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SYED ANWER ALI

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AL - FIQAH

(ISLAMIC JURISPRUDENCE)

VOLUME FIVE

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BY

SYED ANWER ALI

PART - VIII

SHAHADAT

(EVIDENCE)

SYNOPSIS

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Section – Evidence and giving of evidence

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SHAHADAT

(EVIDENCE)

CHAPTER 1 *

SHAHADAT

Note

Literally, "Shahadat" means to give the news of the truth of anything on basis of its actual observation or its apparent condition. But legally, it signifies to give truthful evidence of any event before the Qazi ('Ainul Hidayh)

1. Evidence is binding.

It is necessary upon witnesses to give evidence, and, therefore, it is (Ch 2, Baqarah verses 282) not lawful for them to conceal it, when the party concerned demands it from them ; because Allah says, in the Holy Qur'an, "LET NOT WITNESSES WITHHOLD THEIR EVIDENCE WHEN IT IS DEMANDED FROM THEM;" and also, "CONCEAL NOT YOUR EVIDENCE, AND WHOEVER CONCEALS HIS EVIDENCE IS AN OFFENDER." (Ch 2, Baqarah verses 283)

The requisition by the party concerned, however, is necessary; because the delivery of evidence is the right of the party concerned, and therefore it rests upon his requisition of it, as is the case in respect of all other rights.

2. Cases involving corporal punishment .

In cases which involve corporal punishment, witnesses are entitled to give or withhold their evidence, as they please, because in such cases they are distracted between two appreciable actions; i.e., the establishment of the punishment, and the preservation of the criminal's character. The concealment of vice is, moreover, preferable ; because the

* Qur'an, Ch. 2 (Baqarah), verses 140,282,283 ; Ch. 4 (Nisa), verse 135 ; Ch. 5 (Maa'idah), verse 8 ; Ch. 6 (An'aam), verse 152 ; Ch. 25 (Furqaan), verse 72 ; Ch. 70 (Ma'arij), verse, 19 to 39 ; Mishkaat ; Kitabul Amerat wal Qazi, Babul Aqziah wash Shahadat ('Ainul Hidayah,vol. III, pp. 387 to 440) .

Holy Prophet said to Hazaal who had induced Mua'iz to confess adultery committed by him that, "it would have been better for you, if you had concealed it" (Abu Daud, Nasai Haakim, Tibrani, Ahmed); and also, because he also said, that "Whoever conceals the vices of his brother Muslim will have a veil drawn over his own crimes in the two worlds by Allah." (Bukhari, Muslim). Further Besides, it has been held both by the Holy Prophet as well as his Companions as commendable to assist in the prevention of corporal punishment (Ahmed, Ibne Ali Shaibah) ; and this is an evident argument for the concealment of such evidence which may establish it.

3. Case involving property .

It is however binding, in the case of theft, to give evidence in respect of the property, by testifying that "a certain person has taken such property," in order to safeguard the right of the owner. But in such evidence the word taken should be used instead of the word stolen, so that the crime may be kept concealed. Further, if the word stolen is used, the thief will become liable to amputation ; and when amputation is incurred, there remains no responsibility for the property, and the owners right will be destroyed.

4. Evidence in "Zina".

Evidence in Zina is of four men, as has been ordained in the Qur'an (Ch. 24, Noor, verse 4 and 5) ; and the evidence of a woman in such case is not admitted Zohri says, "in the time of the Holy Prophet and his two immediate Successors it was an invariable rule to exclude the evidence of women in all cases involving punishment or retaliation (Ibne Ali Shaibah)" and also, because the evidence of women involves a degree of doubt, as it is merely a substitute for evidence, being accepted only where the evidence of men is not available ; and therefore it is not admitted in any matter liable to finish on account of doubt.

5. in other criminal cases.

The evidence required in other criminal cases is of two men, according to the text of the Qur'an (Ch. 2, Baqarah, verse 282) ; and the evidence of women is not admitted on the strength of the Tradition reported by Zohri as quoted above.

6. In all other matters .

In all other cases the evidence required is of two men, or of one man and two women (Ch. 2, Baqarah, verse 282), whether the case is in respect of property, or other rights, such as marriage, divorce, agency, executorships, and so on.

7. Evidence of women alone .

The evidence of one woman is admitted in cases of birth as where one woman, for example, declares that 'a certain woman gave birth to certain child'. Similarly, the evidence of one woman is a sufficient in respect of virginity, or in respect of the defect of that part of a woman which is concealed from man. The principle of the law, in these cases, has been derived from a Tradition of the Holy Prophet that, "The evidence of women is valid in respect of such thing as is not fit for man to see;" (Ibne Ali Shaibah)

8. Evidence of women not admitted .

The evidence of women in respect of Istehlaal * or the noise made by a child at its birth, is not admissible, in the opinion of Imam Abu Hanifah so far as it relates to the establishment of the right of heritage in the child ; because this noise is of a nature

* It may be noted that if a child dies immediately on its birth, without making a noise, it is then considered in law to have been born dead, and it has neither to succeeds to a portion of its father's estate, nor are funeral prayers offered over it. But if, it makes even the smallest noise, it is then held to have died possessed of its portion, and funeral prayers are also offered over it.

to be known or discovered by men. But it will be admissible so far as it relates to the leading of funeral prayers over the child ; because these prayers are merely a matter of religion. As a result of her evidence, therefore, the funeral prayers are to be offered over it. But Imam Abu Yusuf and Imam Muhammad are of the view that the evidence of woman is admissible to establish the right of heritage also ; because the noise in question is made at the birth, where none except women are supposed to be present. The evidence of a woman, therefore, in respect of this noise, is the same as her evidence in respect of a living birth ; and as the evidence of women in the one case is admissible, so also it admissible in the other.

9. Uprightness of the witness and his mention of the word "evidence" .

In all cases, whether of property or otherwise, the uprightness of the witness, and the use of the word "Shahadat" (evidence) necessary, even in the case of the evidence of women in respect of birth, and the like ; and this is approved ; because "Shahadat" is testimony, as it contains the status of being blinding ; and therefore it is restricted to the place of jurisdiction; and also, that the witness should be free, and a Muslim.

If, therefore, a witness says, "I know," or "I know with certainty," without using the word "Shahadat", in that case his evidence is not admissible.

As regards the uprightness of the witness, it is indispensable, because of what is said in the Holy Qur'an, "TAKE THE EVIDENCE OF TWO JUST MEN;" and also, because the uprightness of the witnesses creates possibility of the truth, whereas the absence of it in the witness indicated in his commission of prohibited actions, makes it reasonable to suppose that he will assert falsehoods, and therefore induces the possibility of false-hood.

10. Apparent uprightness of the witnesses .

Imam Abu Hanifah has said that the Qazi should remain contented with the apparent uprightness of a Muslim, and should not examine his character in such a manner as to give the opposite party an opportunity to insult him ; because the Holy Prophet according to a Tradition reported by Hazrat Umar has said, "All Muslims are just in respect of evidence, except those who have been punished for slander ;" and also, because the possible character of all that profess the religion of Islam is an abstinence from everything prohibited by that religion ; and here it is necessary to remain satisfied with possibility, as the attainment of certainty is not practicable. But in cases of retaliation or punishment, mere possibility is not enough ; and therefore investigation in respect of the character of the witnesses should be made ; because punishment and retaliation are cases in which all possible ways of prevention should be sought. It is, therefore, necessary that, in such cases, the character of the witnesses should be strictly investigated. Moreover, doubt is preventive in those cases.

11. If their uprightness is challenged.

If the defendant throws a reproach on the witnesses, it will be in such a case necessary for the Qazi to make inquiry into their character.

Imam Abu Yusuf and Imam Muhammad, are reported to be of the view that investigation should be made regarding the character of the witnesses, both openly as well as privately, in all cases whatever ; as the decree of the Qazi depends upon proof, and proof depends upon the integrity of the witnesses. Further, an investigation of the integrity of the witnesses preserves the decree of the Qazi from annulment.

12. Nature of a secret .

A secret investigation is to be is made by the Qazi by writing a letter, privately to a "Muzakki" or purgator, that is, the person whose business it is to investigate into the character of others, and informing him regarding the family and countenance of the witnesses, and also their place of residence; and the purgator, in like manner, should return his answer, privately to the Qazi, so that if it were known to the plaintiff, he may not cause injury to him.

13. Open investigation.

In an open investigation it is necessary that the Qazi should summon together the investigator and the witnesses, and hear the investigation himself. During the time of the Holy Prophet and his Companions an open investigation was practised; but in the present times a secret one is adopted in order to avoid quarrels and disputes between the investigator and the witnesses; because it is noted as an opinion of Imam Muhammad that an open investigation causes sedition and dispute. Some jurists have said that it is necessary that the investigator should report the witness not only to be just, but also free ; because a slave may be just, but his evidence is nevertheless invalid. Some other jurists have said that his report of the integrity of the witness is enough; because his freedom is proved in possibility by his residence in a Muslim country ; and this is approved.

14. Justification of a witness by the defendant .

It may be noted that, according to that doctrine which maintains the necessity of the Qazi's investigation of the witnesses, whether the defendant challenges their uprightness or not, the justification of them by the defendant is not of any weight.

15. One investigation is enough.

One investigator is enough, and two are superfluous, according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad, says that investigation is not valid unless performed by two. A similar disagreement exists between them, regarding both to the messenger who goes to the investigator on the behalf of the Qazi, as well as also the interpreter employed to explain and interpret the deposition of the witnesses.

16. Slave as investigator .

As the qualifications necessary for a witness are not required in an investigator, a slave is capable of being an investigator in a secret investigation. In an open investigation, however, the investigator should, according to all our jurists, be possessed of the qualifications necessary for a witness because of what is noted by Khassaaf, that "an open investigation is restricted to the assembly of the Qazi." The jurists have also observed, that in the investigation of witnesses to "Zina" four investigators are necessary, according to Imam Muhammad.

Section

EVIDENCE AND GIVING OF EVIDENCE
(Fasl Fil Shahadat Wa Tahmil-ush-Shahadat)

1. Evidence is of two kinds .

(a) The first kind of evidence is that which produces effect in itself; as in cases of sale, acknowledgment, usurpation, murder, and the judgment of a judge. In all such cases the effect results from the things themselves ; and therefore, whenever a person hears or sees anything of importance in respect of these things, he may law-fully give the evidence of it, without its being demanded from him ; as in such cases, immediately upon his

hearing or seeing, he becomes acquainted with a fact which causes an effect in itself, and there is therefore no need of demanding such evidence from him. Accordingly sure knowledge is the condition in this kind of evidence the Holy Prophet has said that, "when you know anything like the sun, give evidence of it, otherwise leave it" (Haakim and Behaqi).

But in such a case, also, it is necessary that he should give evidence thus, "I give evidence that a certain person sold or purchased and so on" and not that, "evidence has been asked from me, and so on." because this latter way of giving the evidence is false

But if, a person from any house without a door, or from behind a curtain, hears anything spoken by another person who is within, the house in such a case he will not be entitled to give evidence of it; and if he attests it, the Qazi should not accept it, because it is illegal, as voices are some time similar, and they cannot be distinguished with certainty. But if, he first enters into the house, and comes to know that there is only one person in it, and then comes out, and sits outside the door, and hears that person making an acknowledgement, he may then lawfully attest it, because in such a case he has acquire some knowledge.

(b) The second kind of evidence is that which relates to cases, which do not occasion effect in themselves ; such as attestation of the evidence given by another person, which does not cause an effect in itself ; because, as it is merely an information, it involves the doubt of being either true or false, and things which are doubtful are not the decisive proof. Upon attestation, therefore, the hearer does not immediately know that the right is proved ; and therefore, if one person hears another giving evidence of something, he will not entitled to give evidence of the same unless the witness himself desires him to attest his evidence ; because evidence does not cause an effect in itself, nor until it is removed to the assembly of the Qazi. Further, as the attestation of the evidence of another person is an

overt act in respect of that other person, it is necessary that the other person should previously appoint this person as his deputy and in the case in question this is not supposed.

Similarly, also, if a person hears another person desiring a third person to attest his evidence, it will not be lawful for him in such case to give evidence of it, because the original witness appointed another person, and not him as his deputy for that purpose.

2. Attestation of signature in a deed .

If a person sees his own signature in a bill of sale, or the like, he should not, merely on account of seeing his signature, attest it, unless he otherwise recollects to have seen the said bill ; as handwritings are often similar.

Some jurists have are of the view that this is the view of Imam Abu Hanifah ; and that Imam Abu Yusuf and Imam Muhammad are of a different opinion.

Some jurists, have also said that all agree that it is unlawful to attest merely on seeing of the signature ; and that the only case of this kind in which there is a disagreement is that in respect of a Qazi ; because if he discovers, in his Dewan or records, the evidence of any one, or a decree of his own, he may, in such case, according to Imam Abu Yusuf and Imam Muhammad pass a decree according to it inspite of the fact that he has forgotten the case ; because the records of the Qazi, are kept under his seal, are therefore secure against alterations, and therefore afford certain knowledge.

But it will be otherwise in respect of the bills of sale or the like, because those, as are kept in the hands of other person, and are not secure against alterations.

Similarly, if a person remembers the place in which his evidence had been taken, without remembering the matter to

which it related, it will be the same as his signature without remembering his subscription of it, and therefore he will not be permitted to attest it. The same rule applied where the people in whom he places credit say to him, "you and we did formerly jointly attest such particular matter."

3. Hearsay evidence .

It is not lawful for a person to give evidence of such things which he has not actually seen, except in the cases of birth, death, marriage, cohabitation, and the jurisdiction of a Qazi, as in all such cases he may lawfully be a witness on a reliable hearsay.

4. Should be in an absolute manner .

When a person, in any of the above cases, gives evidence on account of reliable hearsay, it is necessary that he should give it in an absolute manner by saying, for example that, "I bear evidence that, A is the son of B," and not that, "I bear evidence so and so, because I have heard it ;" *

5. Evidence to burial .

If a person gives the evidence that he was present at the burial of another, or that he had offered the funeral prayer over him, this amounts to actual seeing of the death, insomuch that, if he explains to the Qazi the principle on which he gives his evidence, it will still be valid.

What has been said above that, "it is not lawful for a person to give evidence of such things as he has not actually seen, except in the cases of birth, death, marriage, cohabitation and the jurisdiction of a Qazi," has been noted from Qadoore ; and from these particular exceptions it may be inferred that hearsay evidence is not lawful in any other case, such as Walaa, charitable appropriations, and so on.

* For more examples, see 'Ainul Hidayah, vol. III, pp. 398 to 400.

It is however noted, as the last opinion of Imam Abu Yusuf, that hearsay evidence is lawful in a case of Walaa ; because Walaa is equal to relation by consanguinity, as the Holy Prophet has said, "Walaa is a relation like consanguinity." (Haakim)

It is also noted, as the opinion of Imam Muhammad, that hearsay evidence is also lawful in the case of "Wakf" (appropriation) ; because as "Wakf" appropriation continues for a long period of time, the laws in respect of it will be rendered null if hearsay evidence was not allowed to prove it.

Our jurists, however, argue that Walaa is based upon a relinquishment of the right in property ; and as, in giving evidence in respect of it, actual seeing is necessary, it follows that it is in the same manner necessary in respect of a matter derived from it i.e., Walaa.

As regards the "Wakf" i.e., charitable appropriation, on the contrary, hearsay evidence should be allowed so far as regards the appropriation itself such as where the witness says, "I attest this to be a Wakf ; but it should not be allowed in respect any conditional restrictions imposed by "Wakf" the appropriator; because although the "Wakf" (appropriation) itself may be notorious but the conditions of it are not so.

6. Evidence of right in property .

If a person sees any property except an adult male or female slave, in the hands of another person, he may in such a case lawfully give evidence that it is the property of that person, because possession proves property, as in all cases of property, such as purchase, sale gift, or the like, possession is the proof of its existence.

If a person sells anything, the possession of the seller is a proof of the legality of the sale ; and similarly, the right 1of property is proved in a purchase from the possession of the seller, and the right of property in an heir is proved, from the possession of the person from whom he inherits. Hence, in giving evidence of a thing as the property of another person, it is enough to have seen it in his possession.

It is noted from Imam Abu Yusuf, that in addition to the seeing of the possession, it is necessary that the witness should believe the thing to be the property of the possessor, and therefore if he does not really believe so he cannot lawfully give evidence in favour of the possessor.

Many of our jurists also say that this explanation applies to the opinion of Imam Muhammad noted above in respect of the legality of giving evidence in respect of marriage, birth, and cohabitation on hearsay ; that is, it is lawful for a person to give evidence in respect of any of these matters upon hearsay, if he believes it in his own heart, but not otherwise.

7. Evidence of right in property in a slave .

If a person sees a slave, male or female, in the possession of another person, and knows that he or she is a slave, he may law-fully give evidence that the slave is the property of that other person.

But if the person seen has become major and is capable of explaining his condition, and he does not know whether he is a slave or not, then it will not be lawful to give evidence of his being the property of the possessor, simply on seeing the possession.

CHAPTER 2

ACCEPTANCE AND REJECTION OF EVIDENCE

(*Hidayah, Kitab-ush-Shahadat, Baab Min Yuqbilo Shahadat Wa Min Laa Yuqbilo*)

1. Evidence of a blind man .

The evidence of a blind man is not admissible.

2. If a person gives evidence, and afterwards becomes blind .

If a person, has given evidence, and afterwards has become blind previous to the passing of the decree, in such a case according to Imam Abu Hanifah and Imam Muhammad, it will not be lawful for the Qazi to pass a decree on its bases.

If a witness, after giving the evidence, becomes insane, dumb, or unjust, in any of these cases the Qazi should not pass a decree upon the evidence given by such witness.

But it will be otherwise where the witnesses, after giving their evidence, disappear or die ; because in such a case the Qazi may lawfully pass a decree upon their evidence.

3. Evidence of a slave .

The evidence of any person who is the property, that is to say a slave, male or female, is not admissible.

4. Evidence of a slanderer .

The evidence of a person who has been punished for slander is not admissible even though he afterwards has repented.

But it is otherwise in respect of a person who has been punished for any other offence; because the evidence of such a person is admissible after repentance.

5. Infidel slanderer.

If an infidel, who has suffered punishment for slander, and has afterwards become a Muslim, his evidence will then be admissible.

6. Evidence in favour of relations .

Evidence in favour of a son or grandson, or in favour of a father or grandfather, is not admissible.

7. Husband and wife, master and slave, hirer and hireling .

The Holy Prophet has said, "We are not to accept the evidence of a wife relating her husband, or of a husband relating his wife, or of a slave relating his master ; or of a master relating his slave ; or, lastly, of a hirer relating his hireling. (Abu Daud, Tirmizi)

8. Evidence of master in favour of his slave .

The evidence of a master in favour of his slave is not admissible.

9. Evidence of one partner in favour of another .

The evidence of one partner in favour of another person, in a matter relating to their joint property, is not admissible.

10. Evidence in favour of uncle or brother.

Evidence in favour of a brother or an uncle is admissible.

11. Evidence of public mourners or singers .

The evidence of women who lament or sing is not admissible.

12. Evidence of common drunkards ; or of falconers , etc.

The evidence of a person who is a habitual drunkard is not admissible, because of his commission of a prohibited act.

Similarly, the evidence of a person who amuses himself with birds, such as pigeon's or hawks, is not admissible; because such amusement causes forgetfulness ; and also because in the practice of it, he sees the nakedness of strange women, as he happens to sit on the top of his house to fly these birds.

13. Evidence of criminals .

The evidence of a person who has committed any of the great sins, such as "Zina" "Qazf", theft decoity, etc., which is punishable by "Hadd" is not admissible.

14. Evidence of immodest person .

The evidence of a person who goes naked into the public bath is not admissible .

15. Evidence of usurers and gamesters .

The evidence of a person who receives usury is not admissible ; and so, also, of one who plays for a stake at dice or chess ; and similarly, also, the evidence of a person who omits his prayers, due to involvement in these games, is not admissible.

It may however be noted, that simple playing at chess without a stake does not make the evidence of any person as inadmissible, as such play does not cause a want of integrity, because all our Imams are not agreed in its illegality. Imam Maalik and Imam Shaafe'ee hold it to be lawful.

It is noted in the Mabsoot, that the evidence of a usurer is not admissible only in case of his being so in a notorious degree.

16. Evidence of person guilty of indecorum .

The evidence of a person who is guilty of base and low actions, such as passing the urine or eating the food on the high road, is not admissible.

17. Evidence of free–thinkers .

The evidence of a person who openly speaks against the Companions of the Holy Prophet and their disciples is not admissible.

But it will be otherwise, where a person conceals his sentiments regarding to them, because in such a case they want of integrity is not obvious.

18. Evidence of Hawa, and other heretics and Khatabiah .

The evidence of the sect of Hawa (sensualist) * is admissible except that of the tribe of Khatabiah, ** whose evidence is not admissible; for reasons to be hereafter explained.

Imam Shaafe'ee is of the view that the evidence of no tribe of the sect of Hawa is admissible, because the heterodox tenets they profess prove the highest degree of depravity.

Our jurists, however say, that although their tenets are in reality wrong, yet their adherence to them implies probity, as they have been led to embrace them from an opinion of their being right ; and there is, moreover, reason to think that they will abstain from falsehood, because it is prohibited in every religion.

They are six in number, viz., Khariji, Raafizi, Jabriah, Qadnah, Mushabbah, and Mo'talah. ('Ainul Hidayah, vol. III, p. 408).

** Khatabiah are also a sect of the Hawa they were followers of Abu Khattaab. He was an apostate and declared Hazrat Ali as the Allah-O-Akbar, i.e., the Great God and Imam Ja'far al Sadiq as the Allah-O-Asghar, i.e., the small God. Imam Ja'far al Sadiq declared as a "Kafir", and he was killed by Isa bin Musa bin Ali bin Abdullah bin al-Abbas Abbasi (ibid).

Hence the case is the same as if a person eats of an animal which had not been slain according to the prescribed form of Zabbah, because of it is lawful according to his sect. but it will be otherwise where the baseness proceeds from the actions, not and from the belief.

As regards the sect of Khatabiah, it is to be noted that they are in a high degree heretics ; and amongst them it is lawful to give positive evidence in respect of any fact on the ground of another having sworn it to them. some have said that it is a binding duty upon that sect to give evidence in favour of each other, and therefore their evidence is not free from suspicion.

19. Evidence of Zimmees .

The evidence of Zimmees in respect of each other is admissible, inspite of the fact that they are of different religions.

Imam Maalik and Imam Shaafe'ee have said that their evidence is absolutely not admissible because, being infidels they are "Faasiq" (unjust).

20. Evidence of Mustamin and Zimmee against each other

The evidence of an infidel Mustamin in respect of a Zimmee is not admissible, because he has no power over the person of a Zimmee, as the latter is a permanent resident in the Muslim territory. The evidence of a Zimmee, however, is admissible in respect of an infidel Mustamin, similarly as the evidence of Muslims in respect of them is valid.

21. Evidence of Mustamins in respect of each other .

The evidence of one Mustamin is admissible in respect of another Mustamin, provided he is of the same country. But if, they are of different countries such as natives of Russia and Turkey, their evidence in respect of each other is not admissible ;

because, this difference precludes their power over each other ; and therefore they cannot even inherit from each other.

22. Evidence of one whose virtues preponderate .

The evidence of the person whose virtues exceed his vices and who is not guilty of great sins, is admissible, inspite of the fact that he may occasionally commit smalls sins.

23. Evidence of those uncircumcised due to any justifiable cause .

The evidence of an "Aqlaf", i.e., of the one who has not been circumcision due to old age, or for any other justifiable reason, is admissible, because the omission of it is not destructive of justice ; except where it is on account of a contempt of religion, or of the authority of the law by which it is enjoined, because in such a case the integrity no longer remains.

24. Evidence of an eunuch *.

The evidence of an eunuch is admissible, because Hazrat Umar accepted the evidence of 'Alqamah, who was an eunuch** (Ibne Ai Shaibah), Eunuch, stands in the same position as the one who has been mutilated.

25. Evidence of a bastard .

The evidence of a bastard is admissible, because he is innocent in respect of the immorality of his parents, Imam Maalik is of the view that the evidence of a bastard should not be admitted in respect of "Zina", as it may be supposed that he wishes as many others as possible to be of the same level with himself, and his evidence in a matter of this kind is therefore liable to suspicion. Our jurists, however, say that this point relates merely to the integrity ; and if a bastard be is just man, there is no reason to suspect him of such a wish.

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* Eunuch is one whose tacticles or part of them is cut off.

** Part of his tacticles was cut off by violence, ('Ainul Hidayah)

26. Evidence of an hermaphrodite .

The evidence of an hermaphrodite is admissible, because such a person is either a man or a woman and the evidence of both is admissible, provided they are upright.

27. Evidence of a governor .

The evidence of a governor on behalf of a Sultan is admissible, according to majority of the Hanafite jurists, provided he does not act oppressively. But if he acts oppressively, his evidence will not be admissible. Some jurists have however, said that in the latter case also his evidence is admissible, provided he is himself a man of generosity and good character, and is not guilty of boasting and vain talk ; as in such a case it will be natural to think that regard for his reputation will prevent him from uttering falsehood ; and the dignity of his good character will deter others from offering him a bribe.

28. Two brothers giving evidence of their father's appointment of an executor .

Where two brothers give evidence that their deceased father had appointed a particular person to be his executor, and that person also admits the same, their evidence will be valid, upon a favourable construction , but not if he does not the appointment.

29. Evidence regarding appointment of a person as an agent.

If two brothers give the evidence that their decease father had appointed Zaid as an agent for receipt of the debts due to him at Kufah, their evidence will not be admissible, whether Zaid admits the said agency or not ; because the Qazi has no power of himself to appoint an agent on behalf of a deceased; and the evidence in a such a case is not enough to warrant it, as it is liable to suspicion.

30. Impeachment of the credit .

If a defendant reproaches a witness with a fact which can impeach his credit, but which does not involve any of the rights of the spiritual or temporal Law, and produces evidence in support of his assertion, the Qazi should not hear them, nor pass a decree in respect of the credit of the witnesses.

31. Plaintiff acknowledging the "Fisq" or wrong doing of the victims .

But if, witnesses give evidence that the plaintiff had himself acknowledged the "Fisq" or wrong doing of the witness, the evidence will in a such a case is valid ; because acknowledgement comes within the jurisdiction of the Qazi .

32. Evidence regarding witnesses hired by the plaintiff .

If a defendant brings witnesses to prove that the plaintiff had hired his witnesses for ten Dirhams (for example), such evidence should not be admitted, because, although it proves something more than a mere wrong doing, still the defendant not a regular opponent of the plaintiff in respect of this matter, and therefore has no right to proved it by evidence, as regards this point, he is a mere stranger.

33. Unless defendant's own property is involved .

But if, the defendant is a regular opponent (as if, for example, he says that the plaintiff had hired his witnesses to give evidence for ten Dirhams from the property which the defendant had put in his hands, in such a case the evidence he produces in support of his assertion should be admitted ; because the defendant, is in such a case a regular opponent of the plaintiff in respect of property ; and the proof in regard to the property necessarily involves the proof of the reproach. Similarly the

evidence brought by the defendant is to be admitted where he says that "he had compounded with the witnesses for an specific sum of money so that they could withhold their evidence in support of such claim, and that, after payment of the agreed sum, they have given their evidence, and he, therefore, prefers a claim for the sum paid to them;" because here the proof in respect of the claim will also prove the reproach.

The jurists have said that as the evidence of witnesses is admissible in respect of any fact that comes within the jurisdiction of the Qazi, it follows that if the defendant brings witnesses to prove that the witness of the plaintiff is a slave, or that he has been punished for slander, or that he is a drunkard, or a slanderer, or a partner of the plaintiff, in all such cases the evidence so adduced should be admitted.

34. Immediate admission of the miss-statement, or omission, from due to apprehension, by the witness.

If a person gives evidence, and, before leaving the place, or the Qazi passing a decree upon it, admits that "he has given part of his evidence under the influence of apprehension," still, if he is a person of character (i.e. 'Aadil), and, therefore, the deposition to which he adheres should be credited.

But it will be otherwise if a person leaves the court of the Qazi, and then comes back, and says that "I have omitted part of my evidence due to apprehension."

The same rule applies in respect of the errors of a witness in stating the boundaries of a house.

It may be noted that the exposition of the law, in this case applies only to the addition, by the witness, of some fact which may be doubtful. But if it is not doubtful then he may at any time, afterwards, whether at the same meeting or not, lawfully add it to his evidence. Thus if a witness omits the use of the

word "Shahadat", or the like, and afterwards declares this omission , it will in such a case, be admitted, whether it is at the same meeting or not, provided he is an upright man.

It has been noted, as an opinion of Imam Abu Hanifah and Imam Abu Yusuf , that whatever addition or diminution a witness may make after giving the evidence, should in every case be admitted, even though it is at different meeting, provided the witness is an upright man. But the first jurist view is the most authentic, and decrees are passed accordingly.

CHAPTER 3

DISAGREEMENT OF WITNESSES IN THEIR EVIDENCE

(Hidayah, Kitab-ush-Shahadat, Baab-ul-Ikhtilaaf)

1. Evidence repugnant to the claim .

Where the evidence produced by a claimant confirms the claim, it is worthy of credit ; but not where it is repugnant to it.

2. Witnesses should agree in their evidence .

The concurrence of the witnesses, in words and meaning, is necessary, according to Imam Abu Hanifah. If, therefore, one witness bears says one thousand Dirhams as due, and the other witness says two thousand, no credit should be given to either. But Imam Abu Yusuf and Imam Muhammad are of the view that the evidence should be credited to the amount of one thousand Dirhams. Similar disagreement also exists in a case where one witness says one divorce, and the other witness says two or three divorces.

3. Witnesses should be credited to the smallest amount in which they agree .

If a person claims debt of one thousand five hundred Dirhams, and one of his witnesses gives evidence of to one thousand, and the other witness of one thousand five hundred, in such a case the evidence should be credited in the amount of one thousand Dirhams, because the witnesses concur in that amount, both in words and meaning, as one thousand is mentioned by both, and five hundred is an additional part of the speech, which supports the former part, instead of destroying it.

Same is the case of one divorce and one divorce and an half ; or one hundred Dirhams and one hundred and fifty Dirhams, In both these cases the evidence is to be admitted in the least degree, namely, of one divorce, and of the amount of one hundred Dirhams.

But it will be otherwise if one witness says ten Dirhams, and the other witness says fifteen ; because this is similar to the assertion of one thousand and two thousand, the effect of which has been before stated.

4. Witness proving larger sum than the claim .

In a case where one witness says one thousand Dirhams, and the other witness says one thousand five hundred, and the claimant expressly claims only one thousand Dirhams as due to him, the evidence of one thousand five hundred is void, as it is falsified by the claimant himself.

Same is the position where the claimant claims one thousand Dirhams, and one of the witnesses says one thousand and the other witness says one thousand and five hundred ; because here also the claimant falsifies the evidence of one of his witnesses, as his own claim is different from it.

Conformity, therefore, between the claim and the evidence is basically necessary ; and hence, if the claimant says that, "my original claim was one thousand five hundred Dirhams, but I have received five hundred," or "I exempted the debtor from five hundred ;" in such a case each of the above mentioned assertion should be accepted, because of their conformity with the claim.

5. Subsequent declaration of part of the debt having been discharged .

If two persons give evidence of a debt of one thousand Dirhams, and one of them thereafter says that the debtor had paid five hundred Dirhams of it, still the evidence of one thousand Dirhams as due should be accepted, and that of the five hundred having been paid should be rejected. The reason for this is, that both witnesses agree to the debt of one thousand Dirhams, and only one witness attests the payment of five hundred Dirhams ; and as two witnesses are required to establish the proof, the evidence in the first case is, therefore, to be accepted; and the additional declaration of five hundred Dirhams having been paid is to be rejected.

6. Witnesses agreeing in respect of the fact and time, but differing in respect of the place .

If two persons given evidence that a certain person had killed Zaid, on the festival of the sacrifice, at Mecca, and two other witnesses given evidence that the said person had killed Zaid, on the same day, at Kufa ; in such a case, if all these witnesses are assembled at the same time, in the presence of the Qazi, the whole of their evidence should be rejected ; because, of the evidence of two parties, it is undoubtedly certain that, that one of them should be false, and there is no criterion to ascertain to which the preference belongs.

But if, the evidence of one of these parties precede that of the other, and the Qazi in consequence passes the decree, and, afterwards, two others witnesses produce exhibit evidence of a different nature, in such a case the Qazi should not accept the evidence of the latter, because the first evidence, on account of the issue of the decree consequent upon it, acquires a superiority over the latter, which prevents its annulment.

7. Evidence in respect of the theft of an animal .

If two persons testify the theft of a cow, but differ regarding the colour of it, their evidence will nevertheless be valid, and the hand of the thief will be cut off.

But if, one of the witnesses declares the animal to be a cow, and the other one declares it to be a bull, their evidence, in such a case, will not be admissible, and the hand of the thief will not be cut off. This is the view of Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that the thief will not be cut off in either case.

Some jurists have said that this disagreement is based on the supposition the colours are to some extent similar such as red and black, and not where they totally differ, such as black and white. Some others jurists have said that it exists in all cases where the witnesses differ in respect of the colour.

8. Evidence in respect of a contract.

If one person says that Zaid had purchased a slave for one thousand Dirhams, and another person says that he had purchased the said slave for fifteen hundred Dirhams, in such a case the evidence of both will be void.

The same rule also applies in respect of a contract of Kitabat, that is, where a Mukatib and his master disagree in respect of the amount of the ransom or consideration of Kitabat, and the two witnesses also disagree in their evidence. The evidence, in such a case will be void, as the evidence, i.e., proof of the contract of Kitabat is defective ; and this will hold good whether the master of the slave is the plaintiff.

Similar will be the case in respect of Khula; manumission for a compensation, and composition for wilful murder, provided the claim is preferred by the wife, the slave, of the murderer ;

because in all such cases the purpose of the evidence is the same, i.e., the proof of the existence of a contract, and it is defeated by any disagreement of the witnesses.

But if, in any of such cases, the claim is preferred by the opposite party, it will then become equal to a case of debt, and the law will take place accordingly.

Thus , if the claim is for one thousand five hundred Dirhams, and one of the witnesses says that it is of one thousand, and the other witness declares it of one thousand five hundred, in such a case, accordingly to all our jurists, a decree should be passed for one thousand Dirhams. But if, the claim is for two thousand Dirhams, and one witness says that it is of one thousand, and the other who says that it is of two thousand, in such a case nothing should be decreed, according to Imam Abu Hanifah. But according to Imam Abu Yusuf and Imam Muhammad , one thousand should be decreed.

9. Contract in respect of a woman's dower .

In a case of marriage, if one of the two witnesses testifies the dower as of one thousand Dirhams, and the other witness testifies the dower as of fifteen hundred, the dower stands proved in the amount of one thousand Dirhams, according to Imam Abu Hanifah, whether the claim is preferred by the husband or wife, and whether it is for the smallest or the greatest of the testified sums. This is according to a favourable construction.

But Imam Abu Yusuf and Imam Muhammad hold on basis of analogy that the evidence is totally not admissible. It is, however, noted in the Amalee, that the opinion of Imam Abu Yusuf, in this case, accords with that of Imam Abu Hanifah.

Some of the jurists have said that the difference of opinion, between Imam Abu Hanifah, and Imam Abu Yusuf and Imam Muhammad, is based on the supposition of the claim preferred by the woman; because, in case of the claim by the husband, they all agree in regard to the inadmissibility of the evidence ; as his purpose can only be the proof of the contract, while the purpose of the woman is the property. Some other jurists have said that this difference of opinion exists in either case ; and this is approved.

CHAPTER 4

EVIDENCE IN RESPECT OF INHERITANCE

(*Hidayah, Kitab-ush-Shahadat, Fasl Fish Shahadat 'Alal Irs*)

1. Evidence of the death of a person and the right of his legal heirs .

It is a rule that if the right of property of a person in anything is proved, still a decree cannot be passed in favour of his heirs, until the death of the that person, as well as the right of heritage of his heirs, are both proved. This rule has been laid down by Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf is of the view that the thing should be immediately decreed in favor of the heirs ;

2. Witnesses should prove the property or possession of the deceased .

Imam Abu Hanifah and Imam Muhammad, however, deem it sufficient, in order to prove the shifting of the right of property, that the witnesses prove that "the thing in question was the property of the deceased at the time of his death ;" because then the shifting is proved due to necessity ; and similarly, it will suffice if they prove that "it was in the keeping and possession of the deceased at the time of his death ;"

3. An heir can recover an article in possession of another .

If witnesses give evidence that a particular house was in the possession of a certain man at the time of his death, the evidence so given should be admitted in respect of the claimant as the heir of the deceased.

Similarly, the evidence of witnesses must be admitted where a person brings evidence to prove that a particular house, in the possession of a certain person, was the property of his father, and that his father had lent it, or had delivered it in trust, to the person then having its possession.

In such a case, therefore, the said person will be entitled to take back the house from the present occupier, without being required to prove, by witnesses, that his father has died, and that the said house has been left to him in inheritance.

This, according to the view of Imam Abu Yusuf, is clear; and so also according to the views of Imam Abu Hanifah and Imam Muhammad.

It may be noted that the law is the same where, under these circumstances, the claimant says that the possession of the other person has been on account of a lease ; because the possession of a lessee is equal to the possession of the lesser.

4. Right to an article .

If a person claims a right of property to a house which is in the possession of another person, and the evidence of the witnesses is that; "we testify that the said house was in the possession of the claimant one month ago," such evidence should not be admitted. This is the view of the Zahir Rawayat.

It is noted as an opinion of Imam Abu Yusuf that the evidence in such a case is admissible.

The view of the Zahir Rawayat, in this respect, has been adopted by Imam Abu Hanifah and Imam Muhammad.

5. Defendant admitting former possession .

If the possessor of the house (i.e. the defendant) himself admits the former possession of the claimant, in such a case a decree should be passed for restoring the claimant to his possession ; because the uncertainty regarding the subject of an admission is no bar to the validity of the admission itself .

6. Two witnesses proving defendants admission.

If two persons prove the admission of the defendant, that "the thing in his possession had formerly been in the possession of the claimant," the thing in question should in such a case be restored to the claimant ; because, although the subject of the admission is a matter of uncertainly, yet the evidence here relates, not to it, but to the admission itself, which is a matter of certainty ; and the uncertainty in the subject of it is no bar to the decree of the Qazi as he may afterwards ask the person who has admitted to explain the nature of the uncertainty.

CHAPTER 5

ATTESTATION OF EVIDENCE

(*Hidayah, Kitab-ush-Shahadat,Baab Shahadat 'Alash Shahadat*)

1. Attestation of evidence.

Attestation of evidence is permissible in all rights which involve no doubt ; because there is a necessity for this, as it may happen that a witness, from various causes, such as sickness, may not be able to give his evidence in person Therefore, if attestation of his evidence is not permissible, the right of the people will be liable to be destroyed.

But, a degree of doubt is attending it ; because the secondary witness in such a case, is only a substitute for the primary witness ; and if there are many gradations between him and the primary witness, the doubt of falsehood will become stronger.

Moreover, there is also the possibility of avoiding this, by asking the party to produce, independent of the witness whose attendance is not practicable, some other person who is also a primary witness.

Attestation of evidence, therefore, is never allowed where it may establish a matter which is repelled by a doubt, such as punishment or retaliation.

2. Attestation of two witnesses by two other witnesses .

The attestation, by two witnesses, the evidence of two other witnesses is valid.

3. Attestation of each witness must be by two witnesses .

The attestation by one witness the evidence of one witness is not permissible.

4. Attestation should be desired by of the primary witness.

It is necessary that the primary witness should desire the secondary witness to attest his evidence, in the following manner, "testify my evidence, that "A" the son of "B", has admitted before me a particular fact, and has asked me to attest the said admission."

It is also necessary that the primary witness should give unless his evidence to the secondary, similarly as he would have done in the court of the Qazi, so that the secondary witness may respect the same literally, in that court.

It may, however, be noted that if the primary witness does not mention that "A, the son of B, had asked me to attest his admission," still his attestation will be valid ; because whoever hears another making an admission may lawfully give evidence of the admission, even though the acknowledger may not have asked him to attest it.

5. Form of attestation .

It is necessary that the secondary witness should attest in the following manner ; "Zaid has asked me to attest his evidence that Umar has made an admission before him of a particular fact, and that he had asked him to attest his evidence of the said admission."

6. A person cannot attest the attestation of another person

If Umar hears Zaid saying that a particular person had asked him to bear evidence of some fact, it is not in such a case lawful for Umar to attest the said evidence of Zaid, unless Zaid has particularly asked him to attest it; because in the attestation of evidence, mentioning of the fact of having been asked to attest it is a necessary condition. This is according to all our jurists.

7. Admission of attestation .

The attestation of evidence is not admissible except where the primary witness has died, or has gone to a distance of three days journey or upwards, or is so sick as to be unable to attend the court of the Qazi.

It is noted as an opinion of Imam Abu Yusuf , that if the absent person is at a place so distant as that, after appearing in the court of the Qazi in the morning, he could not return to his family that day, in such a case it is lawful to accept, for safeguard of the rights of the people, an attestation of his evidence.

The jurists, however, say that the former views is the most authentic, because in the latter case there is case; and Abul Lais has also adopted the latter view.

8. Appearing of attesting witnesses as purgators .

The attestation of the primary witnesses by the secondary witnesses is allowed, because they are capable of being purgators.

Similarly, the attestation of one witness by another witness is valid, for the same reason.

9. They are not doing so .

If secondary witnesses remain silent in respect of attestation of the primary witnesses, it is valid ; that is to say, the evidence of the primary witnesses, as recited by them, should be admitted ; and the Qazi should scrutinize into their characters from others. This is according to Imam Abu Yusuf. But Imam Muhammad has said that in such a case the primary evidence, as recited by the secondary witnesses, should not be admitted.

10. Denial of the primary witnesses .

If the primary witnesses deny the evidence recited on their part by the secondary witnesses, the evidence of the secondary witnesses should must not be accepted, because of the want of proof, on account of the contradiction which exists between them and the primary witnesses.

11. Attesting witnesses having no personal knowledge of the defendant .

If two secondary witnesses attest the evidence of two primary witnesses, that "a certain woman, the daughter of a native of Samarcand, has made an admission of one thousand Dirhams in favour of Zaid," and the secondary witnesses further say, "that the primary witness had informed them, that they knew the person of the woman", and the plaintiff produces a woman, and the secondary witnesses say that "they do not know whether she is the woman in question or not," in such a case the plaintiff should be asked to produce two witnesses to prove the identity of the woman; because here the evidence of the witnesses prove the claim an uncertain person, which the plaintiff claims his right from a specific and present person ; and therefore a doubt arises, to remove which it is necessary to ascertain the person.

12. And so also in respect of the claim .

Similarly is a case where two witnesses attest the evidence of two other witnesses, that "a certain person sold a piece of ground bound by particular boundaries, and the price is due by the purchaser ;" because here it is necessary to produce two other witnesses to attest that the said ground, bound by the said boundaries, had been delivered to the purchaser, who is the defendant. Similarly it is also, necessary to produce two other witnesses, in case the defendant denies that the boundaries of the ground he had purchased are the same with those mentioned in the evidence of the witnesses ; so that these additional witnesses may testify that those boundaries were the same with those of the ground in the possession of the purchaser.

13. Identity of a person influenced by a Qazi's letter .

The law is exactly the same as regards the letters of one Qazi to another Qazi ; as where one Qazi writes to another Qazi, that "two witnesses have given evidence that a debt of one thousand Dirhams is due to a certain person, the son of a certain person, of a certain family, by the daughter of a certain person of a certain family, and that he should pass a decree for the said daughter's payment of the said sum ;" because here, if the plaintiff, after delivering the letter to the Qazi to whom it is addressed, produces a woman, the Qazi, before he passes the decree, should ask him to bring two witnesses to prove that she is the same woman as mentioned in the letter of the other Qazi.

Section

FALSE WITNESS
(Fasl Fish Shahid -uz- Zoor)

1. False witness should be exposed.

Imam Abu Hanifah is of the view that a false witness should be publicly exposed but not punished with blows. But Imam Abu Yusuf and Imam Muhammad are of the view that he should be scourged and confined ; and this is also the view of Imam Shaafe'ee.

2. Mode of exposing a false witness .

The mode of exposing a false witness, as prescribed by Shari'ah, is that, if the witness is a sojourner in any public street or market-place, he should be sent to that street or market-place ; or, if not, he should be sent to his own tribe or relatives after the evening prayers, as they are generally assembled in greater numbers at that time than any other ; and the exposer should inform the people that "Qazi Shuraih salutes them, and informs them, that he has detected this person in giving false evidence ; that they should therefore beware of him themselves, and so also desire others to beware of him." Shamaul A'immah Sarakhsi has said that a false witness should also to be exposed, according to Imam Abu Yusuf and Imam Muhammad ; and that the degree of correction and imprisonment should, according to them be left to the discretion of the Qazi.

The nature of discretionary correction has been already explained under the head of punishments. It is written in the Jaame'-as-Sagheer that if two witnesses confess that they have given false evidence, they should not be scourged. But Imam Abu Yusuf and Imam Muhammad say that they are to be scourged at the discretion of the Qazi.

CHAPTER - 6

RETRACTION OF EVIDENCE

(Hidayah, Kitab-ush-Shahadat, Baab-ur-Ruju' 'Anish Shahadaat)

1. Witness retracting his evidence before a decree .

If witnesses retract their evidence before the Qazi passes any decree, it will becomes void, i.e., the Qazi should not pass any decree upon it.

2. Witness retracting his evidence after a decree .

But if, the Qazi has passed a decree, and then the witnesses retract their evidence, the decree will not thereby be void.

3. Retraction should be in the presence of the Qazi.

The retraction of evidence will not be valid, unless it is made in the presence of the Qazi.

4. Witnesses retracting after decree .

If two witnesses say that a particular sum is due by a certain person to another person, and the Qazi accordingly passes a decree for the payment of it, and the witness then retract their evidence they will in such a case be responsible to that person for the sum decreed against him.

5. Responsibility of retracting witnesses .

It may be noticed, that the witnesses do not become responsible unless the plaintiff gets possession of the property in question, whether it is in substance or a debt.

6. If some witness is retracts.

If, in such a case, only one of the witnesses retracts his evidence, he will become responsible for one-half of the property ; because it is a rule that where some of the witnesses retract, the right still remains proved so far as it relates to the remaining witnesses.

7. If one of the three witnesses perseveres in his evidence .

Therefore, if three persons give evidence in respect of any property, and then one of them retracts his evidence, he will not be subject to any responsibility, because the whole of the right remains proved on account of the two remaining witnesses. The reason of this is that the right of the claimant is proved because of the complete proof, namely, the evidence of two witnesses.

But if , however, another of those three witnesses also thereafter retracts his evidence, the two receding witnesses will in such a case be responsible for one half of the property, as on account of the existence of one witness, one-half of the right will remain in force.

8.Retraction where witnesses consist of males and females

If one man and two women give the evidence, and one of the women then retracts her evidence, she will be liable for one-fourth of the right because a result of the existing evidence of one man and one woman, three-fourths of it will still remain in force. But if , both the women retract their evidence, they will be responsible for one-half, on account of the existing evidence of one man one-half of the right will remain in force.

If one man and ten women give the evidence, and eight of the women then retract, those eight will not be liable to any

compensation, as the remaining evidence will furnish complete proof. But if, nine of the women retract, those nine will be responsible for one-fourth, as the remaining evidence of one man and one woman will prove three-fourths of the right.

But if, in such a case a question, the whole of the witnesses retract, the man will in that case be responsible for one-sixth of the right, and the ten women for five-sixths, according to Imam Abu Hanifah. But Imam Abu Yusuf are of the view that the man will be liable for one-half, and the ten women also for one-half.

But if only the ten women retract, and not the man, they will be responsible for one-half of the right, according to all our jurists.

If two men and one woman give the evidence in respect of property, and then all of them retract, the whole of the responsibility will rest on the two men, and nothing on the woman, because one woman is no more than one-half of a witness, and therefore the law does not regard her in such a case, as no effect results from the mere part of a cause.

9. Retraction in case of marriage and dower .

If two witnesses give the evidence in respect of a woman, that she was married on a "Mehr-e-Misl", or proper dower, and then retract their evidence, they will not be bound to give any compensation ; and similarly, if they testify to anything less the proper dower.

If two witnesses give the evidence in respect of a man, that he has married a woman on a proper dower, and then retract the same, still they will not be responsible for any compensation, even though by their evidence they have deprived that man of his property.

But if, the witnesses testify to any amount beyond the proper dower, and then retract, they will in such a case be responsible for the excess.

10. Retraction in case of a sale .

If two witnesses give the evidence in respect of a sale for a price equal to, or greater than, the value of the thing sold, and then retract, they will not be in such a case liable for any compensation ; as destruction attended with an equivalent is, in effect, no destruction.

But if, they give the evidence of the sale for a price less than the value, they will in such a case responsible for the deficiency of value, because, in that amount they have occasioned a destruction without any equivalent.

The law here laid down will apply equally to the sale with or without an option to the seller ; because, in the case of an option, the cause of the right of the property is the original sale, and not the determination of the option. The effect, therefore, is to be referred to the sale, upon the determination of the option ; and as such the destruction is to be referred to the evidence of the sale.

11. Retracting in case of divorce before consummation .

If two witnesses give the evidence that a man has divorced his wife before consummation, and then retract, they will in such a case be responsible for the dower ; because they have proved in respect of that man a thing which stood within the possibility of dropping ; and also, because separation before the consummation is equal to annulment of the marriage, and therefore annuls the whole of the dower, as has been already explained but afterwards one-half of the dower is established *de novo* in the manner of a Matat or present, and as such the said one-half is made due by the evidence of the witnesses.

12. Retracting in case of manumission .

If witnesses give the evidence that a certain person had emancipated his slave, and then retract their evidence, they will in such a case be responsible to the person in question for the value of the said slave, because of their having destroyed his property in the slave without any equal in return.

Moreover the right of Walaa, in respect of the slave, rests with that person and not with the witnesses ; because as the emancipation of the slave is not on account of the responsibility, ascribed to their evidence, it follows therefore that the Walaa does not go to them.

13. Retracting in a case of retaliation .

If two witnesses give the evidence against a person, in a case of retaliation for murder, and then retract their evidence after the person has been put to death, they will in such a case bound to pay Diyat, or blood-wit, but are not to suffer death by way of retaliation.

14. Secondary witnesses retracting .

If secondary witnesses retract their evidence, they will be responsible ; as the destruction of the defendant's property to be referred to them, because of their giving evidence in the court of the Qazi.

But if, primary witnesses retract, alleging that they had not authorized the secondary witnesses to attest their evidence, they will not be responsible, as they deny the evidence which occasioned the destruction of the property of the defendant.

Moreover in this case, the decree of the Qazi, based on this evidence, will not be rendered null, as the denial of the

primary witnesses involves the doubt that it may either be false or true), and the decree of the Qazi cannot be reversed by a dubious fact ; as it cannot be reversed by the retraction of evidence, after it has been passed on the strength of that evidence.

But it will be otherwise where the primary witnesses make the denial before the passing of the decree ; because in such a case the Qazi will not pass the decree on the strength of the evidence of the secondary witnesses.

But if, the primary witnesses say that they had authorized the evidence of the secondary witnesses ; but that they had committed an error in so doing, they will in such a case be responsible for the loss that may have been caused. This is according to Imam Muhammad.

But Imam Abu Hanifah and Imam Abu Yusuf are of the view that, even in such a case, the primary witnesses will not become responsible; as the decree of the Qazi has been passed upon the evidence of the secondary witnesses, due to the necessity under which the Qazi lies of proceeding on the proof before him, which in such a case is the evidence of the secondary witnesses.

The view of Imam Muhammad is based on the reasoning that the secondary witnesses do only repeat the evidence of the primary witness and as such it will becomes in effect the same if the primary witnesses were themselves present.

15. Retraction by both primary and secondary witnesses .

If both the primary as well as the secondary witnesses retract their evidence, in such a case Imam Abu Hanifah and Imam Abu Yusuf are of the view that compensation will be due only from the secondary witnesses, because the decree has been

passed on their evidence. But Imam Muhammad, is of the view that the defendant has the option of taking the compensation either from the primary or the secondary witnesses.

16. Secondary witnesses asserting false-hood of primary witnesses .

If, in this case, the secondary witnesses assert that the primary witnesses had been guilty of falsehood, or had committed an error in their evidence, the Qazi should not attend to this assertion because his decree, as has been passed and issued, and cannot be affected by any assertion of theirs. And in this case the secondary witnesses will not be liable for any compensation, as they have not retracted their own evidence, but have merely repeated the evidence of the principal witnesses, fact that they had retracted it.

17. Purgators receding from their attestation.

If purgators recede from their attestation, they will become responsible, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that they will not become responsible.

18. Retraction in suspended manumission or divorce .

If two witnesses give evidence of a Yameen, or suspension on a condition, of divorce or emancipation, and two other witnesses give evidence that the condition had taken place, and both parties thereafter retract their evidence, compensation will in such a case be due only against the witnesses who attested the deed of Yameen, which is the cause of the damage, and not by those who attested the occurrence of the event on which the divorce or emancipation was suspended, because the decree of the Qazi proceeded on the evidence of the deed, and not on the evidence of the condition.

