THE

# HEDÀYA, OR GUIDE;

## COMMENTARY

ON THE

# MUSSULMAN LAWS:

TRANSLATED BY ORDER OF THE

GOVERNOR-GENERAL AND COUNCIL

OF

*BENGAL,*

BY

CHARLES HAMILTON.

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TO

# WARREN HASTINGS, ESQ;

LATE

GOVERNOR-GENERAL OF *BENGAL*, &c.

SIR;

AFTER the labour of ſeveral years, I am at laſt enabled to preſent you with a tranſlation of the

To you, SIR, I feel it incumbent on me to inſcribe a work originally projected by yourſelf, and for ſome time carried on under your immediate patronage.—However humble the tranſlator's abilities, and however imperfect the execution of theſe volumes may be, yet the deſign itſelf does honour to the wiſdom and benevolence by which it was ſuggeſted; and if I might be allowed to expreſs a hope upon

upon the ſubject, it is, that its future beneficial effects, in facilitating the adminiſtration of Juſtice throughout our Aſiatic territories, and uniting us ſtill more cloſely with our *Muſſulman* Subjects, may reflect ſome additional luſtre on your Adminiſtration. — I have the honour to be, with the utmoſt reſpect, and the moſt lively gratitude and eſteem,

SIR,

Your moſt obedient,

and moſt humble Servant,

CHARLES HAMILTON.

PRE-

# PRELIMINARY DISCOURSE,

BY THE

# TRANSLATOR.

THE diffuſion of uſeful knowledge, and the eradication of prejudice, though not among the moſt brilliant conſequences of extended empire and commerce, are certainly not the leaſt important.—To open and to clear the road to ſcience; to provide for its reception in whatever form it may appear, in whatever language it may be conveyed:—theſe are advantages which in part atone for the guilt of conqueſt, and in many caſes compenſate for the evils which the acquiſition of dominion too often inflicts.

PERHAPS the hiſtory of the world does not furniſh an example of any nation to whom the opportunity of acquiring this knowledge, or communicating thoſe advantages, has been afforded in ſo eminent a degree as GREAT BRITAIN.—To the people of this Iſland the acceſſion of a vaſt empire, in the boſom of ASIA, inhabited, not by hordes of barbarians, but by men far advanced in all the arts of civilized life, has opened a field of inveſtigation equally curious and inſtructive.—Such reſearches muſt ever be pleaſing to the ſpeculative philoſopher, who, unbiaſſed by the ſelfiſh motives of intereſt or ambition, delights in peruſing the great and variegated volume of SOCIETY:—but to *us* they come recom-

mended by no *ordinary* inducements; knowing, and feeling, as we ought, how much the preſervation of what we have obtained depends upon the proper uſe of our power; and upon the right application of thoſe means which PROVIDENCE has placed in our hands for continuing, and perhaps increaſing, the happineſs of a large portion of the human race.

THE permanency of any foreign dominion (and indeed, the juſtification of holding ſuch a dominion) requires that a ſtrict attention be paid to the eaſe and advantage, not only of the *governors*, but of the *governed*; and to this great end nothing can ſo effectually contribute as preſerving to the latter their ancient eſtabliſhed practices, civil and religious, and protecting them in the exerciſe of their own inſtitutes; for however defective or abſurd theſe may in many inſtances appear, ſtill they muſt be infinitely more acceptable than any which *we* could offer; ſince they are ſupported by the accumulated prejudice of ages, and, in the opinion of their followers, derive their origin from the Divinity himſelf.

This ſalutary maxim was wiſely adopted by the ſervants of the EAST INDIA COMPANY on the firſt acquiſition of our *BENGAL* territories; and to a ſteady adherence to it much of the preſent flouriſhing ſtate of thoſe provinces muſt be attributed.

THE judicial regulations both of the *Hindoos* and the *Mohammedans* are, in fact, ſo intimately blended with their religion, that any attempts to change the former would be felt by them as a violation of the latter; and ſhould the wiſdom of the Britiſh legiſlature ever ſuggeſt the expediency of introducing an uniform ſyſtem of juriſprudence among them, it will, at the ſame time, dictate the neceſſity of preſerving ſacred and unaffected an infinite number of uſages, eſſential to the eaſe and happineſs of a people differing from us as widely in cuſtoms, manners, and habits of thinking, as in climate, complexion, or language.—Towards the accompliſhment of ſuch an important ſyſtem, every effort which may tend to develope their LAWS is undoubtedly a ſtep, and therefore carries with it its own recommendation.—It was this more remote conſideration,

ſideration, as well as the *immediate* advantages to be derived from it, which dictated the compilation of the HINDOO CODE and it was the ſame motive which gave riſe to the preſent publication.

MANY centuries have elapſed ſince the *Muſſulman* conquerors of *INDIA* eſtabliſhed in it, together with their religion, and general maxims of government, the practice of their courts of juſtice.—From that period the MUSSULMAN CODE has been the ſtandard of judicial determination throughout thoſe countries of INDIA which were ſubjugated by the *Mohammedan* princes, and have ſince remained under their dominion. In one particular, indeed, the conduct of the conquerors materially differed from what has been generally conſidered in Europe (how unjuſtly will appear from many paſſages in this work) as an invariable principle of all *Muſſulman* governments; namely, a rigid and undeviating adherence to their own LAW, not only with reſpect to themſelves, but alſo with reſpect to all who were ſubject to their dominion.—In all *ſpiritual* matters, thoſe who ſubmitted were allowed to follow the dictates of their own faith, and were even *protected* in points of which, with reſpect to a *Muſſulman*, the LAW would take no cognizance.—In other particulars, indeed, of a *temporal* nature, they were conſidered as having bound themſelves to pay obedience to the ordinances of the LAW, and were of courſe conſtrained to ſubmit to its decrees.—Hence the HINDOOS enjoyed, under the *Muſſulman* government, a complete indulgence with regard to the rites and ceremonies of their religion, as well as with reſpect to the various privileges and immunities, perſonal and collateral, involved in that ſingular compound of allegory and ſuperſtition.—In matters of *property*, on the contrary, and in all other temporal concerns, (but more eſpecially in the *criminal* juriſdiction,) the *Muſſulman* law gave the rule of deciſion, excepting where both parties were *Hindoos*, in which caſe the point was referred to the judgment of the *Pundits*, or *Hindoo* Lawyers.—It is true, this ſtatement rather accords with the *ſpirit* of the *Mohammedan* laws, than with the *practice* of them; for it too frequently happened that little regard was paid either to judicial ordinance or natural equity. —Where avarice and bigotry are united with deſpotic power, ſuch a

combination will occaſion abuſes, and corrupt the ſtreams of juſtice.—Accordingly, the *Hindoos* were in many inſtances expoſed to unfair and partial deciſions, but more particularly where a *Muſſulman* was concerned, in which caſe the law of MOHAMMED was doubtleſs often miſinterpreted, and wreſted to the purpoſes of injuſtice, or (which was an evil of equal magnitude) the decree was the reſult of a *bargain* between the magiſtrate and the higheſt bidder.—Still, however, theſe abuſes did not alter the ſpirit of the law, which continued unvaried in its oſtenſible operation; the *Muſſulman* courts determining in all matters of a *criminal* nature, without exception, and in every caſe of *Muſſulman* property; and admitting of appeals to the *Hindoo* Lawyers (for there are no regular *Hindoo* courts of juſtice) only in caſes where the *Muſſulman* law had made no proviſion, or in which no *Mohammedan* had any intereſt.

SUCH was the ſtate of juriſprudence in the *BENGAL* provinces, when a wonderful revolution threw the government of them into the hands of the ENGLISH.

LITTLE acquainted with the *forms*, and ſtill leſs with the elementary *principles*, of the native adminiſtration of juſtice in their newly acquired territories, the Britiſh government determined to introduce as few innovations in thoſe particulars as were conſiſtent with prudence; and the only material alteration which, in courſe of time, took place, was the appointment of Company's ſervants to ſuperintend and decide, as *Judges* in the civil *Muſſulman* courts, and as *Magiſtrates* with reſpect to the criminal juriſdiction.—An important change was indeed effected in the adminiſtration of both juſtice and revenue, ſo far as affected the diſtinctions hitherto maintained between *Muſſulmans* and *Hindoos*. Of theſe the latter had always been ſubject to *double* taxes, and impoſts of every denomination, levied on principles which are fully explained in the courſe of the preſent work: and they alſo laboured under particular inconveniences and diſadvantages in every judicial proceſs, (eſpecially where the

the litigating adverſary was a *Muſſulman*) ſome of which have been already noticed.—By the Britiſh government both have been placed, in theſe points, upon an exact equality; and the *Hindoo* and *Muſſulman*, reſpectively, have their property ſecured to them under that ſyſtem which each is taught to believe poſſeſſed of paramount authority: but where their intereſts claſh in the ſame cauſe, the matter is neceſſarily determined by the principles of the *Muſſulman* law, to which long uſage, ſupported by the policy of the *Mogul* government, has given a ſort of preſcriptive ſuperiority.—Still, however, though much was effected, much remained to be done.—The gentlemen who were appointed to ſuperintend the proceedings of the courts, having had no opportunity of ſtudying the languages in which the laws are written, were conſtrained, in their determinations, to be guided by the advice of the native officers—men ſometimes themſelves too ill informed to be capable of judging, and generally open to corruption.—Hence appeared the neceſſity of procuring ſome certain rule whereby thoſe gentlemen might be guided, without being expoſed to the miſconſtructions of ignorance or intereſt, and which might enable them to determine for themſelves, by a direct appeal to the *Muſſulman* or *Hindoo* authority on the ground of which they were to decide.—A compilation was accordingly formed, under the inſpection of the moſt learned *Pundits*, (*Hindoo* Lawyers,) containing an abſtract of the *Hindoo* laws, the tranſlation of which into Engliſh was committed to Mr. HALHED; and, ſhortly after this was accompliſhed, a number of the principal *Mohammedan* profeſſors in Bengal were employed in tranſlating from the *Arabic* into the *Perſian* tongue a commentary upon the *Muſſulman* law, called the *HEDAYA*, or *Guide*, a work held in high eſtimation among the people of that perſuaſion. The *Engliſh* verſion of that commentary is now ſubmitted to the public.

BEFORE the Tranſlator proceeds to give an account of this work, it may be proper to ſay ſomething concerning the LAWS of which it treats.

THE

THE *Muſſulman* LAW proceeds, in its determinations, upon two grounds; the text of the KORAN, and the *Sonna*, or oral law, correſponding with the *Miſhna* of the Jews.

THE KORAN (or, as it is more commonly termed, AL KORAN) is conſidered by the *Muſſulmans* as the baſis of their law; and is therefore, when applied to judicial matters, entitled, by way of diſtinction, *al Shàrra*, or THE LAW, in the ſame manner as the Pentateuch is diſtinguiſhed by the JEWS.

WHO was the real *Author* of this extraordinary compound of declamation and precept, muſt for ever remain a matter of uncertainty, ſince on this point much difference of opinion obtained, even among the earlieſt opponents of MOHAMMED and his pretended miſſion.—That this extraordinary perſon, however, was himſelf the principal *projector*, is beyond diſpute, although it be probable that he received much aſſiſtance from others in the compoſition of it.—By all orthodox *Muſſulmans*, the original is believed to have exiſted from eternity, inſcribed on the tablet of the divine decrees, which ſtands cloſe by the throne of GOD, and contains the predeſtined fate of MEN and things.—From this tablet a copy of it is ſuppoſed to have been taken by the angel GABRIEL, and conveyed to the *Simma Aſſl*, or loweſt heaven, where it was by him revealed to the Prophet in various portions, and at different times.—In fact, it was delivered by *Mohammed* piece-meal to his followers, according as the occaſion dictated, or as any particular emergency required: nor was it arranged together, in its preſent form, until the reign of his friend and ſucceſſor, the *Khàlif* ABOO BEKR, who ordered the whole to be collected from the leaves or ſkins on which the paſſages had been written, and alſo from the mouths of ſuch of the ſurviving companions of the Prophet as had committed them to memory, and inſerted in one volume, but without any regard to the order of their original promulgation.—Much difference, however, was ſoon perceptible in the ſeveral copies of

this work; wherefore OTHMAN, the second ſucceeding *Khalif*, to remedy the growing evil, directed a number of copies to be tranſcribed from this of ABOO BEKR, and ordered all others to be deſtroyed.—The precepts of the KORAN are of two deſcriptions, prohibitory and injunctive. In the application of them to practice they are always conſidered as unqueſtionable and irrefragable, except where one paſſage has been contradicted, and conſequently repealed, by a ſubſequent paſſage, ſome inſtances of which are cited in the courſe of this Commentary.

SONNA is a word which (among a variety of other ſenſes) ſignifies *cuſtom*, *regulation*, or *inſtitute*. The *Sonna* (or, as it is expreſſed among the *Arabs*, by way of diſtinction, *Al-Sonna*) ſtands next to the KORAN in point of authority, being conſidered as a kind of *ſupplement* to that book. It forms the body of what is termed the *oral* law, becauſe it never was committed to writing by the *Arabian* Legiſlator, being deduced ſolely from his traditionary precepts or adjudications, preſerved from hand to hand, by authoriſed perſons, and which apply to many points of both a ſpiritual and temporal nature, not mentioned or but ſlightly touched upon in the KORAN.—Theſe traditions * are divided, by the *Muſſulman* commentators, into two claſſes: I. the ſimple ſayings of the Prophet from his own uninſpired judgment; II. ſayings from divine inſpiration. The former are termed *Hadees Nabwee*, or traditions of the PROPHET; the latter *Hadees Koodſee*, or *divine* traditions; and both have the force of laws.—After MOHAMMED's death, they were at firſt quoted by his companions merely in order to decide occaſional diſputes, or to reſtrain men from certain actions which the PROPHET had prohibited: and thus, in proceſs of time, they became a ſtandard of judicial determination. The

* The Tranſlator, ſpeaking of the *Sonna*, uſes the word *traditions*, in compliance with cuſtom, which, among Europeans, has applied this term to all the oral precepts, &c. of MOHAMMED.—*Hadees* (pronounced, among the *Arabs*, *Hadeeth*) properly ſignifies an *occurrence* or *event*. Some *Muſſulman* commentators define it to mean "an *emanation*," and underſtand it particularly in this ſenſe when applied to the ſayings or actions of their Prophet.

firſt

firſt collection of them was made in the *Khàlifat* of ALEE; and, in after times, many pious men employed themſelves in making thoſe collections.—There are, beſides theſe, a multitude of traditions cited by the *Muſſulman* commentators, concerning the acts and ſayings, not only of their PROPHET, but alſo of his COMPANIONS and immediate ſucceſſors; which, though not of equal authority, are nevertheleſs admitted to have ſome weight as *precedents* in judicial deciſions, when not repugnant to reaſon, or contradicted either by the KORAN or the SONNA. Upon the *Sonna* a great number of volumes have been written, under the titles of *Sonnàn* *, *Rawàyat* †, and *Hawàdees* ‡, ſeveral of which are quoted in the courſe of this work, and will be more particularly mentioned when we come to treat of *authorities*.

PRACTICAL DIVINITY, alſo, is admitted to have its due weight in judicial determinations, even among the orthodox. As uſed by the *Muſſulman* Lawyers, it chiefly conſiſts of caſuiſtry, and analogous applications to, or deductions from, caſes already determined upon by the more certain ſtandards of the KORAN or *Sonna*; the nature of which will be more fully explained by the peruſal of a ſingle page of the work than by any illuſtration that could be offered.

HAVING ſtated thus much with reſpect to the *foundations* of the *Muſſulman* LAW, we ſhall next endeavour to account for thoſe varieties which at preſent appear in the ſuperſtructure;—but before we proceed to this it will be proper to enter into a ſhort detail of the events in which originated the firſt great ſchiſm among the followers of MOHAMMED.

HAD the impoſtor of *Mecca* left, at his deceaſe, any male heirs, it is poſſible that the diſtinction to which he roſe would have been tranſmitted without queſtion to his poſterity. In this however he was diſappointed,

* Inſtitutes. † Reports. Traditions. ‡ Occurrences. Emanations.

his

his five ſons having all died in their infancy.—He had indeed four daughters by his firſt wife KHADIJA, of whom one alone ſurvived him, his favourite FATIMA, the wife of ALEE; but a female was univerſally deemed incompetent to be the leader of the FAITHFUL.

ALEE *, as the neareſt relation of the prophet, the huſband of his daughter, and the lineal chief of his family, aſpired to the ſucceſſion, with hopes founded not leſs on his perſonal merit than his conjugal and hereditary claims.—When MOHAMMED was ſeized with his laſt illneſs, his ſon-in-law probably expected a nomination in his favour.—His views however were fruſtrated, and his pretenſions for the preſent defeated.—AYSHA †, the ſtepmother of FATIMA, had always entertained an antipathy againſt him; and, by exerting her influence with the dying Prophet, eaſily prevented him from making any declaration which might determine the *Muſſulmans* in favour of the deſcendant of HASHIM.—From this circumſtance, on the deceaſe of MOHAMMED, his followers became divided into ſeveral factions.—The people of *Medina* were deſirous of raiſing SAAD, one of their countrymen, to the dignity of *Imâm*, or chief; whilſt the *Meccanites*, conſidering his advancement as ſubjecting them to a foreign domination, declared their intention of electing a chief among themſelves.—Had ſuch a deſign been carried into effect, it muſt, in its conſequences, have deſtroyed altogether the newly eſtabliſhed religion; and by cruſhing the riſing empire of *Iſlamiſm* in its infancy, would have reſtored the *Arabs* to their primitive barbariſm and idolatry.—The prudence or policy of OMAR, and ſome other of the principal companions, interfered; and they propoſed, in order to avoid the dangerous ſchiſm which this muſt occaſion among the *Muſſulmans*, that all parties ſhould, without diſtinction, unite in the election of a ſucceſſor to the

* *ALEE* BIN ABEE TALIB, couſin German of MOHAMMED, and, with him, deſcended from *Hàſhim Abdalminâf*, from whom the *Hàſhimee* tribe derives its title.

† The daughter of *Aboo Bekr*, ſtiled, by the *Mohammedans*, *OM al MAWMENEEN*, or *Mother of the* FAITHFUL.

Prophet, who as ſuch ſhould be univerſally obeyed.—The matter was not ſettled without much contention: but at length ABOO BEKR, the father-in-law of MOHAMMED, who had exerted himſelf as a mediator among the diſputants, was unanimouſly elected by the *elders*, and acknowledged by the people.—It was in vain that the *Hàſhimees*, and other partizans of ALEE, vehemently oppoſed this deſeaſance of his right, and obſtinately maintained that he alone had an indiſputable and excluſive claim to ſucceed, as well on account of his near relation to MOHAMMED, as becauſe of a declaration of the latter to that effect *.—Their remonſtrances were diſregarded, their clamours drowned amidſt the acclamations of the multitude, and they were compelled to remain ſatisfied with refuſing to acknowledge the *Khálif*.

ALEE himſelf retired from the ſcene of his mortification, and ſuſtained the diſappointment of his ambition with ſilent diſguſt; nor did he pay his homage to the appointed "COMMANDER OF THE FAITHFUL" until ſome time after, when the death of his wife *Fàtima* had weakened his party, and he perceived that a perſeverance in his diſſent might indeed create ſtrife, but could not be productive of advantage.

WITHIN little more than two years after his elevation, *Aboo Bekr*, finding himſelf attacked by a mortal diſtemper, nominated *Omar* to be his ſucceſſor, who accordingly aſſumed the title without oppoſition, and after a moſt ſucceſsful and victorious reign of above ten years, died of a wound he received from one *Firooz*, a *Perſian* ſlave, whom he had offended by a ſarcaſtic obſervation concerning a ſuit which the ſlave had referred to his tribunal.—When dying, OMAR refuſed to appoint any particular ſucceſſor, declaring the *Khalifat* to reſt among ſix perſons, who ſhould ſucceed to each other agreeably to the order of their election or ballot; namely, ALEE, OTHMAN, SAAD, ABDULRIHMAN, TALHA, and ZOBAIR. Of theſe ABDULRIHMAN agreed to forego his right altogether,

* The ſtory cited by the partizans of ALEE, on this occaſion, is related at length, in treating of the term *Màwlá*. (See MANUMISSION, vol. I. p. 425.)



provided

provided he might have the privilege of naming the ſucceſſor to OMAR; a propoſal to which all his colleagues aſſented, except only ALEE, who took this opportunity to urge his ſuperior and excluſive pretenſions to the *Khalifat*. ABDULRIHMAN, however, notwithſtanding his oppoſition, being ſupported by his four other colleagues, offered the *Khalifat* to OTHMAN, and he was proclaimed and recognized as ſucceſſor to the PROPHET, and ſovereign of the *Muſſulmans*. ALEE, on this ſecond defeat, acted with a moderation which, however laudable in itſelf, was much blamed by ſome of his adherents. He paid his homage to OTHMAN without murmuring, and appeared content to ſubmit to the ſucceſs of his competitor.

IF OTHMAN was really deſirous of the rank which he had thus attained, he exhibited a powerful inſtance of the deluſions of ambition! Whilſt his armies were extending the empire of *Iſlàm* in every direction, and penetrating into *Khoraſan* and *Mauritania*, the venerable *Khàlif* found his reign diſturbed by inteſtine commotions, and his perſon expoſed to the violence of faction. His declining age had unnerved his arm; he was unable to hold the reins of dominion with the ſteady hand of his predeceſſors; and he, perhaps too late, diſcovered that he had undertaken a taſk to which he was unequal.—The governors of his provinces, encouraged by the growing imbecility of their prince, plundered and oppreſſed thoſe whom it was their duty to cheriſh and protect.—He had diſobliged AYSHA, "*the Mother of the* FAITHFUL," who excited a powerful cabal againſt him at *Mecca*, whilſt ALEE and his diſcontented *Haſhimites* connived at, perhaps inflamed, theſe diſorders. The malcontents at length being joined by the deputies from the oppreſſed ſubjects of *Egypt* and *Syria* took to arms, and OTHMAN found himſelf beſieged in his own palace.—Superſtition and reſpect for a time withheld the aſſailants. Their ſcruples, however, were ſoon overcome: they forced the gates; and the unfortunate *Khàlif* expiated his errors or his weakneſs by his blood.

THE inſurgents, upon the murder of OTHMAN, made ALEE an offer of the *Khalifat*; which, with the conſent of his colleagues TALHA and ZOBAIR, (already mentioned,) he accepted.—He was publicly proclaimed *Khàlif* within a ſhort time after, and at the diſtance of twenty-four years from the period of his firſt aſpiring to that dignity.

IN obtaining, however, this long-fought object, ALEE ſoon found himſelf embarked upon a tempeſtuous ocean, and the ſtorm ended only with his life.—Conſcious that the concern he was generally, and perhaps juſtly, ſuſpected to have in the death of OTHMAN would not fail to alienate from him all thoſe who were connected with that *Khàlif*, or whom he had advanced, one of his firſt ſteps was, to effect a general removal of the governors who had been appointed by his predeceſſor. This bold and dangerous meaſure excited much diſguſt in all the provinces, but more particularly in *Syria*, where MOAVIAH, to whom the care of that region had been entruſted by OTHMAN, and who was nearly related to him, excited a ſtrong party againſt ALEE, and openly declared his reſolution of avenging upon him the death of his kinſman. At the ſame time TALHA and ZOBAIR were diſguſted with ALEE, becauſe of his having refuſed to them the governments of *Kooſa* and *Baſra*; and underſtanding that AYSHA, the widow of *Mohammed*, had retired from *Medina* (then the ſeat of the *Khalifat)* to *Mecca*, followed her thither. At *Mecca* a powerful faction was excited againſt *Alee*, particularly among the tribe of OMMIAH; and theſe being joined by the diſmiſſed governors of the provinces, and having *Ayſha* at their head, collected a powerful army, determining to depoſe ALEE by force, and ſet up MOAVIAH as *Khàlif* in his room.—Thus was excited the firſt civil war among the *Muſſulmans*; and hence originated the diſſenſions which have ever ſince obtained between the opponents of ALEE and his adherents.

ALEE, with undaunted reſolution, faced, and for the preſent repelled, the threatening ſtorm. He met the inſurgents, and, after a bloody conflict, gave them a complete overthrow, in which TALHA and ZOBAIR were

were ſlain, and AYSHA taken priſoner, whom the *Khàlif* treated with the utmoſt reſpect, and ſent her back, with honourable attendance, to *Mecca*.

AFTER this victory, ALEE remained complete maſter of *Arabia*. But he ſtill found himſelf oppoſed by a powerful party in *Syria*; for MOAVIAH, having retired to *Damaſcus*, and being there joined by all the relations of OTHMAN, was publicly acknowledged by thoſe as *Khàlif* and *Commander of the* FAITHFUL.

PERHAPS the mere effort of a faction at *Damaſcus* would not, of itſelf, have availed to ſhake the throne of ALEE, confirmed as it was by his recent ſignal ſucceſs. But the pretenſions of his competitor were ſupported, on this occaſion, by the celebrated AMROO *ibn al* As, the moſt puiſſant and popular of all the *Muſſulman* commanders. This chieftain had conquered Egypt during the *Khalifat* of OMAR; had afterwards been recalled by OTHMAN; and, at the period of his death, and the inveſtiture of ALEE, commanded in *Paleſtine*.

To gratify ſome particular reſentment againſt the ſon-in-law of the Prophet, or, more probably, induced by his attachment to the houſe of OMMIAH, he repaired from *Jeruſalem* to *Damaſcus*, and took the oaths to MOAVIAH. He pledged himſelf to obey and maintain the uſurper as the only true and legitimate leader of the FAITHFUL. Such was his influence that the multitude immediately joined their acclamations, and flocked to the ſtandard of the *Syrian Khàlif*. The civil war was thus rekindled. The armies of the contending *Khàlifs* prepared for battle, and ALEE was once more on the point of defeating his enemies, when they were ſaved by the ſtratagem of faſtening ſome KORANS to the ends of their ſpears; for the troops of ALEE, beholding the ſacred volumes thus expoſed, could not be prevailed upon to advance to the encounter. Soon after theſe proceedings a truce was agreed upon, and the competitors engaged to retire to their reſpective capitals, *Kooſa* and *Damaſ-*

*cus*, leaving their claims to be decided by a reference, to the award of which each party bound himſelf to adhere.

AMROO was appointed referee on the part of MOAVIAH, and the leſs artful ABOO MOOSA on that of ALEE. In the courſe of their conferences, AMROO had the addreſs to perſuade his co-arbiter that, in order to reſtore peace to the *Muſſulmans*, it was abſolutely neceſſary to depoſe both their principals, and to elect a *Khàlif* who ſhould meet the approbation of all parties: and for this purpoſe a tribunal was erected between the two armies. ABOO MOOSA firſt mounted, and proclaimed the depoſition of ALEE and MOAVIAH. AMROO ſucceeded him, and announced MOAVIAH "as the legal *Khàlif*, who had been nominated by OTHMAN, and "ſtood pledged to revenge his blood." The friends of ALEE, ſuppoſing this to be done with his connivance, retired from the place aſtoniſhed and diſcouraged. When recovered from their confuſion and ſurpriſe, the compromiſe was declared void. Each party proceeded to vilify and excommunicate the other; and the anathemas uttered on this occaſion have continued to be ſolemnly repeated ever ſince, in the moſques of the reſpective ſects, as one of the offices of religion. The war was reſumed with greater fury than ever. AMROO was diſpatched into *Egypt* with a conſiderable force, and ſeized the government of that province in the name of MOAVIAH. The *Muſſulmans*, inſtead of ſeeking foreign enemies, turned their ſwords againſt each others breaſts; and the power of their empire was likely to periſh by an internal diſeaſe, when an event took place which, for the preſent, put an end to the conteſt, and reſtored *peace*, if not *unity*, among

THREE of the *Khàregites* (*inſurgents* againſt ALEE) happening to meet at the temple of MECCA, diſcourſed concerning the many friends and companions they had loſt in this fruitleſs war, and deplored their deaths, as well as the danger which threatened the general cauſe from a continuance of thoſe unhappy diviſions.—One of them at length, in an extaſy of fanaticiſm and deſpair, propoſed to end theſe troubles at once by the death of ALEE, MOAVIAH, and his friend AMROO.—His two comrades

rades immediately agreed to take their ſhare in this deſperate enterprize.—They prepared their daggers, and proceeded,—one for *Damaſcus*, another for *Egypt*, and the third for *Kooſa*; each fully reſolved to ſacrifice his allotted victim.—The event proved that their determination was as firm as their undertaking was deſperate: but one only ſucceeded.—The firſt, having arrived in *Egypt*, miſtook the perſon of AMROO, and ſtabbed another who happened to preſide that day in the character of *Imâm* in his ſtead;—and on being conducted to puniſhment, ſatisfied himſelf with exclaiming, "I intended to ſtrike AMROO, but GOD willed it ſhould be "another."—The ſecond repaired to *Damaſcus*, there wounded MOAVIAH, but not mortally, and was ſuffered to live long enough to diſcover the conſpiracy.—The third accompliſhed his ſanguinary purpoſe.—Having arrived at *Kooſa*, and engaged two aſſiſtants, he, on Friday the 17th of *Ramzan*, A. H. 40, waylaid the *Khàlif* as he was going to the *Moſque*, and gave him a wound, of which he ſoon after died.

THUS periſhed ALEE, after a ſhort and turbulent reign of four years and nine months.—His partizans, however, were not diſmayed by this event.—The murdered *Khàlif* left ſeveral children by nine different wives; the two eldeſt, HASSAN and HOOSEIN, by FATIMA the daughter of *Mohammed*, during whoſe lifetime he contracted no other marriage.

HASSAN was by his adherents proclaimed *Khàlif* on the death of his father; but MOAVIAH, who had aſſumed the dignity of *Khàlif* in *Egypt* and *Syria* ſome time before, was in poſſeſſion of thoſe countries, and refuſed to acknowledge him on account of the ſuſpicion which attached to him as being concerned in the death of OTHMAN.—Hence a new competition aroſe, which could not have failed to rekindle the flame of war, had not HASSAN, who inherited more the *picty* than the *valour* of his predeceſſor, and was more ambitious to diſtinguiſh himſelf in the performance of religious ceremonies than in the ſupport of his regal pretenſions, agreed to relinquiſh his claim in favour of his rival; and thus was transferred the dignity of the *Khalifat* from the tribe of HASHIM to that of OMMIAH.

HASSAN,

HASSAN, upon reſigning the *Khaliſat*, retired to *Medina*, and there lived in privacy until A. H. 49, when he died, poiſoned, as the *Shiyas* alledge, by his wife, at the inſtance of MOAVIAH, who dreaded the poſſibility of his renewing his pretenſions.

HOOSEIN poſſeſſed a larger portion of the martial ſpirit of ALEE than his elder brother; but his fate was not more fortunate.—On the death of MOAVIAH, having refuſed to acknowledge his ſon YEZEED, (who ſucceeded to the *Khaliſat*, A. H. 60,) he was conſtrained to retire for ſafety from *Medina* to *Mecca*, whither the people of *Kooſa*, who were ſtrongly attached to the family of ALEE, ſent him an invitation to join their ſtandard, after having proclaimed him the only lawful *Khalif*, and declared YEZEED to be an uſurper.—YEZEED, underſtanding that HOOSSEIN had accepted this invitation, and ſet out from *Mecca* for *Kooſa*, diſpatched OBEYDOOLA, one of his commanders, to intercept him; and OBEYDOOLA, meeting him paſſing over the plain of *Kerballa*, with only ſeventy-three of his family and attendants, cut to pieces the grandſon of the Prophet and the whole of his feeble party.—In this indiſcriminate maſſacre alſo periſhed four other ſons of ALEE, namely, ABDOOLA, ABBAS, OTHMAN, and JAFIR, together with one or more of his daughters.—The wretched remains of his family were afterwards brought before YEZEED, who was adviſed to ſeize the preſent opportunity, and to cut off all future cauſes of diſturbance, by extirpating this remnant of the Prophet's deſcendants.—This flagitious propoſal filled the *Khàlif* with horror. He repented of the blood which had been already ſhed, execrated the ſanguinary obedience of OBEYDOOLA, and diſmiſſed the captives with honour to the tomb of their father at KOOFA.

FROM this period the poſterity of ALEE ſunk into obſcurity and inſignificance, except in the eyes of their ſectaries.—Their deſcendants, however, under the title of *Seyids*, have ſpread over *India*, *Perſia*, *Turkey*, and the northern coaſt of AFRICA, are held in veneration by the multitude

as

as inheriting the blood of the Prophet, and have frequently excited the jealouſy of the reigning princes of *Arabia* and *Turkey*.—In *Perſia* and *India*, particularly, the memory of ALEE and his ſons is cheriſhed, among the people, with a veneration approaching to idolatry; and the latter country exhibits ſome ſtriking inſtances of the force of this partiality, which poſſibly a long lapſe of time, inſtead of weakening, has rather contributed to ſtrengthen.—The *Muſſulman* Princes of *HINDOSTAN* are, in general, *Soonis*, as well as moſt of their chief men, the heads of the law, or the miniſters of ſtate, whilſt the great body of *Mohammedans*, being deſcended from a *Perſian* ſtock, or from the proſelytes of the firſt *Mohammedan* conquerors, adhere rigidly to the principles of the *Shiyas*.—The *Nizàm*, one of the moſt powerful and independant of thoſe princes, cannot attend public worſhip in the *Jàmá* moſque of his capital *(Hydrabad)* becauſe of the *Anathemas* weekly uttered there againſt the uſurping *Khàlifs* of the houſe of *Ommiah*.—At *Lucknow*, on the tenth of *Moharrim*, the effigy of *Omar* (who, as being the firſt propoſer of an elective *Khàlifat*, in prejudice to the right of ALEE, is regarded by his adherents with particular abhorrence,) is ſet up, filled with ſweetmeats, as a mark to ſhoot arrows at; and, after being uſed with every ſpecies of indignity, is torn to pieces, and its contents devoured by the enthuſiaſtic votaries of ALEE.—This day is throughout theſe regions obſerved as the anniverſary of the death of *Hoſſein* and his brethren, and celebrated by ſongs and proceſſions. The magnificent *Mauſoleums* erected to the memory of theſe illuſtrious martyrs are ſtill viſited by their adherents, who regard this token of reſpect as ſcarcely leſs meritorious than a pilgrimage to the *Käba* itſelf; and the real or fictitious deſcendants from this ſacred ſtock have, at different times, made their affinity to the Prophet a pretext for aſſuming the regal or pontifical authority in *Syria* and *Africa*.—They claim, moreover, a certain pre-eminence, and excluſive privileges, to ſome of which they are admitted, even in *Turkey*, where the memory of ALEE is leaſt reſpected, and the pretenſions of his line to the *Khàlifat* utterly denied.—A few ſlight traces of their aſſumed ſuperiority may be diſcovered in this commentary.

THUS early divided on a ſubject which involved at once the intereſts of individuals, and the prejudices of ſuperſtition, it was not to be expected that the followers of MOHAMMED ſhould long continue to obſerve an uniformity of practice or of doctrine.—The firſt controverſies began, of courſe, between the retainers of ALEE and their opponents. When the contending parties proceeded openly to anathematize each other, the mutual change of heterodoxy was not confined merely to the appointment of an *Imâm*, but ſoon advanced to comprehend the expoſitions of the LAW in other matters both of ſpiritual and temporal concern. Each faction reproached the other with diſbelieving, perverting or miſunderſtanding, the ſacred text of the KORAN.—Notwithſtanding the pious attempt of the *Khàlif* OTHMAN to reſtore a literal uniformity in the ſeveral copies of this work, (as already noticed,) ſtill, from the nature of the compoſition, as well as from the character in which it was preſerved, there was abundance of room in many places for a variety of conſtructions, independant of any particular intereſt which might miſlead the underſtanding, or at leaſt the inclinations, of mankind.—Its contents are diſtinguiſhed under two heads, the محكمات or perſpicuous, and the متشبهات or enigmatical, the latter of which each commentator might explain in the way moſt agreeable to himſelf, or beſt coinciding with the tenets of his particular ſect.—The whole was, moreover, committed to writing in the *Koreiſh* character, the *Arabic*, into which it was afterwards tranſcribed, being of later invention; and as this laſt was deſtitute of vowels, the ſenſe of courſe depended much on the pronunciation of the *Mokris*, or readers, whence, upon the introduction of the *vocal points*, a variation took place in the copies, according to the manner of the reader upon whoſe authority theſe were inſerted.

THE traditions alſo opened a copious field for diſputation. No authentic collections of them having been compiled until all or moſt of the Prophet's companions were dead, they exiſted, for above a century, merely in the memories of the *Arabians*. Thouſands were of courſe promulgated by their leaders as the occaſion or the paſſion of the moment happened

happened to dictate: they ſwelled into a number exceeding all poſſibility of belief*: every collector aſſumed the right of erecting to himſelf a ſtandard of ſelection: none would or could believe in all; and ſome boldly diſregarded or rejected them *in toto*, as affording no authentick rules for faith or conduct.

FROM theſe circumſtances attending their authorities, the diſputants found an ample field on which to exerciſe their polemical talents.—This literary warfare was indeed, for ſome time, confined to the original cauſes of their diſagreement; and, excepting thoſe, they touched merely on points of a ſpeculative deſcription.—This, however, opened the way to the various heterodoxies of the ſcholaſtic divines. Abſtracted ſubtleties and metaphyſical diſtinctions were, by degrees, ſubſtituted for the precepts of the LAW; and the controverſial factions became divided and ſubdivided into parties innumerable.

IT is proper, however, to remark, that a difference of tenets did not enter into judicial deciſions until upwards of a century after the death of ALEE, when it was occaſioned by the defection of HANEEFA from the party of the *Shiyas*, of which more ſhall be ſaid when we come to ſpeak of that doctor.

IN ſtating thus much, we have endeavoured to give a ſummary view of the firſt great ſchiſms in *Iſlamiſm*; but we have only ventured to ſketch an *outline* of the picture, without any reference to collateral events, the recital of which is more properly the province of the hiſtorian.—Having diſmiſſed this topic, we proceed to give ſome account of thoſe eminent perſons whoſe diſcuſſions occupy a conſiderable portion of this work, and whoſe doctrines and opinions are generally admitted as of binding authority at the preſent day.

* ABI DAOOD has left a ſelection of 40,000 out of 500,000; and IBN HANBAL gives us, in his *Moſeuined*, 37,000 out of 750,000 of thoſe real or pretended precepts of the Prophet.

IN every ſyſtem of religion ORTHODOXY and HERESY are merely relative terms. Mankind, however, have in general agreed to confine theſe diſtinctions to points of ſpiritual doctrine.

THE *Muſſulmans* who aſſume to themſelves the diſtinction of *orthodox**, are ſuch as maintain the moſt obvious interpretation of the KORAN, and the obligatory force of the traditions, in oppoſition to the innovations of the ſectaries: whence they are termed *Soonis*, or traditioniſts.—Although differing conſiderably in their legal concluſions, and in the application of the KORAN and the SONNA to *temporal* matters, yet they unite in rejecting the ſpeculations of the ſcholaſtic divines;—and ſome of them condemn the uſe of ſcholaſtic divinity altogether, as tending to deſtroy the foundations of religious belief.—Concerning theſe we ſhall be ſomewhat more particular, as their diſcuſſions occupy a conſiderable part of this work, and it is their opinion alone which is admitted to have any weight in the determinations of juriſprudence.

THE orthodox ſects are four in number—the *Hanceſites*, the *Màlekites*, the *Shafeïtes*, and the *Hanbalites*—who are all *Soonis*, or traditioniſts. But although they equally aſſume the name of *traditioniſts*, they do not all equally adhere to the *Sonna*; for there is this characteriſtic diſtinction among them, that the firſt, in determining upon caſes where the KORAN affords them no poſitive precept, are guided principally by their own judgment, examining and deciding, in moſt of theſe inſtances, according to the rules of practical divinity; whereas the three others adhere more tenaciouſly to the precedents left them by the Prophet. On this account the *Haneeſites* are by ſome writers, for diſtinction ſake, termed *Ahl Keeas*, or *the followers of reaſon*, and the others *Ahl Sonna*, or the *followers of tradition*.

* The word *orthodox*, as here uſed, is confined purely to a juſtneſs of thinking in *ſpiritual* matters, concerning which the opinions of thoſe four ſects perfectly coincide, the differences among them relating ſolely to their expoſitions of the *temporal* LAW.

THE founder of the firſt ſect was *Imâm* ABOO *HANEEFA* NAOMAN BIN SABIT, who was born at KOOFA, the ancient capital of IRAK, A. H. 80, A. C. 702, at which time four of the Prophet's companions were ſtill alive *, from whom, however, it is related, that he never received any inſtructions or traditional knowledge.

HANEEFA is conſidered, by the MOHAMMEDANS, as the great oracle of juriſprudence, he being the firſt among them who attempted to argue abſtractedly upon points of LAW, and to apply the reaſon of men to the inveſtigation of temporal concerns.—They are accordingly laviſh in his praiſe. They even trace the origin of his eminence to a period antecedent to his birth, and ſuppoſe him to have been aſſiſted by the peculiar favour and influence of Heaven; for it is related by the learned INAYET-IBN HAMED, that his father, when yet a child, being preſented to ALEE, received his bleſſing, the Commander of the Faithful at the ſame time declaring, that "from his body ſhould ſpring a light, which ſhould dif-"fuſe its rays throughout all the regions of ISLAMISM."—However well or ill founded this anecdote may be, his early youth is ſaid to have been marked by a ſtrong predilection for ſtudy, an uncommon acuteneſs of underſtanding, and an unremitting but cheerful piety, equally removed from the gloomy auſterity of the bigot, and the frigid indifference of the ſenſualiſt.—HANEEFA was educated in the tenets of the *Shiyas*. He received his firſt inſtructions in juriſprudence at *Bagdad*, from *Imâm* ABOO JAFIR, an eminent doctor of that ſect, and heard traditions chiefly from ABDOOLA IBN AL MOBARICK, both of whoſe authorities he frequently quotes.—After having finiſhed his ſtudies, and gained conſiderable reputation at *Bagdad*, he returned to *Koofa*, and there diſtinguiſhed himſelf by ſeceding from his maſter ABOO JAFIR, and teaching civil law on principles repugnant to thoſe inculcated by that doctor. His defection indeed is, by the *Shiyas*, attributed to motives which, if true, diveſt

* Viz. ANS IBN MALIK, of *Baſra*; ABDOOLA IBN AOFA, who lived in *Koofa*; SIHL IBN SAAD, reſiding in *Madina*; and *Abco* YOOFIL IBN-WASILA, who reſided in *Mecca*.

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him of the merit of proceeding in this upon internal conviction. They relate that ABOO JÄFIR's eminent piety, learning, and auſterity of manners, having attached to him a conſiderable number of followers, the increaſe of his reputation alarmed the reigning *Khàlif*, who, in order to deſtroy his credit, gained over HANEEFA, by promiſing to ſupport, with all the influence of government, his opinions and deciſions againſt thoſe of JAFIR; and that HANEEFA, allured by the offer, quitted his preceptor, and inſtituted a ſchool in oppoſition to him. Whether they be correct in this ſtatement or not, it is certain that the diſſenſion which took place between theſe eminent lawyers is conſidered as the origin of the different tenets of the *Shiyas* and *Soonis* in juriſprudence; and as the habits of mind moſt early acquired are ſeldom to be entirely ſubdued, the little attention which (comparatively with the other *Soonis)* HANEEFA pays to the precepts of the *oral law* may perhaps be attributed to the inſtructions which in his youth he imbibed from ABOO JAFIR.—He is deſcribed of a middling ſtature, a comely countenance, and pleaſant converſation; harmonious in his voice, of an open and ingenuous diſpoſition, and kind to exceſs to his relations and friends, admitting none to his ſociety but of the beſt character. Such a diſpoſition and conduct neceſſarily ſecured to him the univerſal eſteem, whilſt his polemical abilities gained him the reverence and admiration of his diſciples; as may be collected from an anecdote which is recorded by SHAFEI, in the introduction to his *Oſool*, where he relates that, inquiring of MALIK, "Whether he "had ever ſeen HANEEFA?" he was anſwered by that doctor, "Yes; "and he is ſuch a perſon that if he were to aſſert a wooden pillar "was made of gold, he would prove it to you by argument."—*Shafeï* himſelf, although differing materially from him in his legal deciſions, ſays, in another part of the ſame work, that "No ſtudy whatever "could enable any man to rival HANEEFA in the knowledge of the "law."—It appears, indeed, from the beſt authorities, that he was a man eminently endowed with ſcience, both ſpeculative and practical; of a mild diſpoſition and tolerating principles; pious, abſtinent, charitable,

ritable, and accompliſhed beyond all others in legal knowledge.—His diffidence is ſaid to have increaſed with the extent of his acquirements; and he has indeed afforded an inſtance of inſurmountable and ſcrupulous modeſty, ſuch as has been ſeldom recorded, but which twice expoſed him to the moſt ſevere treatment from his ſuperiors, and probably, in the end, ſhortened his life. It is related that HOOBEYRA, the governor of *Kooſa*, importuned him to accept the office of *Kàzee* or judge, and, upon his perſiſting in refuſing it, cauſed him to be ſcourged for ten days ſucceſſively, with ten ſtripes a day, until at length, being convinced of his inflexibility, he releaſed him: and, ſome years after, the *Khàlif al* MANSOOR, having invited him to *Bagdad*, tried to prevail on him to accept the ſame office, which declining as before, he was thrown into priſon, and there confined until he died, A. H. 150.—He wrote ſeveral treatiſes both of a civil and religious nature.—The principal of his ſpeculative works are, I. the *Màſnad*, meaning the ſupport, prop, or pillar, in which are eſtabliſhed all the eſſential points of *Iſlamiſm*, on the authority of the KORAN and the traditions: II. the *Filk-al-èlm*, or orbit of ſcience, a treatiſe on ſcholaſtic theology, in which he expoſes the various errors and contradictions of the heterodox; and, III. *Moàllim*, or the *teacher*, a ſort of catechiſm, ſhewing the ſuperior excellence and efficacy of FAITH. His principal ſcholars were *Imâm* ABOO YOOSAF, and *Imâm* MOHAMMED, of whom we ſhall preſently have occaſion to ſpeak more particularly.—The ſect of HANEEFA at firſt prevailed chiefly in *Irâk*; but his doctrines afterwards ſpread into *Aſſyria*, *Africa*, and *Tranſoxania*; and his authority with reſpect to juriſprudence is at preſent generally received throughout *Turkey*, *Tartary*, and *Hindoſtan*.

THE founder of the ſecond orthodox ſect was *Imâm* ABOO ABDOOLA *MALIK* BIN ANS, who was born at Medina, A. H. 94, A. C. 716.—Living in the ſame place with, and receiving his earlieſt impreſſions from SIHL IBN SAAD, the almoſt ſole ſurviving COMPANION of *MOHAMMED*, an ear witneſs of his precepts, and a participator in his dangers and exploits, MALIK acquired the utmoſt veneration for the traditions, to which he afterwards paid an implicit regard through life.—He was indeed conſi-

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dered as the moſt learned man of his time in that ſpecies of knowledge, and exerted his utmoſt endeavours to procure reverence and reſpect to thoſe poſthumous precepts of the PROPHET.—His ſelf denial and abſtinence were remarkable, inſomuch that he generally faſted four days in the week, during which he denied himſelf even the moſt ordinary indulgencies.—He enjoyed the advantages of a perſonal acquaintance and familiar intercourſe with HANEEFA, although differing from him with reſpect to the abſolute authority of the traditions.—His pride, however, was at leaſt equal to his literary endowments.—In proof of this it is related of him that when the great *Khàlif* HAROON AL RASHEED came to *Medina*, to viſit the tomb of the PROPHET, MALIK having gone forth to meet him, the *Khàlif* addreſſed him, "O MALIK! I intreat, as a favour, that you will "come every day to me and my two ſons AMEEN and MAIMOON, and "inſtruct us in traditional knowledge;" to which the ſage haughtily replied, "O KHALIF! ſcience is of a dignified nature, and inſtead of "going to any perſon, requires that all ſhould come to it."—The ſtory further ſays that the ſovereign, with much humility, aſked his pardon, acknowledged the truth of his remark, and ſent both his ſons to MALIK, who ſeated them among his other ſcholars without any diſtinction.—With regard to the *traditions*, his authority is generally quoted as deciſive.—In fact, he conſidered thoſe as altogether ſuperſeding the judgment of a MAN; and on his deathbed ſeverely condemned himſelf for the many deciſions he had preſumed to give on the mere ſuggeſtion of his own reaſon.—The KORAN and the SONNA excepted, the only ſtudy to which he applied himſelf, in his latter days, was the contemplation of the DEITY; and his mind was at length ſo much abſorbed in the immenſity of the divine attributes and perfections, as to loſe ſight of all more inſignificant Objects!—Hence he gradually withdrew himſelf from the world, became indifferent to its concerns, and after ſome years of complete retirement, died at *Medina*, A. H. 179, A. C. 801.—His authority is at preſent chiefly received in *Barbary*, and the other northern ſtates of *Africa*.—Of his works, the only one upon record is the *Mattâ*, which contains a review of the moſt remarkable adjudications of the *Prophet*.—His principal

ſcholars

ſcholars were SHAFEI (who afterwards himſelf gave the name to a ſect), ABOO LAIS, and the learned IBN SIREEH.

THE founder of the third orthodox ſect was *Imâm* MOHAMMED IBN EDREES AL *SHAFEI*, who was born at *Aſkalon* in *Paleſtine*, A. H. 150, A. C. 772.—He was of the ſame ſtock with MOHAMMED, and is diſtinguiſhed by the appellation of *Imâm al Motlebi*, or *Koreiſh Motlebi*, becauſe of his deſcent from the Prophet's grandfather ABDAL MOTLEB.—He derived his patronymick title, or ſurname, SHAFEI, from his great grandfather SHAFEI IBN SAHIB.—His family were at firſt among the moſt inveterate of *Mohammed's* enemies, and his father, carrying the ſtandard of the tribe of HASHIM, at the battle of *Beder*, was taken priſoner by the *Muſſulmans*, but releaſed on ranſom, and afterwards became a convert to the faith.—SHAFEI is reported, by the *Muſſulman* writers, to be the moſt accurate of all the traditioniſts; and if their accounts be well founded, nature had indeed endowed him with extraordinary talents for excelling in that ſpecies of literature.—It is ſaid, that at ſeven years of age he had got the whole KORAN by rote: at ten he had committed to memory the MATTÂ of *Malik*; and at fifteen he obtained from the college of *Mecca* the degree of a MOOFTEE, which gave him the privilege of paſſing deciſions on the moſt difficult caſes.—He paſſed the earlier part of his life at *Gàza* in *Paleſtine*, (which has occaſioned many to think he was born in that place,) there completed his education, afterwards removed to *Mecca*, and came to *Bagdad*, A. H. 195, where he gave lectures on the traditions, and compoſed his firſt work, entitled the *Oſool*.—From *Bagdad* he went on a pilgrimage to *Mecca*, and thence afterwards paſſed into *Egypt*, where he met with MALIK.—It does not appear that he ever returned from that country, but ſpent the remainder of his life there, dividing his time between the exerciſes of religion, the inſtruction of the ignorant, and the compoſition of his latter works. He died at *Cairo*, A. H. 204, A. C. 826. Although he was forty-ſeven years of age before he began to publiſh, and died at fifty-four, his works are more voluminous than thoſe of any other *Muſſulman* doctor.—He was a great enemy to the ſcholaſtick divines, and moſt of his productions (eſpecially upon *theo-*

*logy)* were written with a view to expoſe their abſurdities, and explode their doctrines.—He is ſaid to have been the firſt who reduced the ſcience of juriſprudence into a regular ſyſtem, and made a diſcriminatory collection of traditions.—AHMED HANBAL remarks that, "until the time of "SHAFEI, men did not know how to diſtinguiſh between the traditions "that were in force and thoſe that were cancelled."—His firſt work was (as before mentioned) the *Oſool*, or *fundamentals*, containing all the principles of the *Muſſulman* civil and canon law.—His next literary productions were the *Sonnàn* and the *Meſned*, both treatiſes on the traditional law, which are held in high eſtimation among the orthodox.—His works upon practical divinity are various; and thoſe upon theology conſiſt of fourteen volumes.—His tomb is ſtill to be ſeen at *Cairo*, where the famous SELAH-AD-DEEN * afterwards (A. H. 587) founded a college for the preſervation of his works and the propagation of his doctrines.—The magnificent moſque and college at *Herat* in *Khoraſan* were alſo founded for the ſame purpoſe, by the Sultan GHEEAS AD DEEN, at the inſtance of the *Shafeïtes*, who at one time were very numerous in the northern provinces of *Perſia*.—The ſect is at preſent chiefly confined to *Egypt* and *Arabia*; and however highly they may deem of his authority, it will appear in the courſe of the preſent work that his deciſions in civil and criminal juriſprudence are ſeldom quoted by the doctors of *Perſia* or *India* but with a view to be refuted or rejected.—He firſt ſtudied juriſprudence under the learned MOOSLIM BIN KHALID, head *Mooftee* of *Mecca*, and accompliſhed himſelf in the knowledge of traditions from MALIK in *Egypt*.—His principal ſcholars were HANBAL and ZOHARI, the former of whom afterwards gave his name to a ſect.—SHAFEI is ſaid to have been a perſon of acute diſcernment and agreeable converſation.—His reverence for GOD was ſuch, that he never was heard to mention his name except

* *Yooſaf Bin Ayoob*, entitled *Selah-ad-deen* (the guard of religion) a native of *Curdiſtan*, who roſe to empire, and is well known in the hiſtory of the *Croiſades*, by the name of SALADIN.—He was a great admirer of *Shafei*, and a ſtrict follower of his rigid diſcipline.—He is therefore repreſented as an inveterate enemy to all ſpeculations not connected with the KORAN or the traditions; and he is reported to have put to death ſeveral who preſumed to broach opinions which were not ſtrictly *orthodox*.

in prayer.—His manners were mild and ingratiating, and he reprobated all unneceſſary moroſeneſs or ſeverity in a teacher, it being a ſaying of his, that "whoever adviſed his brother tenderly, and in private, did him "a ſervice; but that public reproof could only operate as a reproach."

THE founder of the fourth orthodox ſect is *Imâm* ABOO ABDOOLA-AHMED IBN *HANBAL*, ſurnamed *Shabân al Maroozee* *. He was born at *Bagdad*, A. H. 164, (A. C. 786,) where he received his education under YEZEED BIN-HAROON and YEHEEYA BIN SEYID.—On SHAFEI coming to *Bagdad*, (A. H. 195,) IBN HANBAL attended the lectures delivered there by that doctor, and was inſtructed by him in the traditions. In proceſs of time he acquired a high reputation from his profound knowledge of both the civil and ſpiritual law, and particularly for the extent of his erudition with reſpect to the precepts of the PROPHET, of which it is ſaid that he could repeat above a million. His fame began to ſpread juſt at the time when the diſputes ran higheſt concerning the nature of the KORAN, which ſome held to have exiſted from eternity, whilſt others maintained it to be created. Unfortunately for IBN HANBAL, the *Khâlif* MORASIM was of the latter opinion, to which this doctor refuſing to ſubſcribe, he was impriſoned and ſeverely ſcourged by the *Khâlif*'s order. For this hard uſage, indeed, he afterwards received ſome ſatisfaction from MOOTWAKKIL, the ſon of MORASIM, who, upon ſucceeding to the *Khâliſat*, iſſued a decree of general toleration, leaving every perſon at liberty to judge for himſelf upon this point. This tolerant *Khâlif* ſet the perſecuted doctor at liberty, receiving him at his court with the moſt honourable marks of diſtinction, and offering him a compenſatory preſent of 1000 pieces of gold, which, however, he refuſed to accept.—(After having attained the rank of a *Mooktiddee* † and *Peiſhwa* ‡, he retired from the world, and led a recluſe life for ſeveral years.) He

* Meaning probably *Shepherd of the* MAROOZIANS, (a name by which the people of a particular region in *Perſia* are diſtinguiſhed).

† A particular rank among the learned. Literally "an *exemplar*."

‡ The title beſtowed, in *Perſia*, upon the leader of a ſect.

died A. H. 241, A. C. 863, aged 77.—He obtained ſo high a reputation for ſanctity, that his funeral was attended by a train of 800,000 men and 60,000 women; and it is aſſerted as a kind of miracle, that on the day of his deceaſe no fewer than 20,000 *Jews* and *Chriſtians* embraced the faith.—For about a century after his death, the ſect of HANBAL were numerous and even powerful, and uniting to their zeal a large proportion of fanaticiſm, became at length ſo turbulent and troubleſome as to require the ſtrong arm of government to keep them in order.—Like moſt other fanatical ſects, they dwindled away in proceſs of time, and are now to be met with only in a few parts of *Arabia*. Although orthodox in their other tenets, there was one point on which they differed from the reſt of the *Muſſulmans*; for they aſſerted that GOD had actually ſet MOHAMMED upon his throne, and conſtituted him his ſubſtitute in the government of the univerſe; an aſſertion which was regarded with horror, as an impious blaſphemy, and which brought them into great diſrepute.—This, however, did not happen until many years after IBN HANBAL's deceaſe, and is in no degree attributed to him. He publiſhed only two works of note, one intitled the *Moſannid*, which is ſaid to contain above 30,000 traditions, ſelected from 750,000; and another, a collection of apothegms, or proverbs, containing many admirable precepts upon the government of the paſſions.—He had ſeveral eminent ſcholars, particularly ISMAEL BOKHAREE, and MOOSLIM IBN DAOOD. His authority is but ſeldom quoted by any of the modern commentators on juriſprudence.

FROM the diſciples and followers of theſe four great leaders have proceeded an immenſe number of commentaries at different times, ſome treating of the civil, ſome of the canon, law; ſome comprehending the applications both of the KORAN and the SONNA, others confined ſolely to the former, and others, again, treating purely of the *traditions*; but all differing on a variety of points in their conſtructions, although coinciding in their general principles.

THE *Muſſulman* courts of juſtice, when not actuated by any undue influence, in deciding upon cauſes conſult, firſt the KORAN, then the

traditions preſerved in thoſe collections, which are generally admitted to be authentic, and, next to thoſe, the opinions of their moſt approved civilians. The two former lay down the principles, and the commentators give the application. Without theſe laſt indeed, the preſiding magiſtrates muſt be often at a loſs, or muſt depend ſolely on their own judgment; as it is impoſſible, in the infinite variety of human affairs, that the text of the KORAN, or the traditionary precepts of the Prophet, ſhould extend to every particular caſe, or ſtrictly ſuit all poſſible emergencies. Hence the neceſſity of *Mooftees*, whoſe particular office it is to expound the law and apply it to caſes. The *uncertainty* of this ſcience, in its judicial operation, is unhappily proverbial in all countries. In ſome, which enjoy the advantage of an eſtabliſhed legiſlature, competent at all times to alter or amend, to make or to revoke laws, as the change of manners may require, or incidental occurrences render neceſſary, this uncertainty ariſes pretty much from the unavoidable mutability in the principles of deciſion.—Of the *Muſſulman* code, on the contrary, the principles are fixed; and being intimately and inſeparably blended with the religion of the people, muſt remain ſo, as long as they ſhall endure. Here, of courſe, the uncertainty is owing ſolely to the application of the principle, which will neceſſarily vary according to the different tenets or judgment of the expoſitors. In the *Muſſulman* courts, therefore, the works of their great commentators are particularly neceſſary, both in order to give a ſurer ſtability to property, and alſo, that the magiſtrate may avail himſelf, in his deciſions, of the collected wiſdom of ages.

THE expoſitions of the *Muſſulman* law are, in general, of three ſcriptions; the firſt termed *Oſool*, treating of the fundamental principles of the law in matters both ſpiritual and temporal, as derived from the KORAN,—the ſecond *Sonnàn*, treating of the traditions, and of the rules and precepts of juriſprudence with reſpect to points not touched upon in the KORAN,—and the third *Fatàvee*, conſiſting ſimply of a recital of deciſions upon caſes. Under theſe, and a variety of other appellations, ſome thouſands of volumes have appeared at different times. Their authority is of weight according to the ſuppoſed merit of the work, or the

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rank and character of the author. Each, however, has its peculiar characteriſtic, being (generally ſpeaking) confined to ſome one branch of juriſprudence, or receiving, in its concluſions, an unavoidable tinge from the particular tenets under the influence of which it was compoſed.

To attempt a diſtinct analyſis of the various interpretations contained in the comments of even the *orthodox* writers, would require more time and labour than the Tranſlator has at preſent an opportunity of beſtowing on it. He has indeed to lament that the ſhort ſketch here exhibited, of the grounds and principles of *Mohammedan* juriſprudence, is ſo inadequate to the uſefulneſs and curioſity of the ſubject: but, diffident of his own abilities, and indifferently ſupplied with the materials which might enable him to do it juſtice, he thinks it better (for the preſent at leaſt) to wave entering upon a taſk in which to *fail* would be leſs excuſable than to be *ſilent*. Having therefore endeavoured, as far as the narrow bounds of a prefatory eſſay would admit, to explain, I. the foundations of the *Muſſulman* law, II. the origin of thoſe varieties which at preſent appear in the expoſition of it, and III. the uſe of commentaries to direct the practice,—it is fit that he proceed to give ſome account of the *HEDAYA*,—an account, to which the preceding detail was a neceſſary introduction.

*AL HEDAYA* literally ſignifies *the guide*. There are many *Arabic* works on philoſophical and theological ſubjects which bear this name. The preſent, intitled *HEDAYA* FIL FOROO, or the *guide in particular points* *, was compoſed by *Sheikh* BURHAN-AD-DEEN ALEE, who was born at *Murghinàn*, a city of *Maveralne'r*, (the ancient *Tranſoxania*) about A. H. 530, (A. C. 1152,) and died A. H. 591. As a lawyer, his reputation was beyond that of all his contemporaries. He produced ſeveral works upon juriſprudence, which are all conſidered as of unqueſtionable authority.—According to the account which he himſelf gives us in his exordium, the *HEDAYA* is a *Sharh* or expoſition of a work previouſly

* FOROO literally means *the branches of a tree*, and is here oppoſed to OSOOL, ſignifying the i. e. the *fundamental principles*.



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compoſed by him, intitled the *Badàyat al Moobtidda*, an introduction to the ſtudy of the law, written for the uſe of his ſcholars, in a ſtyle exceedingly cloſe and obſcure, and which (it would appear) required an illuſtrative comment to enable them to comprehend it.—Of the *Badàyat al Moobtidda*, the tranſlator has not been able to procure any copy. It is, indeed, moſt probably no longer extant, as the preſent more perſpicuous paraphraſe ſuperſeded the neceſſity of the text, and rendered it uſeleſs.

THE *HEDAYA* is an extract from a number of the moſt approved works of the early writers on juriſprudence, digeſted into ſomething like the form of a regular treatiſe, although, in point of arrangement, it is rather deſultory. It poſſeſſes the ſingular advantage of combining, with the authorities, the different opinions and explications of the principal commentors on all diſputed points, together with the reaſons for preferring any one adjudication in particular; by which means the principles of the law are fully diſcloſed, and we have not only the *dictum*, but alſo the moſt ample explanation of it. The author, being a *Moojtàhid*, was himſelf qualified to paſs deciſions upon caſes (whether real or ſuppoſed) which ſhould operate as a precedent with others. He of conſequence, in many inſtances, gives us merely *his own* opinion, without reſorting to any other authority or precedent. In his comments he generally leans to the doctrine of *Haneefa*, or his principal diſciples; and indeed his work may in a great meaſure be conſidered as an abſtract of the *Haneefite* opinions, modified by thoſe of the more recent teachers, and adapted to the practice and manners of other countries and of later times.

THE perſons whoſe opinions are chiefly quoted by him, beſides the four great LEADERS already mentioned, are ABOO YOOSAF, MOHAMMED, and ZIFFER.

IMÂM *ABOO YOOSAF*, (alſo known by the appellation of YACOOB-BIN-IBRAHEEM,) was born at *Bagdad*, A.H. 113. He ſtudied under *Hanceſa*, and was appointed to the office of *Kázee* of *Bagdad* by HADEE, the fourth of the *Abbaſſian Khàlifs*. He was afterwards advanced, by the ſucceſſor

ſucceſſor of HADEE, the famous HAROON AL RASHEED, to the dignity of *Kázee al Kazàt* *, or ſupreme civil magiſtrate, being the firſt who ever filled that important ſtation. To him was in a great meaſure owing the introduction of regular forms into the adminiſtration of juſtice. Before his time the appellations of *Kâzee* and *Mooftee* were little uſed, or indiſcriminately beſtowed, upon all whoſe knowledge or abilities enabled them to pronounce the law, or determine upon caſes; all matters of diſpute being decided among the *Arabs* in a ſummary way, by appeal to the chief of the tribe, or to the *Imám* of the city or diſtrict. At his recommendation courts of judicature were inſtituted for the ſole purpoſe of hearing and determining cauſes; he himſelf preſiding in the principal or ſupreme tribunal, which was eſtabliſhed in the city of the *Khàlif*, and to which all others were ſubordinate. A particular dreſs was alſo appointed for the doctors of the law, together with other *inſignia*, calculated to add an exterior dignity and importance to the juridical profeſſion. Though he differs, in a variety of his deciſions, from his great maſter HANEEFA, yet he generally profeſſed to be guided by his opinion, and brought his doctrines much into eſteem in *Irâk* and *Perſia*.—He not only acquired a high degree of fame by his legal knowledge, but alſo employed it moſt ſucceſsfully in the advancement of his temporal intereſt, amaſſing, in the ſpace of a few years, a very conſiderable fortune.—He is reported to have been a perſon of great acuteneſs, ready wit, and prompt in expedients, of which a remarkable inſtance is recorded in the *Negàriſtan*, whereby he obtained, in one night, fees to the amount of 50,000 gold *deenars* †. He died at *Bagdad*, A. H. 182.

IMÂM ABOO ABDOOLA *MOHAMMED* BIN HOOSAIN *al Sheïbànee* (commonly called *Imâm* MOHAMMED) was born at *Wâſit*, a city of *Ara-*

* Literally, "*Judge of Judges.*" The office was ſomewhat analogous to that of a *High Chancellor* or *Chief Juſtice*.

† See Introduction to Richardſon's Dictionary, vol. I. p. xlviii. The value of the *Deenar* is ſo very indefinite, (being eſtimated, in different countries, at various rates, from 7 s. to 9 s. 6 d.) that it is impoſſible to ſtate the ſterling amount of the ſum here mentioned with preciſion.—It is from 18 to 25,000 l.

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*bian Iràk*, A. H. 132. He ſtudied under HANEEFA, along with ABOO YOOSAF, and afterwards ſuperintended an academy or college in *Bagdad*. He acquired much fame by his extenſive and accurate knowledge of the traditions; and was deputed, by the *Khàlif* HAROON AL RASHEED, to ſuperintend the adminiſtration of juſtice in the province of *Khoraſan*. He was not more eager in his thirſt after knowledge, than liberal in the encouragement and ſupport of it, having ſpent a large patrimonial fortune in the purſuit of ſcience, and in rewards to its profeſſors.—He ſpent three years of his youth under the tuition of MALIK; and to the tincture he received from that doctor it is perhaps owing that he not only frequently diſſents from the opinions of his chief preceptor HANEEFA, but alſo, in ſome inſtances, from thoſe of his fellow pupil ABOO YOOSAF.—*Shafeï*, in his *Oſool*, mentions him with much reſpect.—He died at *Rai*, the capital of *Khoraſan*, (where his monument is ſtill to be ſeen,) A. H. 179.

ABOO *al* HAZL *ZIFFER* BIN HAZL was a contemporary and intimate companion of HANEEFA, and one of the moſt auſtere perſons of that ſect.—We have not been able to collect any other particulars concerning the character of this doctor, further than the remarkable retention of his memory, which particularly qualified him for excelling in traditional knowledge. He was appointed chief judge and governor of *Baſra*, at which place he died, A. H. 158.

THE books principally cited in the *Heddàya* are the *Mabſoot*, the *Jama Sagheer*, the *Jama Kabeer*, the *Zeeadàt*, the *Nawàdir*, and the commentary of *Kadooree*. The *Mabſoot* or *Amplified Digeſt* (which is alſo, by way of pre-eminence, entitled the *Aſl*, or *root*) was compoſed by ABOO' L' HASN ALI BIN MOHAMMED, who is intitled *Fakhral-Iſlàm*, or *the glory of the faith*, and ſurnamed *Bezdàvee*, from the place of his birth, *Bezda*, a fort in *Maveralne'r*.—This great work was publiſhed about A. H. 460, and was intitled, by its author, a *Mabſoot*, or *Amplified Digeſt*, becauſe of its being written in rather a diffuſive ſtyle, the term literally meaning *ſpread out*. It conſiſts of eleven volumes, and comprehends a complete courſe of

theology and practical divinity, treated according to the principles of the *Haneefit* ſchool, of which the author profeſſed himſelf a follower.—The *Kabeer*, or *great compilation*, is a collection of traditions on the moſt approved authorities, (whence this work is alſo termed *Jàma Sabeeh*, or the *approved* compilation,) compoſed by YEESOO MOHAMMED BIN YESOO *al Termazi*, about A. H. 260. It is related that the author, before publication, ſent copies of his work to all the principal profeſſors in *Arabia* and *Perſia*, each of whom expreſſed his approbation of it in the higheſt terms. Many other works have been written on the ſame ſubject, and under the ſame title; but this is conſidered as the moſt authentic. The *Jàma Sagheer*, or *ſmall compilation*, is alſo a work upon the ſame ſubject, on a more minute ſcale. The author uncertain.—The *Zeeadàt*, or, as it is more fully intitled, *Zeeadàt fi'l foroo al* HANEEFA, meaning, *Addenda concerning the branches* of HANEEFA, is a copious treatiſe upon legal concluſions, as taught by that doctor, ſaid to be compoſed by *Imâm* MOHAMMED, under the inſpection and with the approbation of his maſter. This treatiſe is highly eſteemed; and many commentaries have been written upon it, in *Turkey*, *Africa*, *Arabia*, *Perſia*, and *India*.—Theſe four works are frequently cited, by the compiler of the *HEDAYA*, under the comprehenſive term of *Zàhir al Rawàyat*, or *The letter of Reports* *; and his book conſiſts chiefly of a compendious extract from theſe. The *Nawàdir*, or *curioſities*, is a title beſtowed upon a digeſt of four other compilations of traditions and law reports. Theſe compilations are not ſuppoſed to be poſſeſſed of the ſame authority with the *Zàhir al Rawàyat*, and are therefore, by the commentators, diſtinguiſhed under the head of *Ghair Zàhir al Rawàyat* †.—The commentary of *Kadooree* (which is ſometimes ſimply termed *Kadooree)* takes its title from the patronymic appellation of the author, AHMED BIN MOHAMMED KADOOREE. It is a

* *Zahir* is a term uſed to expreſs the external matter or *text* of a work, (particularly of the KORAN,) in oppoſition to *Batin*, by which is underſtood the *internal meaning*.

† *Ghair* ſignifies "*different from*," "*other than*." It is generally uſed in a *privative*

mentary

mentary upon a previous work of ABOO YOOSAF, intitled *Adab al* or *duties of a magiſtrate*, and is conſidered as of high authority by the ſect of HANEEFA.—It was publiſhed about A. H. 420; the place of its publication uncertain.

A NUMBER of other authorities are quoted in the courſe of this work. Of ſeveral the tranſlator has not been able to procure any authentic account:—but, for the ſatisfaction of the reader, the following ſhort abſtract is given concerning thoſe which appear moſt worthy of notice.

AMONG the *perſonal* authorities cited, we find the names of the four firſt *Khàlifs*, and alſo of ſeveral of the *Sahàbá*, or original companions of the Prophet. Of theſe laſt, the moſt eſteemed are ABDOOLA IBN ABBAS, and ABDOOLA IBN MASAOOD.—ABDOOLA IBN ABBAS was the couſin-german of ALEE, and his principal friend and counſellor during the ſtruggle between him and MOAVIAH for the *Khalifat*.

A. H. 65.—ABDOOLA IBN MASAOOD, alſo known by the name ABDULRIHMAN ABDOOLA *al Hàzlee*, joined the Prophet almoſt at the commencement of his pretended miſſion; led his diſciples, in their retreat to *Ethiopia*, upon the perſecution of the KOREISH; and afterwards repaired to him at *Medina*. He died A. H. 44, intitled, for his eminent knowledge of the KORAN, and the precepts of the Prophet, *Tâj-al-Shirra*, or *the diadem of the law*.—HASSAN, ſurnamed *Bakhtàree*, was an eminent teacher of the law. He was a native of *Khoraſan*, whence he takes his appellation, *Bakter* being the name anciently beſtowed on that region, becauſe of its relative ſituation, as it ſignifies the *eaſt*,—whence the antermed the ſame territory *Bactriana*.—IBN AL *KHASAF*, ſurnamed *Bekr Ahmed*, was an eminent adherent to the ſect of HANEEFA; and wrote a treatiſe under the ſame title as that of ABOO YOOSAF, already mentioned, and upon the ſame ſubject, *(the duties of a magiſtrate,)* in which all the doctrines of his leader are exemplified and ſupported by argument.—ABOO JAFIR *Hindooanee* takes his appellation from the place of his birth, *Hindooan*, a quarter or ward of the city of *Balkh*, the

capital of *Khoraſan*. He attained to ſuch eminence in the law, as to be appointed to the dignity of ſupreme *Mooftee* throughout all the region of *Maveralne'r*, (*Tranſoxania*;) and by his ſuperior excellence acquired the title of *Haneefa Sanee*, or HANEEFA the *ſecond*.—He died at *Bokhàra*, A. H. 362; and it is ſaid that, on the day of his deceaſe, a multitude of Jews and idolators were converted to the faith, by beholding his piety and abſtinence, and the fortitude with which he met his diſſolution.—ABOO MOHAMMED AL KASIM (commonly called ABOO *Hareera*) derives his appellation, *Hareera*, from the place of his reſidence, *Herat*, a city of *Perſia*.—He was born at *Baſra*, (whence he is alſo by ſome termed *al Baſreea*,) A. H. 446. He compoſed, at the inſtance of ABOO SHERWAN KHALID, the Vizir of the *Seljucidian* Sultan MAHMOOD, a work intitled *Makamàt*, (occaſionally mentioned in this commentary,) conſiſting of fifty diſcourſes on various ſubjects of law and morals. He died A. H. 515.—His authority has great weight in all legal diſcuſſions.—The doctor mentioned under the title of *Tehâvee* is ABOO FAKA, *Kâzee* of *Taha*, a town in Upper Egypt.—ABDOOLA BIN MOBÂRICK (commonly ſtyled *Ibn al Mobârick*) was a perſon of eminent piety, who died at *Heet*, a city of *Irâk*, (*Chaldea*,) where his tomb ſtill continues to be viſited by the devout, as the *Mauſoleum* of a ſaint.—TAMEEM BIN TIRFA was one of the *Sahàbá*, or companions of the Prophet, of whom many fabulous miracles are recorded.

AMONG the books quoted, beſides what have been already mentioned, are the following:—

THE *Rawàyat Saheeh*, or *indubitable reports*; a title beſtowed upon two different treatiſes on the *Sonna*; the firſt, by ABOO ABDOOLA MOHAMMED BIN ISMAEL *al Jooſi*, on which a number of comments have been written at different times; and the ſecond, by ZÂK-AD-DEEN *al* MANDREE. They are both conſidered as of good authority.—The *Rawàyat Maſh'hoor* (celebrated *reports*) *Hadees Maſh'hoor*, (celebrated *traditions*,) *Nakl Saheeh*, (true relations,) and *Moontakkee*, (ſelections,) are alſo approved works by dif-

ferent uncertain authors on the ſame ſubject. The *Amàlee* (miſcellany) is a general commentary upon the law, attributed, by ſome, to MOHAMMED BIN MOSLEM *al Zohàri*, who is ſaid to have been the firſt compiler of traditions, and the preceptor of *Imâm MALIK* BIN ANS, the head of the ſecond orthodox ſect, already mentioned.—The *Fatàvee* SHAFEI, *Fatàvee* KÂZEE KHAN, *Fatàvee* TIMOOR-TASHEE, and *Fatàvee Imâm* SIRRUCKHSH, are all collections of the deciſions paſſed by the perſons whoſe names they bear, or upon their authority, and have been compiled with a view to ſerve as precedents in practice. SHAFEI has already been mentioned as the head of the third orthodox ſect. KÂZEE KHAN was the diſtinguiſhing appellation of FAKHR-AD-'DEEN HASAN BIN MANSOOR, a native of *Arnoos*, (*Albania*,) who for ſome years ſuperintended the adminiſtration of juſtice in *Damaſcus*, and afterwards at *Iſfahàn*. He died A. H. 592.—Of the other two nothing particular is recorded. They were probably magiſtrates in ſome part of *Perſia*.

FROM a conſideration of the nature of this work, and of the authorities principally quoted in it, we proceed to notice certain peculiarities which will occur in the peruſal of it, and an explanation of which is requiſite to the elucidation of what might otherwiſe appear unintelligible or obſcure.

ALL laws muſt derive the prominent features of their character from the peculiar manners, cuſtoms, and language, of the people among whom they have originated.—In order, therefore, to enter fully into the ſpirit of the text, it is requiſite that we keep in mind the ſtate of ſociety in *Arabia* at the time when MOHAMMED and his companions began to introduce ſomething like a ſyſtem of juriſprudence among the followers and ſubjects of *Iſlâm*. To enter into this particularly would be much beyond the Tranſlator's deſign, and would occupy more room than a mere preface can admit of. It is ſufficient for our purpoſe to remark, that the *Arabians* were divided into two claſſes or deſcriptions of men, the inhabitants of cities, and the *Bidweens*, or wanderers in the deſert. The former

purſued

purſued commerce and huſbandry; whilſt the latter (that is, the great body of the nation,) followed the uſual occupations of the paſtoral life, occaſionally made inroads upon their more wealthy neighbours, attacked the caravan, and plundered the traveller.—In this general outline time has produced but little alteration.—Subdued by the arms, or allured by the promiſes, of the PROPHET, the tribes of the deſert united their forces, and, iſſuing from their native wilds, over-run the neighbouring nations with an impetuoſity of valour which nothing could reſiſt, and with an uninterrupted uniformity of ſucceſs to which hiſtory oppoſes no parallel. This, however, was only an extraordinary convulſion, proceeding from the coincidence of accidental cauſes, placing them in a ſituation which ſubſequent events have evinced was by no means natural. As the firſt impreſſions of fanatic zeal abated, they recovered from their dream of univerſal conqueſt; and, after having altered the religion of a large portion of mankind, overturned the moſt powerful monarchies, and eſtabliſhed various royal dynaſties in the ſurrounding countries, ſucceeding revolutions gave back the *Bidweens* to their original independence and their original ſolitude. In the mean while, the excluſion of ſtrangers or unbelievers from their principal cities in a great meaſure prevented the more poliſhed from mixing with the reſt of mankind, from being contaminated with their vices, or improved by their example. Hence, except in the ſingle article of religious belief, the *Arabs* perhaps differ little at this day from what they were two thouſand years ago, and indeed preſent to us almoſt the ſame picture in point of genius, temper, and manners, as in the time of the *Jewiſh* patriarchs.

WHEN MOHAMMED aſſumed the prophetic character, he found his countrymen, in general, ſlaves to the moſt groſs and ſtupid idolatry. The paganiſm of the *Sabians* had over-run almoſt the whole nation.—From *Perſia* the eaſtern tribes had caught much of the ſuperſtition of the *Magians*.—There were, indeed, numbers of *Jews* and *Chriſtians*. The former had ſeveral conſiderable eſtabliſhments; and many whole tribes had embraced the *Moſaic* creed or the *Goſpel*. But their conduct and prin-

ciples little deſerved the titles they aſſumed. The *Jews* paid more regard to the fabulous traditions of their *Rabbins* than to the ſevere and unaccommodating precepts of the *Pentateuch*; and the eaſtern churches were divided and convulſed by ſcholaſtic diſputes, in which, inſtead of the mild and forbearing ſpirit of Chriſtianity, nothing but mutual rancour, malice, and uncharitableneſs, prevailed; whilſt the pure and ſimple worſhip by its divine Author had degenerated into mere outward ſhew, preſſi only of a debaſing and idolatrous ſuperſtition.—Among the , the nice diſtinctions of property were imperfectly underſtood. tribe was governed by its own law; and diſputed cauſes were either to the determination of the chief, or (more frequently) decided by an appeal to the ſword. Their only laſting memorials were the effuſions of their poets, tranſmitted orally from age to age, which ſerved to preſerve ancient uſages, or to keep alive the feuds of contending neighbours. Private revenge was not merely tolerated, but encouraged, and the juſtice and neceſſity of it inculcated. Hence every diſſenſion was the occaſion either of ſingle combat or of civil war; and tradition furniſhes us with accounts of above 1500 battles fought before the introduction of the faith.—The art of writing was little known, and the practice of it confined chiefly to the *Jews* and *Chriſtians*. Theſe were diſtinguiſhed by the common appellation of KITÂBEES, *(ſcripturiſts,)* or AHL *al* KITÂB, *(people of the book,)* becauſe of each having received a written revelation from Heaven.—The accompliſhment principally eſteemed among the *Arabs* was expertneſs at weapons and in horſemanſhip. The ſciences moſtly ſtudied were, genealogy, aſtronomy, and rhetoric. The firſt of theſe was carefully employed in preſerving the purity of their deſcent; the ſecond was applied chiefly to aſtrological purpoſes; and the third they exerciſed in the compoſition of love-ſongs and elegies, or poetic fictions concerning the exploits of their chiefs, the relation of which cheered the aged, and animated the young. Their great virtues were, hoſpitality, temperance, and munificence, which laſt was frequently carried to an unwarrantable and (perhaps) oſtentatious exceſs, to the prejudice of their children and kindred.—Their moſt odious vices were a diſ-

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poſition to war and rapine, and an unappeaſable vindictiveneſs of ſpirit. Their ſecluſion from the reſt of mankind taught them to conſider every ſtrange nation in an hoſtile light; and the term *Hirbee* expreſſed, at once, an *alien* and an *enemy*.

THIS ſhort and imperfect ſketch will ſerve to familiarize or explain to us a number of extraordinary paſſages in the following treatiſe. In fact, without ſome ſuch reference, ſeveral of the examples adduced in the courſe of it muſt appear unnatural or improbable, and the arguments upon them frivolous or abſurd. In too many inſtances they certainly are ſo; the *Muſſulman* lawyers being as much addicted to verboſe ſophiſtry as any of their *Chriſtian* brethren. But a due regard to local circumſtances will teach us to conſider, that numbers of the caſes here cited in elucidation of particular points of law, although they may ſeem to an *European* to be ſuch as can ſeldom or never really happen, would yet appear, to a *Muſſulman*, to contain no more than a neceſſary proviſion with reſpect to caſes of frequent or probable occurrence. Many of them, indeed, ſeem to be propoſed merely as exerciſes for the exertion of mental acumen, and the diſplay of ſubtle diſtinctions; and as ſuch they are perhaps not without their uſe. With reſpect to the *argumentative* part in particular, although abounding in futile ſophiſtry, ſtill it poſſeſſes the advantage of leading to a full development of the *principles*. It moreover places ſubjects in every poſſible light, familiarizes us to the modes of reaſoning in uſe among the *Muſſulman* profeſſors, (a matter of ſome literary curioſity,) and frequently involves material points of law, not to be found under the heads to which they properly relate *.

THE firſt ſingularity likely to ſtrike the *European* reader, on caſting his eye over thoſe laws, is the great proportion of them which relates to ſlaves, the diſcuſſions concerning whom occupy nearly a third of the whole work. To account for this, it is proper to remark that, among

* See an inſtance of this in Vol I. p. 8. article ZAKAT; where an opinion of *Haneefa* is introduced with reſpect to a *Kazee*'s declaration of a debtor's inſolvency.

the

of *Iſlâm*, whoſe ideas of luxury extended not beyond the plain ſimplicity of the paſtoral life, the articles of property were few, and confined, for the moſt part, to ſlaves and domeſtic animals. The former generally conſtituted their chief ſubſtance; and *the bodies of bondmen* have in thoſe countries formed, from the earlieſt ages, a principal commodity of traffic.—The *Arabs*, like moſt other barbarous nations, had ever been in the practice of retaining as ſlaves all the captives taken in war, whoſe lives were ſpared by avarice or policy. The children of thoſe captives partook of the condition of their parents.—The fanatic fury of the *Sahàbá*, (companions,) under the prophetic banner, in the beginning of their career, ſpared neither age, ſex, or condition; but, when the firſt ebullitions of zeal ſubſided, their priſoners were reſerved as a valuable part of plunder.—Every new conqueſt poured into *Arabia* a freſh acceſſion of captives; and thoſe formed, in time, not only a great part of the wealth of individuals, but alſo a principal proportion of the community. Hence the conſiderable ſpace which the laws concerning SLAVES occupy.—In numberleſs inſtances, however, the caſes and examples cited with reſpect to them are not excluſively reſtrictive to SLAVES, but may be conſidered in the light of ſo many legal *paradigms*, equally applicable, in their conſtruction, to any other articles of commerce or exchange.

THUS far the tranſlator deemed it requiſite to premiſe of the work in general.—He is now arrived at a leſs agreeable part of his preſent duty, ſince indiſpenſably productive of a degree of *egotiſm*,—it being neceſſary to add a few pages concerning the *Perſian verſion* of the *HEDAYA*, and the *Engliſh tranſlation* of that verſion.

WHEN the attention of the *Britiſh* government in BENGAL was firſt directed to the neceſſity and importance of procuring ſome authentic guide for aiding them in their ſuperintendance over the native judicature, (founded on the reaſons we have already ſtated,) they diſcovered, in the

books recommended to forward this end, a ſyſtem copious without preciſion, indeciſive as a criterion, (becauſe each author differed from or contradicted another,) and too voluminous for the attainment of ordinary ſtudy.—From theſe a compendium might indeed have been abſtracted; but, being a mere compilation, it would have been conſidered rather as a *new code* than as a reviſion of the *old*, and would not, in the idea of thoſe upon whom it was intended to operate, have borne the authority of an original work. Numbers of *Fattàwees* were indeed at hand, and the tranſlation of one compoſed in the *Perſian* language, by the authority and under the inſpection of the *Mogul* Emperor AURUNGZEBE, (from him denominated *Fattàwee Allumgheeree,)* was actually undertaken. It was, however, ſoon diſcovered that this, conſiſting of a ſimple detail of caſes and deciſions, would do little or nothing towards developing the *principles* of the *Muſſulman* laws, and of courſe could afford but a very limited portion of inſtruction with reſpect to them. Some learned *Mohammedans*, who were conſulted on this occaſion, thought it, moreover, unfair that their *Britiſh* rulers ſhould receive their firſt impreſſion of the *Muſſulman* legiſlation from a bare recital of *examples*, ſuch as compoſed the *Fattàwee Allumgheeree*. They therefore adviſed that, previous to any further ſtep, a tranſlation ſhould be executed of ſome work which, by comprehending, in the ſame page, the *dictum* and the principles, might ſerve at once as an exemplar and an inſtructor; and for this purpoſe they recommended the *HEDAYA*, becauſe of its being regarded (particularly throughout *Hindoſtan*) as of canonical authority, and uniting, in an eminent degree, all the qualities required. But as the *Arabic*, in which this treatiſe was written, is known only among the learned, and the idiom of the Author is particularly cloſe and obſcure, they at the ſame time propoſed that, under the inſpection of ſome of their moſt intelligent doctors, a complete verſion ſhould be formed, in the *Perſian* language, which would anſwer the double purpoſe of clearing up the ambiguities of the text, and (by being introduced into practice) of furniſhing the native judges of the courts with a more familiar guide, and a more inſtructive preceptor, than books written in a language of which few of

them

them have opportunities of attaining a competent knowledge.—In conformity with this advice, four of the principal and moſt learned *Molovees* (*Mohammedan* lawyers) were engaged to tranſlate the whole from the *Arabic* into the *Perſian* idiom.—The tranſlation of this verſion into *Engliſh* was at firſt committed to Mr. JAMES ANDERSON, a gentleman whoſe eminent *literary* qualifications for accompliſhing ſuch an undertaking could only be excelled by the ſolidity of his underſtanding, and the goodneſs of his heart. Before he had made any conſiderable progreſs, the preſent Tranſlator had the honour of being aſſociated with him in the work; and Mr. ANDERSON being ſhortly after engaged in an important foreign employment, the duties of which neceſſarily occupied the whole of his attention, the completion of it devolved entirely on his colleague, who, in conſequence, took upon him the ſole management and reſponſibility.

WHEN the *Engliſh* tranſlator came to examine his text, and compare it with the original *Arabic*, he found that, except a number of elucidatory interpolations, and much unavoidable amplification of ſtyle, it in general exhibited a faithful copy, deviating from the ſenſe in but a very few inſtances, in ſome of which the difference may perhaps be juſtly attributed to the inaccuracy of tranſcribers *; and in one particular it is avowed and juſtified by the *Molovees*, becauſe of an alledged error of the author †.—Many of the interpolations are indeed ſuperfluous, and they ſometimes exceed, both in length and frequency, what could be wiſhed. They, however, poſſeſs the advantage of completely explaining the text, from which every reader may for the moſt part with eaſe diſcriminate them, ſince they almoſt uniformly conſiſt of illuſtrative expoſitions of paſſages, beginning with, "that is,"—"in other words,"—and ſo forth; and where

* See, for inſtance, vol. II. p. 281; where it is likely that the deviation pointed out in the note may be owing merely to ſome inaccuracy in the *Perſian* copy, as the error is evident.

† See vol. IV. p. 499; where the *Molovees* correct an error with reſpect to a legatee's proportion in the undefined part of a houſe.

It may doubtleſs be urged that, inſtead of having recourſe to an i diate verſion, the tranſlation ſhould have been made at once from the *Arabic*, by which means the work would have preſented a more cloſe and accurate picture of the original.—Had the tranſlator been at liberty to purſue this plan, much labour would indeed have been ſaved him! Some reaſons are, however, to be aſſigned, which, when duly conſidered, will perhaps be found to give an indiſputable preference to the mode that has been adopted. I. As the *Perſian* verſion was deſigned for the uſe and inſtruction not merely of the *Engliſh* ſcholar, but alſo of the native magiſtrate, and was therefore likely to be introduced into practice, it was indiſpenſably requiſite that the *Engliſh* tranſlation ſhould be taken from it rather than from the *Arabic*, in order to preſerve an exact and literal uniformity between the two ſtandards of judicial determination. II. The *Arabic* is remarkably cloſe in its idiom, and, in treating of every abſtracted ſubject, brief in its conſtruction to a degree which, in any other language, would be conſidered as involving the matter treated of in the darkeſt and moſt perplexing obſcurity. This is evident in the continual ellipſis of *terms*, and a conſequent repetition of *relatives*, (many frequently occurring in the ſame period,) which are referable to their proper antecedents only by certain rules of context peculiarly appropriated to that language. Hence a *literal* tranſlation from the *Arabic* would have left the ſenſe, in many places, as completely unintelligible to the *Engliſh* reader as the original itſelf.—In following the *Perſian* verſion, therefore, (if we except the interpolations already mentioned and accounted for,) the tranſlator has done little more than what he muſt have done, at any rate, to render himſelf underſtood, — namely, given the ſenſe in a *fuller* and more *explicit* manner than the original author,—but without in any degree departing from or altering the tenor of the text. III. The perſons employed in the compoſition of the *Perſian* verſion were themſelves poſſeſſed of deep legal knowledge, qualified, both by their academical rank and judicial ſtations, to paſs decrees, and perhaps as well verſed in the *Muſſulman* inſtitutes as their author. Hence their interpolations proceed from an authority perfectly competent, and being (as in many inſtances they certainly are) of eſſential utility, muſt be conſidered as a

valuable

valuable addition to the text. Theſe interpolations are, in fact, nothing more than *explanatory remarks*, inſerted in the body of the work, inſtead of being ſubjoined in the form of notes.—Had the tranſlator conceived himſelf at liberty to uſe his own unlimited diſcretion in the manner of his performance, he could perhaps have adopted this mode, as being more agreeable to the literary faſhions of his own country, in all except original compoſitions. But this is a plan ſeldom adopted by Oriental writers; and the tranſlator had a particular duty preſcribed to him, which (except in ſome very particular caſes) he conſidered himſelf bound implicitly to fulfil; for it was his buſineſs to give the *Perſian* verſion of the *HEDAYA* an *Engliſh* dreſs both in *order* and in *ſubſtance*, ſince otherwiſe it would have been impoſſible to preſerve the exact uniformity neceſſary to authenticate the *Engliſh* text in caſes of future reference or appeal.