But if only the witnesses to the occurrence of the condition retract, there exists in such a case a difference of opinion amongst the Hanafite jurists.

It may be noted that by the divorce here mentioned is to be understood divorce before consummation ; because in a case of a divorce after the consummation neither party of the witnesses will liable to give compensation, because the wife's right to her dower is proved by consummation.

PART IX

ADAB-UL-QAZI

(DUTIES OF THE QAZI)

SYNOPSIS

Chapter – 1 – Qualification and Appointment of Qazi

Section – Imprisonment

Chapter – 2 – Letters from one Qazi to another Qazi

Section –Miscellaneous cases

Chapter – 3 – Arbitration

Section(1)– Miscellaneous cases relating to Judicial Decisions

Section (2)– Decree of Qazi in respect of Inheritance

Section(3) – Execution of the decrees of the Qazi

ADAB-UL-QAZI *

(DUTIES OF THE QAZI)

(Hidayah, Kitab Adab-ul-Qazi)

CHAPTER 1

QUALIFICATION AND APPOINTMENT OF QAZI

1. Qualification of a Qazi .

The appointment of a anybody as a Qazi is not valid, unless he possesses the qualifications that are necessary for a witness, that is, unless he is free, sane, adult, a Muslim, and not accused of slander.

2. Misconduct by a Qazi .

If a Qazi is a just man at the time of his appointment, and thereafter, by taking bribes, proves himself to be "Faasiq", i.e. a wrong-doer he does not by such conduct become discharged from his office, but he, nevertheless, deserves dismissal. This is the view of the Zahir Rawayat ; and it has been adopted by modern jurists.

3. Muftee .

A question has arisen, whether a "Faasiq", i.e. a wrong-doer is capable of being a Muftee ; and on this point there are different opinions of the learned ones. Some have said that he is

* Muftee is the officer who expounds and applies the law to cases, and the Qazi is the officer who gives it operation and effect.
Mishkaat Kitab-al-Amaarat Wal Qaza, and Babal 'Amal-e-Fil Qaza-e-wal Khauf-e-Minho ; 'Ainul Hidayah, Vol. III, pp 335 to 387

not capable to be a Muftee, because the issuing of a "Fatwa", or statement of the law applicable to any case, is connected with religion, and the word of a wrong-doer is not creditable in matters relating to religion. Some others have said, that a wrong-doer is capable to be a Muftee, because of the possibility that will be work hard in the discharge of his duty, lest the people may accuse him of his faults.

The former, however, is the better opinion. Some jurists laid it down have as a condition, that a Qazi should be a Mujtahid.* The more approved Mujtahid is, however, that this is merely preferable, but not indispensable.

4. Appointment of a non-Mujtahid as a Qazi .

The appointment of a man who is not a Mujtahid to the office of Qazi is valid, according to our jurists.

5. Fit person to be appointed .

It is necessary for the Ruler to select for the office of Qazi a person who is capable of discharging the duties of it, and passing the decrees ; and who is also in a superlative degree just and virtuous.

6. Confidence in his own abilities .

It is not necessary in selecting for the office of Qazi a person who has a thorough confidence in his ability to discharge the duties of his office.

7. Dubious of himself .

But it is abominable to select a person, for the office of Qazi, who suspects that he is not capable of fulfilling the duties

* Mujtahid is the highest degree of learning in the law to which the learned ones can attain,

of his office, and who is not confident of being able to act strictly in doing justice.

8. Appointment not to be solicited or desired.

Muslims are not to desire the appointment of Qazi in their hearts, nor in their tongues, because the Holy Prophet has said, "whosoever seeks the appointment of Qazi will be left to him ; but to him who accepts it on compulsion, an angel will descend and give directions, and also, because whoever desires this appointment shows a confidence in himself, which will preclude him from instruction ; and whoever, on the other hand, puts his trust in Allah, will be secretly inspired with a knowledge of what is right in the discharge of his office. (Tirmizi)

It is lawful to accept the office of Qazi from a tyrannical Ruler, similarly as from a just Ruler.

POSSESSION OF THE RECORD

9. Possession of all the records.

Whenever a person is appointed to the office of Qazi, it is necessary for him to demand the "Dewan" of the former Qazi.

By "Dewan" is meant the bags in which the records and other papers are kept ; for those should be kept to serve as vouchers on future occasions. These bags, therefore, should always remain in the hands of the person possessing the judicial authority; and as the judicial authority rests, for the time being, with the person appointed to the office, he should, therefore, require them from the previous Qazi.

10. The Ameens .

It is necessary that the new Qazi should send two Ameens

(trustees) in order to take possession of the bags of the "Dewan" in the presence of the previous Qazi, or in the presence of his Ameen. It is also necessary that they should ask and inquire of the previous Qazi which are the papers that register his proceedings ; and which are those that establish guardians for the property of orphans ? and that then the previous Qazi should arrange the several descriptions of papers in different bags, in order that no doubt may arise to the new Qazi. It may, however, be noted that enquiry is merely for the sake of knowledge and not for the purpose of impeachment.

11. The prisoners confined upon any legal claim .

It is necessary that the new Qazi should examine into the state of the prisoners, because this is a part of his office. Whoever of them makes an admission of the right of others, the new Qazi should make it binding upon him, as admission causes obligation on the one who makes the admissions. But who-ever of them, makes a denial, the new Qazi should not give credit to the affirmation of the previous Qazi in respect of him unless proved by evidence, because, on account of his dismissal, his affirmation is no more authoritative than that of any of the common people, and the evidence of one person is not proof, more particularly when such evidence is in respect of his own action.

If in the last case the previous Qazi is not able, to produce any evidence, still the new Qazi should not immediately release such prisoner, On the contrary, he should issue the proclamation and use circumspection, i.e., he should cause a person to proclaim, every day, that "the Qazi has ordered that whoever has any claim against such a prisoner should appear and be confronted with him."

If any person appears, and prefers claim against the prisoner, the Qazi should ask him to produce the evidence. But if no person appears, he should then release the prisoner, if he sees it advisable.

The Qazi should not, however, precipitate his enlargement before taking these precautions, because the imprisonment of such prisoner by the former Qazi has apparently been with reason, it is possible that, if he hastily releases him, the claimant against him might lose his right.

12. Deposits of contested property .

It is necessary that the new Qazi should also examine into the properties deposit,* which the previous Qazi may declare to be in the possession of particular persons, and also into the proceeds arising from the Wakfs (charitable appropriations) of Muslims, that he should act with these according to such evidence as may be brought relating to them, or according to the admission of the person in whose hands are the deposits or the proceeds of the Wakf, because evidence and admission are both proofs. But he should not give any credit to the affirmation of the previous Qazi ; unless the person in whose possession the property lies avow that "the said property was given in charge to him by the Qazi;" in which case the new Qazi may accept the affirmation of the previous Qazi with regard to such property, as it here appears, from the trustee's admission, that the property in question had been in the possession of the previous Qazi, and therefore it may be said to be still in his possession ; his affirmation, therefore, in respect of such property, should, in such a case, be accepted.

PERFORMANCE OF DUTY IN THE MOSQUE OR IN A PUBLIC PLACE

13. Performance of duty in a mosque or other public place.

It is necessary that the Qazi should sit openly in a mosque for the performance of his office, in so that his place may not be

* Controverced property, held by the Qazi till decision of the case of the trust.

uncertain for the travelers or for the residents of the town. The Jaame' Mosque is the most suitable place, if it is situated within the city, because it is well known.

14. Or in his own house .

There is no objection if the Qazi sits in his own house to pass judgment. But it is necessary that he should allow free access to the people.

15. Usual associates .

It is necessary that such people should sit along with the Qazi as were used to sit with him before his appointment to the office ; because, if he sits alone in his house, he may give rise to suspicion.

16. Acceptance of gifts .

The Qazi should not accept any gifts, except from his own relatives related to him within the prohibited degrees, or those from whom he was used to receive them prior to his appointment ; neither of whom can be deemed to be on account of his office, as the one is due to relationship, and the other due to acquaintance. Except these, therefore, he should not accept the gifts from any person as these be considered as given to him on account of his office, and such it is not lawful for him to enjoy. If, any of his relatives within the prohibited degrees, has a case pending before him, and he offers him a gift, it is binding on him to refuse it. Similarly, if any person who was accustomed to send him gifts before his appointment sends him more gifts than usual, or if, he has a case before him, and he sends him any gifts whatever ; in none of such cases it is lawful for him to accept them, as they will be considered as given to him on account of his office, and as such an abstinence from it is indispensable.

17. Feast or entertainment .

The Qazi should not accept an invitation to any feast or entertainment, except a general one ; because a particular feast or entertainment will be supposed to have been given on account of his office, and his acceptance of it will, therefore, make him liable to suspicion ; in opposition to the case of a general one. This rule, which has been laid by Imam Abu Hanifah and Imam Abu Yusuf, applies equally to the feasts of relatives as well as other persons.

But according to one Imam Muhammad, view of the Qazi may accept an invitation to a feast from his relative, even though it is a particular one, as he is permitted to accept gifts from him. (Tahaavi)

It may be noted that a particular feast or entertainment means such as depends entirely on the presence of the Qazi ; i.e., such as will not take place in case of his absence ; and a general one is that which does not depend upon the presence of the Qazi.

ATTENDING FUNERALS AND VISITING THE SICK

18. Attending funerals, and visiting the sick .

It is permissible for the Qazi to attend the funeral prayers; and also, to visit the sick.

But it is necessary that on these occasions, he should not make unnecessary delay, nor allow any person to talk with him in respect of his case so that he may not thereby afford a chance for suspicion.

PRECAUTIONS IN GENERAL

19. In general conduct and behaviour.

The Qazi should not invite to a feast or entertainment one of the parties in a case without the other ; because the Holy

Prophet has prohibited this ; and also because it creates suspicious (Dara Qutni, Tabrani).

When the two parties meet in the court of the Qazi, he should treat them both equally because the Holy Prophet has said, "a strict equality should be maintained between the parties in a case in respect of their sitting down, or directing them, or looking towards them." (Ishaq bin Raahviah)

The Qazi should not speak privately to either of the parties, or make signs towards him, to give him instructions or support his argument ; because besides giving rise to suspicion, he will thereby depress the other party, who might give up his claim thinking that the Qazi has biased towards the other.

The Qazi should not smile towards any one of the parties, because that will give him encouragement above the other; nor should he give too much attention to either of them as it will thereby finish the awe and respect of his office.

20. I Conduct towards the witnesses.

It is abominable for the Qazi to encourage or instruct a witness, by saying to him (for example). "Is not your evidence to this or to that effect ?" Because example this will amount to giving assistance to one of the parties; and it is therefore abominable, as it will amount to instruct either of the parties themselves.

Imam Abu Yusuf has, however, said that instruction to a witness, on occasions free from suspicion, is laudable; because a witness may sometimes be affected from the awe of the court of the Qazi ; and in such a case to encourage him, so as to give life to the right of his party, in the same manner as the deputing of a person to ensure the appearance of the defendant in the court, is lawful, in spite of the fact that it amounts to an assistance to the

plaintiff, as it is also lawful to exact bail from the defendant, although an assistance is thereby given to the plaintiff. Hence it is also lawful to give encouragement to a witness, to safeguard his right, although assistance is thereby given to one of the parties.

21. While giving the judgment .

The Qazi should not give judgment when he is hungry or thirsty, because such conditions diminish the intellect and understanding of the person nor should he give judgment when he is angry or when he has filled his stomach with food, because the Holy Prophet, has said that, "the Qazi should not decide between the litigants when he is angry (Bukhari and Muslim), or when he is full."

A young Qazi should satisfy his passion with his wife before sitting in the court, so that he may not be attracted by the view of the women present there.

Section

IMPRISONMENT
(*Fasl Fil Habs*)

1. Rules in imprisonment for debt .

When a claimant proves his right before the Qazi, and request him for imprisonment of his debtor, the Qazi should not make haste in complying with the request, but should first order the debtor to fulfil the right; and if he tries to delay, the Qazi may then imprison him.

This is where the right is proved by the debtor's admission; because in such a case the non-payment on the first demand is not considered as the delay, because it is possible that the debtor expects a respite, and, therefore, has not brought the money along with him. But if he delays after the decree of the Qazi, he should then be imprisoned, as his delay is then clear.

But where, the right is proved by evidence, the defendant should be imprisoned immediately on the proof of it ; because his denial, which resulted in the necessity of proof by evidence, furnishes a proof of his intention to delay.

2. In an award of debt .

If a defendant, after the Qazi has passed a decree against him, delays the payment in a case where the debt due was contracted against some property, as in the case of goods purchased for a price, or of money, or of goods borrowed on promise of a return, the Qazi should immediately imprison him, because the property he has received is a proof of his having the wealth.

Similarly, the Qazi should imprison a refractory defendant who has undertaken an obligation on account of some contract, such as marriage or bail, because his voluntary engagement in an obligation is a proof of his having the wealth, as no one is supposed to undertake what he is not able to fulfil, and if in such a case, he pleads poverty, his plea is to be rejected, and the plaintiff's assertion (of his having the wealth) should be accepted.

3. In every other case .

If the plaintiff proves that the debater is in possession of wealth, the Qazi should in such a case imprison the debtor, under any of the circumstances mentioned above.

The distinctions here stated are from the Zahir Rawayat. But according to other authorities, the assertion of the plaintiff should be accepted in every case of debt ; i.e., whether the debt is contracted against some property, or voluntarily engaged for by the party ; because poverty is the basic condition of man, and

wealth is merely supervenient, and thus the neutral condition of man is a proof of the truth of the defendant's declaration of poverty. There is also another tradition, that the defendant's declaration of poverty is to be accepted in every case of debt, except the one contracted against property.

4. Wife suing for her maintenance .

If a wife demands her maintenance from her husband, and he pleads poverty, his declaration, corroborated by an oath, should be accepted.

Similarly, if a person emancipates his share in a partnership slave, and his partner demands a compensation for his share, and he pleads poverty, his declaration should be accepted.

In a case where the defendant pleads poverty, and the plaintiff proves, by evidence, his having the wealth, the Qazi should imprison the defendant for two or three months ; after which it is necessary that he should make an inquiry into his circumstances ; and if upon such inquiry ; the people say that he is wealthy, he should be continued in confinement ; but if they say that he is poor, he should be released ; because he stands time to enable him to acquire wealth ; and the continuance of his imprisonment is, in such a case, will be an oppression.

5. Admission of debt .

According to the Jaame'-as-Sagheer, if a person makes an admission of debt before the Qazi, he [i.e. the Qazi] should in such a case imprison him, and should then make inquiry from the people in respect of his circumstances. If it is proved that he is rich, he should in such a case continue his imprisonment ; but if it is proved that he is poor, he should release him.

6. Husband can be imprisoned ; but not the father .

A husband can be imprisoned for the maintenance of his wife, because in withholding the maintenance he is quality of oppression ; but a father cannot be imprisoned for a debt due to his son, because imprisonment is a kind of severity ; which a son is not entitled to be the cause of inflicting on his father ; as in cases of retaliation or punishment.

But if, a father withholds the maintenance from an infant son, who has no property of his own, he should be imprisoned ; because this is necessary to preserve the life of the child ; and also because there is no other remedy, as maintenance, in opposition to debt is annulled by the lapse of rime, and, therefore, it is necessary to prevent its annulment for the future.

Chapter 2

LETTER FROM ONE QAZI TO ANOTHER QAZI

(Hidayah, Kitab Adab-ul-Qazi, Baab Kitab-ul-Qazi Ilal Qazi)

1. Letter authenticated by evidence .

A letter from one Qazi to another Qazi is admissible in respect of all rights except punishment and retaliation, if it is supported by evidence produced before the Qazi to whom it is addressed, which is absolutely necessity, as will be shown hereafter.

2. Difference between record and Qazi's letter .

If witnesses produce evidence, before a Qazi, against a defendant, when the subject of the case is at a distance, the Qazi may pass a decree upon such evidence, because it amounts proof. The decree so passed is written down, which is known as Sijil or record, and is not taken to be a letter of one Qazi to another.

But if, the evidence is given in the absence of the defendants, the Qazi should not pass a decree, as it is unlawful to do so in the absence of the person whom it affects, but he should take down the evidence in writing, so that the Qazi to whom such writing is to be addressed may use it as evidence. This writing is known as *Kitab-ul-Hukmi*, or the letter of one Qazi to another Qazi, and is a transcript of real evidence.

3. Letter is transmissible on certain conditions .

It may be noted that the transmission of letters of one Qazi to another Qazi is bound by many conditions, which will hereafter be explained ; and the legality of it is based on its necessity, as it may sometimes be impossible for the plaintiff to bring the defendant and the evidences together at the same place, because of the distance of their abodes. Therefore the letter of one Qazi to another, Qazi serves as the evidence of evidence, as a branch from the trunk.

It may also be noted that the word rights used above, implies the debts, dowers, shares of the heirs, usurpations, disputed trusts, or Muzaribat stock denied by the manager ; as all these are equal to debt, and are capable of being ascertained by description, without the necessity of actual exhibition.

Letters from one Qazi to another Qazi are also admissible in the cases of immoveable property, because it is also capable of being ascertain by a description of its boundaries; but they are not admissible in respect of movable property, because in such a case, there will be a necessity for actual exhibition.

According to an opinion of Imam Abu Yusuf, letters from one Qazi to another Qazi are admissible in respect of a male slave, but not in respect of a female slave, as the possibility of elopement is stronger in the one than the other.

According to another opinion of Imam Yusuf, however, they are admissible in respect of both male and female slaves, but that particular conditions are necessary to prove their admissibility, which will be explained in their proper place.

According to an opinion of Imam Muhammad, that the letters of a Qazi are admissible in respect of every kind of movable property, and this opinion has also been adopted by our modern jurists.

4. Evidence to authenticate it .

The letters of Qazees are not admissible unless authenticated by the evidence of two men, or of one man and two women ; because there is similarity between all letters, and it is, therefore necessary to prove their authenticity by complete evidence.

The reason for this is that these letters are of binding nature, and therefore should be completely proved.

But it will be otherwise in respect of the letters of Harbees, i.e., Infidel aliens, to the Imam, seeking protection ; because these are not to be proved by evidence as they are not of binding nature, as it depends upon the Imam to grant or not to grant the protection, at his pleasure.

It will also be otherwise in respect of the message of a Qazi to a Muzakki, i.e., purgator of witnesses, or in respect of the message of a purgator to the Qazi, because such a message, as being the message of a purgatory, has no force, but merely as a corroboration of the evidence of witnesses.

5. Contents to be previously explained .

It is necessary for the Qazi to read his letter in the presence of the witnesses who are to authenticate it, or to explain the contents of it to them, so that they may have a knowledge of it; because no evidence can be given without knowledge. Then he should close the letter, and put his seal on it in their presence, and then hand it over to them, so that they may have a security against any possibility of change in it. This is according to Imam Abu Hanifah and Imam Muhammad ; and the reason for it is, that a knowledge of the subject of the letter, and an evidence of putting of the seal on it, are indispensible necessary ; and similarly, a remembrance of the contents is also necessary ; and, therefore, it is also necessary that the Qazi should them an open copy of the letter ; with which they may refresh their memory.

It is, however, noted, as the last view of Imam Abu Yusuf, that none of these conditions is necessary, and it, is enough to attest that this is the letter and this is the seal of the Qazi ; and it is also reported, from him, that the putting of the seal is also not necessary.

It appears that, after attaining the dignity of Qazi , Imam Yusuf considered this matter as of little importance ; and his view is of great weight, as those persons who only hear are not so competent to determine as those who see. Shamsul A'imma Sarakhsi has also adopted the view of Imam Abu Yusuf.

6. To be received in the presence of defendant .

When a letter from a Qazi arrives, the Qazi to whom it is addressed, should not to receive except in the presence of the defendant ; because as such letter is equal to an evidence, the presence of the defendant is, therefore, indispensable.

But it will be otherwise in respect of the other Qazi hearing the evidence, because that is merely to transmit it, and not to pass judgment upon it.

7. Forms to be observed .

When the witnesses bring the letter to the Qazi to whom it is addressed, he should first look at the seal of it, and after hearing their evidence that, "this is the letter of a particular Qazi," that "he delivered it to them in his court of judgment," then "he read it in their presence," and, that "he put his seal to it before them', then he should open and read it in the presence of the defendant, and pass a decree according to the contents. This is according to Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf has said that it is enough for the witnesses to attest that "this is the letter and seal of such a Qazi."

According to Qadooree, the proof of the integrity of the witnesses, prior to the opening of the letter, is not a condition.

The better view, however, is that it is a necessary condition ; and the same has also been adopted by Khassaaf. The reason is, that there may eventually be a necessity to require other evidence, in case of a want of proof of the integrity of those who have brought the letter ; and it will be impossible for any others to give their evidence unless the seal still remained upon it. It is, therefore, absolutely necessary that the Qazi should not break the seal of the letter until the integrity of the bearers is proved.

8. Rendered void .

One Qazi should not accept a letter from another Qazi, unless the Qazi who has written it is, at the time, still officiating his office.

If, therefore, before the receipt of the letter, the Qazi who has written it has died, or has been dismissed from his office, or has become disqualified to perform the duties of a Qazi, from apostasy, or insanity, or from having suffered punishment for slander, the Qazi to whom the letter is addressed should then reject it ; because the author of it is at that time reduced to the level of the common people, any information from him, except that which relates to himself, or to both of them, is not admissible.

9. Death or dismissal of the Qazi to whom it is addressed .

Similarly, if the Qazi to whom the letter is addressed has died, another Qazi should not open it, unless the address is in this manner, "to the Qazi of the city or to whatever Qazi it may concern this letter," in which case another Qazi may receive it, because he is implied in the address due to the reference to his office and city.

But if the address, is merely, "to whatever Qazi it may concern," he will not be entitled to open it, due to the uncertainty of the address.

If the defendant dies before the arrival of the letter to the Qazi, judgment should be passed upon it in the presence of his heir, as being his representative.

10. In cases of punishment or retaliation .

A letter from one Qazi to another Qazi is not valid in the case of retaliation or punishment ; because in such a letter there exists a semblance of substitute because the letter is not itself an evidence, but merely a substitute for the evidence, and therefore it is equal to evidence upon evidence ; and as evidence upon evidence is not admissible in these cases, the letter of a Qazi cannot be admitted.

Section

MISCELLANEOUS CASES
(*Fasl Fil Mutafarriqaat*)

1. Woman as a Qazi .

A woman can perform the duties of a Qazi in every case except the cases of punishment or retaliation, as the evidence of a woman is admissible in every case except the cases of punishment or retaliation ; because the rules of jurisdiction are derived from the rules of evidence as was before stated.

2. Appointment of deputy by a Qazi .

The Qazi is not entitled to appoint a deputy, unless he has special power from the Imam to that effect ; because although he has been himself appointed to the office of Qazi, yet he has no authority to confer such appointment on any other person.

Similarly, as it is not lawful for an agent to appoint a sub-agent unless he is permitted to do so by his constituent, so is it not lawful for a Qazi to appoint a deputy unless he has the authority of the Imam to do so.

But it will be otherwise in respect of a person appointed to lead the Friday's prayers ; because he may appoint a deputy to act for him, since, if any delay happens in the offering of the prayers, the prayers will become void and null, as the time for them is fixed. The appointment of a person to lead these prayers, therefore, is an argument in favour of his being empowered to appoint a deputy to act for him, to prevent the nullity of the prayers ; contrary to jurisdiction, which, does not depend on a fixed time, is not therefore defeated by delay.

3. Decrees of deputy .

But if a Qazi, not having the power to appoint a deputy, still any appoints on one as his dispute, and the said deputy, in the presence of the Qazi, or in his absence, but with his approval, passes a decree, the decree so passed will be valid ; similarly as where the sub-agent of an agent performs any act in the presence of the agent, or with his consent, such act is valid.

4. Dismissal of the deputy .

If the Imam gives authority to the Qazi to appoint anybody whom he pay like, his deputy, and he accordingly appoints a personas his deputy the person whom he appoints will become , the deputy of the Sultan ; and the Qazi will not be entitled to dismiss him.

5. Maintenance and enforcement of the decree of other Qazi.

It is necessary for every Qazi to maintain and enforce the decree of another Qazi, unless such decree is repugnant to the Holy Qur'an, or of the Sunnah, or of the opinions of our jurists ; in other words, unless it is a decision supported by authority.

According to Jaame'-as-Sagheer, if a Qazi passes a decree in a matter in respect of which different opinions have been given, and he is thereafter succeeded by another Qazi having a different opinion relating to it, still the latter Qazi should enforce the decree so assed, because it is a rule that when a Qazi passes a decree in a doubtful case, the decree is to be executed accordingly. It is not permitted to a succeeding Qazi to rescind it because although the succeeding Qazi is equal in passing the judgment to his predecessor, still the judgment of the predecessor in such a case is allowed a superiority, because of its having been exercised in passing the decree ; and, therefore, it can-not be affected by the judgment of his successor, which is deemed inferior due to its not having been exercised.

6. Decree in a doubtful case .

If a Qazi, in a doubtful case, passes the decree contrary to his own tenets, due to having forgotten the principles of his sect, still such decree should be enforced, according to Imam Abu Hanifah.

But if, he passes such decree intentionally, and not due forgetfulness, there are in such a case two views of the jurists. According to one view, the decree should be enforced in such a case also, because the error in it is uncertain. But in the opinion of Imam Abu Yusuf and Imam Muhammad, such decree should not be enforced in either case ; i.e., whether the error is intentional, or due to forgetfulness ; and this is the approved view.

Doubtful case is the one in which there is no "Nass", or particular ordinance, either by the Word of Allah, or by the Holy Prophet, and ,therefore relating to it different views have been given by the Companions and their followers. But where a large number, of them, have concurred, and only a few have differed, it is not a doubtful case.

7. Article decreed unlawful .

Every thing which has been decreed as illegal by the Qazi on account of apparent circumstances, that is to say, from the evidence of the witness, as even though in reality such evidence is false, is still *ipso facto* illegal. This is accordingly to Imam Abu Hanifah ; and he is also of the same opinion where the Qazi decrees the legality of a thing ; provided, however, that the claim of the plain-tiff is based on some specific plea, such as purchase, lease, or marriage, as if, for example, he claims a female slave by saying that he had purchased her.

8. Decree against an absentee .

The Qazi should not pass a decree against an absentee except in the presence of his representative.

9. Decree against the person who first opposes the claim and the disappears .

If a defendant, who first opposes the claim, and then disappears, in such a case also the Qazi should suspend the proceeding during his absence, because it is necessary that the defendant should be present at the time of passing the decree. The opinion of Imam Abu Yusuf, on this point is however different.

10. Lending property of orphans .

The Qazi has the right to lend the property of the orphans, but he should keep a record of it in writing because such loan is advantageous for the orphans as it, so that it may preserve and secure their property ; and the Qazi has also the power of enforcing the restitution of it. But an executor, is responsible for the property which he may be lend, as is also a father, because none of them has the power to enforce restitution of it.

CHAPTER 3

ARBITRATION

(Hidayah, Kitab Adab-ul-Qazi, Baab-ut-Tehkeem)

1. Qualification of arbitrator .

If two persons appoint an arbitrator, (i.e., Hakam), are satisfied with the award given by him, such award is valid ; because ; as all persons have a power with regard to themselves, they therefore also possess a right to appoint an arbitrator between them, and his award is therefore binding upon them. But this is where the person so appointed possesses the qualifications of Qazi ; because he stands in such relation to the other two, it is therefore necessary that he should be competent to perform the function of a Qazi.

2. Slave, infidel, slanderer or infant .

It is not lawful to appoint a slave, or an infidel, or a person who has been punished for slander, or an infant, to act as an arbitrator ; because none of them is competent to be a witness.

3. Unjust person .

If an unjust person is appointed an arbitrator, it will be valid, because appointment of such a person to the office of Qazi, is valid as has been already explained.

4. Retraction from arbitration .

If two person appoint anybody an arbitrator, still it will be lawful for any of them to retract before he gives his award, because, as the arbitrator has received his powers from them, he is not entitled to exercise those powers without their consent.

The award given, by the arbitrator is binding upon the parties , because the power of the arbitrator over them was given by their own corroboration.

5. Reference to the Qazi .

If the parties refer the award of the arbitrator to the Qazi, and it is conformable to his opinion, he should order for its execution, because it will be useless to annul it, and then pass a similar decree. But if it is not conformable to his opinion, he should annul it, as the award of an arbitrator is not binding on the Qazi, if he has not authorized it.

6. Reference to arbitrator in cases of punishment or retaliation.

The appointment of an arbitrator is not valid in cases of punishment or retaliation, because no party has the power over his own blood, and is, therefore, not capable of assigning it to others.

The jurists have said that exception of retaliation and punishment affords an argument in favour of the legality in favour of arbitration in all other contested matters, such as divorce, marriage, and so no. This is approved. Still, however, there is the need for confirmation of the award in these cases by a decree of the Qazi, so that a control may be maintained over the people and, their presumption may be restrained, because otherwise the people will always like to settle their disputes by a private reference, without regard to the law.

7. Award of a fine against the tribe of an offender .

If, in the case of murder by mistake, the slayer and the heir of the deceased appoint an arbitrator, and he awards a fine of blood to be paid by the tribe of the slayer, such award will be of no legal effect. In other words, the heir is not entitled to exact such fine from the tribe on account of the award, because it has no force over the tribe as the tribe did not authorize the arbitrator.

8. Award against the offender himself .

If, the arbitrator awards the fine to be paid by the slayer, the Qazi should annul it, as it is contrary to the law, which has laid down that the fine should be paid by the tribe ; except where the fact is proved by the confession of the slayer, in which case the tribe is not liable to pay the fine.

9. Examination of witness .

An arbitrator has the power to hear the witnesses of the plaintiff, and also to pass an award upon the denial or acknowledgment of the parties, because this is according to the law.

10. Parties acknowledging arbitrator's decree .

If an arbitrator gives the information to the Qazi of the acknowledgment of one of the parties, or of the integrity of the witnesses, at a time when both the parties continue to adhere to his award, such information should be accepted, and the Qazi should not then admit the denial of either of the parties, as the authority of the arbitrator still continues.

But if, he gives the information to the Qazi relating to his award, that is, if the parties dispute in respect of his award, one of them saying that "it was to such or such effect," and the other denying this and the arbitrator informs the Qazi that "he has awarded so and so", his information should not be accepted, as in such a case his authority no longer continues.

11. Award in favour of parent, child, or wife .

The determination of every person acting in the capacity of a judge, whether he is a Qazi or an arbitrator, in favour of his father, his mother, his child, or his wife, is not valid, because evidence in favour of any of these relations not lawful on account of the suspicion which it suggests, a determination in their favour is, therefore, also not valid, for the same reason.

A determination, however, against any of these relations is valid, because evidence against them is allowed, as it is not liable to any suspicion.

12. Joint arbitrators .

If two persons are appointed arbitrators, it is necessary for them to act jointly in giving a determination, as this is a matter which requires wisdom and judgment.

Section (1)

MISCELLANEOUS CASES RELATING TO JUDICIAL DECSSIONS
(Fasl Fil Mutafarriqaat)

1. Doing of any act in respect of the under storey of a house.

If in a house the upper storey belongs to one person, and the under storey to another person, the owner of the under storey is not entitled to drive in a nail or to make a window without the permission of the owner of the upper storey. This is the view of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that the owner of the under storey is entitled to do any act in respect of it, provided no damage is o be caused to the upper storey.

Similar disagreement also exists will regard to the owner of the upper storey upon same foundation.

Some of our jurists say that the view of Imam Abu Yusuf and Imam Muhammad is only an explanation of the view of Imam Abu Hanifah, and that actually there is no disagreement between them.

2. Passage into a private long streets .

If there is a long street, parallel to which, there is, on the right or left, another long street, which is not a thoroughfare i.e., not open at both ends, it is not allowed to any of the residents of the first street to open a door into the second street; because the purpose of opening a door is to obtain a passage through it ; and the second street is not free to the residents of the first street as it is not a thoroughfare ; and the right of passage through it belongs only to the residents of it.

Some jurists have said that every residents of the first street is fully entitled to open a door into the second street ; because the opening of a door is nothing more than the breaking of a wall by its owner, which is lawful ; but that the prohibition against passing through it will still remain in force.

The authentic view in this respect is that the opening of a door, in such a case, is not lawful ; because, after the door is opened, it will not be possible to prevent passing thorough it; and because there is also the possibility that after some time the right of passage may be claimed by the person who has made the door, and the entrance of the door may be pleaded as a proof of his right.

But if the second street is not long, but a short one, every resident of the first street has the right to open doors into it ; because he has a right of passage through it as on account of its shortness it is considered as a courtyard, in which all have the right of participating, and therefore they all will have an equal claim of Shuf'ah in respect of the sale of any house in it.

3. Compromise of indefinite claim .

If a person indefinitely claims anything belonging to a house, and the owner of the house denies his right to it, but then compromises with him for his claim, such compromise will be valid.

4. Claim based on gift and purchase.

If a person claims a house which is in the possession of another person, and says that "the possessor had, previously, made a gift of it to him," and upon being asked to produce evidence, he says that, "he denied the gift, and I therefore purchased the house from him," and produces witnesses, and they prove the purchase, but give the date of it to be prior to the gift, such evidence will not be accepted, because of its differing from the assertion of the claimant in respect of the date of the deeds. But, if they prove the purchase as having been made after the gift their evidence will, in such a case, be accepted, because of its conformity with the plea of the claimant.

And if he claims a gift, and brings witnesses to prove the purchase previous to the gift, without mentioning the denial of the gift by the donor, in such a case also the evidence will not be admissible.

5. Purchase of female slave denied by the purchaser.

If a person who possesses a female slave says to another person that, "you have purchased this slave from me, but have not paid me the price," and the other person denies the sale, and the possessor of the slave decides to drop the claim, and as a result refrains from any further dispute with the other person, he may then lawfully cohabit with her, as the denial of the purchaser finishes the sale in the same manner as where both parties deny it.

6. Declaration of receiver in the receipt of money.

If a person admits that he had received ten Dirhams from another person, but afterwards says that they were "Zayoof" or bad, in such a case his declaration should be accepted.

But it will be otherwise if he declares that "he had received ten good Dirhams," or that "he had received his right,"

or "the price of his goods," or "a discharge of his claims," and afterwards says that the Dirhams were bad ; as in neither of these cases will his declaration be accepted.

7. Creditor denying his debtor's admission.

If one person says to another person that, "I owe you one thousand Dirhams," and the other person replies that, "you do not owe me anything," but afterwards, in the same meeting, says that, "you owe me one thousand Dirhams;" in such a case he will not be entitled to anything unless he brings the proof or the debtor confirms his assertion ; because the debtor's admission is actually finished by his denial ; and his subsequent assertion of course will become a claim *de novo*, which will therefore, require to be proved, or to be confirmed by the debtor.

But it will be otherwise where a person says to another that, "you purchase goods from me," and the other person denies it ; because he might inspite of it, afterwards without misleading, confirm the declaration of the person in question in the same meeting ; because in a contract of sale one of the parties only cannot finish it ; in the same manner as one of them is not capable of making it.

8. Evidence of debtor proving a discharge .

If a person makes a claim against another person, and the other person says that he never owed him anything, and the plaintiff proves, by witnesses, that the defendant owes him one thousand Dirhams, and the defendant, also proves by witnesses that he has paid the same, in such a case the evidence of the defendant should be accepted ; and, in the same manner also, the evidence of the defendant should be accepted, in case it proves his having obtained a release or discharge of the claim.

But Imam Zufar says that the evidence of the defendant should not be accepted.

9. Disputed purchase of a defective slave .

If a person says that "he has purchased a female slave from another person," and the other person denies that he had ever sold her to him, and the purchaser proves his assertion by witnesses, and therefore an additional finger is discovered on the hand of the slave, and the seller proves by evidence that the purchaser had exempted him from the responsibility for every defect, in such a case the evidence of the seller should be rejected, as he is clearly guilty of prevarication. This is the view of the Zahir Rawayat.

But according to Imam Abu Yusuf, that the evidence of the seller should be accepted, because of the analogy of this case to that of a debt as explained before, in which it was shown that there is a possibility of reconciling the contradiction.

10. Deed suspended upon the Will of Allah .

If a person, after acknowledging a debt to another person, writes a deed to that effect, and at the end of it inserts the following sentence that, "whosoever produces this deed of admission, and claims the thing recited in it, will be the owner of it, if it please Allah" or, if a person, after having sold something to another person, at the end of the deed of sale inserts the following sentence that, "if any person will hereafter claim the property of the subject of the sale, in such a case I will be answerable for the same, if it please Allah," in both these cases the deeds are of no effect ; and therefore, in the first case, the admission is void, and in the second can the sale is void.

But Imam Abu Yusuf and Imam Muhammad say that in the former case the debt will be binding, and in the later case the sale will be valid ; because in their opinion the condition that, "if it please Allah" applies, not to the general purport of the deed, but merely (in the former case) to the expression, that, "whoever produces this deed of admission," and so forth, or (in the latter

case) to the expression that, "if any person will hereafter claim," and so forth ; because the purpose, in drawing up the deeds of admission and of sale is merely to corroborate and confirm the act ; and if the expression in question had a reference to the whole deed, this purpose would be defeated.

But Imam Abu Hanifah, is of the view that this condition applies to the whole of the deed, and therefore he holds it to be invalid.

It may be noted, that if a blank is left at the end of a bill of sale or deed of admission, and the words "if it please Allah" are afterwards written, our jurists are of view that the clause will not affect the bill or the deed, because the blank, in either case would, mark the conclusion.

Section (2)

DECREES OF QAZI IN RESPECT OF INHERITANCES

(Fasl Fil Qaza Bil Mawarees)

1.Widow of a Christian claiming inheritance after embracing Islam .

If a Christian dies, and his widow appears before the Qazi as a Muslim, and says that "she had become a Muslim after the death of her husband," and the heirs say that she had become a Muslim before his death, their declaration should be accepted. Imam Zufar is of opinion that the declaration of the widow should be accepted.

2. Christian widow of a Muslim claiming inheritance after embracing Islam .

If a Muslim, whose wife was once a Christian, dies and the widow appears before the Qazi, as a Muslim, and says that she had embraced Islam before the death of her husband, and the heirs say that she has embraced Islam after the death of her husband, in such a case also the assertion of the heirs should be accepted.

3. Payment of the deposit by trustee on the death of his principal.

If a person, who had deposited, by way of trust, four thousand Dirhams in the hands of another person, dies, and the trustee admits certain person to be the son of the deceased and his true and only heir, he is bound to pay to that person the four thousand Dirhams which he has held in trust.

4. Demand of security in the division of an estate .

When a division is made of the assets left by a deceased person between his heirs and creditors, the Qazi should not ask for security from the heirs as well as the creditors, by way of precaution expecting the appearance of more heirs or more creditors, because this will amount to oppression, on account of deviation from common practice. This is View of Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that the Qazi should ask for security.

This disagreement is in a case where the debt of the creditors and the right of the heirs is proved by evidence, and where they severally say that they know of no other debtors or heirs than themselves.

5. Security on behalf of an absent heir .

If a person proves by evidence that a house in possession of another person had been left between him and his brother, who is absent, in such a case one half of the house should be given to him and the other half should be left in the hands of the person who is in possession ; and no security should be taken from him. This is the view of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view, that if the possessor denies the right, the share of the absent brother should be put into the hands of a trustee until his return, and if he admits the right, it should then be left in his possession.

6. Alms-gift of "Maal" (Property) .

If a person says that, "I devote my property in charity to the distressed," in such a case the word property, thus generally used, is taken to mean only that part of his property which is subject to Zakat (i.e. Para rate). But, if a person says that, "I bequeath one-third of my property," than the term property is in such a case is taken to apply to his entire property.

This distinction is, however, according to a favourable construction. But Analogy suggests, that in the former case also, the entire property is involved ; and this view has been followed by Imam Zufar ; because the term property applies to and includes property of every description, in the case of an alms-gift, in the same manner as in the case of a bequest.

It may be noticed that the declaration that, "I devote my property in alms, etc." includes also his lands, according to Imam Abu Yusuf, because land of such description is also subject to the obligation of alms, according to his tenets, that in tithe, the consideration of alms is predominant.

But according to Imam Muhammad, his Ushree land is not included, because, according to his tenets, the consideration of support to the State is predominant in tithe.

His Khirajee, or tribute lands, are, however, not included, according to all our jurists, because tribute is meant purely for support of the State, and alms are no consideration in it.

7. Alms-gift of "Milk" (Possessions) .

If a person says that, "I devote my possessions [Milk] in alms to the distress," there is in such a case a difference of opinion. Some jurists are of the view that this should be taken to mean the whole of his property ; because the term "Milk" here used is of a more general nature than the term "Maal", used in the former case ; the occasion, moreover, of restricting the application, in that case, to such property as is subject to Zakat, is purely because of "Maal", being the term used on that occasion in the Qur'an ; and as such is the case, the term "Milk" should, therefore, be taken in its common acceptation.

Some other, jurists say that the terms "Milk" and "Maal", in effect mean the same thing, and this is the better view as both these terms imply that part of his property which is beyond his needs, as is before mentioned ; and that is the part of his property subject to Zakat.

But if, a person has no other property except what he obliges himself to bestow in alms, he should in such a case reserve the property necessary for his own subsistence, and bestow the remaining; and then, after acquiring more property, he should bestow a part of it equals to what he had reserved before.

As regards the property sufficient for his subsistence, no fixed ratio has been determined, because of the different conditions of the people. Some jurists say that a person is to reserve only one day's subsistence, if he is an artificer or labourer ; one month's subsistence, in case he possesses houses and shops which are let out on rent; one year's subsistence, in case he possesses immovable property of lands ; and so on, in proportion to the length of time of receiving the income of his property ; and on this principle a merchant is to reserve as much as may be sufficient till the expected return of his property.

8. Act of an executor without notification of his appointment

If a person is appointed as an executor for another person, and he is not informed of his appointment, but even then he sells some part of the property of the deceased, the appointment will become confirmed, and the sale will be valid; but a sale by an agent is not valid, unless he is informed of his agency. This distinction is according to the Zahir Rawayat.

But Imam Abu Yusuf is of the view, that the sale by the executor is also invalid because an executor is, in fact, a person appointed to act as agent after the death of the testator, and he should, therefore be considered in the same position as an agent before death.

9. Agent's appointment .

If a person appoints another person as his agent and that person is informed of it by another person, and he immediately, upon the receipt of the information such does any act such as sale, in such a case the act will be valid, whether the informant is free or a slave, adult or minor, unjust or just ; because information of his appointment establishes his right to act, although it is in no way binding upon him.

10. Agents dismissal .

The dismissal of an agent is not established unless it is informed to the agent by two persons of unknown character, or by one just man. This is the view of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that the law, in this case, is the same as in the preceding case; because as the dismissal and appointment of agents are matters of frequent occurrence, the notification by one person is therefore sufficient.

11. Liability of Qazi or his Ameen .

If a Qazi, or Ameen appointed by him, sells the slave of a certain person, in order to discharge the debts of his creditors, and the money, after the receipt, is lost or destroyed in the hands of the Qazi, or his Ameen, and the slave is then proved to have been the property of some other person, in such a case neither the Qazi nor his Ameen will be responsible for the loss.

12.Liability of an executor acting under the order of the Qazi

If a Qazi orders an executor, whom he had himself appointed, to sell a slave to satisfy the creditors of a deceased person, and the executor, in obedience to this order, sells the slave, and the slave is thereafter proved to be the property of another person, or dies before he is delivered to the purchaser, and the price in the mean time is lost after it had been received by the executor, the purchaser should in such a case is entitled to receive an indemnification from the executor, and not from the Qazi ; because, having been appointed by the Qazi to act as executor to the deceased, he is therefore a representative of the deceased, and not of the Qazi ; and therefore, in the same manner as the deceased would have been responsible under such circumstances, in case he had himself made the sale during is lifetime, so also is the executor for the sale made after his death. The purchaser, therefore, is entitled to get the price from the executor ; and he, again, is entitled to himself be one of the creditors, as he acted in the business of the sale on their behalf.

But if, any more property of the deceased is thereafter discovered, the creditors will be entitled to receive from it the payment of their debts, which are still held to remain in force.

Jurists have also said that the creditors are on their part entitled to receive an indemnification from the estate of the deceased for the compensation they made through the executor, to the purchaser, as they have incurred that on behalf of the deceased.

13. Infant heir stands in the same position as a creditor.

An intent heir, on whose account anything is sold from the estate of a deceased person, is considered to be in the position of a creditor. In other words, if an infant heir stands in the need of selling something, and the executor accordingly makes the sale for him, and the subject of the sale thereafter proves to be the property of another person, in such a case the purchaser will be entitled to a compensation from the executor, and the executor from the heir.

But if, on the other hand, the Ameen of the Qazi sells anything on behalf of an heir which afterwards proves to be the property of another person, the owner in such a case will be entitled to receive a compensation directly from the heir, provided he is an adult ; and if the heir is an infant, the Qazi should appoint a person for the discharge of the debt from his property.

Section (3)

EXECUTION OF THE DECREES OF THE QAZI
(*Fasl-ul-Aakhir*)

1. Execution of punishment by the direction of the Qazi .

If the Qazi says to a person, "I have sentenced a certain man

to be stoned ; you therefore stone him;" or, "I have sentenced such a man for cutting his hand ; you therefore cut it off;" or, "I have sentenced this man to be scourged ; you therefore scourge him ;" it will lawful for that person to act according to the orders of the Qazi. This is the view of the Zahir Rawayat.

It is said that Imam Muhammad receded from this view, and gave it as his opinion that the directions of the Qazi as here mentioned, should not be obeyed unless his sentence is confirmed by one just man ; because there is a possibility of his being in an error in passing the sentence ; and if the error appear after execution of his sentence, it will impossible to repair the injury caused thereby to the person concerned. From this it would appear that the letter of one Qazi to another Qazi is not valid ; and our modern jurists greatly approve of this opinion, because many of the present day Qazis are loose and irregular. But they admit the validity of letters from one Qazi to another Qazi on the ground of necessity.

The arguments of the Zahir Rawayat upon this point are twofold. Firstly the Qazi gives the information of a matter which he is competent to order ; because it was in his power to have ordered the execution of the sentence passed by him immediately. Therefore as he is liable to no suspicion, he should be credited. Secondly, obedience to a judge in authority, such as the Qazi, is hold to be an incumbent duty ; and as obedience to him is implied in a belief of his word, it is therefore necessary to believe him. Imam Abu Mansoor Maatareedi has also said that, "if a Qazi is learned and just, then believe and obey him, as there is then no reason to suspect him.

But if, he is just but ignorant, it is then necessary to make enquiry of him relating to the case ; and if, after a full enquiry, it appears that the sentence is legally founded, in such a case and not otherwise he should be believed.

And if, he is learned but unjust in his conduct, or ignorant and unjust, his orders should not be obeyed, unless the person to whom he address to execute the sentence, himself comes to know the reason that prompted them."

2. Disputed decree after the dismissal of the Qazi .

If a dismissed Qazi says to a person that, "I have taken one thousand Dirhams from you, and paid it to another person, according to a decree which I passed to that effect ;" and the said person denies this, and says that the Qazi had taken it from him unjustly, still the declaration of the Qazi should be accepted, and therefore he is not responsible for the said sum.

Similarly also, if a dismissed Qazi says to a person that, "I passed a just sentence of amputation against you", and the other person says that it was unjust, the word of the Qazi should be accepted.

The rule laid down here is based on the supposition that in both these cases the persons admit that the decrees were passed at a time when he was actually Qazi ; and the reason of it is, that after such admission on their part, possibility is in favour of the Qazi ; because the possibility is that no Qazi will pass an unjust decree. It is also not necessary to take an oath from the Qazi in either of these cases, because an oath is never put to a Qazi, and both the persons in question admit that he was actually the Qazi when he passed these decrees.

It may be noted that if the person who, in the first case, by order of the Qazi, took the money, or who, in the second case, cut off the hand, declare that they had done so by order of the Qazi, they are not responsible for the consequence, as the Qazi was in office when he gave these orders, and the restoration of the property to its owner was an approved act on the part of the Qazi, in the same manner as if he had made the restoration in the presence of the defendant.

But if, the person says that the Qazi had issued such order, either antecedent to his appointment or after his dismissal, then also the declaration of the Qazi should be accepted, because he has referred the decree to a period which exempts him from responsibility. His declaration, therefore, is to be accepted.

But in this case, if the executioner of amputation, or the receiver of the money, admit these acts, they become responsible for them, because they themselves admit the doing of the acts, which induce responsibility, as the authority under which they acted is doubtful ; because the assertion of the Qazi is accepted in these cases merely to get exemption to himself from responsibility, and not to get it for others.

But it will be otherwise in the first case, where these acts are allowed to have been performed on account of an order from him when he was actually the Qazi.

All this is based on the supposition that the money no longer remains in the hands of the person who had received it on account of the decree of the Qazi ; because if the money is still in possession of the receiver, and he coincides with the Qazi relating to the amount, it should in such a case be taken from him, whether the person from whom it was originally taken confirm the Qazi's allegation, that he had paid the money to that person while he was in office," or whether he pleads that the Qazi had taken and paid it while he was not in office ; because as the receiver here in fact admit that the money had formerly been in the possession of this person, his plea of having become the owner of the money cannot be admitted unless proved by evidence ; and the mere allegation of the dismissed Qazi is not the proof, as after dismissal he also becomes as a common person.

PART X *

VAKALAT

(AGENCY)

SYNOPSIS

Chapter – 1 – Appointment of Agent
Chapter – 2 – Agency for Purchasing and Selling

Section (1) Agency for Purchasing
Section (2) Appointment of agents by Slaves
Section (3) Agency for Selling
Section (4) Miscellaneous Cases

Chapter – 3 – Appointment of agents for litigation and taking permission
Chapter – 4 – Dismissal of Agent

VAKALAT *

(AGENCY)

(Hidayah, Kitab-ul-Vakalat)

CHAPTER 1

APPOINTMENT OF AGENT

1. Appointment of another person as Agent .

It is lawful for a person to appoint another person as his agent, for the settlement on his behalf of every contract which he might have lawfully entered into himself, such as sale, marriage, and so on ; because, as an individual is sometimes not able to his own person, on account of accidental circumstances such as sickness, he is therefore entitled, of necessity, to appoint another person as his agent, so that that person may expedite his requirement by means of the powers which he derives from such appointment.

It is, related in the Traditions that the Holy Prophet appointed Hakeem bin Hizaam as his agent for purchase, so that he could buy for him a camel for sacrifice (Abu Daud, Tirmizi Nasai) ; and, likewise, that he also appointed 'Amir bin Abi Salamah as his agent for marriage, that he could conclude a marriage between his mother Ume Salamah and the Holy Prophet. (Nasai)

2. For suits, criminal prosecutions ; or payments or exaction of rights .

It is lawful for a person to appoint another person as his agent for the filing or defending a suit relating to any of his rights whatever even to corporal punishment or retaliation, for

* 'Ainul Hidayah, Vol. III, pp 440 to 487

the reasons mentioned above ; and also, because every person is not himself capable of managing a matter of this nature.

It is said that Hazrat Ali appointed Aqeel as his agent for the management of his suits, and that when Aqeel became old he removed him, and appointed Abdullah bin Jafar (Behaqi).

Similarly, it is also lawful to appoint an agent for the payment of debts or the recovery of them. But appointment of an agent, in cases of punishment or retaliation is not valid. This is according to Imam Abu Hanifah

But Imam Abu Yusuf is of the view that agency for the establishment of corporal punishment or retaliation or, in other words, for conducting criminal prosecutions, (as if the agent should produce the witnesses) is not valid.

The opinion of Imam Muhammad coincides with that of Imam Abu Hanifah. Some jurists , however, say that he agrees with Imam Abu Yusuf.

Some others, jurists say that this disagreement is only in case of the absence of the constituent, and not in case of his presence ; because in such a case, the agency is legal according to all the jurists; because the words of an agent in the presence of his constituent refer entirely to his constituent.

3. For the defence .

The view of Imam Abu Hanifah, however, is preferred in this case, because the agent may give the replies and file the rejoinders.

But if, the agent makes a confession, it should not be accepted against his constituent, because there exists a doubt whether he has been authorized by his constituent to make such confession or not.

4. Management of a suit .

According to Imam Abu Hanifah it is not lawful to appoint an agent for the management of a suit, unless with the consent of the apposite party; except where the constituent is sick, or is at a distance of three day's journey, or more from the place.

But Imam Abu Yusuf and Imam Muhammad are of the view that such agency is lawful without the consent of the opposite party ; and Imam Shaafe'ee is also of the same opinion.

This disagreement, however, does not relate to the legality of the agency itself, but to the necessity which operates upon the opposite party to answer an agent to whose appointment he has not consented ; Imam Abu Hanifah is of the view that he is not under such necessity ; while Imam Abu Yusuf and Imam Muhammad think that he is under such necessity.

5. About to travel .

It may be noted that in the same manner as Imam Abu Hanifah holds the appointment, in such a case, of an agent by an absent person as valid, so also he hold the appointment by one who is immediately about to go on journey.

6. Appointment by woman .

A woman who remains in privacy, and is not accustomed to go to the court of the Qazi, should, according to Abu Bakr Raazi, appoint an agent for the management of her case; and acquiescence to it is necessary on her opponent. This view has been adopted by our modern jurists ; and decrees are passed accordingly.

7. Competency of the constituent .

The validity of agency, in any case, depends upon the following two conditions:

Firstly, that the constituent should himself have legally The power to do the act for the doing of which he has appoint to another person (because, as the agent derives his authority from the constituent, it is necessary that the constituent should himself be competent, before he gives the authority to another person.

8. Person of understanding .

Secondly, the agent should be of sound understanding, to the extent which may enable him to know and do the work for which he has been appointed. Therefore if, a person appoints a child or an idiot as his agent, it will be invalid which, if a freeman, who is adult and of sound understanding, appoints his fellow (i.e. the one who resembles him in these points), as his agent; or, if a privileged slave appoints his fellow as his agent, it will be valid.

9. Mahjoor slave or an infant .

If a person appoints an infant who understands purchase and sale, or a Mahjoor, or inhibited slave, as his agent, it will in either case be valid.

But the rights of the contract do not belong to them but to their constituent.

10. Obligations of slave or infant agent.

The slave or infant agent is, however, not capable of performing the obligations of the contract ; the infant, because of his want of competency ; and the slave, because it will interfere in the rights of the master ; the performance of the contract will, therefore, belong to the constituent himself.

According to an opinion of Imam Abu Yusuf , if an infant, or a slave, as described above, makes a sale, and the purchaser, does not know their position, is afterwards informed

of it, in such a case it will be entitled to annul the contract, because after concluding the contract on a supposition that they were competent to fulfil the rights of it, and is afterwards informed that the rights of the contract did not belong to them, he will become naturally has be entitled to annul it in the same manner as if he discovered a defect in the goods of it.

11. Contracts entered into by the agents are of two kinds .

(a) Firstly, those of which the performance the agent refers to himself ; and which do not depend, in any way, on the constituent ; as in the cases of sale or hire, which belong to the agent and not to the constituent.

(b) Secondly, Those of which the performance the agent refers to his constituent, and in which he has an immediate interest; such as marriage, Khula' ; or composition for wilful murder ; in all such cases the rights belong to the constituent and not to the agent.

Therefore, there can be no demand from the husband's agent for the dower ; nor can the wife's agent be asked to deliver the dower to her husband ; because in these cases the agent is only a messenger , and is not exempted from the necessity of referring the performance of them to his constituent; because if the agent, in the case of marriage, is to refer the performance of it to himself, it will become his marriage, and not that of the constituent.

12. Agent for receiving a loan .

As regards the agent for the receipt of a loan, the appointment is void; as if a person, on account of such appointment, receives a loan, and takes possession of it, he, and not the constituent, will be the owner of it. But it will be otherwise in respect of a messenger ; because the receipt of a loan by a messenger is valid.

13. Debt contracted by an agent .

If a constituent, in the case of selling the goods through his agent, demands payment of the price from the purchaser, he can legally refuse to comply with the demand ; because, as regards the contract or its obligations, the constituent is as a stranger, as the obligations of the contract belongs to the contracting party.

14. Payment made to the constituent .

But if, the purchaser pays the price to the constituent, it will be valid; and the agent will therefore be entitled to demand it from him, as he has paid it to the constituent, to whom it as of right belonged ; and if the agent persists in making the demand from him, then he should take it back from the constituent and pay it to the agent, and the agent should give it to the constituent.

15. Debt owing the debtor .

It may be noted that as the right belongs to the constituent, the purchaser can, in case the constituent is indebted to him, deduct the debt from the price.

But if, the constituent and the agent are both indebted to him, he will only be entitled to deduct from the price the debt of the constituent.

16. Agent alone indebted .

But if, the agent only is indebted to him, he will be entitled according to Imam Abu Hanifah and Imam Muhammad, to deduct it from the price ; because the agent, as they hold may, if he please, exempt the purchaser entirely from the payment. But in either case, (that is, whether the purchaser makes a deduction on account of the debt due by agent, or whether the agent exempts him entirely, the agent will be responsible for payment of the whole price to his constituent.

CHAPTER 2

AGENCY FOR PURCHASING AND SELLING

(Hidayah, Kitab-ul-Vakalat, Baab-ul-Vakalat Bil Bai' Wash Sharaa)

Section (1)

AGENCY FOR PURCHASING
(Fasl Fil Bai')

1. Agent should be properly instructed .

When a person appoints another person as his agent for purchasing something, it is necessary that he should explain to him the kind and quality of the thing or the kind and price of it ; so that the agent may know the nature of the act for which he has been appointed, and this become capable of doing it.

2. Agents power in general .

But if, a person appoints another person as an absolute agent, by saying to him that, "purchase for me whatever thing you may think advisable," in such a case the explanation or the kind, etc., is not necessary, because the constituent, in such a case, gives the agent a discretionary safeguard of his interest ; and therefore whatever he may then purchase will be considered as in compliance of his order.

In fact a minor uncertainty in agency such as an uncertainty of the quality is of no importance, according to a favourable construction of the law; because agency is based on liberal principle as; and therefore, to makes explanation of the quality as essential condition will amount to a restraint upon it.

3. Agency of which the terms are uncertainty .

If the constituent, in the appointment of any person as his agent, uses a word which is applicable to many kinds in general, such as animal, or a word which serves to express a variety of meanings, such as Daar (i.e., dwelling) in such a case the appointment of agency will not be valid, even though the constituent may have specified the price ; because the article of each kind may be purchased for the same price ; and it is not known which of the kinds the constituent wishes and therefore the agency in such a case, on account of great uncertainty, will not be practicable.

Also if, the word used is applicable to a variety of kinds, the agency will not be valid, unless the constituent, mentions the price, or defines the kinds, though he may not mention the quality i.e., goodness or badness.

But if, he mention the price, or defines the quality, the agency will be valid, because the mention of the price leads to a knowledge of the kind ; and the mention of the kind leaves only the uncertainty of the quality, which is considered an uncertainty so trifling which does not prevent the performance of the agency.

Thus, if a person makes another person as his agent for the purchase of "a slave, whether male or female ;" the agency will not be valid, because "a slave whether male or female," applies to a variety of kinds.

But if, he explains the particular kind such as Turkish, Abyssinian, Indian, or of a mixed decent, the appointment will be valid. Similarly, the appointment will be valid where the price only is mentioned, because in such a case as explained before only a small uncertainty remains which does not prevent the performance of the agency.

According to Jaame-as-Sagheer, if a person appoints another person to purchase for him "cloth", or an "animal" (Daabba), or a "house", the agency will not be valid, because of great uncertainty ; as the term Daabba (for example) includes every animal that moves on the earth, although in common sense, it may means a horse, an ass, or a mule ; similarly, cloth is a generic term, which applies to a variety of kinds from the fine silk to the coarsest sheet of cotton ; and the term "house" is applied to things which with respect to kinds are different from each other, from a variety of causes, such as neighborhood, the abundance or paucity of rights and privileges, or the situation in particular streets or cites ; on account of great uncertainty in all these cases, therefore, the agency will not be valid.

4. Subsequent explanation .

But it will become valid if an explanation of the price of the house, or the kinds of the "cloth" or "animal" is given subsequently .

5. Power to purchase Ta'aam [food] .

If a person gives another person one hundred Dirhams, and says to him "buy the food ;" in such a case the word food is construed to mean the wheat, or the flour of wheat, on a favourable construction. But analogy suggest that it means any kind of food whatever, according to the real import of the word.

Some jurists have said that if the constituent, in such a case, gives many Dirhams (such as ten), then the word food is to be construed to mean the wheat. But if, he gives a few Dirhams (such as three) it is to be construed to mean "bread" made of wheat ; or if a middle number (such as seven), it is to be construed to mean the flour of wheat.

6. Return of the goods by the agent on account of a defect.

If an agent, after the purchasing the goods finds a defect in the goods, he may return them to the seller ; because rejection of the goods sold on account of a defect is one of the rights of the contract of sale ; and the agent, as one of the contracting parties, is also entitled to all the rights of the contract.

7. Return of the goods after delivery to the constituent .

Btu this is only when the agent has not delivered over the goods to his constituent ; as, after that, he cannot return it to the seller unless permitted by the constituent ; because, after delivering the goods bought to his constituent, his agency finishes ; and also, because, if he is then permitted to return the goods to the seller without permission of the constituent, the possession taken by the constituent on his own behalf will be set at naught.

8. Right of pre-emption against an agent .

It may be noted that as, before to the delivery of the goods to the constituent, the rights of the contract rest with the agent ; and finish after the delivery, it follows that if a person claims his right of Shufah in a house purchased by an agent, he has a right to sue the agent before the delivery of the house to his constituent ; but after the delivery no action can lie against the agent.

9. Agency in Sarf or Salam .

If a person appoint another person as an agent to execute a contract of Sarf or Salam, it will be valid ; because the constituent is himself competent to execute such contracts and therefore he is also entitled to lawfully empower another person to execute them on his behalf.

It may however be noted, that the Salam here mentioned signifies a purchase by way of Salam (or advance), and not a sale by that mode.

Similarly it may also be noted that if, in either of these case i.e., either the contract of Salam or Sarf, the agent who is the purchaser, is separated from the seller, before his possession of the goods, in the case of Salam ; or, the mutual possession of the article of exchange in the case of Sarf ; the contract will becomes void.

But it will be different as regards a messenger in a contract of Salam or Sarf ; for his possession is not valid as his function relates to the contract and not to the possession.

10. Agent paying for the goods with his own money .

If an agent for purchase pays the price of the goods from his own money and gets possession of them, he will be entitled to repayment from his constituent.

11. Detention by agent of what he purchases until he is paid the price .

An agent is entitled to detain from his constituent the goods purchased by him on his account, until he is paid the price by him.

But Imam Zufar is of the view that the agent is not entitled to detain the purchased goods.

12. Purchased goods perishing in the agent's hand during detention .

If, in the case stated above, the agent detains the purchased goods from his constituent, and the goods perishes in his hands, he will be liable for it, according to Imam Abu Yusuf , in the same manner as a pledge.

But Imam Muhammad is of the view that he will be liable to the extent, as in the same when goods, the subject of a sale, decay, or are lost, in the hands of the seller, in which case the responsibility for the price, and not for the value ; i.e., the purchaser will be exempted from the payment of the price ; and such is also the view of Imam Abu Hanifah. But Imam Zufar, is of the view, that responsibility attaches to the extent as in a case of usurpation (i.e., at the rate of the full value), as the detention has been made without any right.

13. Agent purchasing larger quantity .

If a person appoints another person as his agent for the purchase of ten Ratls (i.e., about one pound) of flesh for one Dirham, and the agent purchases twenty Ratls for one Dirham, of that kind of flesh which is sold at the rate of ten Ratls for one Dirham ; in such a case according to Imam Abu Hanifah it will be incumbent on the constituent to take only ten Ratls for one-half Dirham. But Imam Abu Yusuf and Imam Muhammad are of the view that it will be incumbent on him to take the twenty Ratls for one Dirham.

In some copies of Qadooree however it is written that Imam Muhammad coincides in the opinion with Imam Abu Hanifah, and that his view in Mabsoot is not incompatible with it, he has only observed there, that "the constituent should take ten Ratls for one-half Dirham.

14. Agent purchasing for himself when directed to purchase for his constituent .

If a person appoints another person his agent to purchase for him some specific goods, in such a case the agent is not entitled to purchase the goods for himself ; because this will be a breach of the trust reposed in him by his constituent ; and, also, because it will be a dismissal of himself from his appointment, which he is not, in the opinion of some empowered to do, unless in the presence of his constituent .

15. Unless the agent purchases the goods for something of a different nature from the price mentioned.

But if, the constituent has mentioned the price of the goods, and the agent purchases it for a price of a different kind from that mentioned by the constituent ; or if the constituent has not mentioned the price and the agent purchases the goods, not for Dirhams, but for something which is estimable by weight or measurement of capacity.

16. Or through another agent .

Or, if the agent appoints another person as agent, and that secondary agent purchases the goods in the absence of the primary agent ; in all such cases the purchase will be held to have been made for the agent himself, and not for his constituent, on account of the deviation from orders of his constituent.

But if, the secondary agent makes the purchase in the presence of the primary agent, the purchase will in such a case be considered as made for the constituent, because the wisdom and judgment of the primary agent is held be involved in it, due to his presence ; and therefore there will be no deviation from the orders of his constituent.

17. Agency for purchasing an indefinite slave .

If a person appoints another person as his agent to purchase for him an indefinite slave, and the agent purchases a slave ; in such a case the slave will belong to the agent himself, (and he himself will be liable for the price), unless he declares that, "I intended the purchase for my constituent," or unless he makes the purchase with the money of his constituent.

The author of "Hidayah" says that this case may occur in many shapes.

18. Which admits of many descriptions .

Firstly, where the agent refers the contract to the money of his constituent and says, "with this one thousand Dirhams (meaning those of his constituent) I have purchased this slave ; " in which case the slave will belong to the constituent.

Secondly, where the agent refers the contract to his own money ; in which case the slave, will belong to the agent himself, as he has referred the contract to his own money.

Thirdly, where the agent refers to money in general ; in which case the purchase will be taken to have been made either for himself or his constituent, as he may have intended in his mind at the time.

Therefore if, the agent and the constituent disagree the agent says that he intended the purchase for himself and the constituent says that he intended it for him, then the payment of the price will determine ; i.e., the slave will be adjudged to him from whose money the price is paid.

But if, it is admitted by both that there was no particular intention. Imam Muhammad holds the slave, in such a case, to be the property of the agent. While Imam Abu Yusuf is of the view that the payment of the price will determine the right to the purchase.

19. If slave, after the purchase by the agent, dies in his hands

If a person appoints, another person as his agent to purchase for him a slave for one-thousand Dirhams, and the agent afterwards informs him that "he had accordingly purchased for him a slave for one-thousand Dirhams, but that the slave had died in his possession," and the constituent, on the other hand, says that "he had purchased the said slave for himself, and not for him ;"in such a case the assertion of the constituent, on oath, should be accepted.

This, however, is based on a supposition that the constituent had not previously giving the said one-thousand Dirhams to his agent ; because if he had given previously the one-thousand Dirhams, the assertion of the agent should be accepted.

20. Dispute between agent and constituent in respect of the purchase of a particular slave .

If a person wants his agent to purchase for him a particular slave, and then disagrees during the life-time of the slave i.e., the constituent says that the agent had purchased the slave for himself, and the agent says that he had purchased him for his constituent, in such a case it is universally agreed that, whether the constituent may have given to the agent the price or not, the assertion of the agent should be accepted.

21. Retraction by agent avowing his commission .

If one person says to another person that, "sell to me this slave on behalf of Umar, who is my constituent ;" and the slave is accordingly sold, and the agent afterwards denies that he had been authorized to make the purchase by Umar, and Umar then appears, and says that he had asked the said agent to purchase the said slave for him, in such a case Umar will be entitled to take the slave, because the agent has himself admitted his agency on his behalf, and denial after admission is of no legal effect.

But if, Umar denies that he had authorized the purchase, in such a case he will not be entitled to take the slave, because the admission of the agent is set aside by the denial of Umar. But if, under these circumstances, the purchaser delivers the slave to Umar, it will become then a contract of sale, for which the original purchaser will be responsible, seeing that Umar has purchased it from him by way of Ta'taa, that is by mutual gift, as when, a person buys a thing for another person without his authority and then delivers the said thing to that other person.

The rule laid down in this case shows that the delivery of a thing, according to sale, is enough to prove a sale by Ta'taa or mutual gift, even though the giving and receiving of the price should not have taken place. It also shows that a sale by Ta'taa in things of great or little value is proved by the mutual consent of the parties. This is the authentic rule in the case of such sales.

22. Agent purchasing only one of two specified slaves .

If a person appoint another person as his agent to purchase for him two specific slaves without mentioning the price, and the agent purchases one of them, it will be valid, unless when he does it by deceit, because his agency authorises him only to make a just purchase.

23. If the purchase is at an evident disadvantage .

It is lawful for the agent, therefore, to purchase one of the two unless, indeed, the purchase is made at an evident disadvantage, which will be contrary to the purpose of the appointment.

24. If the price exceeds the rate mentioned in the instruction.

If a person wants another person to purchase for him as his agent two specific slaves who are supposed to be of equal value for one thousand Dirhams, and the agent purchases one of these slaves for five hundred Dirhams or less, it will be valid, according to Imam Abu Hanifah.

But if, the agent purchases the slave for more than five hundred Dirhams, the contract will not be binding on his constituent.

25. Liquidation of debt due from him to his constituent by the agent .

If a person wants another person, who owes him one thousand Dirhams, to purchase with it as his agent a specific slave, and the agent acts accordingly, it will be lawful.

26. If the goods is not specified and perishes after purchase in the agent's hands .

If a person wants another person, who is indebted to him by one thousand Dirhams, to purchase with it as his agent an indefinite slave; and the debtor accordingly purchases a slave, and the slave dies before the delivery of him to the constituent ; in such a case the slave is held to be the property of the agent.

But if, he dies after delivery to the constituent, he will then be held to have been the property of the constituent. This is the view of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that the property of the constituent commences as soon as the agent obtains possession of the slave.

Similar disagreement also exist in respect of the case of a creditor appointing his debtor to make a purchase with the debt, either by a contract of Salam or Sarf.

27. Agent and constituent disagreeing in respect of a purchase.

If a person gives another person one thousand Dirhams, and asks him as his agent to purchase with it a female slave, and the agent accordingly purchases a female slave, and the parties then disagree, the constituent says that he had purchased her for five hundred Dirhams, and the agent says that he had paid one thousand Dirhams for her, in such a case the assertion of the agent should be accepted provided the value of the slave is estimated at one thousand Dirhams.

But if, the value is estimated only at five hundred Dirhams, then the assertion of the constituent should be accepted.

28. Declaration of the seller .

If a person wants another person to purchase for him as his agent a specific slave, without mentioning the price, and the agent accordingly purchases the said slave, and they then disagree in respect of the price the agent says that he had paid one thousand Dirhams, and the constituent says that he had paid only five hundred Dirhams, in such a case, provided the seller supports the declaration of the agent, his assertion, on oath, should be accepted.

Some jurists have said that an oath should not be taken in such a case, as the doubt arising from the disagreement is finished by the verification of the seller ; in opposition to the preceding case, where the seller is supposed to be absent.

Other jurists have however, said that in such a case also an oath is necessary. Imam Muhammad also says that as, after the receipt of the price, the seller is, as, it were, a stranger to both the agent and the constituent, and, even before the receipt of the price, he is in the relation of a stranger to the constituent, his verification can therefore have no effect in respect of a disagreement between the constituent and agent ; and, therefore, that an oath is necessary. This is also, the opinion of Imam Abu Mansoor ; and it is the most authentic rule.

Section (2)

APPOINTMENT OF AGENTS BY SLAVES

1. Slave asking a person to purchase his freedom .

If a slave says to a person that, "purchase me, on behalf of myself, from my master, for one thousand Dirhams" and at the same time also gives the one thousand Dirhams to him, and the said person accordingly purchases the slave from his master, on behalf of the slave, in such a case the slave will become free ; and the right of Walaa will remain with the master.

But if, the agent does not particularly say and explain to the master that he has purchased the slave on behalf of the slave, but, simply says that, "I have purchased a particular slave of yours," in such a case the slave will become the property of the purchaser.

2. A slave acting as the agent of another person.

If a person says to a slave that, "purchase your own person on my behalf from your master ;" and the slave says to his master that, "sell me, for a particular person, for so much Dirhams," and the master accordingly agrees, in such a case the slave will become the property of the constituent.

But if, the slave simply says to his master that, "sell me," without mentioning the particular person, he will be free ; because his speech is absolute, and admit of two interpretations, and is not applied in favour of the constituent, on account of the doubt which exists in it, and which therefore determines the transaction to be a contract on behalf of himself.

Section (3)

AGENCY FOR SELLING

1. Sale by agent to his father or grandfather .

An agent for purchase or sale is not permitted, according to Imam Abu Hanifah, to enter into a contract of purchase or sale with a person whose evidence is not admitted in his i.e., the agent's behalf, such as his father or grandfather.

But Imam Abu Yusuf and Imam Muhammad are of the view that if an agent sells a thing to any person whatever, standing in that relation to him except his slave or his Mukatib, for an equivalent to the value of the subject of the sale, it will be lawful.

Similar disagreement also exists in respect of a contract of Sarf or of hire, under these circumstances.

2. Sale by agent at his own discretion .

The person who appointed as an agent for the sale of anything, is lawfully entitled according to Imam Abu Hanifah to sell that thing for a large or a small price or in exchange for anything else, as well as for money.

But Imam Abu Yusuf and Imam Muhammad are of the view that it is not lawful for the agent to sell the thing at a great and obvious disadvantage, nor for anything except money.

3. Purchasing by agent at any rate not much exceeding the value .

An agent for the purchase is lawfully entitled to buy a thing for a price equal to its value ; and also for more than its value. But the difference should not be very much. But he is not entitled to purchase it at a rate much beyond the value, as this may create suspicion, as it is possible that he may have purchased it for himself ; and then afterwards, on seeing the loss, he determined it for his constituent.

But if, an agent is appointed for the purchase of a specific thing, and purchases it for a price much more than its value, the jurists have said that the bargain will nevertheless be taken to have been made for his constituent ; as an agent for the purchase of a specific thing, as not being permitted to purchase that thing for himself, is not, liable to any suspicion.

Similarly, if an agent for marriage contracts a woman in marriage to his constituent, for a dower more than her "Mehr-e-Misl", or proper dower, it will be lawful, according to Imam Abu Hanifah, because, in marriage, as the agent should necessarily refer the contract to his constituent, he is, therefore, not liable to any suspicion. But it will be otherwise as regards the agent for purchase, as he can, if he please, conclude the contract in an absolute manner, without referring it to his constituent.

The term "obvious disadvantage", as used here, signifies a rate more the valuation of appraisers, as where, for example, if several persons make an appraisement of a thing, none of their appraisements is equal to the price given.

Some jurists have said that this term i.e., "obvious disadvantage" is used in the exchange of goods for goods, where the difference is as ten to ten and a half ; and in cattle, where it is as ten to eleven ; and in immoveable property, where it is as ten to twelve.

The reason of these proportions according to them is that the sale of the first kind is common ; of the second kind it is in between frequency and rarity ; and of the third, it is rare ; and the "obvious disadvantage" increases in proportion to the rarity of the transaction.

4. Sale of any part or portion of a slave by the agent .

If a person, who is appointed an agent for the sale of a slave, sells one-half of him, such sale will be valid, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that the sale of one-half of the slave will not be valid ; unless the sale of the remainder also is completed before the disagreement of the parties, and their appeal to the Qazi, in which case it will be valid, as the sale of one-half may be necessary to facilitate the sale of the other half as where, for example, there is no purchaser for the whole, when it will be necessary for the agent to make sales of partial shares.

5. Purchasing of slave by the agent wholly or in shares .

If a person is appointed as an agent for the purchase of a slave, and he purchases one-half of the slave, the purchase will remain suspended, that is to say, it will be binding on the constituent in case the agent afterwards purchases the other half ; because the purchase of a part may be the cause of the purchase

of the whole as where the slave, for example , has become the property of many persons, due to inheritance, in which case it will be necessity for the agent to purchase one share from one heir, another from another, and so on ; and where the agent purchases the remainder of the slave before his constituent rejects the first purchase, it is obvious that the purchased part merely with a view to facilitate the purchase of the whole ; the contract of purchase will therefore be binding upon the constituent, and effectual in respect of him.

6. Agent to whom an article of sale is returned by a decree of the Qazi .

If a person appoints another person as his agent to sell his slave, and the agent sells the slave accordingly, and takes possession of the price or not, and the purchaser, on account of a defect of such a nature as could not have been supervenient such, as an additional finger, returns him to the agent, by a decree of the Qazi based on evidence, or on the refusal of the agent to take an oath, or on his express admission ; in such a case the agent is entitled to return him to the constituent.

7. Where the defect in the article is supervenient .

Same is the law where the purchaser returns the slave to the agent, on account of a decree of Qazi, based on evidence or refusal to take an oath, where a defect of such a nature as may have taken place subsequent to the sale, because evidence is absolute proof ; and, as to the agent, he is under a necessity of refusing to swear, as he had not always the possession of the slave, as he has received him only after the appointment as an agent, and, therefore, it is possible that he knows the defect. Therefore, when the purchaser returns the slave on account of the refusal of the agent to take an oath, the sale affects the constituent and, therefore he should take him back.

But if, the purchaser returns him to the agent, on account of a decree based on his admission, the sale will be absolute on the agent, as admission is a weak proof, i.e., does not affect any other than the persons who admits ; and the agent does not act from necessity, in such a case, as he had it in his power to have remained silent, or to have refused to take the oath.

8. Constituent not obliged to receive it back without litigation.

The agent may however, litigate the matter with his constituent, and force him to take back the slave on his giving proof by evidence, or on the refusal of the constituent to take the oath.

But it will be otherwise if the purchaser has returned the slave to the agent, on his admission, without a decree, because in such a case he will have no case for litigation against the constituent to force him to take back the slave ; because this return will be a sale *de novo* in respect of one-third person who is neither the purchaser nor the seller ; and the constituent will be this third person as none but the agent can be taken as the seller.

The agent, therefore, in receiving back the slave from the purchaser to whom he had sold him, does, actually, repurchase him ; and, therefore, he is debarred from giving him back to the constituent, or litigating the matter with him.

A return of the article of the sale, on the other hand, on account of a decree of the Qazi based on an admission of the seller, is finishing of the contract of sale, and not a sale *de novo*; because although the authority of the Qazi is general, still admission is only a weak proof.

In such a case, therefore, as the contract of sale is finished, the agent is entitled to litigate with the constituent, in order to force him to receive back the slave ; but as his admission is not a sufficient proof, the constituent cannot be forced to receive back the slave without proof (of the defect) by evidence.

9. If the defect is original .

But if, the defect on account of which the purchaser has returned the slave is of such a nature as cannot be supervenent, such as superfluous finger, and the return is made to the agent on account of his admission of the defect, without any decree of the Qazi, in such a case, according to one tradition, the constituent will be obliged, without the necessity of litigation against him, to receive back the slave ; as the return is of a determinate nature, and therefore the parties have themselves done what the Qazi would have done.

But according to many traditions, the agent has here no right to sue the constituent, in order to force him to receive back the slave, because, as already stated, "the purchaser's returning the article to the agent, on account of his admission amounts, is a sale *de novo*, in respect of others than the parties themselves ; and the constituent is not a party." As regards the assertion contained in the final tradition that "the return of the article of the sale was a thing of a determinate nature", it is not accepted ; because the right of the purchaser, at first, was that the article of the sale should be in a complete and perfect state ; and failing which, his right then relates to a return of the article ; and afterwards it shifts, and relates to restitution of the exact loss he may have suffered in the price. In such a case, therefore, the return of the article of the sale is not a thing of a determinate nature.

10. Assertion of the Constituent should be accepted in respect of his instruction .

If the constituent and agent disagree, the constituent says that "he had asked the agent to sell his slave for ready money, and that he has sold him on credit ;" and the agent says, that "the constituent had merely asked him to sell him, and that he had said nothing more," in such a case the assertion of the constituent is to be accepted ; because he is the person from whom the order has been issued.

But if, a similar disagreement takes place between a manager and his principal, (in Muzaribad), the assertion of the manager is to be accepted.

11. Responsibility of agent for consequence of sale .

If a person asks another person, as his agent to sell his slave, and the agent, accordingly sells him, and takes a pledge for the price, and pledge is afterwards lost or destroyed in his possession ; or, if he takes security from the purchaser for the payment of the price, and both the surety and the purchaser die insolvent, or disappear, and it is not known whether they have gone, in none of these cases will the agent be responsible.

But it will be otherwise in respect of an agent for the receipt of debt ; because he acts as a substitute; i.e., the creditor has substituted him to receive the debt for him, but has not appointed him to take security or a pledge for the debt ; but an agent for purchase, on the contrary, receives the price on account of his being a principal, and a party in the contract, and therefore the constituent cannot stop him from the doing of these acts.

Section (4)

MISCELLANEOUS CASES
(Fasl Fil Mustafarriqaat)

1. Joint agents .

If a person appoints two persons as his agents, it will not be allowed to either of them to act in any matter relating to their agency, without the concurrence of the other.

This is the law in respect of all transactions which require thought and judgment, such as sale, Khula, and so on, because the constituent, in such transactions, may have a confidence in the joint judgment of both agents, although not in the single judgment of either of them.

2. Management of a suit .

The act of one of the two joints agents without the concurrence of the other is not valid except in some cases ; as where, for example, a person appoints two agents for the management of his suit, in which case, either of the may lawfully act without concurrence of the other ; because their joint action in such a case is not practicable, as it may only create a noise and confusion in the court of the Qazi.

Their joint judgment, however, is required to be exerted previous to their appearance in the court of the Qazi. In other words, they should previously consult each other, and then one of them should attend the meeting of the Qazi to give the replies and interrogations.

3. Gratuitous divorce, manumission, restoration of a deposit, or discharge of a debt .

Similarly, it will be lawful for one of the two joint agents to act singly in the case of their having been jointly appointed agents by another person to give a divorce on his behalf without a compensation ; or to emancipate his slave without a consideration ; or to restore a deposit to the owner of it ; or, lastly, to discharge a debt due by him.

But it will be otherwise if the constituent says to the two joint agents, "divorce a particular wife of mine if you please," or "the business of such a wife is in your hands," because in such a case it will not be allowed to one of the two joint agents to divorce the said wife ; because the constituent has committed the divorce to the joint thought and judgment of both.

4. Appointment of secondary agent by an agent .

An agent is not entitled to appoint another person as an agent to do the act for which he himself has been appointed, as the constituent, in handing over the work to him, did not empower him to appoint an agent for the doing of it.

5. By consent of his constituent ; or, unless his powers are discretionary .

It is, not lawful for an agent to appoint any other person is an agent, unless it be with the consent of his constituent ; or unless the constituent has asked the agent to act according to his wisdom and judgment.

As, in such a case, the agency of the secondary agent will be valid, he will be the agent of the primary constituent ; and therefore the primary agent will not have the power of dismissing him, nor will his power of agency be finished on account of the death of the primary agent.

The agencies of both, however, will finish on the death of the constituent.

6. Contracts made by secondary agent in presence of the primary agent .

If an agent appoints another person as an agent without the consent of his constituent, and the secondary agent makes a contract of sale in the presence of the primary agent, the contract will in that case be valid, because it has had the advantage of the wisdom, and judgment of the primary agent, which is the very object of the constituent.

A disagreement, however, exists in respect of the rights of this contract. Some jurists have said that they belong to the primary agent as the constituent has not consented to any other's fulfilment of the contract ; while others say that they belong to the secondary agent, who is the actual maker of the contract.

But if, the secondary agent makes a contract in the absence of the primary agent, it will not be valid, as it does not have the advantage of the wisdom and judgment of the primary agent.

7. Contracts made by secondary agent in absence of the primary agent .

But if the primary agent, has received information of the contract and consents to it, it will then be valid ; and so also, a contract will become valid which, having been concluded by some person other than the agent, afterwards receives his consent on his hearing of it ; as it will thus have the benefit of his judgment.

8. Contract made by secondary agent on price fixed by primary agent .

If, the primary agent has fixed a price to be observed by the secondary agent, and the secondary agent enters into a contract of purchase or sale on that price, such contract will be valid ; because the judgment of the primary agent is required only for the purpose of fixing the price, which has been already done.

9. Constituent himself fixing the price .

But it will be otherwise, if the constituent appoints two joint agents, and fixes the price himself ; because , in such a case, inspite of the constituent's fixing the price, entering in to the contract by one agent, even though at the fixed price, will not be valid.

10. Joint agents to act together .

Because inspite of fixed the price, by the constituent it is obvious that his purpose is a union of the judgments of both, the agents in order to increase the quantity of the goods as agents for the purchase, or to make a proper choice of purchasers as agents for the sale, as was stated before. But, if the constituent does not fix the price himself, but leaves the entering into the contract to one person who is his immediate agent, and not the agent of his agent, in such a case his purpose is to get the judgment of the agent in the major point of the contract, i.e., the price.

11. Mukatib, slave, or Zimmee, not entitled to act for an infant Muslim daughter .

If a Mukatib, an absolute slave, or a Zimmee, contracts a marriage on behalf of a minor daughter who is free and a Muslimah, or makes a purchase or sale on behalf of a minor child of such description, it will not be lawful and the same will also apply to every other transaction which they perform in respect of the property of such a child ; as a slave or an infidel have no such authority, because of their slavery and infidelity.

12. Apostate, or infidel alien .

Imam Abu Hanifah, Imam Abu Yusuf and Imam Muhammad, are of the view that an apostate who is to be put to death on account of his apostacy, and an infidel alien, are in respect of an infant daughter who is a Muslimah, in the same position as a Zimmee i.e., none of them has a right to perform any act in respect of her property, such as purchase or sale, or the contracting of her in marriage with another ; because an infidel alien has still less power over a Muslim than a Zimmee; and as regards of an apostate, although in the opinion of Imam Abu Yusuf and Imam Muhammad he possesses power in respect of his own property, yet his power over his children, or over their property remains suspended till he repents and returns to the faith according to all our jurists.

CHAPTER 3

APPOINTMENT OF AGENTS FOR LITIGATION AND FOR TAKING POSSESSION

(Hidayah, Kitab-ul-Vakalat, Baab-ul-Vakalat Bil Khusumat Wal Qabz)

1. Agency for litigation .

If a person appoints another person as his agent to litigate on his behalf, the person so appointed is held, in the opinion of majority of our jurists, to be also an agent for taking possession of that thing whether it is a debt or anything else.

But Imam Zufar says that he cannot be considered as an agent for taking the possession.

2. Decrees passed in the present times .

In the present times, however, decrees are passed according to the opinion of Imam Zufar; because of the obvious want of probity of agents ; and also, because many person may be trustworthy as regards the management of litigation, but not as regards the possession of the property.

It may be noted that an agent for litigation is similar to an agent for taking payment of the debt ; because he is also competent to take the possession, as taking payment of the debt is in effect included in the suing for the payment of it. The common sense of the word, however, is different, because from Taqazah i.e., exacting by means of a suit at law, possession is not generally understood ; and the common sense should be preferred to the real meaning. According to the decrees in the present ages, therefore, he is not an agent for taking the possession.

If there are two joint agents for litigation, they are in such a case required jointly to receive possession of the thing which is the subject of litigation ;

But it will be otherwise as regards the mere litigation, because their joint action is in that case will not be practicable, as has been already stated.

3. Agent empowered to take possession of a debt .

Whoever is an agent on behalf of another person for receiving the debt due to him, is also an agent for litigation on behalf of that person according to Imam Abu Hanifah and, therefore, if the other party brings evidence of payment of his debt; or had given the creditor an acquittal, such evidence, according to Imam Abu Hanifah, should be admitted.

But Imam Abu Yusuf and Imam Muhammad are of the view that the agent for receiving the debt is not an agent for litigation and similar view is also reported, by Imam Hasan, from Imam Abu Hanifah.

4. Commission to take possession of substance .

An agent for taking possession of substance * is not an agent for litigation, according to all our jurists ; because he is a mere trustee ; and also, because the possession of substance is not an exchange. He is, therefore, taken to be merely as a messenger. therefore, if a person commissions another person to take possession of his slave, and the person in whose possession the slave is proves by evidence that the constituent had sold the slave to him, the Qazi should not decree the sale against the agent, until the constituent himself appears.

Arab : 'Ain ; meaning some actually existent property such as an article borrowed under an arreat loan

5. Concessions on behalf of his constituent by agent for litigation .

If an agent for litigation makes an admission, before the Qazi, of something affecting his constituent, such admission will be valid regarding the constituent. But if, he makes the admission before any other person than the Qazi, it will not be valid according to Imam Abu Hanifah and Imam Muhammad ; but the agent, on account of making such admission before any person other than the Qazi, will be dismissed from his appointment ; and, therefore, if he will afterwards claims his agency, and brings the evidence to prove his admission, it will not be admitted.

But Imam Abu Yusuf says that an admission made before any person other than the Qazi will likewise be valid regarding the constituent.

Imam Zufar and Imam Shaafe'ee however are of the view that the admission will not in either case be valid regarding the constituent.

A similar disagreement also exists in respect of the case of a person appointing another person as his agent to give, in an absolute manner, an answer on his behalf.

6. Appointment of agency with exception of admission.

If a person appoints another person as an agent for litigation, and excepts his admission, then according to Imam Abu Yusuf such appointment will not be valid.

But according to Imam Muhammad it will be valid.

It is also related that Imam Muhammad, made distinction between the plaintiff and defendant, observing that if a defendant appoints an agent for litigation and excepts his admission, it will not be valid ; because a defendant is required to make an admission when put to his oath, and therefore has not the power to act as an agent for a purpose which may be prejudicial to the plaintiff, i.e., for denial as to this he himself is not competent.

But the plaintiff, is at liberty to admit or deny, as he may pleases, and therefore he is entitled to appoint an agent for one of these purposes, and to except the other.

7. Agency for receipt of a debt to the surety for the debt .

If a person is a surety for the property on behalf of a debtor, and the creditor appoints the said surety as his agent for the receipt of the debt, such agency will absolutely be invalid.

8. Plea of agency for receipt of a debt in absence of the constituent .

If a person pleads that he is an agent for the receipt of a debt due to another person who is absent, and the debtor verifies his assertion, in such a case the debtor should be ordered to pay the debt to the agent ; because verification by the debtor of the claim is an admission against himself, as what the agent receives is purely the property of the debtor.

If, therefore, the absent person thereafter appears, and confirming the assertion of the agent there will be no dispute whatever. But if otherwise, the debtor should again pay the debt to the absentee who is now present, because his former payment of it the agent is not effective, as the creditor denies the agency ; and his denial of agency, if on oath, should be accepted.

The former payment through the agent will, therefore be invalid ; and the debtor will consequently be entitled to recover from agent whatever he has paid to him, if it is still in his possession ; because his purpose, in making the payment, was to absolve himself from responsibility; and as this purpose has not been achieved, he has therefore a right to recover it from the agent.

But if, the thing is not in the possession of the agent, but has been destroyed, in such a case the debtor will not be entitled to recover anything from the agent, as he, by his verification, admitted the right of the agent to receive it.

But as the debtor, in such a case suffers a loss from his credulity, and the oppressed is not entitled to oppress others, he is not entitled to recover anything from the agent in case of destruction of the thing given to him. But if, at the time of making the payment to the agent, he had taken from the agent himself a security for the restoration, in the event of the denial of the agency by the absent person, then it will be lawful for him to recover whatever he may have paid, as the agent become surety, and is therefore liable for it.

If, a person pleads that he is the agent of a certain absentee for the receipt of a debt due to him, and the debtor, without verifying or falsifying his claim, remains silent, and yet pays the debt, and the creditor there after appears and gets payment of it from the debtor, the debtor will in such a case be entitled to repayment from the agent, because he had not verified the agency.

The law is also the same if the debtor pays the debt to the agent, after falsifying his claim.

It may be noted that, in several cases of verification, falsification, or silence, it is not allowed to the debtor to recover the article from the agent, after the delivery of it to him, until the constituent has appeared ; because the payment he has made is the right of the constituent from probability as in the case of his verification, or from construction as in the case of his falsification or silence, as it is possible that the absentee may afterwards give his consent to it.

9. Plea of agency for receipt of a trust , in absence of the constituent .

If a person pleads that he is the agent of a certain person for the receipt of a trust, and the trustee verifies his assertion, still the law does not permit the delivery of the trust by the trustee to such person, as, in opposition to the preceding case to a debtor, the trustee here makes an admission in respect of the property of another person.

But if, such person pleads that "his father has died, and the said trust has devolved by inheritance to him, and that there are no other heirs," and the trustee verifies this, he should be ordered to deliver the trust to such person ; because the trust is no longer the father's property, after his death ; and the trustee and the person in question are both agreed that it is the property of the heir ; the trustee, therefore, should be to deliver ordered his trust to such person as being the heir.

10. Person commissioned to receive a trust on the plea of having purchased it.

If a person pleads that he has purchased a trust from the owner of it, and the trustee verifies his assertion, still the trustee is not entitled to deliver the trust to him ; because the verification of the trustee during the lifetime of the depositor is an admission in respect of the property of another person ; and therefore their assertions namely that of the trustee and of the person who makes the claim are not valid, as regards of the proof of the sale on the part of the owner.

11. Entitlement of the person commissioned to receive a debt

If a person appoints another person as an agent for the receipt of a debt due to him and the debtor pleads that he had acquitted himself of the debt to the owner still it will be necessary for him to pay the debt to the agent ; because the agency is here clearly proved by his assertion. But, after making the payment, he will have a claim upon the creditor, and he may take an oath from him ; but an oath cannot be taken from the agent, as he is only a substitute.

12. Compelling the seller of an article to take it back from the purchaser's agent, on a plea of defect .

If a person purchases a female slave, and thereafter pleads a defect in her, and appoints an agent to manage the litigation with the seller, on this account , and then disappears,

and the agent accordingly files a suit against the seller for the defect, and the seller pleads that the purchaser had knowingly acquiesced in that defect, in such a case the slave will not be returned to the seller ; but the case will remain suspended until the purchaser appears, who will then be asked to declare on oath that he did not acquiesce in the defect.

13. Person receiving money .

If a person gives another person as agents ten Dirhams, to give them to the family of this person for their maintenance, and the agent, instead of the particular Dirhams he had received, gives ten Dirhams of his own, this will not be a gratuitous payment. On the contrary , he will be entitled to retain the particular Dirhams he had received in lieu of those he has given ; because an agent for the delivery of maintenance is like an agent for purchase ; and such is the law, as has already been explained, in treating of an agent for purchase.

CHAPTER 4

DISMISSAL OF AGENT

(Hidayah, Kitab-ul-Vakalat, Baab 'Azlul Vakeel)

1. Constituent may dismiss his agent at pleasure .

It is legally entitled to dismiss his agent, because the agency is his right, he can therefore, if he please, finish it ; except, however, when the right of any another person is connected with it ; as where the agent is an agent for litigation, appointed at the request of the plaintiff, in which case the constituent who is the defendant cannot dismiss the said agent, because of the connection of the right of the plaintiff, because if he dismisses him, the right of the plaintiff is set at naught. The agency in such a case therefore, similar to the agency connected with a contract of pawnage, by the pawner, at the time of making the contract of pawnage, will appoint a person his agent for the purpose of selling the pledge, and with the price so obtained to discharge the debt due to the pawn-holder ; in which case, as the right of the pawn-holder is connected with the agency, the constituent is not entitled to dismiss such an agent, and so also in the present case.

2. Agency to continue till notice of dismissal .

If a constituent dismisses his agent, and the agent does not receive any information of it, his agency will continue in force until he is informed of his dismissal; and all his acts until then will be binding , as his dismissal is a detriment to him ; because it finishes his power of action ; and also, because the rights of contracts of purchase and sale belong to him.

It may be noted that agents for marriage, or the like, are also in this respect to be taken in the same light.

3. Agency is finished.

If a constituent dies, or becomes an absolute idiot, or has apostatized, and gone to a hostile country, in all such cases his agency will become void.

4. If the constituent be a woman .

If the constituent is a woman ; and she apostatizes, still her constitution of agency, will remain binding until her death, or until her going to an infidel country, because it has been settled that the apostacy of a woman has no effect on her contracts, such as sale, or the like.

5. Finishing of agency by Mukatib, Mazoon, or a Copartner.

If a Mukatib appoints an agent and then becomes incapable of discharging his ransom, or, if a privileged slave appoints an agent, and then is laid under restriction, or, if one of two partners appoints an agent, and the partners then separate and dissolve their partnership, in all such cases the agency will become void, whether the agent may or may not have received the information of these circumstances.

6. Death or lunacy of the agent .

If an agent dies or becomes an absolute idiot, the agency will be finished ; because the continuance of agency stands on the same ground as its commencement ; and as, at the commencement, it is required that the agent should be capable of carrying out the orders of his constituent, it follows that the continuance of this capacity is also a condition of the continuance of the agency ; and this capability finishes in the present case, on account of the death or insanity.

7. Agent's apostacy and going to a hostile country .

Similarly, if an agent apostatizes and goes to an infidel country, his acts will not be binding, unless he again becomes a Muslim, and returns, in which case the agency will revert to him.

The author of Hidayah says that this is according to Imam Muhammad According to Imam Abu Yusuf, however, the agency will not revert, inspite of the agent's returning to the faith and to his country.

8. Renewal by repentance and return of an apostate constituent .

If a constituent becomes a Muslim, and returns to the country of the Muslims, after he had apostatized and gone to a hostile country, the power of his agent, which had been finished, will not in such a case revive, according to the Zahir Rawayat. But Imam Muhammad is of the view that the agency will revive, as in the preceding case of the apostacy of the agent

9. Constituent himself performing the act .

If a person appoints another person as his agent for any particular work, and afterwards does that work himself, the agency in such a case will become void.

10. Revival of agency dissolved by any act of the constituent .

If a person appoints another person his agent for the sale of a slave, and afterwards sells that slave himself, and the purchaser returns the slave to him, on account of a decree of the Qazi, based on the proof of a defect, then, according to an opinion of Imam Abu Yusuf, the agent will not be entitled to sell the said slave, because the constituent by selling him himself, had actually prohibited the agent from doing the deed, and it will, therefore, be the same as if he had dismissed him.

But Imam Muhammad, is of the view, that the agent can in such a case resell him, because the agency still continuous, as according to him, agency is a license of action. But it will be otherwise where a person appoints an agent for giving a gift, and then gives the gift himself, and again retracts it ; because in such a case it will not be lawful for the agent to give the gift as the voluntary retraction of it by the constituent did clearly indicates his wish that it should not be given.

PART – XI

TA'AAM

(FOOD)

SYNOPSIS

Book – I – Zabh (Slaughtering of animal for food)

Section – Things which may be lawfully eaten and things which may not be eaten

Book – II – Azheeyah (Sacrifice)

Book – III – Sayd (Hunting)

Section (1) Catching game with animals of hunting

Section (2) Shooting game with an arrow

BOOK – I

ZABH

(SLAUGHTERING OF ANIMALS FOR FOOD)

ZABH *

SLAUGHTERING OF ANIMALS FOR FOOD

(*Hidayah, Kitab-uz-Zaba'eh*)

Note

"Zaba'eh" is the Plural of "Zabiha" which is used for the animal which is slaughtered, and the "Zabah" is known as "Zakirah" which is the condition of the Zabiha to be Halaal i.e., lawful ('Ainul Hidayah)

1. All animals except fish and locusts .

All animals, the flesh of which is eatable, except fish and locusts, are unlawful, unless they are slaughtered by Zabh. But when slaughtered by Zabh, they are lawful, as by means of Zabh the unclean blood is separated from the clean flesh.

2. Kinds of Zabh .

Zabh is of two kinds viz., (1) Ikhtiaree, that is, voluntary, or at pleasure), which is effected by cutting the throat above the breast ; and (2) Iztiraree, that is, at random, due to necessity, which may be affected by a wound on any part of the animal's body.

The second kind, however, is merely a substitute for the first one, and therefore is not of any account unless the first one is not be practicable, as the first one is more effectual in extracting the blood ; but the second one suffices where the other is not practicable ; as the people are required to act only according to their ability.

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* Qur'an, Ch. 2 (Baqarah), verse, 173 ; Ch. 5. (Maa'idah), verse 3 ; Ch. 6 (An'aam), verse 118,119, 121, 142 ; Mishkaat, Kitab-us-Sayd Waz Zibah ; Ainul Hidayah, Vol. IV, pp. 143 to 196.

3. By Muslim, or a Kitabee .

It is one of the laws of Zabh that the person who performs it should be either a Muslim or Kitabee. According to the rules the Zabh of a Muslim is lawful ; and so also the Zabh by a Kitabee, even though he may not be a subject of a Muslim State, provided, however, that it is done in the Name of Allah, because in the Qur'an it is said that, "THE FOOD OF KITABEES ARE LAWFUL TO YOU AND YOUR FOOD IS LAWFUL FOR THEM ." [Qur'an, Ch. 5 (Maa'idah), verse, 5]

4. Acquainted with the form of invocation .

The Zabh will be lawful provided the slaughter is acquainted with the Tasmiyah or invocation in the Name of Allah, the nature of Zabh, and the method of cutting the veins of the animal ; and it is not material whether the person is a man or a woman, an infant or an idiot, a circumcised, or an uncircumcised person.

5. A Magian .

An animal slaughtered by a Magian is not lawful ; because the Holy Prophet has said, "you may deal with them as well as with Kitabees ; but you should not marry their woman, nor eat of the animals slaughtered by them ;" and also, because a Magian is a polytheist, and does not believe in the Unity of Allah.

6. An apostate .

The Zabh performed by an apostate is not lawful ; because he is not allowed to remain in the faith to which he has turned, but should rather be put to death.

But it will be otherwise in respect of a Kitabee ; because if he changes his religion, and, according to our jurists, he is allowed to continue in that faith which he has adopted ; and the law will still consider him, in respect of Zabh, like the people of that faith which he has adopted.

7. An idolater .

The Zabh of an idolater is not lawful ; because he does not believe in the Prophets of Allah.

8. Games slaughtered by a Mohrim or by any other person in the Holy Territory .

Any kind of game slaughtered by a Mohrim, i.e. a person in the "Ehraam", is not lawful, even though it is not slaughtered within the Holy Territory, and similarly, any game slaughtered in the Holy Territory is not lawful, even though the slaughterer is not a Mohrim.

But it will be otherwise where a Mohrim, or any other person, slaughters an animal which is not a game either in the Holy Territory or in any other place ; because which is permitted by the Law, because the Holy Territory affords no protection to goats, and the slaughtering of goats by a Mohrim is not prohibited.

9. Rules of Tasmiyah or Invocation .

If the slaughterer wilfully omits to recite the Tasmiyah, or the Invocation "in the Name of Allah," the animal will be a carrion, and should not be eaten. But if, he omits the Invocation through forgetfulness, it will be lawful in either case.

10. In slaughtering and in game .

It is necessary in an Ikhtiaree Zabh, that the Invocation should be pronounced over the animal at the time of slaughtering it, but in the case of Zabh Iztiraree, or of a man slaughtering an animal in hunting, the condition is that the Invocation should be pronounced at the time of letting loose the hound or hawk, or shooting the arrow, which is known as an Invocation over the instrument.

It is abominable to add any other thing to the Name of Allah at the time of performing the Zabh, such as for example if a man says, "O Allah, accept this from me !" This may be in three different ways; as firstly, where he says anything besides the Name of Allah, without pausing between them, or making use of the conjunction "and," as in the example mentioned above or, where he says, Bismillah, Muhammad Rassoolullah, "in the Name of Allah, Muhammad is His Prophet," which will be abominable, but the meat will not be unlawful ; secondly, where he says anything besides the Name of Allah, without making a pause, but using the conjunction ; as if he says, "Bismillah wa Ism Falan," "in the Name of Allah and the name of another ;" in either of such a case the animal slaughtered will be unlawful ; and, thirdly, where he says anything besides the Name of Allah, separately, and by itself, either before or after the Invocation, and the throwing down of the animal, which is of no consequence, and does not make the meat unlawful because it is related of the Holy Prophet that he offered the supplication immediately after performing Zabh.

11. Nothing except the Invocation .

It is necessary for Zabh that nothing but the Invocation should be pronounced; that is, that no prayer or other matter should be mentioned. If, therefore, a man, during the Zabh, instead of "Bismillah" ("in the Name of Allah") says, "Allahumma – Aghfir lee", ("O Allah, forgive me !"), the animal slaughtered will not be lawful, as this is a prayer or entreaty. If, however, instead of "Bismillah" he says, "Al-Hamdo-Lillah"(Praise be to Allah), or "Subhan-Allah" ("Allah is Purest"), and thinks it to be an Invocation, it will be sufficient. But if he sneezes during the Zabh, and says "Al-Hamdo-Lillah !" ("Praise be to Allah !"), it will not be sufficient, according to the Rawayat – Saheeh, because the exclamation will then be considered as thanks, and not as the Invocation. The method which has frequently prevailed of saying "Bismillah or Allaho Akbar"("in the Name of Allah, and Allah is the Highest"), during the Zabh, is noted from Ibne Abbas.

12. Proper method of slaughtering.

The place for slaughtering is between the throat and the libba (i.e. the head of the breast-bone), because the blood freely issues from a wound given in that place. The Zabh, therefore, when performed anywhere within that space, will be lawful.

The veins which are required to be cut in Zabh are four ; namely, the Halqoom, or windpipe ; the Marree, or gullet ; and the Wadijan, or two jugular veins. This is based on a saying of the Holy Prophet.

13. With nails, horns, or teeth .

If a man slaughters an animal with nails, horns, or teeth, it may be eaten without Recitation, provided the nails, horns, or teeth are separated from the place in which they grew.

This is, however, abominable, because it implies the use of human members, and further, because it causes too much pain to the animal, and we are asked to perform the Zabh in a manner which may be least painful to it.