HAVING hazarded thus much in juſtification of the general plan, it will be proper to point out ſuch particulars in the tranſlation as it is eſſential to explain, for the information of the European reader.

IT is well known that in every language there are certain peculiarities of idiom which do not admit of a very intelligible literal tranſlation into any other.—In every ſcience alſo (and more, perhaps, in *legal* diſquiſitions than in any other) there are certain peculiarities of phraſeology concordant with the ideas, moral, religious, or political, of thoſe who uſe them, and alſo certain alluſions, connected with thoſe ideas, or referring to them, which require ſome illuſtration in order to their being fully underſtood by perſons not familiarized to the ſame habits of thinking, or to ſimilar modes of expreſſion.

THE firſt of theſe which ſtrikes the reader (and which occurs very frequently) is "*a favourable conſtruction*" (of the *law*, or the *caſe*,) as oppoſed to "*analogy*." The original term *iſtihſan*, which the tranſlator has rendered "*a favourable conſtruction*," literally means *benevolence*;

; and the expreſſion referred to, as it ſtands in the original, ſignifies "*on the ground of* BENEVOLENCE,"—that is, by a mode of arguing, in its concluſion more favourable, either to the individual or the community at large, than could be adduced by reaſoning according to the ſtricter principles of analogy and legal caſuiſtry. It is obſervable, in the courſe of the work, that this ſpecies of reaſoning is frequently adopted by HANEEFA, or his diſciples, in oppoſition to the rigid tenets of the *Shafeïte* ſchool. And this difference proceeds from the more liberal complexion of that doctor's practical divinity, which diſtinguiſhes him from the heads of the other orthodox ſects, as has been already ſtated.

IN a work of this nature, an exact uniformity in the tranſlation of technical terms and phraſes is not only adviſable, but, in general, indiſpenſably requiſite. It has, however, ſometimes unavoidably happened that a term is differently rendered in different places,—not indeed with reſpect to the *ſenſe*, but with regard to the *Engliſh* term uſed to expreſs it in. Thus *Mazoon*, (for inſtance,) which is commonly rendered "*li-*" "*cenſed* ſlave," is alſo, in ſome places, tranſlated "*privileged* ſlave," a phraſe which equally well expreſſes the ſenſe of the original term.—Wherever this occurs, a reference is (for the ſake of uniformity) made, in the Index, to that term which the tranſlator intends ſhould be conſidered as the *technical* one.

WITH reſpect to any remaining peculiarities, technical or idiomatical, not noticed in this place, as they are all fully defined in one part or other of the work, an explanation of them is eaſily obtained by conſulting the INDEX.

IT were to be wiſhed that, in a performance deſigned for the uſe and information of European readers, correſpondent *Engliſh* expreſſions could have been found for all the various technical terms contained in it. It muſt doubtleſs be irkſome to meet frequently with words which a reader unlearned in the *Arabic* language finds it difficult to pronounce, and for the meaning of which he is under a neceſſity of referring to the INDEX, and

and back from that to the body of the work. This, however, is a ficulty which could not in all cafes be remedied. Where the cuftoms of different countries are at all analogous, the language of each will of courfe contain fynonymous terms for expreffing the fame ideas. Where, on the contrary, cuftoms, laws, or modes of thinking, prevail in one country totally different from any thing to be found in the other, no modes of expreffion that could be adopted in the language of either would fuffice to expreſs, with preciſion, the meaning of technical or local terms uſed in the other. This ſcience, moreover, has in every country its peculiar phraſes, which will not bear any very intelligible tranſlation, whence the neceſſity of adopting and retaining them in their original form,—an obſervation the truth of which may be perceived by caſting an eye over any one page in any one of our own law-books. The tranſlator, there-

has found himſelf under an unavoidable neceſſity of occaſionally the original terms, without attempting any tranſlation of them, taking care, at the ſame time, to refer, in the INDEX, to the definiof them, which is invariably to be found in ſome part of the work; —making it, however, a general rule to expreſs in *Engliſh* every term capable of a technical or intelligible tranſlation.—It is proper to remark that, in the orthography of theſe *Arabic* terms, there ſometimes occurs a ſlight variation, which in a work of ſuch extent it was not eaſy always to avoid. Thus, inſtead of *Tàlhá*, (a man's name,) we have, in one place, *Telliha*; and, in five or ſix inſtances, *Deeyat* is uſed for *Deyit*, (the fine of blood.) Wherever this variation occurs, it is rectified by a reference in the INDEX;—but there are not above three or four inſtances in which this is neceſſary. It is alſo to be obſerved that, in the uſe of the *Arabic* perſonal nouns, attention muſt be paid to the termination, which in *á* always denotes the feminine gender. Thus *Hirbee* means an alien, *Hirbeeá* an alien *woman*; *Zimmee* an infidel ſubject of the *Muſſulman* government, and *Zimmeeá* a *female* infidel ſubject; and ſo of the reſt, except *Muſſlimá*, (a female *Mohammedan*,) which is derived from *Moſlim*, (a *confider*, or a perſon in a ſtate of *ſalvation*,) a term generally qualified by the characteriſtic termination in *án*,—whence *Moſlimán*, or (according to the vulgar orthography) *Muſſulman*.

As a if confined within any tolerable limits, would imperfectly expreſs the meaning of the various law-terms and phraſes, or, if giving the definition of them, would contain merely a repetition of what is already ſet forth in the body of the work, the Tranſlator has in this inſtance hazarded a new mode, by introducing all thoſe terms in a ſupple-plementary Index, with a reference to their place in the text. He has alſo, for the ſatisfaction of the Orientaliſt, and in order to remedy the defects of the *European* alphabet, (which, at beſt, expreſſes *Arabic* words but very imperfectly,) inſerted, in that Index, each term or proper name in its original character.

To promote, as much as poſſible, the beneficial ends intended by this work, the Tranſlator has in various places added ſuch notes as appeared neceſſary to clear away ambiguities and obſcurities in the text; and he has alſo annexed a *marginal abſtract*, which gives the *ſubſtance* of the law, unencumbered by the long details of reaſoning which generally accompany it.—To the whole is affixed a copious INDEX, deſigned to be uſeful in three reſpects, by referring, I. to legal concluſions, II. to the general HEADS or SUBJECTS, and, III. to rules which occur (as it were) *incidentally*, involved in the reaſonings upon other matter.—As each volume has alſo prefixed to it a table of contents, the references are ſo much broken and divided, that the reader can never be at a loſs to ſatisfy himſelf upon any particular point which duty or curioſity may prompt him to inveſtigate.—It may be proper to remark that the marginal abſtract, the notes at bottom, and the Index, form no part of the original work, which has only a general table of contents.

IN one particular, and in one alone, has the tranſlator conceived himſelf at liberty to deſert his text; namely, by a *total omiſſion* of particular paſſages, for reaſons which are aſſigned in their proper place. reaſons generally are, either that the paſſage relates ſolely to certain rules of *Arabic* grammar, which therefore do not admit of an intelligible tranſlation into another language, or contains merely ingenious ſophiſms, ſo exceedingly futile as to be of no uſe.—Of this *laſt* reaſon abundance of

ples are ſtill retained!——It will, however, in moſt of theſe be

that, amidſt the frivolity of the argument, ſome uſeful illuſtration is involved: nor is the tranſlator conſcious of having omitted any thing, the retaining of which could, either directly or incidentally, have been attended with advantage.

ANOTHER and more conſiderable omiſſion it is proper he ſhould account for.

As the HEDAYA includes a complete ſyſtem of *Muſſulman* juriſprudence, it commences with the *Abadât* or *ſpiritual* law, including the five great religious duties of *purification*, *prayer*, *alms*, *faſting*, and *pilgrimage*.—Of theſe the book of ALMS (*Zakât*) only is retained by the tranſlator, as the others are neither very curious in their nature, nor could afford any manner of aſſiſtance in deciſions concerning matters of property; and would have burthened the work with an additional and totally uſeleſs volume.—This omiſſion has not occaſioned any alteration in the conſecutive arrangement of the books; but it has neceſſarily induced a difference in the diſtribution, among the four volumes, of thoſe which are retained.—In the original the ſubjects are diſtributed as follows:—

VOL. I. *Purification. Prayer. Alms. Faſting. Pilgrimage.*

VOL. II. *Marriage. Foſterage. Divorce. Manumiſſion. Vows. Puniſhments. Larciny. The Inſtitutes. Foundlings. Troves. Fugitive Slaves. Miſſing Perſons. Partnerſhip. Appropriations.*

VOL. III. *Sale.* SIRF *Sale. Bail. Transfer of Debts. Duties of the* KÂZEE. *Evidence. Retractation of Evidence. Agency. Claims. Acknowledgments. Compoſitions. Mozâribat. Depoſits. Loans. Gifts. Hire. Mokâtibs. Willa. Compulſion. Inhibition. Licenſed Slaves. Uſurpation.*

VOL. IV. *Shaffa. Partition. Compacts of Cultivation. Compacts of Gardening. Zabbah. Sacrifices. Abominations. Cultivation of Waſte Lands. Prohibited*

*Liquors. Hunting. Pawns. Offences againſt the Perſon. Fines. Levying of Fines. Wills. Hermaphrodites*

If the reader is not already tired with this introductory detail, the tranſlator would requeſt his indulgence while he adds a ſhort account, apparently neceſſary, of the books which have been omitted, as well as a few remarks on the others in their order as they occur.

Purification is conſidered as eſſential to devotion, and the *key* of prayer, which without it is of no effect.—It is of two deſcriptions, the *Ghoſsl*, or complete ablution of the whole body, and the *Wazoo*, or waſhing of the hands and feet, after a manner particularly preſcribed. The firſt chapter treats of the occaſions for purification, the accidents by which it may be broken or interrupted, and the manner in which it is to be performed. The ſecond relates to the waters fit for ablution.—The third treats of the *teyummim*, or ſubſtitution, in caſes of drought, of duſt or fine ſand for water; a regulation well calculated for the thirſty deſerts of *Arabia* * ! In directing this, Mohammed followed the example of the *Jews*, who were accuſtomed to perform their luſtration after this method, in caſes of neceſſity.—The fourth chapter relates to the anointing of *boots*, or other leathern apparel or utenſils, in which certain rules are laid down for the obſervance of cleanlineſs.—The fifth regards women, the rules to be obſerved by them in their menſtruations, and the modes of purification requiſite after thoſe, or childbed labour, to qualify them for acts of devotion.—The ſixth treats of the purifications enjoined after performing any of the natural evacuations.

Prayer is declared to be *the corner-ſtone of* Religion, *and the pillar of* Faith. It is not, by the *Muſſulman* doctors, conſidered as a thing of mere *form*, but requires that the heart and underſtanding ſhould accompany it, without which it is pronounced to be of no avail.—The *preſcribed* prayers are directed to be performed at five different times in the twenty-

* This practice is alluded to in vol. I, p. 195.

four hours. I. between day-break and ſun-riſe; II. immediately after noon; III. immediately before ſun-ſet; IV. in the evening, before dark; and, V. before the firſt watch of the night. At theſe hours, therefore, the *Mawzins* or criers warn the people, from the *minarets* of the *moſques*, to prepare for prayer, and all devout perſons forthwith either repair to the moſque, or proceed to perform their devotional exerciſes in ſome other convenient ſpot, after the previous luſtration.—The firſt chapter of this book treats of the proper hours for prayer, whether preſcribed or voluntary, prohibiting, at the ſame time, the repetition of any during the riſing or ſetting of the ſun, or at the hour of his paſſing the meridian.—The ſecond chapter concerns the duty of the public criers, and the manner in which they are to ſummon people to worſhip.—The third relates to the *conditions* of prayer,—that is, thoſe points which are regarded as eſſentially requiſite to its efficacy;—which are as follows. I. that the perſon be free from every ſpecies of defilement: II. that all ſumptuous apparel be previouſly laid aſide, at the ſame time that the body be ſo far covered as to avoid any offence to decency,—unleſs, however, the perſon be deſtitute of clothing, in which caſe this is diſpenſed with: III. that the attention accompany the act, and be not ſuffered to wander to any other object, inſomuch that if the perſon, whilſt praying, caſt his eyes on a book ſo as to recollect the contents, his prayer is of no effect: IV. that the prayer be performed with the face towards the *Kabla*, or temple of MECCA, the relative ſituation of which is for that reaſon pointed out in all their moſques by the poſition of the *Niche* for the *Kibla*, which is termed the *Mehrab*. Where, however, the relative ſituation of the *Kabla* is uncertain or unknown, the perſon who prays is only required to obſerve this ceremony *to the beſt of his knowledge or recollection*.—The fourth chapter relates to the *nature* and *deſcription* of the prayers, preſcribing the forms proper to uſe on each particular occaſion, and the parts of the KORAN which it is proper to read each day.—The paſſage worthy of notice in this chapter is, that men are allowed to repeat the prayers, or to read the allotted portions of the KORAN, in every other language as well as the *Arabic*; "for" (as *Haneefa* well argues) "the "difference of language makes no alteration in the ſenſe; and it is not poſſibl

possibl join in what the understanding does not
chen The fifth chapter contains the qualifications necessary to the office of a priest, and the particular duties attached to that
ersons held incapable of exercising this function *slav*
*probates* the *blind*, the *Bidweens*, (people of the desert,) and *bastards* These last are deemed unfit, because of the baseness of their birth giving room for discontent to some who might suppose themselves dishonoured by attending them in public.—This head likewise comprehends all the directions for public worship, in which certain precautions are laid down against the women mixing with the men, each sex having a particular station allotted, for the sake of decency, and also to avoid any excitement to passion.—The sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth, chapters contain merely matters of form, precaution, and so forth.—The thirteenth chapter prescribes the prayer proper to the sick, and the various forms of lustration, &c. which may be dispensed with on account of their indisposition.—The fourteenth chapter relates to the prostrations: the fifteenth contains the rules to be observed by those who travel: the sixteenth the prayers proper to *Friday* [the *Mussulman* sabbath:] the seventeenth and eighteenth those for particular fasts and festivals: the nineteenth those for rain.—The twentieth chapter prescribes the manner of performing prayer when surrounded by an enemy,—in which case the *Imâm* is directed to divide his troops into two bodies, one to oppose the foe whilst the other prays, and thus to relieve each other successively.—The twenty-first chapter contains the prayers for the DEAD, with the various forms of ablution, enshrouding, and interment.—The twenty-second relates to the same, with respect to those who are slain in battle.—The twenty-third regards the prayers proper for pilgrims who visit the inside of the temple of

FASTING is an essential part of piety, and termed, by the orthodox, *the gate of religion*. It is of two kinds, *voluntary* and *incumbent*; and is distinguished, by the *Mussulman* divines, into three degrees: I. the refraining from every kind of nourishment or carnal indulgence: II. the restraining of the various members from any thing which might excite

ſinful or corrupt deſires: III. the abſtracting the mind wholly from worldly cares, and fixing it excluſively upon GOD,—which, as it is the moſt difficult of obſervance, is alſo accounted the moſt meritorious.—The great preſcribed faſt is that enjoined from the firſt new moon, in the month of *Ramzán*, until the appearance of the next,—during which it is required, from day-break until after ſun-ſet of each day, to abſtain from every ſort of nouriſhment, inſomuch that the faſt is broken by ſuffering any thing whatever to enter any part of the body. From this obſervance none are excuſed except the ſick, aged, or children; and the firſt of theſe, if they recover, are required to make up for what they have loſt, by faſting an equal number of days after their health is perfectly reſtored.—Any breach of this duty muſt moreover be expiated by a donation of alms to the poor.—The *Niſl*, or *voluntary* faſts, are thoſe not enjoined by the LAW, but which a man impoſes on himſelf on ſome particular occaſions, ſuch as in expiation of a broken vow, that ſpecies of abuſe to a wife termed *Zihâr*, the breach of the faſt during the moon of *Ramzân*, or any other irregularity.—The firſt chapter of this book contains regulations with reſpect to the commencement and obſervance of the faſt of *Ramzân*.—The ſecond relates to the occaſions of *expiatory* faſts.—The third treats of the *Ittikâf*, or continual reſidence in the *moſque* during the time of a faſt.

THE PILGRIMAGE to *Mecca* is conſidered as ſuch an eſſential point of religious duty, that no perſon is accounted a good *Muſſulman* who, poſſeſſing the ability, neglects the performance of it, at leaſt once in his lifetime.—The antiquity of the *Käba*, or holy temple of *Mecca*, extends far beyond the records of hiſtory, it having been uſed by the *Arabs* as a place of idolatrous worſhip for centuries before MOHAMMED's pretended miſſion.—He, who in an eminent degree poſſeſſed the capacity of converting the ſuperſtitions of others to his own ends, finding it neceſſary to give his religion ſome *ſtationary habitation*, at firſt fixed upon the ſite of the temple of *Solomon* at *Jeruſalem*; and he, for a time, made that his *Kàbla*, or point towards which he directed his prayers. Motives of prudence

prudence or policy, however, in a few months dictated the neceſſity or convenience of preferring a place held in habitual reverence among his own countrymen; and reaſons were eaſily found or invented to juſtify the change.—The traditions of the *Arabs* repreſent the *Käba* as a place of worſhip almoſt coeval with the world. Some accounts mention that it was firſt built by *Adam*, ſoon after his expulſion from paradiſe.—Other accounts ſay, that the father of mankind, being by his fall deprived of the light of the Divine preſence, knew not which way to direct his prayers, until an exact repreſentation of the paradiſiacal tabernacle was, by the favour of the ALMIGHTY, exhibited, encompaſſed by a glory, on the ſpot where the temple now ſtands, directly under the ſtation of the original *Käba* in HEAVEN *, and which ſpot ADAM from that period made his *Käba*.—His ſon SETH, after his death, erected upon the place a building of ſtone and clay, (or, as ſome ſay, of ſun-burnt bricks,) the ſame in ſhape as the celeſtial one. This being deſtroyed by the deluge, was afterwards, at the Divine command, rebuilt by ABRAHAM and his ſon ISHMAEL, the great progenitor of the *Arabians*. The *Koreiſh* (moſt probably by dint of ſuperior power) obtained poſſeſſion of it, and kept it in repair for ſeveral generations.—At length, in the infancy of MOHAMMED, the old temple having fallen, or being pulled down, a new one was erected on the ſame foundation, and after the ſame model.—Again, in the twenty-fourth year of the *Higera*, having ſuſtained ſome damage from the zeal of the *Muſſulman* reformers, in clearing it of idols, it was once more pulled down and rebuilt by *Aboo* YOOSAF IBN AL HIJÂJ, then *Shareef* of *Mecca*, as it now ſtands.—The *Käba* is certainly a place of very great antiquity. It was, moſt probably, from its firſt foundation, the temple of an idol. Both *Arabians* and *Egyptians* regarded it with profound veneration, and every ſect filled it with the images of their fantaſtic worſhip.—Amongſt its pretenſions to antiquity, and its fictitious excellencies, we muſt not paſs over in ſilence the famous *Hijr-*

* From this fable, perhaps, originated the idea, entertained by ſome, of the ſtation of the *heavenly* JERUSALEM, which many of the primitive *Chriſtians* ſuppoſed to be placed directly in the zenith of the capital of

*aſwad, or black ſtone, a ſmall block of marble or granite, which is re-* ported to have fallen to the earth with *Adam* when he was hurled from paradiſe It is at preſent fixed in a caſe of ſilver, in the ſouth-eaſt corner of the temple, and is exceedingly reſpected, and piouſly kiſſed by all devout pilgrims. This ſacred ſtone was carried away by the *Carmatians*, A. H. 278, (who at the ſame time ſpoiled the temple of its *golden ſpout*, and other precious ornaments,) but was reſtored in twenty-two years after.—Another relic is the *Higr Ibraheemé*, or ſtone of *Abraham*, which, it is ſaid, was uſed as a ſcaffold by the patriarch when conſtructing the temple in company with his ſon *Iſhmael*.—The third object of note is the fountain or well *Zimzim*, ſituated to the eaſt of the *Käba*, and the waters of which are reported to poſſeſs the ſame virtues as are attributed to all conſecrated wells in every country. It is ſaid that the water guſhed out miraculouſly on this ſpot as *Hagar* was wandering through the deſert with her ſon, oppreſſed with thirſt.—Of the preſent ſtate of the *Käba*, ſtill bears its ancient name, *Bait Oolla*, (the HOUSE of GOD,) or *ſjidal hirâm*, (the INVIOLABLE TEMPLE,) we can only obtain a knowledge through the medium of the *Turks*, or other *Mohammedans*, as no infidel is ever admitted within the precincts of the holy territory. In its original conſtruction it is ſaid to have been a perfect cube, the ſimpleſt of all figures, and therefore the beſt calculated to typify the unity of GOD. —IBN AL HIJÂJ, in rebuilding it, cauſed a ſmall alteration from the original figure, the temple, as it now ſtands, being twenty-four cubits long, twenty-three broad, and twenty-ſeven high. Still, however, it does not in any other reſpect deviate from the ſimplicity of its primitive form, it being entirely deſtitute of pilaſters, cornice, or any ornament, except a veil or outer cover of black damaſk or velvet, a golden (or more probably *gilt*) band which encompaſſes it near the top, and a gold ſpout projecting from the roof to convey off the rain water.—The veil was formerly of *Egyptian* linen, and in the "*days of* IGNORANCE" was ſupplied by different chiefs of the *Sabeans*, or other idolatrous tribes. The piety of the *Khâlifs* ſubſtituted a more coſtly ſtuff, which, ſince the acceſſion of the *Othmânian* dynaſty, has been annually renewed by the *Turkiſh* emperors. Several inferior buildings have been erected round it, particularly four open pavilions, which

ſerve as oratories to the four orthodox ſects of HANEEFA, MALIK, SHAFEI, and HANBAL.—The whole ſtands in the midſt of a ſpacious area, encloſed by a magnificent portico, having twelve gates and a range of twelve ſteps all round, from the level of the portico into the area.—The epithet *haram* [inviolable] is not confined to this ſacred ſpot, but extends for many miles round MECCA, ſmall towers being placed at proper diſtances in every direction, to mark the precincts of the holy territory, within which it is not lawful to hunt, ſhoot, attack an enemy, or, in ſhort, to commit any act of violence, except in ſelf-defence, or for the deſtruction of noxious creatures, ſuch as ſerpents, or animals of prey. In the neighbourhood of the city are two hills, *Saffa* and *Marwa*, the valley of *Minna*, and a ſort of chapel named *Moozdalifa*, on the way thence to *Mount Arafat*, which lies at a ſomewhat greater diſtance.—The *Arabian* writers ſay that the city of MECCA, in the centre of which the *Käba* ſtands, is nearly as ancient; and indeed if we conſider how long this has been a ſpot for the reſort of ſuperſtition or devotion, it is probably one of the oldeſt cities in the world.—Such is the ſpot to which, in the month *Zee-al-Hidjee* * of every year, multitudes of *Muſſulmans* repair, to proſtrate themſelves before the "HOUSE OF GOD," and to perform the various ceremonies preſcribed by their LAW, or ſanctioned by antiquity, in moſt of which they vary little or nothing from their *Pagan* anceſtors. We ſhall not dwell upon the particulars of theſe ceremonies. Suffice it to ſay, that they are in general highly abſurd, and not defenſible, even by the *Muſſulman* doctors themſelves, except on the ground of ordinance or cuſtom. One particular it is nevertheleſs proper to remark upon, as it is frequently adverted to in the courſe of this work; namely, the ſtate of a *Mohrim*. The caravans of *pilgrims* have each a particular place aſſigned, according to the parts whence they proceeded, which marks to them the boundary of the *holy territory*. Here they generally arrive towards the end of *Zee-al-Kâda*, and on the firſt morning

* *Hidj* ſignifies pilgrimage;—and the month takes this name, as being peculiarly appropriated to the performance of that ſolemnity.

of the ſucceeding month (*Zee-al-Hidjee*) the preſcribed ceremonies commence. The pilgrims now lay aſide all other dreſs or ornaments, and aſſume the humble habit of *Ihrâm*, which conſiſts only of two colourleſs woollen cloths, and a kind of ſandals, defending the ſoles of the feet, but leaving all the reſt bare. It is from this time, and during the remainder of their ſtay in the holy territory, that the devotees bear the title of *Mohrim*. Whilſt engaged in this pious work, a *Mohrim* is required to keep the ſtricteſt guard upon all his actions, and to refrain from contention, anger, and every indulgence of his carnal appetites. He is alſo inhibited from hunting or fowling even *beyond* the preſcribed limits, not being allowed to deſtroy any thing for ſubſiſtence except *fiſh*. He is moreover under a variety of other inhibitions, which may be traced in the courſe of this work. For many centuries the greateſt potentates were proud to ſubmit themſelves to theſe reſtrictions, and to ſink, for a time, to a level with their fellow creatures.—It may not, however, be improper to obſerve, that for ſome time paſt, and particularly within the preſent century, the *Käba* has ſuſtained a falling off both in the rank and number of its votaries. Whether this defection ariſes from the advancement of knowledge, or (as is moſt probable) from the rapid decay which the great *Muſſulman* empires have experienced within that period, it certainly denotes a revolution in the minds or habits of the *Mohammedans*, which is perhaps only a prelude to the extinction of *Iſlamiſm*.—The firſt chapter of the book of PILGRIMAGE treats of thoſe upon whom it is indiſpenſably incumbent that they once in their lives viſit the *Käba*; namely, upon every *Muſſulman* who is ſane, adult, free, in perfect health, and poſſeſſed of the means for performing a journey, ſuch as a camel, a horſe, a ſervant, and a maintenance ſufficient for thoſe and himſelf during the pilgrimage, and for the ſupport of his family until his return. No perſon is, however, required to croſs the *ſea* for this purpoſe.—This duty is as much enjoined upon *women* as upon *men*; but they are directed to perform it under the protection of ſome male relation within the prohibited degrees.—The ſecond chapter relates to the various ceremonies of the *Ihrâm*, and the reſtrictions to which a *Mohrim* is ſubjected, as already mentioned.—The third chapter relates to the different names and deſcriptions

tions of pilgrimage, according as the ceremonies of it are performed alone, or in company with others; and alſo, the viſitations performed within any other than the ſacred months.—The fourth chapter treats of the reſtrictions to which a pilgrim is ſubject during his reſidence within the "HOLY TERRITORY," and the offences which, from diſregard of theſe, he is liable to commit; with the atonement required for each offence. In this chapter are alſo ſet forth the reſtrictions impoſed upon pilgrims, and the indulgences allowed to them with reſpect to their wives or ſlaves, as well as the penalties impoſed in caſe of infringement. A number of mere petty offences are likewiſe mentioned, for which atonements of a trifling nature are required, ſuch as beſtowing a day's ſubſiſtence upon one *pauper*, or (in caſes of omiſſion) repeating any particular part of the ceremonies. The remainder of this chapter relates to the inhibitions with reſpect to killing game, or feeding cattle within the holy territory, in either of which caſes ſatisfaction muſt be made to the Chief of MECCA. —The fifth and ſixth chapters relate to points of mere form.—The ſeventh concerns thoſe who may be impeded in their pilgrimage by either ſickneſs or an enemy;—in which caſe, it is requiſite that the perſon ſo prevented ſend a goat or other victim (by the hands of ſome truſty deputy) to be ſacrificed at the temple; or elſe, that he ſend the value in money, with which the deputy may purchaſe an animal at *Mecca* for that purpoſe;—and until this ceremony be performed he is not releaſed from the reſtrictions of a pilgrim.—The ſixth chapter treats of the time at which the ſeaſon of pilgrimage expires,—namely, on the *Yd Kirbàn*, or feſtival of ſacrifice, when, if the pilgrim have not gone through the whole of the ceremonies, all that he has done is of no account, and the pilgrimage muſt be performed again on ſome enſuing year.—The ſeventh chapter relates to the performance of pilgrimage on behalf of another perſon, which is lawful and valid for three different deſcriptions of people, namely, the dead, (who have bequeathed a ſum for this purpoſe,) perſons prevented by diſtance, ſickneſs, or an enemy, or perſons who, having already performed the *ordained* pilgrimage, procure another to perform it again on their account, either from motives of piety, to expiate an offence, or to fulfil a vow. This kind of *ſubſtitutive* pilgrimage became indiſpenſ-

THIS ſhort ſketch will ſuffice at once to ſhew the uſeleſs nature of theſe four books, and, we truſt, to juſtify the omiſſion of them in the *Engliſh* tranſlation.—We ſhall now proceed to make a few brief remarks upon the other books, in the order in which they ſtand, and which, for the convenience of the reader, are numbered according to their ſucceſſion.

## VOL. I.

### BOOK I. *Of ZAKAT.*

*ZAKAT* means the alms impoſed by the LAW, in oppoſition to *Sàdká*, [charity,] which ſignifies the voluntary contributions of individuals, and which is treated of at large under the head of *gifts*.—As ALMS, in our application of that word, is always uſed to denote ſomething purely *gratuitous*, the tranſlator, in treating of thoſe impoſed by the *Muſſulman* law, has retained the original term, to which the *Engliſh* language does not afford any expreſſion ſtrictly analogous. Some writers have confounded *Zakât* and *Sàdká* under one common meaning. The *Arabian* commentators, however, make an eſſential difference between them; for the former is merely an indiſpenſable compliance with a legal obligation, claiming no merit in *futurity*; whereas the latter is as much an impulſe of the mind as an act of the hand, and is of courſe entitled to its

its reward.—The impoſt of *Zakât* originated with MOHAMMED himſelf, who at firſt employed the revenue ariſing from it according to his diſcretion, in the ſupport of his needy adherents; but the objects of it were afterwards aſcertained by various paſſages in the KORAN; and it is ſomewhat remarkable that the Prophet particularly excluded the members of his own family from any participation in it, and this in terms which ſufficiently denotes the arrogant ſuperiority aſſumed by the tribe of HASHIM *. To compenſate, however, for this excluſion, he admitted them to a fifth ſhare in that proportion of the ſpoil which was allotted to the public treaſury. For ſome generations after MOHAMMED this impoſt was regularly collected, and faithfully applied to its appointed purpoſes.—*In moſt Muſſulman territories it continues to be levied at the preſent day;* but the original objects of its diſburſement have been long ſince diſregarded, and what was intended as a relief to the poor is now, even in the beſt regulated governments, carried to the exchequer of the prince, who endeavours to ſatisfy his conſcience by a ſort of commutation, in the erection of *moſques*, or the ſupport of a few indigent and idle *Fakeers* about his palace. That which commenced in the indigence or rapacity of the ſovereign, has now acquired a ſort of preſcriptive authority; and the revenue derived from *Zakât* is univerſally conſidered as the right of the ſtate. It has indeed, for ſeveral centuries paſt, ceaſed to be collected upon *ſtationary* property, the only tax which at preſent bears the name of *Zakât* being that impoſed on goods imported in the way of trade, from one country or diſtrict into another, and levied in the name of a *toll*.—Many of its rules will be found to apply peculiarly to ARABIA and SYRIA, the countries in which theſe laws originated, and where *flocks* and *herds* have ever formed a chief part of the wealth of the inhabitants. Although the laws of *Zakât* have in a great meaſure been ſuperſeded, or become obſolete with reſpect to their *original deſign*, yet they are worthy of attention, as incidentally involving many of the laws of property in points not immediately connected with this ſubject.—Under this head is

* See his declaration upon this ſubject, (vol. I. p. 58,)—where the *groſſneſs* of the metaphors uſed by him is worthy of remark.

comprehended

comprehended the *Sàdká Fittir*, or alms given to the poor on the feſtival of breaking Lent; becauſe the payment of thoſe is conſidered as a divine ordinance, and the amount (contrary to other deſcriptions of *Sàdká*) is particularly preſcribed by the LAW.

ZAKAT is the only one of the five books upon the *Abadât*, or *ſpiritual* law, retained by the *Engliſh* tranſlator. It is therefore immediately followed by the *Maàmilat*, or *temporal* law,—commencing with MARRIAGE, and ending (properly) with BEQUEST, the laſt temporal act of MAN;—though a ſhort ſupplementary book upon *Hermaphrodites* is added.

## BOOK II. *Of* MARRIAGE.

THE preliminaries to this moſt important of all contracts, as ſet forth in Chap. I. are ſtated in terms remarkably ſimple. No proviſion is made for the execution of any written engagement; no particular form or ceremony is preſcribed; but the efficiency of the whole is made to depend merely upon the oral declarations of the parties, before ſufficient witneſſes. In fact, *written* engagements were not in common uſe until ſome time after the eſtabliſhment of *Iſlamiſm*.—A ſection of this chapter is occupied throughout with the matrimonial prohibitions and reſtrictions, with reſpect to which the *Mohammedan* and *Levitical* law have a cloſe affinity. The principal of theſe reſtrictions are, that a man ſhall not marry his relation within the prohibited degrees; that he ſhall not have more than *four* wives at a time; and that he ſhall not marry, together, two women related to each other within the prohibited degrees.—To the political and ſpeculative enquirer the moſt curious features in this book are, the paſſages which particularly concern WOMEN, as contained in Chap. II. and III. from which it appears, that the female ſex are, among the *Muſſulmans*, inveſted with many perſonal rights and independent privileges, ſuch as certainly, in ſome meaſure, compenſate for the various hard conditions to which law or cuſtom has ſubjected the daughters of *Iſlâm*.—Theſe, as they are fully diſcuſſed in the body of the work, it is needleſs

needleſs to recapitulate. The moſt ſtriking of them which occurs under this article is, the liberty allowed to a woman to diſpoſe of herſelf in marriage independent of her guardians, and the right of option which ſtill remains to one contracted during infancy, after ſhe ſhall have attained to maturity, which the law fixes at a very early age *. A woman is alſo entitled to poſſeſs her *dower*, or marriage ſettlement, as her own excluſive property, which ſhe may diſpoſe of by gift, will, or other deed, altogether independent of her huſband, or of any claims which may lie againſt his eſtate.—Chapter VI. exhibits a ſtill more extraordinary regard, in the *Muſſulman* legiſlator, for the feelings of the ſex, upon a point of a very delicate nature, and in which he doubtleſs conſulted the peace of the *Haram* as much as the dictates of abſtract equity.—Concerning this, however, we ſhall leave the text to ſpeak for itſelf.

## Book III. *Of* Fosterage.

In a ſtate of ſociety where faſtidious refinement has not deſtroyed the genuine feelings of the heart, the tie of foſterage is, next to that of blood, of the ſtrongeſt and moſt laſting nature.—Even in the more remote parts of our own country the Nurse is ſtill conſidered rather in the light of an humble relative than a menial dependent. By the people of Asia this idea is carried ſtill farther; and the nurſling is ſuppoſed to partake of the very nature of her from whoſe blood he receives his earlieſt nouriſhment. An affinity is therefore created by this circumſtance, which operates to render marriage illegal in the ſame manner as actual conſanguinity. Hence the prohibitions occaſioned by foſterage are analogous to thoſe ſet forth in the ſecond ſection of the preceding book,—to which this is a kind of ſupplement.

* See Vol. III. p. 482.

## Book IV. *Of* Divorce.

The great variety of matter which this book embraces, and the many deviations which it admits from its main ſubject, the Tranſlator ſhall not undertake either to account for or to defend.—From the contents of the firſt ſix chapters the reader will perceive that the *Mohammedan* law of divorce bears a ſtrong affinity throughout to that of Moses. In this, as in marriage, no written inſtrument is required, the repudiation being effected merely by the verbal declaration of the party.—Cuſtom, indeed, and the municipal regulations of moſt *Muſſulman* countries, following the example of the *Jews*, have made a *writing of divorce*, if not an eſſential, at leaſt a circumſtance which it would be highly indecorous to omit. What moſt forcibly ſtrikes us on the peruſal of this ſubject is the extreme facility with which a huſband may rid himſelf of his female partner,—a facility which, when we conſider the too frequent levity and ficklenеſs of Man, ſeems at firſt ſight calculated to expoſe the weaker ſex to the moſt degrading inſult which malice could dictate, or caprice put in practice.—The *Arabian* legiſlator has, however, eſtabliſhed ſo many bars, and pride itſelf oppoſes ſuch obſtacles as, if they do not completely remedy, at leaſt tend greatly to counteract this apparent defect. —Before a divorce becomes *irreverſible* it muſt have been pronounced three times, allowing (according to the *orthodox* form) an interval of a month to paſs between each ſentence,—or ſuch a period muſt have elapſed as affords ample room for reflection and repentance, in caſes of anger or diſguſt; and a reverſal is, at any time before the expiration of that term, eſtabliſhed by either word or deed, denoting a reconciliation. The huſband, moreover, unleſs he can prove groſs miſbehaviour, muſt give up the dower.—But the moſt powerful obſtacle to unjuſt or capricious repudiation is that part of the law which provides, that if a wife be once completely divorced, the huſband cannot take her again, until ſhe be previouſly married to, bedded with, and divorced by, another man.—To this ſalutary regulation chiefly is owing the diſlike which obtains againſt divorce in all *Muſſulman* countries, and the diſhonour attached to it,—

inſomuch that the inſtances of it are very rare, notwithſtanding the liberty which is permitted by the LAW. The place and title of Chap. XV. would naturally lead us to conclude, that it treats in particular of the alimony payable to a divorced wife during the term of probation. This, however, is by no means the caſe; for it is made to comprehend thoſe rights of every perſon which come under the denomination of MAINTENANCE,—not of the *wife* alone, but alſo of parents, children, poor or diſabled relatives, and ſlaves.—With reſpect to domeſtic arrangements, this is, perhaps, the moſt uſeful ſection in the whole work. It evinces, in many places, a conſiderable ſpirit of humanity, and very properly introduces—

## BOOK V. *Of* MANUMISSION.

TENDERNESS towards SLAVES is certainly a prevalent principle in the *Muſſulman* law, notwithſtanding ſome paſſages which occur in his treatiſe concerning them are directly repugnant to common feeling, and to the natural rights of MAN.—In the XXIVth chapter of the KORAN this tenderneſs is ſtrongly enforced with reſpect to certain points in the domeſtic treatment of them *; and it may alſo be traced in various parts of this Commentary.—It is, indeed, in *practice* pretty much confined to the ſlaves profeſſing the *Muſſulman* faith, as it is natural to ſuppoſe that the followers of the Prophet do not entertain the ſame regard towards their bond-ſervants of other religions. Still, however, we ſhall be guilty of great injuſtice, if we form our ideas of *Muſſulman* ſlavery from the treatment experienced by Chriſtian captives among the barbarians of *Tunis* and *Algiers*. The precepts concerning

* The paſſage referred to treats of *matching* ſlaves who are ſingle:—"CONTRACT (in "marriage) THOSE OF THEM WHO ARE SINGLE, SUCH AS ARE WORTHY, OF YOUR MALE "AND FEMALE (ſlaves;) IF THEY BE POOR, GOD WILL ENRICH THEM OF HIS BOUNTY."——"UNTO SUCH AS DESIRE A WRITTEN COVENANT, (of *Kitabat*,) GRANT IT, IF YE "SEE GOOD IN THEM; AND GIVE THEM OF THE RICHES OF GOD, WHICH HE HATH "GIVEN YOU," &c.

manumiſſion are injunctive with reſpect to *believers* only; but thoſe which recommend kindneſs and good uſage apply to all alike. The law in many inſtances affords them protection againſt injuſtice, and declares them to be "*claimants of right.*" It in ſome particulars, moreover, provides an alleviation to this otherwiſe moſt hopeleſs and degraded ſtate of MAN, unknown to the more poliſhed inhabitants of Europe;—as may be perceived in peruſing the laws with reſpect to *Am Walids*, *Mokátibs*, *Modabbirs*, and *Mazoons*.—To the free-born denizen of BRITAIN, the very name of SLAVE carries with it ſomething odious and diſguſtful: but the *Mohammedan* bond-man, generally ſpeaking, experiences in a very ſlight degree, if at all, the miſeries which neceſſarily attend that ſtate in ſome of the dependencies of EUROPE; where the riches of the community grow out of the inceſſant labour of wretches, whoſe ſhortened date of life is balanced againſt their earnings, by rules of *Algebra* and calculations of *Arithmetic!* If the ſlaves of *Muſſulmans* appear, by their conduct, to be deſerving of encouragement, they are frequently treated rather as humble friends and confidents than as ſervile dependents; and though inhibited from riſing in the ſtate, often, in the capacity of *Mazoons*, amaſs a degree of wealth which enables them to purchaſe their freedom.—The ſubject of *Manumiſſion* is diſcuſſed at large in the firſt five chapters of this book.—Chap. VI. treats of a practice which was common in ARABIA before the time of MOHAMMED, and was confirmed by his precepts. It affords a ſtrong incentive to emancipation, by enabling a maſter to perform an act of piety which, being poſthumous in its effect, cannot injure his circumſtances.—Chap. VII. exhibits a branch of that moſt important article, "*the eſtabliſhment of parentage.*" It ſhews, that the children born to a man by his female ſlaves are as legitimate as thoſe begotten in marriage; and alſo, that the *Muſſulman* law, like the *Roman*, does not acknowledge any affinity between a *baſtard* and his father, but throws him wholly upon the mother.

## Book VI. *Of* Vows.

Oaths are one of the bonds of ſociety, and in many inſtances the chief ſecurity for public integrity and private property. Perjury, therefore, has in all communities been juſtly reprobated as a moſt flagrant crime. It is remarkable, however, that the *Muſſulman* law has inſtituted no ſpecific puniſhment for this ſpecies of offence, except in the caſe of *ſlander*, the legiſlator ſeeming to think the apprehenſion of puniſhment in a *future ſtate* of itſelf ſufficient to reſtrain men from the commiſſion of it. This is evidently the caſe with reſpect to the expurgatory oaths required of accuſed or ſuſpected perſons. In matters of property, indeed, the magiſtrate is at liberty to puniſh it by a ſlight diſcretionary correction; but in thoſe moſt enormous inſtances of it which implicate the life of Man, the only ill conſequence it induces, on diſcovery, is a *fine* adequate to the blood thus unjuſtly ſhed:—a very trifling atonement certainly! In this defect, however, (if it be ſuch,) of their law, the *Muſſulmans* do not ſtand alone.

## VOL. II.

## Book VII. *Of* Punishments.

This book treats only of the puniſhments incurred by crimes of a *ſpiritual* nature, thoſe inſtituted for offences againſt *perſon* or *property* being diſcuſſed under their reſpective heads. The puniſhment for adultery is certainly ſevere. Yet we will not, perhaps, be forward to condemn this ſeverity, if we compare it for a moment with what is recorded in the twentieth chapter of *Leviticus* upon the ſame point.—In fact, from the nature of the evidence required, it was next to impoſſible that the offence ſhould ever be fully proved, even among the tents of the Arabs; ſo that the inſtitution of the preſcribed puniſhment was in a great meaſure nugatory, except in caſes of confeſſion by the parties.

That thoſe confeſſions were ſometimes made in the early days of *Iſlamiſm*, is a fact; and made, as they were, at the certain expence of life, they afford a wonderful inſtance of devoted zeal among the firſt followers of MOHAMMED. Still, however, even in thoſe inſtances, every means that precaution could ſuggeſt is enjoined to avoid the neceſſity of inflicting the ſentence.—The three firſt chapters of this book relate entirely to *whoredom*, and the penalties incurred by each ſpecies of illegal connexion.—Chap. III. involves ſome curious matter concerning the retroſpective limitations of teſtimony, which in practice extend to all caſes of criminal accuſation. Much here occurs, likewiſe, concerning the general laws of evidence, that may not be deemed unworthy of notice. Chap. IV. containing the penalties of drunkenneſs, exhibits a degree of lenient indulgence with reſpect to that vice which we ſhould ſcarcely expect to meet in a *Muſſulman* law-book, as it hence appears that a man may offend in this way, even to a conſiderable degree, without any danger of legal cognizance.—*Slander*, as treated of in Chap. V. comprehends all expreſſions which may either affect the reputation of a man or woman previouſly poſſeſſed of a fair character, or the legitimacy of their iſſue; and the puniſhment has, added to it, an effect equally juſt and politic, namely, incapacitating the ſlanderer from appearing as an evidence on any future occaſion.—*Diſcretionary correction*, which forms the ſubject of Chap. VI. extends to all *petty* deſcriptions of perſonal inſult, even to *abuſive language*. In fact, two thirds of the puniſhments incurred under the *Muſſulman* juriſdiction at the preſent day, whether in *Turkey*, *Perſia*, or *India*, are inflicted under the name of *Tazeer*.—We muſt not paſs this book without noticing the extraordinary indulgence ſhewn to ſlaves, in ſubjecting them, for all ſpiritual offences, to only *half* the puniſhment of freemen. The reaſons alledged for this lenity manifeſt an uncommon degree of conſideration and feeling for the ſtate of bondage.

## Book VIII. *Of* Larciny.

The Tranſlator has adopted the term *Larciny*, as the title of this book, becauſe that word expreſſes every ſpecies of Theft, from the moſt petty to the moſt atrocious. The uniform puniſhment annexed to *Larciny* is the amputation of a limb, unleſs where the act has been accompanied by murder, in which caſe the offender forfeits his life by the law of Retaliation.—Many arguments might be adduced againſt the law of mutilation in caſes of *Larciny*, founded as well on the *inhumanity* as the *inefficiency* and *inconvenience* of that mode of correction. It is, however, the only method expreſsly authoriſed by the text of the Koran;—and if we conſider the force of religious prejudice, and the effect of long habit, it may perhaps appear very unadviſable to introduce any haſty alteration in the penal juriſdiction in this particular,—eſpecially as we have nothing better to offer by way of ſubſtitute, (for ſurely our penal laws are ſtill more ſanguinary!) and alſo, as the *Gentoo* laws, with reſpect to theft, are ſtrictly analogous to the *Muſſulman*, in awarding mutilation under certain circumſtances.—Chap. VII. of this book is particularly worthy of attention, as it reſpects the moſt daring and outrageous breach which can be made againſt the peace and ſecurity of ſociety. To enter fully into the ſpirit of the text, in this and many other parts under the head of *Larciny*, it is requiſite that we keep in mind the peculiar manners of the people in thoſe parts of the world where the *Muſſulman* law operates. It is obſervable that, at the end of this book, a remarkable inſtance is *incidentally* introduced of the forbearance of the law in a caſe of homicide upon *provocation*.