14. With any sharp instrument .

It is lawful to slaughter with specific kind of a reed, with a sharp stone, and with everything that is sharp and capable of cutting the veins and drawing the blood excepting teeth and nails fixed in their natural place.

15. Precautions to be observed .

It is better for the slaughterer to sharpen his knife ; because the Holy Prophet has said, "Allah has enjoined us to be merciful to all; therefore, when you slaughter, it should be done in the most merciful manner ; and when you perform the Zabh, you should sharpen your knife and do it in the least painful manner for the animal. (Ahmad, Ibne Maajah Dara Qutni)

It is abominable first to throw down the animal on its side, and then to sharpen the knife ; because it is related that the Holy Prophet once saw a man doing so, and said to him, "How many deaths you intend that this animal should die ? Why did you not sharpen your knife before you threw it down ?" (Haakim Tabrani)

It is abominable that the knife should reach the spinal marrow, or to cut off the head of the animal. The meat, however, in either of these cases is lawful. The reasons of the abomination in cutting into the spinal marrow are: Firstly, because the Holy Prophet has forbidden this (Tabrani) ; and Secondly, because it unnecessarily causes more pain to the animal, which is prohibited in our Law. In short, everything which unnecessarily causes more the pain to the animal is abominable.

It is abominable to catch an animal for slaughtering by the feet, and drag it to the place appointed for slaughtering it.

It is abominable to cut off the neck of the animal while it is still in the struggle of death ; but when the struggle is finished it is not abominable to cut off the neck and strip off the skin, because then it becomes insensible to the pain.

16. Animal wounded previous to cutting its throat .

If a man slaughters an animal by first cutting it in the back of the neck, doing it, however, in such a manner as to cut the veins while the animal is still alive, the meat will be lawful, because the animal dies by Zabh ; but the act itself is abominable, as it unnecessarily causes more pain to the animal, as in effect it is the same as if he had first wounded the animal, and then cut off it veins.

But if, the animal dies before cutting off the veins, the meat will not be lawful, because in such a case the animal dies before the Zabh has taken place.

17. Tame animals and wild animals .

In the case of all animals attached to man, and which do not run away from him, Zabh is to be performed by cutting off the veins ; but in the case of those animals which are wild, and run away from him, the Zabh is to be performed by chasing and wounding them; because where the Zabh Ikhtiaree, or Zabh of choice, is not practicable, there is the occasion for the Zabh Iztiraree, or Zabh of necessity ; and such an impracticability is in respect of the latter class of animals, but not in respect of the former. The Zabh Iztiraree is also lawful in respect of an animal which has fallen into a well, provided the other kind of Zabh is not practicable.

18. Camels to be slaughtered by Nahr .

The most laudable way of slaughtering a camel is by Nahr, that, is, spearing it in the hollow of the throat, near the breast-bone, because this is according to the Sunnah, and also because in the part of the throat the vessels of a camel are combined. It is also lawful to slaughter it by Zabh, even though this is considered as abominable, as it differs from the Sunnah. As regards the goats and oxen, it is most laudable to slaughter them by Zabbah, as it is according to the Sunnah, and also because the vessels of a goat are assembled together in the upper part of the throat. But they may also be speared like a camel, even though this way is not approved, as it is contrary to the Sunnah.

19. Foetus of a slaughtered animal .

If a person, after slaughtering a camel or cow, finds a dead foetus in its womb, such foetus is not lawful, whether it is covered with hair or not. This is the opinion of Imam Abu Hanifah ; and it has also been adopted by Imam Zufar and Imam Hasan bin Ziyad.

But Imam Abu Yusuf and Imam Muhammad say that if the foetus is complete in its form, it is lawful, and Imam Shaafe'ee also concurs with them in this view.

Section

THINGS WHICH MAY LAWFULLY BE EATEN AND THOSE WHICH MAY NOT BE EATEN.

(Fasl Fee Maa Yahul Aklohu Wa Maa Yahul)

1. Beasts and birds of prey .

All quadrupeds which catch their prey with their teeth, and all birds which catch it with their talons, are not lawful. The Holy Prophet has prohibited the people from eating them. (Muslim; Abu Daud)

Hyenas and foxes, are both included under the class of animals of prey, and are therefore both unlawful. Elephants and weasels are also counted as animals of prey ; and pelicans and kites are abominable, because they eat the dead bodies.

2. Rocks, carrion, crows and revens .

Magpies, the crocodile, otter, all insects, and the ass and mule are not lawful. Crows which feed on grain [i.e. rooks] are neuter; but the crow of the wilderness [i.e. the carrion crow] and the raven, are not lawful. According to Imam Abu Hanifah, the magpie is also neuter, like poultry ; even though it is said, upon the authority of Imam Abu Yusuf, that it is abominated, because it frequently eats dead bodies. The crocodile and the otter, wasps, and in general all insects , are abominated. The ass and the mule are unlawful, because they are prohibited by the Holy Prophet (Abu Daud, Nasai Ibne Maajah). The flesh of horses is held in abomination by Imam Abu Hanifah and Imam Maalik. But according to Imam Abu Yusuf, Imam Muhammad and Imam Shaafe'ee, it is neuter ; because it is mentioned in the Hadees-e-Jabir that the Holy Prophet permitted it ; and some are of the view that the milk of mares is also neuter.

3. Hares .

According to Imam Abu Hanifah, the flesh of hares is neuter, because the Holy Prophet ate it, and commanded his Companions to eat of it.

The flesh and skin of all unlawful animals become pure after they have been slaughtered according to the laws of Zabh, excepting only men and hogs.

4. Aquatic animal except fish .

No animal that lives in water is lawful except fish.

5. Fish perishing of themselves .

Fishes which, dying of themselves, float upon the surface of the water, are abominated. But according to Imam Shaafe'ee and Imam Maalik, they are neuter. The rule followed in our sect is this : Fishes which are killed by any accident are lawful, like those which are caught. But the fish, which die of themselves without any accident are unlawful, like those which are found floating on the surface of the water. There are, however, different views as regards the fish which die of extreme heat or cold.

6. Without Zabh .

Fishes and locusts are lawful without being killed by Zabh.

BOOK – II

AZHEEYAH

(SACRIFICE)

AZHEEYAH *

SACRIFICE

(*Hidayah, Kitab-ıızl-Azheeyah*)

Note

Literally, "Azheeyah" means "Sacrifice", but legally it is "Zabiha" which is performed during the 10^{th} – 12^{th} of Zilhaj, i.e., the twelfth month of Hijrah. Religious by it is a form of Ibaadt in which some specified animals are slaughtered in the Name of Allah. It is in fact a Tradition of Abraham, the Prophet of Allah who, on account of a dream, attempted to offer the sacrifice of his beloved son Ismael. It is in commemoration of this event that the Holy Prophet himself performed and ordered the Muslims to perform the sacrifice of specific animals during the above mentioned three days of the month of Azha.

1. Sacrifice to be performed at the 'Eidul Azha .

It is binding on every adult and sane Muslim, to perform a , sacrifice on the 'Eidul Azha, or festival of the sacrifice, * provided he then possessed of Nisab, and if not in a journey. This is the opinion of Imam Abu Hanifah, Imam Muhammad, Imam Zufar, Imam Hasan and also of Imam Abu Yusuf. But according to one tradition, and also in the opinion of Imam Shaafe'ee, sacrifice is not an indispensable duty, but only laudable, Tahavee says that in the opinion of Imam Abu Hanifah it is indispensable ; while Imam Abu Yusuf and Imam Muhammad hold it to be most laudable.

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* Qur'an, Ch. 2 (Baqarah), verse, 196 ; Ch. 22. (Hajj), verses 28, 33 to 37 ; Ch. 108 (Kausar), verse, 2 and 3 ; Mishkaat, Kitab-ul-Azheeyah ; Ainul Hidayah, Vol. IV, pp. 197 to 236.

2. For himself and for his infant children .

The performance of a sacrifice is binding on a man on account of himself, and on account of his infant child. This is the opinion of Imam Abu Hanifah in one tradition. But in another Tradition he has said that it is not binding on a man to offer a sacrifice for his child. In fact, according to Imam Abu Hanifah and Imam Abu Yusuf, a father or guardian are to perform a sacrifice at the expense of the child, if he is possessed of property. But Imam Muhammad, Imam Zufar, and Imam Shaafe'ee have said that a father is to sacrifice on account of his child at his own expense, and not at that of the child.

3. Goat for one person and cow or camel for seven persons .

The sacrifice established for one person is a goat ; and that for seven, a cow or a camel. If a cow is sacrificed for any number of people less than seven, it is lawful ; but it will be unlawful if sacrificed on account of eight persons. If, also, in an association of seven people, the contribution of any one of them is less than one-seventh share, the sacrifice will not valid on the part of any person.

4. Animal held in partnership .

If a camel which is owned jointly and in an equal shares by two persons, is scarified by them on their account, it will be lawful, according to the most authentic Traditions. In such a case they should divide the flesh by weight, as flesh is an article of weight. But if, they distribute it on account of estimation, it will not be lawful ; unless they also add to each share of the flesh part of the head, neck and joints.

5. Others may be admitted to share .

If a person purchases a cow, with the intention to sacrifice it on his own account, and he afterwards admits six

other person to associate with him in the sacrifice, it will be lawful. It will, however, be better if he associates with the other persons at the time of purchase, so that the sacrifice may be valid person in the opinion of all our jurists ; because otherwise there is a difference of opinion. It is reported, from Imam Abu Hanifah, that it is abominable to admit other persons to share in a sacrifice after purchasing the animal ; because, as the purchase was made with a view to devotion, the sale of it will therefore be abomination.

6. Poor or traveller .

Sacrifice is not binding on a poor person or a traveller ; because Hazrat Abu Bakar and Hazrat Umar did not offer the sacrifice of the 'Eid during their travels ; and moreover, it is reported that Hazrat Ali has said, "neither the prayers of Friday, nor the sacrifices of the 'Eid are binding on travellers."

7. Time of performing the Sacrifice .

The time of offering the sacrifice is on the morning of the day of the Eid-ul-Azha ; but it is not lawful for the residents of a city to offer the sacrifice before offering the 'Eid prayers. Villagers, however, may after the sacrifice after break of day.

8. During three days only .

Sacrifice is lawful during three days only, that is, on the day of the Eid-ul-Azha, and on the two ensuing days. The sacrifice of the day of the Eid-ul-Azha is, however, superior to any of the other days. It is also lawful to sacrifice on the nights of these three days, even though it is considered as abominable. Moreover, the offering of sacrifices on these days is more laudable than of omitting them, and, afterwards going an adequate sum to the poor.

9. Sacrifices delayed beyond the proper time .

If a person neglects the performance of the sacrifice

during the three specified days, and has previously determined upon the offering of any particular goat, for example ; or, being poor, has purchased a goat for that purpose ; in, either of these cases it will be necessary for him to give it alive in charity. But, if he is rich, it will in that case be necessary for him to give, in charity, a sum adequate to the price, whether he has purchased a goat with an intention to sacrifice it, or not.

10. Defective Animal .

It is not lawful to offer sacrifice of the animals which are defective, such as those that are blind, or lame, or so lean as to have no marrow in their bones, or having greater part of their ears or tail cut off. But such as have a greater part of their ears or tail remaining may lawfully be sacrificed.

As regards the determination of a greater part of any organ, there are indeed various opinions reported from Imam Abu Hanifah. In some animals he has determined it to be one-third ; in others more than one-third ; and in others, again, only the one-fourth. In the opinion of Imam Abu Yusuf and Imam Muhammad, if more than one-half remains, the sacrifice will be valid, and this opinion has also been adopted by Abul Lais.

11. Trifling Defect .

If an animal has lost the tail, or one-third of its ear, or eyesight, it may be lawfully sacrificed. But if, in either of these cases, it has lost more than one-third, the offering of it will not be lawful.

The rule which our jurists have laid down to discover to what extent the eyesight is defective, is as follows. The animal should first be deprived of its food for a day or two so that it may be rendered hungry ; and having then covered the eye that is depictive, food should be gradually brought towards it, from a distance, until it indicates, by some emotion, that it has discovered it. Having marked the particular spot at which it

observed the food, and uncovered the weak eye, the perfect eye should then be bound, and the same process repeated, until it indicates that it has observed with the defective eye. If then the particular distance from those parts to where the animal stood be measured, it may be known, from the proportion they bear to each other, to what extent the sight is defective.

12. Animal without a horn, or mad, or castrated .

If a person sacrifices an animal without a horn, it will be lawful ; and similarly where the horn is broken, or where the animal is mad or castrated. Many jurists, however, have said, that it will not be lawful to sacrifice a mad animal, unless it eats food, and similarly it will not be lawful to sacrifice a Gurgeen [the offspring of wolf and goat] unless it is fat. As regards the animals without the teeth, it is reported from Imam Abu Yusuf that they may be lawfully sacrificed, provided they are able to chew ; or according to another report provided the greatest of their teeth is remaining. Animals, however, that are born without an ear cannot lawfully be sacrificed. What said is here is in respects of such defects as may have existed in the animal previous to the purchase of it ; because if it is prefect at the time of purchase, and afterwards gets such a defect as to render the sacrifice of it unlawful, and the owner is rich, it is in such a case necessary for him to sacrifice another. But, if he is poor, he may lawfully sacrifice the same.

The reason for this is, that as an offering is binding on a rich person originally, and not on account of his purchase, the animal, therefore, which he buys is not particularly set aside for the offering. But since an offering is not binding on a poor person except when he purchases an animal with that intention, the animal so purchased is therefore particularly destined for the purpose and, accordingly, our jurists hold that if an animal, purchased with a view to be offered, dies, it will be binding on the owner, if he is rich, to substitute another, but not if he is poor or, if the animal is either lost or stolen, and the purchaser, has purchased another, and he then recovers the first, in such a case

it is binding on the owner, if he is rich, to sacrifice one of them, whether it is the first purchased or the second ; but if he is poor, he should sacrifice both.

13. Accident falling of the animal while slaughtering .

If it happens that the goat, having been turned over so that the sacrifice be performed, in the struggle breaks one of its legs, in such a case, provided the sacrifice is immediately made it will be lawful and sufficient. So also, it will be lawful, if the animal, in that situation, having received any hurt should run away, and having been immediately and without delay taken back, should then be sacrificed. Imam Muhammad has similarly judged the sacrifice lawful, if, in such a case, the animal is not be retaken until after some delay ; contrary the opinion of Imam Abu Yusuf.

14. Goats, camels, and cows alone are to be sacrificed .

It is not lawful to sacrifice any animal except a camel, a cow or a goat ; because it is not recorded that the Holy Prophet or any of his Companions ever sacrificed any other animal. Buffaloes, however, are lawful, as being of the species of a cow; and sheep of the species of goat. Every animal of a mixed breed, moreover, is considered to be of the same species with the mother.

15. Age of animal .

The sacrifice is lawful of any animal of the three species mentioned above, even though it is only a Sanee, but not of younger ; except, however, a sheep, which may be sacrificed when a Jaz'ah, or so young as to have no teeth ; and in such a case our jurists have made it a condition that the sheep should be of large stature, as to have the appearance of a Sanee with a little difference. The period of Jaz'ah in the case of sheep, according to our jurists, is at the expiration of six months, and the commencement of the seventh. The time of Sanee in goats or sheep is at the age of one year ; in cows, at the age of two ; and in camels at the age of five years.

16. If one of seven joint sacrificers dies .

If seven persons purchase a cow for sacrifice, and one of them thereafter dies, and his heirs desire the other six to sacrifice a cow on account of themselves, and on account of the dead, it will be lawful. But if they sacrifice it without the consent of the heirs it will not be lawful.

If a Christian, or any person whose object is the flesh, and not the sacrifice, is a sharer with six other persons, the sacrifice will not be lawful on the part of any.

17. Rules of disposal of the flesh, etc.

It is lawful for a person, who sacrifices, to eat the fresh, or to give it to anybody he pleases, whether rich or poor ; and he may also lay it up in store.

It is most advisable that one-third of the flesh of a sacrifice should be given charity.

It is lawful either to give the skin of a sacrifice in charity, or to make any utensil of it, such as a bucket, sieve, or the like. It is also lawful to barter it for any unconsumable article that yields profit in its substance ; but it is not permitted to barter it for anything consumable, as vinegar, and such like. Flesh, in these respects, is also considered in the same light as the skin, according to the most authentic Traditions.

If the flesh of a sacrifice is sold along with the skin of it for money, or for any thing that is not profitable but in consumption, it is necessary of the seller to give the price to the poor ; and the sale will be valid.

It is not lawful to give a part of the sacrifice in payment to the butcher.

It is abominable to take the wool of the animal and sell it before the sacrifice is performed, but not after the sacrifice. Similarly, it is also abominable to milk the animal and sell the milk.

18. To be slaughter by the person who sacrifices, or in his presence .

It is most advisable that the person who offers the sacrifice should himself perform it, provided he is well acquainted with the method. But if he is not expert of it, it is then advisable that he should take the assistance of another, and be present at the time of slaughtering.

19. Kitabee may slaughter it, but not Magian .

It is abominable to handover the slaughter of the animal to a Kitabee. If, however, a person orders a Kitabee to slaughter his animal, it will be lawful. But it will be otherwise where a person orders a Magian, or worshipper of fire, to slaughter his animal, this is inadmissible.

20. Two persons slaughtering each other's animal by mistake .

If two persons commit a mistake, while each slaughters the animal of the other one, it will be lawful ; and no compensation will on that account is due against either of them.

If, also, after committing a mistake in this manner, they eat the flesh, and then discover the mistake, in such a case it is will be necessary that they justify the act of each other, and sacrifice will then be fulfilled.

But if, they refuse to do so, and dispute among themselves in this matter, each is in that case will be entitled to take a compensation for the value of the flesh of his offering from the other, and should then give such compensation in charity, as it will be a return for the flesh of his offering ; and the same rule will also apply where a person destroys the flesh of the offering of another.

21. Sacrifice of usurped animal .

If a person usurps a goat and sacrifices it, he will in that case be bound to compensate for its value, and his offering will thereby be rendered valid ; because upon paying the compensation he will be held to have been owner of the goat from the time of his having usurped it.

But it will be otherwise where a person sacrifices a goat handed over to him as a trust ; because this will not be valid ; because he is obliged to compensate for it not on account of the animal, but on account of the sacrifice, and hence his property in it will not be established until after he has sacrificed it.

BOOK – III *

SAYD

(HUNTING)

SAYD *

HUNTING
(*Hidayah, Kitab-us-Sayd*)
NOTE

Literally, "Sayd" means hunting as well as the animal which is targeted whether it is eatable, e.g., deer ; or uneatable, e.g., tiger. But legally, in the following article, it signifies the eatable animals and birds only which include pet animals and birds rather than wild ones.

Section (1)

CATCHING GAME WITH ANIMALS OF HUNTING

1. Hunting with animals of hunter duly trained .

It is lawful to hunt with a trained dog, a panther a hawk, a falcon, and in short with every animal of the hunter duty trained. According to in the Jaame'-as-Sahgheer, the game caught with a trained animal of the hunter, whether bird or beast, will be lawful. But that, caught with any other animal it will not be lawful, unless when taken alive, and slaughtered. The word Kalb [dog] includes, in its general acceptation, every carnivorous animal even a tiger. But according to Imam Abu Yusuf , that tigers and bears are excepted, as neither of them hunt for others, the tiger because of his ferocity, and the bear because of his voraciousness. Some of the kite tribe have likewise been excepted because of their voraciousness ; and the hog has been excepted because it is essential filth, and because it will be unlawful to derive any advantage from it.

It may be observed that it is a condition for the lawfulness of the game that the animal which takes it should be of the hunter tribe and trained ; and also that the owner let slip the animal in the Name of Allah ; for it is so mentioned in a Tradition of 'Adi, the son of Hatim Tai.

* Qur'an, Ch. 5 (Maa'idah), verses, 4, 95, 96 ; Mishkaat, Kitab-us-Sayd ; Ainul Hidayah, Vol. IV, pp. 448 to 493.

2. Rules for knowing whether a dog. &c. is duly trained.

The sign of a dog duly trained is that it catches the game three times without eating it ; and the sign of a hawk duly trained is, merely, that it returns to its owner, and attends to his call. These signs have been adopted from Abdullah Ibne Abass. The body of a hawk, moreover, is not capable of bearing blows. But as, if, the body of a dog has this capability, a dog is therefore to be beaten until he desists from eating the game. Further, one sign of duly trained is ; to desist from that which nature and habit have made agreeable ; and as it is the nature of a hawk to be wild and to fly from man, it therefore, follows that its paying attention to its owner's call, and shows no wildness, is a sign of its duly trained.

But in respect of a dog, it is attached to man ; but its nature is to tear and eat ; and consequently, when it takes the game and does not eat it, it is a sign of his duly trained.

It may be noted that the condition mentioned here, of a dog desisting, and not eating three times, is the view of Imam Abu Yusuf and Imam Muhammad and there is also one tradition from Imam Abu Hanifah to the same effect ; and the reason of it is that, in less than three times there is a possibility of the dogs forbearance having proceeded from satiety or any such cause ; but that when he desists from eating for three different times, it is a proof that such forbearance has become a nature ; because the number "three" is the established standard for experiments, and for the discovery of an evasion.

According to Imam Abu Hanifah, however, as noted in the Masboot, a training does not take place, so long as the hunter does not conceive the animal to be trained ; and he holds it improper to fix on the number three ; because the fixing on a particular number cannot be done by the forethought of man, but should be regulated by the precepts of the sacred writings and as no precept has been issued on this account. It is proper to leave it to the judgment of the hunter.

Accordingly to a former tradition. Imam Abu Hanifah holds the game of the third time to be lawful. But Imam Abu Yusuf and Imam Muhammad say that it is not lawful, as the animal does not become trained until after the third time ; and therefore the game of the third time is the game of an untrained animal, and, as such, is unlawful.

3. Repetition of the recitation .

If a person lets slip his trained dog, or his trained hawk, and at the time of letting them slip recites the Name of Allah, or forgets it, and the dog or hawk catches the game, and wounds it and it dies, the game may in such a case lawfully be eaten.

But if, he intentionally, and not from forgetfulness, does not invoke the Name of Allah, it will not then be lawful to eat the game so taken.

According to Zahir Rawayat the wounding of the game is a condition of its lawfulness, because it provides the reason for a Zabh Iztiraree.

4. Hunting animal eating any part of the game .

If a dog or panther eats any part of the game, it will be unlawful to eat of it ; but if a hawk eats part of it, it may lawfully be eaten.

If a dog, for example catches a game several times without eating it, and thereafter, catches the game and, eats a part of it, such game cannot lawfully be beaten, as the fact of the dog eating it is a proof that it has not been properly trained. Similarly the game which it may afterwards take will not be lawful until it has been trained again, concerning this also there is the same difference of opinion as mentioned above.

As regards the game previously taken by it, there will be no illegality in respects of the parts which have been eaten, as there the subject no longer remains ; but with respect to such parts as have not been preserved. i.e., have been left upon the plain, they will be unlawful according to all our jurists.

As regards that part which has i.e., what the hunter has carried to his own house, it will be unlawful, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that it will be lawful ; because they say that the fact of the dog eating at the time does not prove its not having been previously trained, as an art may be acquired and afterwards forgotten. The argument of Imam Abu Hanifah, however, is that the dog's eating of the game at that period is a proof of his never having been properly trained from the first.

5. Game caught by a hawk after returning to its wild state .

If a hawk flies from its owner, and remains for sometimes in a state of wildness and flight, and afterwards catches game, such game will not be proof lawful, as the hawk in that state is not trained ; for the proof of its being trained is to return to its owner ; and as it did not return, the proof no longer remains, and therefore to be it is to be considered in the same light as a dog which eats its game.

6. Dog eating blood of the game .

If a dog eats the blood of his game, and not the flesh, the game will be lawful , and capable of being eaten, as the dog has preserved it for his owner, which proves that it has been well trained, as it eats merely what was unfit for his owner, and preserved what was fit for him.

7. Dog eating a piece of the flesh thrown to it by the hunter .

If a hunter, has taken the game from his trained dog and cuts off a piece of it, and throws it to the dog, and the dog eats the same, still the remaining part of it will be lawful, as it will not then be a game ; the case, in fact will be the same as if a person throws to a dog any other kind of food.

Same rule will apply to where a dog which leaps upon his owner ; and takes from him part of the dead game in his hands and eats it. Similarly where a dog attacks its, and kills a goat, which will be no proof that the dog is untrained.

8. Dog biting off a piece in the pursuit of its game .

If a dog holds a game with its teeth, and has bitten off the part eats it and afterwards catches the game and kills it, without eating any other part of it, the game will be unlawful ; because eating of the part by the dog of its game it will be clear that it is not trained.

But if, it drops the part bitten off, and, has pursued the game, kills it and delivers it up to his owner without eating any part of it ; and has thereafter passed by the part bitten off, eats the same, the game will be lawful ; for, as if the dog, under these circumstances, had eaten part of the body of the game in the hands of his owner, it would have been of no consequence, it will follow that it is, *a fortiori*, of no consequence where it eats what was separated from it, and unlawful to the owner to eat.

It will be otherwise in the former case ; because there the dog eats during the hunting ; and also, because the cutting off a piece of flesh with teeth involves of two explanations ; firstly, this may be done with a view to eating ; and secondly, it may be done with a view merely to weaken the animal, in order to catch it more easily ; and the eating of the piece before catching the animal proves the first of these, whereas the eating of it after catching and delivering the game to the hunter proves the second, whence no inference can be drawn that the dog is not trained.

9. Game taken alive.

If a hunter takes game alive, which his dog had wounded, it is binding on him to slaughter it according to the prescribed form of Zabh; and if he delays so doing until be it dies, it will be then carrion and incapable to be eaten.

The law will be the same in respect of game taken by a hawk, or the like; and also in respect of a game shot by an arrow.

But this law, supposes a capability in the hunter to perform the slaughter ; because where he takes the game alive, and is not able to slaughter, and there exists in the animal more life than in one whose throat has been just cut, such game, according to the Zahir Rawayat will not be lawful. According to Imam Abu Hanifah and Imam Abu Yusuf, it will be lawful, and this opinion has also been adopted by Imam Shaafe'ee.

10. Provided it lives long enough to admit Slaughter.

If the hunter finds the game alive, and does not take it from his dog till it is dead, and there has been sufficient time, after he found it alive, to slaughter, it will not be in such a case lawful to eat it ; because this will be like an omission of the Zabh, notwithstanding an ability to perform it.

But if, he had found it alive at a period when, if he had taken it, there was not sufficient time to slaughter, it will be lawful.

11. Game taken but not the same intended by the hunter .

If a hunter lets slip his dog at game, and the dog catches some other game, the game so taken will be lawful.

12. Rule in letting a panther at the game .

If a person lets slip a panther at the game, and the panther lies for a while in ambush, and then catches and kills the game, it

will be lawful to eat it ; because the lying in ambush being with a view to catch the game, and not to take rest, does not of consequence finish the act of letting it slip.

Same rule will also apply in respect of a dog, when trained like a panther.

13. Games caught by the dog, etc., under one invocation .

If a dog is let slip at game, and catches and kills it and afterwards catches and kills another game, both will be lawful.

But if, the dog, after killing the first game, lies down upon the ground and rests for a long time, and then, some other game passing by, he rises up and kills it, it will not be lawful to eat that other game.

14. Hawks .

If a hawk, is let slip at game, first perches upon something, and thereafter, going in pursuit of the game, catches it and kills it, it will lawful to eat it.

This, is based on the supposition of the hawk neither taking rest for the long time, nor with a view to rest, but merely for a short time, and with a view to surprise its victim.

15. Game caught by hawk, etc., independent of the act of the hunter .

If a trained hawk catches a game and kills it, and it is not known whether any person let it slip at such game, it will then be unlawful to eat it ; because in such a case a doubt exists in respect of the letting slip ; and the game will not be lawful unless the animal which catches it is let slip at it.

16. Game caught dead .

If a game is strangled by a dog, and not wounded, it will not be lawful to eat it ; because the wounding of it is a condition of

its legality, according to the Zahir Rawayat, as mentioned before and this condition implies that where merely particular organs of the game are broken by the dog it will not be lawful to eat it.

17. Game by the conjunction of any cause of illegality .

If a trained dog is helped in killing the game by an untrained dog, or by a dog belonging to a Magian , or by one upon which the invocation had been wilfully omitted, in such a case the game will be unlawful.

18. Game hunted by person not qualified to do slaughter.

Any person not permitted to perform slaughter such as an apostate, a Mohrim, or a person who wilfully omits the invocation will be the same as Magian in respect of letting loose an animal of the hunter tribe.

If a dog, without being let slip, himself pursues the game, and a Muslim recites the invocation, and then makes noise and incites the dog to run faster, and the dog catches the game, it will in such a case be lawful to eat it.

19. Game killed at a second catching of it .

If a Muslim, the invocation, lets slip his dog at the game, and the dog after pursuing catches the game and thereby makes it weak and lets it go and then catches it again and kills, it, it will in such case be lawful to eat it, and similarly where a Muslim lets slip two dogs, and one of them makes the game weak, and the other one kills it ; and also, where two men let slip their dogs i.e., each of them one dog, and one of the dogs makes the game weak, and the other one kills it.

In the last case, however, the game will belong to him whose dog made it weak ; because he deprived it of the quality of the game, as he disabled it from running.

Section (2)

SHOOTING GAME WITH AN ARROW
(Fasl Fil Rami)

1. Game killed by shooting at random on hearing a noise .

If a person hears a noise, and, thinking it to be the voice of a game, shoots an arrow, or lets slip his dog or hawk, and in either case game is killed ; and it is thereafter discovered that the noise did actually was of a game, it will then be lawful to eat the game so killed by the arrow, dog, or hawk, whether it was the game of which the noise was heard, or not ; because the purpose of the hunter was merely to game of whatever kind. This is according to the Zahir Rawayat.

But according to an opinion of Imam Abu Yusuf, a dog is in such a case an exception. In other words, if it is afterwards known that the noise was of the dog, the game killed by the arrow, hawk or dog will not be lawful, because a dog is in a higher degree impure and as such it is that no part of it is allowed by hunting ; contrary to other quadrupeds, because of those the skin, by their being hunted, is lawful. Imam Zufar has also excepted all those animals of which the flesh is not lawful for eating, and as such the hunting of these is not for making them lawful.

2. Game shot by arrow aimed at another animal .

If an arrow is shot at a bird and it hits other game, and the bird shot at flies away, without its being known whether it was wild or tame, the game will in that case be lawful, because it is just probable that the bird was a wild one.

But if an arrow is shot at a camel, and it hits the game, and the camel has escaped and, it is not known whether it was a wild one or not, the game in such a case will not be lawful, because the natural habit of a camel is that of tameness and attachment to man.

But if an arrow is shot at fishes or locusts, and it hits a game, such game will be lawful according to the opinion of Imam Abu Yusuf , because it is a game, but according to his another opinion it will not be lawful because hunting is equal to the performance of Zabh, which is not required in respect of fishes and locusts.

If a person, hears a noise, and thinking it to be the voice of a man, shoots an arrow, and kills a game, and it thereafter discovered that the noise was of the game, in such a case the game so killed will be lawful ; because , when it actually proves to be a game, the thinking of the person who shoots is of no importance.

3. Animal taken alive .

If a hunter, upon shooting his arrow, recites the invocation, and the arrow wounds and kills a game, it will be lawful to eat it, because the shooting of an arrow along with the invocation, and the wounding of the animal, is equal to the performance of Zabh. But, if the animal is taken alive, it will be necessary to slaughter it by Zabh, as has been already noted in the first section.

4. Game wounded and found dead .

If an arrow hits a game, and the game flies away with the arrow until it disappears and the hunter goes in search of it, and finds, it dead, will in such a case lawful to eat it.

But if, he does not follow or go in search of it, and afterwards finds it dead, it will not be in such a case lawful; because it is reported that the Holy Prophet held it abominable to eat the game which disappeared from the sight of the bow man ; and also, because it is just possible that it may have died due to some other cause.

5. Another wound discovered on the game .

If the hunter mentioned above finds another wound in the game besides that of his arrow, it will not be lawful to eat it, inspite of the fact that he may have gone in the search of it and found it.

6. Game falling into water, or upon building, before reaching the ground .

If a person shoots at a game with an arrow, and hits it, and it falls into water, or upon the roof of a house, or some other eminence, and afterwards upon the ground, it will not be lawful to eat it ; because the animal is in such a case a Mutaraddiyah, the eating of which is prohibited in the Holy Qur'an ; and also, because there is a doubt that its death may have been caused by the water, or by the fall from the eminence, and not by the wound.

7. Rule in respect of water fowl .

If a water-fowl is wounded, and the organ wounded is not a part under water, it will be lawful, but, if it is a part under water, it will not be lawful, in the same manner as a land bird, which after being wounded falls into the water.

8. Game killed by a bruise without a wound .

A game hit by an arrow without a sharp point will not be lawful, as it is so noted in the Traditions. More it may be noted, that the wounding of a game is a condition of its legality ; because a Zabh Iztiraree cannot otherwise be proved.

A game killed by a bullet from a cross-bow will not be lawful, as this missile does not would, and is therefore like a blunt arrow.

A stone, also, is subject to the same rule, as it does not wound ; and a game is also unlawful when killed by a great heavy stone, inspite of it being sharp ; because there is a possibility that the game may have died from the weight of the stone ; and not from the sharpness of it. But if, the stone is sharp, and not weighty, the game killed by it will be lawful, as it is then certain that it must have died in due to a wound from it.

A game killed by a small pebble stone, of which no part has been cut by the stone, will not be lawful, because in such a case the game is bruised and not wounded.

If, also, a game is beaten by a stick or piece of wood until it dies, it will not be lawful, as the death is then cause by the weight of the stick or piece of wood, and not by any wound. But if, in such a case, the stick or piece of wood, because of their sharpness, cause a wound, there is no objection in eating the game as the stick and piece of wood are then equal to a sword and spear.

If a person throws a sword or a knife at a game, and the game is struck by the handle of the sword, or the back of the knife, it will not be lawful. But if struck by the edge, and wounded, it will be lawful.

9. Cutting off the head of an animal .

If a person cuts off the head of a goat, it will be lawful to eat it, as the jugular veins have been cut off ; but inspite of it, it will be abominable.

But if, a person does this by beginning with the spine, so as to cause the death of the animal before the jugular veins is cut, it will be lawful ; but it will be lawful if the animal does not die until after the jugular veins are cut.

10. Killing of a game by Magian, apostate, or idolator .

A game killed by a Magian, an apostate, or a worshipper of idols, will not be lawful, because they are not allowed to perform the Zabh, because Zabh is a condition of the legality of a game.

But will be otherwise in respect of a Christian or a Jew, because, as their performance of a Zabh Ikhtiaree is lawful, it therefore, follows that their performance of a Zabh Iztiraree should also be lawful.

11. Game wounded by one person, and kill by another .

If a person shoots an arrow at a game, which hits it, without making it so weak as to prevent it from running, and in that state another person shoots at it, and kills it, the game will be the property of the second hunter, because he was the person who took it, and according to a Tradition of the Holy Prophet that, "game belongs to him who takes it." ('Ainul Hidayah).

But if, the first hunter makes it too weak to run, and another person then kills it, it will be in such a case the property of the first hunter. But, he must abstain from eating it, as there is a possibility that it may have died in as a result of the second wound ; and as it had not the power of running after the first wound, it ought to have been slain by a Zabh Ikhtiaree,

12. Game first wounded, and then killed by the same person.

If, instead of two persons shooting the game, one person shoots the same game twice, the law will then be the same in respect of the illegality of the game as when it receives two wounds from two different persons. This is similar to where a person, having shot the game upon any animal, and made it weak and feeble, afterwards shoots it a second time, and brings it to the ground, in such a case the game so killed will not be lawful, because the second wound is the cause of illegality ; and so also in the case in question.

13. All animals may be hunted .

The hunting of every kind of animal is lawful whether they are fit for eating or not, because the legality of hunting has been absolutely declared in the Qur'an without reserving it to animals fit for eating. [Ch. 5 (Maa'idah), verse 96]

Another reason is, that the hunting of animals not fit for eating may be either for the purpose of getting their wool, or their feathers, or because of a wish to finish them on a account of their being mischievous or hurtful ; and all these motives are allowable.

PART – XII

MAKRUHAAT

(ABOMINATIONS)

SYNOPSIS

Section – (1) – Eating and Drinking

Section – (2) – Dress

Section – (3) – Ornaments

Section – (4) – Contact between the sexes and looking at or touching the strange persons

Section – (5) – Istibra ; waiting for the purification of the women

Section – (6) – Rules for the sale

Section – (7) – Miscellaneous Cases

MAKRUHAAT

(ABOMINATIONS)

(*Hidayah, Kitab-ul-Karahiyat*)

Note

Literally, "Makruhaat", is the plural of "Makrooh", which is derived from "Kuriha", meaning to abominate."

Legally, there is difference of opinion among the jurists in respect of its application. The author of Hidayah has noted that previously Imam Muhammad was of the view that everything "Makrooh" is "Haraam" i.e., unlawful but as he could not get any authoritable reference (from Qur'an and Sunnah) in support of it, he did not use word "Haraam" i.e., unlawful in its general application for "Makrooh".

On the other hand, from Imam Abu Hanifah and Imam Abu Yusuf hold "Makrooh" as "Aqrab-ul-Haraam", i.e., nearest to "Haraam", but not "Ain.e.Haram", i.e totally unlawful but as regards "giving up", both are equal i.e., while to "give up" the "Haraam" is necessary, to "give up" the "Makrooh" is also necessary. ('Ainul Hidayah, vol. IV, pp. 236, 237)

According to the learned ones "Makruhaat", are of two kinds, viz., (1) "Makrooh. –e- Tehreemah", i.e. nearest to "Haraam", or prohibited, of which the doing is a sin ; and (2) "Makrooh-e-Tanziah", thou not approved, but the doing of it is not a sin.

Section (1)

EATING AND DRINKING
(Fasl Fil Akl Wash Sharb)

1. Eating and Drinking.

Imam Abu Hanifah is of the view that the flesh and milk of an ass, and the urine of a camel are abominable.

according to Imam Abu Yusuf , the urine of a camel can be taken as a medicine ; but in respect of milk, it is a secretion from the blood, and is therefore subject to the same rule with the flesh of the animal from which it is produced.

2. Vessels of gold or silver .

It is not allowed, either to men or women, to use a vessel of gold or silver in eating, drinking, or in keeping perfumes.

This rule also applies to the using of oils, and similar articles, that being in effect the same with drinking, as in both cases the use of a vessel of gold or silver is induced, whence it is that the use of a golden or silver spoon is abominable as also the use of a silver or golden bodkin for drawing antimony along the eyelids, or of boxes for holding antimony, or any other thing, made of those.

3. Vessels of lead, glass, crystal, or agate.

The use of vessels of lead ; glass, crystal, and agate, is allowed.

4. Vessels, saddle, chair or sofa, decorated with gold or silver.

It is allowed, according to Imam Abu Hanifah, to drink out of a wooden vessel decorated with silver, provided the particular part to which the lip is applied be void of it.

Similarly, it is also allowed to ride upon a saddle interwoven with silver, provided the space allotted for the seat is plain ; and similarly this rule will also applies in respect of a couch or sofa.

But according to Imam Abu Yusuf, all these are abominable.

From Imam Muhammad two opinions are reported on this point ; one corresponds with the opinion of Imam Abu Hanifah, and the other with that of Imam Yousuf.

Similarly they have also disagreed regarding the use of a vessel or chair decorated both with gold and silver. As regards the swords, mosques, frames of glasses, and books, when they are decorated either with gold or silver ; and regarding stirrups, bridles, or cruppers of that kind.

But these differences of opinion, exist only where the gold and silver is so applied in any of these cases that it is difficult to separate the except only by means of some difficult process ; but the gilding of things, either with gold or silver, in a manner as to apply and to separate it, is unanimously allowed.

5. Information of an infidel in respect of lawfulness of food.

If a person sends his servant, or a hireling, who is a Magian, to purchase the meat, and he purchases the meat accordingly, and tell his master that the he had purchased it from a Jew, a Christian, or a Muslim, it will be lawful for the master to eat the food so purchased.

But If, the servant tells his master, that "he has purchased the meat from an infidel who is not a Kitabiah, and it was slaughter by one who was neither a Kitabiah nor a Muslim," in such a case it will not be lawful for the master to eat the flesh so purchased.

6. Gift by the hands of a slave or an infant .

If a slave, either male or female, or an infant, brings anything to a person and says that, "such a person has sent this to you as a gift," in such a case the person may accepted the information, as it is a common to send gifts by such persons.

Similarly, if either of these persons tells to a slave that his master had given him a licence to trade, he will, accordingly be allowed to accept of it.

According to, Jaame' as-Sagheer, where a slave girl comes to person and says that, "my master has sent me as a gift to you," it will be lawful for that person to accept of her.

7. Word of a Reprobate .

In all worldly affairs the word of a reprobate * may be accepted ; but in matters of a spiritual nature the word of an upright man only is to be accepted.

8. Person of unknown character .

A person, whose character is unknown is also considered in the same light as an unjust man or reprobate ; and his word relative to matters of faith is not acceptable.

9. Word of an Upright Person .

The word of a freeman or slave, whether male or female, is to be accepted in spiritual matters, provided they are upright.

10. Invitation to a marriage – feast.

If a person is invited to a marriage-feast, and, after going there, sees the persons engaged in wanton amusement, or in singing, still it will be better for him to sit down and take part in the entertainment.

But if, he has the power to stop such irregularities, it will be incumbent on him to exert it ; but if he does not possess such power, he should then remain silent.

This is where the person invited is not a Muqtadaa, * or holy man ; because, if such a person is present and does have

* Literally, an exemplary person i.e., Eminent for sanctity of character or a person who holds a Holy office.

in his power to stop these irregularities, it will then be incumbent on him to withdraw, as his presence in such a place will show a relaxation of religion.

Further if, irregularities are committed during the eating, it will be improper that any person should remain there, whether he is a Muqtadaa or not because, according to the Holy Quran, Allah has prohibited us, from sitting in the company of the wicked ones. [Ch. 28, (Qasas) verse, 55].

All this is based on the supposition that the invited person is actually present at the marriage-feast, before he was aware of these irregularities.

11. Irregularities known beforehand .

But if he was already aware of such irregularities it will be incumbent on him to stay away, whether he is a Muqtadaa or not.

Section (2)

DRESS
(Fasl Fill Labs)

1. Dress of silk .

Dress of silk is not lawful for men ; but women are allowed to wear it ; because it is narrated by several of the Companions of the Holy Prophet, and Hazrat Ali in particular, that one day the Holy Prophet appeared with a piece of silk in one hand, and of gold in the other, and said, "Both these are prohibited to the men of my Ummah, but are lawful to the women." (Abu Daud, Ibne Maajah, Nasai, Ahmed, Ibne Hibban).

2. More than what is merely decorative.

But small quantity of silk, such as of three or four fingers breadth, used as a fringe or border to a garment, or used for any

such purpose, is permissible ; because it is reported that the Holy Prophet prohibited the wearing of silk, except a shred of the breadth of three or four fingers in a garment ; and it is also narrated, that the Holy Prophet wore a robe with an edging of silk to it (Muslim, Abu Daud).

3. Pillow of silk.

According to Imam Abu Hanifah, it is permissible to make a pillow of silk, and to sleep upon it. But Imam Abu Yusuf and Imam Muhammad says that, this is abominable ; and the same difference of opinion exists in respect of making the curtains of silk, and hanging them upon the doors.

4. Dress of silk for warriors .

It is , however, permitted to the warriors, in the opinion of Imam Abu Yusuf and Imam Muhammad, to wear a dress of silk or satin in the time of war ; because there is a Tradition, noted by Imam Shaafa'ee, that the Holy Prophet permitted the wearing of silk during the time of war. Moreover, it is necessary, and best adapted to counteract the hard pressure of armour, and also to excite horror in the eyes of the enemy,

But Imam Abu Hanifah, says that this is abominable, because the Traditions which prove its illegality are absolute, and do not distinguish between any particular period occasions, such as the war, or the like ; and the necessity can be fulfilled by the dress of Makhloot, that is having the woof of silk, and the warp of anything else. Besides, silk, and every other thing that is prescribed, becomes permissible in no case except that of necessity ; and as regards the Tradition noted by Sha'by, it proves the dress of Makhloot.

5. Mixed cloth .

A dress of cloth, the woof of which contains the silk, and the warp of anything else, such as wool or cotton, is permissible

to wear during the war, because of its necessity, but it is abominable at any other occasion because then there is no necessity for it.

The same rule also applies in respect of cloth of which the warp is silk and the woof of wool or cotton ; and for the same reason.

Section (3)

ORNAMENTS
(Fasl Fil Hilgation)

1. Ornaments of gold or silver .

Men are prohibited from the use of ornaments of gold, such as rings, and the like, because of a saying of the Holy Prophet to that effect. Ornaments of silver are also unlawful; because silver is, in effect, the same as gold. An exception, however, is made in respect of signet-rings, girdles, or swords ; the use of silver in ornamenting those is approved.

According to Jaame' as-Sagheer, silver rings only should be used ; from which it is inferred that rings of stone, iron, or brass, are forbidden.

It is also narrated that the Holy Prophet, on seeing ring of brass upon the finger of a man, said, "I perceive the smell of an image," and also after seen, upon the finger of another person, a ring of iron, he spoke to him thus, "I see upon your finger the ornament of the people of Hell." (Abu Daud, Nasai, Ibne Hibban)

What is laid down here is in respect of the circular hoop, and not the setting or beazel of the ring. And, therefore, it is lawful that the setting is of stone. It is proper, however, that men, in wearing rings, turn the setting or beazel towards the palm of the hand, and women otherwise, because, in respect of them, rings are considered as ornaments.

Rulers and judges, wear rings, to seal with them ; but as regards the other people, it is most advisable that they should never wear rings, as this reason does not apply to them.

2. Setting of a ring .

If a piece of gold is inserted in the setting of ring, it will be allowable ; because in such a case, the gold is only a dependant on the ring, similar to a shred of silk upon a garment.

3. Use of gold where silver is equally well .

It is forbidden in the opinion of Imam Abu Hanifah to bind the teeth with a thread of gold. But Imam Muhammad, is of the view that this practice is unobjectionable. But according to Imam Abu Yusuf there are two opinions noted ; one corresponds with the opinion of Imam Abu Hanifah and the other with that of Imam Muhammad.

4. Infants .

It is abominable for any person to clothe an infant child in a dress of silk, having ornaments of gold ; because that dress is prohibited to men. They are therefore, forbidden to dress others also in it, in the same manner as it is forbidden to give wine to drink, because of the illegality of drinking it.

5. Vain decorations .

The custom of keeping hand kerchiefs, as it common, is abominable. Many jurists, however, hold that it is allowable, if done due to necessity. This is approved ; because the practice is abominable only when it is done for the purpose of pride or show, in the same manner as sitting with the knees on, a line with the chin, and the hands folded round the legs.

It is allowable to bind the finger with a string, or a ring, with a view to aid the memory in respect of some affairs relating to another person.

Section (4)

CONTACT BETWEEN THE SEXES ; AND LOOKING AT OR TOUCHING THE STRANGE PERSONS. (Fasl Fil Watiwn Nazar Wal Lams)

1. Looking at strange women .

It is not allowed for a man to look at strange women, except at the face, and palm of the hands, which is allowable, because women have to come in contact with men, such as giving and taking etc., it would therefore subject them to great inconvenience if these parts also veiled. Therefore there is a necessity for leaving them bare. It is noted, from Imam Abu Hanifah, that it is allowable to look at the feet of a woman ; because it is sometimes necessary. According to Imam Abu Yusuf, the seeing of the hands is also allowed ; because on account of custom, it is left exposed. But if, a man is not secure from the lust, it is not allowable to him to look even at the face of a woman, except in the case of absolute necessity.

2. Touching a strange woman .

It is not allowed to a man to touch the hand of a strange woman, inspite of having a control over his lust ; because the Holy Prophet has said, "whoever touches a strange woman, will be scorched in the hand with hot cinders on the Day of Judgment. (Sharh-e-Kaafi, 'Ainul Hidayah)

This is however, based on a supposition of the woman being young ; because if she is old to the extent of being insensible to the lust, in such a case it will be lawful to touch her at the time of salutation.

It may be noted that the case is similar where the man, is old to the extent of being insensible to passion himself, and is not such who may excite it in the woman he touches.

3. Female infant .

It is lawful for him to touch or look at an infant girl who is insensible of the sexual urge ; as in such a case there is no danger of seduction.

4. Rules to be followed by a Qazi .

A Qazi may look at the face of a strange woman, when he passes a decree upon her, inspite of there being an apprehension of lust ; because he is under a necessity of it, for expediting his decrees, so that the rights of the people may not suffer any injury.

Witnesses, also, are under the same necessity, in order to give the evidence ; and therefore it is lawful for them also to look at the face of a strange woman, where they have to give the evidence regarding her.

But as regards the looking merely in order to give the evidence, it may be noted that this is not allowable where there is any apprehension of lust, as others may be found free from such influence ; which argument does not apply at the time of actually giving the evidence.

5. Looking at woman with a view to marry .

A man may look at a woman whom he wants to marry, inspite of his knowing that it will increase his lust.

6. Rules to be followed by a physician .

A physician, in examining medically a strange woman, is allowed to look at the affected part. It will however, be advisable

that he should instruct another woman to apply the medicine, as the fact of an individual of one sex looking at another of the same sex is of less consequence. But if he is not able to arrange for a fit woman for this purpose, them in such a case it will be incumbent on him to cover all the organs of the woman, leaving exposed only the affected part when he may look at it ; refraining from it however possible, as anything the suffering of which may be prompted by necessity, should be exercised with as much restriction as the facts of the case may allow.

Similarly, it is lawful for a man, in administering a glyster to a man, to look at the proper part only.

7. Man viewing or touching another man .

One man may, without blame, look at any part of another man, except from beneath the navel up to the knee ; because the Holy Prophet has said, "the nakedness of a man is from the navel to the knee ;" and as, in another Tradition, it is said, "from beneath the navel," it may therefore be inferred that the navel is not included, but that the knee is included (Dara Qutni, 'Ainul Hidayah)

Every part of a man, which it is proper for another man to look at, may also, without blame, be touched by him ; for the sight and the touch of those parts of a man which are not nakedness are to be taken in the same light.

8. Woman looking at a man .

Woman may lawfully look at a man, except at the space from the navel to the knee ; provided, however, that they are secure from lust.

9. Woman looking at another woman .

A woman is allowed to look at any part of another woman except from under the navel to the knee. This is according to one

view of Imam Abu Hanifah ; but according to his another view, the looking of one woman at another woman is like that of a man at his female relation allowed ; to look at the back or belly. The first view is, however, the most authentic.

10. Man looking at his wife or his slave .

It is lawful for a man to look at his slave girl in any part, provided he is not related to him within the prohibited degrees ; and also at his wife in any part, even in the pudenda, pleases; because the Holy Prophet has said that, "shut your eyes from all women except your wives and female slaves." (A'immal-e-Arbah, Haakim, Tirmizi)

But, it is most appreciable that a husband and wife should neither of them look at the genital part of the other, as the Holy Prophet has said, "when you copulate with men should conceal as much as possible ; and should not be then naked, as that resembles too much to the habit of asses." (Ibid).

11. Man looking at his kinswoman .

It is lawful for a man to look at his female relation (i.e., Mahrim) at her face, head, breast, or legs ; because as it is usual with relations to visit one another without any previous intimation, and unattended with any retinue, and as women, in their house, generally wear a dress needed for service, if, therefore, the sight of these parts were not allowed, it would impose too great restraint upon them.

But as regards the other parts ; and it is illegal to look at the back or belly.

12. Male and female relations touching each other .

Every part of a relative, which can lawfully be looked at can also be touched ; unless, however, there is the danger of its inflaming the lust of either, in which case neither the sight nor the touch will be lawful.

13. Sitting in privacy, or travelling together .

There is no illegality in a man sitting in privacy with his female relative, or travelling with her ; because the Holy Prophet has said, "no woman shall travel more than three days and three nights, unless. She is accompanied by her husband, or her relative (i.e. Mahrim) and if, in such a case the woman has the occasion to mount upon, or descend from a horse, the man may then, in assisting her, touch her back or belly, if covered, but if he is sure of his passion, otherwise he should not touch her."

14. Man looking at the female slave of another .

Every part which it is lawful for a man to look at in his female relative may also be been by him in the female slave of another person, whether she is an absolute slave, a Mudabbirah, a Mukatibah, or an Umm-e-Walad.

As regards to privacy, or travelling with the female slave of another person, many jurists have said that it is lawful, in the same manner as in the case of a female relative.

Some, jurists, however, declare it improper, as not being required due to necessity. But Imam Muhammad, in the Mabsoot, has said that the assisting of a female to ascend or descend from a horse is lawful of it is in the case of necessity.

15. Man touching a Female-slave with a view to purchase her

It is allowed to a man to touch a female slave when he has the intention to buy her, inspite of the fact that he may be apprehensive of lust.

16. Adult female-slave .

When a female slave becomes adult, it is not proper to leave her in drawers only. But, it is necessary that she should

have two clothes, so that her back and belly may be covered, Moreover, it is reported, from Imam Muhammad, that when a female slave reaches the age of puberty, she should not be exposed in drawers only as that may cause the lust.