## Book IX. *The* Institutes.

This book contains a chief part of what may be properly termed the *political* ordinances of Mohammed, and is uſeful both in a hiſtorical and a legal view,—in the *former*, as it ſerves to explain the principles upon which

which the *Arabians* proceeded in their firſt conqueſts, (and in which they have been imitated by all ſucceſſive generations of *Muſſulmans,*) and in the *latter*, as many of the rules here laid down, with reſpect to ſubjugated countries, continue to prevail in all of that deſcription at the preſent day. The nature and end of thoſe regulations is ſo fully explained in the text, that they do not require any illuſtration or comment in this place. We ſhall therefore paſs on to

## Book X. *Of* Foundlings.

One of the earlieſt and moſt laudable attempts of Mohammed, in the proſecution of his ~~pretend~~ed miſſion, was, to correct certain barbarous practices then prevalent among his countrymen, particularly with reſpect to infant children, whom it was common for the parents to expoſe or put to death, where they apprehended any inconvenience from the maintenance of them. The preſent book is to be conſidered merely as a comment upon his precepts in this particular.

## Book XI. *Of* Troves.

## Book XII. Absconding *of* Slaves.

## Book XIII. *Of* Missing Persons.

The rules laid down in theſe books will be found, in general, ſtrictly conſonant to natural juſtice, and ſuch as prevail (or *ought* to prevail) in all well-regulated communities.

## Book XIV. *Of* Partnership.

This book contains a number of ſubtle diſtinctions with reſpect to property, in many of which acute diſcrimination ſeems to be ſtudied more than practical

practical utility. Several of them the reader may indeed be tempted to conſider rather as the ſcholaſtic reveries of an abſtracted divine, than as flowing from an active intercourſe with the world, or dictated by the liberal ſpirit of commerce.—Still, however, it will perhaps be found, that in the maſs of ſpeculation much matter is interwoven of a more ſubſtantial kind. The MUSSULMAN *laws of property* (to aſcertain which is one great end of the preſent work) are in ſome inſtances defined with conſiderable preciſion; and the various ſubdiviſions it exhibits to us of *repreſentative* wealth, as oppoſed to *real*, gives us an intereſting idea of the refinement which, ſo many centuries ago, ſubſiſted in *Mohammedan* countries with reſpect to thoſe particulars.

## BOOK XV. *Of (pious or charitable)* APPROPRIATIONS.

IN all *Mohammedan* countries (and in none more than in HINDOSTAN) it has been a common practice to dedicate *lands*, *houſes*, and other fixed as well as moveable property to the uſe of the poor, or the ſupport of religion. The founding of a moſque, the conſtruction of a reſervoir, and even the digging of a well, for the public uſe, come all under the ſame head; and many noble monuments of theſe kinds are ſtill to be ſeen in different parts of INDIA, the uſeful effects of benevolence or ſuperſtition, in the more flouriſhing periods of the *Mogul* empire. That empire has, indeed, long ſince been haſtening to decay; and the monuments of *Muſſulman* piety or magnificence have ſuffered, with it, a ſympathetic dilapidation. Numberleſs grants of LAND, however, to pious or charitable uſes, have been executed at different times, of which many are ſtill in full force, under the general title of *Aimá*;—and theſe muſt give ſome intereſt to the ſubject of the preſent book, in which the various modes of alienation are diſcuſſed with conſiderable accuracy.

BOOK

## Book XVI. *Of* Sale.

## Book XVII. *Of* Sirf Sale.

To enter fully into the ſubjects of theſe books, would occupy more time and ſpace than is conſiſtent with the brevity of prefatory remark. The obſervations we have made concerning Book XIV. will equally apply to theſe throughout. The book of Sale is ſwelled by a vaſt acceſſion of incidental matter. Of theſe the moſt ſtriking is Usury, the ſubject of Chap. VIII. The *Mohammedans*, in this particular, cloſely copy the *Jewiſh* law, by which the *children of* Israel were alſo ſtrictly forbidden to exerciſe *uſury* among *each other*.—To this chapter the book of SIRF Sale may in ſome meaſure be conſidered as a *ſupplement*, ſince it ſeems chiefly calculated to guard and provide againſt the practice of Usury in the exchange of the *precious metals*.

## Book XVIII. *Of* Bail.

Under this head are comprehended all ſorts of ſecurity, whether for *perſon* or *property*.—This book contains a good deal of *practical* matter, (particularly in the laws concerning *guarantees*,) and is therefore worthy of an attentive peruſal.

## Book XIX. Transfer *of* Debts,

Is in ſome meaſure ſupplementary to the former, as the tranſaction of which it treats is performed by way of giving ſecurity to a creditor.

## Book XX. Duties *of the* Kâzee.

The ſubject of this book is of the utmoſt importance in all countries, as upon the conduct of the *magiſtrates* the welfare and happineſs of every ſociety muſt chiefly depend: and indeed the *Mohammedans* eſteem it of ſo much importance, that ſeveral large works have been written, by their principal law commentators, under this title.—In Chap. I. and II. the proper conduct of a judge, and the behaviour required in him, are briefly defined.—In theſe, however, as well as in the ſucceeding chapters, the text wanders ſtrangely from its profeſſed ſubject, and goes into a variety of matter which would appear to fall more properly under other heads.

## Book XXI. *Of* Evidence.

## Book XXII. *Of* Retractation *of* Evidence.

These are two as uſeful books as any in the whole work,—and develope ſome of the moſt important principles in judicial proceedings.—The laſt ſection of Book XXI. ſhews, that the puniſhments incurred by perjury are (as has been already noticed) of a very ſlight nature, and calculated to operate more upon men's *feelings* than their *fears*. The reaſons for this lenity are of the ſame deſcription with thoſe urged by our lawyers. Perhaps, indeed, the infamy and perpetual diſqualifications to which the witneſs is ſubjected by it may operate as effectually as thoſe penalties which the Law preſcribes;—but it is certain that *falſe teſtimony* is regarded with leſs abhorrence by *Mohammedans* in general than among *Chriſtians*.

## VOL. III.

### Book XXIII. *Of* Agency.

### Book XXIV. *Of* Claims.

In the former of theſe books nothing very remarkable occurs, the laws with reſpect to agents being in general analogous to thoſe which obtain in our own courts.—Book XXIV. chiefly relates to the conduct of ſuits at law, and the rules to be obſerved, in adminiſtering oaths, &c. It alſo comprehends much extraneous matter with reſpect to the various ſubjects of ſuits.—Chap. V. treats of a point already mentioned, namely, *the eſtabliſhment of parentage.* In all ſocieties where polygamy and concubinage are allowed, this ſubject muſt neceſſarily afford frequent ground for litigation.

### Book XXV. *Of* Ackowledgments.

It is only neceſſary to remark of this book, that *Acknowledgment*, in the *Muſſulman* Law, has the ſame effect, in the eſtabliſhment or tranſfer of property, as a *formal deed.*

### Book XXVI. *Of* Compositions.

### Book XXVII. *Of* Mozâribat.

Those books contain a quantity of technical matter. *Mozâribat* ſeems to have been a device adopted in order to avoid the imputation of uſury, by

by which the monied man was enabled to obtain a profit from his capital without the odium of receiving any *intereſt* upon it.—This ſpecies of contract is in common uſe in *Hindoſtan*.

## Book XXVIII. *Of* Deposits.

## Book XXIX. *Of* Loans.

## Book XXX. *Of* Gifts.

These books chiefly conſiſt of plain rules, applied to ordinary caſes.—It is to be remarked, however, that the *Muſſulman* law, with reſpect to gifts, differs conſiderably from the *Roman*, in leaving to the donor an unreſtricted right of reſumption.

## Book XXXI. *Of* Hire,

Is a book of conſiderable practical utility, as it comprehends every deſcription of valuable uſufruct, from the hire of land to that of a workman or an animal.

## Book XXXII. *Of MOKATIBS.*

## Book XXXIII. *Of WILLA.*

It is probable that many of the laws in thoſe books have now fallen into diſuſe, or are confined to *Arabia*, *Perſia*, and *Turkey*. The privileges and immunities of *WILLA*, however, ſtill obtain in all *Muſſulman* countries, and are of conſiderable conſequence, as involving many rights liable to become ſubjects of litigation. The privilege allowed to a ſlave, of covenanting for and purchaſing his freedom, place the *Muſſulman* laws of bondage in a ſtriking, but not a diſagreeable light.

# PRELIMINARY

## Book XXXIV. *Of* Compulsion.

It is in general agreed, by moſt juridical writers, that a defect of the will, ariſing from compulſion, is an excuſe for any crime committed, and an annulment of any deed executed under it. In the *Muſſulman* code this rule, however, does not invariably hold, as from what occurs under this head it appears, that *compelled* contracts or other acts are nevertheleſs valid in their effect; and that offences committed under the influence of fear have ſtill a degree of criminality attached to them.

## Book XXXV. *Of* Inhibition.

The ſubject of this book comprehends every ſpecies of incapacity, whether *natural* or *accidental*. The ſecond chapter exhibits one of the moſt ſtriking features in the inſtitutes of *Mohammedaniſm*.—How far legal reſtrictions upon adult *prodigals* are calculated for the advantage of the community at large, is not our buſineſs to inquire. It is, however, certain, that the impoſition of wholeſome limitations upon thoughtleſs extravagance, and every other ſpecies of folly, if more generally introduced, would operate powerfully to preſerve the property and peace of families, and (perhaps) the virtue of individuals.—The inhibitions upon *debtors*, as contained in Chap. III. are well worthy of attention.

## Book XXXVI. *Of* Licensed Slaves.

That regulation of the *Muſſulman* law by which a maſter is empowered to endow his ſlave with almoſt all the privileges and reſponſibilities of a freeman, preſerving, at the ſame time, his *property* in him inviolate, affords a ſtrong proof of its tenderneſs with reſpect to bondage. It in fact places the ſlave who obtains this advantage rather in the light of an *attached dependant* than of a mere ſervile inſtrument, deprived of privilege, and deſtitute of volition.

Book

## Book XXXVII. *Of* Usurpation.

## Book XXXVIII. *Of* Shaffa.

The points of diſcuſſion which occupy theſe books are of ſome importance in every view. The regulations in the former are, for the moſt part, ſanctified by natural juſtice, and thoſe in the latter, by many conſiderations of conveniency and expedience. Several particulars which occur in treating of *Uſurpation* muſt indeed be referred to certain cuſtoms prevalent in *Arabia*. The right of pre-emption enjoyed in virtue of community or contiguity of property, is perhaps peculiar to the *Muſſulman* law. However accommodating to the intereſts and partialities of individuals, this privilege may nevertheleſs be conſidered as liable to ſome objection, on the ſcore of affording room for endleſs litigation. Under certain reſtrictions, it is both a *juſt* and a *humane* inſtitution.

# VOL. IV.

## Book XXXIX. *Of* Partition.

This book relates chiefly to the diviſion of inheritable property. By the *Muſſulman* law, as by the *Roman*, parceners in an eſtate may be conſtrained to make a partition of their joint inheritance, for which purpoſe proper officers are appointed by public authority.—The ſame rule alſo extends to other deſcriptions of partnerſhip property. The principal tendency of the diſquiſitions under this head is, to ſhew what are proper objects of partition, and in what inſtances the magiſtrate is at liberty to compel the parties to accede to the ſeparation of their joint poſſeſſions.—The laws of *uſufructuary* partition, as contained in Chap. V. poſſeſs much curious originality.

## Book XL. Compacts *of* Cultivation.

## Book XLI. Compacts *of* Gardening.

These books are of uſe chiefly on account of the regulations with ſpect to landed property which incidentally occur in them. They exhibit the farming of lands in a very imperfect ſtate, and at a time when money had as yet come little into current uſe. They, however, explain a number of principles upon this ſubject equally applicable to all ages.

## Book XLII. *Of* Zabbah.

In the *Mohammedan* as in the *Jewiſh* Law, the eating of blood is ſtrictly forbidden, and hence the various rules and precautions ſet forth under this head. It appears, from ſome paſſages, that the *Arabian* Prophet was deſirous of inculcating not only a ſcrupulous regard to the purity of food, but alſo a humane and tender attention to the feelings of the animal deſtroyed for the purpoſe of ſupplying it.—This laſt is indeed a ſentiment diſcoverable in many parts of his precepts.

## Book XLIII. *Of* Sacrifice.

Sacrifice, whether as a memorial or an expiation, is one of the moſt ancient religious obſervances which occur in the hiſtory of mankind. The particular ceremony which is the ſubject of this book, was inſtituted in commemoration of Abraham's obedience to the Divine command by the intended ſacrifice of his ſon. This ſon the *Arabian* commentators make to be their great progenitor Ishmael, and not Isaac, whom they aſſert to have been promiſed ſubſequent to that event. This concluſion they draw from the manner in which the whole circumſtance is worded in the thirty-ſeventh chapter of the Koran, though the paſſage

is

is certainly very equivocal. The anniverſary of this rite falling on the tenth of *Zee-al-Hidjee*, [the month of pilgrimage,] it is performed by pilgrims in the valley of *Minna*, and conſtitutes one of the preſcribed ceremonies of pilgrimage. —It is, however, equally enjoined on all others poſſeſſed of the ability; and may be performed by any man at his own habitation. The rules reſpecting it are few and ſimple; and are, in fact, of little conſequence in a *civil* light, farther than as they tend to affect property. The ſame obſervation in a great degree applies to

## Book XLIV. *Of* Abominations,

A subject which involves a vaſt variety of frivolous matter, and muſt be conſidered chiefly in the light of a treatiſe upon *propriety* and *decorum*. In it is particularly exhibited the ſcrupulous attention paid to female modeſty, and the avoidance of every act which may tend to violate it, even in thought.—It is remarkable, however, that this does not amount to that *abſolute ſecluſion* of women ſuppoſed by ſome writers. In fact, this ſecluſion is a reſult of *jealouſy* or *pride*, and not of any *legal injunction*, as appears in this and ſeveral other parts of the *Hedáya*. Neither is it a cuſtom univerſally prevalent in *Mohammedan* countries.

## Book XLV. Cultivation *of waſte* Lands.

In moſt *Muſſulman* governments, particular encouragement has been held forth to the reclaiming of barren or deſerted grounds, by the powerful incentive of granting to the cultivator a property in the ſoil.—A conſiderable portion of this book is occupied with diſcuſſions upon the right to *water*, that element being juſtly regarded as a moſt valuable commodity in countries where, from the heat of the climate, the ground is liable, for the greateſt part of the year, to exceſſive drought; and where, of courſe, the ſucceſs of tillage muſt chiefly depend upon an artificial ſupply of it.

## Book XLVI. Prohibited Liquors.

In prohibiting the uſe of *wine*, (under which term are included all deſcriptions of inebriating liquors,) the Prophet meant merely to reſtrain his followers from unbecoming behaviour, and other evil effects of intoxication. At firſt the precept was iſſued in the Koran ſimply againſt *drunkenneſs*, which amounted only to a prohibition of *exceſs* in the uſe of ſtrong liquors; but this not proving ſufficient for the purpoſes of complete determent, the negative injunction was produced, by which inebriating fluids were altogether proſcribed, and declared unlawful. The tendency of this book is, chiefly, to exhibit the opinions of their divines concerning what kind of liquors thoſe are which fall under the denomination of *prohibited*; in which we may trace the rigid ſcrupuloſity of the more early *Muſſulmans* upon this point. At preſent, however, they are not, in general, very ſtrict obſervers of the Law in this particular, their modern doctors allowing that various fluids may be drank, either medicinally or for pleaſure, provided it be done with moderation, and ſo as to avoid ſcandal.

## Book XLVII. *Of* Hunting.

This book is, properly, a ſupplement to *Zabbah*; and any reflections upon it may therefore be referred to the obſervations under that head.

## Book XLVIII. *Of* Pawns.

## Book XLIX. Offences *againſt the* Person.

In determining the meaſure of puniſhment for offences committed upon the *perſons* of men, the *lex talionis* ſeems at firſt ſight to have been dictated by natural reaſon, and to be conſiſtent with juſtice, as affording the

the beſt means of a ſtrict and equal retribution. Accordingly, we find it among the earlieſt inſtitutes of every ſociety approaching to a ſtate of perfect civilization. Before the time of MOHAMMED, the adminiſtration of public juſtice being little known in *Arabia*, perſonal injuries were a fruitful ſource of private revenge and civil war, and preſerved, among the deſcendants of ISHMAEL, a ſanguinary ferocity of ſpirit, which was conſidered as a *virtue* rather than a *blemiſh* in their character. The Prophet ſoon perceived it neceſſary to the completion of his project, to introduce a reform in this particular; and therefore, with a view at once to indulge his countrymen's propenſity to revenge, and to preſerve the peace of the community, ſhortly after his flight to *Medina*, (as it is ſaid,) revealed that paſſage of the KORAN allowing of *retaliation*, in which he has nearly copied the law of MOSES. As *equality* is the profeſſed ground of this inſtitution, the *Muſſulman* doctors, in their comments upon it, ſeem to have followed the *literal* acceptation of the text, in all caſes where the obſervance of this equality is poſſible. In practice, however, retaliation is ſeldom or never inflicted upon a *limb* or *member*; but a mulct is impoſed in proportion to the injury, and according to the circumſtances by which it is excited or attended.—In fact, however equitable this mode of requital may appear in ſome inſtances of perſonal injury, yet, when applied to all without limitation, it certainly involves much groſs abſurdity and injuſtice, a charge from which it does not ſtand acquitted by all the diſtinctions which the commentators have eſtabliſhed concerning it in this book. Hence it is that the *Muſſulman* courts, following the example of the *Jews*, underſtand the words of the KORAN, in all caſes ſhort of life, in the ſame manner as thoſe do the *Pentateuch*; that is, *not* as awarding an *actual* retaliation, according to the ſtrict literal meaning, but an atonement in exact proportion to the injury.—Thus much with reſpect to *wilful* offences. That law by which a man is made reſponſible in his property for offences unintentional or merely accidental, is certainly, in ſome inſtances, rather rigorous. It was, however, well calculated, in an irregular ſociety, and a defective ſtate of civilization, to guard men from acting careleſsly, and has a ſtrong tendency to ſupport and inculcate the

ſacredneſs of the perſon of MAN.—We ſhall ſpeak more fully upon this ſubject, in treating of

## BOOK L. *Of* FINES.

ALTHOUGH the manner in which this ſubject is treated involves a conſiderable portion of frivolous abſurdity, yet we alſo find, in the courſe of its diſcuſſions, many wiſe and ſalutary regulations, both for preſerving the ſecurity of the perſon, and the peace and good order of ſociety. We may perceive, from the peruſal of it, that a man is made reſponſible not only for his overt acts, but likewiſe for any injury which may be more remotely occaſioned by his careleſſneſs, obſtinacy, or wilful neglect. The degree of the fine was originally fixed at a certain amount, that for the life of a man being determined at one hundred camels, and all others at a proportionable rate, according to the injury. In later times, however, the changes in manners, and in the value of property, introduced other modes of aſcertaining amercement, and fines came to be levied not only in proportion to the injury ſuſtained, but alſo according to the circumſtances of the caſe.—Chap. VI. exhibits the only ſpecies of *inqueſt* admitted by the *Muſſulman* law in caſes of uncertain homicide, conſiſting ſolely of expurgatory oaths. However well calculated this may have been for the meridian of *Arabia* or *Iràk*, and for the ſtate of ſociety in thoſe countries at the time theſe laws were firſt ſyſtematized into a code, it is certainly but a poor device for the detection of guilt or the aſcertainment of fact in a well-regulated community.—It is remarkable that a law ſtrictly correſpondent to what is mentioned in this chapter formerly prevailed among the *Saxons* and other northern nations of EUROPE, where the reſponſibility for unaſcertainable bloodſhed lay with the maſter of the family, or with the people of the *tything* in which the body was found.

## Book LI. *The* Levying *of* Fines.

The ſubject of this book is purely of a *local* nature, relating entirely to the levying of fines upon the *Arabian* tribes for offences unintentionally committed by any individual of them.—Theſe regulations ſerve to give us a pretty clear idea of the ſtate of ſociety in the native land of *Iſlamiſm*. However uſeleſs, and perhaps impracticable, in a more advanced ſtate of refinement, theſe, as well as many regulations in the two preceding books, were well calculated to reduce a fierce people under the reſtraints of law and civil government.

## Book LII. *Of* Wills.

With reſpect to the *forms* of wills, the ſame obſervations occur as have been already made in treating of Marriage.—In fact, as writing was formerly very little in uſe among the *Arabs*, all deeds are, in the commentaries upon their laws, regarded and mentioned as being merely *oral*. Hence Wills, as diſcuſſed in this book, are ſolely of the *nuncupative* deſcription. The moſt remarkable features in this book are, the reſtrictions impoſed upon teſtators with reſpect to the diſpoſal of their property.

## Book LIII. *Of* Hermaphrodites.

This book, and the ſucceeding chapter, which, becauſe of its being detached from any particular ſubject, is termed Chapter the last, are a kind of *ſupplement* to the reſt of the work. *Hermaphrodites* are probably a claſs of beings which exiſt in imagination rather than in reality. We ſhall therefore leave this book to ſpeak for itſelf.—The laſt chapter is worthy of particular notice, as (if we except *bills of ſale* and *judicial letters*) it

BUT it is time to close this address. The Translator cannot, however, conclude without paying that tribute which justice and gratitude demand. —Concerning the public zeal, the penetrating and comprehensive mind, of the Gentleman to whom the work is dedicated, it is unnecessary to enlarge in this place. From him the present translation derives its existence; and the merit of his design received its best confirmation in the continuance of support it experienced from his immediate superiors, as well as from his successors in office.—To the liberal attention and honourable confidence of SIR JOHN MACPHERSON and his Colleagues in the *BENGAL* government it is owing, that the Translator was at all enabled to look forward to the completion of his labours. Yet this attention and confidence, flattering as they were, would not have sufficed to bear him through an arduous and expensive undertaking, had it not been aided by the generous and munificent support of the COURT OF DIRECTORS, whose regard to every effort which may tend to promote the interests of our Oriental dominions has been repeatedly experienced both by himself and others. Conscious of his own deficiences, he has only to hope it may appear, that what they have liberally granted has been faithfully and diligently employed. He entertains too humble an opinion of his abilities not to be sensible that, with all his assiduity, aided by the many happy suggestions of the worthy and excellent friend who had for some time been his Colleague in the performance, it will still be found far short of perfection. —The chief business of a translator, when engaged in an undertaking of this kind, is *scrupulous accuracy*, and the only merit he can claim *laborious application*. The former of these the present Translator has endeavoured to preserve, and the latter he presumes to affirm has not been wanting. Nevertheless, there is undoubtedly much room for correction and amendment. The very nature of the work rendered the translation of it a business attended with no common degree of difficulty. Treating of an abstruse science, the technical terms of which are but nakedly explained, and frequently not to be met with in any of his guides, all the light the Translator could obtain to a knowledge of his subject necessarily sprung out of the text; and consequently, as he advanced, he saw continual occasion for retrospective alterations, which amounted to little less

than a repetition of his labour. He found himſelf therefore frequently at a loſs; and repeatedly experienced the truth of an obſervation made by our immortal Lexicographer,—that "a writer may often in vain trace his "memory, at the moment of need, for that which yeſterday he knew "with intuitive readineſs, and which will come uncalled into his thoughts "to-morrow."

In confirmation of his wiſh to render this publication, as much as in his power, worthy of the patronage under which it has been conducted, the Tranſlator hopes he may be indulged in the egotiſm of the remark,—that he has dedicated his three laſt years unremittedly to reviſal or re-tranſlation.—He now diſmiſſes it with an anxious wiſh that *that* patronage may not appear to have been beſtowed, or his own efforts applied, in vain!

THE

THE

# *HEDAYA*, or GUIDE;

A

## COMMENTARY

ON THE

## MUSSULMAN LAWS.

# CONTENTS

OF THE

# FIRST VOLUME.

# CONTENTS.

## BOOK III.



## BOOK IV.

### Of *Talâk*, or *Divorce*.



Chap.

BOOK

## BOOK V.



## BOOK VI.

INTRO-

# INTRODUCTORY ADDRESS:

BY THE

# COMPOSERS

OF THE

# PERSIAN VERSION

OF THE

# *HEDAYA.*

PRAISE and glory unbounded is due to that adorable Being, in the inveſtigation of whoſe ways, through their ſeveral mazes, the moſt learned theologians are exhauſted, and the moſt contemplative philoſophers, in the wilderneſs of reſearch, find the foot of comprehenſion ſhackled with the fetters of amazement!—Duly to return thanks for his favours (which to offer is a duty indiſpenſably incumbent on every exiſtent being) is impoſſible; and to touch the ſkirt of his intelligence

(which exceeds the power of the finger of diligence) by force of reaſon and ſtudy, impracticable!—Salutations innumerable are alſo to be preſented at the tribunal of HIM who is ſeated on the elect throne, to follow whoſe infallible inſtitutes is a certain means of attaining the Divine favour, and whoſe world-illuminating Lamp of LAW derives its ſacred light from the morning beams of the Day of Judgment.—All honour and bleſſing upon him, and upon his holy family, and his worthy COMPANIONS!—Upon the tablets of the hearts of thoſe who adorn the exordium of the book of knowledge and wiſdom, and upon the minds of thoſe who expound the collected myſteries of the creation, it is impreſſed,—that, from the day that the delightful region of BENGAL was cheered by the rays of Government of the *Nawàb* Governor-General, Mr. WARREN HASTINGS, the whole of his wiſe and prudent attention was occupied and directed to this point,—that the care and protection of the country, and the adminiſtration of public affairs, ſhould be placed on ſuch a footing, that the community, being ſheltered from the ſcorching heat of the ſun of violence and tyranny, might find the gates cloſed againſt injuſtice and oppreſſion; and that the range of ſedition in thoſe who deviate from the road of truth might be limited and ſhortened:—and ſince this hope muſt be fulfilled through the influence of the holy LAW of the PROPHET, and the injunctions and inhibitions of the choſen ſect,—this denizen of the kingdom of humility and

ſolitude, named GHOLAM YEHEE, was therefore inſtructed and empowered, together with *Molla* TAJ-ADDEEN, *Meer* MOHAMMED HOSSEIN, and *Molla* SHARREEAT OOLLA, to tranſlate from the *Arabic* language into the *Perſian* idiom certain treatiſes upon the LAW, but particularly that excellent work the *HEDÀYA*, (which, from its great ſubtilty, and the cloſeneſs of its ſtile, is a ſpecies of miracle,)—to which, accordingly, with their aſſiſtance, applying his attention, the *Arabic* text was, as much as it would admit, reduced into a *Perſian* verſion; which they have entitled the *HEDÀYA FARSEE*, [*Perſian Guide*,]—hoping that mankind may thereby find their wants ſupplied, and that profit and advantage may thence accrue.

FROM thoſe who travel in this fruitful garden let it not be concealed, that where, in the courſe of their inveſtigation, the word *Sheikhine* [the *two Elders*] is mentioned, it ſignifies the two renowned Doctors *Imâm* ABOO HANEEFA, and the moſt illuſtrious of his diſciples, *Imâm* ABOO YOOSAF:—where the word *Tirrafine* [the *two extremes*] is written, it imports the ſublime name of ABOO HANEEFA (on whom be the peace of GOD) and *Imâm* MOHAMMED, who ſtands next in rank to the two *Elders*; and by the term *Sahibine* [the

[the *two Diſciples*] are intended the two ſcholars of HANEEFA, upon both of whom be the bleſſing of GOD!

A HOPE is indulged, from the benevolence of thoſe who ſhall peruſe the following pages, that if, in paſſing over the vallies and the hills of this long journey, it ſhould happen that the foot of meditation has any where ſlipped from its place, they will not treat it with ſeverity, nor expoſe it to the finger of ſcorn or reprehenſion.—The guidance is with GOD!

TRANS-

# TRANSLATION

OF THE

# *HEDÂYA*

# MMENTARY

ON THE

# MUSSULMAN LAWS.

## BOOK I.

### *Of ZAKÂ*

ZAKÂT, in its primitive ſenſe, means *purification*, whence it is alſo uſed to expreſs a contribution of a portion of property aſſigned to the uſe of the poor, as a ſanctification of the remainder

Definition of the term.

der to the proprietor. It is by ſome commentators termed *the indiſpenſable alms.*



## CHAP. I.

Obligation of *Zakât*, and the conditions upon which it is incumbent.

ZAKÂT is an ordinance of God, incumbent upon every perſon who is free, ſane, adult, and a Muſſulman, provided he be poſſeſſed, in full propriety, of ſuch eſtate or effects as are termed in the language of the law a *Niſâb*, and that he has been in poſſeſſion of the ſame for the ſpace of *one complete year*, which is denominated *Hawlân-Hâwl*. The reaſon of this obligation is found in the word of God, who has ordained it in the KORAN, ſaying, "BESTOW ZAKÂT." The ſame injunction occurs in the traditions; and it is moreover univerſally admitted. The reaſon for *freedom* being a requiſite condition is, that this is eſſential to the complete poſſeſſion of property. The reaſon why *ſanity of intellect* and *maturity of age* are requiſite conditions ſhall be hereafter demonſtrated. The reaſon why the Muſſulman faith is made a condition is, that the rendering of *Zakât* is an act of picty, and ſuch cannot proceed from an infidel. The reaſon for

for the poſſeſſion of a *Niſâb* being a condition is, that the Prophet has determined the obligation of *Zakât* upon that amount.) The reaſons for *Hawlân-Hâwl* being made a requiſite condition are two-fold; FIRST, becauſe ſome ſpace of time is neceſſary to increaſe * of property, and the law determines this at *one year*, becauſe the Prophet has declared, "ZAKÂT *is not due upon property until the ſame ſhall have* "*been poſſeſſed one year by the proprietor:*"—SECONDLY, the proprietor of a *Niſâb* is able, within ſuch a period, to obtain an increaſe from it, ſince in a year there are four ſeaſons, in each of which it moſt commonly happens that ſuch property bears a different price; wherefore the rule is determined accordingly.) It is to be obſerved, that ſome maintain *Zakât* to be due immediately upon the completion of *Hawlân-Hâwl*, and others that it is ſo through life †.

*Zakât* is not due from *infants or maniacs,*

(ZAKÂT is not incumbent upon infants or maniacs.)—*Shafeï* declares *Zakât* to be an obligation connected with property, and therefore that it is incumbent upon thoſe, as well as upon other proprietors, in the ſame manner as ſubſiſtence to a wife, and *Tythe* and *Tribute:* but to this our doctors reply that *Zakât* is an act of piety, and, as ſuch, is fulfilled only by being paid with the option of thoſe who are ſubject to it; and infants and maniacs are not held in law to be poſſeſſed of option, this being neceſſarily connected with *reaſon*, which they are not endowed with; but this does not apply to *Tribute*, as that is a proviſion ariſing from the ſoil, for the expences of the ſtate; nor to *Tythe*, as that is alſo in ſome ſhape of the ſame nature.

* By increaſe is here underſtood that obtained by *breeding*, where the *Niſâb* conſiſts of cattle, or by *profit*, where it conſiſts of merchandiſe.

† That is to ſay, annually, upon the ſame property, ſo long as it remains with the proprietor.

with certain exceptions;

If a lunatic have lucid intervals within the year, it is the ſame as if they happened within the month of *Ramzân*; that is to ſay, if he recovers his reaſon within the year, he is ſubject to *Zakât*, in the ſame manner as if he were to recover it within the month of *Ramzân*, in which caſe he would have to make up for the days of Lent he had omitted in conſequence of his inſanity.—*Aboo Yooſaf* has obſerved that regard is to be paid to the length or continuance of the lucid intervals; that is to ſay, if they continue the greater part of the year, the lunatic is ſubject to *Zakât*; but if he be inſane for the greater part, it is not incumbent upon him. It is to be obſerved, that *original* and *ſupervenient* inſanity are here conſidered as the ſame; by *original* is underſtood that which appears in a perſon in infancy, and continues upon him as he grows up to puberty; and by *ſupervenient*, that which occurs after a perſon has attained the years of maturity. It is related as an opinion of *Aboo Yooſaf*, that if a perſon attain maturity in a ſtate of inſanity, and then becomes ſane, the year * is conſidered to commence from the inſtant of his recovery, the ſame as a boy attaining puberty, with whom it is regarded as commencing on the day of his majority.

nor from *Mokâtibs*;

Zakât is not incumbent upon a *Mokâtib*, he not being completely and independently poſſeſſed of property, ſince he is ſtill a *ſlave*; whence it is that he is not at liberty to emancipate any of *his own* ſlaves.

nor from inſolvent debtors:

Zakât is not incumbent upon a man againſt whom there are debts equal to, or exceeding, the amount of his whole property. *Imâm Shafeï* alledges that it is incumbent, becauſe the cauſe of the obligation, to wit, *poſſeſſion of an increaſing* Nisâb, is eſtabliſhed. To this our doctors reply, that ſuch a *Niſâb* is not poſſeſſed by him

* For the eſtabliſhment of *Hawlân-Hâwl* in his poſſeſſions.

*clear*

*clear of incumbrance*, and is therefore held to be non-exiſtent, the ſame as water, which, when provided for the ſole purpoſe of drink *, is held to be non-exiſtent with reſpect to performance of the *Tammeem*, and cloth provided for the purpoſe of apparel, which is held non-exiſtent with reſpect to the obligation of *Zakât*. But if his property exceed his debts, *Zakât* is due upon the exceſs, provided the ſame amount to what is ſufficient to conſtitute a *Niſâb*, and that it be free from incumbrance. By the debts here mentioned are underſtood thoſe due to individuals; ſuch therefore as are due in conſequence of vows, or on account of expiations, do not forbid the obligation to pay *Zakât*: but a debt of *Zakât* forbids the obligation to pay *Zakât* in the continuance of the *Niſâb*, as that would be thereby rendered defective: and, in like manner, a debt of *Zakât* forbids *Zakât* after the diſſolution of the *Niſâb*. The caſe of the *continuance* of a *Niſâb* is, where the proprietor keeps it for two years without rendering any *Zakât* upon it, in which caſe no *Zakât* is due from him on account of the *ſecond* year; becauſe a *Zakât*, in the proportion of *one* in *forty*, is already due on account of the preceding year, whence the full amount neceſſary to conſtitute a *Niſâb* does not remain in the ſecond year: and the caſe of *diſſolution* of the *Niſâb* is, where the proprietor keeps the ſame for the full ſpace of *one year* without paying *Zakât*, and then diſpoſes of the *Niſâb*, and afterwards becomes poſſeſſed of another *Niſâb*, and this alſo continues in his poſſeſſion for the complete ſpace of one year; in which caſe, no *Zakat* is due upon this ſecond *Niſâb*, becauſe a proportion of *one* in *forty* is already occupied by the *Zakât* due on the former *Niſâb* which has been diſpoſed of. *Ziffer* controverts the rule in both theſe caſes: and it is alſo ſaid that *Aboo Yooſaf* controverts it with reſpect to the ſecond caſe. The reaſon why a debt of *Zakât* thus forbids any further obligation to pay

* As in the caravans, where water is provided and carried upon camels for *drink*, but not for the purpoſe of *purification*, which in that or ſimilar ſituations is permitted to be performed [illegible]

*Zakât* is, that the claimant of a debt of *Zakât* is, in fact, *an individual**, as the claimant thereof, in paſtures, is the *Imâm*, and, in articles of merchandiſe, the deputy of the *Imâm*†; and the proprietor of the property, in all other articles, is the *Imâm*'s ſubſtitute ‡.

nor upon the neceſſaries of life:

(ZAKÂT is not due upon dwelling-houſes or articles of clothing or houſehold furniture, or cattle kept for immediate uſe, or ſlaves employed as actual ſervants, or armour, or weapons deſigned for preſent uſe; all theſe falling under the deſcription of *neceſſaries*; neither are ſuch conſidered as *increaſing property*: and the ſame of *books of ſcience*, with reſpect to *ſcholars*, and likewiſe of *tools*, with reſpect to *handicrafts*; theſe being to them as *neceſſaries*.)

nor upon uncertain

(IF a man have a claim upon another for a *debt*, and the other diſpute the ſame, and ſome years thus paſs away, and the claimant be deſtitute of proof, and the debtor afterwards make a declaration or acknowledgment publicly, inſomuch that there are witneſſes of the ſame, there is no obligation upon the claimant to render any *Zakât* § for ſo many years as have thus paſſed. This uncertain ſort of property is termed, in the language of the law, *Zimâr*; and *trove* property, and fugitive ſlaves, and *uſurped* property, reſpecting which there is no proof, and property ſunk in the ſea, or buried in the deſert and its place forgotten, and property tyrannically ſeized

* In oppoſition to *God*; for, if *Zakât* were claimed purely as a right of *God*, the payment of it would be abſolutely and unconditionally incumbent.

† Becauſe the *Imâm* is always ſuppoſed to collect the *Zakât* upon paſtures in perſon, and that upon merchandiſe by his deputies, *i. e.* by collectors placed at particular ſtations for that purpoſe.

‡ As the payment of *Zakât*, upon all other articles, is committed to the proprietor himſelf.

§ Upon the property which is the ſubject of the claim.

by

by the Sultan, are all of the deſcription of *Zimâr*: and all theſe articles are equally exempted from *Sadka-fittir* *. *Ziffer* and *Shafeï* maintain, that all theſe articles are ſubject both to *Zakât*, and alſo to *Sadka-fittir*, as the cauſe of the obligation to pay *Zakât* (to wit, poſſeſſion of a *Niſâb*) is eſtabliſhed in each of them, although it was not in the immediate ſeiſin of the proprietor whilſt it fell under the deſcription of *Zimâr*, which does not forbid the obligation to *Zakât*; like the property of a traveller, which, if it remain in his houſe, is nevertheleſs ſubject to *Zakât*, although it be not at the time in his hands. The arguments of our doctors herein are two-fold; FIRST, *Alee* declared that no *Zakât* is due upon *Zimâr* property: SECONDLY, the cauſe of the obligation to pay *Zakât* is the poſſeſſion of property in a ſtate of increaſe, which cannot be the caſe but where the proprietor has an immediate power of management over it; but this does not apply to a traveller who has property at home, as he may manage it by agents.

PROPERTY buried in the houſe of the proprietor is not *Zimâr*, becauſe it is eaſily recovered; but, with reſpect to property buried in any other ground than that on which the houſe actually ſtands (ſuch as the *garden*, for inſtance), there is a difference among our modern doctors.

PROPERTY which is acknowledged by a debtor to be owing to his creditor is ſubject to *Zakât*, whether ſuch debtor be rich or poor, becauſe the recovery of it is poſſible; or if the debtor diſpute the demand, yet here alſo the property in queſtion is ſubject to *Zakât*, provided there be proof ſufficient to ſubſtantiate the creditor's claim, or that the *Kâzee* himſelf be ſatisfied of the juſtice of it; becauſe

it is due upon unqueſtionable property.

* For an explanation of *Sadka-fittir*, ſee Chap. VIII.

here

here alſo recovery is poſſible. And if the acknowledging debtor be poor,—that is to ſay, if the *Kâzee* declare him inſolvent,—yet here alſo the property in queſtion is ſubject to *Zakât*, according to *Haneefa*,—he holding that a *Kâzee*'s declaration of the inſolvency of a debtor is not approved: but *Imâm Mohammed* maintains that the property in this caſe is not ſubject to *Zakât*,—he holding a *Kâzee*'s declaration of a debtor's inſolvency to be approved.—*Aboo Yooſaf* agrees with *Mohammed* reſpecting the validity of a *Kâzee*'s decree of inſolvency; but he, at the ſame time, coincides with *Haneefa*, that the property of which the debt conſiſts is not, in this caſe, ſubject to *Zakât*.

Intention of traffick in property ſubjects it to *Zakât*.

(If a perſon purchaſe a female ſlave for the purpoſe of traffick, and afterwards retain her for his own uſe, declaring his intention, no is due upon her, becauſe the intention is here connected with the act, namely, the relinquiſhment of traffick in her; and an intention thus declared, when connected with an act, is to be credited:—and if he ſhould afterwards declare a deſign of trafficking in her, yet no *Zakât* will be due upon her in virtue of ſuch declaration, until he actually diſpoſe of her by ſale, becauſe here the intention is not connected with the act, and conſequently ſhe is not held to be a ſubject of traffick from his declaration, unleſs he actually ſell her, when *Zakât* is due upon her price.

(If a perſon purchaſe a thing with an intention of traffick, it is to be conſidered as an article of traffick, on account of the connection of an intention of traffick with the act, to wit, purchaſe: contrary to a caſe where a perſon obtains poſſeſſion of property by inheritance, and intends to traffick in the ſame, ſuch not being conſidered an article of traffick merely from the intention, ſince that, in this caſe, bears no relation to the act *.

* That is, to the means by which ſuch property was acquired.

If a man become poſſeſſed of property by *gift*, or *bequeſt*, or *marriage*, or *Khoola*, or *compoſition for blood*, and intend trafficking in the ſame, it becomes (and is, in virtue of his intention, conſidered as) an article of merchandize,—according to *Aboo Yooſaf*,—he holding the *intention* here to be connected with the *act*. It is related as an opinion of *Imâm Mohammed* that this property does not become as *merchandize*, becauſe the intention is not here connected with the *act* of traffick, which is underſtood only by *purchaſe* and *ſale*: ſome, however, have related this difference of opinion the reverſe of what is here mentioned.

Intention of *Zakât*, in the payment, neceſſary to its validity;

The payment of *Zakât* is not lawful, except under an intention exiſting at the period of ſuch payment, or at the period of ſetting apart the proportion of *Zakât* from the *Niſâb*-property, becauſe the rendering of *Zakât* is an act of piety, to which the intention is eſſential; and a radical principle of the intention is that it be connected with the payment: but yet, inaſmuch as the giving of *Zakât* to the poor is neceſſarily an act of frequent repetition and occurrence, it ſuffices that the intention exiſt at the period of ſetting apart the proportion of *Zakât*, (as aforeſaid,) for the ſake of convenience.

Excepting under certain circumſtances.

If a man beſtow his *whole property* in charity, without intention of *Zakât*, the obligation of *Zakât*, with reſpect to him, drops, upon a principle of benevolence, becauſe ſuch obligation extends to a *certain part* of his property only; and where *the whole* is thus beſtowed, that *part* is neceſſarily included; whence it is that there is no neceſſity for his ſpecifying the ſame by *intention*.

If a man give to the poor *a portion* of his *Niſâb* property, without intention of *Zakât*, his obligation to *Zakât* drops with reſpect to ſuch portion, (according to *Mohammed*,) becauſe the part of his property due

(on account of *Zakât*) affects the whole of his *Nisâb* equally,—wherefore, when a part of the *Nisâb* is thus bestowed, the proportion due upon such part goes along with it. *Aboo Yoosaf* maintains that the obligation to the *Zakât* of that portion does not drop, because no part thereof is particularly specified as *Zakât*, the remainder of the *Nisâb* being the subject from which the obligation is to be discharged: contrary to where the whole *Nisâb* has been bestowed, since there the proportion due on account of *Zakât* goes, *a certiori*, as being involved in the *whole*.

## CHAP. II.

### Of ZAKÂT from *Sawâyeem*; that is, *Herds* and *Flocks*.

Definition of

SAWÂYEEM is the plural of *Sâyeema*; and *Sâyeema* is, by the learned, understood to imply camels, oxen, goats, and other animals, which subsist for the greater part of the year upon pasture; wherefore, if they live but half the year in pastures, and are fed, for the other half, upon forage, they do not fall under the description of *Sawâyeem* *.—And this chapter is divided into several heads.

### SECT. I.

#### *Of the* ZAKÂT *of Camels*,

One goat due upon five camels, &c.

(NO ZAKÂT is due on fewer than five camels; and upon five camels the *Zakât* is one goat, provided they subsist upon pasture throughout

* This term is in our dictionaries translated *pastures*, but the above is the precise definition of it.

the

the year; becauſe *Zakât* is due only upon ſuch camels as live on paſture, and not upon thoſe which are fed in the houſe with forage.

ONE goat is due upon any number of camels from *five* to *nine*; and two goats is the *Zakât* on any number from *ten* to *fourteen*; and *three* on any number from *fourteen* to *nineteen*; and *four* upon any number from *twenty* to *twenty-four*: and upon any number of camels from *twenty-five* to *thirty-five* the *Zakât* is a *Binnit-Makhâſs*, that is, a yearling camel's colt; and upon any number from *thirty-ſix* to *forty-five*, a *Binnit-liboon*, or camel's colt of two years; and upon any number from *forty-ſix* to *ſixty*, a *Hikka*, or four year old female camel; and upon any number from *ſixty-one* to *ſeventy-five*, a *Jazeeyat*, or five year old female camel; and for any number from *ſeventy-ſix* to *ninety*, the *Zakât* is two camel's colts of two years; and on any number from *ninety-one* to *one hundred and twenty*, two *Hikkas*. Theſe proportions of *Zakât* upon camels are what were written by the prophet in his letters and inſtructions to his public officers and *Aumeels*. And when the number of camels exceeds *one hundred and twenty*, the *Zakât* is calculated by the aforeſaid rule; that is to ſay, where the whole number is *one hundred and twenty-five*, (for inſtance,) the *Zakât* is one goat for the odd five, and two *Hikkas* for the one hundred and twenty; and if the exceſs number be *ten*, two goats; and if it be *fifteen*, three goats; and if it be *twenty*, four goats; and if it be *twenty-five*, a yearling camel's colt: and if the whole number of camels be *one hundred and fifty*, the *Zakât* is three *Hikkas*; and if the number exceed *one hundred and fifty* by *five*, it is then one goat and three *Hikkas*, that is to ſay, three *Hikkas* upon the *hundred and fifty*, and a goat upon the odd *five*; and upon *one hundred and ſixty* camels, the *Zakât* is three *Hikkas* and two goats; and upon *one hundred and ſeventy*, three *Hikkas* and four goats; and upon *one hundred and ſeventy-five*, three *Hikkas* and one yearling colt; and upon any number from *one hundred and eighty-ſix* to *one hundred*

*and ninety-five*, the *Zakât* is three *Hikkas* and a two-year old colt; and upon any number from *one hundred and ninety-six* to *two hundred*, *Zakât* is four *Hikkas*: and in this manner is the *Zakât* to be calculated on every fifty camels exceeding one hundred and fifty.—

arrangement is according to our doctors. *Shafeï* alledges that the number exceeds the *hundred and twenty* by *one* only, the *Zakât* is three two year old colts; and if it amount to *one hundred and thirty*, it is one *Hikka* and two two year old colts; after which the *Zakât* is calculated at a two year old colt upon every forty camels, and a *Hikka* upon every fifty; the prophet, upon a particular occasion, having written to one of his *Aumeels* to this effect, without making any mention of a goat upon the odd five, and so forth. But our doctors, in support of their opinion, as above, cite the letters of the prophet to *Omar*, where he says, "upon every five camels the *Zakât* is one goat."

*Female* camels only lawful in the payment of *Zakât*.

And it is to be observed that, in the payment of the *Zakât* of camels, *females* alone are lawful, because males are held to be lawful only in regard to their value *, such being recorded both in the sacred writings and in the traditions.

all included.

CAMELS of every description, whether *Bactrian*, *Arabian*, or others, are all included in these rules of *Zakât*, as the term *camel* [*Shû* is common to all.

## SECT. II.

### *Of the* ZAKÂT *of Horned Cattle.*

One yearling due upon thirty kine, &c.

No *Zakât* is due upon fewer than *thirty* kine; and upon *thirty* kine which feed on pasture for the greater part of the year, there is due at the end of the year a *Zakât* of one *Tubbee*, that is, a *follower*, or yearling calf, male or female; and upon *forty* kine there is due one

* That is to say, the *price* of a male is held to be lawful in *Zakât*, but not the

*Miss*

*Miſna*, or calf of two years, male or female, on the authority of the prophet; and where the number exceeds *forty*, the *Zakât* (according to HANEEFA) is to be calculated, agreeably to this rule, ſo far as *ſixty*; that is to ſay, if there be one animal more than the *forty*, there is an additional *Zakât* of the *fortieth* part of a *Miſna*; and if *two*, of the *twentieth* part of a *Miſna*; and ſo on to the number *ſixty*.—What is here advanced accords with the *Mabſoot*; and the ground upon which it proceeds is that, in the ſacred writings, the *Zakât* is particularly ſpecified for any number between *thirty* and *forty*, and alſo for thoſe of *ſixty* and above, but none for the numbers between *forty* and *ſixty*. *Haſan* ſtates the doctrine of *Haneefa* to be, in this caſe, that, on the numbers from *forty* to *forty-nine*, no exceſs *Zakât* whatever is due; and that upon *fifty* kine the *Zakât* is one *Miſna*, and the fourth of a *Miſna*, or the third of a *Tubbee*; becauſe upon every *Akid*, or drove of even number, in a *Niſâb* of cattle, ſuch as *thirty*, *forty*, or *fifty* head, *Zakât* is due, but not upon any intermediate number.—The two diſciples ſay that no *Zakât* whatever is due upon any odd number between forty and fifty; and there is alſo one tradition of the opinion of *Haneefa* to this effect: and the reaſon they alledge is, that the prophet ſaid to *Maaz*, "*Take not any thing from an Owkâs of kine*;" and he explained an *Owkâs* to mean any number between forty and ſixty. And upon *ſixty* kine, the *Zakât* is two yearling calves, male or female: and upon *ſeventy*, one *Miſna* and one *Tubbee*: and upon *eighty*, two *Miſnas*: and upon *ninety*, three *Tubbees*: and upon *one hundred*, two *Tubbees* and one *Miſna*: and thus on every *ten head* a *Miſna* and a *Tubbee* alternately, the prophet having ordained that the *Zakât* upon *thirty* kine ſhould be a *Tubbee*; and that upon *forty* a *Miſna*:—thus, upon *one hundred and ten* kine, the *Zakât* is two *Miſnas* and one *Tubbee*; and upon *one hundred and twenty*, four *Tubbees*.

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The uſual method however of calculating the *Zakât* upon large herds of cattle is, by dividing them into *thirties* or *forties*, impoſing upon every *thirty* one *Tubbee*; or upon every *forty* one *Miſna*.

*Buffaloes* are included with horned cattle.

It is to be obſerved that *buffaloes* are included with kine in the laws of *Zâkat*, theſe being alſo conſidered as a ſpecies of *black cattle*: but yet, in our country*, the *buffalo* is not regarded as of the *black cattle* ſpecies; whence it is that if a perſon were to make a vow, ſaying, "I will not eat of the fleſh of black cattle," and were afterwards to eat *buffalo beef*, he would not be forſworn.

## SECT. III.

### *Of the* ZAKÂT *of Goats.*

One goat due upon forty goats, &c.

No *Zakât* is due upon fewer than *forty goats*; and upon *forty* goats, which feed for the greater part of the year upon paſture, there is due, at the expiration of the year, a *Zakât* of *one goat*; and this *Zakât* ſuffices for any number from *forty* to *one hundred and twenty*: and if the number exceed one hundred and twenty, a *Zakât* of *two* goats is due from *one hundred and twenty-one* to *two hundred*: and if it exceed two hundred, a *Zakât* of *three* goats is due from *two hundred and one* to *three hundred and ninety-nine*: and if it amount to *four hundred*, the *Zakât* is *four* goats: and beyond four hundred the *Zakât* is *one* goat for every *hundred*; the prophet having thus ordained, and all the doctors uniting in this opinion. It is alſo to be obſerved, that the ſame rules of *Zakât* are applicable to ſheep as to goats, the term *Ghannem*, in the tradition, equally implying both ſpecies.

Kids or lambs are not acceptable payment unleſs they be above a year old;

In the *Zakât* of goats or ſheep, *Sinnees* are acceptable payment, but not *Juzzas*. This is the *Zâhir-Rawâyet*. *Sinnees* are kids which have entered on the ſecond year; and *Juzzas* are ſuch as have not yet

* Meaning *Perſia*, or *Hindoſtan*.

compleated

compleated their firſt year.—The two diſciples have ſaid that the *Zakât* may be paid with the *Juzzas* of ſheep; and there is one opinion of *Haneefa* recorded to this effect; and the reaſons are twofold; FIRST, the prophet has ſaid, "*The Zakât upon them conſiſts of Juzzas* "*and Sinnees*;"—SECONDLY, ſacrifice is fulfilled by the immolation of a *Juzza*, and therefore *Zakat* may be alſo diſcharged by it. The ground upon which the *Zâhir-Rawâyet* proceeds is alſo twofold; FIRST, a ſaying of *Alee*, "*In Zakât nothing is acceptable ſhort of a Sin-*"*nee*;"—SECONDLY, in the *Zakât* of goats it is incumbent to give thoſe of a *middling ſize*, and the *Juzzas* of ſheep are not of that ſtandard, being ſmall; whence it is that the *Juzzas* of *goats* alſo are not acceptable in *Zakât*. With reſpect to the firſt reaſon urged by the two diſciples, it may be replied, that by the term *Juzza*, as mentioned in the tradition, is to be underſtood the *Juzzas* of *camels*, that is, *yearling colts*: and what they ſay of ſacrifice is no rule, as that of a *Juzza* is approved, (not by *analogy*, but) from the expreſs words of the ſacred text.

but males and females are equally ac-

IN paying the *Zakât* of goats or ſheep, males and females are equally acceptable; the term *Shât*, in the traditions, applying indiſcriminately to both genders.

## SECT. IV.

### *Of the* ZAKÂT *of Horſes.*

One per head due upon

on the total valve.

WHEN horſes and mares are kept indiſcriminately together, feeding for the greater part of the year on paſture, it is at the option of the proprietor either to give a *Zakât* of one *Deenâr* per head for the whole, or to appreciate the whole, and give five *Deenârs* per cent. upon the total value: and this laſt is the mode adopted by *Ziffer*.—The two diſciples maintain that no *Zakât* whatever is due upon horſes,

horſes, the prophet having ordained *that Muſſulmans ſhould not be ſubject to* ZAKÂT *for their horſes or ſlaves.* *Haneefa*, in ſupport of his doctrine, as above, ſtates an ordinance iſſued by the prophet, in which he directed that the *Zakât* upon *ordinary* horſes ſhould be one *Deenâr*, or ten *Dirms* per head. And with reſpect to the ordinance above quoted by the two diſciples, that applies ſolely to and not to *ordinary* cattle.

*t* not due upon droves conſiſting entirely either of *males* or of *females.*

No *Zakât* whatever is due upon a *Niſâb* of horſes conſiſting entirely of *males*, becauſe in that there can be no increaſe by breeding; and, in like manner, there is no *Zakât* upon a *Niſâb* conſiſting entirely of *mares*, for the ſame reaſon.—This is one tradition from *Haneefa.* There is another tradition from him, however, which ſays that a *Zakât* is due upon *mares* although there be no horſes among them, as horſes can be occaſionally borrowed by the proprietor for the purpoſe of producing, whence increaſe may be had; but this is impoſſible with reſpect to droves conſiſting entirely of *horſes.*

leſs as articles of *commerce.*

THERE is no *Zakât* due upon *aſſes* or *mules*, the prophet having ſaid, "*With reſpect to Zakât upon aſſes and mules, I have received no* "*revelation.*" But yet, if theſe animals be as *articles of merchandize*, a *Zakât* is due upon them, becauſe, in the preſent times, *Zakât* is impoſed upon the property involved in them the ſame as upon any other articles of traffick.

## SECT. V.

### *Of the* ZAKÂT *of Kids, and Calves, and Camels' Colts.*

No *Zakât* pon the of *herds* *ks* until a year old.

No *Zakât* whatever is due (according to *Haneefa*) upon the young of *goats*, *kine*, or *camels*, which are under *one year*; that is to ſay, if a man were to purchaſe twenty-five camels' colts (for inſtance) or forty

forty kids, or thirty calves, and one complete year ſhould paſs from the period of poſſeſſion, ſtill no *Zakât* is due; nor does any become due, until the expiration of the term of a year after they ſhall have been grown up.

One camel's colt due on 25, &c.

*o Yooſaf* holds that *Zakât* is not due upon fewer than forty kids, or thirty calves, or twenty-five camels' colts: and upon *twenty-five* camels' colts the *Zakât* is *one* colt: and there is no further *Zakât* due till the number amounts to *ſeventy-ſix*, when the *Zakât* is *two* colts; becauſe upon *ſeventy-ſix Miſnas* a *Zakât* is due of two *Binnit-liboons*: and there is no further *Zakât* till the number amounts to *one hundred and forty-five*, when it is *three* colts; becauſe upon one hundred and forty-five *Miſnas* the *Zakât* is two *Hikkas* and one *Binnit-makhâſs*. There are other traditions of the opinion of *Aboo Yooſaf* herein; but the above, as being of poſterior record, ſuperſedes them.

Caſe of the payment of

If a perſon owe, as *Zakât*, a *Miſna*, and it ſhould happen that he is not poſſeſſed of one, having no cattle in his flocks but what are either *under* or *over* that deſcription, the officer who collects the *Zakât* is at liberty either, in the *former* caſe, to take an animal of the under rate, and the difference in money,—or, in the *latter*, to take a ſuperior ſort, paying the difference of value between that and a *Miſna* to the proprietor. It is to be obſerved that, in the latter caſe, no conſtraint is to be put upon the collector, who is at liberty to inſiſt upon either the actual thing due, (to wit, a *Miſna*,) or the value of one in money, becauſe the acceptance of an animal of the ſuperior ſort, on the terms above ſtated, wears the aſpect of traffick; his acceptance of it, therefore, cannot be compelled, inſomuch that if the proprietor were to give him no obſtruction in taking it, yet he is not conſidered as being ſeized of it; but the collector may be compelled to

accept of an animal of an inferior ſort, and the difference in money, inſomuch that if the proprietor merely *give no obſtruction* to the officer, in thus taking the animal and the difference, he (the officer) is conſidered as being ſeized of the ſame; becauſe here the tranſaction does not bear the aſpect of *purchaſe* and *ſale*, as the proprietor pays the inferior animal in part of the *Miſna*, and conſequently the difference along with it.

Subſtitution of the *value* lawful.

If a proprietor, in *Zakât*, ſhould, in lieu of the actual thing due, pay the value in *money*, it is approved, according to our doctors; and the ſame holds good in *expiation*, or in the payment of *Sadka-fittir*, or *Tythe*, or the *fulfilment of a vow.* ) *Shafeï* maintains that this is unlawful, becauſe it is not lawful to exchange, for a ſubſtitute, any thing ſpecified in the ſacred writings; as in ſacrifice (for inſtance) where a ſubſtitution of *value* for the *victim* is illegal. The argument of our doctors is, that God has himſelf ordained *Zakât*, and has directed the ſame to be diſtributed in alms to the poor, which plainly indicates that the intent of the inſtitution is merely that the poor ſhould derive a ſubſiſtence from it, ſo as that their wants may be thereby relieved; and to effect this the value will anſwer equally well with the ſpecific animal, wherefore the ſubſtitution of the value in payment of *Zakât* is legal, the ſame as in payment of *Jazzeeyat*, or capitation-tax: but this reaſoning does not apply to *ſacrifice*, as that is an act of piety, to the fulfilment of which the ſhedding of the blood of the victim is eſſential, wherefore no concluſion can be drawn from this inſtance, as there is no analogy between the two caſes.

Labouring cattle exempt

Camels and oxen kept for the purpoſe of *labour*, ſuch as carrying burthens, drawing the plough, and ſo forth, are not ſubject to *Zakât*; neither is any *Zakât* due upon them where they are fed one half of the year or more upon forage. *Mâlik* controverts this doctrine:

trine: but the arguments of our doctors herein are threefold; FIRST, the prophet has expreſsly ordained that theſe two ſpecies of cattle ſhould be exempted from *Zakât* under ſuch circumſtances; SECONDLY, the cauſe of the obligation of *Zakât* conſiſts in *the poſſeſſion of increaſing property*, and the increaſe of cattle can be conceived only under two circumſtances, that is, their being either kept in paſtures*, or for the purpoſe of traffick, neither of which is the caſe with the cattle now under conſideration; THIRDLY, in caſes where the cattle are fed upon forage, the keeping of them is attended with great expence, a circumſtance which more than counterbalances any advantage to be derived from their breeding in ſuch a ſituation, and therefore *virtually* prevents increaſe, although it may not *actually* do ſo.

Muſt be paid in animals of a *medi.* value.

THE officer, in collecting *Zakât*, is not at liberty either to inſiſt upon the *beſt* or to accept of the *worſt* ſort of the property collected upon, but muſt take what is of a medium ſtandard, becauſe the prophet has ſo ordained it; and alſo, becauſe, in confining the *Zakât* to property of a medium value, regard is had at once to the intereſt of both the parties concerned, to wit, the *poor* and the *proprietor*.

Law of payments

WHOEVER is poſſeſſed of a *Niſâb* property, and obtains an addition of the ſame ſort or ſpecies within the year, muſt add it to the *Niſâb*, and pay *Zakât* upon the whole. *Shafeï* objects to this, maintaining that the ſupervenient acquiſition ſhould not be added to the firſt *Niſâb*, becauſe the property of which that conſiſts is original and independent with reſpect to *propriety*, and is therefore ſo with reſpect to *Zakât* likewiſe: contrary to acquiſition by *breed* or *profit* obtained within the year, that being a *dependant* only of the original property,

* Meaning, that where the cattle are ſuffered to go at large, as in paſtures, the males have free acceſs to the females, which produces breed.

and, as ſuch, not to be confounded with it. To this our doctors reply, that the reaſon for ſupervenient acquiſition, by brood or profit, being added to the *Niſâb*, is homogeneity in the ſubject of it; ſince, where the original and ſupervenient property are of the ſame ſpecies, it is not eaſy to diſcriminate preciſely between them, and conſequently difficult to aſcertain the *Hawlân-Hâwl* with reſpect to any ſpecies of profitable acquiſition ariſing from original property; and, as the *Hawlân-Hâwl* is regarded only for the ſake of convenience, it therefore appears that homogeneity in the ſubject is a ſufficient reaſon for the ſupervenient acquiſition being added to the original property; and this reaſon exiſts in the preſent caſe.

Rules reſpecting the

THE two *Sheikhs* hold *Zakât* to be due upon the *Niſâb* only, and not upon the *Afoo* *; but *Mohammed* and *Ziffer* maintain it to be due upon both the *Niſâb* and the *Afoo*, that is, upon the whole; the reſult of which difference in opinion is that, if the *Afoo* were to periſh, and the *Niſâb* to remain, then, according to the two *Sheikhs*, the whole *Zakât* that had been before obligatory ſtill remains due; but, according to *Mohammed* and *Ziffer*, an adequate proportion of *Zakât* drops: and, in ſupport of this latter opinion, *Mohammed* and *Ziffer* argue that *Zakât* is due as an acknowledgment for the bleſſings of Providence, and the *Afoo* is a bleſſing the ſame as the *Niſâb*; that is to ſay, they are both equally bleſſings, wherefore *Zakât* is equally due upon both. (The argument upon which the *Sheikhs* ſupport their opinion is twofold: FIRST, the prophet has expreſsly ſaid "*The* ZAKÂT *upon five camels is one goat, and* ZAKÂT *is not due* "*upon any further number till it amount to ten*;" and in like manner the prophet has ordained the *Zakât* upon every *Niſâb*, and forbidden

* *Afoo* literally means *exempt*. In the *Zakât* of cattle it is uſed to expreſs any *intermediate* or *odd* number between one *Niſâb* and another, as between *twenty-five* and *thirty-ſix* camels for inſtance.

it upon the *Afoo*; SECONDLY, the *Afoo* is a dependant of the *Niſab*, whence, if a part of the whole *Niſab* and *Afoo* were to periſh, the loſs would be firſt calculated upon the *Afoo*, as being the dependant part; as in a contract of *Mozâribat*, where any accidental loſs is firſt calculated upon the *profit*, and not upon the *capital*: and on this ground it is that *Haneeſa* accounts the loſs upon the *Afoo* to the extent thereof, and beyond that upon the *Niſab* property of the firſt (or higheſt) denomination, and beyond that upon the *Niſab* of the next lower denomination, and ſo on to the *laſt* (or loweſt) denomination of *Niſab*; becauſe the *Niſab* of the higheſt denomination is the principal, to which all the inferior *Niſabs* are dependants; and, according to *Aboo Yooſaf*, the loſs is calculated firſt upon the *Afoo*, and beyond that upon all the degrees or deſcriptions of *Niſab* collectively.

Caſe of *Zakat* being levied by the

IF the rebels or ſchiſmaticks overcome any particular tribe of Muſſulmans, and take from them the *Zakât* of their cattle, when theſe rebels are driven away, the rightful *Imâm* muſt not impoſe another *Zakât* upon that tribe, becauſe it appears from the above circumſtance that the *Imâm* has not protected them, and the right of impoſing *Zakât* appertains to the *Imâm*, in virtue of the protection he affords; the learned however have decreed, upon this caſe, that the tribe in queſtion ſhould repeat their *Zakât*, and pay it a ſecond time, but not their *Tribute*, becauſe the latter is declared, in the ſacred writings, to be applicable to the uſe of the warriors who fight their enemies; and hence rebels may be conſidered as an object of its application, they alſo anſwering this deſcription; whereas the only object of the application of *Zakât* is the *poor*, and rebels do not be-

* This and the next following caſe are merely *local* in their application, and allude to the ſtate of Arabia, ſhortly after the eſtabliſhment of *Iſlamiſm*. The *Schiſmaticks* were thoſe who refuſed to ſubmit to the law of the Prophet; whilſt others (like the tribe of *Toglib*, mentioned in the next caſe,) ſubmitted and paid tribute.

ſtow

ſtow what they may levy upon the tribe, under that denomination, to the uſe of the poor; wherefore it is neceſſary that the tribe ſhould again pay *Zakât*, ſo as that it may be applied to its proper object; but not their *Tribute*. Some of our doctors ſay, that if the aforeſaid tribe, at the period of paying *Zakât* to the rebels, intend in ſo doing to give them *alms*, in this caſe *Zakât* drops with reſpect to that tribe, and there is no neceſſity for their afterwards repeating it; and the giving of *Zakât* to any tyrant or plunderer whatever is capable of this conſtruction, becauſe perſons of this deſcription, whatever wealth they may be *apparently* poſſeſſed of, are yet actually *poor*, on account of the retribution, which lies againſt them hereafter: but the former doctrine (that the tribe ſhould repeat their *Zakât*) is preferable to this, becauſe here the *Zakât* is rendered and applied, *a certiori*.

How far the *Toglib* tribe ſubject to

THE *Zakât* of cattle is not incumbent upon an infant of the tribe of *Toglib*;* and whatever is incumbent upon the *men* of that race is ſo upon the *women* alſo, becauſe peace was made with them upon thoſe terms, "*that they ſhould pay, of all publick impoſts, double* "*what was paid by Muſſulmans*:" now the Muſſulman women are ſubject to *Zakat*, and it follows that the women of the *Togleb* race are ſo in a *double* proportion; but no *Zakat* whatever is required of infant Muſſulmans, wherefore the infants of the aforeſaid tribe are not ſubject to it.

An accidental deſtruction of the property in-

the property be deſtroyed, without being conſumed by the proprietor after *Zakât* has become due, (that is to ſay, after the completion of *Hawlân Hâwl,)* the *Zakat* upon it drops. *Shafei* has

* One of the Arabian tribes, who refuſed to embrace the faith, but agreed to pay tribute to the Prophet. The tribe itſelf is ſuppoſed to be long ſince extinct; but the laws to which the people of it were ſubject are applicable, in general, to all infidel tributaries.

ſaid

ſaid that if the property be deſtroyed after the proprietor has been enabled to pay the *Zakât* upon it, either by the claimant making his demand of *Zakât*, or by the proprietor finding a claimant, although ſuch claimant ſhould not have demanded it, in this caſe the proprietor is reſponſible for the *Zakât*, becauſe it was due from him, and he did not pay it, although it was in his power to have done ſo; moreover, if he ſhould not pay the *Zakât* upon the requiſition of the claimant, this circumſtance ſtands as a *deſtruction* of it on his part. The argument of our doctors is, that the *Zakât* due is a *portion* or *part* of the *Niſâb*; and, as its deſtruction is involved in that of the *Niſâb*, it drops of courſe, the ſame as where a ſlave commits a *Jenâyat* [offence againſt the perſon], in which caſe it is incumbent upon the proprietor to make over that ſlave to the *Walee-Jenâyat*, or perſon intitled to the compoſition; but, if the ſlave ſhould die or be loſt in the interim, the proprietor is no longer reſponſible for the transfer of him, and that conſequently drops; and, with reſpect to the *ſecond* argument of *Shafeï*, it may be replied, that no perſon can be conſidered as the *claimant* of *Zakât* except a pauper whom the proprietor may have ſpecified as the object of its application, and the caſe does not ſuppoſe the requiſition to be made by ſuch an one. But if the collector demand the *Zakât*, and the proprietor neglect payment, and the *Niſâb* afterwards periſh, there are various opinions among the Haneefite doctors, ſome alledging that the proprietor of the deſtroyed *Niſâb*, in that caſe, ſtill remains reſponſible for the *Zakât* due upon it; whilſt others maintain that, in this inſtance alſo, he is not reſponſible, becauſe the *Niſâb* does not here appear to have been deſtroyed by him.

duces an exemption from

If, after *Hâwlan Hâwl*, a portion of a *Niſâb* (ſuch as a *third* for inſtance) ſhould be deſtroyed, the claim of *Zakât* is proportionably deſtroyed,

A partial de

portionable exemption.

deſtroyed, in the ſame manner as where the whole *Niſâb* is deſtroyed; in which caſe the whole *Zakât* drops.

*Zakat* may be paid in advance.

If the proprietor of a *Niſâb* ſhould pay the *Zakât* upon it, before *Hawlân Hâwl*, it is lawful, becauſe he has here paid it during the exiſtence of the creative principle of obligation to *Zakât*, which is underſtood in his poſſeſſion of a *Niſâb*; this payment, therefore, is approved, the ſame as a diſcharge of a debt, under the exiſtence of its cauſe; as where a *Mohrim*, for inſtance, pays expiation for wounding game whilſt the animal is yet alive. This doctrine is controverted by *Mâlik*.

If the proprietor of a ſingle *Niſab* ſhould, before *Hawlân Hâwl*, make payment of *Zakât* upon the ſame for a certain number of years *in advance*, or ſhould pay a *Zakât*, upon a certain number of additional *Niſâbs*, it is approved, becauſe the firſt *Niſâb* is the *original* with reſpect to the cauſe of the obligation of *Zakât*, and any thing beyond that is as a *dependant*.

## CHAP. III.

### Of ZAKÂT from Perſonal Effects.

### SECT. I.

#### *Of the* ZAKÂT *of Silver.*

No *Zakât* due on leſs than 200 *dirms*.

No *Zakât* is due on leſs than two hundred *Dirms**, becauſe the prophet has ordained that there ſhall be no *Zâkat* upon fewer than five *Awkiyat*†, and an *Awkiyat* is valued at forty *Dirms*.

* A ſilver coin, value about two pence ſterling.

† An ounce of ſilver; or a ſilver coin of that weight, value between ſix and ſeven ſhillings.

The

THE *Zakât Niſâb* of ſilver is two hundred *Dirms*: and if a man become poſſeſſed of two hundred *Dirms*, and the *Hawlân-Hâwl* be completed, the *Zakât* due upon it is five *Dirms*, becauſe the prophet wrote to *Maaz*, ſaying, "*Upon two hundred* DIRMS *take a* "ZAKÂT *of five* DIRMS; *and upon twenty* MISKALS *of gold, half a* "MISKAL."— and upon 200 at the rate of two and an half per cent.

(No *Zakât* is due upon any exceſs above the two hundred *Dirms*, till ſuch exceſs amount to *forty*, upon which the ZAKÂT is one *Dirm*: and upon every ſucceeding forty the ſame *Zakât* is due, but not on fewer than forty.) This is according to *Haneeſa*. The two diſciples have ſaid that a proportionate *Zakât* is due on whatever exceſs may occur over and above two hundred *Dirms*;) and *Shafeï* coincides in this opinion, becauſe in the traditions of *Alee* it is related that the prophet has ſo ordained it; and alſo, becauſe *Zakât* is rendered as a return of gratitude for the bleſſings of Providence; and the reaſon why it is expreſſed as a condition, in the beginning of this book, that the property, in order to cauſe an obligation of *Zakât*, amount to a *Niſâb*, is that the proprietor may thence appear to be in eaſy circumſtances; but where, from his being poſſeſſed of a *Niſâb*, this appears to be already the caſe, it is not requiſite that any exceſs amount to a *Niſâb*; and hence *Zakât* is due upon ſuch exceſs proportionably, whatever its amount may be. and at the ſame rate upon every *forty* above two hundred.

OBJECTION.—This would lead to a concluſion that, in the *Zakât* of cattle, the ſame is due upon any exceſs under a *Niſâb*; whereas the rule is otherwiſe, no *Zakât* whatever being due upon ſuch exceſs, ſince that is conſidered as *Afoo*, or *exempt*.

REPLY.—Such is the concluſion from analogy; but the exceſs in cattle is made *Afoo*, becauſe, if a proportionate *Zakât* were to be levied upon it, this would neceſſarily induce a copartnerſhip in the ſubject, by the proprietor admitting the *claimant* of *Zakât* to a ſhare in it:—for inſtance, the *Zakât* upon *twenty-five camels* is one year-

ling colt; now, if *Zakât* were due upon exceſs camels, and the drove conſiſt of *twenty-ſix* there would be a *Zakât* upon this *one* exceſs camel of the twenty-fifth part of a yearling colt, which is not payable in any way than by admitting the claimant to a partnerſhip in ſuch colt; and this partnerſhip, being *compulſive*, is *illegal*; but *plate* or *caſh* not being liable to the ſame objection, a *Zakât* is due, proportionably, upon any exceſs whatever over *two hundred Dirms*.

Rules reſpecting *ſilver*.

4. It is to be obſerved that the *Niſâb* of ſilver of two hundred *Dirms* calculated by the *Wazn-ſebbâyat*, or ſeptimal weight (which is in the proportion of ten *Dirms* to ſeven *Miſkals*), as this was the weight uſed in the tribunal of *Omar*, and that of the *Dirm* is thence

5. Those *Dirms* in which ſilver predominates are to be accounted as ſilver; and the laws reſpecting ſilver apply to them, although they ſhould contain ſome alloy; and the ſame rule holds with all articles whatever falling under the denomination of *plate*, ſuch as cups, goblets, and ſo forth; but *Dirms*, in which the alloy predominates, are not to be accounted as *ſilver*, but only as *trading property*, eſtimable by its real value, to which alone regard is to be had; and accordingly, if the value of them amount to a *Niſâb*, they are ſubject to *Zakât*, provided there be an intention of trafficking in them; as is the condition with reſpect to all other chattels. In all plate, therefore, in which the alloy prevails, reſpect is to be had to the intention of trafficking in it, excepting where the ſilver contained in it amounts to a *Niſâb*, in which caſe the intention of trade is not a condition, nor is any regard paid to the eſtimated value, becauſe in actual ſilver no reſpect is had to either of theſe. The above caſe is thus ſtated; becauſe money always contains a ſmall portion of alloy, as pure ſilver is unfit for coinage, ſince, without being hardened by an addition of ſome baſer metal, it cannot retain the mint impreſſion; but the alloy

is

is generally in the ſmaller proportion; regard therefore is had to exceſs; that is to ſay, if the proportion of *ſilver* be the greater it is accounted as ſilver, but not if the *alloy* be in greater proportion, (that is, in a proportion above a moiety of the whole weight.)

## SECT. II.

### *Of the* ZAKÂT *of Gold.*

(THERE is no *Zakât* on fewer than twenty *Miſkals* of gold, this ſum being the ſmalleſt that conſtitutes a *Niſâb* in that metal; and the *Zakât* upon twenty *Miſkals* of gold is one half *Miſkal*, when the *Hawlân-Hâwl* therein becomes eſtabliſhed, on the authority of the tradition before quoted.—By the *Miſkal* * here mentioned, is to be underſtood that which weighs in the proportion of ſeven *Miſkals* to ten *Dirms*; and the *Miſkal* conſiſts of twenty *Kerât* †, and the *Kerât* of five grains.)

No upon leſs than 20 two and an half per cent.

(WHEN the quantity of gold exceeds twenty *Miſkals*, on every four *Miſkals* of ſuch exceſs a *Zakât* of two *Kerâts* is due, becauſe the *Zakât* due is a fortieth of the whole, and two *Kerâts* are the fortieth of four *Miſkals*; and upon any exceſs ſhort of four *Miſkals* no *Zakât* is due, according to *Haneeſa*. The two diſciples hold that on every exceſs there is a proportionable *Zakât*, the ſame as mentioned in the preceding ſection; and the foundation of their difference in opinion is alſo the ſame here as was there recited, to wit, *Haneeſa* holds that broken numbers are free of impoſt, whereas the two diſciples maintain the contrary opinion. The ground upon which *Haneeſa* proceeds, in the rule here recited, is this: the legal value of a *Deenar* is ten *Dirms*, and a *Deenar* and *Miſkal* are of the ſame weight; the value of four *Miſkals* in gold is therefore *forty Dirms*; and conſequently no

and at the ſame rate upon every *four* above twenty.

* A dram and a half: alſo a *coin* of that weight.

† A *Carat*; the twenty-fourth part of an ounce.

*Zakât* is due upon fewer than four *Miſkals*, ſince theſe ſtand the ſame as forty *Dirms*: and it has been already ſhewn that nothing ſhort of forty *Dirms* is ſubject to *Zakât*, on account of the tradition of *Amroo Bin Khurrm*, as before recited.

General rule. ZAKÂT is due upon gold and ſilver bullion, which is termed *bur*: and in like manner upon ornaments or utenſils of gold or ſilver, whether the uſe thereof be allowable (ſuch as *rings*, and ſo forth) or otherwiſe *.—*Shafeï* maintains there is no *Zakât* upon the gold or ſilver ornaments of women, nor upon rings worn by men, the uſe of which is allowable, and which are therefore the ſame in this reſpect as clothing or articles of apparel.—The argument of our doctors is, that the cauſe of the obligation to *Zakât* ſtill continues in the preſent caſe:—moreover, articles of gold and ſilver do, in their own nature, afford an argument of increaſe in the ſubject, ſince theſe metals are brought into uſe principally for the purpoſe of facilitating exchanges by traffick, which affords an argument of increaſe; and it is the *virtual* and not the *actual* increaſe in any ſubject that creates the obligation to *Zakât* upon it; contrary to the caſe of articles of apparel, which afford no argument or probability of increaſe.

## SECT. III.

### *Of the* ZAKÂT *of perſonal Chattel Property* †.

*Zakât* due upon all *merchandize.* ZAKÂT is due upon articles of merchandize, of whatever deſcription, where the value amounts to a *Niſâb* either of gold or ſilver, becauſe

* This alludes to prohibitions againſt the uſe of the precious metals in certain articles of perſonal ornament and houſehold furniture, which have been at various times iſſued by the prophet and his followers as checks upon luxury. (See *Abominations.*)

† In the original, perſonal *chattels* are expreſſed by the terms *Rakht* and *Matâ*, of which it is not eaſy to give any literal tranſlation; they expreſs, in general, all articles which appertain to perſonal eſtate or effects [*Mâl*]: articles of gold and ſilver, it is true, do alſo fall

becauſe the prophet ordained that articles of merchandize ſhould be appraiſed, and that a *Zakât* be paid on the ſame, in the proportion of five *Dirms* upon every two hundred *, as the proprietor has prepared and keeps them with a view to increaſe, ſo that they reſemble gold and ſilver, which the law holds to be kept for the ſame purpoſe; and, as *Zakât* is due upon the latter, it is in like manner due upon the former: but the intention of trade in theſe articles is made a condition, in order that it may be aſcertained that they are kept with a view to *increaſe*. *Mohammed* ſays that, in eſtimating the value of articles of merchandize with a view to the impoſition of *Zakât* upon them, they ſhould be reſolved into ſuch *Niſâbs* as may be moſt advantageous to the poor; thus if, in valuing an article by *Dirms*, it would amount to a *Niſâb* of *ſilver*, and in valuing the ſame by *Deenars*, it would *not* amount to a *Niſâb* of *gold*, it muſt be eſtimated by *Dirms*; and, *vice verſa*, if its value ſhould appear to amount to a *Niſâb* of gold, it is to be eſtimated by *Deenars*.—The compiler of the *Hedâya* obſerves that there is one opinion recorded from *Haneeſa* to the ſame effect. *Mohammed* again, in the *Mabſoot*, has ſaid that the proprietor of the article has it in his option to eſtimate it at whatever ſpecies of *Niſâb* he pleaſes, becauſe gold and ſilver are ſtandards, and in eſtimating the value of effects are both equally proper.—It is recorded as an opinion of *Aboo Yooſaf*, that an article ſhould be eſtimated by that with which it was purchaſed: thus, if it has been purchaſed with *Dirms*, it is to be appraiſed in *Dirms*; and if with *Deenars*, it is to be appraiſed in *Deenars*: and if it ſhould have been purchaſed with any other than either of theſe, it is to be eſtimated in money of the moſt general currency.—It is on the other hand recorded, as an opinion of *Mohammed*, that whatever the purchaſe may have been made with, the eſtimate is to be in *current money*, as

Mode of aſcertaining the *Niſâb* of merchandize

fall under this general deſcription of *Rakht* and *Matâ*; but they are introduced under a different head, as the laws of *Zakât*, with reſpect to them, are of a peculiar nature, and ſuch as do not affect or apply to other articles of perſonal property.

* To wit, at the rate of two and an half per cent.

above,

above, in the ſame manner as that of property forcibly ſeized, which is thus eſtimated in all caſes.

Property not exempted by an intervening defect in it.

If a *Niſâb* be complete in the beginning of the year, and alſo at the end, *Zakât* does not drop on account of its having been defective at any time *within* that period; becauſe it is difficult to aſcertain its completeneſs through the intermediate ſpace; moreover, in the commencement of the year its completeneſs is requiſite, in order to the eſtabliſhment of the cauſe of obligation, and ſo alſo at the *cloſe* of the year, in order to *Zakât* becoming due; but it is not ſo within the interval.

Other chattel with money or bullion to form a *Niſâb:*

The value of perſonal effects, or other articles, may be united or ſilver; that is to ſay, if (for inſtance) the proprietor ſhould have effects eſtimated at the value of one hundred *Dirms*, and alſo one hundred *Dirms* in money, the value of the effects, as above, muſt be added to the one hundred *Dirms*, ſo as that the whole may make one *Niſâb*; and *Zakât* is due thereon, becauſe the obligation to *Zakât*, in ſuch property, is occaſioned by the circumſtance of its being kept with a view to traffick, although the ſhape in which it is ſo kept be different with reſpect to each of the two deſcriptions of it, traffick in *chattels* being eſtabliſhed by the act of the individual, but that in *money* by the conſtruction of the law.

and alſo ſilver with gold.

Gold and ſilver may in the ſame manner be united, both being in effect of one nature, as ſtandards of eſtimation, and the poſſeſſion of each equally cauſing the obligation to *Zakât*.

13.

Gold and ſilver may be united, according to *Haneeſa*, in reſpect to their *value**; but, according to the two diſciples, in reſpect to their

* That is to ſay, may be both reſolved into one *Niſâb*, not by the reſpective weight of *each*, but by a general valuation of *both*.

*parts:*

*parts*: and the conſequence of this difference of opinion is, that if a man were poſſeſſed (for inſtance) of one hundred *Dirms* in ſilver, and five *Miſkals* of gold (the value of which would amount to one hundred *Dirms*), this perſon would be ſubject to *Zakât*, according to *Haneefa*, but not ſo according to the diſciples; for theſe latter ſay that, in aſcertaining the *Zakât* of gold and ſilver, regard is to be had to the *quantity* only, and not to the *value*; whence it is that *Zakât* is not due upon a veſſel of ſilver, where the *weight* is ſhort of two hundred *Dirms*, although the *value* ſhould be to that amount, or beyond it: *Aboo Haneefa*, on the other hand, contends that gold and ſilver are united with each other on account of their homogeneity, which is eſtabliſhed between them in reſpect to their *value*, but not in reſpect to their *ſubſtance*.

## CHAP. IV.

### Of the LAWS reſpecting thoſe who come before the *Collector*.

Declarations reſpecting property, when made *upon oath*, to be credited:

IF a perſon come with his property* before the collector and ſay, "It is ſo many months ſince this property has come into my poſ-"ſeſſion, and a year has not yet elapſed;" or, "I am indebted ſo "and ſo," and make oath of the ſame, the collector is to credit him, and muſt not exact any thing, becauſe this perſon ſtands as a defendant denying his obligation to *Zakât*; and the declaration of a defendant, when ſupported by his oath, muſt be credited. So alſo, if a perſon were to declare that he had already paid the *Zakât* upon ſuch property to a former collector, his declaration muſt be credited, becauſe the collector, in taking *Zakât*, acts merely as a *Truſtee*, and

* Meaning *merchandize*, but not *cattle*; and the word bears the ſame ſenſe throughout this chapter.

the

the *Zakât* comes to and remains with him as a *depoſit*; and the declaration of the above perſon amounts only to his having depoſited the truſt in its proper place, and this is to be credited, provided there ſhould have been another collector there within that year; but if, on the contrary, there ſhould have been no other collector on that ſtation within the current year, the affirmation and oath are not to be credited, ſince, in this caſe, the falſehood is manifeſt. And, in like manner, if the proprietor were to declare that he had already paid the *Zakât* upon ſuch property in his own city, by having there beſtowed the ſame upon the poor, his declaration muſt be credited, becauſe a proprietor, whilſt in his own city, is entruſted with the payment and diſtribution of the *Zakât* upon his property, and he continues to be ſo until he comes forth and brings his property before the collector, when the authority for levying *Zakat* reſts with the latter, as the property and the proprietor do both then come within his juriſdiction *.—In ſhort, in all theſe four inſtances, the declaration of the proprietor is to be credited. And in the ſame manner the declaration of a proprietor, reſpecting *Zakât* upon cattle, is to be credited in the three firſt inſtances, but it is not ſo in the fourth, although he ſhould confirm his atteſtation by an oath. *Shafeï* maintains that it is to be credited here alſo, as the proprietor appears, by the tenor of his declaration, to have rendered the right duly to the claimant.—In oppoſition to this, our doctors argue that the right of exacting the *Zakât* upon cattle appertains ſolely to the *Sultan*, and the proprietor is not at liberty to preclude the *Sultan*'s right: contrary to the caſe of property of other nature, ſuch as is termed, in the language of the law, *Bâtena* [*internal*, or *domeſtick*,] the rendering of the *Zakât* upon which is committed to the proprietor.—It is to be obſerved that ſome have ſaid, reſpecting cattle, that the *Zakât* which was paid by the proprietor himſelf in the firſt inſtance is the true obligatory *Zakât*, and that whatever may be afterwards exacted of him

* This comment upon the law (as in many other inſtances) has reference to ſome local cuſtoms or circumſtances which cannot now be aſcertained.

under

under that denomination, is conſequently an oppreſſion; whilſt others maintain that this latter is to be conſidered as the obligatory *Zakât*, and the former to be held as an act *Nifl*, or *gratuitous*; and this laſt doctrine is approved.—Now a queſtion here ariſes, as the aſſertion of the proprietor is to be credited, whether he ought to produce his writing of diſcharge [voucher] or not:—*Mohammed*, in the *Jama Sagheer*, has not required this as a neceſſary condition; but in the *Mabſoot* he has made it a condition; and this latter opinion (according to a tradition of *Hooſn*) is that of *Aboo Haneefa*. The principle of this doctrine is, that as the proprietor pleads a diſcharge, and as he poſſeſſes a voucher of ſuch diſcharge, he ought conſequently to produce it; whilſt the principle of the doctrine maintained in the *Zâhir-Rawâyet* is that as one writing reſembles another writing, they are not admitted as proofs.

declarations of *Zimmees* to be credited:

In whatever inſtance the declaration of a Muſſulman, with reſpect to *Zakât*, is to be credited, that of a *Zimmee* * muſt be ſo likewiſe, becauſe a *Zimmee* is ſubject to double the impoſt of a Muſſulman; and hence all the conditions which are to be regarded, with reſpect to the property of the latter, muſt be equally ſo with reſpect to that of the former.

but not thoſe of *aliens*.

If an alien appear before the collector of the *Sultan* with articles of merchandize, it behoves that officer to exact from him what is uſually exacted of aliens, without paying any regard to his declarations in thoſe points in which the declarations of a Muſſulman or *Zimmee* are to be credited, although he ſhould ſwear to the ſame, excepting where he declares, concerning his female ſlaves, that thoſe ſlaves are his *Am-Walids* †; for, in all other ſpecies of property, his affirmation is not worthy of attention, becauſe the impoſt which is thus levied

* An infidel ſubject of the Muſſulman government.

† Slaves who have born children to him.

upon him is not in fact *Zakât* *, but rather a contribution exacted as a return for the protection he receives, and which is requiſite for the ſafeguard of whatever he may poſſeſs; it is therefore proper to take from him the impoſt uſually levied upon aliens, except where he declares, as above, with reſpect to his female ſlaves, that they are his *Am-Walids*, which declaration muſt be attended to and credited; becauſe, if an alien were to declare, concerning any other perſons who accompany him, that "they are his children," his declaration is approved; and ſo, in like manner, with reſpect to his female ſlaves, as the rights of the *Am-Walid* are derived from the eſtabliſhment of the child's deſcent, and conſequently the female ſlaves do not appear to be *transferable property*; and nothing but transferable property is an object of taxation.

Proportion levied upon merchandize.

FROM a *Muſſulman* is taken the fourth of the *tithe* of his property; and from a *Zimmee* the half of the *tithe*; and from an alien the *tithe*; *Omar* having inſtructed his collectors to this effect.

*Zakât* to be levied on the property of *aliens*, to the value of fifty *Dirms*, or upwards.

IF an alien ſhould come before the collector with property to the amount only of *fifty Dirms*, nothing whatſoever is to be exacted of him, except where aliens exact contribution upon an equally ſmall property of muſſulmans; in which caſe a ſimilar impoſt muſt be laid upon this amount, the property of an alien, becauſe what is taken from aliens is merely in the way of *reciprocity*: contrary to the caſe of *Muſſulmans* or *Zimmees*, as what is levied upon them is in fact *Zakât*, either ſingle or twofold, whence it is indiſpenſable that the property with them amount to a *Niſâb*.—This is the doctrine of the *Jama Sagheer*. In the *Mabſoot*, under the title *Zakât*, it is written that if the property of an alien ſhould be *ſmall* (that is, ſhort of a *Niſâb*,) nothing whatever is to be exacted of him, let the cuſtom of aliens, in this reſpect, be what it may, becauſe a proportion of pro-

* Becauſe, as being an act of piety, an infidel is held to be incapable of paying wherefore it cannot be conſidered in that ſenſe, although it be exacted under that mination.

perty not amounting to *Niſâb* is invariably to be conſidered as *Afu* or exempt; and alſo, becauſe a trifle of this ſort is not ſuppoſed to ſtand in need of the ſtate's protection, as travellers muſt neceſſarily carry with them ſmall ſums for the purpoſe of expences, and robbers do not pay any attention to ſuch trifles, not conſidering them objects of their purſuit.

Proportion of property of aliens:

If an alien come before the collector with two hundred *Dirms*, and it be uncertain what tax foreigners levy upon a ſimilar property of *Muſſulmans*, in this caſe a *tithe* is to be taken; and if it be known that foreign ſtates exact only a *twentieth* or a *fortieth*, a ſimilar proportion is to be taken; but if it be known that they take *the whole*, yet the *Muſſulman* collector muſt not act accordingly, becauſe this is an act of rapine. And if it be known that they take nothing of the *Muſſulmans*, it is then proper that nothing be taken from them, in order that the *Muſſulman* merchants, travelling into foreign countries, may remain free of impoſt; and alſo, becauſe where foreign ſtates obſerve kindneſs towards *Muſſulmans*, and exact nothing of them, it is requiſite that nothing be exacted of them in return, as it behoves the *Muſſulmans* to preſerve a character of benevolence towards all men.

Muſt not be exacted *re*

If an alien come before the collector, and the latter exact the *tithe* of him, and he ſhould again paſs near the ſtation of the collector, yet nothing more is to be exacted till the completion of the *Hawlán-Háwl*, becauſe, if the *tithe* were to be repeatedly levied within the year, the property would be *annihilated*, and the impoſt is laid for the purpoſe of *protecting* the property; moreover, the protection which is firſt granted continues until the beginning of a new year, when the *Amân*, or protection, commences *de novo*, becauſe it is not permitted to an alien to remain in a *Muſſulman* territory beyond the ſpace of a year. But the tax may be again demanded of him at the expiration of the *ſecond* year, as this does not tend to annihilate his

property.—What is here advanced proceeds upon a ſuppoſition that the alien has not returned into his own country within the period of the year, after his payment of the *tithe*, as aforeſaid: but if he ſhould return thither, it is to be again exacted of him upon his re-entering the *Muſſulman* territory, even though he were to go there on the very day of payment, and to come again into the *Muſſulman* territory on the ſame day, becauſe every time he thus returns into the *Muſſulman* territory, he returns under the virtue of a new protection; moreover, the repetition of exaction upon his return cannot be conſidered as tending to annihilate his property, ſince on every return he is ſuppoſed to acquire a profit.