18. Eunuch or hermaphrodite .

A Khasee, or simple eunuch, is also taken in the same light with a man, and therefore anything prohibited to a man is also prohibited to him, because he possesses virility, and is not disabled from copulation; and the same, also, applies to a Majboob or complete eunuch; because he is also capable of friction, and has the power of discharging the semen ; and so also to of an hermaphrodite, because he is merely a defective man .

18. Male slave looking at his mistress .

It is not lawful for a male slave to look at his mistress, except at the face, or palm of the hands, in the same manner as a stranger.

19. Man performing 'Azl .

It is lawful for a man to perform the act of 'Azl with his female slave without her consent. But he cannot lawfully do so by his wife without her consent.

Section (5)

WAITING FOR PURIFICATION OF THE WOMEN
(Fasl Fil Istabra * wa Ghairohu)

1. Man having connection with his female slave after purchasing her.

A man, when he purchases a female slave, is not permitted either to enjoy her, or to toucher her, or to kiss her, or

* "Istabra" means to clear the womb of the slave woman from pregnancy by menses ('Ainul Hidayah)

look at her pudenda, in lust, until after her Istabra, or purification from her next courses ; because when the captives taken in the battle of Autaas were brought, the Holy Prophet ordered that no man should have sexual intercourse with pregnant women until after their delivery, or with other women until after one menstruation ; which proves that the abstinence so ordered is binding on an ordered ; and further, that the occurrence of right of property and of possession is the cause of its necessity. The purpose proposed in this rule is, that it may be known whether conception has not already taken place in the womb, so that the child may not be doubtful.

2. Application of this rule .

Abstinence until after purification is binding on the purchaser, but not on the seller ; because the reason of its necessity is the desire of copulation ; and as the purchaser is supported to possess this desire and not the seller, the observance of it is therefore ordered for him, and not the seller.

This law, therefore, also applies to a right of property in all its different kinds of being acquired, such as by purchase, donation, legacy, inheritance, covenants, etc.,

3. Purchase of a menstruous female .

If a person purchases a female slave during her menstruation, no regard is to be paid to this menstruation in respect of determining the abstinence. similarly, also, no regard is paid to paid to a menstruation which occurs between the time of taking possession and the time of the right of property being established, by purchase, or the like ; and so likewise, regard is not to be paid to the delivery of a female slave between the establishment of a right of property in her, and the act of taking possession.

The same rule also applies in regard of such menstruous purgations are may happen previous to the procuring of sanction,

in the case of an unauthorized sale of a female slave, notwithstanding the purchaser may be seised of her ; and similarly where the courses happen after the seisin in the case of an illegal contract of sale, and before the slave is purchased by a valid contract ; for in none of all these do the present courses determine the abstinence.

4. Person purchasing partner's share in a female slave .

Abstinence is necessary in the case of a partnership female slave, where one of two partners purchases the other's share ; because here the cause is complete, and upon the completion of the cause the effect takes place.

5. Other rules in respect of female slaves .

If a person purchases a Magian female slave, or receives her in donation, and she, after his taking possession of her, has her courses, and then becomes a Muslim or ; if a person purchases a female slave, and makes her a Mukatibah, and she, after his taking possession of her, having voided her courses, proves unable to discharge her ransom, such courses are sufficient to establish the requisite purification, in either of these cases, as having happened after the occurrence of the cause for waiting, namely, right of property and possession.

In the cases where a female slave, having eloped, returns to her master ; or, having been taken away, or hired out, is restored; or, having been pawned, is redeemed, abstinence is not requisite, for the cause of it i.e., the acquisition of property and possession does not exist in either case.

6. Where sexual act is unlawful .

In every case where abstinence is ordered, and sexual intercourse prohibited, all sorts of allurements and dalliance, such as kissing and hugging, are also prohibited, as these lead to the commission of unlawful acts, and there is also, the possibility of such acts being committed on the property of another, as may

happen if the slave prove with child and the seller lay claim to her. It is however, reported from Imam Muhammad that dalliance with a captive slave girl is lawful.

7. Pregnant women and immature females .

The purification of a pregnant female slave is proved by her delivery, and that of a girl in whom the menses have not yet started, by the lapse of one month, that space is, in respect of such women a substitute for the courses, in the same manner as it holds in the case of a woman under 'Iddat. But If, however, the menstrual blood discharges itself before the expiration of one month, the purification by lapse of time is annulled, because of the ability in respect of the original circumstances, prior to accomplishing the object of the substitute.

8. Adult females not subject to the courses .

If the courses are delayed in a female slave who is of age to be subject to them, it is in such a case necessary to abstain from sexual intercourse with her, until it is proved that she is not pregnant, when it becomes lawful to cohabit with her.

9. Devices to elude the abstinence required .

It is lawful, according to Imam Abu Yusuf, to elude the abstinence by a device. The opinion of Imam Muhammad, however is otherwise.

The opinion of Imam Abu Yusuf has been followed by the Qazees in their decisions, where it has appeared that the seller seller had not cohabited with the slave woman from the period of her courses prior to the sale ; but, according to the opinion of Imam Muhammad, when the contrary has been proved.

The rule which may be followed in a case where the purchaser is not married to a free woman, * is that he may first marry the slave woman, and then purchase her.

* This condition is laid down, because it is not lawful for a Muslim to marry a slave womn if he is previously married to a free woman.

But if, he is already married to a free woman, the rules in that case is that the seller, previous to the sale, or the purchaser, before taking possession, give the slave woman in marriage to another person who should, however, be the one in whom they can have the confidence, that he will not cohabit with her, and that he will divorce her, and then, that the party may purchase the slave woman, the former case, or take possession of her, in the latter, and the husband divorce her ; because as the purchaser was at any rate prohibited from cohabiting with the slave at the time when the cause of the prohabitation first operated i.e., when he first acquired the property and possession, no prohabitation is therefore required after she did become lawful to him, as regard is to be paid to the time and circumstance under which the cause takes place ; similarly as where a person purchases and takes possession of a slave woman who is in her 'Iddat, in which case, upon the expiration of the term of 'Iddat pro-habitation is no longer required, as in such a case the slave woman was not lawful to the purchaser at the time when the cause take place.

10. Person pronouncing Zihaar .

It is not lawful for a person, who has pronounced Zihaar upon his wife, to look at her pudenda in lust, or to cohabit with her, or to kiss or touch her, until he has performed the expiation.

11. Person indulging in wantonness with two female slaves who are sisters .

If a person, incited by passion, kisses two female slaves who are sisters, he will not in such a case permitted to have sexual intercourse with either of them, or to kiss, touch, or look at the private part of either in lust, until he makes one of them unlawful to him, by making her the property of another person, in whatever manner he may choose, or by giving her to another in marriage, or by setting her free.

But if, he lets one of them to hire, or pawns her, or creates her a Mudabbirah, the other will not thereby be made lawful to him, as he does not by any of these acts relinquishes his property in her.

If, also, he gives one of them in marriage to any other person by an invalid contract, he will not thereby acquire a right to enjoy the other ; unless, the husband of the other one consummates the marriage, in which case an 'Idaat will be binding upon her, and this will be the same as a valid marriage, with regard to making the enjoyment of her illegal.

If, also, he once sexually enjoys one of them, he may then continue to do so ; but he cannot then lawfully have sexual connection with the other ; because, otherwise it will be a connection with two sisters, which is unlawful ; but this consequence is not induced by sexual connection with one of them.

Any two women who are related to each other in a manner which prevents their being lawfully married to one and the same person, are taken as sisters, and are consequent by therefore subject to the rules mentioned in the preceding case.

12. Men kissing or embracing each other .

It is abominable for one man to kiss another man, either on the face or hand, or on any other part ; as it is similar to two men to embrace each other. Tahavee reports this as the opinion of Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf holds that it is not improper for a man either to kiss or embrace another ; because it is related that when Ja'far came from Abyssinia, the Holy Prophet embraced him and kissed him between the eyes, (Haakim, Tabrani). The argument of Imam Abu Hanifah and Imam Muhammad is based on a Tradition that the Holy Prophet prohibited both kissing and embracing, Ibne Ali Shaibah, Aub Daud and Nasai) and as regards the tradition relied upon by Imam Abu Yusuf, they say that it should be construed to have happened prior to the prohibition.

The learned ones have however, said that this disagreement between our jurists concerning the embracing, relate only to a case where men are not properly dressed, as where, for example they are in drawers only. But that these acts are allowable, in the opinion of all our jurists, when the parties are clothed with an under and upper garment. This is the most approved view.

13. Joining the hands .

The joining of the hands by way of salutation is permitted, because the Holy Prophet has said, "whoever joins his hand to the hands of his brother Muslim and shakes it his sins, will be forgiven. (Tabrani; Behaqi, Bu Dau'd, Tirmizi, Ibne Maajah, Ahmed'.)

Section (6)
RULES FOR THE SALES
(Fasl Fil Bal')

1. Sale of dung and human excrement .

There is no objection to the sale of dung ; but it is abominable to sell human excrement.

2. Excrement mixed with mud .

But it will be otherwise in respect of excrement, as that is not capable of profit, unless it is mixed with mud, when the sale of it will becomes lawful, according to Imam Muhammad which is approved.

3. Person purchasing and having sexual connection with a female slave on the faith of the seller's assertion regarding her.

If a person sees another person selling a female slave, and he knows her to be the property of some other person, and he is informed by the seller that "he has been empowered by that other person to sell her," it will in such a case be lawful for him

to purchase her, and have sexual connection with her ; and the word of one man, even though he is not upright, may be accepted in wordly matters, provided there is no opponent to dispute the credit of his testimony.

The same rule will also apply also if the seller alleges that he had received her as a donation from the other person, or that he had purchased her from him ; with this difference, however, that he will here be required to be of an upright and trustworthy character and similarly if he is not trustworthy, but the purchaser believes that he has speak the truth ; but if he disbelieves him, it will not be lawful for him to purchase the slave.

The law will be the same, if the purchaser, did not previously know that the female slave, is informed by the seller, that she is the property of another person who has empowered him to sell her," or that "he has purchased her from such a person."

But if, he knows her to have been in the possession of another person he does not receive any information from the seller, he cannot in that case lawfully purchase her until he knows by what means the seller has acquired a property in her ; because her having been in the possession of another person is a proof of her being the property of another person.

But if, he does not know her to have been before the property of another person, he may then lawfully purchase her, inspite of the fact that the seller is a man of bad character ; because possession, even with an unjust man, proves the property; and doubt, or possible conjecture loses all force in any case where a legal argument can be urged.

Where it is clear, however ; that a person of such character as the seller cannot likely be the proprietor of her, it is most prudent on that account to avoid buying her. But if, the purchase is made, there is a hope that it may be lawful, because it is supported by a legal argument.

4. If the seller is a slave .

If the person who offers the female slave to sale is a slave, male or female, in such a case the other person should neither accept nor purchase her until he enquires into the circumstances ; because as property cannot be an owner, it is clear that some other person is the owner of her.

But if, the seller informs him that "his master had permitted him to sell her," his words may in that case may be accepted, if he is an upright and trustworthy man ; but if he is not so, the purchaser should be guided by a possible opinion ; and if he has not the means to form any opinion of him, whether good or bad, he should not in such a case purchase her, or admit his word regarding her.

5. Woman marring after observing her 'Iddat .

If a person of an upright and trustworthy character informs a woman that her husband who was absent had died, or that he had divorced her thrice ; or, if a person of a bad character delivers her a letter from her husband, wherein he informs her that he has divorced her, and she does not know with certainty that the letter was written by her husband ; is, anyhow, led to think so, in either of these cases she may lawfully observe her 'Iddat and then re-marry ; because in this case a fact destructive of the former marriage has occurred and there is no person to contradict it.

Similarly, if a woman informs a man that the husband of that woman had divorced her, and that the period of her "Iddat" also had elapsed, the man can lawfully marry her.

If, also, a woman informs that the first husband of a particular woman, had divorced her thrice, and that after the lapse of her 'Iddat she had married another man, with whom she had cohabited, and that having also divorced by him she had again completed her 'Iddat due to that divorce," the first husband can in such a case lawfully marry her again.

The law is also the same where a woman informs a person that, she was a slave, and that she has received her freedom.

6. Information tending to annul a marriage .

If a person informs a woman that her marriage had been originally unlawful, as her husband was at that time an apostate, or her foster-brother, his word will not in that case be accepted, unless confirmed by the evidence of two men, or one man and two women. Similarly, if a person informs another person that his wife was an apostate at the time of marriage, or that she is his foster-sister, he will not in that case be allowed to marry the sister of that woman, or to marry other four women, until the information so given is proved by the evidence of two upright men because here the husband is informed of an illegal fact co-existent with the marriage ; while his execution of the contract of marriage is an argument in favour of its validity, and a denial of its illegality ; and therefore the information of the other person is clearly, contradicted.

But the case will be otherwise, if a person, having married her, is informed that she had afterwards sucked the milk of his mother or sister ; because the information so given has to be believed as here the bar to the marriage is subsequent to, and not co-existent with, the marriage contract ; and the execution of the contract is antecedent to the fact of its illegality, and therefore it does not afford any proof of its non-existence ; and therefore the information is not disproved.

7. Man marring a female slave on her informing him that she is free .

If a girl, is so young that she is not to give any account of herself, and she in the possession of a man who asserts her to be his property, afterwards when she becomes, meets in another city by a man who formerly knew her, and tells him that "she is a

free woman," he will not, on the strength of her word, be permitted to marry her, as there is an argument against the truth of it, namely, that she was in the possession of another man.

8. Repayment of debt by selling the wine .

If a Muslim, involved in debt, sells wine, it will be abominable in his creditor to receive payment in the money so obtained ; whereas, if the debtor is a Christian, it will be allowable so to do.

9. Monopolizing the necessities of life ; or forestalling the market .

It is abominable to monopolize the necessities of life, and food for cattle, in a city, where such monopoly is likely to be detrimental. Similarly it will be abominable to forestall as where the people leave a city to meet a caravan with a view to purchase goods and lay them up. This, however, is immaterial when it is not injurious to anyone.

10. Person monopolizing the product of his own grounds or what he brings from a distant place .

If a person has a quantity of grain, which is the product of his own cultivation, or which he had brought from another city, in any of these cases it will not be deemed as abominable monopoly.

11. Rulers fixing prices .

It is not the duty of the rulers to fixed prices to be paid by the people ; because the Holy Prophet has forbidden this, saying, "Fixed not the prices, as these are regulated by Allah." Further, the price is the right of the merchant, and the fixing of it is therefore left to him ; and rulers are not entitled to disturb any such right. (Ahmed, Darimi, Abu Daud, Ibne Maajah, Tirmizi, Ibne Hibban).

12. In case of necessity .

Except where the welfare of the people is concerned, as shall presently be made to appear.

13.Monopolizer required to sell his superfluous provisions

If a person guilty of a monopoly is brought before the Qazi , he should order him to sell whatever he may have laid up more than is amply sufficient for the subsistence of himself and family, and should prohibit him from the same practice in future ; and if, after this, he again monopolizes, the Qazi may then punish him at his own discretion.

14. Combination to raise the prices .

If eventualists , taking advantage of the necessity of the people, raise the market to an exorbitant rate, and the Qazi is not able to maintain the rights of the people ; he may in such a case fix the prices, with the assistance of men of ability and discernment.

Inspite of this, if they continue to sell their grain at a rate exceeding the fixed standard, the Qazi should confirm the sale, nor has he the power of annulling it. This, according to Imam Abu Hanifah, is evident ; for he holds it unlawful to prohibit a freeman in this respect, and similarly, according to Imam Abu Yusuf and Imam Muhammad, unless the prohibition affects only some particular people, as according to their views prohibition is not allowed where it is not definite.

As regards the point whether it is lawful for a Qazi to sell the grain of a Monopolizer without his consent, some jurists are of the view that upon this point there is a difference of opinion, in the same manner as in the case of selling the effects of a debtor ; whilst some other jurists maintain that it is lawful in the opinion of all our jurists, because Imam Abu Hanifah holds it just to prohibit a free-man, with a view to removing a common evil, as is the case in the present instance.

15. Sale of Arms to seditious persons .

It is abominable to sell arms in the time of sedition to a person whom the seller knows to be a rebellion, as this is a cause of evil. If , however, the seller does not know the purchaser to be engaged in the rebellion, he may then sell the arms to him.

16. Sale of unrefined juice of fruit for making wine .

There is no illegality in selling the juice of dates or grapes to a person whom the seller may knows that he want to make wine of it because the evil does not exist in the juice, but in the liquor, after it has been essentially changed.

But the case will be different in respect of selling the arms at a time of tumult, as in such a case the evil is proved, and exists in the original thing, arms being the instruments of sedition and rebellion.

17. Letting of a house on rent for a Pagoda or a Church .

If a person lets his house on rent in a village, or in the neighborhood of a city, so that it may be converted into a Pagoda, or a Christian Church, or that he may sell wine in it, it is not material, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that such lease is improper, as it may promote the sin.

18. Carrying of wine for an infidel on wages .

If an infidel engages a Muslim on wages to carry wine for him, and then pays to him the wages for his labour, the money so received will be lawful to the Muslim.

But Imam Abu Yusuf and Imam Muhammad say that, it will be abominable, it is the means of the sin.

19. Rules in respect of the lands and houses of Mecca .

There is no illegality in the sale of the walls of the houses at Mecca, but it is abominable to sell the land on which they stand. This is according to the opinion of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad say that, the land of Mecca may also be sold ; and it is also said that Imam Abu Hanifah accorded in this opinion ; because as the houses are property, so also is the land. (Sharahe Aasaar by Tahavi, Ainul Hidaya)

But the real opinion of Imam Abu Hanifah, is that it is not proper ; because the Holy Prophet has said, "Mecca is sacred, and the houses there can neither be sold nor inherited." (Haakim, Dara Qutni). Moreover Mecca, is sacred, as being a dependency of the Kabah, and the place where reverence is particularly shown to it ; and therefore it is not lawful either to hunt at Mecca, or to cut the thorns or grass which grows there except when they have faded and become parched ; or to shake the leaves off the trees growing there.

It is also abominable to let the land at Mecca, because the Holy Prophet has said, "whoever rents out the land of Mecca is guilty of usury. (Behaqi 'Ainul Hidayah) whoever uses the land at Mecca, let him reside in it ; and whoever possesses more than what is sufficient for his own purpose, let him give it to others." (Ibna Maajah, 'Ainul Hidayah)

20. Implied usury .

If a person takes from a merchant something what he may need, and leaves with him a certain number of Dirhams for example, he is guilty of an abomination ; because in thus taking what he wants, he gets an advantage from a loan namely, the money he leaves with the merchant ; and the Holy Prophet has prohibited us from taking interest on loans. He should therefore

first deposit the Dirhams with the merchant, and then take from him whatever he may need ; as the money is in such a case a trust, and not a loan, so that the merchant is not subject to pay a compensation in case of the loss of it. ('Ainul Hidayah)

Section (7)

MISCELLANEOUS CASES
(*Masaa'il-e-Mutafarriqah*)

1. Qur'an written with marks or points .

It is abominable to distinguish the sentence of the Qur'an with marks, or to insert in it the points or short vowels. Inspite of this the learned ones amongst the modern jurists have said that these distinctions are proper if made for the use of a foreigner.

2. infidels not to enter the Sacred Mosque .

There is no illegality if a polytheist enters the Sacred Mosque . Imam Shaafe'ee has said that this is abominable ; and Imam Maalik has said it is improper for such a man to enter into any mosque.

The argument of Imam Shaafe'ee in support of his opinion is, that Allah has said in the Qur'an "POLYTHEISTS ARE IMPURE AND THEREFORE SHOULD NOT BE PERMITTED TO ENTER THE SACRE MOSQUE." (Ch. 9 Taubah, verse 28) Another argument is, that an infidel is never free from impurity, as he does not perform the bath in such a manner as to acquire purification ; and an impure man is not allowed to enter into a mosque.

The same arguments have been advanced by Imam Maalik ; but he extends them to every mosque.

The argument of our jurists on this point is drawn from a Tradition that the Holy Prophet lodged several of the tribe who were infidels in his own mosque. Besides, as the impurity of an infidel lies in his unbelief, he does not thereby defile a mosque. With respect, moreover, to text above quoted, it merely alludes to infidels entering a mosque in a haughty and forcible manner, and to a custom which was practiced in the days of ignorance of walking round the mosque naked.

3. Keeping the eunuchs .

It is abominable for a Muslim to keep an eunuchs in his service, as the employment of them is a motive with men for making others to a same state.

4. Castrating the cattle .

It is not abominable to castrate cattle, or to make a horse copulate with an ass, as these are beneficial for the people. Further, it is narrated that the Holy Prophet rode upon a mule, and therefore, if such a procreation of animals had been prohibited, he would have never done so, as thereby a door would have been opened for the sin.

5. Visiting the Jew or Christian .

There is no illegality in visiting a Jew or Christian during their sickness, as this amounts them a kind of consolation ; and the Law does not prohibit us from thus consoling them. We are told that the Holy Prophet visited a Jew who lay sick in his neighbour-hood. (Ibne Hibban)

6. Wasteless supplications in prayer.

It is abominable, that a person, in offering up prayers to Allah, should say, "I beseech Thee, by the glory of Thy heavens!" or "by the splendour of Thy Throne !" for a supplication of this kind will be lead to suspect that the Almighty derived glory from the heavens ; whereas the heavens are created, but Allah with all His Attributes, is Eternal and Immutable.

But it is, noted from Imam Abu Yusuf, that there is no illegality in this way of supplication. This opinion is also adopted by Abul Lais in Sharahe Jaam-e-Sagheer, because it is related of the Holy Prophet that he offered up a similar prayer to Allah. (Ibnul Jauzi on the pattern of Hakim and Tabrani).

But our jurists, have said that this Tradition is uncertain ; and that to abstain from whatsoever is suspected of being wrong is most prudent and advisable. (Ahmed, Nasai, Abu Dau'd, Dara Qutni)

It is abominable to say, in the prayer, "I beseech Thee, O Allah, by the Right of any of the Prophets" ; because none of his creatures is possessed of any right in respect of the Creator.

7. Gaming .

It is abominable to play at chess, dice, or any other game; because if anything is staked it will be gambling, which is expressly prohibited in the Qur'an [Ch. 5 (Maa'idah) verse 90]; and if, on the other hand, nothing is hazarded, it will be useless and vain.

Beside this, the Holy Prophet has declared all the games of a Muslim as vain excepting three viz., breaking in of his horse ; the drawing of his bow ; and his playing and amusing himself with his wives. (Tabrani, Ishaq, Bazzar)

Several of the learned ones, however, are of the view that the game of chess is allowable, as it has a tendency to quicken the intellect. This opinion has also been ascribed to Imam Shaafe'ee.

Our jurists have based their opinion on this point on a saying of the Holy Prophet that, "whoever plays at chess or dice does in fact plunge his hand into the blood of a hog." (Muslim) Moreover, games of this kind withhold men from the adoration and worship of Allah at the fixed timings ; and the Holy Prophet has said that, "whatever relaxes men in their duty to Allah is to be taken as the same as the practice of gaming." (Ahmed, Behaqi)

It is also proper to say, that if a man plays at chess for a stake, it finishes the integrity of his character, and makes him a Faasiq, or Reprobate ; but if he does not play at it for a stake, the integrity of his character is not affected.

Imam Abu Yusuf and Imam Muhammad also say that it is abominable to salute any person who is engaged in a game ; since, in thus refraining, our abhorrence of gaming may be expressed. But Imam Abu Hanifah say that, it is proper, because it may serve as a means to divert the parties from their game.

8. Gifts and invitation to entertainments from a mercantile slave.

There is no illegality for a person in receiving a gift from a slave who is a merchant ; or in accepting from him an invitation to an entertainment ; or in borrowing his carriage. But it is abominable to receive from him a gift of cloth or money.

9. General rule in respect of infant orphans and foundings.

If a person gives anything as a gift or alms to an orphan under the protection of a particular person, it will be lawful for that person to take possession of such gift or alms on his behalf.

But it is not lawful for the Multaqit i.e., taker-up of a founding to give him in service on hire; nor is it lawful for an uncle to do so by his infant nephew, even though he is under his immediate care.

But it will be otherwise with a mother ; because she may lawfully let her infant child on hire, provided she has the immediate charge of him ; because a mother has the power to use the services of her infant child by employing him, without giving him any return, while a Multaqit or an uncle does not have this power.

If the child himself enters into an engagement of service, it will not be valid, as there is possibility of it being to his prejudice. But, if after having hired himself out the child fulfils his engagement, it will then be valid, because in thus confirming it his advantage only is consulted ; and he will therefore, be entitled to the wages agreed upon.

10. Master fixing iron collar on the neck of his slave .

It is abominable for a person to fix an iron collar on the neck of his slave in the manner as to deprive him of the power of moving his head, according to the custom of the tyrants ; because a punishment of this kind is like the punishment of the damned, and is therefore unlawful, in the same manner as scorching with fire.

11. Master confining his slave .

A Muslim may confine his slave; because there is a custom amongst the Muslims for confining people who are mad or seditious, so similarly it is lawful for a person to confine his slave, so that he may prevent him for absconding, and thus secure his property.

12. Applying glysters .

It is not abominable to apply a glyster on account of need because medical practices are approved, in the agreed opinion of all our jurists, as well as by the Traditions of the Holy Prophet. Moreover an application of this kind is, equally proper, whether it is administered to a man or woman.

But It is not allowable, to have the recourse to any forbidden thing, such as wine or the like ; because it is unlawful to cure any disease by unlawful things. (Ibne Hibban, Behaqi, Muslim, Abu Dau'd)

13. Allowances of a Qazi .

It is not improper to pay the allowances of a Qazi from the Public Treasury, because, the Holy Prophet appointed 'Attaab Bin Osaid as Qazi of Mecca, and fixed his allowance from the Public Treasury ; and he also appointed Hazrat Ali as the Qazi of Yemen, and fixed his allowance from the Public Treasury.

Besides, as a Qazi is, by the nature of his office, confined to the duty of guarding the rights of Muslims, his maintenance is, therefore, drawn from their property, and the Public Treasury is the property of the Muslim Community ; because a confinement to any particular office or duty entitles to maintenance ; as it is in the case of an Executor, or a Muzarib who travels with the stock.

It may be noted, however, that the necessity for the Qazi to receive his allowance from the Public Treasury is only where he takes it in a satisfactory manner, without any condition ; because if he refuses to undertake the office, unless the Ruler allows him a certain salary, it will be unlawful ; because he in such case demands a reward for the discharge of an act of piety ; for which the office of a Qazi is in fact, the exercise of jurisdiction is the noblest kind of devotion.

It is also proper to note, that if a Qazi is poor, it will be most eligible, rather incumbent on him to receive his maintenance from the Public Treasury ; because otherwise he will not be able to uphold the dignity of his office on account of his attention being towards his own subsistence.

But if, he is rich, some jurists deem it most eligible that he should not receive his allowance from the Public Treasury ; while some other jurists hold that it is binding on him so to do. The latter is the better opinion ; because otherwise the office might be made low and contemptible ; and also because, if an indigent person succeed as a rich Qazi, it will then be difficult for him to get the salary, as that had been, perhaps, for a long time relinquished.

14. A Qazi dismissed after having received his allowance .

If a Qazi, after getting one year's salary, is dismissed from his office before the expiration of that year, there is in this case disagreement amongst our jurists, in the same manner as they have differed in this opinion where a wife dies in a similar predicament. The better opinion, however, is that he should return the balance.

15. Travelling of female slave

There is no illegality for a female slave or an Umm-e-Walad, in travelling without being attended by a kinsman ; because a stranger is considered as the same as a kinsman in respect of looking at or touching a female slave ; and an Umm-e-Walad is also a slave, as being the property, even though she cannot be sold.

PART – XIII *

AL-SIYAR

SYNOPSIS

Chapter – 1 – The War
Chapter – 2 – Manner of waging the war
Chapter – 3 – Making Peace ; and the person entitled to grant protection

Section – Protection granted by a single person

Chapter – 4 – The Booty ; and its division

Section – 1 – Manner of the division of the Booty
Section – 2 –Gratuitous Grants

Chapter – 5 – Conquests of the Infidels
Chapter – 6 – The Mustamins

Section – The Aliens

Chapter – 7 – Tithe and Tribute
Chapter – 8 – The Jizyah, (Capitation-Tax)

Section – 1 –The Zimmees.
Section – 2 –The Bany Taghlab

Chapter – 9 – The Apostates
Chapter – 10 – The Rebels

AL – SIYAR *

(*Hidayah, Kitab-al-Siyar*)

Note

"Siyar" is the plural of "Seerat", which, actually means biography, and particularly the biography of the Holy Prophet Muhammad (Peace be upon him), which includes his life–sketch, important events of his life, his endeavours for establishment of Islam, his achievements and his ultimate successes.

But here under the heading of "Al-Siyar", are dealt with only the "Ways and Means" adopted by the Holy Prophet himself, or enjoined to his companions as well as the commands, he gave to them from time to time, in respect of the battles (known as Jihaad **) against the infidels and the polytheists, and includes the manner of the war, peace and granting protection, distribution of the Booty of War, and laying of Jizyah etc.,

CHAPTER 1

The War

1. War to continue against the infidels, at all times, by a party of the Muslims .

The sacred command regarding the war (in the Way of Allah) is sufficiently fulfilled when it is continued by any party or tribe of the Muslims ; and it then no longer remain in respect of the rest of them. It is proved as a Divine Ordinance, by the Word of Allah, Who has said, in the Qur'an "Fight against the infidels" (Ch. 2, Baqarah, verses, 192, 244, Ch. 8, Anfaal, verse

* 'Ainul Hidayah, vol. II, pp. 624 to 716

** Qur'an, Ch. 2, Baqarah, Verses, 154, 190 to 193, 216 to 218, 244 ; Ch. 3, Aal-e-Imran, Verses, 139 to 148, 156 to 158, 165, 166, 149 to 175, 195, 200 ; Ch. 4, Nisa, Verses, 71 to 78, 84, 88 to 91, 94, 95, 104 ; Ch. 8, Anfaal, verses, 60 to 62, 65, 66, ; Ch. 9, Taubah, Verses, 1 to 12, 14 to 6, 20 to 22, 24, 29, 36, 38, 39, 41 to 45, 57, 72, 76 to 89, 91 to 93, 111, 120, 121, 123, Ch. 16, Nahl, Verses, 110 ; Ch. 22, Hajj, Verses, 39, 40, 78 ; Ch. 29, Ankaboot, Verses, 5, 6, ; Ch. 33, Ahzaab, Verses, 16, 17, 22, 26, 27 ; Ch. 47, Muhammad, Verses, 4 to 7, 20, 21, 31, 35 ; Ch. 48, Fatha, Verses, 17, Ch. 49, Hujaraat, Verses, 15 ; Ch. 57, Hadeed, Verses, 10 ; Ch. 59, Hashar, Verses, 2; Ch. 60, Muntahinah, Verses, 1; Ch. 61, Tehreem, Verses, 9 ; Mishkaat, Kitab-ul-Jihaad, vol. II, pp. 209 to 221.

399) ; and also by a saying of the Holy Prophet, "war is to continue until the Day of Judgment," (Muslim, Abu Dau'd.)

The observance, of war however, to the extent mentioned above suffices ; because war is not a "Farz-e-'Ain", i.e., a positive command as it is, in its nature, murderous and destructive, and is ordered only for the purpose of advancing the true faith, or repelling evil from the servants of Allah ; and when this purpose is achieved by any single tribe or party of the Muslims making the war, the obligation remains no longer binding upon the rest . To this extent it is therefore, a Fara-e-Kifayah as in the case of prayers for the dead which is also Fara-e-Kifayah which may be fulfilled even by the observance of it by some people only and thus absolves the entire Muslim community of its obligation. But if no one Muslim is to make war, the whole of the Muslims of neglecting it ; and also, because, if the injunction had been positive, the whole of the Muslims will consequently have to engage in war, in which case the materials for war such as horses, armour, and so forth could not be procured. Thus it appears that the observance of war, as aforesaid, suffices, except where there is a general call for it, i.e., where the infidels invade a Muslim territory, and the Imam for the time being issues a general proclamation, requiring all persons to stand forth to fight, because in such a case, war becomes a positive injunction for the whole of the inhabitants, whether men or women, and whether the Imam is a just or an unjust person ; and if the people of that territory are unable to repulse the infidels, then the war becomes a positive injunction for all in the neighbourhood ; and if they also do not suffice, it then becomes a positive injunction for the next neighbour ; and in the same manner, for all the Muslims, from east to west.

2. Infidels may be attacked .

Fighting by the Sword against the infidels is "Waajib", i.e., obligation even though they are not the first aggressors, as is

i.e., obligation even though they are not the first aggressors, as is clear from various verses (of the Holy Qur'an and Tradition of the Holy Prophet) which are generally received to this effect.

3. Infants, slaves, women, disabled men .

But if it is not obligation for the infants to make war, as they are objects of compassion ; neither is it obligatory for the slaves, or women, as the right of the master or of the husband has to preference ; nor is it for the blind, the maimied, or the decrepit, as they are incapable.

But if, the infidels make an attack upon a city or territory, the repulsion of them is obligation for all the Muslims, and, therefore a wife may go forth without the permission of her husband, and a slave without the leave of his master. But this is when there is a general summons ; as, before that, it is not lawful for a woman or a slave to go forth to make war without the permission of the husband or the master.

4. Extraordinary exactions .

If there is any fund in the Public Treasury, and so long as the fund lasts, any extraordinary exactions i.e., donations, rewards, etc., for the support of the warriors is abominable.

But if, there are no funds in the Public Treasury, the Imam should not hesitate in leveling contributions for the better support of the warriors. A confirmation of this is found in what is related of the Holy Prophet, that he took various armours, and so forth, from Safwan (Abu Daud, Nasai and Ahmed) and similarly Omar took property from married men, and bestowed it upon the unmarried, in order to encourage them, and enable them to go forth to fight with cheerfulness ; and he also used to take the horses from those who remained at home, and give them to those who went forth to fight, on foot. (Abu Daud)

CHAPTER 2

MANNER OF WAGING THE WAR *

(Hidayah, Kitab-al-Siyar, Baab Kaifiyat-il-Qitaal)

1. Acceptance of faith or payment of Jizyah .

When the Muslims enter any enemy's country, and besiege the cities and have strong hold of the infidels, it is necessary to invite them to accept the faith, because as related by Ibne Abbas the Holy Prophet "never attacked without previously inviting them to accept the faith." (Haakim)

But if, they accept the faith, it will be unnecessary to fight against them, because that which was the purpose of the war is achieved without war. Moreover the Holy Prophet, has said that, "we are directed to make war upon men until such time as they shall confess there is no god but Allah ; but when they repeat this, creed, their persons and properties in protection." (Bukhari and Muslim) But if they do not accept the call to the faith, they should then be called upon to pay Jizyah, or Capitation tax ; because the Holy Prophet directed the commanders of his armies so to do (Aainul Hidayah) ; and also, because by submitting to this tax, war is forbidden and terminated, upon the authority of the Qur'an. This call to pay the Jizyah, or the Capitation tax, however, is in respect of only those from whom the Jizyah or Capitation tax is acceptable ; because as to the apostates and the idolaters of Arabia, to call upon them to pay the tax will be useless, as nothing is acceptable from them but accepting the faith, as it is thus commanded in the Holy Qur'an.

If those who are called upon to pay the Jizyah or Capitation tax agree to do so, they then will become entitled to the same protection, and subject to the same rules as the Muslims, because Ali has declared that, "Infidels agree to pay

* Mishkat, Vol. II, Baab-ul-Qitaal Fil Jihaad, pp. 242 to 246.

Jizyah or Capitation tax only in order to render their blood the same as the Muslim blood, and their property the same as the Muslim property."

2. Call to faith should be before making the war .

It is not lawful to make the war against any people who have never before been called to the faith, without previously asking them to accept it ; because the Holy Prophet had so instructed his commanders, directing them "to call the infidels to the faith." (ibid)

3. Attack without previous call to faith

If a Muslim attacks the infidels without previously calling them to the faith, he will be an offender, because this is forbidden but yet, if he does attack them before thus inviting them, and kills them, and takes their property, neither fine, expiation, nor atonement will be due against him.

4. People to whom call to faith has already come .

It is better to call to the faith the people to whom a call has already come, so that they may have the more full and ample warning ; but yet this is not necessary, as it appears in the Naql-e-Saheeh that the Holy Prophet attacked and despoiled the tribe of Banu Mustlaq by surprise ; (Bukhari and Muslim) and he also agreed, with Usamah, to make a predatory attack upon Ubna (Abu Daud), at an early hour, and then to set it on fire ; and such attacks were not preceded by a call.

5. Refusal to accept the faith, or pay the Jizyah .

If the infidels, after receiving the call, neither consent to it nor agree to pay Jizyah or capitation tax, it will then be binding on the Muslims to call upon Allah for assistance, and to make war against them. And after doing so, the Muslims should then,

with Allah's assistance, attack the infidels with all manner of warlike engines, as the Holy Prophet did to the people of Tayeef, (Tirmizi) and should also set fire to their habitations, the Holy Prophet fired at Baweera, (Bukhari and Muslim) and should inundate them with water, and tear up their plantations, and tread down their grain.

6. Use of missiles in the war .

There is no objection to shooting the arrows, or using such other arms, against the infidels, even though there may happen to be among them a Muslim by way of bondage or of business.

7. Even though the infidels place Muslim children or captives in the front .

If the infidels, during the battle, make shields of Muslim children, or of Muslims who are prisoners in their hands, still there is no reason, on that account also to refrain from the use of missile weapons. It is however, necessary that the Muslims, in using such weapons, should aim at the infidels, and not at the children or the captives.

Yet there will also be neither fine nor expiation due against the warriors on account of such of their arrows or other missiles which may hit the children or the Muslims.

8. Carrying Qur'an and women into the field .

There is no objection to the warriors carrying their Qur'an and their women along with them, where the Muslim force is large enough, to such an extent as may afford a protection from the enemy, and not to feel any danger from them.

But if the force of the warriors is small, such as is known as Sarreeyah, so as not to afford security from the enemy, their carrying their women or Qur'an along with them will be reprobated.

But if a Muslim goes into an infidel camp, under a protection, there will be no objection to his taking his Qur'an along with him, provided these infidels are such as fulfil their promises.

9. Aged women, but not young women .

It is lawful for aged women to accompany an army, to perform such business as suits them, such as dressing victuals, supplying water, and preparing medicines for the sick and the wounded. But as regards the young women, it is better that they stay at home, as this may prevent perplexity or disturbance.

10. Women are not to fight .

The women, however, should not engage in the fight, unless there occurs absolute necessity. Further it is not laudable to carry young women along with the army, for the purpose of sexual satisfaction, or for service. But if, the necessity be very urgent, female slaves may be taken, but not the wives.

A wife should not engage in the fight but with the permission of her husband, nor a slave, but with the permission of his owner, unless on account of necessity, where an attack is made by the enemy.

11. Treaties should not be broken .

Muslims are not to break treaties, or to act unfairly in respect of war, or to disfigure people by cutting off their ears and noses, and so forth ; because as to what is narrated of the Holy Prophet, that he disfigured the Oormeans, it was abrogated by subsequent prohibitions. (Ainul Hidayah)

12. Women, children, or disabled persons, should not to be slain .

Similarly, Muslims are not to kill the women or children, or men aged, bed-ridden, or blind, or the paralytic or those who are deprived of the right hand, or of the right hand and the left foot.

But still, if any of these person is expert in the war, or if a woman is a queen or chief, it is permissible to kill them, because they are known to molest the servants of Allah. So also, if such persons as mentioned above attempt to fight, they may be killed, for the purpose of removing evil, and because fighting renders the killing as "Mubah", i.e., permissible.

13. Lunatics not to be killed unless they fight .

A Lunatic should not be killed unless he fights, because such a person is not responsible for his faith. But still, if he is found fighting it is necessary to kill him, for the removal of evil.

14. Lunatic and Infant prisoners .

It may also be noted that infants or lunatics may be killed so long as they are actually engaged in the fight, but it is not allowed to kill them after they are taken as prisoners ; as opposed to the case of others, who can be killed even after they are taken, as prisoners, if they are liable to punishment, because they are responsible for their faith.

15. Fighting with one's own father .

It is abominable for a Muslim to begin fighting with his own father who happens to be among the infidels ; nor should he kill him ; because Allah has said, in the Qur'an, "Honour your father and your mother." (Ch. 29, 'Ankaboot, verse 8)

If, also, the son finds the father, he should not kill him himself, but should hold of catch him in view until some other comes and kills him.

But if, the father attempts to kill the son, and the son is unable to repel him except by killing him, the son should not hesitate to kill him.

CHAPTER 3

MAKING PEACE ; AND THE PERSONS ENTITLED TO GRANT PROTECTION *

(Hidayah, Kitab-al-Siyar, Baab-ul-Mawada'ah Wa Mann Yajuz Amanahu)

1. Peace may be made .

If the Imam makes peace with the "Harbi", i.e., aliens or with any particular tribe or body of them, and thinks it to be beneficial for the Muslims, there should be no hesitation ; because it is said, in the Holy Qur'an that, "If the infidels are inclined to peace, you should also agree thereto ;" (Ch. 8, Anfaal, verse 61) and also, because the Holy Prophet, in the year of Hudaibiah, made a peace between the Muslims and the people of Mecca for the period of ten years. (Abu Daud, Ahmed)

But it may also be noted that it is not absolutely necessary to restrict the peace to the term mentioned above namely, ten years, because the purpose for which peace is made may sometimes be more effectually achieved by extending it to a longer term

2. Peace may be broken .

If the Imam makes peace with the aliens for any term, say, ten years, and then thinks that it will be most beneficial for the Muslims to break it, he may in such a case lawfully renew the war, after giving them due notice.

It may be noted that giving of due notice to the enemy is necessary, in such a manner that treachery may not be induced, because this is forbidden. It is also necessary that such a delay

* Mishkat, Vol. II, Baabo Hukm-il-Usara, pp. 246 to 252 ; Baab-ul-'Aimaan, pp. 252 to 255 ; Baab-us-Sulha, pp. 270 to 274.

should be made in renewing the war with them as may allow intelligence of the peace being broken off to be universally received among them ; and for this such a time suffices as may admit of the king or chief of the enemy communicating the same to the different parts of their dominion, since, by such a delay, the charge of treachery is avoided.

3. Attack without notice .

If the infidels act with perfidy in a peace, i.e., break the treaty of peace by any hostile act it is in such a case lawful for the Imam to attack them without any previous notice. (Behaqi)

But if only a small party of them violates the treaty, by entering the Muslim territory and there committing robberies upon the Muslims, this will not amount to breach of treaty. If, moreover, if this party is in force, so as to be capable of opposition, and openly fight with the Muslims, this will be a breach of treaty, in respect of that party only, but not as regards the rest of their nation or tribe ; provided this party has violated the treaty without any permission from their prince.

But if they have made their attack by permission of their king or chief, the breach of treaty will be regarded as by the whole, all being virtually implicated in it.

4. Peace against property .

If the Imam makes peace with aliens in return for property, there is no scruple. This, however, will be permissible, only where the Muslims stand in need of the property thus to be acquired.

It may be noted that if the Imam receives such property by sending a messenger, and make peace, without the Muslim troops entering the enemy's territory, the object of disbursement

of it will be the same as that of Jizyah or Capitation tax ; i.e., it is to be spent upon the warriors, and not upon the poor. If, however, the property is taken after the Muslims have invaded the enemy, in such a case it will be booty i.e., a plunder, one fifth of which will go to the Imam, and the remainder will be divided among the warriors .

5. War against apostates .

It is binding on the Imam to keep peace with the apostates, i.e., tribes which apostate and desert the Muslim cause, as occasionally happened in the earlier times of Islam and not to make war against them, so that they may have time to consider their situation, as it is to be hoped that they may again return to the faith. But it is not lawful to take property from them. If, however, the Imam takes property from them, it is not binding on him to return it, as such property is not in protection.

6. Muslims not to purchase a peace .

If infidels harass the Muslims, and offer them peace against property, the Imam should not accede thereto, as this will be a degradation of the Muslim honour, and disgrace would be attached to all the parties concerned in it. This, therefore, is not lawful, except where destruction is apprehended, in which case the purchasing a peace with property is lawful, because it is a duty to repel destruction in every possible mode.

7. Warlike stores not to be sold to aliens .

The sale of warlike stores to aliens is not permitted ; nor is it allowed to send merchants among them for the purpose of selling their horses and amour ; because the Holy Prophet has forbidden us to sell warlike stores to the aliens, or to carry them to them (Bukhari).

However, to sell them foods and clothing is lawful, in conformity with what is recorded of the Holy Prophet , that he directed Samamah to carry provisions to the people of Mecca for sale, although those people were then the enemies. (Ibne Ishaq, Hishshaam, Waaqidi)

Section

PROTECTION GRANTED BY A SINGLE PERSON
(*Fasl iza Aamin Rajulum Hurrah Wa Imratum*)

1. Protection granted by a single person .

If a free person grants protection to an infidel, or to a body of infidels, or to the people of a fort or city, the protection is valid, whether the person granting it is a man or a women ; and no person of the Muslims is then entitled to molest them ; because the Holy Prophet has said, "If the least among the Muslims grants protection to an infidel, and makes a contract with him, it binds the whole of them to honour such protection the and contract, and not to break it ;" (Ibne Majah) and the learned ones agree that the word adna [the least,] in this saying, means a single person.

If any one Muslim grants protection to an infidel, the same is proved against and is binding upon all other Muslims, and no Muslim is entitled to finish it, except where it has an evil motive, in such a case it can be finished, and knowledge of it should be communicated to the infidels, in the same manner as if the Imam himself has granted the protection, and then finds it advisable to finish it, in which case he will be entitled to finish it, giving the infidels notice of the annulment.

The Imam should also reprehend any person who singly gives a protection, where the protection is of an evil motive, as he has in such a case presumed to set his own judgment above that of the Imam, and has relied upon his own understanding.

2. Protection granted by a Zimmee .

If a Zimmee grants protection to an alien infidel, his protection is not valid, because the acts of a Zimmee are liable to doubt, as regards the granting of protection, on account of his infidelity. Besides, a Zimmee has no authority in respect of the Muslims.

3. By a Muslim residing among infidels .

If a Muslim is residing among the infidels, as a captive or as a merchant, and grants protection to the aliens, his protection will not be valid.

4. By a proselyte who has not yet returned to the Muslim territory .

If a person who has embraced the Islamic Faith in the country of the aliens, but who has not yet returned to the Muslim territories, grants protection to the infidels, this protection will not be valid.

5. Protection granted by a slave .

If a Muslim slave grants protection, it is not valid according to Imam Abu Hanifah except where his master has permitted him to engage in the war.

But Imam Muhammad says that the protection granted by a slave is valid, and this is the opinion of Imam Shaafe'ee, and Imam Abu Yusuf also agrees with him, according to one tradition. But according to another tradition, his opinion is the same as that of Imam Abu Hanifah.

6. Protection granted by a boy .

If a boy of immature understanding grants protection to an infidel, his protection, like that of a lunatic, will not be valid.

But if the boy is of mature understanding, but not allowed to engage in the war, then as regards his protection there is a difference of opinion is the same as mentioned above in respect of the slave permitted to engage in the war. But if, such boy is permitted to engage in the war, his protection will be valid, and this is approved.

CHAPTER 4

THE BOOTY, AND ITS DIVISION *

(*Hidayah, Kitab-al-Siyar, Baab-ul-Ghana'im Wa Qismatoha*)

1. Conquered Territory.

If the Imam conquers a territory by force of arms, he will be at liberty to divide it among the Muslims, in the same manner as the Holy Prophet divided Khaybar among his followers : , or, he may leave it in the hands of the original owner, exacting from them a Jizyah or capitation-tax, and imposing a tribute upon their lands, in the same manner as Umar did in respect of the people of Iraq.(Bukhari)

Such is the law in respect of immovable property. But as regards the moveable property, it is not lawful to leave it with the infidels, as no mention is made of it in the sacred writings.

If the Imam relinquishes to the inhabitants of the territory their lands and persons, it is necessary for him to leave for them such portion of their moveable property as may enable them to perform their business, and cultivate their lands, lest abomination be induced ; as if he does not leave for them thus much property, it will be abominable.

2. Captives .

The Imam, as regards the captives, has it in his discretion to kill them, because the Holy Prophet also put some of the captives to death, (Bukhari) and also, because killing them terminates finishes wickedness; or, if he chooses, he may make them slaves, because by enslaving them the evil is remedied, and

* Qur'an, Ch. 8, Anfaal, verses 1 and 41 ; Mishkat, Vol. II, Baabo Qismat-il-Ghana'im Wal Ghulube Feeha, pp. 255 to 258 ; 'Ainul Hidayah Vol. II, pp. 643 to 664.

at the same time that the Muslims also get an advantage ; or, if he pleases, he may release them so as to make them freemen and Zimmes, according to what is recorded of Umar ; but it is not lawful so to release the idolaters of Arabia, or apostates, because there no option in respect of them except acceptance of Islam or to be killed.

It is not lawful for the Imam to return the captives to their own country, as this will amount to strength the infidels against the Muslims.

If the captives become Muslims, the Imam should not put them to death, because the evil of them is here finished without killing them. But still he may lawfully make them slaves, after their conversion. But it will be otherwise if the infidels become Muslims before their capture.

3. Exchange of captives .

It is not lawful to release the infidel captives in exchange for the release of the Muslim captives from the infidels, according to the first view of Imam Abu Hanifah.

But according to Imam Abu Yusuf and Imam Muhammad, it is lawful, and the same is also the opinion of Imam Shaafe'ee, to which Imam Abu Hanifah also subsequently submitted, because the Holy Prophet himself released one infidel captive against the release of two Muslims captive by the infidel; (Muslim, Abu Daud, Tirmizi)

4. Converted captive .

If a captive becomes a Muslim in the hands of the Muslims, it will not be lawful to release and send him back to the infidels in return for their releasing a Muslim who is a captive in their hands, because no benefit can result from such transaction. But if, the converted captive agrees to it, and there is no expectation of his apostatizing, the releasing of him in exchange for a Muslim captive will be a matter of discretion.

5. Favour upon captives released .

It is not lawful to confer a favour upon the captives by releasing them, without receiving anything in return, or their becoming Zimmees, or being made slaves.

6. Cattle and baggage .

If the Imam wants to return from a hostile country the Muslims territory, and if he happens to have along with him different cattle, such as oxen, camels, etc., and he is not able to convey them the Muslim territory, he is entitled to kill and burn them ; but he should not hamstring them, or turn them loose.

7. Division of Booty .

The Imam should not distribute the booty in the country of the enemy, but should make the distribution of it in the Muslim territory.

8. Right of the warrior and the auxiliary .

In sharing the booty, the warrior and the auxiliary who are present with the army, have an equal claim.

9. Reinforcements .

If reinforcements join the army in the enemy's country, before the booty is brought into the Muslim territory, they are entitled to a full share of the booty.

10. The followers .

The followers of the army have no right in the booty, unless they actually engage in the fight with the infidels.

11. In case of defect of carriages .

If the Imam is not possessed of carriages sufficient for the carrying the booty to the Muslim territory, he should distribute

it among the troops, giving to each person his share, in the manner of a trust, until they bring it into the Muslim territory, when he should take it back from them, and again make a distribution of it.

12. Sale of Booty .

It is not lawful to sell the booty while in the enemy's country, or before it is regularly distributed, because, until then, it is not the property.

13. Death in enemy's country precludes the right to booty.

If a warrior dies in the country of the enemy, he has no right to the booty ; but if he dies after the booty is brought into the Muslim territory, his share to go to his heirs.

14. Eatable articles, etc.,

There is no objection if the troops feed their cattle by the booty such as grain, date while in the country of the enemy, nor to them if they eat such booty which is fit for the food, such as bread, oil, etc.,

15. Wood taken as Booty .

There is no objection to the warriors if they use the wood, seized as booty in the country of the enemy. It is also lawful for them to make use of the oil, such as oil of olives, and also grease, to soften the hoofs of their cattle.

16. Sale of food, etc., allowed to be used .

It is not lawful for the warriors to sell the food, forage etc,. But it may be noted that the prohibition of sale implies that it is not at all lawful for the troops to sell these articles in return for

either gold, silver, or effects. But if, they sell them for gold, silver, or effects, it is necessary on them to lodge the price along with the rest of the booty, because such price is a thing held in partner-ship by the whole army.

Similarly, it is not lawful to give these articles in return for provisions or clothing, without necessity. But if a necessity for provision or clothing arises, these articles in question may also be lawfully given in return for these necessaries.

17. Booty cannot be used .

It is abominable for the troops, without necessity, to use the cloth or other similar articles of booty, before the regular distribution, because these articles are, until then, held in partnership.

But if, the troops are in need of cloth, cattle, or other articles, the Imam should distribute these among them, even though it happens in the enemy's country.

There is, however no difference between the arms and armour ; and the cloth or other articles, as regards the application of the above rule, because if any of the warriors are in need of them, the use is allowed to him, and if all the troops are in need of weapons and accoutrements, they should be distributed among them.

But it will be, in the case of a want of male or female slaves, because no distribution can be made of the captives on any plea of necessity.