*Zakât*-tithe

If a *Zimmee*, or infidel ſubject, paſs the ſtation of a collector with wine and pork, the collector is to levy a *tithe* upon the former article, but not upon the latter. By levying a *tithe* upon the wine, is to be underſtood (*not* upon the *actual article*, but) upon the *eſtimated value* of the article. The diſtinction here made between wine and pork, is taken from the *Zâhir-Rawâyet*.—*Shafeï* ſays, that nothing whatever ſhould be levied on either pork or wine, neither being legally ſubjects of eſtimation. *Ziffer*, on the other hand, argues that it ſhould be levied equally upon both, as both do equally conſtitute property among *Zimmees*. *Aboo Yooſaf* alſo ſays that the tax ſhould be levied upon both, provided that they be found together upon the *Zimmee*; but poſſibly he is here to be underſtood as making the pork an appendage to the wine, whence it is that he adds "if the *Zimmee* were to come before the "collector with either wine or pork, ſingly, the tenth would be levied "on the *former*, but not upon the latter."—The reaſons upon which the *Záhir Rowáyet* proceeds, in this caſe, are twofold; FIRST, the eſtimated value of a thing which falls under the deſcription of *Zooâtal-Keem* ſtands as the identical thing itſelf, and pork is of this claſs; whereas the value of an article belonging to the claſs of *Zooâtal-Imſâl* does not ſtand in place of the identical articles, and wine is of this deſcription; SECONDLY, the right of exacting the tenth is veſted in the

the collector in consequence of the protection afforded by the state; and a *Mussulman* has a right to take measures for the preservation of his wine, for the purpose of making vinegar of the same, whence it is also lawful for him to protect the wine of a *Zimmee*; whereas he is not permitted to take any of his pork, insomuch that if a *Zimmee*, being possessed of pork, were to be converted to the faith, it would be incumbent on him to destroy it or throw it away; and a *Mussulman* not being allowed to take care of his *own* pork, it follows that he is not competent to the protection of the pork of *others*; and hence the state not being considered as affording protection to the pork of a *Zimmee*, no tax can be levied upon it.

IF a boy or a woman of the *Toghleb* tribe pass the station of a collector, with property, nothing is to be taken from the former, but he must exact from the latter the usual proportion of persons of that tribe, according to what is said concerning the *Zakât* of cattle.

IF a person come to the collector with one hundred *Dirms*, declaring that he has another hundred at home, and that the *Hawlân-Hâwl* has elapsed, yet the collector is not at liberty to take *Zakât* either upon those hundred or upon the other; because the one does not come under his protection, and the other is short of a *Nisâb*.

IF a person come to the collector with two hundred *Dirms*, which are with him as a *Bazât*, the collector must not impose any *Zakât* upon it,—because this person is not empowered by the actual proprietor to pay *Zakât*: and so also, if that property were in his hands in the way of *Mozâribat*.—This is the doctrine of the two disciples; and *Haneefa* has also subscribed to it; and the reason upon which it is founded is that the *Mozârib* is neither the actual proprietor, nor the representative of the proprietor, with respect to the payment of *Zakât*; wherefore *Zakât* is not to be required, except where the *Mozârib*, by the nature of the contract, derives such a proportion of profit from the

No *Zakât* to be levied on *Bazât* or *Mozâribat* property.

the capital ſtock entruſted to him as amounts to a *Niſâb*; in which caſe a proportionable *Zakât* muſt be levied, as he is the actual proprietor of ſuch proportion.

a *Mazoon* ſlave, not indebted to any perſon, come before the collector with two hundred *Dirms*, the *Zakât* muſt be levied.—*Aboo Yooſaf* ſays, that it is not known whether *Haneefa* ever retracted this opinion, and delivered another (that the collector ſhould *not* levy *Zakât* upon a *Mazoon*) or not; but from his ſubſcribing to the opinion of the two diſciples in the preceding caſe, (to wit, that no *Zakât* is to be levied upon a *Mozârib*,) it may be preſumed that he has alſo agreed that none is to be levied upon a *Mazoon*, as *he* is not the *proprietor*, but his *Maſter*, the former having only a power of tranſaction, with reſpect to the property in queſtion, ſo that he ſtands in the ſame predicament with a *Mozârib*.—Some have ſaid, that between a *Mazoon* and a *Mozârib* there is this difference, that the former tranſacts with the property on *his own* account, and hence is ſubject to its obligations; for, as he cannot have recourſe to his maſter, but may be ſold, in order to the fulfilment of ſuch of its obligations as he is legally liable to, it follows that he *does* ſtand in need of protection for it upon *his own* account: contrary to a *Mozârib*, for he manages the *Mozâribat* ſtock in the manner of an *agent*, and hence whatever may attach to him in the obligations thereof he takes again from the proprietor, wherefore the owner of the property is the perſon who requires protection for it: and there thus appearing an eſſential difference between a *Mazoon* and a *Mozârib*, no inference can be drawn of *Haneefa*'s opinion reſpecting the former, from what he has conceded concerning the latter.—It is to be obſerved that if the maſter of the *Mazoon* accompany him, the collector muſt take the *Zakât* (*not* from the *Mazoon*, but) from the *maſter*, he being the actual proprietor; the *Zakât*, therefore, is to be taken from him, except where it appears that the ſlave is indebted to ſuch an amount as comprehends the property in queſtion; in which caſe no *Zakât* whatever can be required

unleſs accompanied by their owners.

quired of the maſter, ſince (according to *Haneefa*) the maſter, in this circumſtance, has, in fact, no actual property in the *Mazoon*'s hands;—and (according to the two diſciples) the right of another is connected with the property, namely, the *debt*,—and conſequently no *Zakât* is due upon it, they holding that debt upon a property forbids the exaction of *Zakât*.

If a merchant, being in a country where the *Schiſmaticks* prevail, go to a collector of the *Schiſmaticks*, and there pay the *Zakât* upon his property, and afterwards come before a collector of the *Orthodox*, the latter may again exact *Zakât* of him, becauſe, in going before a collector of the *Schiſmaticks*, and there paying *Zakât*, he was in fault.

## CHAP. V.

### Of *Mines* and buried *Treaſures*.

There are three legal terms which particularly belong to theſe ſubjects, and which are employed for the uſe of diſtinction; *Mâdin*, *Kanz*, and *Rikaz*: by *Mâdin* is underſtood the place in which the *ore* or *metal* is naturally produced; by *Kanz*, treaſure, or other property, buried in the ground *; and *Rikaz* applies equally to either, to *Mâdin* literally, and to *Kanz* metaphorically.

Mines ſubject to a *Zakât* of

If there be diſcovered, in *Kherâjee* or *Aſhooree* lands, (that is, lands ſubject to *tithe* or *tribute*,) a mine of gold, ſilver, iron, lead, or

* This is a common practice in all parts of *Aſia*. Treaſures are hidden in the ground on the commencement of a war, or other troubles; and it frequently happens that, the depoſitors periſhing, the treaſure remains concealed, perhaps, for many years, till it be diſcovered by accident, and at a time when no legal claimant can be found.

copper,

copper, it is ſubject to a *Zakât* of one *fifth*, according to our doctors; and this *Zakât* is termed *Khams* *.—*Shafeï* has aſſerted that nothing whatever is due upon a mine, becauſe it is free to the firſt finder indifferently, and is therefore the ſame as game; but yet, if the metal be produced from the mine, it is ſubject to *Zakât* independent of *Hawlân-Hâwl*, that having been conſtituted as a condition of *Zakât* merely to afford time for increaſe, whereas here the identical ſubject itſelf (the metal) is increaſe of property; wherefore the lapſe of *Hawlân-Hâwl* is not in this inſtance required. The arguments of our doctors, on this ſubject, are twofold;—FIRST, the ordinance of the prophet, who directed that upon *Rikaz* there ſhould be impoſed a fifth; and the term *Rikaz* applies to mines, as was already demonſtrated;—SECONDLY, the mine, as being diſcovered in *tithe* or *tribute* lands, muſt at one period have been the property of the infidels, and afterwards have fallen into poſſeſſion of the *Muſſulmans* by conqueſt, wherefore the whole falls under the deſcription of *Ghaneemat*, or plunder; and one fifth is due upon plunder:—contrary to the caſe of *game*, the property in which cannot be traced to any antecedent proprietor.

OBJECTION.—If the mine be thus reſolved into *plunder*, it ſhould follow that, as ſuch, the product of it is the common property of all the warriors.

REPLY.—The property of the warriors is eſtabliſhed in the mine conſtructively, in virtue of the eſtabliſhment of their property in the *ſurface* of the territory: but the diſcoverer of the mine is the *actual acquirer* of it; wherefore the property of the warriors is eſtabliſhed in one fifth, their right being only *conſtructive*; and that of the diſcoverer is eſtabliſhed in the remaining four fifths, as his right is *actual*; whence it is that thoſe four fifths are reſerved to *him*.

Caſe of a

IF a perſon diſcover a mine within the precincts of his own habitation, nothing is due upon it, according to *Haneeſa*. The two

* Literally a *fifth*. It is elſewhere tranſlated *double tithe*.

diſciples

diſciples hold that a *fifth* is due upon *that* alſo, in conformity to the traditionary ordinance already quoted, becauſe that applies equally to the preſent caſe. *Haneeſa* argues upon this, that a mine is a conſtituent part of the land in which it lies, as being ſuppoſed to have been originally created with it, and nothing being due upon the ground *generally*, it follows that nothing is due upon any *particular portion* of it, (ſuch as the mine, for inſtance,) becauſe a *part* does not differ from the *whole*: contrary to the caſe of a *Kanz*, which is no conſtituent part of the ſoil, as not having been originally created with it, but depoſited there by ſome perſon.

or in lands which are private property:

IF the ſaid mine be diſcovered, *not* actually in the houſe of the *finder*, but in lands, ſubject either to *tribute* or *tithe*, which are his own eſpecial and excluſive property, in this caſe there are two opinions recorded of *Haneeſa*'s doctrine; one, that no *Zakát* whatever is due, any more than if the mine had been diſcovered within the houſe of the finder; another, that a *fifth* is due upon it: the former of theſe opinions is mentioned in the *Mabſoot*, and the latter in the *Jama Sagheer*: and the principle upon which the latter opinion proceeds is, that between a houſe and lands there is a manifeſt diſtinction, becauſe the ground on which a houſe ſtands is not ſuppoſed to be any way productive of the fruits of the earth (whence it is that no tax of any kind is levied upon it, inſomuch that, if a date tree were by accident to grow within a dwelling, and to produce fruit, yet nothing is due upon the fruit,) whereas *lands*, on the contrary, as being productive, are not thus exempted from *tithe* and *tribute*, and conſequently a *fifth* is due upon all mines which are found in them.

and of buried treaſures.

IF a perſon find a *Kanz*, or depoſit, of buried treaſure, a *fifth* is due upon it, according to the opinions of all the doctors, in conformity to the traditionary ordinance already quoted, the expreſſion there uſed [*Rikaz*] applying to *Kanz*. It is to be obſerved, however, that if the treaſure in queſtion be *coin*, bearing the impreſſion of *Muſſulman*

money, (ſuch as the words of the *Creed* *) the *Kanz* ſtands as a *Lookta*, or trove-property, the laws concerning which are explained elſewhere:—yet, if it bear the impreſſion of infidel coinage, (ſuch as the image of a ſaint or idol,) a *fifth* is due upon it in all caſes,—that is to ſay, whether a perſon may have found the ſame in his own grounds, or in thoſe of another, or in common lands which are not the property of any perſon; and the *fifth* is thus due upon the authority of the traditionary ordinance to which we have juſt referred.—It is here proper to remark, that if the treaſure be found in common land, four fifths of it appertain to the finder, as having recovered it, becauſe the other warriors had no information concerning it, and of courſe no ſhare in the diſcovery; and conſequently he has an excluſive right to it:—and the ſame rule obtains if it be found in appropriated land, whether ſuch be his own property, or belonging to another, (according to *Aboo Yooſaf*,) becauſe the claim is eſtabliſhed in virtue of *ſalvage*, or *recovery*, and the treaſure has been recovered by the finder.—*Mohammed* and *Haneefa* maintain, on the contrary, that the treaſure is the property of him upon whom the *Imâm* had beſtowed the lands, originally, at the period of ſubjugation, who is termed the *Mokhuttut-le-hoo*, or firſt grantee, upon the principle that whoever has the firſt excluſive property in a ſoil is the true proprietor of whatſoever may be contained in it, although he ſhould not have obtained viſible poſſeſſion thereof,—the ſame as where a perſon catches a fiſh with a pearl in its maw, in which caſe he becomes the proprietor of the pearl, although he has not actually laid his hands upon it, nor knows of its being in the fiſhes belly †. And it is further to

* Meaning the *Kulma*, or *Muſſulman* Confeſſion of Faith, "*There is no* God *but one* "God, *and* Mohammed *is the prophet of* God."

† This is a caſe of ſome curioſity, and affords an inſtance (among a multitude of others) of points of law adduced in elucidation of paſſages to which they do not appear to have any immediate reference.---From the above it appears, that if a man were to catch a fiſh with a jewel in its belly, and were to ſell the fiſh, (not knowing what it contained) he would have a right to recover the jewel of the purchaſer.

be

be obſerved, that if the firſt grantee ſhould have ſold his lands, yet he does not forfeit his right to any *Kanz*, or buried treaſure, which may be afterwards diſcovered there, as that does not form a part of the ſoil, like mines, which, as being a conſtituent portion of it, upon a transfer by ſale become the property of the purchaſer. And if the *firſt grantee* be unknown, in this caſe, according to the opinion of the learned, the four fifths go to him who was the firſt known proprietor from the period of the eſtabliſhment of the *Muſſulman* faith, that is to ſay, him beyond whom no antecedent proprietor can be diſcovered.—And if the treaſure ſhould conſiſt of coin, the impreſſion of which is ſo far effaced as to render it doubtful whether it be *infidel* or *Muſſulman* money, in this caſe (according to the *Zâhir-Rawâyet*) it is to be conſidered as of the *former* claſs: ſome, however, have obſerved that, in modern times, it is held as *Muſſulman* coinage.

Of mines in a foreign country.

If a *Muſſulman* go under protection into a foreign country, and there find a *Rikaz* within the houſe of an infidel, whether it be a *Madin* or a *Kanz*, let him deliver the ſame up to the proprietor, in order that treachery and breach of faith may not be induced; becauſe whatſoever is in that country belongs of right to the people of it: but if he were to find the *Rikaz* in the open country or deſert, it belongs to him, no perſon having any excluſive right in it ſo as to make his appropriation of it an act of treachery: and here the *fifth* would not be due; as treaſure, thus found, does not bear the conſtruction of *plunder*, the perſon who finds it ſtanding as a *thief*, and not as a *warrior*.

Precious ſtones not to

No *fifth* is due upon turquoiſes, ſuch as are found in mountainous places; becauſe a turquoiſe is a ſtone; and the prophet has ſaid, "*Upon ſtones there ſhall be no* KHAMS."

Quickſilver

Upon quickſilver there is due a *fifth*, according to *Haneefa*, in his laſt opinion recorded upon this ſubject: contrary to the opinion of

but no or *amber*.

*Yooſaf*.—Upon pearls and amber there is no *fifth* due, according to *Haneeſa* and *Mohammed*.—*Aboo Yooſaf* maintains that upon thoſe, as well as upon all gems procured from the ſea, there is a *fifth*; becauſe *Omar* uſed to levy a *fifth* upon amber.—*Haneeſa* and *Mohammed* argue, that the depths of the ſea do not come under the deſcription of parts ſubjugated by conqueſt; and hence any thing procured thence cannot be defined *plunder*, although it ſhould conſiſt of *gold* or *ſilver*; and the caſe of *Omar* levying a fifth upon amber exiſted only where that article was caſt up by the ſea upon the ſhores; and here they alſo coincide that the *fifth* may be levied.

IF a perſon find, in common ground, a depoſit of chattel property, ſuch as veſſels or cloths, the ſame is the property of the finder; and there is a *fifth* due upon it, becauſe this comes under the deſcription of *plunder*, the ſame as gold or ſilver.

## CHAP. VI.

### Of ZAKÂT upon the Fruits of the EARTH.

A *tithe* due upon the product of lands watered by *natural* means

UPON every thing produced from the ground there is due a *tenth*, or *tithe*, which is termed *Aſhar*; whether the ſoil be watered by the annual overflow of great rivers, (ſuch as the *Oxus* and *Shyhoon*,) or by periodical rains; excepting the articles of *wood*, *bamboos*, and *graſs*, which are not ſubject to *tithe*.—This is according to *Haneeſa*. The two diſciples ſay that *tithe* is not due except upon ſuch things as are *permanently productive* *, which are ſubject thereto, provided the product amount to five *Wuſks*, or ſixty *Sâas*; and they further hold that *herbs* are not ſubject to *tithe*. From this it appears that the

* Such as *fruit-trees*.

difference

difference of opinion between *Haneefa* and the two diſciples exiſts with reſpect to two points in particular;—FIRST, the ſpecification of the quantity as a condition; SECONDLY, that of permanency in the ſubject. The argument of the two diſciples, with reſpect to the former of theſe, is twofold:—FIRST, the prophet has ordained that there ſhould be no *Zakât* on leſs than five *Wuſks:* SECONDLY, *tithe* being as *alms*, to render it obligatory it is requiſite that ſome *Niſâb* be aſcertained and eſtabliſhed, ſo as to confine the contribution to the *rich*.—The argument of *Haneefa* is that the prophet ordained that *an* ASHAR *ſhould be held due upon every thing produced from the ground*, which ordinance is general in its application, and without any ſpecification of quantity; and, with reſpect to the ordinance quoted by the two diſciples, it is to be taken as applying ſolely to articles of commerce; that is to ſay, that "*there is a* ZAKÂT *upon thoſe articles, as* MERCHANDIZE, *where the quantity amounts to five* WUSKS;" becauſe, in the time of the prophet, fruits were ſold by the *Wuſk*, and the value of a *Wuſk* was eſtimated at forty *Dirms*, ſo that the value of five *Wuſks* was two hundred *Dirms*, the amount of a *Niſâb* in eſtimated property:—and, with reſpect to their ſecond argument, the obligation to *tithe* upon the fruits of the earth is connected with what it yields only, without reſpect to the proprietor; (whence it is that a *tithe* is due upon the product of *Wokf*-lands,) how, therefore, ſhould any regard be had to the deſcription of the proprietor as being *rich*?

hence alſo it is that *Hawlân-Hâwl* is not requiſite in the preſent caſe, that having been eſtabliſhed for the purpoſe of aſcertaining *increaſe*; and the fruit of the earth does itſelf come under this deſcription.—The argument of the two diſciples, with reſpect to the ſecond point, is, that the prophet has ordained that, "*upon vegetables*" (that is, *herbs*) *no alms are due*;" and by *alms* is here to be underſtood *tithes*; as *Zakât* is not forbidden here, ſince it is due provided the property amount to a *Niſâb*.—In reply to theſe obſervations, the arguments of *Haneefa* are twofold;—FIRST, the tradition before quoted;—and, with reſpect to the ordinance adduced by the two

diſciples,

diſciples, it is to be obſerved, that by the term *Sadka* [alms] there mentioned, is to be underſtood ſuch alms as are taken by the collector, but not that contribution which falls under the denomination of *Aſhar*; and in this *Haneeſa* alſo agrees, that the collector is not to take *tithe* from thoſe articles;—SECONDLY, articles of product are often cultivated which are not of a permanent nature, ſuch as *melons* and *cucumbers*; and theſe are the increaſe of the earth: and the cauſe of obligation to the payment of *Zakât* upon land is *increaſe*: whence it is that the land is ſubject to *tribute*, and therefore *tithe* is alſo due: but, with reſpect to the articles of *wood*, *bamboos*, and *graſs*, the ground is not tilled or prepared for the cultivation of them; nay, it is uſual to clear them away:—yet, if a perſon were to till the ground with a view to the culture of ſuch articles, his land would be ſubject to *tithe*.

and an *half tithe* upon the product of lands watering lands which partake of both deſcriptions.

LAND watered by means of buckets, or machinery, or watering-camels, are ſubject to *half tithe* *,—according to *Haneeſa* and the two diſciples:—the latter, however, coincide in this, under the reſtriction, conditional, that the product be of a permanent nature, and that the quantity of product amount to five *Wuſks*; whereas *Haneeſa* does not ſpecify any ſuch condition.—The reaſon why ſuch lands are made ſubject to *half tithe* only is, that the expence of tillage greatly exceeds that of lands watered by rains, or by the periodical overflow of great rivers.

WITH reſpect to lands watered a part of the year by rivers and a part by labour, in regulating their proportion of impoſt, regard is to had to the greater portion of the year; that is to ſay, if the land be ſuch as is watered by rivers for the greater part of the year, the impoſt is a *tithe*; but, if it be watered for the greater part of the year by labour, it is only *half tithe*, or a *twentieth*.

* To wit, *a twentieth of the whole product*.

ABOO YOOSAF has ſaid that, upon every article the amount of which is not eſtimated by *Wuſks*, (ſuch as *ſaffron* and *cotton*,) *tithe* is due, provided its value be equal to that of five *Wuſks* of an article of the loweſt value ſo eſtimable, (ſuch as *millet* in the preſent times;) becauſe articles, the quantity of which the law does not hold to be eſtimable by *Wuſks*, can have their *Niſâb* aſcertained only by eſtimation of the value; as is the caſe with articles of merchandize.—*Mohammed*, on the other hand, alledges that *tithe* is due upon thoſe articles, provided their quantity amount to the number *five* of the higheſt ſtandard of aſcertainment of quantity with reſpect to each; for inſtance, cotton is weighed by *Mans* and *Hamls*, each *Haml* containing three *Mans*; a *Niſâb* of cotton therefore conſiſts of five *Hamls*; ſaffron, on the other hand, is weighed by *Dirms*, *Aſtars*, *Rutls*, and *Mans*; and the latter being the greateſt of theſe, a *Niſâb* of ſaffron, conſequently, conſiſts of five *Mans* weight.—The reaſon upon which *Mohammed* proceeds herein is, that the *Wuſk* is conſtituted the ſtandard of eſtimation of *Niſâb* in grain, &c. only on account of its being the largeſt ſtandard by which their quantities can be aſcertained; and the ſame principle operates with reſpect to all other articles.

A *tithe* due upon honey:

TITHE is due upon honey where it is collected in *tithe*-lands. *Shafei* maintains that nothing is due upon honey, becauſe that is an animal production, the ſame as ſilk, which being *tithe-free*, honey is ſo likewiſe.—The arguments of our doctors are twofold: FIRST, the prophet ordained that honey ſhould be ſubject to *tithe*; SECONDLY, bees collect their honey from bloſſoms and fruits, which articles being ſubject to *tithe*, it follows that *honey*, which is extracted from thoſe, muſt be ſo likewiſe: contrary to the caſe of ſilk-worms, becauſe thoſe feed upon leaves of trees, which are not ſubject to *tithe*. *Haneeſa* holds *tithe* to be due upon honey, whether the quantity be great or ſmall; he not regarding *Niſâb* as eſſential in this article.—*Aboo Yooſaf* has reported it as an opinion of *Haneeſa*, that the *Niſâb* of honey is to be aſcertained by eſtimate, according to his general tenet

upon

upon the ſubject, of *Zakât*: and he further ſays, that nothing is due upon honey, (unleſs the quantity amount to ten *Kirbs*, (a *Kirb* being fifty *Mans*,) becauſe this was the rule by which the tribe of *Syára* paid *tithe* on their honey to the prophet.) Again, it is related as an opinion of *Aboo Yooſaf*, that a *Niſáb* of honey conſiſts of five *Mans*. According to *Mohammed* the *Niſáb* in honey is five *Sirks*, (a *Sirk* containing thirty-ſix *Rutls*,) becauſe the *Sirk* is the largeſt ſtandard of quantity in honey, as the *Wuſk* is in grain. And the ſame of ſugar-cane; that is to ſay, according to *Mohammed*, *tithe* is due upon ſugar-cane where the quantity of ſugar produced from it amounts to five *Sirks*.

and upon wild honey and fruits:

Honey and fruits, collected in the wilderneſs, are ſubjects of *tithe*. This is the doctrine of the *Záhir-Rawáyet*. — It is related as an opinion of *Aboo Yooſaf*, that nothing whatever is due upon ſuch articles, becauſe the occaſion of obligation to *Zakát* is the land being of a productive nature, which is not the caſe in this inſtance.—The principle upon which the *Záhir-Rawáyet* proceeds herein is, that all that is required to conſtitute land being productive, is the circumſtance of its affording produce of any ſort; and produce does appear in the articles abovementioned.

and upon all the product of *tithe* lands, indiſcriminately.

Tithe is due upon all the produce of *tithe*-lands indiſcriminately; nor is any deduction to be made on account of the expenſe of men or cattle employed in tilling thoſe lands, becauſe the prophet has ordained that dues ſhould be different in proportion to the difference of expence, and alſo that lands watered by rain ſhall be ſubject to *tithe*, and thoſe watered by labour to *half-tithe*; wherefore the deduction of expence is needleſs.

and *double tithe* upon thoſe lands when held by *Toglebees*.

Upon *tithe* lands, poſſeſſed by perſons of the Togleb tribe, a twofold *Aſhar*, or *fifth*, muſt be levied; and in this all the doctors agree.—It is recorded, however, as an opinion of *Mohammed*, that upon

upon *tithe* lands which may have been purchaſed by a *Toglibee* of a *Muſſulman*, a *ſingle tithe* only ſhould be levied; he holding that the impoſition upon lands does not ſuffer any alteration in conſequence of a tranſition of the property.

Caſes of tranſition of property in land ſubject to *double tithe*.

IF a *Zimmee*, or infidel ſubject, purchaſe land of a *Toglibee*, from which *double tithe* had uſed to be collected, the *Zimmee* muſt alſo pay *double tithe* upon it. In this all our doctors coincide, becauſe it is lawful to require twice as much of a *Zimmee* as of a *Muſſulman*,—whence it is that, if ſuch an one were to come before the collector with merchandize, twice as much would be exacted of him as of a *Muſſulman*. And the ſame rule obtains (that is to ſay, the ſame proportion of *tithe* continues to be impoſed upon thoſe lands) where a *Muſſulman* purchaſes them of a *Toglibee*; or where a *Toglibee*, being the proprietor, becomes a *Muſſulman*. *Haneeſa* holds this opinion in all caſes, whether the lands had originally belonged to a *Toglibee*, or the *Toglibee* had purchaſed them of a *Muſſulman*,—for in either caſe the rule of double impoſt continues, with reſpect to them, where they are purchaſed by a *Muſſulman*,—becauſe he holds double impoſt upon thoſe lands to have been already irreverſibly eſtabliſhed *, and, conſequently, that this incumbrance on the lands devolves to the *Muſſulman* purchaſer along with the property, in the ſame manner as obtains in the caſe of a ſale of *tribute*-lands. *Aboo Yooſaf* maintains that, in the caſe here recited, a *ſingle tithe* only is to be collected from the *Muſſulman* proprietor; nor will the lands, whilſt in his poſſeſſion, be ſubject to any further impoſt, ſince the only principle upon which *double tithe* had been exacted of the *Toglibee* was the infidelity of the proprietor; and this, upon the devolving of the property to a *Muſſulman*, is done away. *Aboo Yooſaf*, in the *Kadooree*, has further ſaid that (according to the *Rawâyet-Sabeeh*) the opinion of *Mohammed* is the ſame as that here recited. Our author, however, remarks that it is moſt certain that *Mohammed* coincides entirely with *Haneeſa* in his

* By original compacts between the *Muſſulmans* and *Toglibees*. This is expreſſed at large under the head of *Seyir*.

general principle, that the impoſt upon the land continues as before; but he [*Mohammed*] carries this ſtill farther; for, as where a *Muſſulman* purchaſes lands, ſubject to double impoſt, of a *Toglibee*, the ſame continues upon him, ſo, if a *Toglibee* were to purchaſe lands of a *Muſſulman*, ſubject only to ſingle impoſt, he will not have to pay any more than the ſaid ſingle impoſt, ſince a change in the property makes no alteration with reſpect to thoſe rules to which the lands are ſubject.

Land devolving from a *Muſſulman* to a *Zimmee* becomes tribute.

If a *Muſſulman* ſell his lands to a *Chriſtian*, who is a *Zimmee* and not a *Toglibee*, and the *Chriſtian* aforeſaid have ſeizin of thoſe lands, *Haneefa* holds that *tribute* is to be collected from the ſame, the payment of *tribute* being a conſequence of infidelity. According to *Aboo Yooſaf*, the *double tithe* collected therefrom is to be expended upon the objects of the expenditure of *tribute*, which is a mode of adjuſtment eaſier than that of thus exchanging *tithe* for *tribute*. *Mohammed* holds that the lands remain ſubject to *tithe* as before; and he moreover maintains that the *tithe*, collected from thoſe lands, is to be applied to the purpoſes of *Zakât*.—It is to be obſerved that, if a *Muſſulman* were to take thoſe lands of a *Chriſtian* in right of *Shaffa**, or if the property in them were to revert to the ſeller, being a *Muſſulman*, on account of the ſale having been invalid, in either caſe the lands remain ſubject to *tithe*, as before; in the firſt inſtance, becauſe the *Muſſulman*, as *Shafee*†, muſt effect his purpoſe (of obtaining the lands in right of *Shaffa*) by means of a contract of ſale with the proprietor, wherefore the tranſaction here, in fact, amounts to his *purchaſing* the lands; and, in the ſecond inſtance, becauſe, by the property in the land reverting to the *Muſſulman* proprietor, on account of any invalidity in the ſale, the caſe remains the ſame as if no transfer by ſale had ever been made; moreover, the *Muſſulman*'s right is in no reſpect affected by ſuch invalidity, ſince it is proper that *that* tranſaction be altogether diſregarded; whence the caſe remains the ſame as if no ſale had ever

* *Neighbourhood*, or *conjunction of property*, which gives a right

† The perſon in whom the right of *pre-emption* lies.

taken place; and for all theſe reaſons the land will continue ſubject to *tithe* as before.

IF a *Muſſulman* convert the ground of his habitation into a garden, the ſame having been his original property, (that is to ſay, he being the *firſt grantee*,) he owes *tithe* upon it where he waters it with *tithe*-water, or *tribute* where he waters it with *tribute*-water, becauſe this land is not, in its original deſcription, either *tithe*-land or *tribute*-land, and in ſuch ground the mode of watering is the ſtandard of the expenſe of cultivation.

Caſe of a *Majoos*.

A *Majoos* * does not owe either *tithe* or *tribute* for his *habitation*, becauſe *Omar* exempted *dwellings* from all impoſt. But, if the *Majoos* were to convert the ground of his habitation into a *garden*, he owes *tribute* upon the ſame, although he ſhould water it with *tithe*-water, as he cannot lie under any obligation to pay *tithe*, becauſe that bears the ſenſe of an *oblation* and *act of piety*, of which an infidel is held to be incapable; he is appointed, therefore, to pay *tribute*, which is conformable to his ſituation, as being a ſort of *infliction*. Our author remarks that analogy, (from the opinion of the two diſciples,) would ſuggeſt that the *Majoos* owes *tithe* where the land is cultivated with *tithe*-water; *ſingle tithe*, according to *Mohammed*; and *double*, according to *Aboo Yooſaf*:—the reaſons for this have been related before.

Definition of *tithe* water and of *tribute* water.

RAIN-WATER, and the water of wells and fountains, and of lakes which are not under the particular authority of any individual, is what is termed *tithe*-water; and the water of the artificial canals and aqueducts, conſtructed by the kings of *Ajim* (ſuch as the river of *Yezd*) is *tribute*-water.

* Meaning a worſhipper of fire;---a *Magus*, or *Majian*.

The river of *Khârzim*, called the *Jyhoon* [Oxus] is *tithe*-water, according to *Mohammed*; and ſo likewiſe is the *Shyhoon*, and alſo the *Dijlet* [Tigris] and the *Firât* [Euphrates,] becauſe thoſe rivers are not under the authority of any perſon whatever, nor is any one entitled to an excluſive priviledge with reſpect to them, wherefore they are the ſame as the open ſea. *Aboo Yooſaf* conſiders the waters of all thoſe rivers as *tribute*-water, becauſe bridges of boats are occaſionally thrown over them, which is an act of ſeizin, evincing that thoſe who do ſo are the guardians of the ſtream; and hence the water of thoſe rivers muſt neceſſarily be deemed

upon land the property of *Toglib* or

The lands of *infants* or *women* of the *Toglib* tribe are ſubject to the ſame laws as thoſe of the *men* of that tribe: that is to ſay, upon their *tithe* lands is impoſed double *tithe*, and upon their ſingle *tribute*; becauſe peace was made with them on the terms of double contribution to purpoſes of charity, but not to the ſervice of the ſtate: moreover, the lands of *Muſſulman* infants or women are ſubject to a ſingle *tithe*, and therefore the ſame is to be levied twofold upon the lands of *Toglib* women and children.

Upon fountains of pitch or bitumen, or wells of ſulphur, nothing is due where they are found in *tithe*-lands, becauſe thoſe productions do not come under the deſcription of *growing out of the earth* [vegetables,] but are rather the ſame as the water of fountains, which ſpring out of its boſom, and are not ſubject to any impoſt. The proprietor of ſuch places, however, is ſubject to *tribute* where they exiſt in *tribute*-lands; but this is to be underſtood only provided the contiguous ſoil be capable of cultivation, becauſe the impoſition of *tribute* depends upon the proprietor of the land being able to cultivate the ſame.

CHAP.

## CHAP. VII.

### Of the Diſburſement of ZAKÂT, and of the Perſons to whoſe Uſe it is to be applied.

Perſons to whoſe uſe *Zakat* is to be applied.

THE objects of the diſburſement of ZAKÂT are of eight different deſcriptions: FIRST, *Fakeers*;—SECONDLY, *Miſkeens* *;—THIRDLY, the collector of *Zakât*, (provided he be not a *Haſhimee* †;)—FOURTHLY, *Mokâtibs*, (upon whom *Zakât* is beſtowed, in order to enable them, by fulfilling their contract of *Kitâbat*, to procure their freedom;)—FIFTHLY, debtors not poſſeſſed of property amounting to a *Niſâb*;—SIXTHLY, *Fee Sabeel Oola*, [in the ſervice of God ‡;]—SEVENTHLY, *Ibnus Sabeel*, or travellers;—and EIGHTHLY, *Mowleſut-al-kalloob*§. And thoſe eight deſcriptions are the original objects of the expenditure of *Zakât*, being particularly ſpecified as ſuch in the KORAN; and there are, therefore, no other proper or legal objects of its application. With reſpect to the laſt, however, [*Mowleſut-al-kaloob*,] the law has ceaſed to operate, ſince the time of the prophet, becauſe he uſed to beſtow *Zakât* upon them as a bribe or gratuity to prevent them from moleſting the *Muſſulmans*, and alſo to ſecure their occaſional aſſiſtance; but when God gave ſtrength to the faith, and to its followers, and rendered the *Muſſulmans* independant of ſuch aſſiſtance, (the occaſion of beſtowing this gratuity upon them no longer remained; and all the doctors unite in this opinion.) (By the term *Fakeers* is to be underſtood perſons poſſeſſed of property,

Definition of the terms

* *Fakeer* and *Miſkeen* both apply to *perſons in want*; the diſtinction between theſe two terms is fully explained in the *definition* of them, a little lower down.

† A deſcendant from the tribe of the prophet.

‡ The meaning of this phraſe is more particularly deſcribed in another part of this chapter.

§ The tranſlator is not able to find any preciſe meaning for this term in the lexicons. By *Kullub* is underſtood an *Aſil Arbee*, or original Arabian of the deſert, and it is probable that ſome tribe of theſe is alluded to in this place.

the

the whole of which, however, amounts to ſomewhat leſs than a *Niſâb.*

*Miſkeen.* (By *Miſkeens* is underſtood perſons who have no property whatever. This comment upon the terms *Fakeer* and *Miſkeen* is recorded from *Aboo Haneeſa.* Some, however, hold the reverſe deſcription to be true.

Allowance to the collector.

THE *Imâm* is to allow the officer employed in the collection of *Zakât* as much out of it as is in proportion to his labour: as much, therefore, is to be allowed as may ſuffice for himſelf and his aſſiſtants; and his allowance is *not* fixed to an *eighth.* *Shafeï* argues that *Zakât*, being appropriated to eight different objects, becomes thus divided into eight equal lots, of which one is the right of the collector, who is conſequently entitled to an eighth of the whole. (Our doctors argue that, as *Zakât* is paid to the collector, not as *alms*, but in the manner of a reward for ſervice performed, it follows that the proportion paid him muſt be whatever may ſuffice for that purpoſe; and hence it is that the collector is entitled to pay himſelf out of the collections of *Zakât*, although he ſhould be *rich* *

Definition of other terms.

BY the phraſe *Feear-Rikâb*, mentioned in the KORAN, (where it treats of the objects of expenditure of *Zakât*,) is to be underſtood *Mokâtibs:* (this definition is taken from *Seyid Ben Jeeroo.* (And by the term *Gharumeen*, in the ſame paſſage, are meant *debtors*): *Shafeï* ſays that it means perſons who have involved themſelves in compoſing the differences of others. (By the phraſe *Fee Sabeel Oola*, in the ſame paſſage, is to be underſtood (according to *Aboo Yooſaf*) a perſon who, by poverty of eſtate, is incapacitated and cut off from taking a part in the wars of the faith;) that is, in the *Jihâd Farz.* (*Mohammed*, on the contrary, argues that the phraſe here mentioned applies to a perſon who, by poverty, is incapacitated from performing pilgrimage

* An *objection* and *reply* are here omitted, as they turn ſolely upon points of *verbal criticiſm*, and conſequently do not admit of an intelligible tranſlation.

the

the latter deſcription, however, is neceſſarily implied and underſtood in the former; whence the phraſe in queſtion may be ſaid to apply to both. It is to be obſerved that (according to our doctors) no portion of *Zakât* is to be paid to ſuch warriors as are in a ſtate of affluence, none being objects of its application but thoſe who are poor.

(By the term *Ibnus Sabeel* [travellers] is to be underſtood perſons, in a ſtrange place, having left their property at home, and who are conſequently deſtitute of means of ſupport.)

(The ſeven deſcriptions of perſons here ſpecified are the proper objects of the application of *Zakât*; and a proprietor (who chooſes to diſburſe his *Zakât* himſelf, and not to pay it to the collector) is at liberty either to diſtribute it, in equal ſhares, among *ſeven* perſons of thoſe different deſcriptions, or to pay the whole to *one* of them.—This is the opinion of our doctors.)—*Shafeï* has ſaid that a proprietor is not at liberty himſelf to diſburſe the *Zakât* upon his own property in any other way than beſtowing a part upon three individuals of each ſeveral deſcription. The arguments on both ſides here turn on ſome peculiarities in the *Arabic* language. Our doctors take their opinion from *Amroo Bin Abbas*.

*Zâkat* not to be beſtowed upon infidels.

(It is not lawful to beſtow *Zakât* upon a *Zimmee*, or infidel ſubject, becauſe the prophet directed *Máaz*, ſaying, "*Take* ZAKÂT *from the rich Muſſulmans, and beſtow it upon the poor Muſſulmans.*"—But although infidel ſubjects are not entitled to ſhare in *Zakât*, yet other alms may be beſtowed upon them in the manner of *Sadka*, or *alms-gift*.—*Shafeï* ſays that they are prohibited from partaking of theſe alſo, as well as of *Zakât*: but our doctors ground their opinion on this point upon a precept of the prophet, who has ordained that *alms* ſhould be beſtowed upon perſons of every religion indiſcriminately; and our doctors alſo alledge, that if it were not on account of the directions to

*Mâaz*, before quoted, they ſhould deem the beſtowing of *Zakât* upon *Zimmees* to be legal.

Caſes which do not conſtitute a payment of

(If a perſon employ the *Zakât* upon his property in the erection of a moſque, or the burial of the dead, yet his *Zakât* is not conſidered as being thereby diſcharged, becauſe, in the payment of *Zakât*, it is eſtabliſhed as a principle that it ſhall be made over to the perſon or perſons entitled to it; and ſuch delivery does not appear in this caſe.)

(If *Zakât* be employed in diſcharging the debts of a defunct, this is not conſidered as a payment of *Zakât*, becauſe delivery does not appear in this inſtance.)

(If a perſon employ the *Zakât* upon his property in the purchaſe of a ſlave, for the purpoſe of granting him his freedom, this is not a diſcharge of *Zakât*.) *Imâm Mâlik* maintains that this act amounts to a due diſcharge of *Zakât*; becauſe he alledges that the phraſe *Feear-Rikâb*, which occurs in the Koran, applies to a ſlave thus bought and liberated: but our doctors argue that the emancipation of a ſlave amounts ſimply to a dereliction of property, and does not in any reſpect bear the conſtruction of delivery or transfer of poſſeſſion.

Perſons who are not the proper objects of its application.

(It is not lawful to beſtow any part of *Zakât* upon the rich, the prophet having declared that "*alms are not lawful to the wealthy.*") *Shafei* extends the uſe of *Zakât* to warriors, although they ſhould be rich; but the precept here quoted is in proof againſt him.

(It is not lawful for an owner of property to pay the *Zakât* upon it to his father, grandfather, or great-grandfather; nor to his ſon, grandſon, or great-grandſon; becauſe the uſe of property between him and thoſe perſons is *conjunct*,—that is to ſay, each of thoſe relatives

latives is entitled to the uſe of the other's property; and hence transfer of property, in its full ſenſe, does not exiſt in theſe caſes.

IT is not lawful for a proprietor to pay the *Zakát* upon his property to his *wife*, becauſe the uſe of property is common between the huſband and wife, according to general cuſtom; nor is it lawful for a wife to pay the *Zakát* upon her property to her huſband, (according to *Haneeſa*,) for the ſame reaſon. The two diſciples have ſaid that it is lawful to give *Zakát* to the huſband, becauſe the wife of *Abd'-Oola-bin-Maſaood* aſked the prophet, whether ſhe ſhould give *Sadka* to her huſband?—to which he replied,—"*You have here two* "*duties, one, that of* SADKA, *the other, that of* RELATIONSHIP."—But to this our doctors reply, from *Haneeſa*, that by the term *Sadka*, mentioned in this tradition, is to be underſtood the *Sadka Niſl*, or *voluntary* alms *.

IT is not lawful for a proprietor to beſtow the *Zakát* of his property upon his own *Mokátib*, or *Am Walid*, or *Modabbir*, becauſe in none of theſe caſes is there a *transfer of property*, ſince that which falls to a *ſlave* becomes the property of his maſter;—and a maſter has, in like manner, a ſuperior right in the property of his *Mokátib*, whence the maſter's transfer of property *to him* cannot be eſtabliſhed.

IT is not lawful for a proprietor to beſtow the *Zakát* of his property upon his ſlave, whom he may have partially emancipated, (according to *Haneeſa*,) becauſe ſuch a ſlave is held by him to ſtand as a *Mokâtib:* but the two diſciples maintain that the beſtowing of *Zakât* upon ſuch a ſlave is legal, becauſe they hold this ſlave to be a debtor to his maſter †.

* In oppoſition to *Zakât*, which comes under the deſcription of *Sadka Farz*, or *obligatory* alms; and conſequently what is quoted above by the two diſciples does not in any reſpect apply to the preſent caſe.

† That is *for the remainder of his bondage.* For a full explanation of this, ſee *Ittâk.*

(It is not lawful to beſtow *Zakât* upon the ſlave of a *rich* man, becauſe, if it be made over to the *ſlave*, it becomes the property of his *maſter*, and the maſter being *rich*, the delivery of *Zakât* to him is illegal.) And, in like manner, it is illegal to beſtow *Zakât* upon the child of a rich perſon, being an infant, ſince the child is ſuppoſed to be rich in the property of the father: contrary to the caſe of the child of a rich perſon, being an adult, who is poor, he not being accounted rich in the property of his father, although his ſubſiſtence be a debt upon his parents: and alſo contrary to the caſe of the *wife* of a rich perſon, becauſe ſhe, if ſhe be poor, is not accounted rich in the property of the huſband, or in proportion to, or on account of, the ſubſiſtence ſhe enjoys from him.

It is not lawful to beſtow any part of *Zakât* upon perſons of the tribe of *Haſhim*; the prophet having ſaid, "O, *deſcendants of Haſhim!* "*of a truth* God *hath rendered unlawful to you the* Ghoosâla [water "dirtied by ablution] *of men, and alſo their* Chirk [fifth,] *and in* "*lieu thereof he hath ordained to you a* fifth *of the fifth of all plunder:*" and by the term *Ghooſâla* is here to be underſtood the *Zakât* upon property, which is not lawful to *Haſhimees*: contrary to *Sadka Niſl*: and by the term *Chirk* is to be underſtood the ſame. By the tribe of *Haſhim* are here to be underſtood the families of *Alee*, and *Abbas*, and *Jaſir*, and *Akleel*, and *Haris-Ibnal-Mootlib*; all theſe deriving their deſcent from *Haſhim* the ſon of *Minâf*. But by the name *Haſhim*, in the words of the prophet before quoted, is to be particularly underſtood *Haſhim* the great-grandfather of the prophet, who alſo gives a name to a tribe *.——

*Zakât* is diſcharged by the erroneous

(If a perſon were to beſtow *Zakât* upon another, erroneouſly ſuppoſing him to be a proper object of its application, and ſhould after-

* What follows of this paſſage relates merely to the *Arabian* tribes, and is therefore quite uſeleſs.

wards

wards diſcover him to be *rich*, or a *Haſhimee*, or an *infidel*,—or, if he ſhould give *Zakât* to a perſon in the *dark*, and afterwards diſcover that perſon to be his *father*, or his *ſon*,—in theſe caſes *Zakât* is conſidered to be fully diſcharged, and no longer to remain due.—This is according to *Haneeſa* and *Mohammed*.—*Aboo Yooſaf* has ſaid that, in the caſes here recited, *Zakât* is ſtill held to remain due, becauſe it was in the power of that perſon to inquire into, and diſcover the particulars concerning him upon whom he beſtowed *Zakât*, previous to making it over to him; and ſuch being the caſe, where he is guilty of an evident neglect, his act is null, and conſequently the *Zakât* is ſtill a debt upon him; the ſame as where there are ſeveral veſſels of water, ſome clean and others unclean,—or ſeveral garments, ſome pure and others defiled,—in which caſe, if a perſon, after due deliberation, ſelect one of the pots of water, and perform his ablution with it, or put on one of the garments, and ſay his prayers, and he ſhould afterwards appear to have committed an error, a repetition of the prayer or ablution is held to be incumbent upon him.—*Haneeſa* and *Mohammed* ſupport their opinion, in this caſe, upon a deciſion recorded of the prophet in a ſimilar inſtance; and they moreover argue, that a knowledge of the ſituation and circumſtances of men is only to be formed from conjecture, and cannot be eaſily obtained to a degree of deciſive certainty, wherefore the matter is to be taken according to the donor's conception of it; the ſame as in a caſe of prayer, where if a man, intending to turn his face towards the *Kâba*, were to look in another direction, and pray, and his miſtake afterwards appear, a repetition of the prayer is not incumbent upon him. It is recorded as an opinion of *Haneeſa*, that *Zakât* is to be held diſcharged if thus beſtowed, by miſtake, upon a *rich* perſon, but not if beſtowed upon a *Haſhimee*, a *parent*, or a *child*; but the *Zâhir Rawâyet* accords with what was before advanced.—What is here mentioned proceeds upon a ſuppoſition that the *Zakât* has been beſtowed after due deliberation, in conſequence of the donor conceiving that the receiver is a proper object of its application: but if he ſhould not have deliberated, or if,

application of it to an improper perſon,

after deliberation, a doubt ſtill remain, the *Zakât* is not diſcharged, unleſs it afterwards appear that the receiver was a proper object of its application.

unleſs that perſon be the ſlave or *Mokâtib* of the donor.