18. An alien becoming a convert .

If a hostile infidel becomes a Muslim in the hostile country, his person is his own, that is, he cannot be made a slave. Similarly, his infant children also belong to himself, because they

also are to be held as Muslims, in dependence of their father. Such of his property, also, as is in his hands is his own ; because the Holy Prophet has said "whoever becomes a Muslim, and is possessed of property, in his own hands, such property belongs to him." (Abu Daud, Ahmad). Similarly such of his property as is a trust in the hands of a trustee, whether a Muslim or a Zimmee, is also reserved to him.

19. His lands .

If the Imam conquers a country by the force of arms, the lands which were the property of one who has embraced the faith become the property of the public treasury.(Maalik, Ahmed)

20. Use of forage or provisions after coming out of the enemy's country .

Upon the Muslim army coming out the enemy's country, it becomes unlawful for the troops to feed their cattle with forage belonging to the booty ; and, similarly, it is unlawful for them to eat of such food as is a part of the booty.

If, after coming into the Muslim territory, there remains with any of the troops any part of the food or forage of booty, it should be returned into the stores of the booty if the general distribution of it has not yet taken place.

Moreover if, the forage or the food remains with any one after the general distribution of the booty, and the possessor is rich, he should give it in alms. But if he is poor, he may use it, because the food or forage will then be a Luqtah, or trove property, as the restoration of it to the troops has become impossible.

If, also, any person uses the food or the forage after coming into the Muslim territory, and before the booty is distributed, it is necessary for him to pay the value thereof into the booty ; or, where the booty has been distributed, he should, if he is rich, give the value in alms. But if he is poor, nothing will be due from him, as the value of a thing is substitute for the thing itself , and is therefore subject to the same rule.

Section (1)

MANNER OF THE DIVISION OF THE BOOTY
(*Fasl Fee Kaifiyat-il-Qismatuh*)

1. One fifth for the State, and four fifths for the troops .

In distributing the booty, the Imam should set apart one fifth of the whole, and distribute the remaining four fifths among the troops, as it was thus the Holy Prophet divided it. (Tabrani)

2. Share of a horseman and that of a foot soldier.

The share of a horseman is double of the share of a foot soldier, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that the share of a horseman is three times more that of a foot solider, and this is also the opinion of Imam Shaafe'ee, because it is reported by Abdullah Ibne Umar that the Holy Prophet gave to the horseman three shares, and one share to the foot solider. (Bukhari, Muslim, Abu Daud, Tirmizi, Ibne Majah), due to the reason, that the right to the booty is in proportion to the duty and the labour, and the horseman performs three several duties ; first, Kirr, or attack ; secondly, Firr, or retreat, made by way of stratagem, or with a view to return to the charge with increased violence ; and thirdly, Isbaat, or standing firm in one place ; whereas the foot solider performs only one duty, namely, Isbaat or standing in his post.

The argument of Imam Abu Hanifah is that Abdullah Ibn Abbas has reported that the Holy Prophet gave to the horseman two shares, and to the foot soldier only one share (Tabrani and Dara Qutni). Now this is irreconcilable with what is reported by Abdullah Ibne Umar, and therefore, there appears to be a contradiction between two acts of the Holy Prophet ; and this being the case, the saying of the Holy Prophet is to be followed that is "to the horseman belongs two shares, and to the foot soldier "one share." Ibn Umar, moreover reported, that the Holy Prophet gave three shares to the horse-man and one to the foot soldier ; and also, in another place, that he gave to the horseman two shares, and to the foot soldier one share ; and as these two accounts are contradictory, a preference is to be given to the narration of another person, namely, Ibne Abbas. ('Ainul Hidayah).

It may be reported, that nothing more is to be allowed to a horseman than the share on account of one horse, although he has along with him two horses, or more.

It is also proper to note that a Birzoon, an Arab, an Hoojeen, and a Mokarrif, are all equally entitled to claim to booty.

3. If the horse is killed.

If a person enters the enemy's country as a horseman, and his horse is afterwards killed, he will still be entitled to a horseman's share of the booty. But if a person enters the enemy's country on foot, and then purchases a horse, he will be entitled to a foot soldier's share only.

4. Horseman sometimes also fighting on foot .

If a person enters the enemy's country as a horseman, and afterwards fights on foot, on account for wants of space, he will be entitled to a horseman's share, according to all our jurists.

If, also, he enters the enemy's country as a horseman, and thereafter sells his horse, or gives it away, or hires or pledges it, he will be entitled to a horseman's share, according to what Imam Hasan has reported from Imam Abu Hanifah regard is to be had to the station in which he went forth. But according to the Zahir Rawayat, he will in such a case be entitled only to share as a foot solider, because his disposing of his horse in any of the ways mentioned here shows that he did not go forth with a view to fight as a horseman.

If a person sells his horse during the war, his share, which is a horseman's share, does not drop. But some hold the rule to be the same, if he sells his horse during the war. But the more approved view is that he will not in such a case be entitled to a horseman's share, because the sale here shows it as a business, but not if he waited until the war began, with a view to enhance the price of his horse.

5. Slaves, woman, children, or Zimmees .

There is no share of the booty to be allotted to the slaves, women, children, or Zimmees ; but yet it is necessary for the Imam to give something to them, such amount as he may deem advisable ; because the Holy Prophet, although he did not fix any share for women or children, yet was used to allow them a small part ; and also, because the Holy Prophet once demanded the aid from a certain party of Jews against another party of the same people, and yet did not allow them any thing in the manner of a share or lot. A Mukatib is also in the same position as an absolute slave in this matter.

It may be noted, that this small allowance out of the booty is not paid to a slave, except where he actually fights. Similarly, this allowance is not paid to a woman unless she attends the sick and the wounded person and prepares their medicines. Similarly also this allowance is not paid to a Zimmee

unless where he fights, or where he acts as a guide ; and in this last case it is lawful to pay him even more than the share of a Muslim, if his acting as a guide is attended with any important advantage. But when he only fights, what is paid to him should be less than that a Muslim's share.

6. Rules relating to the "Khams".

The Khams, or fifth, of the booty, should be divided into three equal portions, one portion for orphans, one for the poor, and one for the travellers.

If one or two particular persons enter a hostile country, with a view to pillage, without authority from the Imam, and capture any property, it will not be subject to the Khams.

But if one or two particular persons enter a hostile country, by authority of the Imam, and capture any property, there are two opinions concerning it; but the generally accepted opinion is that one-fifth will be deducted from it.

If a party enters a hostile country, by force, and captures any property, what they capture will be subject to the Khams, even though they enter without the authority of the Imam.

Section (2)

GRATUITOUS GRANTS
(*Fasl Fil Tanfeel*)

1. Gratuities to be occasionally bestowed .

It is laudable for the Imam to give gratuities in time of war, and by means thereof to encourage the troops to fight, or more properly to make them zealous in fighting, by declaring for example that, "whoever kills an infidel will have his garments," and so forth ; or, by promising to any particular body of troops,

that, "I have allotted you one-fourth of the booty, after deducting the one-fifth." Allah have commanded his Prophet in the Qur'an, saying , that, "excite the believers to battle" (Ch. 2, Anfaal, verse, 65) ! and giving a gratuity in the manner mentioned is one way of exciting them. It may be noted that gratuity is sometimes held forth in the manner mentioned above, and sometimes in another manner, as if the Imam to declares "Whoever finds anything, the same will be his. But it is, not laudable in the Imam to give the whole of the booty in gratuity, because that is destructive to the right of the troops, and if, he gives the whole, in gratuity, upon any particular party or division of the army, it will be lawful, because the management of the booty is entrusted to the Imam, and he may sometimes deem it advisable thus to give gratuity of the whole.

But it will not be lawful for the Imam to give any gratuity after the booty is secured within the Muslim territory, because the right of others in it is then confirmed. But if, he sees it fit, he may give gratuity out of the Khams, or the reserved one-fifth, because in that the troops have no right.

2. Rules in respect of the personal property of the killedone.

If the Imam does not give in gratuity the "Salab" or personal property of the one who is killed, to the killer, it will become a part of the general booty, in which the killer and others will have all an equal share.

By "Salab" is understood whatever may be found upon the person of the killed, such as clothes, weapons, and armour ; and also the animal upon which he rode, together with the equipage, such as the saddle and so forth, or whatever may be found upon him in his girdle or pockets, such as a purse of gold and so forth ; but any thing beyond these is not the "Salab" ; nor is any thing so which is carried upon another animal by his servant.

3. Gratuity does not become a property until it is brought into the territory .

It is a rule, in respect of gratuity, that the right of others in whatever may be so given is terminated ; but yet it does not become the property of the person to whom it is given until it is secured within the Muslim territory ; and therefore, if the Imam declares that, "whoever finds a female slave, she will be his," and a Muslim thereafter finds a female slave, and asserts his right in her, still it will be not lawful for him to have sexual intercourse with her, or to sell her, in the hostile country. This is according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad says that he may lawfully do either.

CHAPTER 5

CONQUESTS OF THE INFIDELS

(*Hidayah, Kitab-al-Siyar, Baab Isteelaa Wal Kuffaar*)

1. Right of Infidels in the property they gain by conquest .

If infidels of Turkistan conquer infidels of Rome, and make captives of them or seize their property, they are the rightful owner of it and if Muslims thereafter conquer those infidels of Turkistan, whatever property of the infidels of Rome they may find with these infidels of Turkistan will be lawful to them.

Similarly, if infidels get possession, by conquest, of the goods of the Muslims and secure the same i.e., carry them into their own country, they will be the rightful owner thereof.

It may be noted, that if the Muslims after-wards subdue the infidel territory, and the original owners of the property in question find it before the chief has made the distribution among the troops, such property will be given back to the owners without any return. But if they find it after the distribution, they will be entitled to take it upon payment of its value; because the Holy Prophet, in a similar case, said to the owner of a property that, "if you find your property before the distribution, it is yours without any return ; and if, after distribution, it will be your's for the value.

If, also, a merchant goes into the infidel territory, and there purchases property which had been plundered from the Muslims, and bring it into the Muslim territory, the former owner has it in his choice either to take the property from the merchant, paying to him the price for which he had purchased it, or to leave it ; but he is not at liberty to take the property from the merchant

without a return, as this will be injurious to him, as he obtained possession of it by paying the value. The rule here laid down is therefore an act of tenderness to both. Moreover if, the merchant had purchased the property by giving other property for it, the former owner will be entitled to take it upon paying the value of such property ; and if the infidels have made a gift of the property to the merchant, the former owner will be entitled to take it upon paying the value.

But if, the merchant had purchased it for less than its quantity, or in return for something of a different kind, or for an article of the same kind, but in a state of decay, in either of these case the former owner will be entitled to reclaim it in return for the like of whatever the merchant had purchased it with.

2. Slaves of the Muslims captured by the infidels .

If the infidels make captive and take to their own country the slave of a Muslim, and any person thereafter purchases and brings him back into the Muslim territory, and any one after that puts out the slave's eyes, and this person gets the fine, the former owner is entitled to reclaim the slave in return for the price for which this person had purchased him from the infidels, but he should not deduct anything on account of the eyes, because the eye-sight is a natural quality, or sense, and the senses are not estimable at any price ; neither is he entitled to take from this person the amount of the fine on account of the eyes, because the slave, at the time of putting out his eyes, was the lawful property of the person in question, from whom he took the fine, as being the owner.

If the infidels capture and take the slave of a Muslim their own territories, and a person there, purchasing him for one thousand Dirhams, brings him back into the Muslim territory, and the infidels again capture him and take him to the infidel territory, and another person then, in the same manner, purchases him for one thousand Dirhams, and brings him back into the

Muslim territory, in such a case the original owner cannot claim the slave from the second purchaser, because, when captured and taken a second time, he was not his property, but the first purchaser may demand the slave from the second purchaser for the price at which he had purchased him from the infidels, because the slave, when taken the second time, was his property and then, if the original owner chooses, he may take the slave of the first purchaser on paying him two thousand Dirhams, because the slave has come to the latter at that sum ; the original owner may, therefore, if he pleases, take him for two thousand Dirhams.

It is a rule that the original owner is not entitled to take the slave from the second purchaser, where the first purchaser happens to be absent, in the like manner as he is not entitled to take him from the second purchaser where the first purchaser is present.

3. Capture of the Mudabbirs, Umm-e-Walaads or Mukatibs by the infidels .

If the infidels attack and conquer a Muslim territory, still they do not, by conquest and conveyance into the infidel territory, become owners of the Mudabbirs of Muslims, nor of their Umm-e-Walaads or Mukatibs, or of freemen, whether Muslims or Zimmees ; but the Muslims, on the contrary, by conquest of the infidel territory, become owners of all those.

4. Capture of an absconded slave by the infidels .

If the slave of a Muslim enters into the infidels territory, and the infidels make him captive, they will not become his owners, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad say that they will become the owners.

It may be noted, that as the slave, in the present case , is not the property of these infidels, the original owner is entitled to reclaim him without any return.

5. Capture of stray animal by the infidels .

If a camel, which is the property of a Muslim, strays into the country of the infidels, and they lay hands upon it they will become the owners of it.

If, also, a person purchases the camel, and brings it back into the Muslim territory, the original owner will be entitled to take it upon paying that person the price for which he had purchased it.

6. A slave absconding with property .

If the slave of a Muslim absconds into the infidel territory, carrying with him a horse, or other goods, and the infidels capture the whole, and a person thereafter purchases the whole, and brings them back into the Muslim territory, the original owner will be at liberty to take his slave without any return, and to take the horse or goods upon paying the price for which they had been purchased. This is the view of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad say that the original owner will be at liberty to take, in return for the price, the slave, as well as the accompanying property.

7. A Muslim slave purchased by an infidel .

If an infidel alien comes under protection into the Muslim territory, and there purchases a slave who is a Muslim, and carries him into the infidel territory, the slave will become free, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad say that he will not become free.

8. Slave of an infidel, becoming Muslim .

If the slave of an infidel alien becomes a Muslim, and then comes into the Muslim territory, or the Muslims conquer the infidel territory, such slave will be free ; and similarly, if the slave of an infidel alien embraces the faith, and comes to the Muslim camp, he will be free ; because of what is recorded, that certain slaves of the people of Ta'if, having embraced the faith, came over to the Holy Prophet, and he declared them as free, saying that, "thoese are the freedmen of Allah" (Ahmad, Behaqi, Tabrani, Abu Daud).

CHAPTER 6

THE MUSTAMINS *

(*Hidayah, Kitab-al-Siyar, Baab-ul-Mustamin*)

1. A Muslim residing under a protection in a hostile country.

If a Muslim goes as a merchant into a hostile country, (i.e., Darul Harab) it will not be lawful for him to molest the inhabitants either in person or property, because he, in his acceptance of a protection, has undertaken to observe this forbearance towards them. Any molestation of them, therefore will be a breach of agreement ; and a breach of agreement is prohibited.

It is therefore not lawful for him to molest them in person or property, unless where the ruler of the country breaks the engagement in respect of him, by capture his property, or putting him into the prison ; or where others do so with the ruler's knowledge, he not preventing them, in which case it will be lawful for the merchant to molest them in person and property, as here the breach of contract is on their part.

It may be reported that if the merchant breaks his agreement with the people of the country, and takes any of their property, and brings the same into the Muslim territory, he will become the owner of it ; but still in his possession of it there will be an abomination, because the property has been obtained by a breach of treaty, and this is the cause of abomination in respect of that property ; and hence the merchant should be directed to give it in alms.

* 'Ainul Hidayah, Vol. II, pp. 670 to 678.

2. No decree can be passed in a Muslim court in respect of the transactions between a Muslim and an alien, or between two aliens, in foreign country .

If a Muslim, having got a protection, goes into a foreign country, and there purchases goods of an alien upon credit, or disposes of his goods to the alien upon credit, or usurps the property of an alien, or an alien usurps his property, and he thereafter returns into the Muslim territory under a protection, in none of these cases will the Qazi be entitled to pass any decree against one of these in favour of the other.

Moreover, if both of those persons are aliens, and one of them acts by the other as above described, and they both afterwards come, under a protection, into the Muslim territory, the rule will be the same. But if both become Muslims, and then come into the Muslim territory, the Qazi will be entitled to pass a decree in respect of the debt, because the debt of the one to the other is a lawful debt, as having been voluntarily engaged in. But if, one of them has usurped the property belonging to the other, the Qazi cannot pass any decree whatever, according to what was before observed, that "the usurper becomes the owner of what he has usurped."

3. A Muslim usurping the property of an alien who afterwards becomes a Muslim .

If a Muslim, having got a protection, goes into a foreign country, and there usurps the property of an alien, and the Muslim and the alien having become a Muslim, come into the Muslim territory, a notice is to be issued to the Muslim usurper, in the manner of a decree, directing him to give back the usurped property to the converted alien ; but the Qazi should not issue any positive decree upon the subject, because of the reason before mentioned, that the usurper becomes owner of what he has usurped.

The notice in the manner of a decree is because the article usurped has become the property of the usurper by an invalid appropriation, on account of the breach of agreement, which is not lawful.

4.One Muslim slaying another Muslim in a foreign country

If two Muslims go under protection into a foreign country, and one of them kills the other, either wilfully or accidentally, no retaliation will be incurred ; but the fine of blood will be due from the killer's property, and an expiation will also be necessary from him, where the act was accidental.

5. One Muslim captive killing another .

If two Muslims, are captives in a foreign State, and one of them kills the other, or, if a Muslim residing as a merchant in a foreign country kills another who is a captive there, in either of these cases nothing will be due from the killer, except expiation where the act was accidental. This is according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad say that, in the former case, the fine of blood will be due, whether one of the captives have killed the other willfully or accidentally.

Section

THE ALIENS
(*Fasl Harali Mustamim*)

1. Alien residing in the Muslim territory above a year .

If an alien comes under a protection, into a Muslim territory, the Ruler should not allow him freely to reside there for the complete term of a year, but should give him notice that "if he remains the full year, he will impose Jizyah [capitation-tax] upon him."

2. An alien purchasing and paying the impost on tribute-land

If an alien comes, under a protection, into the Muslim territory, and there makes a purchase of tribute-land, and the tribute thereof is imposed upon him, he will becomes a Zimmee, or a subject.

But he will not, become a Zimmee immediately on the purchase of the land, nor until such time as he under-takes the payment of tribute, as an alien may purchase land by way of business ; but upon becoming subject to tribute, he will also become liable to Jizya, or capitation – tax for the next year, because by submitting to tribute he will become a Zimmee, and hence the term of his Jizya or capitation – tax will be due from the time of his submitting to tribute.

3. An alien woman marrying a Zimmee .

If an alien woman comes, under protection, into the Muslim territory, and there marries a Zimmee or an infidel subject, she will become a Zimmeeah, being a dependant of her husband.

4. An alien marrying a female infidel subject .

If a protected alien marries a female infidel subject, still he will not become a Zimmee, because it is in his power to divorce her, and return to his own country.

5. An Alien returning to his own country and leaving property in the Muslim territory .

If a protected alien returns into his own country, and leaves property in trust with a Muslim or Zimmee, or leaves debt due from them to him, upon going into his own country his blood will become neutral, (i.e. he may be slain without incurring any penalty) because by that act he annuls his protection ; and in respect of such of his property as remains in

the Muslim territory, the rule to which it is subject will depend upon circumstances ; because if the alien, after returning to his own country, is made a captive, or, if an army of Muslim conquests that country, and he is killed, the person indebted to him will become discharged from the debt, and his property left in trust will becomes public property (as Fai i.e., that portion of the booty which belongs to the state).

But if, the person in question is killed, without the Muslim army conquerring the country, or, if he happens to die, in either case the debt or the trust will go to his heirs.

6. Every thing gained from aliens without war .

It may be noted that whenever any property belonging to aliens is seized by the Muslims, without war, it is to be spent in the payment all charges of a public nature, as in case of the tribute. The learned ones define this to be land, (for example,) the owner of which has been ejected by the Muslims, the Jizyah or capitation– tax ; and this property is not subject to the imposition of one-fifth.

7. If an alien, whose family and goods are in the alien country, becomes a Muslim in the Muslim territory .

If an alien comes, under a protection, into the Muslim territory, and his wife and children remain in the alien country, and he has also property there, lying as a trust, some with an alien, some with a Zimmee, and some with a Muslim, and he becomes a Muslim in the Muslim territory, and the Muslims thereafter conquer his country, the whole of his property together with his wives and children, as aforesaid, will be the public property i.e., booty.

But if, the alien in question becomes a Muslim in his own country, and then comes into the Muslim territory, and his wives and children remain in the alien country, and he has also

property there, some in trust with a Zimmee, some with an alien, and some with a Muslim, and the Muslims thereafter conquer that country, in such a case his infant children will be accounted as Muslims, depending on their father, because here they were under his authority at the time of his embracing the Islamic faith, as he was then in his own country along with his children. Such of his property, also, as is in trust with a Muslim or a Zimmee will belong to him, as it was virtually in his possession, the possession of his trustee amounts to the same as his own possession . Anything beyond these will however, be the public property.

8. An alien proselyte killed by a Muslim in the alien territory

If an alien embraces the faith in his own country, and a Muslim kills him, wilfully or accidentally, and he has embraced the faith there, nothing will be due from the killer, except expiation, if the act was accidental.

9. A person killing a Muslim who has no relations, or a foreign proselyte, in the Muslim territory .

If a person kills, inadvertently, a Muslim who has no relations ; or kills an alien who, having come under a protection into the Muslim territory, has there embraced the faith, the fine of blood falls upon the tribe of the killer ; and the killer will owe expiation for the homicide, because, as he has killed a person of protected blood, the rule will be the same as in respect of all protected persons.

It may also be noted that the Imam will take the fine, as the person killed has no heirs.

But if, a person wilfully kills such a Muslim or an alien, it will be at the option of the Imam to put the killer to death, or to exact the fine of blood, because here the killed one is of protected blood, and the killing is willful ; and the relations of the killed person are found either in the whole body of Muslims, or in the Sultan, as the Holy Prophet has said that, "the Sultan is the relation of those who are without relations." ('Ainul Hidayah).

What is here laid down, that "it is at the option of the Imam to exact the fine of blood," means that if the Imam deems fit, he may accept the fine in the manner of composition ; because the law, in a case of willful murder, requires only retaliation ; thus the Imam has the option to accept the fine, as that, in the case here dealt with, is more proper than retaliation. The Imam is therefore authorised to accept composition in property, but he has no authority to totally forgive the killer, because, in the case in question fine or retaliation is the right of the collective body of Muslims ; and the Imam's authority is established for the purpose of guarding the interests of the public; and the remission of their right without some return will amounts to desertion of their interest.

CHAPTER 7

TITHE AND TRIBUTE *

(*Hidayah, Kitab-al-Siyar, Baab-ul-Ushr Wal Khiraaj*)

Note

The term "Tithe" means the "Ushr", which was the tax imposed by the Holy Prophet, and, after him his worthy Caliphs, at the rate of one-tenth of the product of lands ; and the term "Tribute" means the "Khiraaj", which was the tax imposed upon Zimmees. The lands of Arabia proper were the "Ushr" or subject to the "Tithe", and those of Arabia-Iraq were the "Khiraaji", or subject to the "Tribute".

1. Extent and situation of the countries subject to tithe and tribute.

The length of the territory of Arabia Proper is from the banks of the river 'Uzeib to the farthest part of Yemen, which is known as "Mohrah", and the breadth of it is from Bereen, and Rihna, and Raml Allij the borders of Syria ; and the breadth of the territory of Iraq–Arabia is from the 'Uzeib to the back of Hallwan ; and the length of it is from Sa'labah and Aloos to the extreme end of it, which is the fort of Kotchbuk upon the sea side.

The reasons for the former of these two arrangements are twofold. Firstly, the Holy Prophet and the "Khulafa-e-Raashideen", i.e., the first four Caliphs of the Holy Prophet did not take tribute upon the lands of Arabia ; secondly, tribute is substitute for that part of booty which goes to the State, and is therefore not imposed upon the lands of the people of Arabia, in the same manner as the "Jizyah" or capitation–tax is not imposed upon their persons, on account of the reason, that one

* 'Ainul Hidayah, Vol. II, pp. 678 to 683.

condition of imposing tribute upon the land is that the people to whom the land belongs, be established there as infidels, such as the people of Iraq (for example) who were allowed to continue in infidelity, whereas we are enjoined to make war upon the infidels of Arabia till they embrace the faith. The reason for the second arrangement is that Umar, when he conquered Iraq, imposed tribute upon the lands in the presence of all the Companions of the Holy Prophet 'Amr Ibne 'Aas, moreover, when he conquered Egypt, imposed tribute upon the inhabitants and all the Companions of the Holy Prophet in the same manner, agreed to impose tribute upon the people of Syria.

It may be noted, that the lands of the territory of Iraq are the property of the inhabitants, who may lawfully sell or otherwise dispose of them ; because the Imam, whenever he conquers a territory by force of arms, is entitled to re-establish the inhabitants in their possessions, and to impose tribute upon their lands, and "Jizyah" or capitation–tax upon their persons ; and such being the case, the land continues the property of the inhabitants, as was before stated, in dealing with booty.

2. Lands distributed among the Muslims .

Lands, the owners of which become Muslims, or which the Imam divides among the troops, are 'Ushree, or subject to tithe.

3. Lands restored to the conquered ones

But the lands, which the Imam conquers by the force of arms, and then restores to the people of the conquered territory, are Kharaajee, or subject to tribute.

4. General rule for fixing tithe or tribute upon land .

According to Jaame'-as-Sagheer all the land conquered by the force of arms, if watered by canals cut by the 'Ajamees,

is subject to tribute, whether the Imam has divided it among the troops, or restored it to the original inhabitants ; and if there are no canals, but the land is watered by springs, which rise within it, it is 'Ushree or subject to tithe, in either case ; because tithe is peculiar to productive land, that is, land capable of cultivation, and which yields increase ; and the increase produced from it is due to the water. The standard, therefore, by which tribute becomes due is the land being watered by tribute water, namely, river ; and the standard by which tithe becomes due is the land being watered by tithe–water, namely, springs.

5. Waste land, upon being cultivated .

If a person cultivates waste lands, the imposition of tithe or tribute upon it according to Imam Abu Yusuf, is to be determined by the neighbouring soils. In other words, if the neighbouring lands is subject to tithe, a tithe should be imposed upon it, or tribute if they are subject to tribute.

Imam Muhammad says that if a person cultivates waste lands by means of water drawn from wells dug in them, by means of springs which rise in them, or with the waters of the Euphrates or the Tigris, or with the water of any large river or lake which has no exclusive owner, such lands will be subject to tithe and similarly, lands cultivated by means of rain-water. But if he cultivates those lands with the water of canals cut by the kings of Persia, such as the Nosherwaan, and the Yazdgard, they will be subject to tribute.

6. Rates of tribute .

The tribute established and imposed by Umar upon the lands of Iraq was adjusted as follows. Upon every Joreeb * of land through which water runs, that is to say, which is capable of

* i.e., land producing about one hundred and sixty-eight ponds weight of corn. (Lexicons)

Cultivation, one Saa * and one Dirham **; and upon every Joreeb of pasture-land, five Dirhams *** and upon every Joreeb of gardens and orchards ten Dirhams **** ; provided they contain vines and date trees. A Joreeb of land signifies sixty Zirraa *****, of the Persian Zirra, which is seven Qabzas ******. This rule for tribute upon *arable* and pasture lands, gardens, and orchards, is taken from Umar, who fixed it at the rates above mentioned, none contradicting him ; wherefore it is considered as agreed to by all the Companions of the Holy prophet. Upon all land of any other description, such as pleasure-grounds, saffron-fields, and so forth, is imposed a tribute according to ability ; since, even though Umar has not laid down any particular rule in respect of them, yet as he has made ability the standard of tribute upon *arable* land, etc., similarly, ability is to be regarded in lands of any other description.

7. Tribute may be occasionally abated, but cannot be increased beyond the established rate.

If the land be incapable of yielding the established tribute, the Imam should make an abatement ; and it is lawful so to do, where the product falls shore.

According to Imam Muhammad, it is also lawful to exact beyond the established tribute, where the product happens to exceed, judging of a case of increase from a case of deficiency. But, according to Imam Abu Yusuf , it is not lawful to take more than the established tribute and this is approved ; because Umar never exacted anything beyond what was established, upon being informed of any increase of produce. But if, anything is voluntarily given in addition to what is established, it can be accepted.

* About twenty-one pounds sterling ; also a weight of about seven pounds.
** A small silver coin from two-pence to eight-pence-sterling.
*** From ten-pence to two shillings and sixpence sterling.
**** From one shilling and eight-pence to five shillings-sterling.
***** A square yard or cubit
****** Qabza ; a span

8. Failure of the crop causes a remission of tribute .

If tillage is rendered impracticable in the tribute lands, from floods or draughts ; or if, after sowing, the crop fails from any other unavoidable cause, such as locusts, or blights, or violent beats, in any of these cases tribute will not be due from it. If the landholder is unable at all to cultivate the soil, either in a case of inundation, or of a scarcity of water ; and in a case of failure of the crop from other accidents of locusts, blights, and so forth, he is debarred from the advantage of tillage for a part of the year ; in both these cases, therefore, there is no increase (in the degree which constitutes ability, for the whole year ; and it is conditional to the exaction of the tribute that this ability is found for the whole year, in the same manner as increase to the like degree for the whole year is conditional to the payment of Zakaat.

9. Tribute on untitled land .

If a landholder, where no obstruction to cultivation exists, keeps tribute lands untitled, and thus reap nothing from them, tribute will nevertheless be due upon them.

But Imam Abu Hanifah and Imam Abu Yusuf say that if the landholder, being enabled to sow grain of the first quality, sow grain of a second quality, he will be accountable for the highest degree of tribute ; for example, if his ground is capable of producing saffron, and he therein sows lentils, in such a case tribute as for saffron ground will be due from him. Decrees, however, should not be passed to this effect, lest tyrants might be encouraged to oppress the landholder.

10. Tributary continues subject to tribute after conversion to the faith .

If any person subject to tribute becomes a Muslim, tribute will continue to be imposed upon him after his conversion to the faith in the same manner as before.

11. Tribute – land purchased by a Muslim continues subject to tribute .

It is lawful for a Muslim to purchase tribute – lands of a Zimmee ; after which tribute will be taken from the Muslim purchaser as it is said, in the Naql-e-Saheeh, that the Companions of the Holy Prophet purchased tribute – land, and paid the tribute upon it, which proves that it is lawful for a Muslim so to do, and it is not abomination.

12. Tithe is not due from tribute – land .

Tithe is not due from the product of tribute – lands. The Holy Prophet has said that, "Tithe and Tribute are not to be united in the land of Muslims." (Ibne 'Adi)

Tribute is due upon such lands as have been conquered by the force of arms, and tithe, upon the lands the owners of which have voluntarily embraced the faith, and these two descriptions cannot both apply to one soil.

13. Zakaat is not due from tithe or tribute land .

If a person purchases the tithe – land or the tribute – land, by way of business, our jurists say that nothing but tithe or tribute will be due, and that Zakaat will not be due.

14. Second crop causes a second payment of tithe, but not of the tribute .

If tribute – land yields two crops in one year, from a double cultivation, still tribute will not be levied a second time on account of the second crop, as Umar did not levy a second tribute, for a second crop. But it will be otherwise with tithe, as that is repeatedly levied on repeated produce, in tithe–land, because if tithe were not repeatedly levied on account of a repeated crop, the collection of it would be uncertain.

CHAPTER 8

THE JIZYAH (CAPITATION – TAX) *

(*Hidayah, Kitab-al-Siyar, Baab-ul-Jizyah*)

1. Kinds of "Jizyah" or capitation – tax

Jizyah, or capitation-tax, is of two kinds. Viz., (1) that which is established voluntarily, and by mutual agreement, the rate of which is such as may be agreed upon by both parties, because the Holy Prophet entered into an agreement with the tribe of Bany Najraan, (Abu Daud), for twelve hundred pieces of cloth, and not more, and also, because the fixing of tribute in this mode is a mutual act of both parties, and, therefore it is not lawful to swerve from what has been so mutually agreed upon, and (2) that which the Imam himself imposes, where he conquers the infidels, and then confirms them in their possessions properties.

2. Rates of "Jizyah" or capitation – tax .

The common rate of "Jizyah" is fixed upon every rich person a tax of forty-eight Dirhams per annum, or four Dirhams per month ; and if he is in middling circumstance, twenty – four Dirhams per year, or two Dirhams per month ; and upon the labouring poor ones twelve Dirhams per annum, or one Dirham per month.

It may be noted that in charging the "Jizyah" or capitation – tax from the labouring poor ones, it is a condition that the person upon whom it is levied is in a state of health is able to fight for the greater part of the year.

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* Mishkat, Vol. II, Baab-ul-Jizyah, pp. 268 to 270.

3. It is imposed upon Kitabees and Majoosees .

The "Jizyah" or capitation – tax is to be imposed upon Kitabees, because this is mentioned in the Qur'an ; and it is in the same manner to be imposed upon the Magians, because the Holy Prophet imposed "Jizyah" on them (Bukhari).

4. The inhabitants of a conquered country are the property of the State .

If a Muslim army conquers an infidel territory before any capitation – tax is established, the inhabitants, together with their wives and children, are all booty and the property of the State, as it is lawful to make slave all infidels, whether they are Kitabees, Majoosees, or idolaters.

5.No agreement from Arabian idolaters nor from apostates

The "Jizyah" or capitation – tax is not imposed upon the idolaters of Arabia, because their infidelity is particularly atrocious, as the Holy Prophet was sent among them, and manifested himself in the midst of them, and the Qur'an was revealed in their language ; and therefore their depravity is most evident.

Similarly, "Jizyah" or capitation – tax is not to be imposed upon the apostates, as their infidelity is also of an atrocious nature, because they have apostatised and become infidels after they have been led to the faith, and made acquainted with its excellence. Therefore, from them also nothing is to be accepted, except that they either embrace the faith, or be put to death.

6. If conquered they will become public property .

If a Muslim army conquers the idolaters of Arabia, or apostates, their wives and children, will be the booty, and will

become the property of the State ; because Abu Bakr Siddique made slaves of the women and children of the Bany – Hanifah tribe, when they apostatised, and divided those slaves among the troops, and killed such of the men as did not return to the faith.

7. Person from whom the "Jizyah" or capitation – tax is not changeable.

The "Jizyah" or capitation – tax is not chargeable from women or children, nor from the maimed, the blind, the paralytic, or the aged ones.

It is noted from Imam Abu Yusuf that capitation – tax is imposed upon the aged, of sound understanding, if they possess the property.

The "Jizyah" or capitation – tax is not chargeable from such poor as do not work, nor is it imposed upon slaves, Mukatibs, Mudabbirs, or Umm-e-Walads, nor upon Rabbees, that is, Christian or Pagan monks and hermits, who do not mix with the rest of mankind, the same is reported by Qadooree. But Imam Muhammad, in the Jaame'-as-Sagheer, has noted from Imam Abu Hanifah that "Jizyah" or capitation – tax may be imposed upon these, if they are capable of doing the labour, and such is also opinion of Imam Abu Yusuf.

8. Remission of arrears of "Jizyah" or capitation – tax .

If a person becomes a Muslim, who is indebted for any arrear of "Jizyah" or capitation – tax, such arrear is to be remitted, and similarly, the arrear of "Jizyah" or capitation – tax due from a Zimmee is to be remitted upon his dying in a state of infidelity.

9. Case of arrear for two years .

If a Zimmee owes the "Jizyah" or capitation – tax for two years, it is compounded ; that is, the tax for one year only is to be charged from him ; and it is noted, in the Jaame'-as-Sagheer, that if the "Jizyah" is not charged from a Zimmee until such time as the year has elapsed, and another year arrived, the tax for the past year cannot be levied. This is the view of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad say that the tax for the past year may be charged.

But if, a Zimmee dies near the close of the year, the tax for that year cannot be charged according to all our jurist ; and similarly, if he dies in the middle of the year.

10. When the "Jizyah" or capitation – tax is due .

It is certain with our jurists that, capitation – tax is due on the commencement of the year.

Section (1)

THE ZIMMEES
(*Fasl Fil Zimmi*)

1. Construction of infidel places of worship in a Muslim territory .

The construction of churches or synagogues in the Muslim territory is not lawful, this being forbidden in the Tradition but if place of worship originally belonging to Jews or Christians is destroyed, or decay, they are entitled to repair it.

But if, they attempt to remove these, and to build them in a place different from their former situation, the Imam should prevent them, as this will be an actual construction ; and the places which they use as hermitages are to be held in the same light as their churches, and therefore the construction of these also is not lawful. But it will be in respect of such places of prayer as are within their dwellings, which they are not prohibited from constructing, because these are an appurtenance to the habitation.

What is here laid down is the rule in respect of cities ; but not in respect of villages or hamlets ; because as the tokens of Islam such as public prayer, festivals, and so forth appear in cities, Zimmees should not be allowed to celebrate the token of infidelity there, in the face of them ; but as the tokens of Islam do not appear in villages or hamlets, there is no reason to prevent the construction of synagogues or churches there. Sarakhsi says that in our country (i.e., upper Asia) Zimmees are to be prohibited from constructing churches or synagogues, not only in cities, but also in villages and hamlets ; because in the villages of our country (i.e., upper Asia) various tokens of Islam appear ; and what is recorded from Imam Abu Hanifah, that the prohibition against building churches and synagogues is confined to cities, and does not extend to villages and hamlets relates solely to the villages of Kufa ; because the greater part of the inhabitants of these villages are Zimmees, there being few Muslims among them, and therefore the tokens of Islam do not there appear. Moreover, in the territory of Arabia, Zimmees are prohibited from constructing churches or synagogues either in cities or villages, because the Holy Prophet has said "two religions cannot be processed together in the Peninsula of Arabia". (Maalik, Ibne Ishaq, Abdul Razzaq)

2. Restrictions upon Zimmees in the dress and equipage.

Distinction it is to be made between Muslims and Zimmees in respect both of dress and equipage. It is therefore

not allowable for Zimmees to ride upon horses, or to use amour, or to use the same saddles, and wear the same garments or head-dresses as "Muslims" do ; and it is noted, in the Jaame'-as-Sagheer, that Zimmees should be directed to wear the Kafteej openly, on the outside of their clothes ; the Kafteej is a woolen cord or belt which Zimmees wear round their waists on the outside of their garments ; and also, that they should be directed, if they ride upon any animal, to provide themselves a saddle like the panniers of an ass.

3. Their wives should not associate with the wives of Muslims .

It is necessary that the wives of Zimmees should be kept separate from the wives of Muslims, both in the public roads, as well as in the baths ; and it is also necessary that a mark should be set upon their dwellings, so that beggars who come to their doors may not pray for them.

4. Dissolution of a Zimmee's contract of subjection .

If a Zimmee refuses to pay the "Jizyah" or capitation – tax, or murders a Muslim, or blasphemes the Holy Prophet, or commits "Zina" with a Muslimah, still his contract of subjection will not dissolved.

A contract of subjection will be dissolved only by Zimmees absconding to the territory of the infidels, or making an attack upon the Muslims.

5. Upon breaking the contract .

A Zimmee, upon breaking his contract of subjection, will stand in the same position as an apostate, that, he will be condemned to death upon absconding to the territory of the infidels, in the same manner as it holds in respect of the apostates.

The rule also in respect of such property as he may take away along with him into the said territory, is the same as in respect of the property of an apostate ; that is, if the Muslims afterwards conquer that territory, the property aforesaid will be for-feited to the State, in the same manner as the property of an apostate. But if the Zimmee is made a captive, he will be a slave ; contrary to the case of an apostate, who if he repents not, is put to death.

Section (2)

THE BANY TAGHLAB

(*Fasl Fil Nasaara-e-Bani Taghlab*)

1. Christians of the Taghlab tribe.

Of Zakaat twice as much is levied upon the property of Christians of the Bany Taghlab tribe as is levied upon the property of Muslims, because Umar made peace with them upon this condition, and this in the presence of the other Companions of the Holy Prophet, none of whom disputed it ; and similarly, twice as much is taken from the women of that tribe as from the Muslims, because the above peace established the taking of double Zakaat, and Zakaat is binding upon women ; double Zakaat, therefore, is exacted of the women of that tribe, but not of their children, because Zakaat is not incumbent upon children. (Ibne Abi Shaibah)

But Imam Zufar says that the women of that tribe are also exempted from this, and such is likewise the opinion of Imam Shaafe'ee. (Behaqi)

2. Rule of "Jizyah" or capitation – tax in respect of Taghlabees and Quraishees.

The "Jizyah" or capitation – tax is imposed upon the freedmen of the Baney Taghlab tribe, and also tribute upon their

lands, although the "Jizyah" or capitation – tax and tribute be not charged from their masters ; in the same manner as these imposts were levied upon the freedmen of the Quraish tribe, although a Quarish is not subject to them.

But Imam Zufar says that there is levied upon their property a twofold proportion of what is levied upon the property of Muslims, in the same manner as a twofold proportion is levied upon the tribe of BanyTaghlab.

3. Tribute, "Jizyah" or capitation – tax, and public gifts .

The Tribute, and all other exactions from the property of the Bany Taghlab tribe, as well as the gifts sent by foreigners to the Imam, together with the "Jizyah" or capitation – tax, is spent upon the purposes of the Muslims, such as the construction of fortresses upon the Muslim frontiers, building of bridges, and so forth. Out of these, also, a sufficient allowance is to be paid to the Muslim judges, public officers, and learned men. Subsistence allowance is also paid out of this property to the warriors, and their families.

4. Arrears of pay cease upon the death of the person to whom they are due .

If any warrior, or other person, dies in the middle of the year, having a subsistence allowances fixed on him out of the public treasury, his heirs are not entitled to any of the pay so fixed for him.

But if, a person dies towards the end of the year, it will be proper to give his pay to his relations.

CHAPER 9

THE APOSTATES

(*Hidayah, Kitab-al-Siyar, Baab Ehkaam-ul-Murtadeeri*)

1. Exposition of the faith .

When a Muslim apostatizes from the faith, an exposition thereof is to be laid before him, in such a manner that if his apostacy has arisen from any religious doubts or scruples, those may be removed. But yet this exposition of the faith is not binding, according to what the learned ones have remarked upon this head, as a call to the faith has already reached the apostate.

2. Three days imprisonment .

An apostate should be imprisoned for three days, within which time if he returns to the faith, it is well ; but if not, he should be killed. It is noted in the Jaame'-as-Sagheer that "an exposition of the faith is to be laid before an apostate, and if he refuses the faith, he should be killed," and in respect of what is above stated, that "he is to be imprisoned for three days," it only implies that if he requires a delay, three days may be granted to him, as such is the term generally admitted and allowed for the purpose of consideration, it is noted from Imam Abu Hanifah and Imam Abu Yusuf that the granting of a delay of three days is proper, whether the apostate requires it or not.

It may be noted that, in these rules, there is no difference made between an apostate who is a freeman, and one who is a slave, as the arguments upon which they are laid down apply equally to both descriptions.

3. His repentance .

The repentance of an apostate is sufficient if he formally renounces all religions except the religion of Islam.

4. Premature killing of an apostate .

If any person kills an apostate, before an exposition of Islam to him, it is abominable, but neither retaliation nor ransom will be due against the killer.

5. Female apostate .

If a Muslim woman becomes an apostate, she will not be put to death, but will be imprisoned, until she returns to the faith.

6. Apostate's right over his property .

An apostate's right over his property is finished by his apostacy. But if he again becomes a Muslim, he will again become the rightful owner of his property as before.

7. Property of a deceased apostate .

If an apostate is killed due to apostacy, his property acquired during his faith will go to his heirs who are Muslims. But whatever he has acquired during apostacy will, according to Imam Abu Hanifah go to the public treasury.

But Imam Abu Yusuf and Imam Muhammad say that his property of both descriptions will go to his heirs who are Muslims. But Imam Shaafe'ee, is of the view, that these will be the public property.

8. Condition of inheriting from an apostate .

It may be noted that no person is entitled to inherit from an apostate except but one who was competent to inherit at the time of his apostacy, by being then free and a Muslim, and who continued as such till the apostate's death or desertion into a foreign territory.

9. Muslim wife of an apostate inherits from him .

The wife of an apostate, being a Muslimah, inherits from him, where he dies or is killed during her Iddat from separation on account of his apostacy.

10. Property of a female apostate .

The property left by a female apostate will to her heirs, whether it has been acquired during her faith, or in her apostacy.

11. Inheritance by Muslim husband from apostate wife .

The husband of a female apostate being a Muslim, inherits from her, if she has apostatised during sickness, with a view to invalidate her husband's right. But if she has apostatised during the health, her husband cannot inherit from her.

12. Umm-e-Walads, Mudabbirs, debts and property of apostate .

If a apostate goes to a foreign country, and the person in authority declares him united to the infidels, his Mudabbirs and Umm-e-Walads will be free, and his deferred debts will become undeferred, i.e., payment of them will become immediately due, and his property acquired during his faith will go to his Muslim heirs.

The same rule will apply where a female apostate absconds to a foreign country.

The debts contracted by the apostate during his faith are to be discharged out of his property acquired during the faith, and the debts contracted during his apostacy are to be discharged from his property acquired during the apostacy.

The author of the Hidayah says that this is one opinion of Imam Abu Hanifah. Another opinion reported from him is that his debts will all be discharged from the property acquired during his faith ; and if that is not sufficient, and a part of the debts still remain unpaid, then such remaining debt will be discharged out of the property acquired during apostacy. There is also a third opinion reported from him, which is the reverse of it.

13. Suspension of certain acts of an apostate .

All acts of an apostate in respect of his property, such as purchase, sale, manumission, and gift, done during his apostacy, will be suspended in their effect, so that if, he becomes a Muslim, those acts will be valid ; but if he dies, or is killed, or absconds to a foreign country, those acts will be null. This is the view of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad say that those acts on his part will be lawful in either case, i.e., whether he becomes a Muslim, or dies, or is killed, or absconds to a foreign country.

14. Claming property by an absconded apostate, again becoming a Muslim, and returning to the Muslim territory.

If an apostate, after a decree has been issued uniting him to the infidels, becomes a Muslim, and returns into the Muslim territory, he will be entitled to take back whatever of his property he finds remaining in the hands of his heirs.

But the above rule will not apply where there is no property remaining in the hands of the heirs.

The above rule will also not apply to his Umm-e-Walads or Mudabbirs.

If an apostate who had absconded to a foreign country, becoming a Muslim, comes back into the Muslim territory, before the Qazi has issued a decree regarding him, will be taken as the same as if he had continued uniformly a Muslim, and had never apostatised.

15. Child born of the slave of an apostate .

If an apostate has sexual intercourse with a Christian female slave, who had been in his possession during his faith, and this slave gives birth to a child after more than six months from the date of his apostacy, and he claims the child, the slave will become his Umm-e-Walad, and the child will be his child, but still will not inherit from him.

But if, the female slave becomes a Muslimah, the child will inherit from him, upon his death, or expatriation. His claim of the child will be valid, for this reason, that the validity of a claim of the child does not depend upon actual possession, and the child's inheriting where the mother is a Muslimah, and not inheriting where she is a Christian, is because the child of an apostate is a dependant on the father where the mother is a Christian, as the father is more nearly related to Islam, as compulsion will be used to make him return to the faith, and it is possible that he may again become a Muslim ; and such being the case, the child will be taken as the same as an apostate, and an apostate cannot inherit from an apostate ; but where the mother is a Muslimah, the child is also a Muslim, as a dependant on the mother, and a Muslim may inherit of an apostate.

16. Property of an absconded apostate .

If an apostate goes away, with his property, into a foreign country, and the Muslim forces thereafter obtain possession of that property (on account of the war), such property will be a booty, and the right of the State. But if the

apostate first absconds to the foreign country, and then comes into the Muslim territory and takes his property, and carries it away to the foreign country, and the Muslim forces thereafter obtain the said property, and the heirs of the apostate have taken that property before its distribution, (as booty) it will be delivered to them.

17. Contract of Kitabat entered into by the son of an absconded apostate .

If an apostate absconds to a foreign country, leaving a slave in the Muslim territory, and the Qazi declares the slave to be belonging to his son, and the son constitutes the slave a Mukatib, and the apostate afterwards, becomes a Muslim and returns to the Muslim territory, the 'Aqd-e-Kitabat or contract of ransom will be lawful ; but the ransom, as well as the Walaa-right over the Mukatib, will belong to the reconverted apostate.

18. Atonement of accidental homicide by an apostate .

If an apostate kills any person accidentally, and then absconds to a foreign country, or is killed in his apostacy, the fine of blood will be due only from his property acquired during his faith, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad say that it will be due from his property of every description, i.e., both from that acquired during his adherence to the faith, and, also, from that acquired in apostacy.

19. Fine for offence committed upon a Muslim who afterwards apostatizes, and *vice versa* .

If a person wilfully cuts off the hand of a Muslim, and the Muslim thereafter apostatizes, and then dies in his apostacy

due to the loss of his hand, or goes away to a foreign country, and the Qazi issues a decree of expatriation against him, and he thereafter becomes a Muslim and returns to the Muslim territory, and then dies due to the loss of his hand, in either case one-half fine only will be due from the maimer to the apostate's heirs.

But if a person cuts off the hand of an apostate, and the apostate thereafter becomes a Muslim, and then dies due to the loss of his hand, no fine whatever will be due.

20. A Mukatib apostatizing and absconding to a foreign country .

If a Mukatib becomes an apostate, and abscond to a foreign country, and there acquires property, and is thereafter made a captive with such property, and brought back, and refuses to embrace the faith, and does not become a Muslim, he will be put to death ; and the property will be given to his owner is discharge of his ransom. But if anything remains after discharging the ransom, it will go to his heirs, according to all the jurists.

21. Capture of descendants of an absconded apostate, in a foreign country .

If a husband and wife both apostatize, and abscond to a foreign country, and the woman becomes pregnant there, and gives birth to a child, and to this child another child is afterwards born, and the Muslim troops then conquer the territory, the child and the child's child both will be a booty, and the property of the State.

22. Boy apostate .

The apostacy of a boy, who though under age, is yet arrived at years of discretion, is also regarded, according to Imam Abu Hanifah and Imam Muhammad ; and he may be compelled to return to the faith. But he will not, be put to death, but he should be imprisoned.

Similarly, regard is paid to the Islam of a boy of the same description, due to which reason he cannot inherit of his parents if they are infidels.

But Imam Abu Yusuf says that his Islam will be regarded, but not his apostacy. Imam Zufar and Imam Shaafe'ee, on the other hand, are of the view that no regard will be paid either to his Islam or his apostacy.

It may be noted all that is said here applies to boys under age, who have attained discretion. But as to a boy who has not yet attained discretion, no regard will be to his apostacy according to all the jurists, because the declaration of such does not amount to a change of faith.

The same rule will also apply to the lunatics ; and a person intoxicated with liquor who is deprived of his reason will also be taken as the same as a lunatic.

CHAPTER 10 *

THE REBELS

(*Hidayah, Kitab-al-Siyar, Baab-ul-Baghaat*)

Note

Rebels are those who, without lawful cause, go out of allegiance to, and arise against, the lawfully appointed Imam.

But if, however, the Imam has done anything wrong to them, then they will not be the rebels, and it will be obligatory on the Imam to do justice to them, and in such a case the other people should neither help the Imam nor the rebels, but remain neutral. But if the Imam has not done anything wrong to them, and he is acting according to the Shari'ah in dealing with them, then it will be obligatory for the people to help the Imam against them.

1. Rebels should be given a chance .

If a group of Muslim rebels get control over any part of the country, and goes out of obedience to the Imam, then the Imam should first ask them to return to, and join, the "Jama'at" of the Muslims, and also remove their doubts, if any, so that per chance they may be satisfied and give up rebellion.

2. Rebels do not become infidels .

Rebels do not become infidels they simply go out to obedience to the Imam, and, therefore, according to Holy Qur'an, the Muslims are to fight against the rebels till they submit to the Imam (Ch. 49, Hujuraat, verses 9 and 10).

3. Fight against the rebels .

Muslims should not start the fight against the rebels. When the rebels start fighting, the Muslims should also fight against them till they are dispursed. This is also the view of Imam Shaafe'ee.

4. If there is any other group at the help of the rebels .

If there is any other group at the help of the rebels, then those wounded among them in the fight should be killed, and those running away should be chased and taken into custody.

If there is no other group at the help of the rebels, then neither the wounded ones should be killed nor they should be chased and taken into custody.

5. Women, children and property of the rebels .

Neither the women and children of the rebels are to be taken as slaves, nor their property is to be taken as booty.

But if, the rebels have any other group at their help, then the Imam has the option to either put the captives to death, or keep them in custody.

6. Weapons and animals of the rebels.

The Imam can take the weapons of the rebels for the purpose of fighting if the Muslims are be in need of those weapons. The same rule will apply to the animals for conveyance.

The weapons and animals so taken will be for the purpose of use only by the Muslims in the war, and not for distribution among them as booty.

7. Property of the rebels .

The Imam should keep the property of the rebels in his custody, and return the same to them after they repent.

The Imam can, however, sell their animals and keep their sale price with himself and return the same to them after they repent.

8. Tribute and tithe recovered by the rebels .

If the rebels have recovered the tribute and tithe from the people of the territory which was occupied by them, the Imam, after overpowering the rebels, will not recover the same again from those people.