(If a perſon beſtow *Zakât* upon another, and afterwards diſcover that this other is his own ſlave or *Mokâtib*, this is not held to be a diſcharge of his *Zakât*, becauſe, in this caſe, there is no *transfer of property*, (according to what has been already remarked,) and the diſcharge of *Zakât* reſts upon a *complete transfer* of it, as was formerly explained.)

(It is not thought proper to beſtow *Zakât* upon a perſon poſſeſſed of a complete *Niſâb* in any property whatever, ſuch an one being conſidered as coming under the deſcription of *Ghannee* [rich,] becauſe this is the law term for any one poſſeſſed of a *Niſâb*; but the condition on which any perſon is accounted a *Ghannee* is, that the *Niſâb* which conſtitutes his property be excluſive of all demands or incumbrances, (ſuch as *debts*, and ſo forth;) and on this preciſe quantity of abſolute property no *Zakât* is legally due from the proprietor, the *increaſe* thereof (underſtood in the lapſe of *Hawlân-Hâwl*) being a condition of the obligation to *Zakât*.

Other perſons upon whom *Zakât* may be lawfully beſtowed.

(It is lawful to beſtow *Zakât* upon a perſon poſſeſſed of leſs than a *Niſâb*, although he be found in body and capable of labour, becauſe ſuch an one comes under the deſcription of a *Fakeer*, who is one of the ſpecified objects of its application, and alſo, becauſe *actual neceſſity* in the ſituation or circumſtances of the object is difficult to be aſcertained, and therefore the rule is reſtricted to that deſcription which affords *argument* of ſuch neceſſity; and a deficiency in worldly property, to the amount of a *Niſâb*, affords ſuch argument of neceſſity with reſpect to the proprietor.

(If a perſon were to beſtow to the amount of two hundred *Dirms*, or upwards,

upwards, of the *Zakât* of his property, upon one individual, ſuch a procedure is abominable, but yet is legal.—*Ziffer* has ſaid that this is illegal; becauſe in the act of beſtowing that quantity of *Zakât*, the perſon who receives it becomes a *Ghannee* *, which would induce the idea of *Zakât* being beſtowed upon a *Ghannee*; but to this our doctors reply, that the opulence of the perſon in queſtion is an effect of the gift of *Zakât* to him, and therefore he does not come within the deſcription of a *Ghannee* until *after* it has been beſtowed;—yet, where diſcharge of *Zakât* tends to bring any one within the deſcription of *Ghannee*, it is abominable, the ſame as prayer when performed near any filth.

ABOO HANEEFA has ſaid, "*I regard it as moſt laudable to beſtow, "upon a* FAKEER, ZAKÂT *to ſuch an amount as may preclude him "from the neceſſity of begging for that day*

THE transfer of *Zakât* from one city to another is abominable, it being rather indiſpenſable that the *Zakât* of every city be beſtowed upon the claimants of that city; and alſo, becauſe in this a regard is had to the rights of *Jowâr* [neighbourhood:]—and hence it is abominable in men to transfer the *Zakât* upon their property from their own city to another, except either for the uſe of their relations, or for the purpoſe of aſſiſting thoſe who may be in greater neceſſity than the inhabitants of their own city; becauſe in the one caſe exiſts the peculiar duty of conſanguinity, and in the other the application of relief where it is moſt required.—But although the transfer of *Zakât* from one city to another, excepting for the purpoſes here mentioned, be accounted abominable, yet it amounts to a valid diſcharge of *Zakât*, becauſe the term *Fakeer*, mentioned in the ſacred writings as one of the proper objects of the application of *Zakât*, is not *local*, but *general*.

city not tranſferable to another except in certain caſes.

* Literally, a *rich* perſon, in oppoſition to *Fakeer*, a *poor* perſon.

CHAP.

*lodging*, which are termed *Rawâtib* .[neceſſaries,] any thing beyond which he is not accountable for.—(And, in the ſame manner, it is not incumbent upon a man to diſburſe the *Sadka-fittir* for his children, being adults, although theſe form a part of his family, becauſe he is not inveſted with any authority of guardianſhip over them.)—But yet if a man were to diſburſe the *Sadka-fittir* on behalf of his wife or adult children, without their deſire, it is lawful, on a principle of benevolence, their conſent being by cuſtom underſtood.

( is not incumbent upon men to pay the *Sadka-fittir* for their ; neither is it incumbent on a *Mokâtib* to pay it on his own account, ſuch an one coming under the deſcription of a *Fakeer*.)

Exception.

r is incumbent on men to pay *Sadka-fittir* on behalf of their *Modabbirs* and *Am-Walids*, as being inveſted with complete authority over them.)

Not incumbent on behalf of ſlaves kept as articles of traffick.

(It is not incumbent upon men to pay *Sadka-fittir* on behalf o their male and female ſlaves deſigned for ſale as merchandize.) *Shafe* alledges that the *Sadka-fittir* is obligatory upon ſuch ſlaves, and tha the proprietor is to pay it for them; and that the *Zakât* upon them i due from the proprietor. In ſhort, *Shafeï* holds that *Sadka-fittir* is du from the ſlave, and *Zakât* from their proprietor, on two diſtinct an ſeparate accounts; and conſequently, that this does not induce the ide of a repetition of *Sadka* upon one and the ſame property: but wit our doctors the obligation to *Sadka-fittir*, on behalf of ſlaves, held to reſt upon their owner, the ſame as *Zakât*; and conſequentl if the payment of the former were incumbent, it would adm the idea of two *Sadkas* upon one property within the year, whic is illegal.

Nor on behalf

(No *Sadka-fittir* is incumbent upon any of the proprietors on a count of a partnerſhip ſlave, becauſe none of them, individually,

inveſted with complete authority over him, nor obliged to furniſh his entire proviſion. And, in the ſame manner, no *Sadka-fittir* is incumbent upon any of the proprietors, on account of two or more partnerſhip ſlaves, according to *Haneefa*.—(The two diſciples have ſaid that, in this caſe, *Sadka-fittir* is incumbent upon the proprietors; but in ſuch a degree only, with reſpect to their ſhares) as may amount to a complete ſlave or ſlaves, and not to any fractional part or portion of them: for inſtance, if there were five ſlaves held in partnerſhip by two men, each partner would have to pay *Sadka-fittir* for *two* ſlaves, and not for *two and a half*.—Some, however, have ſaid that the two diſciples agree with *Haneefa* in their doctrine upon this point, becauſe the ſhare of each partner, individually, cannot be collected into any particular ſlave or ſlaves, until a partition take place of the partnerſhip ſtock, and conſequently none of them appertains to either partner in particular.

Incumbent on behalf of *infidel* ſlaves:

(It is incumbent upon *Muſſulmans* to pay the *Sadka-fittir* for their infidel ſlaves, on the authority of the tradition of *Salba-Adwee*, already quoted, becauſe there the term *ſlaves* is uſed *generally*, and is not reſtrictively applied to *Muſſulman* ſlaves: moreover, in the traditions of *Abbâs*, it appears that the prophet ſaid "*Render* SADKA-FITTIR "*on behalf of every freeman, and alſo of every ſlave, be that ſlave a* "CHRISTIAN, *a* JEW, *or a* PAGAN:") and further, it is incumbent, becauſe the occaſion of the obligation is here eſtabliſhed, and the proprietor [of the ſlave] is capable of taking upon him the reſponſibility for ſuch obligation. *Shafeï* maintains that, in this inſtance, no *Sadka-fittir* is due, becauſe the obligation to *Sadka-fittir* reſts upon a ſlave himſelf, and not upon his owner; and the former (in the caſe here ſuppoſed) is incapable of ſuch obligation, as being an infidel.

but not on behalf of a ſlave the property

(If the ſlave be a *Muſſulman*, and his maſter an *infidel*, in this caſe no *Sadka-fittir* whatever is due for ſuch ſlave, according to all the doctors) according to our doctors, evidently, becauſe they hold the

obligation of *Sadka-fittir*, with reſpect to the ſlave, to reſt upon the maſter, and here the maſter is an *infidel*; and, according to *Shafei*, becauſe he holds the obligation to reſt upon the ſlave himſelf, to be diſcharged by his maſter; and the maſter, in the preſent caſe, is incapable of diſcharging it, as being an *infidel*.

Caſe of a ſlave ſold with a reſerve of option.

If a ſlave be ſold with a reſerve of option to one of the parties, the ſeller or the purchaſer, determinable on the enſuing feſtival of *Fittir*, in this caſe the *Sadka-fittir*, on behalf of that ſlave, is incumbent upon the party to whom he may ultimately belong.—*Ziffer* alledges that the diſcharge of the *Sadka-fittir* reſts with the party in whoſe behalf reſerve of option was made a condition, becauſe the authority over that ſlave is in fact veſted in *him*. *Shafei* maintains that it reſts with him who has poſſeſſion in the interim, whom he holds to be the purchaſer, on this ground, that the furniſhing *Sadka-fittir* is one of the rules of *poſſeſſion*, the ſame as furniſhing *ſubſiſtence*.—Our doctors argue that the poſſeſſion of the ſlave, in the preſent caſe, is a matter which remains in ſuſpence, ſince, if he to whom the option was reſerved chuſe to diſſolve the ſale, the property in the ſlave reverts to the ſeller; but, on the other hand, if he confirm the ſale, and render it valid, the ſlave becomes the property of the purchaſer from the period of the original engagement; and the poſſeſſion thus remaining in ſuſpence, that which depends upon ſuch poſſeſſion muſt remain ſuſpended alſo: contrary to the caſe of *Nifka*, which is requiſite from day to day, to ſupply the wants of nature, and is conſequently incapable of ſuch ſuſpenſion. And if this ſlave be an article of traffick, the ſame difference of opinion holds with reſpect to the *Zakât* upon him.

SECTION.

## SECTION.

### *Of the Meaſure of* SADKA-FITTIR, *and of the Time of its Obligation and its Diſcharge.*

(THE meaſure of a *Sadka-fittir* in wheat, or flour, or bran, or in dried fruits, is an half *Sáa*; and in dates or barley it is one *Sáa.*) (The two diſciples ſay that dried fruits are the ſame as barley in this reſpect; and there is alſo one tradition of the opinion of *Haneeſa* to the ſame effect.)—The former is the doctrine recorded in the *Jama Sagheer.* *Shafeï* ſays that the meaſure of a *Sadka fittir*, in all the articles here ſpecified, is one *Sáa*; becauſe *Aboo Seyid Kadooree* remarks that this was the cuſtomary *Sadka-fittir* in all articles in the time of the prophet.—Our doctors ſupport what was before advanced on the authority of the tradition of *Salba Adwee*, already repeatedly quoted; and the doctrine of the whole of the companions, (ſuch as the *Kholfa Raſhidine** and others,) is conſonant to that of our doctors: the tradition, alſo, of *Aboo Seyid*, cited by *Shafeï*, implies no more than that, in the time of the prophet, people were accuſtomed to give ſomething over what was obligatory.—The two diſciples alledge (in ſupport of their opinion, *that dried fruits are the ſame as barley*) that *Khurma* [dried dates] is one ſpecies of dried fruits; and they being conſidered the ſame as barley, it follows that all dried fruits, as being of one general deſcription, ſhould be ſubject to the ſame rule. The argument of *Haneeſa* is, that dried fruits and barley are of a correſpondent nature, becauſe as the poor eat the flour of wheat with its bran, ſo do they dried fruit with its core or ſtone: contrary to *dates*, which are the ſame as barley, in as much as the ſtones of the one and the bran of the other are thrown away.—Barley meal is the ſame as barley; but it is beſt that, (in diſcharging the *Sadka-fittir* in the flour or bran of either barley or wheat, attention be paid to the *value*;) that is to ſay, if, for inſtance, the value of half a *Sáa* of flour be equal to that of the

Proportion of articles in which it may be diſcharged.

* The immediate ſucceſſors of the prophet.

ſame quantity of wheat, it will ſuffice to give half a *Sâa* of flour, but otherwiſe not; and the ſame with reſpect to barley-meal.—This is not noticed in the *Jama Sagheer*, becauſe the value of the meal or flour does not commonly fall ſhort of that of the grain, but rather generally exceeds it.

(In diſcharging the *Sadka-fittir* with *bread* regard is to be had to the *value* only; this is approved doctrine.)

(The half *Sâa* now mentioned is to be aſcertained by *weight*, according to *Haneefa*; but the two diſciples hold that it is to be aſcertained by *meaſure*.)

In diſcharging the *Sadka-fittir*, flour is preferable to wheat, and money is preferable to flour, according to what is recorded from *Aboo Yooſaf*; becauſe money ſatisfies the wants moſt amply, and flour moſt readily: contrary to wheat, which, after it is beſtowed, requires to be made flour before it is fit for uſe.—It is recorded, as an opinion of *Aboo Bikr Ayâmuſh*, that wheat is preferable either to flour or money, becauſe this is univerſally admitted to be a proper article in which to diſcharge the *Sadka-fittir*, whereas concerning money and flour there are various opinions.

(The *Sâa*, according to *Aboo Haneefa* and *Mohammed*, conſiſts of eight *Ratls* * of the *Ratls* of *Irâk*.—*Aboo Yooſaf* has ſaid that it is only five *Ratls* and one third;) and this is alſo the doctrine of *Shafeï*; the prophet having ſaid "*Our* SÂA *is ſmaller than that of others.*"—The argument of the *Tirrafine* †, in this caſe, is, that it is recorded by the prophet, that he performed the *Woozo* by the *Mid*, (which is two *Ratls*,) and the *Ghoſl* by the *Sâa*, (which is eight *Ratls*;) and the *Sâa* of *Omar* was the ſame: moreover, this *Sâa* is ſmall compared with that of *Haſhimee*, which was the *Sâa* in common uſe,

* A *Ratl* is about *fourteen ounces*.

† Literally, *the two extremes*, as being the *oldeſt* and *youngeſt* of the three orthodox doctors; namely, *Haneefa* and *Mohammed*.

wherefore it is lawful to regard that mentioned in the tradition above quoted as the ſtandard in *Sadka-fittir*.

Time of the commencement of the obligation.

(THE obligation to the performance of *Sadka-fittir* commences with the dawn of the morning of the feſtival of *Fittir*; that is to ſay, the arrival of that ſpecified period is a condition of its obligation.) (*Shafeï* alledges that the obligation commences with the ſunſet of the laſt day of *Ramzân*;) and the reſult of this difference of opinion is, that if (for inſtance) an *infidel* were to be converted, and to become a *Muſſulman*,—or, if a child were to be born,—on the eve of the feſtival of *Fittir*, the *Sadka-fittir* would be due on account of the convert or the child, according to our doctors; but, according to *Shafeï*, it would not be due: and, on the other hand, if a man's child, or male or female ſlave, were to die on the laſt night of *Ramzân*, *Sadka-fittir* is incumbent upon him on their account, according to *Shafeï*; but it would not be ſo, according to our doctors.—The argument of *Shafeï*, in this caſe, is that the *Sadka-fittir* is eſſentially connected with, and bears relation to *Fittir*, [the act of breaking of faſt,] as the connection of the terms evinces; and the ſunſet of the laſt day of *Ramzân* is the time of *Fittir*, becauſe the faſt may be then broken.—(To this our doctors reply, by admitting that the *Sadka-fittir* is certainly connected with the act of *Fittir*, but the *Fittir* has reference to the *day*, and not to the *night*, whence it is that this period is expreſſed by the words *Yawm-al-fittir* [*day* of breaking faſt,] and not by the words *Lail-al-fittir* [*night* of breaking faſt;] and hence it follows that the obligation to the performance of *Sadka-fittir* is connected with the *morning* of the feſtival of *Fittir*, and not with the *eve* thereof.)

IT is moſt laudable that men diſcharge their *Sadka-fittir* on the day of the feſtival of *Fittir*, before they proceed to the moſque to perform the prayers of that feſtival, becauſe the prophet did thus; and alſo, becauſe the precept regarding *Sadka-fittir* was iſſued with a view that this donation might relieve the wants of the poor, and thereby enable them.

them to enjoy the feſtival, and to unite in the duties of it with a cheerful mind; and the deſign is beſt anſwered by the donation being made before prayer.)

(If the *Sadka-fittir* be diſcharged previous to the day of the feſtival of *Fittir*, it is lawful; becauſe the diſcharge of an obligation, at any time after the eſtabliſhment of the *cauſe* of the obligation, is legal, in the ſame manner as that of *Zakât* previous to the lapſe of *Hawlân-Hâwl.*)

(If a perſon were not to diſcharge the *Sadka-fittir* within the day of the feſtival of *Fittir*, yet the obligation ſtill continues, and it is proper that it be made good afterwards, becauſe the obligation of it is impoſed with a view to the relief of the poor, which object ſtill remains: contrary to *ſacrifice*, the obligation to which, if it be neglected on the *Yawn-al Nihr*, [the *day of ſacrifice*, being the tenth of the month *Zee-al Hidjee*,] drops altogether;—this being merely an act of piety, in which the wants or rights of others are no way concerned.

# HEDÂYA.

## BOOK II.

### *Of NIKKAH, or MARRIAGE.*

NIKKAH, in its primitive ſenſe, means *carnal conjunction*. Some have ſaid that it ſignifies *conjunction* generally. In the language of the law it implies a particular contract uſed for the purpoſe of legalizing generation. Definition of the term.

Chap. I. Introductory.
Chap. II. Of *Guardianſhip* and *Equality*.
Chap. III. Of the *Mihr*, or *Dower*.
Chap. IV. Of the Marriage of *Slaves*.
Chap. V. Of the Marriage of *Infidels*.
Chap. VI. Of *Kiſſm*, or *Partition*.

CHAP.

## CHAP. I.

Forms under which marriage may be contracted.

MARRIAGE is contracted,—that is to ſay, is effected and legally confirmed,—by means of *declaration* and *conſent*, both expreſſed in the preterite, becauſe although the uſe of the preterite be to relate *that which is paſt*, yet it has been adopted, in the law, in a *creative* ſenſe, to anſwer the neceſſity of the caſe *. *Declaration*, in the law, ſignifies the ſpeech which firſt proceeds from one of two contracting parties, and *conſent* the ſpeech which proceeds from the other in reply to the declaration.

II. MARRIAGE may alſo be contracted by the parties expreſſing themſelves, one in the *imperative*, and the other in the *preterite*; as if a man were to ſay to another "Contract your daughter in marriage to "me,"—and he were to reply "I have contracted" [*my daughter to you*,]—becauſe his words "Contract your daughter to me" are expreſſive of a commiſſion of agency, empowering to contract in marriage; and one perſon may be authorized to act on both ſides in marriage, (as ſhall be hereafter explained;) wherefore the reply of the father, "I have contracted," ſtands in the place both of *declaration* and *conſent*,—as if he had ſaid "I have contracted, and I have "conſented."

MARRIAGE may alſo be contracted by the uſe of the word NIKKAH, or *marriage*,—as if a woman were to ſay to a man "I have "married myſelf to you for ſuch a ſum of money †," and the man were to reply "I have conſented:" and, in like manner, by the word *Tazweej*, or *contracting in marriage*, as if a woman were to ſay a man "I have contracted myſelf in marriage unto you," and ſo

* Becauſe the *preſent* and *future* being expreſſed, in the *Arabic* language, under *one* , a contract expreſſed in the *preſent* would be *equivocal.*

† Meaning her *dower.*

forth :

forth:—and ſo alſo, by the word *Hibba*, or gift *, as if ſhe were to ſay "I have beſtowed myſelf upon you:" and likewiſe, by the word *Tamleek*, or conſignment,—as if ſhe were to ſay "I have conſigned "myſelf over to you:" and ſo alſo, by the word *Sadka*, or alms-gift, as if ſhe were to ſay "I have given myſelf as an alms unto you."—*Shaffeï* is of opinion that marriage cannot be contracted except by the words *Nikkah* and *Tazweej*, becauſe the term *Tamleek* (for inſtance) does not bear the conſtruction of *matrimony* either in a literal or metaphorical ſenſe;—evidently not in a *literal* ſenſe, this term never being uſed to expreſs marriage; nor in a *metaphorical* ſenſe, becauſe a metaphor is to be underſtood in a particular ſenſe only from the propriety of its application, which is not the caſe here, the terms *Nikkah* or *Tazweej* implying *conjunction*, (as was before obſerved,) and between the poſſeſſor and the poſſeſſion no conjunction whatever exiſts. The argument of our doctors, in this caſe, is that conſignment operates as the principle of a right to a carnal conjunction in the ſubject of it, in virtue of a right in the perſon, (as in the caſe of *female ſlaves*;) and the right to carnal conjunction is alſo eſtabliſhed by matrimony; wherefore, as marriage and conſignment thus appear to be both principles operating to the ſame end, the latter may be metaphorically taken for the former.

MARRIAGE may be contracted by the uſe of the term *Beeya*, or *ſale*; as if a woman were to ſay to a man "I have ſold myſelf into "your hands," and this is approved, becauſe ſale operates as the principle of a right in the perſon, and a right in the perſon is the principle of a right to carnal conjunction, whence the propriety of the metaphorical application of ſale to matrimony.

ACCORDING to the *Rawáyet Sabeeh*, marriage cannot be contracted by the uſe of the term *Iſhárit*, or *hire*, (as if a woman were to ſay

* This, and the two following terms, are ſuch as are uſed where the woman does not ſtipulate any *dower*.

"I have hired myſelf to you for ſo much;")—nor by *Ibâhit*, or permiſſion; nor by *Ibläl*, or rendering lawful; nor by *Areet*, or loan; none of theſe operating as the principle of a right to carnal conjunction. —Neither can marriage be contracted by the uſe of the term *Waſeeyat*, or bequeſt; becauſe bequeſt does not convey any right of poſſeſſion until after the teſtator's death;—and as a contract of marriage in *expreſs* terms, referring the execution of it to a period ſubſequent to the deceaſe of either of the parties, would be null, ſo alſo, in the preſent caſe, *a fortiori*.

Muſt be contracted in the preſence of witneſſes.

(MARRIAGE, where both the parties are *Muſſulmans*, cannot be contracted but in the preſence of two male witneſſes, or of one man and two women, who are ſane, adult, and *Muſſulmans*, whether they be of eſtabliſhed integrity of character or otherwiſe, or may ever have ſuffered puniſhment as ſlanderers.)—The compiler of this work obſerves that evidence is an eſſential condition of marriage, the prophet having declared ("*no marriage is good without evidence*;") and this precept is a proof againſt *Mälik*, who maintains that in marriage *notoriety* only is a condition, and not *poſitive evidence*.—It is neceſſary that the witneſſes be *free*, the evidence of *ſlaves* being in no caſe valid, becauſe ſuch are not competent to act in any reſpect *ſui juris*: and it is alſo requiſite that they be of ſound mind and mature age, becauſe minors or idiots are incapable of acting for themſelves; and it is likewiſe neceſſary that they be *Muſſulmans*; the evidence of *infidels* not being legal with reſpect to *Muſſulmans*.

Qualification of a witneſs.

Perſons may witneſs a marriage, whoſe teſtimony would not be received in ſome caſes.

The *ſex* of the witneſſes is not an eſſential condition of their competency, inſomuch that marriage may be lawfully contracted in the preſence of one man and two women:—neither is the *integrity* of the witneſſes an eſſential condition, inſomuch that (according to our doctors) a marriage is valid if contracted in the preſence of two *Faſiks*, or unjuſt perſons *.—*Shafeï* maintains that the integrity of the witneſſes

* The word *Faſik*, which throughout this work is uſed in contradiſtinction to *Adil*, as therefore been rendered, in the tranſlation, *unjuſt*, which is indeed the moſt common acceptation

neſſes is an eſſential condition, becauſe evidence is entitled to reverence and reſpect, the prophet having ſaid "pay reverence to witneſſes;" and *Faſiks* are not proper objects of ſuch reverence, but rather the reverſe.—To this our doctors reply that *Faſiks* are competent to act for themſelves, and of courſe competency in evidence muſt alſo appertain to them, ſince they are not incapacitated from acting with reſpect to others; a *Faſik*, moreover, is capable of holding the office of a *Sultan* or an *Imám*, whence it follows that he is alſo capable of becoming a *Kázee*, or a witneſs.—A perſon who has ſuffered puniſhment for ſlander, as being ſtill poſſeſſed of general competency, is alſo capable of bearing witneſs, ſo far as merely reſpects declaration and conſent in matrimony, but no farther, there being a poſitive prohibition to the reception of ſuch a perſon's evidence, which, however, admits of exception in the preſent caſe, like that of blind perſons, or of the children of the parties, whoſe evidence, although not admiſſible in any other caſe, is yet allowed in marriage.

Infidels may witneſs the marriage of an infidel woman:

(IF a *Muſſulman* marry a female *infidel* ſubject in the preſence of two male *infidel* ſubjects it is lawful, according to *Aboo Yooſaf* and *Haneeſa*. *Mohammed* and *Ziffer* maintain that it is not lawful, becauſe their teſtimony, with reſpect to declaration and conſent in marriage, amounts to *evidence*, and the evidence of *infidels* regarding *Muſſulmans* is illegal; whence it is the ſame in fact as if they had not heard the declaration and conſent of the parties. The argument of the two elders, in reply to this objection, is, that evidence is required in matrimony, not with any view to the aſcertainment of a point of property, (ſuch as *dower*,) but merely in order to eſtabliſh the huſband's right of cohabitation, which is in this caſe the object.

the negotiator of the contract

(IF a man deſire another to contract his daughter (being an infant)

acceptation of the word; it muſt, however, be underſtood to relate to a perſon who neglects decorum in his behaviour and dreſs, and ſuch other inferior points, rather than to one who is actually known to be *diſhoneſt*.

may alſo, in certain caſes, be a witneſs to it.

in marriage to a third perſon, and the other ſhould accordingly contract his daughter, upon the ſpot, to the third perſon, in the preſence of the perſon ſo deſiring, and the act be witneſſed by only *one* perſon beſides theſe two, the marriage is lawful; becauſe, in this caſe, the father, as being upon the ſpot, is conſidered as the actual contractor of the marriage [on behalf of his daughter;] wherefore the ſecond perſon ſtands merely as the *negotiator* of the contract, and of courſe, not appearing as a *party* in it, is a competent witneſs with the other. But, if the father of the infant aforeſaid ſhould go away, and be not actually preſent at the execution of the contract, the marriage would be null; becauſe the father, as not being preſent, cannot be conſidered as the contractor, that appellation properly applying to the other—who appears to act, in his abſence, as his matrimonial agent on his daughter's behalf; conſequently here would be only *one* competent witneſs preſent; and one evidence is not ſufficient; whence the marriage would be illegal.—And the rule is the ſame where a father matches his daughter, (being an adult,) at her deſire, in the preſence of one other witneſs; that is to ſay, if the daughter be herſelf preſent at the execution of the contract it is legal, otherwiſe not.

## SECTION.

### *Of the* Prohibited Degrees; *that is to ſay, of Women whom it is lawful to marry, and of thoſe with whom Marriage is unlawful.*

It is unlawful to marry a mother, or a grandmother,

A man may not marry his mother, nor his paternal or maternal grandmother; becauſe the word of God in the Koran ſays "Your "Ams (that is, *your mothers*) and your daughters are forbidden "to you;" and the primitive ſenſe of the term Am [*mother*] being *origin* or *root*, the grandmothers are comprehended in this prohibition. The illegality of ſuch a connexion is, moreover, ſupported upon the united opinion of all our doctors.

A man

A man may not marry his daughter, on the authority of the text above quoted, nor his grand-daughter, nor any of his direct deſcendants. a daughter or a grand-daughter,

NEITHER may a man marry his ſiſter, nor his ſiſter's daughter, nor his brother's daughter, nor his paternal aunt, nor his maternal aunt; the prohibition of ſuch in marriage being included in the text already quoted. a ſiſter, a niece an aunt,

ALL the degrees of aunts are alſo included in this prohibition; to wit, maternal and paternal aunts, as well as the aunts of the father, and the aunts of the mother, both paternal and maternal:—ſo alſo the daughters of all the brothers; that is to ſay, of the full brother, and of the paternal * brother, and of the maternal brother; and, in like manner, the daughters of all ſiſters, to wit, of the full ſiſters, and of the paternal ſiſters, and of the maternal ſiſters; becauſe the terms *Amma*, *Khala*, *Okh*, and *Okht*, which occur in the paſſage of the KORAN already cited, apply to all thoſe degrees of kindred.

IT it not lawful for a man to marry his wife's mother, whether he may have conſummated his marriage with her daughter or not, the Almighty having prohibited ſuch a connexion in general terms, without any regard to that circumſtance: neither is it lawful for a man to marry the daughter of his wife; but this only, provided he have already conſummated his marriage with the latter, becauſe the ſacred text reſtricts the illegality of this union to that circumſtance, wherefore marriage with the daughter of the wife is illegal, where carnal connexion has taken place with the latter, whether the daughter be an inmate of the huſband's *Haram* or not. It is here to be obſerved, that the text in the ſacred writings which ſays "YOUR or a mother-in law, or a ſtep daughter

* By the terms *maternal* or *paternal*, applied to brothers and ſiſters, is to be underſtood *half* brothers or *half* ſiſters, by the father's or mother's ſide.

WOMEN

" WOMEN WHO RESIDE IN YOUR *Harams*, BEING THE DAUGHTERS " OF YOUR WIVES WITH WHOM YOU HAVE HELD COHABITATION, " ARE UNLAWFUL TO YOU," has merely reference to cuſtom, and does not imply that the reſidence of the daughter in the man's *Haram* along with her mother is unlawful; for it is uſual, when a man marries a woman who has a daughter by a former huſband, that the latter accompanies her mother to his houſe, and is thence conſidered as one of his *Haram* *.

6 or a ſtep-mother, or ſtep-grandmother,

IT is unlawful for a man to marry the wife of his father, or of his grandfather, God having ſo commanded, ſaying " MARRY NOT " THE WIVES OF YOUR PROGENITORS."

7 ter-in-law, or grand daughter-in-law,

NEITHER is it lawful for a man to marry the wife of his ſon, or of his grandſon, the Almighty having ſaid " WED NOT THE WIVES " OF YOUR SONS, OR YOUR DAUGHTERS WHO PROCEED FROM YOUR " LOINS."

8 or a nurſe, or a foſter-ſiſter,

IT is not lawful for a man to marry his foſter-mother, or his foſter-ſiſter, the Almighty having commanded, ſaying " MARRY " NOT YOUR MOTHERS WHO HAVE SUCKLED YOU, OR YOUR " SISTERS BY FOSTERAGE;" and the prophet has alſo declared, " *Every thing is prohibited by reaſon of foſterage which is ſo by reaſon* " *of kindred.*"

or two ſiſters.

IT is not lawful to marry and cohabit with two women being ſiſters, neither is it lawful for a man to cohabit with two ſiſters in virtue of a right of poſſeſſion, [as being his *ſlaves*,] becauſe the Almighty has declared that ſuch cohabitation with ſiſters is unlawful.

* This obſervation is introduced merely with a view to explain an ambiguity in the text referred to.

Case of two sisters.

IF a man marry the sister of his female slave with whom he has cohabited, such marriage is approved, the contract being, in this case, entered into by parties competent in every respect.—And this marriage being legal and valid, the man must not afterwards hold any carnal connexion with his female slave, even though he should never consummate his marriage carnally with her sister, because a wife stands, in the law, as a *Fœmina Fututa*:—neither should the husband indulge in the connubial enjoyment with this wife until he shall previously have rendered her sister [the slave] unlawful to him, and relinquished his right of cohabitation with her, by some means or other, such as emancipating her, or marrying her to another man, in order to avoid the construction of cohabitation with sisters; but having so done, he may afterwards cohabit with his wife; because then no breach of the law would ensue, since a female slave is not held in the law, merely as such, to be a *Fœmina Fututa*.

Another case of two sisters.

IF a man should happen to marry two sisters by two contracts *, and it be not known with respect to which marriage first took place, a separation from both the sisters must ensue; because it is evident that his marriage with *one* of the *two* is illegal, but it is impossible to ascertain with which, by reason of ignorance of priority; nor is it conceivable that a judgment should be pronounced legalizing the marriage of either, unspecified, since the marriage of both remaining unascertained, a rule to make the same valid would be illegal, as not leading to any good or advantage; for the advantage proposed in matrimony is *procreation*, which is unattainable without carnal connexion of the parties; and this connexion with a woman unspecified is inadmissible: moreover, allowing the marriage to be valid, it would be injurious to both, as laying them under the matrimonial restraints

* This doubtless supposes a case where a man is contracted in marriage through the agency of others empowered by him for that purpose, (as shall be shewn in an ensuing chapter) and who may engage in the contract without his immediate knowledge.

without

without the advantage of the connubial enjoyment, which neither could legally poſſeſs; for all which reaſons their ſeparation is indiſpenſable. And in this caſe each ſiſter is entitled to receive an half dower, becauſe, if either could have been proved to be firſt married, ſhe would have had a claim to her *full* dower, but the priority of marriage of either remaining unaſcertained the dower is thus divided between them.—Some have ſaid that this is only where each of the ſiſters reſpectively maintains the priority of her marriage without either being able to adduce any proofs; but that where they both declare their ignorance of ſuch priority, nothing whatever is to be paid to either, until ſuch time as both agree to receive an half dower, as above, becauſe that is due to them in virtue of a priority unaſcertained, wherefore it is neceſſary either that each ſhould reſpectively maintain her priority, or that both ſhould agree, as above, before any decree for payment of an half dower to each could be paſſed.—But if each ſiſter maintain her priority, and both produce equal evidence in ſupport of it, an half dower is the right of each, according to all the doctors.

A man may not marry an *aunt* and *niece:*

It is unlawful for a man to marry two women, of whom one is the *aunt* or *niece* of the other, the prophet having declared a precept, as recorded in the *Zâhir-Rawâyet*, to this effect.

or two women related within the prohibited degrees.

It is not lawful for a man to marry two women within ſuch degree of affinity as would render a marriage between them illegal, if one of them were a *man*,—and for the ſame reaſon, becauſe this would occaſion a confuſion of kindred.

ıan may marry a wo- and her

But a man may marry two women, one of them being a widow, and the other the daughter of that widow's former huſband by another wife, becauſe here exiſts no affinity, either by blood or foſterage.—*Ziffer* objects to this, and maintains that the marriage would be illegal; becauſe, if the daughter were ſuppoſed a *man*, a marriage between her

her and the widow would be illegal, and theſe two conſequently ſtand in the ſame predicament, with reſpect to each other, as thoſe in the preceding caſe.—To this our doctors reply that the illegality there ſtated is ſuppoſed to exiſt only in caſes where this ſuppoſition, if applied to either of the women, would render their marriage illegal; but that does not hold in the preſent inſtance, for if the widow were ſuppoſed to be a man, ſhe could lawfully marry the daughter.—And it is moreover related, in the *Nakl Saheeh*, that *Abdoola* the ſon of *Jâfir* married a wife and a daughter of *Alee*.

Caſes which induce illegality.

IF a man commit whoredom* with a woman, her mother and daughter are prohibited to him.—*Shafeï* maintains that they are not prohibited, becauſe whoredom does not induce *Hoormat-Mooſâhirat*, or *prohibition from affinity*, as this law of *prohibition* is a peculiar diſtinction beſtowed upon the ſervants of GOD through the divine favour, and whoredom, being a crime, cannot poſſibly induce that which is a favour of GOD.—To this our doctors reply, that the carnal act operates as a principle or cauſe of a mutual participation of blood between the parties concerned in it, in virtue of the child which is, or may be, the fruit thereof, that partaking of the father and the mother reſpectively, *in toto*, for it is uſually ſaid "This child is the "offspring of ſuch a *man* and of ſuch a *woman*;" and this participation being thus eſtabliſhed between the child and each of the parents reſpectively, it is virtually ſo between the parents themſelves, becauſe although a portion of the child be a part of the mother, yet it is attributed, *in toto*, to the father, whence a part of the mother is attributed to him; and *vice verſa*; and a mutual participation of blood being thus eſtabliſhed between the man and the woman, it follows that the mother or the daughter of the latter ſtands as the actual mother or daughter of the man, becauſe the former would be the *grandmother* of the child produced by ſuch act of whoredom; ſhe is therefore the root of the root of ſuch offſpring, and the offſpring is the

* Arab. *Zinna*, meaning either *fornication* or *adultery*.—(Vide Sales's *Koran*.)

branch of a branch from her; and it is inconceivable that the child ſhould be a branch of a branch from her, unleſs the fornicator were conſidered as a branch from her, and the grandmother the root of the fornicator: and the ſame reaſoning applies with reſpect to the daughter.

(If a woman touch a man in luſt [i. e. *manu penem fricans, ſtuprum excitat,*] the mother and daughter of that woman are thereby prohibited to him.)—*Shafei* ſays that they are not prohibited. And the ſame difference of opinion obtains in caſes where a man touches a woman in luſt, or ſees the pudendum of a woman; or where a woman ſees the yard of a man in luſt; in all which inſtances our doctors hold that the mother or daughter of ſuch woman are rendered unlawful to the man: but *Shaffei* maintains a contrary ſentiment, arguing that ſeeing or touching do not amount to the *abſolute act*, inſomuch that the uſual ceremonies required by the law, after the carnal act *, are not here neceſſary.—To this our doctors reply, that ſuch acts as thoſe, being a cauſe of copulation, ſtand as that conſtructively.—It is to be obſerved, that by *touching in luſt*, with reſpect to a man, is meant producing a priapiſm with the hand, or increaſing the turgudity of the virile member, by the ſame means, where the priapiſm already exiſts.—This is an approved definition of that phraſe, as to the term *luſt*, with reſpect to young men in full vigour and equal to the performance of coition; but with reſpect to old men, and *Inneens* (or perſons naturally impotent,) the exciting of luſt amounts only to cauſing the heart to beat more quickly than uſual, or increaſing that palpitation where it already exiſts.—By the exciting of luſt in women or eunuchs is underſtood ſimply cauſing a deſire of coition, or increaſing that deſire where it already exiſts.——Theſe definitions are recited at large in the *Fatâvee Alumgueeree*. By ſeeing the pudendum of a woman is underſtood, ſeeing the entrance of the vagina,

* Such as *ablution*, and ſo forth.

which

ſuppoſed practicable unleſs ſhe be in a reclining poſture.

If a man indulge in lewdneſs with a woman until he produce an emiſſion, ſome have ſaid that this occaſions *Hoormat-Mooſâhirat*, or prohibition from affinity, [with reſpect to the kindred of that woman;] but it is certain that this does not occaſion prohibition, becauſe the man, by producing an ex-vulval emiſſion, manifeſts that coition was not his intention; wherefore it does not ſtand as ſuch. And, in like manner, if a man enter a woman *in ano*, ſome have ſaid that this occaſions prohibition from affinity, as ſuch an act amounts to *touching in luſt*; but it is certain that this does not occaſion prohibition, becauſe the carnal conjunction of the ſexes does not ſtand as *procreation* on any other principle than as it may be the occaſion of offſpring, which it cannot poſſibly be from the performance of the act as above deſcribed.

A man cannot marry the ſiſter of his repudiated wife during

If a man repudiate his wife, either by a *complete* or a *reverſible* divorce, it is not lawful for him to marry her ſiſter until the expiration of her *Edit* *).—*Shafei* maintains that it is lawful, becauſe by either of thoſe forms of divorce the former marriage was completely diſſolved, inſomuch that if a man were to have carnal knowledge of his repudiated wife during her *Edit*, knowing the illegality of the ſame, he would be liable to the puniſhment for whoredom.—To this our doctors reply, that whatever the nature of the divorce may have been, whether reverſible or complete, the marriage with the firſt ſiſter does ſtill, in fact, continue during her *Edit*, in virtue of the continuance of ſeveral of its effects, ſuch as maintenance, and cuſtody, and inability to marry another man; neither does it appear, in the book of divorce, that any puniſhment for whoredom is ſpecified in the

* The time of probation which a divorced woman is to wait before ſhe can engage in a ſecond marriage, in order to determine whether or not ſhe be pregnant by the former. See Book IV. Chap. XII.

caſe of the huſband having carnal connexion with his repudiated wife within the term of her *Edit*; although, according to the book of *puniſhments*, he would incur it, becauſe, by the act of divorce, the huſband's right of cohabitation is diſſolved, and conſequently any ſubſequent cohabitation with her would bear the conſtruction of whoredom; but yet his other rights are not diſſolved (as was above obſerved,) wherefore, if he were to marry the ſecond ſiſter before the expiration of the former's *Edit*, it would amount to a marriage with two ſiſters at one time, which is forbidden.

Marriage with ſlaves;

A maſter may not marry his female ſlave, nor a miſtreſs her bondſman, becauſe marriage was inſtituted with a view that the fruit might belong equally to the father and the mother, and maſterſhip and ſervitude are contradictory to each other, wherefore it is not admiſſible that offspring ſhould thus be divided between the maſter and the ſlave.

and with *Kitâbees*;

MARRIAGE with a *Kitâbee* woman is legal, according to the word of GOD, "WOMEN ARE LAWFUL TO YOU, SUCH AS ARE *Mahſanas* "OF THE SCRIPTURAL SECTS:" (the term *Mahſana* does not, in this paſſage, imply a *Muſlamite*, but merely a woman of chaſte reputation *.)—Free *Kitâbee* women, and thoſe who are ſlaves, are equal in point of matrimonial legality, as ſhall be demonſtrated hereafter.

and with *Majooſees*.

IT is unlawful to marry a *Majooſee* woman, GOD having ſaid "YE MAY HOLD CORRESPONDENCE WITH THE *Majooſees* THE "SAME AS WITH THE *Kitâbees*, BUT YE MUST NOT MARRY "THEIR DAUGHTERS, NOR PARTAKE OF THEIR SACRIFICES."

and with *Pagans*;

IT is unlawful to marry a *Pagan* woman, according to the words

* This comment upon the text is meant as an exception to the general definition of the term *Mahſana*, as explained in the laws concerning ſlander, Book VII. Chap. V.

of

of the KORAN, "MARRY NOT A WOMAN OF the *Polytheiſts* UNTIL "SHE EMBRACE THE FAITH."

and with *Sabeans*.

(A *Muſſulman* may marry a woman of the *Sabeans*,) ſhe believing the ſcriptures, and profeſſing faith in the prophets; but if ſhe worſhip the ſtars, and believe not in any of the divine ſcriptural revelations, it is unlawful to marry her,—ſuch being idolators.—The diverſity of opinion which is recorded between *Haneeſa* and the two diſciples, originates in their different ideas with reſpect to the *Sabeans*; each arguing according to his own premiſes, for *Haneeſa* accounts the *Sabeans* to be *Kitábees*; whereas the two diſciples conſider them as worſhippers of the ſtars.

Marriage during pil-

(IT is lawful either for a man or a woman to marry during the *Ihrâm* * of pilgrimage.) *Shafeï* alledges that it is unlawful. And the ſame difference of opinion obtains in the caſe of a *Mohrim* † contracting in marriage a woman to whom he is guardian.—*Shafeï* ſupports his opinion upon a precept of the prophet, "MOHRIMS *marry not, nor* "*cauſe to marry.*"—In oppoſition to this, however, our doctors produce the inſtance of the prophet himſelf, who married *Meyemoona* whilſt he was a *Mohrim*; and with reſpect to the traditionary precept cited by *Shafeï*, as above, it is to be regarded as ſolely applying to the act of carnal conjunction; that is to ſay, the word *Nikkah* ‡ in that ſentence is to be conſtrued into *Wuttee* §,—as if he had ſaid, "*Let not* "MOHRIMS *hold carnal connexion, nor* MOHRIMAS *admit men to ſuch* "*connexion.*"—This indeed is rather a weak comment, ſince the word *Nikkah* has never been conſtrued into the admitting of man to the commiſſion of the carnal act: but the better principle upon which to anſwer it is that from the grammatical conſtruction of the

* The period of the pilgrims remaining at *Mecca*.

† A pilgrim, whilſt he remains at *Mecca*.

‡ Meaning *conjunction* in its *primitive* ſenſe, and *marriage* in its *occaſional* ſenſe.

§ Literally *conjunction*, but generally applied to the *carnal act*.

ſentence,

ſentence, the words of the prophet may be rendered into merely a *negative remark*, rather than a *poſitive prohibition.*

may female ſlaves.