If the rebels have spent the tribute and tithe, recovered by them from the people, for the purposes for which they should be spent, then the people will be absolved of their liability to pay the same again. But if they have not so spent them, then the people will be obliged to pay again the same to the persons entitled to them.

9. Murder committed by any rebel .

If one rebel commits the murder of another rebel, then, even after the Imam overpowers the rebels, the murderer will not be liable to retaliation or blood – wit.

10. Murder committed during the control of the rebels .

If a citizen commits willful murder of another citizen, during the control of the rebels over that city, then, after over-powering the rebels, the murderer will be liable to retaliation. Fakhrul Islam has, however, explained that this will be applies when the control of the rebels over that city is not complete and they have not enforced their laws therein.

11. Inheritance .

If any of the Ehl-e-'Adl i.e., follower of the Imam commits the murder of his relative among the rebels, even than he will be entitled to inherit from him. But if a rebel commits the murder of his relative among the Ehl-e-'Adl, then, if he asserts that he was then, and is even now, on the right, he will be entitled

to inherit from the murdered one, otherwise not. This is the view of Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf says that in either case he will not be entitled to inherit, and this is also the view of Imam Shaafe'ee.

12. Sale of the weapons to the rebels .

Sale of the weapons to the rebels is "Makrooh" i.e., abominable. But sale of the material from which weapons are made is not "Makrooh".

PART – XIV

MAMLOOK

(SLAVE)

Book – I *

'ITAQ
(Manumission of Slaves)

Book – II **

IBAQ
(Absconding of Slaves)

Book – III ***

MUKATIBAT
(Purchasing of his freedom by Slave)

Book – IV ****

MAZOON
(Licensed Slaves)

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* Book V of Hedaya, by Charles Hamilton 'Ainul Hidayah, Vol. II, p. 418

** Book XII , of Hedaya, by Charles Hamilton 'Ainul Hidayah, Vol. II, p.729

*** Book XXXII, ibid of Hedaya, by Charles Hamilton 'Ainul Hidayah, Vol. III, p. 759

**** Book XVI, ibid of Hedaya, by Charles Hamilton 'Ainul Hidayah, Vol. III, p. 843

Note : all these books have been omitted from second edition of Hedaya, by Charles Hamilton (1870), on account of the Abolition of Slavery Act, 1843. For the same reason, I have also not included these books in this volume.

SYNPOSIS

Book – I – 'Itaq

Book – II – Ibaq

Book – III – Mukatibat

Book – IV – Mazoon

Book – V – Walaa

Section – Walaa of Mutual Amity.

BOOK – V

WALAA

WALAA *

(*Hidayah, Kitab-ul-Walaa*)

Note

"Walaa" is derived either (1) from "Wali" meaning "nearness", or (2) from "Mawalaat", meaning "following one another", in which case if it is "Walaa-e-'Itq" or "Walaa-e-Mawalaat", it creates the right of inheritance, when it consists of the condition of inheritance, (3) from "Maula" (from Mawalaat), meaning "mutual love or help", in cases of inheritance, and ransom for the homicide, etc., (Ainul Hidayah).

1. Kinds of Walaa .

Walaa is of two kinds viz., (1) Walaa-e-'Ataqat (i.e., Manumission) which is also known as Walaa Ni'amat (i.e., favour or beneficence) the occasion of which according to Rawayat-e-Saheeh is manumission from right of property from which it is that if a person becomes owner of his kinsman by inheritance, such kinsman is free, and his Walaa goes to that person and (2) Walaa Mawalaat, (i.e. Walaa of mutual amity, or of confederacy) the occasion of which is a contract of Mawalaat i.e. mutual amity or patronage and clientage, which is explained in its proper place.

The occasion of the first kind, therefore, is manumission, and that of the second kind is a contract of mutual amity. They are termed the Walaa of manumission, or the Walaa of mutual amity, by a reference of their effect. Both these kinds moreover, bear the characteristic of assistance ; and as the Arabs were accustomed to assist each other in various ways, and the Holy Prophet interpreted such mutual assistance into Walaa of both kinds, he used to say of them, indiscriminately, "they have Walaa people among them," and also, "they have"Haleefs" i.e. sworn confederates among them" (Bukhari, Tabrani and Haakim), by which last is understood the relation of

* Ainul Hidayah, Vol. III, pp. 803 to 813

Mawlal Mawalaat, as the Arabs were accustomed to confirm their contracts of Mawalaat, or mutual amity, by oaths.

2. Walaa of a slave belongs to his emancipator .

If a man emancipates his slave, the Walaa of such slave belongs to him; because the Holy Prophet has said, "the Walaa of a slave belongs to the person who emancipates him ;" ('Alimmah- sittah), and also because two consequences arise from manumission viz. (1) Liability to the Diyat, or fine of blood, the cause of which liability is assistance, exhibited and obtained by means of manumission ; and (2) inheritance, because the emancipator has given life to the emancipated by means of removing his bondage, and therefore inherits from him.

Moreover the relationship of Walaa, is like the relationship of blood, in respect of inheritance, and the obligation of atonement by fine, the Holy Prophet has said that, "the relationship of Walaa is like the relationship of consanguinity."

Another reason, why the Walaa of an emancipated slave belongs to his emancipator is, that there should be an acquisition for a surrender, or, in other words, an advantage in lieu of a loss ; and as, due to emancipation the ownership involved in the slave is finished, the Walaa thereof as a result should belong to his emancipator.

It may be noted that a woman is also entitled to the Walaa of her emancipated slave in the same manner as a man.

It may also be noted that manumission against compensation, and manumission, without compensation, are alike in respect of this rule.

3. Condition of waving the claim to inheritance .

If a person emancipates his slave, agreeing at the same time, that "he will not claim the right from him," such agreement

will be voids, and the Walaa will belong to the emancipator inspite of it.

4. Walaa of a slave emancipated by Kitabat .

If a Mukatib pays his ransom he becomes free, and the Walaa belongs to his master, even though he becomes free after the death of his master because he becomes free due to the contract of Kitabat to which his master was a party ; and as a Mukatib, like a Mudabbir, is not a subject of inheritance, he is therefore, emancipated while the master's right of property continues.

The same rule will also apply in respect of a slave whose master has gifted his manumission, or a slave for whom a person directs, in his will, that he should be purchased and set free upon his death, because the act of the executor, after the testator's death, is equal to the act of the testator.

5. Walaa of Mudabbirs and Umm-e-Walads.

If a master of slaves dies, his Modabbirs and Umm-e-Walads become free and the Walaa of them belongs to him, (Descending, as a heritage to his heirs) as he emancipated them by making them Mudabbirs and Umm-e-Walads.

6. Slaves emancipated by affinity .

If a person becomes owner of a relative within the prohibited degrees, such relative is free, and the Walaa of him belongs to his person, as he is emancipated from his ownership.

7. Emancipation of a pregnant female slave .

If a slave marries the female slave of any person, and she becomes pregnant, and her master then emancipates her, she is accordingly becomes free, together with the fetus in her womb;

and the Walaa of the foetus belongs to her master, and can never shift from him.

The same rule will apply if the female slave gives birth to a child at any time before six months from the date of her manumission.

The same rule will also apply if she gives birth to two children, one within the six months, and the other after six months

But it will be otherwise where a female slave, being pregnant, enters into a contract of Mawalat with any person, and her husband also enters into a similar contract with any other person ; because in such a case the Walaa of the child will belong to the master of the father, because an embryo cannot of itself be a party to a Mawalat contract, as that is concluded by proposal and acceptance, of which an embryo is not capable.

8. She not giving birth within six months from manumission.

If the female slave mentioned above gives birth to a child after six months from the date of manumission, the Walaa will belong to the mother's owner.

9. 'Ajami marrying a freed woman .

If an 'Ajami marries a freed woman, and they have children, the Walaa of those children will belong to the Mawlas of the mother, whether she had been emancipated by an Arab or an 'Ajami. The author of the Hidayah says that this is the opinion of Imam Muhammad ; but that Imam Abu Yusuf says that the child will be in such a case subject to the same rule with the father.

10. If the father and mother are both freed - persons .

If the father is a free-man, and the mother is a freed-woman, the parentage of their children will be referred to the

father's tribe ; because in such a case the parents are both upon an equality ; and the father's side has the preference, as protection is on his side more effectual.

11. Heirship established by the Walaa of manumission .

By the Walaa of manumission 'Asoobat * is established. In other words ; where a person emancipates his slave, he become the 'Asaaba ** to such slave, and is entitled to inherit from him in perference to his maternal uncles or aunts, or other uterine relatives.

But if, the emancipated slave has any 'Asaaba by blood, they will precede, as the emancipator comes after the paternal relatives.

But if, the emancipated slave has no 'Asaabas by blood, the whole inheritance will go to the emancipator. This is where there is no participating heir. But where there is a sharer, the emancipator will be entitled to what remains after paying the sharer his, or her share.

12. Emancipatress entitled to the Walaa .

A woman is entitled only to the Walaa of the person whom she has herself emancipated, or of the person whom she again has emancipated, or of the person whom she has made a Mukatib, or of the person whose Walaa has been transferred to her by her freed-man.

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* 'Asoobat, has been used here in the sense of the descent of inheritance in the male line.

** 'Asaaba, has been used here in the sense of the first heir or head of family,

13. Descending of the estate of freed-man .

It may be noted that the estate of a freed-man goes to the 'Asaaba i.e. lineal heir of the emancipator, to the nearest, and after him to the next of kin, and not solely to his children ; because inheritance does not hold in respect of Walaa.

Section

WALAA OF MUTUAL AMITY
(*Fasl Fil Wala-ul-Mawalaat*)

1. Contract of Mutual Mawalaat .

The case of Walaa-ul-Mawalaat is where an Ajami or stranger says to the person who has embraced Islam in his hands, or to any other person that, "I enter into a contract of Mawalat with him, so that when I die, my property will go to you, or if on the other hand I commit an offence, the fine will be upon you or your 'Aaqilah", and the person thus addressed agrees to it, and, therefore, as a result of which he will becomes the Mawla of the stranger, and upon his death, without heirs, will inherit his property.

2. Dissolution of the contract .

The Mawla Asfal, or client, is entitled to separate himself from his Mawla A'ala, or patron, and to enter into a contract of Mawalat with some other person, so long as the first will not have paid any fine of his incurring ; because a contract of Mawalat is, like a bequest, a revocable act.

Similarly, the Mawla A'ala, or patron, is entitled to relinquish his right of Walaa and to finish the contract of Mawalat, because such a contract is not binding.

But it is necessary, in case of either party dissolving the contract, that it should dissolved in the presence of the other party.

3. Dissolving the contract .

But it will be otherwise, where the client enters into a contract of Mawalat with a person in the absence of the former patron ; because in such a case the first contract of Mawalat can be dissolved without the presence of the party, and this will be a dissolution by effect. In other words, the dissolution of the first contract is a necessary result of the formation of the second contract. In such a case, therefore, the presence of the other party is not necessary.

4. If the patron has paid a fine incurred by his client .

But where the patron pays the fine incurred for an offence committed by his client, the client will not entitled to quit him, and engage in a contract of Mawalat with any other person.

Similarly, if the child of the client cannot quit the patron who has paid a fine on account of its father ; and so also, if the patron pays a fine on account of the child of his client. Thus neither the client nor his child can afterwards quit the patron, because as regards the Walaa-ul-Mawalat, they are as one person.

5. Freed-man engaging in a contract of Mawalaat .

An emancipated slave, having a Mawla as his emancipator, is not entitled to enter into a contract of Mawalaat with any person ; because the Walaa of Manumission is binding, but the Walaa of Mawalaat is not so ; and during the existence of a contract which is be entered into binding, any contract which is not so, cannot.

PART – XV

MUTAFARRIQAAT

(MISCELLANEOUS TOPICS)

SYNPOSIS

Book – I – Aimaan

Chapter – 1 – The Vows
Chapter – 2 – What constitutes an oath or vow and what does not constitute it
Section – Kaffarah (Expiation)

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BOOK – I *

AIMAAN

(VOWS)

AIMAAN

(VOWS)

(*Hidayah, Kitab-ul-Aimaan*)

Note

"Aimaan" is the plural of "Yameen", which, literally but legally, means "strength" or "power" ; also the "right hand". It signifies "Halaf" (Oath or vow) by which the resolution of a vower is strengthened in the performance, or avoidance, of any thing ; and the man who swears, or vows, is known as "Haajif", and the thing sworn or vowed is known as the "Mahloof Ilaih" and the one who breaks it is known as the "Haanis".

It may also be noted that the person who takes the oath, or makes a vow, in the Name of Allah, should be adult and sane and also a Muslim.

CHAPTER 1

THE VOWS

According to Qaduri, vows or oaths are of three kinds, viz., "Ghamoos", "Mun'aqidah", and "Laghw".

Yameen-ul-Ghamoos – It signifies on oath taken in respect of something already past, which is to convey an intentional falsehood on the part of the swearer ; and such an oath is a great sin (Ibne Hibban, Bukhari and Muslim).

"Kaffarah" or expiation is not available in a "Yameen-ul-Ghamoos", but repentance and seeking forgiveness from Allah is necessary.

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* Qur'an, Ch. 2, Baqarah, verse, 270 ; Ch. 9, Taubah, verses, 75 to 77 ; Ch. 22, Hajj, verses, 27 to 29 ; Ch. 76, Dahr, verse, 5 to 11 ; Mishkaat, Baab-ul-Aimaane Wan Nuzoore and Baabun Fin Nuzoore. Ainul Hidayah, Vol. II, pp. 46 to 523.

Yameen-ul-Mun'aqidah – It signifies an oath taken in respect of a matter which is to come, i.e., when a man swears to do or not to do anything ;

In such an oath if not fulfilled "Kaffarah" or expiation is necessary.

Yameen-ul-Laghw – It is an oath taken in respect of something already past, where the swearer believes that the matter to which he bears the testimony accords with what he swears, but it happens to be actually otherwise ; and from the Divine Mercy it is hoped that the swearer will not be condemned for such an oath (Bu khari, Abu Daud, Dara Qutni, Ibne Hibban, Behaqi).

"Kaffarah" or Expiation – A wilful vow, and an oath taken under a deception of the memory, are all the same, and on account of each expiation is necessary.

Violation of a vow – If a man does anything which breaks his vow, compulsion or through forgetfulness, both are the same, and an expiation is necessary ; and so also, if the thing is done by a maniac or an idiot (Abu Daud, Tirmizi, Ibne Maajah).

CHAPTER 2

WHAT CONSTITUTES AN OATH OR VOW AND WHAT DOES NOT CONSTITUTE IT

(*Hidayah, Kitab-ul-Aimaan, Baab Maa Yakoon Yameena Wa Maa Laa Yakoon*)

1. Name and Attributes of Allah – An oath may be taken in the Name of Allah, or in any of His Appellations, viz., "Rahmaan", or "Raheem"; or His Attributes, viz., Power, Mighty, or Glory.

2. Knowledge, Wrath, or Mercy – An oath can not be constituted by saying, "by the Knowledge of Allah", or, "by the Wrath of Allah", or, "by the Mercy of Allah", because these are neither the Appellations nor the Attributes of Allah; and oath is not extant by either of these words.

3. By the truth of Allah – According to Imam Abu Hanifah and Imam Muhammad, if a person says, "by the Truth of Allah", this will not constitute an oath. But Imam Abu Yusuf has two opinions on this point. According to one opinion, it does not constitute an oath but according to another opinion it constitutes an oath because Truth is an Attribute of Allah.

4. Any other name – If a person swears by any name other than that of the Name of Allah, such as the Prophet, the Qur'an, the Ka'bah, this will not constitute an oath. The Holy Prophet has said that "whoever of you takes the oath, let him take the oath in the Name of Allah or keep silence" (Bukhari, Muslim, Abu Daud, Nasai).

5. Particles of oath – There are three particles in Arabic, by which an oath is constituted. These are "Waw", "Be" and "Te", e.g., "Wallah", Billah", "Taallah" (Qaduri). But sometimes, according to the Arabic usage, these are also not

specifically used, but are understood, as for example, in the expression, "Allah ! I will not do this". Sometimes "Laam" is also used.

6. Without the Name of Allah – The expression, "I swear", "I wow", or "I testify", without using the Name of Allah, also constitutes an oath. These expressions are used in the present as well as in the future tense ;

7. Imprecation of a conditional penalty – If a person says, "if I do this, may I be a Jew", or "a Christian", or "an infidel", it will constitutes an oath. But if a person says, "if I have done so, may I be a Jew", or "an infidel", etc., this is a Yameen-ul-Ghamoos, or perjury, but the swearer will not, in such a case made a Jew or an infidel ;

If a person says, "if I do so, may the Anger of Allah fall upon me", this will not constitute a vow, as it is not a usual mode of expression for that purpose. And so, also, if a person says, "may I be an adulterer", or "a drunkard", or "an userer."

Section

KAFFARAH
(EXPIATION)

(*Hidayah, Kitab-ul-Aimaan, Fasl Fil Kaffarah*)

1. Emancipation of slave or giving alms .

The expiation of a vow is to be performed by the emancipation of a slave in Zihaar, or providing clothes to ten poor ones (the least being to cover each of them from the waist upto down the knees, as is required for the prayer), or feed ten poor ones as in Zihaar (Qaduri).

2. Or fasting .

But if one is not able to perform the expiation in either of the three above mentioned modes, then he should keep the fast for three successive days.

3. Previous expiation .

If a person performs the expiation before the violation of his vow, It will not be "Kaffarah" (expiation), but "Sadaqah" (alms).

4. Sinful Vow .

If a person swears a sinful vow, it will be necessary for him to violate his vow and perform the expiation (Muslim).

5. Vow of an infidel .

If an infidel makes a vow, and then violates it as an infidel or as a Muslim, still he will not be forsworn, because as he is not competent to make a vow, he is also not competent to perform an expiation, because expiation is an "Ibadat".

6. Vows of abstinence .

If a person makes anything unlawful to him, which is remain lawful, such thing will not actually become unlawful to him ; but he will have to perform expiation before making use of that thing.

If a person makes a vow saying that, "everything lawful is unlawful to me", every kind of food and drink will forthwith becomes unlawful to him, unless the intention of the vow is in response of some other thing also.

But a vow of this kind will not include the use of women, unless it is the intention of the vower ; but in such a case will constitute an "Eila";

7. Vow without condition .

If a person makes a vow in general terms, that is, not subject to any condition, as if he says, "I shall fast on such a day for the sake of Allah", he is bond to observe the fast (Bukhari).

8. Vow with condition .

If a person makes a vow subject to a condition, and the condition afterwards occurs, and the condition is of the kind as that the vower had no intention it should ever take place, and then performs an expiation for his vow, it will be enough ; because here the vow is of the kind of a "Yameen", i.e., a conditional vow

But if the condition is of the kind as that actually intended by the vower, it is binding upon him to perform the vow, and here expiation will be of no avail, because here the vow is of the kind of a "Nazr", i.e. an absolute vow. (Muslim and Bukhari).

CHAPTER 3

VOWS REGARDING TO ENTRANCE AND RESIDENCE

(*Hidayah, Kitab-ul-Aimaan, Baab-ud-Dukhool Wal Sakani*)

1. Entering into a house .

House is the place where people reside and sleep in the night and therefore a vow for not entering into a house will not be violated by entering a mosque, or a church, etc., or even the porch or portion before a house, if it totally opens on the front side ; but according to the approved view, entering into the lawn (of a house) will be a violation of the vow.

2. Entering a Sara'e .

A vow for not entering will a Sara'e will not be violated by entering a ruin.

3. Entering a house after it becomes a ruin .

A vow for not entering into a particular house will not be violated by entering it when it becomes a ruin ; or when it is totally demolished and another house is constructed on its ground, because entering into the newly built house will not be violation of the vow.

4. Going on the roof or entering the portico .

A vow for not entering into a particular house will be violated by going upon the roof of it even from the outside. Some jurists are however, of the view that it will not be violated.

Similarly, entering into the portico will be violation of the vow, if the portico is such that by closing its door it becomes part of the house ; but not if otherwise. Same is the position as regards an arch of the doorway.

5. House in which the vower is present.

If a person swears that, "I will not enter into this house", and he is actually present in that house at the time of swearing, he will not be forsworn by sitting in that house. But he goes out and then again enters into it, it will be violation of the oath.

If a person swears that, "I will not put on a particular garment", and is already having the said garment upon him at the time of swearing, and forthwith puts if off, he will not be forsworn.

Similarly if a man is riding upon an animal and swears that, "I will not ride upon this animal", and forthwith comes down of it, he will not be forsworn ; *

* For more examples of this chapter, see the 'Ainul Hidayah, Vol. II, pp. 479 to 483.

CHAPTER 4

VOWS IN RESPECT OF COMING, GOING, RIDING, etc.,

(Hidayah, Kitab-ul-Aimaan, Baab-ul-Yameen Fil Khurooj Wal Ityaan War Rakoob Wa Ghairo Zalik)

1. Evasion of vow .

Evasion of vow amount to violation of it. Thus, if, for example, a person swears that he will not go out of the mosque, and he, then, asks another man to carry him out, and that man carries him out, it will be violation of the vow.

And if anybody carries him out with his will, though not asked by him, even then it will be violation of the vow.

2. Undermined vow .

Undermined vow of performance will not be violated until the death of the vower. If a man makes a vow that, "I will go to Mecca", he will not be forsworn until after his death, because so far he is alive, there will be hope of his fulfilling the vow.

3. Vow made with vow of prevention .

If a man makes a vow, saying to his wife that, "if you go out, except with my permission, you are divorced", and he then grants her permission, and she goes out accordingly ; and she then again goes out without his permission, it will amount to violation of the vow, and, she will stand divorced, because in such a vow permission for each going out is necessary, but not if the husband declares that he meant permission once only.

4. General vow restricted to particular event.

If a woman is desirous of going out, and her husband says that, "if you go out, you are divorced", and she thereupon sits down, and then goes out, there will be no violation, and divorce will not take place. This kind of vow is known as "Yameen-e-Faur", i.e. sudden vow, and is introduced by Imam Abu Hanifah *.

* For more examples of this chapter, see the 'Ainul Hidayah, Vol. II, pp. 483 to 486.

CHAPTER 5

VOWS RELATING TO EATING OR DRINKING

(Hidayah, Kitab-ul-Aimaan, Baab-ul-Yameen Fil AkloWash Sharb)

1. Eating dates .

If a person swears that, "I will not eat from such a date-tree", his vow is in respect of the fruit of that tree only, and if he eats the fruit of it, he will be forsworn. But if the dates of it are changed, "Nabeez" is prepared from them, or juice is extracted from them, and he drinks it, it will not be a violation.

2. Thing acquiring a new description .

A vow of abstinence from anything will not be broken by eating that thing when it has acquired a new description. If a man swears that, "I will not eat of those "Busrs" (half-ripe dates)", and eats of them when they are ripe, he will not be forsworn, similarly, when he swears that, "I will not eat of those "Ratbs" (ripe dates)", and eats of them when after they have become mellow, it will not be a violation.

3. Denomination .

If a person swears that, "I will not eat of such a kid", and eats of it after it has become a grown up goat, it will not be a violation.

4. Purchasing .

If a man vows that, "I will not buy any ripe dates", and he then buys a cluster of unripe dates, among which by chance there are some ripe dates also, it will not be a violation, because the purchase relates to the whole.

5. Flesh and fish .

If a man vows that, "I will not eat flesh", and he afterwards eats the fish, it will not be a violation, because fish is not flesh in its strict sense.

6. Drinking .

If a person makes a vow that, "I will not drink out of such a fountain", and then takes the water out of that fountain in a cup, and drinks it, it will not be a violation. But if he lifts it with his mouth, (i.e. drinks with his lips direct from the fountain), in such a case it will be a violation.

But, if a person makes a vow, saying, "I will not drink of the water of such a fountain", and then drinks the water of that fountain by a vessel, he will be forsworn, because the water that remains the water of that fountain even after being taken in the vessel.

If a man makes a vow saying, "if I do not drink, this day, of the water which is in this vessel, my wife is divorced", and actually there is no water in it, he will not be forsworn, also if the water is in that vessel but it is spilled before the night of that day. This is according to Imam Abu Hanifah and Imam Muhammad. But the view of Imam Abu Yusuf is that he will be forsworn.

7. Absolute impossibility .

A vow made in respect of an absolute impossibility is held as violated upon its making itself. If a person makes a vow that, "I will by some means or the other, ascend to heaven", or, "I will, somehow, convert this stone into gold", this will be a vow, and the vower will be forthwith forsworn *.

* For more examples on chapter, 5 see the 'Ainul Hidayah, Vol. II, pp. 486 to 495.

CHAPTER 6

VOWS RELATING TO SPEAKING AND CONVERSING

(*Hidayah, Kitab-ul-Aimaan, Baab-ul-Yameen Fil Kalaam*)

1. Against speaking .

If a person makes a vow, saying that, "I will not speak to such a man", and then speaks to him, while he is sleeping, from a distance within his hearing, he will be forsworn. But according to "Mabsoot", he will not be forsworn unless the sleeping awakes by the words spoken by the vower, and this is also the agreed view of the jurists.

2. Violation depends upon the meaning of the words used .

If a man makes a vow that, "I will not speak to such a man without his permission", and the said person permits him, but the vower does not know of the permission until after he has spoken to him, he will be forsworn. But Imam Abu Yusuf is of the view that he will not be forsworn.

3. Against speaking for a particular time .

If a person makes a vow, saying that, "I will not speak to such a man for a month", it should be counted from making the vow.

4. Repetition of prayer .

If a man makes a vow that, "I will not speak", and he then reads the Qur'an, or the Tasbeeh, Tahleel, and Takbeer, at the stated times of prayer, he will not be forsworn. Some jurists are of the view that he will not be forsworn even if he does so at other than the stated times of prayer because it will not amount to speaking.

5. Day and Night .

A vow made in respect of the "day" extends to the "night" also. But the vow made in respect of the "night" does not extend to the "day".

6. Restriction to particular incident.

If a person says that, "if I speak to Zaid, unless a certain person comes, my wife is divorced", and he then speaks to that man before coming of Zaid, he will be forsworn. *

7. Person described in relation to another .

If a man makes a vow, saying that, "I will not speak to the slave, or the wife, or the friend, of such a man", and that man sells his slave, or repudiates his wife, or falls at enmity with his friend, and the vower then speaks to either of them, he will not be forsworn.

Section

VOW RELATING TO THE TIME
(*Fasl Fil Yameen ab Muta'alliq-bil-Auqaat*)

If a man makes a vow, saying that, "I will not speak to such a man for 'a time' (Heena) or for 'a pace of time' (Zamaan), the time so expressed should be understood as "six months".

If a man makes the vow, saying that, "I will not speak to such a man for 'days' (Ayyaam)", it is to be understood to be "three days" (by all) ; but if he says, "for 'the days' (Al-Ayyaam)", it is to be understood as "ten days" (by Imam Abu Hanifah), and 'a week' (by Imam Abu Yusuf and Imam Muhammad).

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* For more examples on this chapter, 6 see the 'Ainul Hidayah, Vol. II, pp. 495 to 502.

Similarly, by "months" (Shuhoor) is to be understood as "ten months" (by Imam Abu Hanifah), and "one year" (by Imam Abu Yusuf and Imam Muhammad); and by "the Friday" (Al-Jumu'ah), or by "the years" (Al-Sineen), is to be understood as "ten Jumu'ahs", or "ten years", respectively (by Imam Abu Hanifah) ; and by "many days" (Ayyaam-ul-Kaseerah), is to be understood as "ten days" (by Imam Abu Hanifah), and "seven days" (by Imam Abu Yusuf and Imam Muhammad).

CHAPTER 7

VOWS IN MANUMISSION AND DIVORCE

(Hidayah, Kitab-ul-Aimaan,Baab-ul-Yameen Fil'Itq Wal Talaq)

1. Vow of Divorce .

If a man says to his wife that, "by Allah, or I swear that, when-ever you give birth to a child, you shall become divorced", even if she gives birth to a dead child, divorce will take place upon her.

2. Vow of freedom .

The female slave - Similarly, if a man says to his female slave that, "by Allah, or I swear that, whenever you give birth to a child, you shall become free", even if she gives birth to a dead child, she will becomes free.

To the child to be born – Freedom vowed in favour of a child that may be born of a female slave takes place on her first live-born child. In case she gives birth first to a dead child, and then to a living child, then, according to Imam Abu Hanifah, the live-born child will becomes free.

To the first purchased slave – If a man says that, "by Allah, or I swear that, the first slave that I purchase is free", and he then purchases a slave, such slave will be free ; but if he purchases two slaves together, and then a third, none will be free, because singularity does not apply to the third one ; but if he says, "the first slave that I purchase singly is free", then the third one will be free.

To a last purchased slave – If a man says that, "by Allah, or I swear that, the last slave that I buy is free", and he purchases a slave and then dies, the slave will not be free, because the term "the last" applies to "Fard-e-Laahiq", i.e. individual adjunct, and as no other has preceded him, therefore, he will not be considered as adjunct, but if he dies after purchasing a second slave also, then the second one will be free.

To whoever of the slaves congratulates – If a man says that, "by Allah, or I swear that, whoever of my slaves congratulates me upon the delivery of my wife shall be free", and then several of his slaves successively inform him of his wife's delivery, the one only who informed him first will be free.

3. Emancipation as an expiation .

Does not suffice – The emancipation of a slave, in consequence of a vow, will not suffice for expiation.

Suffices – But the emancipation of a father, in consequence of purchase, will suffice.

Umm-e-Walad – The emancipation (by purchase), of a female slave, by a person to whom she stands in the relation of an Umm-e-Walad, will not suffice ;

4. Freedom or condition of concubinage .

If a man says that, "by Allah, or I swear that, if I make a concubine of a female slave, she shall be free", and he then he makes a concubine of any female slave, his own property, she will be free accordingly.

5. General vow of freedom .

A general vow of freedom to slaves includes every kind of them, and accordingly his Umm-e-Walad, Mudabbirs and 'Abds, all become free, except his Mukatibs, unless such is the intention, because "absolute possession does not apply to the Mukatibs.

6. Indefinite vow of divorce or freedom .

(a) **Of Divorce** – If a man who has three wives, says to them, "by Allah, or I swear that, this one is divorced, or this, or this, divorce will take place upon the last wife, and it will remain in the choice of the husband to declare and specify which one of the other two should become divorced, whether the first, or the second.

(b) **Of Freedom** – Similarly, if a master says, in respect of three slaves, "this one is free, or this one, or this one", the last one will become free, and it will remain at the option of the master to specify which of the other two shall be free, the first or the second.

CHAPTER 8

VOWS FOR BUYING, SELLING, MARRIAGE etc.

(Hidayah, Kitab-ul-Aimaan, Baab-ul-Yameen Fil Bai' Wash Sharaa Wal Tazawwuj Wa Ghaira Zalik)

1. Through agent .

A vow in respect of the doing of certain acts will not be violated by authorising an agent to as those acts except in respect of marriage, manumission, or divorce or any act, the rights of which solely belong to the vower, e.g., beating the slave, or killing the animal, nor by employing another to do thing, where the advantage results solely to the subject of the vow.

2. Freedom.

A vow of freedom on condition of the sale of a slave will take place on the event of sale, and the sale will be void.

3. Divorce.

Divorce on the condition of not selling of a slave will takes place on emancipation or "Tadbeer" ;

4. General divorce .

A vow of general divorce in reply to a wife charging her husband with bigamy will take place upon her also in the same manner as upon his other wife or wives.

CHAPTER 9

VOWS RELATING TO PILGIMAGE, FASTING, AND PRAYER

(Hidayah, Kitab-ul-Aimaan, Baab-ul-Yameen Fil Hajj Was Salaat Was Som)

1. Pilgrimage.

(1) If a man makes a vow "to perform a 'Mashi' (on foot) pilgrimage to the Ka'bah", it will be upon binding on him to perform the pilgrimage to the Ka'bah on foot, or on the ride subject to offering a sacrifice by way of "Kaffarah".

(2) If a vow of manumission is made by the master subject to his non-performance of the pilgrimage this year, and after a year dispute arises between the master and his slave, the master says that he has performed the pilgrimage, and the slave say that he has not performed the pilgrimage, and the slave's witnesses give the evidence that "the master had offered the sacrifices that year at Kufa", then, according to Imam Abu Hanifah and Imam Abu Yusuf, the slave will not be emancipated ; but according to Imam Muhammad, he will be emancipated.

2. Fast.

If a man makes a vow that, "I will not fast on a day", and he afterwards intends a fast, and observes the fast for a few hours, and then breaks his fast, he will not be forsworn.

3. Prayer.

If a man makes a vow that, "I will not pray", and he afterwards stands up and performs the 'Qir'at', and 'Ruku', he will not be forsworn. But if he also performs the 'Sajdah' along with these performances, he will be forsworn.

If a man vows that, "I will not offer any prayer", he will not be forsworn upon praying, until he offers two Rat'ats of the prayer along with the "Qaa'idah" (sitting).

CHAPTER 10

VOWS RELATING TO CLOTHING AND ORNAMENTS, ETC.

(Hidayah, Kitab-ul-Aimaan,Baab-ul-Yameen Fil Labs-us-Siyaab Wal Hai Wa Ghair Zalik)

1. Clothing .

If a man makes a vow, saying to his wife that, "if I put on any cloth which is woven by the thread of cotton spun by you, it will be a 'Hudi' (i.e. offering at Mecca)", and he afterwards buys cotton, and his wife spins it into thread, and weaves that thread into cloth, and the man puts on the same, then, according to Imam Abu Hanifah, it will be binding upon him to make an offering of it at Mecca.

2. Ornaments .

If a man makes a vow that, "I will not wear the ornaments", and he afterwards wears the ring of silver, he will not be forsworn, because, according to Shari'ah, ring is not an ornament, and it is also used as a seal. But if the ring is of feminine type and also has a precious stone, or is coloured with gold, he will be forsworn. He will also be forsworn if he wears the ring of gold, because it is an ornament ;

3. Cotton .

If he says that, "I will not wear the (cloth woven by the) cotton spun by women", and he afterwards wears the 'Takmah' of it, he will not be forsworn according to Imam Abu Yusuf ;

4. Bedding .

If a man makes a vow that, "I will not sleep upon such a bed", and afterwards sleeps upon it, having a sheet, blanket, quilt, etc., spread over it, he will be forsworn ; he will be forsworn even if another bed is laid upon the bed which is the subject of the vow ;

5. Ground .

If a man makes the vow that, "I will not sit upon the ground", and he afterwards sits upon a carpet or met spread on the ground, he will be not forsworn ;

6. Seat .

If a man makes a vow that, "I will not sit upon such a seat", and he afterwards sits on it even when there is covering spread upon it, he will be forsworn ; but he will not be forsworn if he sits on another seat put over the seat which is the subject of the vow.

CHAPTER 11

VOWS RELATING TO STRIKING, KILLING, ETC.,

(Hidayah, Kitab-ul-Aimaan, Baab-ul-Yameen Fil Qatl Waz Zarb Wa Ghaira)

1. Striking .

A vow for not striking a person will not be violated by striking that person when he is dead * ;

2. Washing .

If a man makes a vow saying to another, "if I wash you, my slave will be free", and he washes that person after his death, he will be forsworn, because washing is also after death.

3. Beating .

A vow for not beating will be violated by any act which causes pain, unless that act is committed in sport.

4. Slaying (killing) .

Vow of slaying a person who is already dead will incur the penalty. If a man says that, "if I do not slay such a person, my wife will be divorced", and the person mentioned is already dead, and the vower himself knows this, he will be forsworn. But if, the vower is not aware of the fact that the said person is already dead, he will not be forsworn.

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* For more examples, see 'Ainul Hidayah, Vol. II, pp. 515 to 516.

CHAPTER 12

VOWS IN RESPECT OF THE PAYMENT OF MONEY

(Hidayah, Kitab-ul-Aimaan, Baab-ul-Yameen Fee Taqaza-ad-Drahim)

1. Payment shortly, or in length of time .

If a man makes a vow that, "I will discharge my debt shortly", this will mean "within less than one month" ; and if he says, "in a length of time", this will mean "more than a month" ;

Discharging in good or base money .

A vow to discharge a debt be will fulfilled even by discharging it in good money or base money, or in money belonging to another person.

3. Liquidation .

Or even by liquidation ;

4. Gift by creditor .

But not by gift of the debt to the debtor by the creditor ;

5. Reimbursement .

A vow not to accept reimbursement of a debt in partial payments will not be violated until the entire debt has been received in partial payments ;

If the debt consists of goods estimable by weight, and the vower accepts payment by two or more weighings of it, in such a manner so as not to be employed in any other concern between

these two weighings, he will not be forsworn, although this is a partial mode of receiving payment, because the receipt of the entire at once is sometimes, impossible, and hence any debt of this kind is an exception from the present case ;

If a creditor demands from his debtor a part of what is due to him, supposing two hundred Dirhams, and the debtor says that, does not have so much money, and the creditor disbelieves him, and the debater says that, "if I possess more than one hundred Dirhams, my wife is divorced", and he at the time of saying this actually possesses of fifty Dirhams only, he will not be forsworn.

CHAPTER 13

MISCELLANEOUS CASES

1. A vow for not doing anything, unconditionally pronounced will operate as a perpetual inhibition.

2. A vow of performance will be fulfilled even by a single performance.

3. An oath imposed by a supreme authority remains in force only during the existence of that authority.

4. A vow of gift will be fulfilled by the offer of the gift, even though it may not be accepted ;

5. Vows in respect of odoriferous herbs or flowers have force according to the sense in which the denomination of them is generally taken. Thus if a men makes a vow that, "he will not smell the Rehaan", and he then smells the rose or the jessamin, he will not be forsworn, because Rehaan is of that kinds of flower which have no stalk, and the rose and the jessamin have stalks or branches from which they depend.

If a man makes a vow that, "he will not purchase violets", and he has no specific intention therein, the vow will be taken to mean oil of violets, from general custom, according to which, a person dealing in that article is known as violet-seller, and as purchase is founded upon sale, a person purchasing oil of violets is termed a buyer of violets.

If the vower says that, "I will not purchase flowers", by this are meant the leaves only, and not the oil, as such is the literal meaning of it, and custom also confirms it, because by flowers is usually meant the leaves of the flowers. In the case of violets however custom has established it otherwise, as the word violets is commonly used for the oil of violets.

BOOK – II

LAQEET

(FOUNDLINGS)

LAQEET *

FOUNDLINGS

(*Hidayah, Kitab-ul-Laqeet*)

Note

"Literally", Laqeet, means anything lifted from the ground. But term is specifically used to denote an infant abandoned by some person in the highway. But, legally it signifies a child which is abandoned by those to whom it actually belongs, from the fear of poverty, or in order to save themselves from detection on account of Zina (i.e. illicit sexual intercourse)

The child is known as "Laqeet", because it is eventually lifted from the ground, and therefore this term is figuratively also applied, even to the property which is found upon it. The person who takes up the foundling is known as the "Multaqit" or taker-up.

1. Lifting up of a foundling .

The lifting up of a foundling is appreciable as well as generous, as it may tend to save his life. This is where the finder sees no immediate reason to suppose that if the child is not lifted up, it may perish. But where he sees reason to apprehend that it may otherwise perish, the lifting of it up is binding upon him.

2. Foundling is free .

A foundling is free ; because freedom is inherent in man; and the Muslim territory, in which the infant is found, is a territory of freemen, and, therefore, it is also free. Moreover, freeman, in a Muslim territory, are more in number than slaves, and therefore, the foundling is free ; as the smaller number is a dependant on the greater number.

* 'Ainul Hidayah, Vol. II, pp. 717 to 720. Also see Bukhari and Muslim.

3. Maintained by the State .

The expenses for the maintenance of a foundling are to be paid from the public treasury ; because it is so recorded from Hazrat Umar ; and also, because, where the foundling dies without leaving any heirs, his estate goes to the public treasury ; and as it is the property of the Muslim Community, his maintenance should be furnished from the property, since as the advantage goes to the community, the loss should also falls upon the community, and for this reason it is that the Diyat, or blood-wit, against the foundling is to be paid due from the public treasury, if he commits murder.

4. Return from the foundling to his Multaqit .

The Multaqit is not to take any compensation from the foundling on account of his maintenance, as in maintaining him he acts gratuitously, as he has no authority over him. He, therefore, cannot take any compensation from the foundling, except where he has provided him maintenance by order of the Qazi, in which case the maintenance will be a debt upon the foundling, because, the Qazi's authority being absolute, he is empowered to take the compensation from the foundling.

5. Taking a foundling from his Multaqit .

If a person takes up a foundling, no other person is entitled to take the foundling from him, because the right of charge of the foundling is established in him, as he first laid hands upon it.

But if, any person claims the foundling, saying that, "this is my child," the claimant's declaration will be accepted on the principle of benevolence.

This is where the Multaqit does not make any claim of parentage. But if the Multaqit also makes a claim, saying that, "this is my child," he will have the preference, because both parties are upon an equal footing in respect of their claim, but one of them, namely, the Multaqit, is in immediate possession, and is therefore to be preferred to the other.

Some jurists have, however, said that the declaration in question is valid only in respect of the establishment of parentage, but not in respect of finishing the Multaqit's right of possession and some have again, said that upon the parentage being established, the Multaqit's right of possession is finished, because one result of establishment of parentage is that the father gets the preference, in having the charge of his child, over all others.

6. Multaqit's claim of parentage in respect of his foundling.

If a Multaqit declares his foundling to be his own child, after having already declared it to be a foundling, some jurists say that his declaration will be valid.

7. Claim of parentage made by two persons .

If two persons make a claim together, each saying, that, "the foundling in the hands of such a person is my child," and one of them points out a particular mark upon the foundling's body, and not the other, the fondling will be adjudged to him, because apparent circumstances provide the proof in his favour, as the mark corresponds with his declaration.

But if neither of them is able point to out any particular mark, the foundling will be adjudged to both of them, because they are both upon a footing in respect of the ground of their claim.

But if one of them, makes his claim first i.e. before the other, the fondling will be adjudged to him because his right is

established at a time when no person objected to it, except where the other brings evidence, as evidence is more powerful than a mere claim.

8. Foundling discovered by a Zimmee in a Muslim territory

If a foundling is found up in a Muslim city or village, and a Zimmee claims it as his child, the parentage will be established in the Zimmee, but the child will be a Muslim.

9. If in a Zimmee territory .

But if, the child is found in a city or village of the Zimmees, or in a church or synagogue, it will be a Zimmee.

10. Foundling claimed as a slave .

If any person claims a foundling, to be his slave, his claim will not be admitted, because as it is apparent that the foundling is free, it cannot be supposed a slave unless the claimant produces evidence to prove that it belongs to him as a slave.

11. Slave's claim of parentage in respect of a foundling .

But if a slave claims a foundling , saying that, "this is my child," the parentage will be established in him, because this is advantageous the foundling, however, will be free, because the child of a man who is slave is free when born of a free woman, and it is a slave when born of a woman who is a slave. Concerning the child being a slave, therefore, there is a doubt ; and hence its freedom, which is shown by apparent circumstances, cannot be finished because of the doubt.

A freeman, in claiming a foundling, will have the preference over the slave, and a Muslim will have the preference over a Zimmee, because the claim of a freeman or of a Muslim is most advantageous to the infant.

12. Things found upon a foundling .

If there is anything found upon a foundling such as bracelets etc. it will belong to the foundling, because apparent circumstances prove it. Similarly and for the same reason, if there is anything fastened on the animal upon which a foundling is exposed, it will also belong to the foundling.

The Multaqit, moreover, should spend this thing in supplying the wants of his foundling, upon an order from the Qazi, because no person is known as owner of it, and the Qazi has authority to expend goods of this nature upon such an object.

Some jurists say that the Multaqit will be entitled to spend the thing in supplying the wants of his foundling, without any order from the Qazi, because it appears that the thing in question belongs to the foundling ; and a Multaqit is authorized to provide maintenance for his foundling, and to purchase such goods as are required and necessary for him, such as food and clothing.

13. Multaqit contracting his foundling in marriage .

It will not be lawful for a Multaqit to contract his foundling in marriage, because he has no authority for so doing, since the reason for such authority namely, relationship, ownership, or sovereignty, do not exist in him.

14. Multaqit not to perform any act in respect of his property.

Similarly, it will not be lawful for a Multaqit to perform any act in respect of the property of his foundling, analogous to the restriction upon a mother ; that is, a mother has a right to the charge of her infant child, but still she is not entitled to perform any act in respect of his property ; and a Multaqit stands in the same position.

15. Taking possession of gifts .

It will be lawful for a Multaqit to take possession of anything presented to his foundling as a gift, because this is of advantage to the foundling and for this reason it is that an infant is entitled to take possession of a gift, where he has attained discretion ; and similarly the mother of an infant, or her executor, are entitled to take possession of any gift presented to the infant.

16. Sending to school .

A Multaqit is entitled to send his foundling to school for the purpose of education, because this comes under the head of tuition and instruction, and amounts to his welfare.

17. Letting him out to hire .

A Multaqit is entitled to hire out his foundling. The author of Hidayah remarks that this is noted by Qadooree in his Compendium. But in the Jaame'-as-Sagheer it is noted that it is not lawful for a Multaqit to hire out his foundling, and this is approved.

BOOK – III *

LUQTAH

(TROVES)

LUQTAH *

(*Hidayah, Kitab-ul-Luqtah*)

Note

Legally, "Luqtah" signifies anything which a person finds lying upon the ground, and takes it away for the purpose of preserving it, in the manner of a trust.

It may be noted that the terms "Laqeet" and "Luqtah" have an affinity in respect of their sense ; the difference between them is merely this, that "Laqeet" is used in respect of human beings, and "Luqtah" is used in respect of all other things.

1. Trove property .

A Luqtah or Trove is considered as a trust in the hands of the Multaqit or finder, where he has called persons to witness that "he takes such thing in order to preserve it, and that he will restore it to its owner," because this mode of taking it is allowed by the Law, and is even the most eligible conduct, according to many of our jurists.

But this is where there is no apprehension of the thing to be lost or damaged. But where that is to be apprehended ; the taking of it up is necessary, according to what the jurists have laid down upon, this point.

2. Damage to property .

If such be the case, the thing will not be a subject of responsibility ; that is, indemnification for the trove thing will not be incumbent upon the finder, where it happens to be destroyed in his hands, and Similarly, the finder will not be responsible in a case where himself and the owner both agree

* 'Ainul Hidayah, Vol .II. pp.720 to 729. Also see Bukhari, Muslim and Sunan

that he had taken the thing avowedly "for the owner ;" because their agreement on this point is a proof in respect of both ; and, therefore, the declaration of the owner that "the finder had taken them from the owner," amounts to the same as if the finder was to produce evidence that he had taken them for the owner.

3. Finder taking the thing for his own use .

But if, the finder declares that, "I took them for myself," responsibility will be incumbent upon him according to all jurists, because he here appears to have taken the thing of another without his consent, and without the permission of the Law.

4. Responsibility for the trove.

If the finder has not called any person to witness, at the time of his taking the thing, that "he took it for the owner", and he and the owner afterwards differ upon this point, the finder says that, "I took it for the owner," and the owner denies it, then indemnification will be due, according to Imam Abu Hanifah and Imam Muhammad.

But Imam Abu Yusuf says that indemnification will not be due, and that the finder's declaration will be accepted.

5. Finder's notification of the trove to the bystanders.

In calling the people to witness it will suffice that the finder says to the bystanders, "if you hear of any one seeking for this trove thing, direct him to me ;" and this, whether the trove, thing consists of a single article, or of many articles, because, as the term Luqtah is a generic noun, it applies to a single article, as well as to many different articles.

6. Trove to be advertised.

If the trove thing is of less value than ten Dirhams, it is necessary for the finder to advertise it for some days, that is, for so long as he deems proper. But if it exceeds ten Dirhams in value, he should advertise it for one year.

The author of the Hidayah says that this is one opinion of Imam Abu Hanifah. But Imam Muhammad, in the Mabsoot, says that the finder should advertise it for one year, whether the value is great or small, and such is also the opinion of Imam Shaafe'ee, as the Holy Prophet has said "the person who takes up a trove thing should advertise it for one year," inspite of the thing being small or great.

The reason for the former opinion is that the fixing it at one year occurred in respect of a trove thing of the value of one hundred Deenars, which are equal to one thousand Dirhams. Now ten Dirhams, or anything above that sum, are the same as one thousand Dirhams in respect of the amputation of a thief's hand, or the legalizing of generation. Therefore, it is enjoined to advertise a trove thing for one year, out of caution. But anything short of ten Dirhams does not resemble one thousand Dirhams in respect of any of those particulars. Therefore, this point is left to the discretion of the finder of a thing of that value.

Some jurists say that the approved opinion is that there is no fixed time. This is left entirely to the discretion of the finder, who should advertise the trove thing until he is satisfied that it will never be called for by the owner, and should then give it in charity.

All that is here said is based on a supposition that the trove thing is of a lasting and unperishable nature. But if it is of perishable nature and unfit to be kept, it should be a advertised until it is in danger of perishing and should then be given in charity.

It may be noted that the finder should make advertisement of the trove thing in the place where he finds it, and also in other places of public resort, as by advertising it in such places it is most likely that the owner may recover it.

7. Trove of an insignificiant nature .

If the trove thing is of such a nature as that it is known that the owner will not call for it, such as date-stones, or pomegranate skins it will be the same as if the owner had thrown it away, and that it is lawful to use it without advertisement. But yet it will still continue to be the property of the owner, as transfer to a person unknown is not valid.

8. If the owner does not appear.

If the finder duly advertises the trove thing, and discovers the owner, it is well ; but if he does not fixed him, he will have two options ; (1) if he chooses, he can give it in charity, because it is incumbent to restore it to the owner as far as it may be possible, and either by giving the actual property to the owner, where he is discovered or by giving it in charity, so as that the merit of it may reach the owner as he will assent, upon hearing of its having been so given; or (2) if he chooses, he may keep the thing, in the hope of discovering the owner and restoring it to him.

9. Trove given in Charity.

If the finder of a trove thing discovers the owner, after having given it in charity, the owner will have two options.

(1) if he chooses, he may confirm the charity, in which case he will have the merit of it ; because, although the finder has given it in charity by permission of the Law, yet as the owner has not consented to it, the charity will remain suspended upon his consent to it.

(2) If he chooses, (a) he may take an indemnification from the finder, because he has given a thing to the poor without consent of its owner.

Or (b) he may take indemnification from the poor, where the trove thing has been lost in his hands, because he has taken possession of the thing of another person without his consent.

Or (c) if the thing is still in the hands of the poor, the owner may take it from him, as he will thus get back his own property.

10. Stray animals .

It is good to secure and take care of strayed animals; such as oxen, goats, or camels.

11. Responsibility of the owner to the finder for expenses.

If , the finder provides the subsistence to troves of this kind without authority from the Qazi, it is a gratuitous act, because of his not having any authority. But if he provides subsistence by order of the Qazi, it is a debt upon the owner, because the Qazi is endowed with authority over the property of an absentee for the purpose of enabling him to act with kindness to the absentee ; and the providing of subsistence is an act of kindness.

12. Qazi **to direct them to be hired out .**

If the question in respect of the subsistence of the troves is brought before the Qazi he should inquire into the particulars ; and if the troves are capable of hire, such as horses, camels or oxen, he should order them to be hired out, and subsisted from their hire, because in such a case the animal continues to be the property of the owner without subjecting him to any debt, and a similar judgment should be passed in respect of fugitive slaves.

13. Direction to be sold .

But if the troves are unfit for hire such as goats or sheep, and it is apprehended that, if the finder subsists them, the subsistence will be equal to their value, the Qazi should direct them to be sold, and the price to be kept in such a manner that the troves may be virtually preserved in their value, because the preservation of such animals is not practicable.

14. Qazi to order for subsistence .

But if, the Qazi deems it fit to provide subsistence, he should adjudge subsistence to be provided, and the same a debt upon the owner of the animals, because the Qazi is appointed for the purpose of exercising humanity and kindness ; and the providing of subsistence is a kindness both to the owner as well as to the finder-to the owner, because his property is thus preserved to him in subsistence ; and to the finder, because the subsistence he provides is thus made a debt upon the owner.

15. Subsistence not for more than a few days .

The jurists, however, have said that the Qazi is to issue the order for subsistence only for the period of two or three days, in the hope that the owner may appear. But if the owner does not appear, he should then order the troves to be sold, because to provide subsistence to them for a longer period will be to eradicate the property, and therefore there will be no kindness in providing them subsistence for a longer period that is, for more than three days.

16. Evidence in proof of the trove .

It is said, in the Mabsoot, that the production of evidence is necessary, that is, the Qazi is not to give an order for subsisting the animal, except where the finder produces evidence

to prove that "such an animal is a trove ;" and this is approved, because it is possible that he may have got possession of the animal by usurpation, and in a case of usurpation the Qazi does not give an order for providing subsistence, but directs the thing usurped to be returned to the owner, except in a case of trust, which cannot be proved without evidence. The production of evidence, therefore, is essential so that the actual state of the case may be ascertained.

17. If the finder has no evidence .

If the finder says that, "I have no evidence of the animal being in my possession as a trove" still if it is apparent that it is a trove, the Qazi should say, "Subsist this animal, if your declaration is true!" and then, if the finder's declaration is true, he will have a claim upon the owner for the subsistence but not if he is a usurper.

18. Responsibility of the owner for the subsistence .

It may be noted that what is laid down above, that "the Qazi should adjudge subsistence to be provided, and make the same a debt upon the owner of the animals," implies that the finder will have no claim upon the owner for such subsistence, upon his appearing at a time when the trove has not yet been sold, unless the Qazi, in his decree, directs that "he shall have such a claim upon him." But if the Qazi does not thus render the subsistence a debt upon the owner, the finder will have no claim upon him for it. This is an approved doctrine.

Some jurists say that the finder has a claim upon the owner for the subsistence, where he provided it by order of the Qazi whether the Qazi may have explicity declared the same to be a debt upon the owner or not.

19. Finder may detain the trove from the owner .

When the owner appears will be entitled, the finder to detain the trove, until the owner pays the finder for the subsistence ; because the finder has preserved the trove, and kept it alive by subsisting it.

20. Trove perishing in the finder's possession after detention.

It may be noted that the debt for subsistence will not be finished if by the trove perishes in the hands of the finder, before his detention of will be finished if the trove perishes in his hands after detention, because by detention it is placed in the same state as a pledge, and as debt is finished by the destruction of the pledge, similarly the debt for subsistence is finished, if the trove perishes after detention.

21. Trove of Haram article .

Troves of Haram * articles and those of Hil ** articles are the same, in this respect, and the finder should advertise them for one year.

22. Claimant of a trove to prove his right or describe the tokens of it .

If a person appears, and claims the trove, it will not be given to him until he produces evidence.

But if, the claimant describes the specific signs of the trove, by mentioning the weight of the Dirhams for example, or the purse in which they are contained, and its tying, it can be lawfully given to him, but the Qazi will not to use any compulsion upon this point .

* Sacred territory round the Ka'bah .

** Area between Haram and Meeqaat .

23. Finder surrendering a trove upon description of the signs .

When the claimant describes the specific signs of the trove, without producing evidence, and the finder surrenders it to him, it will be necessary for the finder to take security from him out of caution *; and on this point there is no difference of opinion, according to the Rawayat Saheeh, because here the finder will require the security for himself .**

24. Compelling the finder to surrender the trove .

If a person appears claims the trove and the finder also verifies his claim, still some jurists say that the Qazi should not compel him to surrender the trove.

25. Giving trove in charity to a rich person .

The finder should not give the trove in charity to a rich person, because the Holy Prophet has said, "if no owner of a trove thing appears, gives it in charity; " and it is not lawful to give charity to the rich person; a trove, resembles Zakaat.

26. Converting by the finder to his own use .

(1) If the finder is rich it is not lawful for him to derive any benefit from the trove.

(2) If the finder of a trove is poor, he need not hesitate to make use of the trove **** as in such a disposal of it there is kindness for both-to the owner and to the finder. *****

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* Lest another person should afterwards appear, and prove the trove to belong to him by evidence.

** He takes the security on his own behalf, and not on behalf of any future possible claimant, who, if he appears, has recourse to him for restitution.

*** After having dully advertised it, as before directed .

**** Because the finder thus obtains a relief from his wants, and the owner has the merit of the charity.

Upon the same principle, also, it is lawful to give it to other poor person. Thus if the finder is rich, but his children, or wives are poor, he may give the trove in charity to them, for the reason above stated.

BOOK – IV *

MAFQOOD

(MISSING PERSONS)

MAFQOOD *

MISSING PERSONS

(*Hidayah, Kitab-ul-Mafqood*)

Note

Literally Mafqood, means lost and not known. But legally, it signifies a person who disappears, and of whom it is not known where he is, and whether he is alive, or dead.

1. When a person disappears .

If a person disappears, and it is not known where he is, or whether he is dead or alive, the Qazi should appoint some person to look after his property ; and to manage his affairs, and maintain his rights.

2. Taking possession of the acquisitions .

The person appointed by the Qazi will look after the rights of the missing person, which means that he will take possession of all acquisitions arising to the missing person from his tenements, lands, or goods, and also of such debts as are acknowledged by his debtors ; and that he will also prosecute for debts owing on account of contracts entered into by himself (on behalf of the Mafqood or missing person) which are disputed by the debtor, as the rights of the contract belong to him, as he is the contractor.

3. Processing for disputed debts, or deposits .

But he will not prosecute on account of debts owing on account of any contract entered into by the missing person, and

* 'Ainul Hidayah, Vol .II. pp.733 to 738.

which are disputed by the debtors ; nor will he prosecute for the missing person's share in lands or gives, in the hand of a third person, who disputes the same.

4. Missing person's perishable effects.

It may be noted that if there is, among the goods of the missing person, articles of a perishable nature, such as fruit, etc., the Qazi should sell them.

5. Unperishable goods.

But he will not sell any articles which are not liable to perish, either on account of subsistence, or for any other purpose.

6. Subsistence to be provided.

The Qazi will order for providing subsistence to the wife and children of a missing person out of his property.

But this rule will not be restricted only upto his immediate children, but it will extend to all related to him in the line of paternity, such as the father, the grandfather, the son's son, and so forth ; because it is a rule that every person entitled to a subsistence from the property of the missing person while he was present, independent of an order from the Qazi, such as his infant children, and adult daughters, or adult sons who are disabled, should in his absence be provided subsistence, out of his property, by the Qazi ; but to those who, while the missing person was present, had no right to subsistence independent of an order from the Qazi, such as brothers, sisters, or maternal uncles or aunts, no subsistence will, in his absence, be provided by the Qazi, because these are entitled to a subsist-ence only through a decree, and a decree against an absentee is not valid.

By the property of the missing person, as here referred to, is meant money, because the right of the above persons is food and clothing, and where these are not available among the

goods of the missing person, there is the necessity for the Qazi to decree the value; and the value consists of cash. Bullion, that is, uncoined gold and silver is in this respect subject to the same rule with cash, as that also admits of being given as value, in the same manner as cash. But this will be where the Qazi has money in his hand.

7. There are no goods in the Qazi's hands .

But if, there is no money in his hands but there is some in trust in the hands of another person ; or a debt due from some other person, the Qazi should, in such a case, order to provide the subsistence from such deposit or debt, where the trustee or debtor acknowledges the trust or debt, and also the marriage or parentage.

But this acknowledgment, will be necessary only where these facts are not fully known to the Qazi ; because if they are fully known to him, the acknowledgment will not be necessary.

But if, some of these facts are known such as the debt and the deposit, and some are unknown, such as the marriage or the parentage, or *vice versa*, in such a case the acknowledgment will be necessary in respect of that which is unknown. This is approved.

If the trustee or debtor provides the subsistence without an order from the Qazi, the trustee will be responsible for such disbursement, and the debtor will not be discharged from his debt, because in so doing they have not paid anything either to the owner or to his representative ; contrary to where they provide subsistence by order of the Qazi, because he is the representative of the owner.

If the trustee or debtor denies the trust or the debt, together with the marriage and parentage, or if they deny the marriage and parentage only, in such a case the persons entitled to subsistence can-not be admitted, as plaintiffs, to prove and

establish those facts which the trustee or the debtor denies ; because a claim is not admitted, unless it is laid against either the principal, or his representative ; and the principal, in the present case, is absent ; and the debtor or trustee is not, actually or virtually his representative.

8. Effecting separation between a missing person and his wife.

The Qazi is not empowered to effect a separation between a missing person and his wife.

9. Missing person to be declared a defunct .

When one hundred and twenty years have elapsed, from the day of the missing person's birth, he will be declared as defunct. *

The author of Hedayah says that Imam Hasan has related this as an opinion of Imam Abu Hanifah. According to the Zahir-ur-Rawayat, this point is to be determined by the decease of the co-evals of the missing person, or of his equals, that is, those who are known to resemble him in health and habits of body. It is noted from Imam Abu Yusuf that the period is one hundred years. Some of the jurists, again, fix it at ninety years.

Analogy requires that the period should not be fixed at any particular person, such as one hundred years, or ninety years, because to fix a time merely from judgment or opinion is not valid but still it is necessary that it should be fixed by some specific standard, such as the demise of the missing person's co-evals, because, if no criterion, whatever, is fixed, his death will never be declared.

10. At the end of ninety years from his birth .

The benevolence of the law, however, suggests that the period should be fixed at ninety years, as this is the shortest fixed term mentioned, ** and it is difficult to ascertain anything in

*This is according to Sunnah. The author of the Hedayah, however, has fixed it at ninety years.

** By many of the jurists or commentators .

respect of the circumstances of the missing persons' co-evals or equals.

11. Wife to observe 'Iddat of widowhood .

When the death of the missing person is duly declared, his wife should observe her 'Iddat for four months and ten days from the date of the declaration, as this is the 'Iddat of widow-hood.

12. Property to be divided among his heirs .

And his property should be divided among those of his heirs who are then living. The case, therefore, is the same as if he had actually died upon the instant of the declaration, and, therefore, any person who died previous to the declaration will not be entitled to inherit of him.

13. Missing person's right of inheritance .

If the relation of a missing person dies during his disappearance, the missing person will not be an heir, because his existence at the time is proved merely from circumstances, as having been once known, and therefore accounted to continue so long as nothing appears to the contrary.

It may be noted that mere circumstantial evidence is but weak, and therefore is not capable of constituting proof to a claim that is, to the establishment of a thing as yet unestablished; although it constitutes proof sufficient for repulsion, that is to say, to prove the continuance of a thing already proved.

14. His share held in suspense .

As regards the statement that, "the missing person is not an heir," it means that, whatever may be his share of inheritance, he does not obtain a property in it, but is held in suspense; because his being alive is doubtful ; and this is a sufficient cause of suspense.

15. At the end of ninety years .

If, he afterwards appears to be alive, his share will go to him. But if there is no evidence of his being alive when ninety years have elapsed, his share, which has been so suspended, will then be distributed among those who were heirs to the original owner at the time of his death, as in the case of embryos in the vomb.

Similarly, if a person makes a bequest to a missing person, and the testator dies, the bequest will not take place, but will be held in suspense, because bequest stands upon a similar footing with inheritance.

16. Disposal of inheritance in case of a coheir .

It is a rule that if there is another heir, besides the missing person, who is not entirely precluded by the missing person, but whose right is diminished by his intervention, this heir will receive that which is the least of the two shares of inheritance and the remainder will be kept in suspense.

But if, there will be another heir, who is entirely precluded by the missing person, no part of the inheritance will be paid to him, but the whole share of inheritance will be kept in suspense.

BOOK – V

IKRAAH

(COMPULSION)

IKRAAH *

COMPULSION

(*Hidayah, Kitab-ul-Ikraah*)

Note

Literally "Ikraah" means to force anybody to do anything against his will. But legally, "Ikraah", or compulsion, applies to cases where the compeller has it in his power to do what he threatens, whether he is a man of authority for example, the Sultan, or any other person, as, for example, the decoit.

Compulsion is known as "Ikraah" or "Jabr", compeller is known as "Makarah" or "Jaabir", and the compelled one is knowns as "Majboor."

It may be noted that as it is necessary to prove compulsion, that the compeller should be able to carry his threat into execution, so also it is necessary that the person compelled be in the fear that the thing threatened will actually take place ; and this fear is not supposed except when it appears most probable to the person compelled that the compeller will actually do what he has threatened, so as to force him to do the act which the compeller wants of him to do.

1. Person forced into a contract .

If a person uses compulsion upon another person, by cutting, beating or imprisonment, with a view to make him sell his property, or purchase the goods, or acknowledge a debt of one thousand Dirhams to a particular person, or let out his house to hire, and the and this other person accordingly sells his property, purchases the goods, or so forth, he will afterwards be

* Qur'an, Ch.2 (Baqarah), verse 256; Ch.10 (Yonus), verse 99; Ch.16 (Nahal), verses, 106 and 107; Ch.18 (Kahf), verses 28and 29; 'Ainul Hidayah, Vol.III pp814 to 825

entitled to honour to the contract into which he has been so compelled or to dissolve it, and take back or return the goods purchased or sold.

2. Means of compulsion being trifling .

But this rule, will not apply where the compulsion is only of a single blow, or of imprisonment for one single day, as fear is not usually created by this degree of beating or confinement. Compulsion, therefore, is not proved by one single blow, or one day's imprisonment ; unless the compelled is a person of rank, to whom such a degree of beating or confinement will appear detrimental or disgraceful ; because in respect of such a person compulsion is also proved by this degree of violence, as by it his volition is destroyed.

3. Purchaser of goods sold upon compulsion .

Similarly, an acknowledgment taken by any of the above modes of compulsion is not valid; because acknowledgment is a kind of proof, as truth is more possible, in acknowledgment, than falsehood. But in a case of compulsion falsehood is more possible as a man acknowledges falsely where, by so doing he can avoid injury.

Where a person sells goods by compulsion as above and gives the delivery of them under the effect of such compulsion, the purchaser becomes owner of them, according to the jurist. But Imam Zufar says, that he does not become the owner.

4. Seller resuming the articles sold .

Where a person sells his goods under compulsion, he still has a right, as long as he does not signify his consent to the sale, to take back the goods, even though the purchaser has sold it to another person.

5. Wafa sale .

It may be noted that some jurists consider a Wafa Sale as invalid, like a Compelled Sale, and apply to it the rules of sale by compulsion ; and, therefore according to them if, the purchaser in a Wafa Sale sells the purchased goods, the sale so made by him can be broken through, as the invalidity of the sale, in such a case is on account of the absence of the consent of the seller, as in the case of compulsion.

Wafa Sale is where the seller says, to the purchaser that, "I sell you this article against the debt which I owe you, in this way, that upon my paying the debt the goods sold will be mine."

Some jurists hold this to be, in fact, a contract of pawn ; as between it and pawn there is virtually no difference, as, although the parties hold it a sale, but the intention is, in effect of a pawn.

Since in all such acts regard is given to the spirit and intention ; and the spirit and intention of pawn exist in this case, and, therefore the seller is entitled to resume the goods from the purchaser upon paying his debt to him.

Some, jurists, also consider a Wafa Sale as utterly void, as the purchaser, in the case in question, is like a person in jest as he, like a jester repeats the words of sale, at the same time that the effect and purpose of sale are not within his plan. Such sale is therefore utterly void, as a sale made in jest.

The Hanafi jurist of Samarcand, on the other hand, hold a Wafa Sale as both valid as well as useful, as it is a kind of sale commonly made due to necessity and convenience, and is attended with benefit with regard to some aspects of sale, such as the use of the goods, even though the purchaser is not entitled to dispose it off.

6. Compelled sale .

If, in the sale under compulsion, the seller gets the price readily and willingly, the sale will be valid, as his thus getting the price will be the proof of its validity.

7. Seller compelled to receive the price.

If, in the sale under compulsion, the seller takes the price by compulsion, such receipt will not make the sale valid ; and it will accordingly be binding on him to return the price to the purchaser, if it is in his hands, because the contract is not valid.

But if, the price has been lost, or destroyed in his hands, nothing will be taken from him for it, because it was merely a trust with him, as he took it by consent of the owner, namely, the purchaser.

8. Seller is compelled, but not the purchaser .

If one person compels another to sell any goods to a third person, but does not compel this person to purchase the goods, and it is then destroyed in the purchaser's hands, the purchaser will be responsible to the seller for the value, as the goods is insured in his hands, as this is the law of invalid sale.

It may be noted, that in such a case the seller is entitled to take the compensation from the compeller.

Section

MISCELLANEOUS CASES
(*Fasl-ul-Mutafarriqaat*)

1. Eating or drinking prohibited things under compulsion

If any person compels another person, by imprisonment or beating by blows ; to make him eat carrion or drink wine, still

is not lawful for the person thus compelled to eat or drink those things, unless he is threatened with danger to his life or limb of body, in which case he may lawfully do so and the same rule will apply if compulsion is used to make a person eat blood or pork.

2. Declaring himself an infidel, or reviling the Holy Prophet under compulsion .

If one person compels another person to turn infidel, or to revile the Holy Prophet, by imprisonment or beating by blows, still compulsion in its legal and exculpatory sense will not proved but if he threatens him with something which puts him in danger to life or limb of body, in such a case compulsion will be proved.

3. Destroying the property of another under compulsion .

If any person compels another person to destroy the property of a Muslim, by threatening him with something dangerous to life or limb of body, it will be lawful for the person so compelled to destroy the property.

The owner of the property should in such a case take the compensation from the compeller.

4. Murdering another person under compulsion .

If any person compels another person, by threatening him with death, to murder a third person, still it will not be lawful for the person so threatened to commit the murder, but he should rather refuse, even unto death.

But if, he notwithstanding commits the murder, he will be an offender, as the slaying of a Muslim is not permitted under any respect whatsoever.

But in such a case, the retaliation will be upon the compeller, if the murder is willful. The author of the Hedayah

says that this is according to Imam Abu Hanifah and Imam Muhammad. But Imam Zufar, says that the retaliation will be upon the compelled himself; and Imam Abu Yusuf is of the view that there will be no retaliation upon either party. But Imam Shaafe'ee on the contrary says that it will be incurred by both.

5. Compelled divorce or emancipation .

If any person compels another person to divorce his wife, or to emancipate his slave, and this person accordingly divorces his wife or emancipates his slave, such divorce or emancipation will take place.

In the case of compulsive manumission, the person compelled will be entitled to take the value of the slave from the compeller.

6. Compelled appointment of agency for divorce or emancipation .

If any person, under compulsion, makes another person as his agent for divorce or emancipation, and the agent divorces the wife, or emancipates the slave, of the person thus compelled to authorize him, such divorce or manumission will be valid.

In the case of divorce, the compelled one will be entitled to take half the dower from the compeller ; and, in the case of manumission, to take from the compeller the value of the slave.

7. Irreversible deed executed by compulsion .

It may be noted, that in all contracts which, after engagement, do not admit of reversal or dissolution, compulsion will have no effect whatsoever, but they will be equally obligatory under compulsion as otherwise.

Therefore compulsion has no effect upon a vow, as this (unless it be of a suspended nature) is not capable of dissolution ;

and accordingly, the person compelled into such a vow will not be entitled to take anything whatsoever from the compeller, in compensation of the loss he suffers by such vow.

Similarly, compulsion will have no effect in oaths, or in Zihar, as they do not admit of retraction and reversal of divorce and Eila is also subject to the same rule, as well as a recantation of an Eila oath at the time of making the assertation. In Khula, also, as it is a suspension of divorce on the part of the husband as the suspends it on the payment of the consideration, compulsion will have no effect, as it is not capable of reversal or dissolution ; and accordingly, if the husband is compelled into it, not the wife, she will be responsible for the consideration, as she consents to it, as having undertaken for it without compulsion.

8. Zina by compulsion .

If a person, under compulsion, commits Zina, he will be liable to punishment, according to Imam Abu Hanifah, except where the compeller is a Sultan. But Imam Abu Yusuf and Imam Muhammad say, maintain that he will not liable to punishment in either case.

9. Apostacy under compulsion .

If a person, under compulsion, becomes an apostate by pronouncing a renunciation of the faith, still his wife will not be separated from him, because apostacy has a connection with belief, and therefore if his faith of heart continues firm, he will not be become an infidel by the mere verbal renunciation. (Qur'an, Ch. 16, [Nahl], verses, 106 & 107).

But it will be in respect to otherwise a man who becomes Muslim under compulsion, as a man who embraces the faith under compulsion will nevertheless be admitted to be a Muslim, because of the possibility that his faith accords with his words.

10. Acceptance of Islam under compulsion .

If a person becomes a Muslim under compulsion, so as to be known as a Muslim, and afterwards apostatizes, still he will not be put to death, as his Islam is doubtful, and doubt will prevent him from putting to death.

11. Husband acknowledging his apostatizing under compulsion .

If a person, after making under compulsion, a declaration of infidelity, says to his wife, who demands a separation that, "I said a thing in which I was not serious", or that, "I spoke falsely", in such a case his wife will be separated from him in the conception of the Qazi and the Qazi should issue a decree accordingly, although there will be no separation before Allah .

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* On refusing to say the "Kalmah-e-Kufr", Hazraat Yasir and Sumaiyyah Suffered the highest merciless murder and Suhaib, Bilal and Khabbaab Suffered severe most tyrany, at the hands of the polytheists of Mecca. But Hazrat Ammaar the son of Yasir, on seeing the tragic murder of his parents, got frightened, and said the "Kalamah-e-Kufr", and this saved his life, and then reported the incident to the Holy Prophet (Peace Be Upon Him), and after confirming from him that at the time of saying the "Kalamah-e-Kufr", his heart was firm on the faith of Islam, the Holy Prophet (Peace Be Upon Him), consoled him that there was no responsibility on him. It was on this occasion that verses 106 and 107 of Ch. 16 (Nahl) were revealed (see commentaries of Holy Qur'an by Qurtabi and Qazi Sanaullah of Panipat, as reffered to by Mufti Muhammad Shafie in his Ma'ariful Qur'an, vide Vol. V, pp. 394 and 395.

BOOK – VI

HIJR

(PROHIBITION)

HIJR *

PROHIBITION
Note

Literally "Hijr", means prohibition or prevention. But legally it signifies an prohibition of action, in respect of a particular person, who is either an infant, an idiot, or a slave, as the causes of prohibition are three viz., infancy, insanity, and slavery.

CHAPTER 1

PROHIBITION

1. Operation of prohibition.

The acts of an infant are not lawful unless permitted by his guardian, nor the act of a slave is lawful unless permitted by his master ; and the acts of a lunatic, who has no lucid intervals, are not at all lawful.

The acts of an infant are not lawful, because of the lack of understanding in him ; but the authority of his guardian is a proof of his capacity ; and, therefore, on account of it an infant is taken as an adult.

The illegality of the acts of a female or male slave is based on the right of the owner ; because if their acts such as purchase and sale were valid and efficient, they would be liable to debt, and their creditors might take their acquisition, or even sell their persons for the discharge of their debts, and, therefore the master's right would be defeated.

But if, the master gives his consent to their acts, he will thereby agree to the loss of his right.

* Ainul Hidayah, Vol. III, pp. 825 to 843.

As regards the acts of a lunatic, they are not lawful under any circumstance, as he is totally incompetent to it, even though his guardian agrees to his acts.

2. Purchase or sale by prohibited persons .

If a slave, an infant, or a lunatic, sells or purchases anything, knowing, at the time, the nature of purchase and sale, and intending one or other of those, the guardian, or other immediate superior, has it his option either to confirm if he sees it fit, or to finish the bargain.

3. Prohibition operates in respect of words, and not of acts .

It may be noted that the three disqualification's, namely, infancy, insanity, and slavery, create prohibition in respect of words, but not in respect of the acts ; because acts, upon proceeding from the doer, are existent and perceptible, while mere words, such as purchase, sale, and so forth, are existent only where they are of lawful force and authority, which depends upon the plan of them which, in the case of infants and lunatics, is not regarded, because of their lack of understanding ; or in the case of slaves, because of the loss to their master.

4. Contracts or acknowledgments by prohibited persons .

Contract entered into, or acknowledgment made by an infant or lunatic, is not valid, for the reason before assigned in the same manner, divorce or manumission pronounced by them does not take place, the Holy Prophet has said, "every divorce takes place except the pronounced by an infant."

It may be noted, that the manumission is peculiarly prejudicial ; and an infant does not understand the nature of divorce, as he is not capable of desire ; and his guardian cannot possibly know whether the infant and his wife may not agree together after he attains maturity. Therefore the divorce or manumission pronounced by an infant do not depend, in their effect, upon the consent of the guardian.

5. Contracts or acknowledgments by their guardians .

Similarly if, the guardian himself pronounces a divorce upon the infant's wife, or grants manumission to his slave, it will not take place ; in opposition to other acts, such as purchase, sale etc.

6. Responsibility of destruction of property .

If an infant or a lunatic destroys anything, they will be liable for the recompense, so that the right of the owner may be preserved.

7. Acknowledgment by a slave regarding property .

An acknowledgment made by a slave is valid in respect of the slave himself, because of his competency. But it will not be valid in respect of his master, from tenderness to his right ; because if he were liable to be affected by it, the debt or obligation contracted by the slave's acknowledgment would attach to the slave's person or to his acquisitions, which would be destructive of the master's property.

If , therefore, a slave makes an acknowledgment relating to the property, such property will be obligatory upon him after he will become free ; because a slave is in himself competent to make a valid acknowledgment, the validity of which is, however, obstructed by the right of his master ; but that right is extinguished upon his becoming free, and therefore the obstruction then finishes.

8. Acknowledgment by a slave inducing punishment .

If a slave makes an acknowledgment causing punishment or retaliation, those are to be executed upon him on the instant, as he is taken as free in respect of his blood, and, therefore his master's acknowledgment affecting his blood is not accepted .

9. Divorce pronounced by a slave .

Divorce pronounced by a slave is valid because of the saying of the Holy Prophet before quoted ; and also because the Holy Prophet has said, "a slave and a Mukatib are not masters of any thing except divorce".

Further, as a slave knows what is advisable for him as regards divorcing his wife, he is therefore competent to do so. His maser's right of property in him, moreover, or the advantage he derives from his services, are not liable to be thereby lost or defeated. Divorce by a slave is, therefore valid and effective.

CHAPTER 2

PROHIBITION DUE TO "FASAAD" (WEAKNESS OF MIND)
(Hidayah, Kitab-ul-Hijr, Baab-ul-Hijr Lil Fasaad)

1. Prohibition in respect of a prodigal .

Imam Abu Hanifah has said that there is no prohibition upon a freeman who is sane and adult inspite of the fact that he is a prodigal and also, that the acts of such a person, regarding to his property, are valid, although he is of an extravagant and careless disposition, who throws away his property on the object in which neither his interest nor his inclination are concerned.

A prodigal (Safeeyah) means the one who due levity of understanding, acts merely from the impulse of the moment, and not according to the law, or common sense.

But Imam Abu Yusuf, Imam Muhammad and Imam Shaafe'ee hold that a prodigal is under prohibition, and is prohibited from acting with his own property, as he spends his property idly, and in a manner opposed to reason.

2. Imposed by one Qazi and removed by another .

If a Qazi lays an prohibition upon a prodigal, and the matter is referred to another Qazi, and he finishes the prohibition, and leaves the prodigal at full liberty, it will be valid.

3. Property of a prodigal minor .

Imam Abu Hanifah has said that, if a minor is a prodigal at the time of his attaining maturity, his property should not be delivered to him until he is of twenty five years of age. But still, if he performs any act in respect of his property in that period, it will takes effect, as, according to Imam Abu Hanifah, prodigals are not liable to prohibition ; but upon completing his twenty-fifth year, his property should be delivered to him, even though his discretion may not be ascertained.

But Imam Abu Yusuf and Imam Muhammad hold that his property should not be delivered to him until such time as his discretion is fully known ; and that in the interim period all acts performed by him will be invalid ; because a mental imbecility is the cause of the obstacle to his power of action. It, therefore follows that the obstacle continues as long as the chance of it remains.

4. Sale contracted by a prodigal after maturity, and before prohibition .

If the prodigal, discussed in the preceding case contracts a sale before any prohibition has been laid upon him by the Qazi, such sale will be valid, according to Imam Abu Yusuf, as to render the acts of the prodigal invalid, it is necessary that the Qazi lay an prohibition upon him, that prohibition so may be fully proved. But accordingly to Imam Muhammad, the sale in question will be unlawful, as the prodigal is in fact under prohibition after majority, as the cause of prohibition, namely prodigality, stands in place of infancy.

The same difference of opinion is in respect of an infant who is discreet at the time of attaining majority and after-wards becomes prodigal .

5. Prodigal grating manumission .

If the prodigal in question emancipates his slave, it is valid, and the slave will become free. This is the view of Imam Abu Yusuf and Imam Muhammad.

6. Tadbeer .

If the prodigal in question declares his slave as a Mudabbir, it is lawful ; and it actually amounts to manumission.

Emancipatory labour, however, is not binding on the Mudabbir during the prodigal's life, as he still continues his property. But if the prodigal dies, without discretion having been

ascertained in him, the Mudabbir will in such a case perform emancipatory labour (to the prodigal's hires or creditors, as the case may be), to the extent of the value of the Mudabbir ; because he has become free upon his master's death, at which time he is a Mudabbir, and the case is therefore the same as if the master had first declared him a Mudabbir, and then emancipated him.

7. Claiming a child born of his female slave .

If the female slave of the prodigal gives birth to a child and he claims it, and the parentage is proved in him, the child will be free, and the mother will become his Umm-e-Walad; because as the prodigal has the right to make the claim in question, with a view to posterity, he will therefore, be entitled to claim the Child.

8. Creating his female slave as Umm-e-Walad .

If the female slave of the prodigal is not in possession of any child, and the prodigal declares her to be his Umm-e-Walad, she will accordingly become his Umm-e-Walad, with the result that he will not be entitled to sell her.

If, however, the prodigal dies, she will have to perform emancipatory labour [to his heirs or creditors] for her whole value; because declaration as Umm-e-Walad is the same as his acknowledgment of her being free, as the child, which could be a proof of her freedom, is not available in this case ; and as, if he had declared her to be free, she would have to perform emancipatory labour, and the same is the position in the present case.

9. Prodigal may also marry .

If the prodigal in question marries any woman, it will be legal and valid.

If, also, he fixes any dower, it will be valid up to the proper dower of a women, as that is one of the requirements of marriage ; but any thing beyond the proper dower will not be valid.

If, also, he divorces his wife before consumration, one-half dower will be payable to the woman from his property.

Similarly, if he marries four wives, or a new wife every day, it will be valid.

10. Payment of Zakaat and maintenance out of his property.

Zakaat is levied upon the property of the prodigal in question, as Zakaat is binding on him. Similarly, maintenance is to be provided to his parents and children, his wife or wives, and all relatives who have a claim upon him for maintenance.

It may be noted that it is the duty of the Qazi to give the amount of Zakaat to the prodigal so that he may spend it on the proper objects of Zakaat.

The Qazi should, however, appoint one of his Ameens to see that Zakaat is applied to its proper objects ; and as regards the maintenance to relatives, he should give the necessary amount to the Ameen so, that he may distribute it among those who are entitled to maintenance.

11. Prevention from performing Pilgrimage .

If the prodigal wants to perform the Hajj, he should not be prevented, because this is a duty binding upon him by a Commandment of Allah, independent of his will.

The Qazi should not, however, give to him the amount needed for his travelling expenses, but should hand it over to a trustworthy person among the pilgrims, to provide him a maintenance out of it upon the journey.

Similarly, if the prodigal wants to performing the Umrah, he should not be prevented.

12. Bequests for pious purposes .

If the prodigal falls sick, and makes many bequests for pious and charitable purposes, they will be valid up to the extent of one-third of his whole property.

13. There is no prohibition upon a Faasiq .

Our jurists are of the view that no prohibition should be imposed upon a [Faasiq] in respect of his property, if he is able to use his discretion ; and as regards general or supervenient inability of manners are alike in respect of application of this rule.

14. Liability to prohibition from carelessness in affairs .

Imam Abu Yusuf and Imam Muhammad are of the view that the Qazi has the right to impose prohibition upon the people on account of carelessness or neglect in their affairs, even though they are not prodigals.

Section

TIME OF ATTAINING PUBERTY
(*Fasl Fee Haddil Buloogh*)

1. Puberty of a boy and that of a girl .

The puberty of a boy is proved by his being subject to nocturnal emission, his impregnating a woman, or emitting in the act of coition ; and if none of these facts are known to exit, his puberty will not be proved, until he has completed the age of eighteen year.

The puberty of a girl is proved by menstruation, nocturnal emission, or pregnancy ; and if none of these facts has taken place, her puberty will be proved on her attaining the age of seventeen year.

This is according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that the boy as well as the girl on completing the fifteenth year, are to be declared adult. There is also a similar view reported from Imam Abu Hanifah and Imam Shaafe'ee is also of the view.

It is also reported, from Imam Abu Hanifah, that to prove the puberty of a boy nineteen years are required. Some jurist, however, say that by this is to be understood merely the completion of eighteen years and the commencement of the nineteen year ; and therefore, this report fully accords with the other opinions. Some jurists also affirm that this is not the sense in which the last report is to be received ; because there have been other opinions reported from Imam Abu Hanifah on this point, different from that first mentioned as above ; because some jurists expressly say that (according to him) the puberty of a boy is not to be counted by years until he shall have completed his nineteenth year.

It may be noted that the earliest period of puberty, in respect of a boy, is twelve years, and in respect of a girl, nine years.

2. Their declaration of their own puberty .

When a boy or a girl attains the age of puberty, and they declare themselves to be adult, their declaration should be accepted, and they will become subject to all the rules applicable to the adults ; because the attainment of puberty is a matter which can only be known by their testimony ; and therefore, when they declare it, their declaration should be accepted similarly as the declaration of a woman in respect of her courses.

CHAPTER 3

PROHIBITION ON ACCOUNT OF DEBT

(*Hidayah, Kitab-ul-Hijr, Baab-ul-Hijr Ba Sabab-ud-Dain*)

1. Debtor is not liable to prohibition.

According to Imam Abu Hanifah, no person can be subjected to prohibition on account of debt. If, therefore, a debt is proved against any person, and the creditors request the Qazi to imprison him and lay him under prohibition, still the Qazi should not lay the prohibition against him; because prohibition will make him incompetent. It is not therefore allowable for the removal of a particular injury.

2. Nor can his property be made the subject of any transaction.

If, also, the debtor is possessed of property, still the Qazi is not entitled to purchase or sell it be a kind of prohibition, and his thus dealing with the property will, moreover, be an act of conversion without the consent of the honour, and, therefore, void according to the Holy Qur'an as well as Sunnah.

3. He may be imprisoned.

But it is necessary that the Qazi should imprison the debtor, and keep him as such till he sells his property for the discharge of his debt, and for the cause of justice.

Imam Abu Yusuf and Imam Muhammad say, that if the creditors request the Qazi to impose inhibition on their insolvent debtor, it is necessary that he should impose inhibition on him, and prohibit him from selling, transacting or making acknowledgments, so that his creditors may not suffer any loss.

4. If he has money equal his debt .

If the debt due to the debtor consists of Dirhams, and the debtor also possesses Dirhams, the Qazi may in such a case discharge the demands against him without his consent. This is the concurrent view of our jurists.

But if, the debt consists of Dirhams; and debtor possesses Deenars, or vice versa, the Qazi is in such a case has the authority to sell the Deenars for payment of the debt. This is the view of Imam Abu Hanifah, based upon a favourable construction.

5. Rule in selling off the debtor's property .

In discharging the debts, first the money in possession of the debtor should be disposed of, then his goods and household furniture ; and at last his houses and lands, because in this manner of adjustment a regard is paid to the ease as well as convenience of both parties.

The clothes, of the debtor are also, to be sold, except only one suit, on account of necessity. Some jurists are however, of the view that two suits should be left with the debtor, so that when one suit is in use, the other one may be in washing.

6. Acknowledgment by a debtor

If the debtor makes an acknowledgment while he is under prohibition, such acknowledgment will not be binding upon him until he satisfies his creditors; because as their right is first connected with his property, he cannot therefore, invalidate it by an acknowledgment in respect of any other person.

7. Subsistence to a poor debtor, his wives, children and uterine relatives.

A subsistence should be given to the debtor out of his property (provided he is poor), and also to his wives, infant

children, and uterine relatives; because his indispensable needs have the right of his creditors; and also because; as the maintenance of his wife, etc., is their right, it cannot be invalidated by prohibition, and, therefore if he marries, his wife will come in upon an equal footing with his other creditors, as regards the amount of her proper dower.

8. Imprisonment of debtor .

If the debtor does not possess any property, and the creditors request the Qazi to imprison him, and he at the same time declares that "he has nothing," the Qazi should in such a case imprison him on account of such debts as he has incurred by contracts such as a dower, or an obligation due to undertaken by his becoming surety for property.

9. General rules in respect of him while in prison .

If the debtor, who pleads poverty as above, falls sick in the prison, he will nevertheless be kept as such, provided he has an attendant for him who gives medicine to him. But if he has no such attendant, he should in such a case be released from confinement, lest he may die.

If he is an artisan, he should be prevented from following his work and should not be allowed to do any work, so that, from distress, he may be compelled to pay his debts. This view is approved.

If he possesses of a female slave, and also cohabit with her, he should not be prevented from so doing ; as sexual connection is necessary to satisfy a man's sexual appetite in the same manner as eating or drinking ; and, therefore, he should not be prevented from indulging himself in this, any more than from eating or drinking.

10. Creditors may pursue him after release.

But upon his being released from the prison, the creditors should not be prohibited in enforcing their claims against him, because they are entitled to pursue him. They should not, however, prevent him from transacting business or travelling. The reason of this is that the Holy Prophet has said, "the honour of a right has a hand and a tongue," (Dara Qutni) meaning, by the hand, the power of pursuing, and by the tongue, the power of demanding the right.

The creditors are also entitled, in such a case, to take the excess of the debtor's earnings, and divide it among them-selves according to their respective claims; because as their right is equal, therefore attention should be given equally to that of each.

But Imam Abu Yusuf and Imam Muhammad are of the view that if the Qazi declares the debtor's poverty (insolvency), the creditors should be prohibited from pursuing the debtor, unless they bring evidence to prove that he possesses property.

According to Imam Abu Hanifah, on the contrary, the Qazi's declaration of poverty of the debtor is not valid ; because property may comes in the morning and go in the evening. Further, as witnesses possess the knowledge of property only as regards the appearance, evidence, therefore, even though it is proof sufficient to release the debtor from prison, is yet not the proof sufficient to invalidate the right of the creditors, that is, their entitlement to pursue the debtor.

11. Creditors have an option, if he prefers continuing in prison

If a debtor wants to continue in the prison, and his creditor is also desirous of holding him in pursuit, regard is to be given to the opinion of the creditor, as that will be the most effectual towards obtaining the desired end, as he, it is to be supposed, will adopt such measures as may disappoint the debtor, and thus compel him to do justice.

But if, the Qazi thinks that the debtor will be subjected to any injury from the creditor in pursuing, as, for instance, not permitting him to enter his own house, in such a case the Qazi should imprison the debtor in order to avoid such injury.

12. Male creditor pursuing his female debtor .

If the debtor is a woman, and the creditor is a man, the creditor should not be allowed to pursue her, as if that is allowed, it will cause the retirement of a man with a strange woman. The creditor, however, is entitled to depute a confidential female to attend the debtor in the exercise of his right.

13. Purchased article is in the debtor's hands .

If a debtor becomes poor, and at the same time has also the goods purchased from such person, this person, in getting the price of such goods, is on an equal footing with the other creditors.

BOOK – VII *

KHINSAH

(HERMAPHRODITES)

KHINSAH *

HERMAPHRODITES

(Hidayah, Kitab-ul-Khinsah)

Section (1)
(Fasl Fee Bayanehi)

1. Hermaphrodites are either male or female .

A "Khinsah", or Hermaphrodite, is a person who has the parts of generation of both a man as well as a woman. If, therefore, such person passes urine from the male organ he is to be taken as a male, but if from the female organ, he is to be taken as a female; because it is so recorded in the Traditions, and similarly reported by Hazrat 'Ali (Betlaqi) and also, because the fact of the urine being passed through either organ specifically, denotes that organ to be the original, and the other one merely a defect.

But if, the person passes the urine from both organs, regard is to be given to that from which it first proceeds, as this will denote that organ to be the original.

But if, the person passes his urine from both organs equally that is, at one and the same time he is Khinsah Mushakkal, or equivocal hermaphrodite, according to Imam Abu Hanifah.

2. Or ambiguous .

No regard is to be given to the superior or inferior quantity of the urine in this such a case, because a superiority of passing the urine from either organ does not denote that organ to be the primary, as this event arises merely from the urinary

* 'Ainul Hidayah, Vol. IV, pp. 913-930

passage in the one being wider than in the other. Imam Abu Yusuf and Imam Muhammad are of the view that regard should in such a case be given to the comparative quantity of urine ; and therefore the sex is to be determined according to the organ from which the greatest quantity passes ; this denotes that organ to be the superior and primary and also, because the greater quantity is, in effect of law, the whole, from whichever organ, therefore, the major quantity of urine passes, that organ is to be taken as the superior.

But if, the urine passes from both organs alike that is, at the same time, and in equal quantity, the person is to be taken an equivocal hermaphrodite, according to all our jurists, as in such a case neither organ possesses any superiority over the other.

But all this apply solely to hermaphrodites who has not arrived at the age of majority so far because on attaining majority, if his beard grows, or he has connection with a woman, or nocturnal emission, or his breasts appear as those of a man, he is to be taken as a male, as these are indisputable signs of manhood. But if the breasts swell like those of a woman, or the menstrual discharge appear, or pregnancy, or carnal connection with a man, the hermaphrodite is to be taken as a female, as these are the signs of womanhood.

But if, no distinguishing signs of any sex appear, or the signs of both such as a beard, with the breast of a woman, the person is to be taken as equivocal hermaphrodite.

Section (2)

LAWS RELATING TO EQUIVOCAL HERMAPHRODITES
(*Fasl Fee Ahkamehi*)

1. Equivocal hermaphrodite .

The rule in respect of equivocal hermaphrodites is that they are to follow all spiritual law, except those which are doubtful regarding them.

2. His position in public prayers .

An equivocal hermaphrodite, in standing behind the Imam for the purpose of prayer, should stand behind the man and in front of the woman i.e., in between the man and woman as it is possible that he may be a man, and it is also possible that he may be a woman.

If, he happens to stand among the women, he should repeat the prayers because as it is possible that he may be a man the prayer will be nugatory.

If, on the contrary, he stands among the men, his prayers will be valid ; but the men who are next to him should repeat their prayers, out of caution because, as it is possible that he may be a female.

3. Observing the customs of women .

It is better for an equivocal hermaphrodite to cover his head, during prayer, with the head-covering of his garment, and also to sit in the posture of women ; because if he happens to a man, this will be a deviation from custom, yet it will not imply any illegality ; and if he happens to be a female, his neglecting so to do will amount to an abomination, if it is indispensably binding on women to be covered upon that occasion.

It is also better for him, if he is without a garment, to recite the prayers repeatedly; but still the prayers will be lawful even though he neglects to do so. Moreover, it is abominable for him to wear silk and ornaments.

4. Not to appear naked or travel without a near relation

It is abominable for an equivocal hermaphrodite to appear naked before either man or women, or to be in retirement with either man or woman except his prohibited relation.

Similarly, it is abominable for him to travel with a man other than his prohibited relation, or with a women even though she is a prohibited relation, as it is not lawful for two women to travel together, although they are relatives.

It is also abominable that he may be circumcised by either a man or a woman ; and, therefore, to perform this ceremony, a female slave should be purchased at his expenses ; or, if he has no property, the price of such slave should be given to him, by way of loan, from the public treasury, with which he may purchase her for the purpose of circumcising him ; and having so done, she is to be sold, and her price deposited into the treasury as he has then no further need of her.

5. Rules to be followed by him during a Pilgrimage .

If an equivocal hermaphrodite undertakes a Pilgrimage while he is nearing the age of majority, Imam Abu Yusuf declares that he is uncertain regarding the dress which he should wear; because if he is a male, his wearing a stiched garment is abominable; and if he is a female, it is abominable to wear anything else. But Imam Muhammad, says that he should wear a stiched garment, in the same manner as woman; because it is still more abominable for a woman to neglect this during Pilgrimage than for a man to wear it.

6. Divorce or emancipation, suspended upon the sex .

If a man suspends the emancipation of his slave, or the divorce of his wife, upon her producing "a male child," and she gives birth to a hermaphrodite child, the divorce or emancipation will not take place until the sex of the child is established, as the person cannot incur the penalty, in this case, because of the doubt.

7. Until his sex is established.

If a man declares, "all my male slaves are free," or, "all my female slaves are free," and he is in possession of a hermaphrodite slave, this slave will not be emancipated until his real condition is established, as here the master cannot be forsworn, because of the doubt.

But if, he thus mentions his male and female slaves together, in such a case the hermaphrodite will be emancipated, as one or the other description will apply to him indisputably, as he may be either a male or female.

8. His declaration of his sex .

If a hermaphrodite declares himself to be a male, or a female, and he is of the equivocal description, his declaration will not be accepted because his plea requires the proof.

But if he is not of an equivocal description, his declaration may be accepted, because he knows his condition better than any other person.

9. Rules to be followed in his shrouding and burial.

If an equivocal hermaphrodite dies before his condition is established, his body will not be washed by any man or woman, neither of those being allowed to perform it to the other. Since washing impracticable in this case, Tayammum; i.e., rubbing with dust or sand should be substituted for it ; and it is mentioned in the Jaame' Rumooz, that if the Tayammum is performed by any other than a prohibited relatives, the hand should be covered with a cloth.

If a hermaphrodite dies at an age nearing majority (at twelve years of age, according to the Jaame' Rumooz), his dead

body will not be washed, whether it is male or female. Upon burying it, moreover, in the grave it will be better to screen him by a cloth. This necessary in respect of woman, although not in respect of men.

When there is occasion to offer the funeral prayers over a man, a woman, and a hermaphrodite, at the same time, the bier of the man should be placed next to the Imam, that of the hermaphrodite next, and behind them of the woman.

If for is any reason a hermaphrodite is to be burried in one and the same grave with a man, the body of the former should be placed after the latter, as it is possible that he may be a female ; then a partition of earth should also be constructed between them.

But if, a hermaphrodite is burried in the same grave with a woman, should be placed first, as it is possible that he may be a man.

It is better to shroud the body of a hermaphrodite in the same manner as that of a woman, by wrapping it in five cloths ; because it may be a female. Such is the ordained practice in respect of a women ; and if it is a male, that will merely be an excess of two cloths, which is a matter of no importance.

10. Rules of inheritance in respect of hermaphrodite.

If a man dies, leaving two children, one of whom is a hermaphrodite, and the other one is a son, in such a case, according to him to Imam Abu Hanifah, the whole inheritance should be divided between them in three shares, two to go the son, and one to go to the hermaphrodite; because according a hermaphrodite is subject to the law of a woman, unless his condition is established to be otherwise.

But Sha'bee, says that in such a case the hermaphrodite is to get half the share of a male heir, and half the share of a female, by first calculating the amount of his shares, supposing him to be a female, and adding the two together, and paying him a moiety of the added sums.

Imam Muhammad and Imam Abu Yusuf agree with this view. But they, differ in their exposition of it ; because Imam Muhammad holds that the whole inheritance is to be divided into twelve shares, seven of which go to the son, and five to the hermaphrodite ; whereas Imam Abu Yusuf says that it should be divided into seven shares, four of which should go to the son, and three should go to the hermaphrodite.

BOOK – VIII *

MISCELLANEOUS CASES

Misellaneous Cases

(Masaa'il – Shitta – Masaa'il – Mulafariqah)

1. Inteligible signs of a dumb person to verify his bequests, and those of a person merely deprived of speech.

When people read a deed of bequest person, and want to now whether he shall testify such deed, and the dumb person makes and sign by his head an expression of "Yes !" or where a dumb person himself writes such deed, and they want to know whether he shall testify it and he makes a sign ; by his head in the affirmative, the bequest, provided the sign is made in such a manner as is commonly used to express affirmation is valid. But this mode of affirmation by a sign does not suffice in respect of a person whose inability to speak is caused by some recent disorder .

2. What a dumb person can do and what he cannot do.

When a dumb person is capable of either writing intelligibly, or making intelligible signs, marriage, divorce purchas, of sale, declared by him, are valid, and retaliation is also execte on his behalf or upon him ; but he is not liable to punishment for offences against God, i.e., for adultery and slander. Nor is punishment inflicted on his behalf. His written deeds are valid, and cognizable, for the reason that the writing of an absentee is equal to the oral declaration of a person actually present (in somuch that the Prophet, in promulgating his laws, sometimes used one mode, and sometimes another) ; and necessity is the reason for validity in respect of the writing of an absentee, which reson exists still more strongly in the case of a dumb person.

It may be noted that writings are of three kinds, viz., (i) regular testimonials i.e. such as are written on paper, as is customary, which are equal to real declration, whether the person is present or absent. (ii) irregular testimonials (i.e. such as are not written on paper but upon a wall, or the leaf of a tree or, upon

paper without any title or superscription), which are not admitted as proof farther than merely as they signify the writer's object or design ; and (iii) writings which are not testimonials in any sense (i.e., such as are delineated in the air or on water), which, as they are merely equal to words not heard are in no way cognizable, nor are of any effect. As regards the signs made by a dumb person, they are recognized in the cases of marriage, divorce, and so forth (as mentioned above), due to necessity, since those are matters in which the right of the individual alone is concerned, and which are not restricted to any particular form of words, but are even, in some cases (such as of a sale by mutual surrender), effected without any words whatever ; and retaliation also is a right of the individual.

But there is no necessity for punishment, as that is a right of God, from which the prevention of it is by the existence of any doubt) and therefore if a dumb person verifices the report of slanderer, still he is not liable to punishment, neither is punishment inflicted upon him if he himself slanders another by signs, because the slander is not express which is the condition of its being punishable.

The difference between punishment and retaliation is, that the former is not established by doubtful evidence, whereas the latter is so because if witness charge a particular person with "illegal carnal connexion" or a person makes confession of "illegal carnal connexion", still punishment is not to be inflicted; whereas if witnesses testify to "a murder" in general terms, or a person makes a confession of "a murder", retaliation is infilicted, although the term "willful" should not have been expressly mentioned. The ground of this is that retaliation possesses the character of reciprocity, as having been ordained for the preparation of injuries ; and it is therefore admitted to be established inspite of a doubt, in the same manner as all other matters of reciprocity which relate to the rights of the individual.

On the contrary in such punishment as are inflicted purely in the right of God, they have been ordained for the purpose of determent ; and as that does not bear the character of reciprocity, punishment, as not being a matter of necessity, is not established under any circumstance of doubt.

Muhammad in dealing with Acknowledgments says, "the writing of an absentee is not cognizable as proof, in respect of retaliation upon himself.

The author of Hidayah says upon this passage, that it may be taken in two ways. Firstly, by the absentee may be meant any absentee whether dumb or otherwise ; and on this construction the point admits of two determinations ; the one what is here mentioned ; and the other, what has been before recited, and secondly, by the absentee may be meant a person who is not dumb ; and if he [Muhammad] had said "the writing of a absentee, not being dumb, is not congnizable as proof in respet of retaliation, since, having the power of speech it is possible that he may himself appear and make an express confession by word of mouth ; an expectation which cannot be entertained in respect of a dumb person since it is impossible that such person should speak so as to make an express oral confession." Some of our jurist on entertain an apprehension that the signs of a dumb person, who is at the same time able to write are cognizable ; because signs are admitted as proof purely from necessity, which does not exist in this instance. This apprehension, however, is repugnant to what has been before mentioned, as from that we are to infer that the signs of a dumb person are cognizable notwithstanding he is capable of writing ; because as it is said that "if a dumb person makes signs, or writes, it is valid," it follows that signs and writing are of equal weight, and that either of them sufficies the reason of which is that signs and writings are both of them admitted as proofs purely due to necessity ; and as, on the one hand, writing possesses an explicitness of whole signs are destitute (the design or meaning of the person being ascertained indubitable from

what he writes), whereas signs are of anambiguous nature, so, on the other hand signs possess an explicitness of which writings are destitute as they are still nearer to speech ; and signs and writing are therefore upon an equal footing.

The writing of a person who has been deprived of the use of speech by any accident for two or three days, is not cognizable, any more than that of an absentee who is not dumb, since there is still room to hope that he may be able to speak as his organs of speech remain.

3. Slaughtered carcases mixed with carrion.

If the carcases of slaughtered goats are mixed with those of carrion goates, and the one is not known from the other, and the number of slaughtered exceed the number of carrion, the persons about to use them should make a selection, and eat such only as they suppose most likely to have been lawfully slain. But if the number of carrion exceed the number slaughtered or if they are equal in number, none of them should be used. What is here said applies solely to a situation which admits a latitude of choice ; as in a situation of necessity the selection may be made under either circumstance, and those used which the people suppose most likely to have been lawfully slain, because as, in time of want indubilable carrion is allowed to be lawful it follows that what comes within the possibility of having been duly slain, is lawful a fortior ; but still a selection should made as it is most likely that by this means those will be used which have been duly slain ; and selection is therefore not to be dispensed with except in cases of extreme urgency.

Note

As slavery has now been abolished from all over the world, the following books and chapters of Hidayah have not been included in this compilation.

1. Book V of Itaaq or Manumission of slaves
2. Book XII of Ibaaq or Absconding of slaves
3. Book XXXII of Mukatibs
4. Book XXXVI of Muazoon or licensed slaves
5. Chapter 4 of offences committed by or upon slaves and chapter 5, of offences committed upon usurped slaves during the usurpation, both chapters of Book No. L-Diyaat, and
6. Book of Heel is also not included in this compilation because according to me it is not vey much releved for this book.

THE END**

** **Note** : By the Extreme Grace and Mercy of Allah, the Almighty, the work of writing this book commenced on Wednesday, the 11th Shaa'baan, 1416 A.H., corresponding to 13th January, 1996 A.D, and completed on Tuesday, the 1st Rabi-us-Saani, 1421 A.H., corresponding to 4th July, 2000 A.D, exactly on my completing the age of seventy two **(SYED ANWER ALI)**