It is lawful for a *Muſſulman*, who is free, to marry a female ſlave, whether ſhe be a *Muſlima*, or *Kitâbeea*, although he be in circumſtances to marry a free woman—that is to ſay, able to pay a dower, and afford an adequate maintenance to ſuch a woman.—*Shafeï* ſays that a man cannot lawfully marry a *Kitâbee* ſlave, he holding that it is not lawful for a freeman to marry any ſlave except of neceſſity, becauſe by ſuch an act he incurs the conſequence of ſubjecting a portion of his body to bondage; that is to ſay, his ſeed (which is a portion of his body) by entering the womb of a ſlave, is born in bondage; neceſſity, therefore, he holds can alone legalize ſuch a marriage, and conſequently, that ability to pay the dower and maintenance of a free woman prohibits a freeman from marrying a ſlave; but from this rule he excepts *Muſlima* ſlaves. — With our doctors, on the other hand, marriage with female ſlaves of every deſcription is legal, becauſe the text of the KORAN, on which the legality of marriage is founded, extends to all deſcriptions of women, to ſlaves as well as to thoſe who are free:—and, with reſpect to what *Shafeï* objects, that "*by ſuch an act a man incurs the conſequence of ſubjecting a portion of* "*his body to bondage*," it may be replied that, by marrying a ſlave, a man is only withheld from producing free children; but it is not thence to be concluded that he, *de facto*, ſubjects a portion of his body to ſlavery, as this portion (to wit, his ſeed) is neither free nor otherwiſe; and as a man is at liberty to abſtain from producing the child itſelf, (either by *not* marrying, or by marrying a woman who is *barren*) it follows that he is certainly at liberty to abſtain from producing it in a ſtate of *freedom.*

A man already married to a free woman cannot marry

It is unlawful for a man already married to a free woman to marry a ſlave, the prophet having iſſued a precept to this effect, "*Do not* "*marry a ſlave upon* [along with] *a free woman.*" *Shafeï* ſays that the

the marriage of a ſlave upon a free woman is lawful to a man who is a ſlave; and *Malik* likewiſe maintains that it is lawful, provided it be with the free woman's conſent.—The above precept, however, is an anſwer to both, as it is general and unconditional:—moreover, the legality of marriage is a bleſſing to males and females equally, but the enjoyment of it is by bondage reſtricted to *one half*, inſomuch that ſlaves can have only two wives, whereas freemen may legally have four, (as will be explained hereafter,) and ſlavery operating thus reſtrictively upon males does ſo equally upon females;—upon the former it operates by a reſtriction in point of *number*, as above; but ſince, with reſpect to females, this is impoſſible, it has its effect by a reſtriction in point of *circumſtances*; for inſtance, by reſtricting the legality of the marriage of female ſlaves to certain particular circumſtances, as in the preſent caſe, where it is admitted only under the circumſtance of the man not having any free wives.

but a man wedded to a ſlave may marry a free w

A man may lawfully marry a free woman upon a ſlave, the prophet having ſo declared:—moreover, a woman who is free is lawful under all circumſtances, the principle of reſtriction beforementioned not operating with reſpect to ſuch a woman.

If a man marry a ſlave during the *Edit* of complete divorce of another wife who is free, it is null, according to *Haneefa*.—The two diſciples alledge that it is valid, as under the circumſtances now recited it does not amount to marrying a ſlave upon a free woman; whence it is that if a man were to make a vow that he would not marry another woman upon his preſent wife, and he were afterwards to divorce his wife, and to marry another woman during her *Edit*, he would not be forſworn. The argument of *Haneefa*, in this caſe, is that the marriage with the free wife does ſtill in ſome ſhape remain, on account of the continuance of ſeveral of its effects; wherefore that with a ſlave during the term of the free woman's *Edit* is not admiſſible, on a principle of caution: contrary to the caſe of a *vow*, as

recited above, becauſe there the intention of the vower goes only to expreſs that he would not introduce another wife to the prejudice of her right of *Kiſſm*; but her right of *Kiſſm* * is annihilated by divorce.

Four wives allowed to freemen;

(U r is lawful for a freeman to marry four wives, whether free or ſlaves: but it is not lawful for him to marry more than four, becauſe God has commanded in the Koran, ſaying "YE MAY MARRY "WHATSOEVER WOMEN ARE AGREEABLE TO YOU, TWO, THREE, OR FOUR," and the numbers being thus expreſsly mentioned, any beyond what is there ſpecified would be unlawful.—*Shafei* alledges a man cannot lawfully marry more than one woman of the deſcription of ſlaves, from his tenet as above recited, that "*the marriage of free-*"*men with ſlaves is allowable only from neceſſity*;" the text already quoted, is, however, in proof againſt him, ſince the term *Niſſa* [*women*] applies equally to free women and to ſlaves.

and two to ſlaves.

(It is unlawful for a man who is a ſlave to marry more than two women; *Malik* maintains that it is lawful for a ſlave to marry as many women as a freeman, he holding it as a principle, that a ſlave, with reſpect to marriage, is in every particular the ſame as a free perſon, inſomuch that (according to him) a ſlave is authorized to marry without his proprietor's conſent.—The argument of our doctors, in this caſe, is that ſlavery operates to the privation of one half of the natural privileges and enjoyments, and the legality of four wives in marriage being of this deſcription, it follows that the privilege of a ſlave extends to the poſſeſſion of *two* wives only, in order that the dignity of freedom may be duly ſupported.

A man, having the full number

(If a man, having four wives, repudiate one of them, it is unlawful for him to marry any other woman during the term of that

* Impartiality in cohabitation with his wives. See Chap. VI.

Wife's

wife's *Edit*, whether the divorce, under which ſhe ſtands repudiated, be reverſible or complete. *Shafei*'s doctrine differs from this. His reaſoning, and the reply to it, are the ſame as in the caſe of a man marrying a ſiſter of his wife during the term of the latter's *Edit*.

of wives allowed, cannot marry during the *Edit* of one of them.

man may lawfully marry a woman pregnant by whoredom, but he muſt not cohabit with her until after her delivery.—This is the doctrine of *Haneefa* and *Mohammed*. *Aboo Yooſaf* ſays that a marriage made under ſuch a circumſtance is invalid: if, however, the deſcent of the *Fœtus* be known and eſtabliſhed, the marriage is null, according to all the doctors. The argument upon which *Aboo Yooſaf* ſupports his opinion as above, is, that the illegality of the marriage, in caſes where the parentage of the *Fœtus* is eſtabliſhed, originates purely in a principle of tenderneſs towards the *Fœtus*, and a *Fœtus* is an object of this tenderneſs, although it be begot in adultery, ſince it is innocent of any offence; whence procuring the abortion of it is illegal; marriage, therefore, with a woman pregnant by adultery is invalid, equally with one where the parentage of the *Fœtus* is aſcertained, and for the ſame reaſon. Our doctors, upon this point, argue that the woman is lawful in matrimony, on the authority of the ſacred writings, the KORAN ſaying "ALL WOMEN ARE LAWFUL TO YOU, EXCEPTING THOSE WITHIN THE PROHIBITED DEGREES:" and the prohibition of cohabitation until after delivery, is merely on account of the impropriety of ſowing ſeed in a ſoil already impregnated by another, a prohibition which occurs in the traditions. With reſpect to what *Aboo Yooſaf* alledges, that "the illegality of the "marriage in caſes where the parentage of the *Fœtus* is eſtabliſhed, "originates purely in a principle of tenderneſs towards the *Fœtus*,"—it is altogether unfounded, becauſe the nullity of the marriage in that caſe originates in a regard for the right, not of the *Fœtus*, but of the *father*.

A man may marry a woman pregnant

(IT is unlawful to marry a woman taken in war, being pregnant at the

but not a *captive* taken in ſtate.

the time of her capture, becauſe the parentage of her *Fœtus* is aſcertained *.

A man cannot contract his *Am-Walid* (being pregnant) to another:

If a man contract his *Am-Walid*, who is pregnant by him, to another man, it is null, becauſe the *Am-Walid* is accounted as the *Firâſh* of her maſter, or *partner of his bed*, inſomuch that the parentage of her child is eſtabliſhed by the law in him, independant of any formal claim or acknowledgment thereof on his part; wherefore, if the marriage were valid, it would induce the exiſtence of a right to cohabitation in two individuals with one and the ſame woman, a right which is null, as it would occaſion a doubtful parentage.

Objection.—The *Am-Walid* being declared the *Firâſh* of her maſter, it would appear that his marriage of her to another would not be legal, although ſhe were not pregnant.

Reply.—The *Firâſh* right of a maſter in his *Am-Walid* is of but weak conſideration; whence it is, that if he were to deny her child's deſcent from him, it would become baſtardized on the inſtant, without any aſſeveration. His *Firâſh* right in her, therefore, not being of any account, independent of *pregnancy*, is not prohibitory to her marriage, unleſs as connected with that circumſtance.

but he may ſo contract his enjoyed female ſlave.

If a man have carnal connexion with his female ſlave, and afterwards contract her in marriage to another man, it is lawful; becauſe an abſolute ſlave is not accounted as a *Firâſh*, or partner of her maſter's bed, ſince, if ſhe were to produce a child, the parentage would not be eſtabliſhed in him unleſs he were to claim it.—But yet it is adviſeable that the maſter, previous to contracting her to another perſon, ſuffer one term of her courſes to elapſe, ſo as to guard againſt the poſſibility of his ſeed mixing with that of the other.—It is to be remarked, in this place, that the marriage of the ſlave, under the circumſtance now mentioned, being valid, it is lawful for her huſband to have carnal

* As neceſſarily proceeding from ſome one of the *enemy*.

connexion

connexion with her immediately, and before her purification from her firſt ſucceeding courſes, according to *Haneeſa* and *Aboo Yooſaf*.—*Mohammed* alledges, however, that it will be laudable in the huſband to abſtain from carnal connexion with her until one complete term of her courſes ſhall have elapſed, becauſe it is poſſible that there may remain in her womb ſeed of her maſter,—wherefore it is requiſite that it be purified of that ſeed, the ſame as in a caſe of the purchaſe of a female ſlave.—The argument of the two *Elders*, in this caſe, is that the inſtitute of the law, legalizing her marriage, is in itſelf a proof that her womb is unoccupied, as the law does not admit any marriage to be legal but under that ſuppoſition; wherefore purification, in the preſent inſtance, is not made a rule, either *laudable* or *injunctive*: contrary to a caſe of *purchaſe*, that of a female ſlave being held lawful although ſhe be pregnant.

IF a man marry a woman, knowing her to have been guilty of whoredom, he may lawfully have carnal connexion with her immediately, before her purification from her courſes, according to the *Elders*: but *Mohammed* deems it laudable that he have no ſuch connexion with her until after her purification.—The reaſoning of each upon this point is to the ſame effect as in the preceding caſe.

A NIKKAH MATÂT, or *uſufructuary* marriage, where a man ſays to a woman "I will take *the uſe* of you for ſuch a time for ſo "much," is void, all the companions having agreed in the illegality of it.—It is related in the *Nakl Saheeh*, that *Ibn Abbas* retracted from his firſt opinion and embraced that of the other companions:—for *Ibn Abbas* was firſt of opinion that the *uſufruct* here mentioned is allowable; but *Alee* informed him that the prophet had declared it unlawful, upon which he retracted from his opinion of *uſufruct* being allowable:—and *Ibn Abbas* having thus retracted, *all* the companions appear to have agreed concerning its illegality.

An *uſufructuary* marriage is void;

A NIKKAH

and ſo alſo a *temporary* marriage.

A Nikkah Mowokket, or *temporary* marriage,—where a man marries a woman, under an engagement of *ten days* (for inſtance) in the preſence of two witneſſes,—is null.—*Ziffer* aſſerts that ſuch marriage is valid and binding, the condition expreſſed of a ſpecified period for its continuance being of no effect; becauſe a marriage is not to be held null on account of a null or illegal condition therein expreſſed.—The argument of our doctors is that a *temporary* marriage is of the ſame nature with a *uſufructuary* marriage; and in all contracts regard is had to the *ſenſe* rather than to the *letter*, wherefore a *temporary* marriage is null as well as a *uſufructuary* marriage, whether the period ſpecified be ſhort or long; becauſe the principle on which a contract of marriage falls under the deſcription of *Matât*, or *uſufructuary*, is its containing a ſpecification of time; and the ſame is found in a *Nikkah Mowokket*, or *temporary* marriage.

Caſe of a double marriage by one contract.

If a man marry two women by one contract, one of whom is lawful to him, and the other prohibited, his marriage with the one who is lawful holds good, but that with the other is void; becauſe in that only a cauſe of nullity is found: contrary to where a man puts together a freeman and a ſlave, and ſells them by one agreement, as ſuch ſale is null with reſpect to both, becauſe *ſale* is rendered null by an invalid condition, and the conſent to the contract of ſale is required with reſpect to the *free* perſon, in order to the legality of it with reſpect to the *ſlave*; this is therefore an invalid condition, as ſhall be demonſtrated in treating of *ſlaves*.—It is to be obſerved that the whole of the ſtipulated dower, in the caſe now recited, goes to her with reſpect to whom the marriage is lawful, according to *Haneefa*.—With the two diſciples, on the contrary, the dower is divided into the *proper* dower to each *, and therefore ſhe with reſpect to whom the marriage is legal receives the amount of her *proper* dower, and the

* That is to ſay, a dower ſuitable or proportioned to the rank and circumſtance of each reſpectively.

remainder

remainder drops in favour of the huſband; and the ſame is recorded in the *Mabſoot*.

Caſe of marriage by a *judicial decree*.

a woman ſue a man on a plea of marriage, declaring that *ſuch an one had married her*, and produce evidence in proof of her affirmation, and the *Kâzee* accordingly declare her to be the wife of ſuch a man, and it ſhould ſo happen that the man had never been actually married to that woman, yet he may, after this, lawfully reſide with her;—and this is a ſign of the authority of a judicial decree (or order of the *Kâzee*) in regard to appearance: and if the woman deſire carnal connexion, the man may lawfully hold ſuch connexion with her;—and this is a ſign of the authority of a judicial decree, in *reality*.—The authority of the judicial decree extending both to *appearance* and *reality* is a tenet of *Haneefa*; and is alſo found in a *prior* opinion of *Aboo Yooſaf*.—In a more *recent* opinion of *Aboo Yooſaf*, and with *Mohammed* and *Shafeï*, it is not lawful for the man to have carnal connexion with this woman, becauſe the *Kâzee* has erred in his proof, as the witneſſes bore falſe teſtimony, and an error in the proof deſtroys the authority of the decree in regard to *reality* wherefore it is, in ſome meaſure, the ſame as if the witneſſes were *ſlaves* or *infidels*, in which caſe the decree would have no authority either in *appearance* or *reality*; and ſo it would appear in the preſent inſtance likewiſe; but here the decree has authority in regard to *appearance*, on account that the witneſſes gave a true teſtimony *in appearance*; yet it has no authority in *reality*, as their teſtimony is falſe *in point of fact*; whereas, where the witneſſes are *ſlaves* or *infidels*, the decree is deſtitute of authority in *appearance* alſo, as the proof remains uneſtabliſhed even *in appearance*, ſince the diſcovery of their being *ſlaves* or *infidels* is practicable.—The argument of *Haneefa* is that the witneſſes are held, with the *Kâzee*, to bear true teſtimony, and this is *proof*, as it is impoſſible to aſcertain whether their teſtimony be *actually* true: contrary to the *ſtate of bondage*, or the *infidelity* of witneſſes, as theſe are circumſtances eaſily known and aſcertained, wherefore their evidence is not *proof* in any

way.—Now the decree being founded on the *proof*, and the authority of the decree, in reſpect to *reality*, being here poſſible, by previouſly taking the marriage for granted, as a matter of neceſſity, it follows that the decree has authority in reſpect to *reality*, in order that the contradiction between the two may be obviated in every ſhape,—for if ſhe were not lawful to him in *reality*, it would *occaſion* a contradiction between the two, inſtead of *obviating* a contradiction: contrary to a caſe of property claimed *generally* (that is to ſay, without any mention of the *cauſe* of propriety,) ſuch as if a man were to claim a female ſlave generally, and bring falſe evidence, and the *Kâzee* decree the ſlave to the plaintiff, and it afterwards appear that the witneſs bore falſe teſtimony,—for in this caſe the decree has authority in *appearance*, but not in *reality*, becauſe the cauſes of propriety in the ſlave are ſeveral, ſuch as *ſale*, *purchaſe*, *gift*, and *inheritance*, and regard cannot legally be had to any one of theſe as being prior to the others, ſince no one of them has precedence of the others, and to regard the *whole* of them as prior, is impoſſible; wherefore the decree cannot poſſeſs any authority [in *reality*.] Obſerve that the previouſly taking the marriage for granted, as a matter of neceſſity, is on account that a decree ſignifies the promulgation of a thing which is eſtabliſhed, and *not* the eſtabliſhment of a thing which is *not* eſtabliſhed,—for, if it were not previouſly taken for granted, it would follow that a decree ſignifies the eſtabliſhment of a thing which is *un*eſtabliſhed, wherefore the marriage is neceſſarily firſt taken for granted; and this is poſſible in the caſe of a claim of *marriage*, but not in a caſe of general *propricty*, for the cauſes of propriety there are multifarious, and no one of theſe has priority over the other;—in ſuch a caſe, therefore, the regarding of any one cauſe of propricty as *prior* to the *others* is impoſſible.

CHAP.

## CHAP. II.

### Of Guardianſhip and Equality.

A WOMAN who is an adult, and of ſound mind, may be married by virtue of her own conſent, although the contract may not have been made or acceded to by her guardians; and this, whether ſhe be a virgin or a *Siyeeba*.—This is the opinion of *Hanceſa* and *Aboo Yooſaf*, as appears in the *Zâhir Rawâyet*.—It is recorded, from *Aboo Yooſaf*, that her marriage cannot be contracted except through her guardian. *Mohammed* holds that the marriage may be contracted, but yet its validity is ſuſpended upon the guardian's conſent: on the other hand, *Málik* and *Shafeï* aſſert that a woman can by no means contract herſelf in marriage to a man in any circumſtance, whether *with* or *without* the conſent of her guardians;—neither is ſhe competent to contract her daughter or her ſlave, nor to act as a matrimonial agent for any one, ſo as to enter into a contract of marriage on behalf of her conſtituent; becauſe the end propoſed in marriage, is the acquiſition of thoſe benefits which it produces, ſuch as procreation, and ſo forth; and if the performance of this contract were in any reſpect committed to *women*, its end might be defeated, they being of weak reaſon, and open to flattery and deceit.—*Mohammed* argues that this apprehenſion is done away by the permiſſion of the guardian being made a requiſite condition.—The reaſoning upon which the *Zâhir Rawayet* proceeds in this caſe is that, in marrying, the woman has performed an act affecting *herſelf only*, and to this ſhe is fully competent, as being *ſane* and *adult*, and capable of diſtinguiſhing *good* from *evil*, whence it is that ſhe is by law capacitated to act for herſelf in all matters of property, and likewiſe to ~~chuſe~~ a huſband; neither does a woman require her guardian to match her for any other reaſon than as ſhe may, by that means, avoid the imputation which might be thrown upon her

An adult female may engage in contract without her guardian's conſent.

her modeſty if ſhe were to perform this herſelf; for all which reaſons a woman contracting herſelf in marriage is valid, independent of her guardian, although it ſhould be an unequal match; but yet, in the latter caſe, the guardian is at liberty to diſſolve the marriage.—It is recorded as an opinion of *Haneeſa* and *Aboo Yooſaf*, that the marriage is illegal if there be an inequality between the parties.—It is alſo recorded that *Mohammed* afterwards adopted the ſentiments of the two elders upon this point, and agreed with them, that the marriage here treated of is lawful, and that its validity is not ſuſpended upon the approbation of the guardian.

unleſs the match be unequal.

An adult virgin cannot be married by her

It is not lawful for a guardian to force into marriage an adult virgin againſt her conſent.—This is contrary to the doctrine of *Shafei*, who accounts an adult virgin the ſame as an infant, with reſpect to marriage, ſince the former cannot be acquainted with the nature of marriage any more than the latter, as being equally uninformed with reſpect to the matrimonial ſtate, whence it is that the father of ſuch an one is empowered to make ſeizin of her dower without her conſent.—The argument of our doctors is that the woman, in this caſe, is *free*, and a *Mokâtib*, (that is, ſubject to all the obligatory obſervances of the law, ſuch as *faſting*, *prayer*, and ſo forth,) wherefore no perſon is endowed with any abſolute authority of guardianſhip over her: contrary to the caſe of infants, over whom others are neceſſarily endowed with this authority, the underſtanding of ſuch being defective, whereas that of an adult is held complete, in conſequence of her having attained to years of diſcretion; for, if it were otherwiſe, ſhe would not be ſubject to the obſervances of the law: from all which it follows that this woman is the ſame as an adult ſon; and that all her acts with reſpect to matrimony are good and valid, the ſame as his with reſpect to property; neither is her father empowered to make ſeizin of her dower without her conſent expreſſed or virtually underſtood, as he is not at liberty to do ſo where ſhe has forbidden him.

WHENEVER

Tokens of consent from a

WHENEVER a guardian, being the perſon empowered to engage in the contract, requires the conſent of an adult virgin to a marriage, if ſhe ſmile or remain ſilent, this is a compliance; becauſe the prophet has ſaid "*A virgin muſt be conſulted in every thing which regards "herſelf; and if ſhe be ſilent it ſignifies aſſent*;" and alſo, becauſe her aſſent is rather to be ſuppoſed, as ſhe is aſhamed to teſtify her deſire; and *laughter* is a ſtill more certain token of aſſent than ſilence: contrary to *weeping*, as this manifeſts abhorrence, ſince tears are moſt commonly the effect of grief, and not of joy, which is rarely the occaſion of them, and therefore not to be regarded.—Some have ſaid that if her laughter be in the manner of jeſt or deriſion it is not a compliance; nor is her weeping a diſapproval, if it be not accompanied with noiſe or lamentation.

BUT if a marriage be propoſed to an adult virgin by any other than her guardians, or by a *Walee Bayeed*, (or guardian of a more diſtant degree than her father, brother, or uncle,) her ſilence or laughter are not ſufficient, until ſhe ſhall from her lips pronounce an explicit compliance; becauſe here her ſilence might be conſtrued to ariſe from ſhyneſs towards ſuch a perſon as being a ſtranger, and not from her conſent to the match; and if it were even to be conſidered as a token of approbation, yet, under ſuch a circumſtance, it muſt be regarded as doubtful: but this is not the caſe if the perſon who propoſes the marriage be acting merely as a *meſſenger* from her parent, or other immediate guardian; becauſe to ſuch an one the ſame ſigns of aſſent or diſſent ſuffice as were ſpecified in the preceding caſe.—It is here to be obſerved that, in requiring the woman's conſent as aforeſaid, it is requiſite that the huſband propoſed to her be particularly named and deſcribed, ſo as to enable her to form ſome idea of him, whereby to aſcertain her liking or diſlike; but it is unneceſſary to name or ſpecify the dower; and this is approved, becauſe marriage may be independent of any dower, as that is not eſſential to it.

If a man contract an adult virgin in marriage to another without her knowledge, upon her receiving intelligence of it the ſame tokens ſuffice, to ſignify her compliance or approval, as were ſpecified in the former caſe; that is to ſay, if ſhe laugh or remain ſilent ſhe conſents, or if ſhe weep ſhe diſapproves, provided the perſon contracting on her behalf be her guardian, and as ſuch empowered ſo to contract; but if the contract be entered into by any other than her guardian, her conſent is not underſtood until ſhe ſhall have expreſſed the ſame in terms; and in this, as in the preceding caſe, the naming and deſcribing of the huſband to her is a requiſite condition, but not the ſpecification of the dower.—It is to be here obſerved that, if the perſon who conveys the intelligence to her be a *Fazoolee*, (that is, one who is neither an *agent* nor *guardian*,) number or integrity are conditions eſſential to the effect; that is to ſay, the information muſt be conveyed to her by *two* perſons, or at leaſt by one perſon of known good repute, according to *Haneefa:* but if the informer be acting merely as a *meſſenger* from the guardian, then neither number nor integrity are conditions, according to all the doctors. There are many caſes ſimilar to this with reſpect to the point at preſent in queſtion, ſuch as the recall of an ambaſſador, and the revocation of the privileges of a *

Tokens of conſent from

If a guardian propoſe a marriage to a *Siyeeba*, (or woman with whom a man has had carnal connexion,) it is neceſſary that her compliance be particularly expreſſed by words; ſuch as, "I conſent to it," becauſe the prophet has ſaid "Siyeebas *are to be conſulted*," and alſo becauſe a *Siyeeba*, having had connexion with man, has not the ſame pretence to ſilence or ſhyneſs as a virgin, and conſequently the ſilent ſigns before intimated are not ſufficient indications of her aſſent to the propoſed alliance.

Caſes under which a woman is ſtill conſidered as a *virgin*, in

If the ſigns of virginity in a girl ſhould happen to be effaced, either by leaping or any other exertion, or by a wound, or by frequent repetitions of the menſes, yet ſhe is ſtill to be conſidered as a virgin; that

that is to ſay, her ſilence is a ſufficient ſign of her acquieſcence in a marriage propoſed, becauſe ſhe is ſtill in reality a *virgin*, the law accounting every woman ſuch who has not had carnal connexion with the other ſex,—and conſequently ſubject to the ſame ſhyneſs and reſerve, from her not being accuſtomed to male ſociety.—And if the ſigns of virginity be effaced even by *fornication*, yet ſhe here alſo ſtands as a virgin, according to *Haneeſa*. *Aboo Yooſaf*, *Mohammed*, and *Shafei*, are of opinion that the ſilence of ſuch an one is not a ſufficient token of conſent to a marriage propoſed, becauſe ſhe is actually a *Siyeeba*, ſince ſhe has actually had connexion with man.—*Haneeſa* in this caſe argues that people in general ſtill ſuppoſe her to be a *virgin*, and hence conſider her ſpeaking as a breach of decorum, and conſequently ſhe will refrain from ſpeech; her ſilence, therefore, muſt be held ſufficient, leſt her delicacy be violated: contrary to a caſe where a woman has loſt her virginity either in an erroneous or an invalid marriage, as ſuch an one would not be held a virgin with reſpect to the point in queſtion, the law having manifeſted her carnal connexion, by inſtituting, in her caſe, obſervances which are a conſequence of it, (ſuch as *Edit* and *Dower*,) and by eſtabliſhing the parentage of her child, whereas it recommends, as laudable, the concealment of fornication: this, however, is only where the caſe is not of a very notorious nature; for if a woman be known to abandon herſelf to fornication publicly, her ſilence would not be deemed ſufficient.

tokens of conſent.

If a man ſhould ſay to a woman "You have heard of your being "contracted to me by our friends, and remained ſilent;" and ſhe reply, "No, I refuſed you," or "I diſſented," her declaration is to be credited.—*Ziffer* ſays that the declaration of the huſband is to be credited, on account that ſilence is the original ſtate of man, wherefore the perſon who adheres to that is the *defendant*; and the repulſion of the marriage is *ſuperveuient*, wherefore the perſon who adheres to that is the *plaintiff*; the caſe is therefore the ſame as where a perſon enters into a contract of ſale under a condition of option, and pleads a rejec-

Caſe of allegation and denial.

tion after the time of option has elapſed, and the other denies the rejection,—for in that caſe the declaration of the *denier* is to be credited, as he adheres to what is original, to wit, *ſilence*. Our doctors, on the other hand, ſay that the huſband, in the preſent caſe, on account of his plea of *ſilence*, pleads the obligation of the contract of marriage, and conſequently of his being the proprietor of the *woman's perſon* *; and that the wife, by pleading the rejection, ſets aſide the claim of her huſband, and muſt therefore be conſidered as the *defendant*, in the ſame manner as when a depoſitee pleads the reſtoration of a depoſit, and the proprietor of the depoſit declares that he had not returned it to him; becauſe, in ſuch a caſe, the declaration of the truſtee would be credited, ſince he is in reality the *defendant*, although in appearance he be the *plaintiff*, for he frees himſelf from reſponſibility, and the original ſtate of man is freedom, and an exemption from reſponſibility:—it is otherwiſe with reſpect to the caſe of a condition of option in ſale, becauſe the obligation of a ſale is manifeſted after the lapſe of the time of option, and therefore the perſon who pleads the rejection is *plaintiff* both in reality and in appearance. But here, if the huſband ſhould produce evidence in ſupport of his ſilence, the marriage becomes eſtabliſhed: if, however, he have no evidence, then an oath muſt not be impoſed upon the wife, according to *Haneefa*.—This is one out of ſix caſes in which an oath is incumbent upon the *defendant*, according to *Haneefa*, in oppoſition to the opinion of the two diſciples; as will be fully treated of under the head of *ſales*.

Infants may be contracted by their guardians

THE marriage of a boy or girl under age, by the authority of their paternal kindred, is lawful, whether the girl be a virgin or not, the prophet having declared "*Marriage is committed to the paternal kindred.*" *Mâlik* alleges that this is a power the exerciſe of which does not appertain to any of the kindred except the father.—*Shafeï* maintains that it belongs only to her father or grandfather: and he

* Arab. *Booza*, i. e. *Genitale Mulieris*. The phraſe here adopted is to be thus underſtood, in *marriage* and *divorce*, throughout.

adds

adds that this privilege does not appertain to any guardian whatever with reſpect to an infant *Siyeeba*, although he be her father or her grandfather.—*Málik* argues that power over freemen is eſtabliſhed from neceſſity; but in the preſent inſtance no ſuch neceſſity exiſts, as infants are not ſubject to any carnal appetite; yet it is veſted in a father, on the authority of the ſacred writings, contrary to what analogy would ſuggeſt:—but he alſo ſays that a grandfather, not being the ſame as a father, is not to be included with him. Our doctors, on the other hand, allege that the guardianſhip veſted in a father is in no reſpect *contrary*, but is rather *agreeable* to analogy; becauſe marriage is a point which involves in it many conſiderations, both civil and religious; and it is not perfect unleſs the parties be equal in degree according to the cuſtomary acceptation; and this equality is not always to be found; wherefore authority is veſted in the father to contract his children during their minority, leſt an opportunity of marrying them equally might be loſt.—*Shafei* argues, that entruſting the power of contracting marriage to any others than the father or grandfather would be oppreſſive upon the child, ſince it is to be ſuppoſed that no others are equally intereſted in its welfare or happineſs; on which principle it is that kindred of a more diſtant degree are not empowered to act with reſpect to the *property* of infants, a matter of infinitely leſs importance than their *perſons*, and conſequently the acts of ſuch, with reſpect to the latter, are unlawful *a fortiori*.—Our doctors argue, that affinity is a cauſe of affection in other relations the ſame as in the parents, and in whatever degree that may be defective, a proviſion is made againſt any evil conſequence, by veſting in the child an option of acquieſcence in the match after puberty, which acquieſcence is neceſſary to conſtitute its validity: contrary to the caſe of acts with reſpect to *property*, becauſe theſe are capable of repetition, ſince they are done with a view to the acquiſition of gain, which cannot be obtained but by ſuch repetition; and ſuch being the caſe, if any loſs ſhould happen in the property, it is irretrievable; wherefore authority to act in reſpect to property is uſeleſs, unleſs it be abſolute;

and

and abſolute authority cannot be eſtabliſhed where there is any defect. The argument of *Shafei*, in ſupport of his ſecond propoſition, (to wit, "that this privilege does not appertain to any guardian whatever "with reſpect to an infant *Siyeeba*, although he be her father or grandfather,") is, that her becoming a *Siyeeba* is to be conſidered as endowing her with ſufficient underſtanding and capacity to act and judge for herſelf, on account of her being thus accuſtomed to male ſociety, wherefore the law operates upon this conſideration, without any regard to the abſolute fact of her being endowed with ſuch a portion of underſtanding or not, as that is a matter which does not readily admit of aſcertainment. To this our doctors reply, that the infant requires a guardian whoſe tenderneſs and affection muſt be neceſſarily admitted; neither can her acquaintance with the other ſex be conſidered as endowing her with any additional portion of underſtanding in regard to mankind, without concupiſcence, which, in a child, does not exiſt.—It may alſo be further obſerved that the precept of the prophet already quoted is general and indiſcriminate, and therefore includes all relations equally; which makes it a ſufficient anſwer to *Mâlik* and *Shafei*.

Relations ſtand in the ſame order in point of authority to contract minors in marriage as they do in point of inheritance; but this authority, in the more diſtant relatives, is ſuperceded by the exiſtence of thoſe of a nearer degree.

Caſe in which the marriage of infants continues binding after puberty.

If the marriage of infants be contracted by the fathers or grandfathers, no option after puberty remains to them; becauſe the determination of parents in this matter cannot be ſuſpected to originate in ſiniſter motives, as their affection for their offſpring is undoubted; wherefore the marriage is binding upon the parties, the ſame as if they had themſelves entered into it after maturity.

But

Case which admits an option of acquiescence afterpuberty.

But if the contract ſhould have been executed by the authority of others than their parents, each is reſpectively at liberty, after they become of age, to chuſe whether the marriage ſhall be confirmed or annulled.—This is according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* maintains that, in this caſe alſo, no option remains to them, ſince he conſiders all guardians to be the ſame as parents. To this *Haneefa* and *Mohammed* reply, that the more diſtant the guardians ſtand in their affinity to the parties, the leſs warm are their affections ſuppoſed to be; whence it is to be apprehended that, in contracting the marriage, ſelf intereſt, or ſome other ſiniſter motive, might operate in their minds to the diſadvantage of the infant under their guardianſhip, an evil which is provided againſt by leaving an option to the infant after maturity.—It is to be obſerved, however, that this caſe, applying generally to all except the father and grandfather, includes the mother of the infant, and alſo the *Kázee*; becauſe the former, as being a woman, is deficient in judgment; and the latter, as a ſtranger, in affection; and conſequently a right of option muſt be reſerved to the infant after maturity.—It is alſo to be remarked that, in diſſolving the marriage, the decree of the *Kázee* is a neceſſary condition in all caſes of option exerted after maturity: contrary to the rule in the exertion of a ſimilar right of option after manumiſſion; that is to ſay, if a maſter marry his female ſlave to any perſon, and afterwards emancipate her, ſhe will have a right of option upon her emancipation; if ſhe pleaſe the marriage continues, but if ſhe diſapprove it is diſſolved; and the decree of the *Kázee* is not eſſential to ſuch diſſolution: but it is otherwiſe in the caſe of option after maturity; becauſe that option is reſerved with a view to guard againſt injury to the other rights of the parties, which might occur in a variety of inſtances, and which, if admitted, (as, if the marriage were *abſolute*, they muſt be,) would be calculated to introduce many evils into the married ſtate, ſince the guardian might, for inſtance, in executing the contract, agree to an inadequate dower, or to an unequal match; and as the diſſolution of the marriage thus tends to affect other rights, a decree of the *Kázee*

is

is eſſential thereto: but, in the caſe of the female ſlave, the right of option after emancipation is intended as a ſecurity againſt an evident injury to herſelf, as the huſband's power over her is extended, and his authority, as well as her obligations, in many reſpects enlarged, by her emancipation from ſlavery; whence it is that this right of option is reſtricted to *female* ſlaves only, and does not extend to *males*, to whom the above principle would not apply; and ſuch being the caſe, the diſſolution of her marriage is to be regarded merely as the removal of a hardſhip from herſelf, in which the decree of the *Kâzee* is no way neceſſary, ſince all perſons are entitled to relieve themſelves from evil.

Tokens of acquieſcence after puberty.

If the female, thus contracted during infancy, be of age when the marriage is firſt mentioned to her, and ſhe upon that occaſion remain ſilent, her ſilence, (according to *Haneeſa* and *Mohammed*,) is to be conſtrued into conſent; but if ſhe continue ignorant of the contract, her right of option is ſtill reſerved to her, until ſuch time as ſhe is informed of it, and remain ſilent as above. *Mohammed*, in this caſe, makes it a condition that the girl be duly informed of the marriage, becauſe ſhe cannot exert her right of option without a knowledge of that circumſtance, as the guardian may effect the marriage altogether unknown to her, and it may conſequently happen that ſhe never hears of it, and of courſe ſhe would remain excuſed (as to her *ſilence*) on the ground of *ignorance*; but he does not make a knowledge of her right of option a condition, becauſe that is an inſtitute of the law, and ignorance is no plea with reſpect to an inſtitute of the law, with which it is ſuppoſed that every perſon ought to be acquainted; the caſe is otherwiſe with a female ſlave, who being employed in the ſervice of her maſter has no opportunity to obtain any knowledge of the law, wherefore ignorance of this point is a good plea in favour of the continuance of her right of option.

Circumſtances which

The right of option in a virgin, after maturity, is done away by

her ſilence; but the right of option of a man is not done away by the ſame circumſtance, nor until he expreſs his approbation by *word* or by *deed*, ſuch as preſenting her dower, cohabiting with her, and ſo forth: and in like manner the right of option of the female after maturity, (in a caſe where the huſband has enjoyed her before ſhe attained to that ſtate,) is not annulled until ſhe expreſs her conſent or diſapprobation in terms, (as if ſhe were to ſay "I approve," or, "I "diſapprove,") or until her conſent be virtually ſhewn by her conduct, in admitting the huſband to carnal connexion, and ſo forth.

annul the right of option. 10

THE option of maturity of a virgin is not protracted to the end of the aſſembly*; but that of a *Siyeeba*, or a youth, is not annulled even by the riſing from the aſſembly, becauſe the option of maturity is eſtabliſhed by diſſent, on account of the apprehenſion of the ends of marriage being defeated; and whatever is eſtabliſhed by diſſent is annulled by aſſent, on account of its advantage being obtained; now the ſilence of a virgin is aſſent, but not that of a *Siyeeba*, or a *youth*; wherefore the option of the former is annulled, but not that of the two latter:—moreover, a *Siyeeba*'s option of maturity † has not been eſtabliſhed by the act of her *huſband*, as is evident; and a circumſtance which is not eſtabliſhed by the act of the huſband is not reſtricted to that aſſembly, ſince that only which is *delegated* ‡ is ſo reſtricted, as ſhall be hereafter demonſtrated §. contrary to the option of *manumiſſion*, as that is not annulled by ſilence, but is protracted to the end of the aſſembly, and annulled by the riſing from the aſſembly, becauſe the option of manumiſſion is eſtabliſhed by the act of the

Degree of the continuance of a right of ity.

* Arab. *Majlis*, meaning the place or company in which ſhe may happen to be at the time of her attaining maturity. It is treated of at large elſewhere. Vide *Index*.

† By *option of maturity*, and *option of manumiſſion*, is meant, option of acquieſcence *after* maturity, or *after* manumiſſion.

‡ Namely *a power of divorce*.

§ See Book of Divorce, Chap. III.

maſter, namely, *emancipation*; and hence regard is had to the *Majlis* in this caſe, as well as in that of a woman endowed by her huſband with an option of divorce.

Separation in conſequenee of option is not *divorce*.

A ſeparation between a huſband and wife in conſequence of option after maturity is not divorce, from whatever ſide it proceed, becauſe it may with propriety proceed from the wife, whereas divorce cannot. And ſo alſo, ſeparation in conſequence of option after manumiſſion is not divorce, for the ſame reaſon.

Rule of inheritance in the marriage of infants.

If a girl who has been contracted in marriage by her guardians, as already ſtated, ſhould die before ſhe attain maturity, her huſband inherits of her: and, in like manner, if a youth ſo contracted would die before he attain maturity, his wife inherits of him;—and ſo alſo, if either ſhould happen to die *after* maturity, without a ſeparation having taken place;—becauſe the marriage contract was regular and valid *ab origine*, and would remain ſo, until diſſolved by the diſſent of one or both of the parties in the event of their arriving at maturity; but this being precluded by the demiſe of one of them, the marriage continues good for ever; and conſequently all the mutual privileges eſtabliſhed in the parties by the marriage are irreverſibly confirmed by the deceaſe of either of them:—contrary to the caſe of a marriage contracted by an unauthorized perſon, where, if either of the parties were to die before aſſent being duly expreſſed, the other would not inherit; becauſe, in this caſe, the exiſtence of the marriage is ſuſpended upon the conſent of the parties, and is conſequently rendered null by the demiſe of either previous to the declaration of their will in it; whereas, in the other caſe, the deceaſe of either party, previous to maturity or ſeparation, as aforeſaid, does not *annull*, but rather *confirms* their mar-

Perſons incapable of acting as

Authority to contract others in marriage is not veſted in a ſlave, an infant, or a lunatic, becauſe ſuch perſons, being conſidered in law as

as incapable of acting for themſelves, are incompetent to exerciſe any authority over others, *a fortiori*: moreover, this authority is eſtabliſhed in guardians and others out of tenderneſs to perſons who, from their ſituation, require attention and care, (ſuch as infants and lunatics;) but this would not be manifeſted by committing the execution of marriage, on their behalf, to perſons of the above deſcriptions. guardians in marriage.

AN infidel cannot be veſted with this authority with reſpect to a *Muſſulman*, male or female, becauſe the word of GOD ſays "HE "DOTH NOT ADMIT INFIDELS TO ANY CLAIM UPON BELIEVERS;" and, if this authority were veſted in *infidels*, it would be admitting them to ſuch a claim: and hence alſo it is, that the evidence of *infidels* regarding *Muſſulmans* is not admitted; and, upon the ſame principle, that *Muſſulmans* and *infidels* cannot inherit of each other.

AN *infidel* is veſted with this authority with reſpect to his children who are *infidels*, the word of GOD ſaying "INFIDELS MAY EXERCISE "AUTHORITY OVER INFIDELS;" whence it is that the evidence of *infidels* regarding *infidels* is admitted, and that inheritance obtains among them.

IN defect of *paternal* relations, authority to contract marriage appertains to the *maternal*, (if they be of the ſame family or tribe,) ſuch as the mother, or the maternal uncle or aunt, and all others within the prohibited degrees, according to *Haneeſa*, upon a principle of benevolence.—*Mohammed* alleges that this authority is not veſted in any except the *paternal* kindred; and there is alſo an opinion of *Haneeſa* on record to this effect.—Of *Aboo Yooſaf* two opinions have been mentioned; according to that moſt generally received, he coincides with *Mohammed*: and their arguments on this ſubject are twofold: FIRST, the prophet has declared "*Marriage is committed to the pa-* "*ternal kindred*," (as was before quoted;) SECONDLY, the only inſtituting this authority is, that families may be preſerved from *Maternal* relations may act in defect of the *paternal*: 14

improper or enequal connexion; and this guard over the honour of a family is committed to the paternal relatives, whoſe peculiar province it is to take care that their ſtock be not expoſed to any mean or debaſing admixture, ſo as to ſubject them to ſhame.—The argument of *Hanneſa* is, that authority to contract marriage is inſtituted out of a regard to the intereſt of the child, which is fully manifeſted by committing it to perſons whoſe relation to the infant is ſo near as to render them intereſted in its welfare.

or the *Mawla* of an infant female ſlave:

If the *Mawla* * of an infant female ſlave, having emancipated her, ſhould contract her in marriage, it is lawful, although ſhe have relations within the prohibited degrees upon the ſpot, provided there be not among them any relations of the *paternal* deſcription, becauſe the *Mawla* ſtands as a paternal relation with reſpect to her.

or the *Magiſtrate*, in defect of a natural guardian;

(Where perſons are deſtitute of any natural guardian, the authority of contracting them in marriage is veſted in the *Imâm* or the *Kâzee*; becauſe the prophet has, in his precepts, declared "*Perſons being* "*deſtitute of guardians have a guardian in the Sultan.*")

or the neareſt guardian preſent, in the

(If the parents, or other firſt natural guardians of an infant, ſhould be removed to ſuch a diſtance as is termed *Gheebat-Moonkatat*, it is in that caſe lawful for the guardian next in degree to contract the infant in marriage.)—*Ziffer* and *Shafeï* allege that it is not lawful, becauſe this authority is veſted in the firſt guardian as a *right*, in order that the family may be preſerved from the ſhame occaſioned by the infant forming a degrading connexion; and this being a *poſitive right*, cannot be annulled by the abſence of the party, as the law does not admit *abſence* to be deſtructive of a *right*; and hence it is that if the abſent guardian were to contract the infant in marriage on the ſpot where he

* Meaning the *emancipator*. For a full definition of this term, ſee the *Emancipation of Slaves*.

may

may at that period happen to be, it is lawful; moreover, a relation of a more diſtant degree is not veſted with authority in the exiſtence of a nearer relative, ſince the more diſtant is precluded by the nearer.—The argument of our doctors is that authority to contract minors in marriage is inſtituted out of regard to their intereſt, as was already noticed; whence it is that this authority is not admitted over any, excepting ſuch as are incapable of paying the neceſſary attention to their own intereſt; and this regard is not manifeſted in committing the buſineſs of marriage to the nearer guardian, who is abſent, as from the exertion of his prudence or good ſenſe no advantage can, in that ſituation, be eaſily derived; the authority, therefore, in this caſe, devolves to the guardian next in degree who is preſent:—moreover, as, in caſe the firſt guardian were to die, or to become inſane, the authority would devolve to the next in degree, ſo does it likewiſe in the preſent caſe. And with reſpect to what *Ziffer* and *Shafeï* have advanced, that "if the abſent guardian were to contract "the infant in marriage on the ſpot where he may at that period "happen to be, it is lawful,"—the aſſertion is not admitted: but even granting this, it is ſtill to be obſerved, that although the more diſtant guardian be further removed from the infant in point of conſanguinity, yet, being upon the ſpot, he is enabled to tranſact for the latter, with the advantage of immediate and local knowledge; and *vice verſa* of the other guardians. Thus they ſtand upon an equal footing with reſpect to authority; and whoever of them may enter into a contract of marriage on behalf of the infant, the ſame holds good, and is not liable to be ſet aſide.—By the abſence termed *Gheebat-Moonkatat*, is to be underſtood the guardian being removed to a city out of the track of the caravans, or which is not viſited by the caravan more than once in every year; ſome, however, have defined it to ſignify any diſtance amounting to *three days journey*.

The guardianſhip over a lunatic woman reſts with her *ſon*.

IF a lunatic woman have two guardians, one her ſon and the other her father, the authority of diſpoſing of her in marriage reſts with the

the former and not with the latter, according to *Haneefa* and *Aboo Yoofaf*. *Mohammed* ſays that the father is her guardian in this reſpect, as feeling a more lively intereſt in her than the ſon.—The argument of the two *Elders* is that a ſon is prior to all others of the parental kindred; and the right of guardianſhip goes by this right of priority, in preference to affection: thus any paternal kinſman (ſuch as the ſon of the father's brother, for inſtance,) is in this reſpect prior to the maternal grandfather, although the natural affection of the latter be admitted to be the ſtrongeſt.

## SECTION.

### *Of* KAFÂT, *or* EQUALITY.

Definition of

KAFÂT, in its literal ſenſe, means equality.—In the language of the law it ſignifies the equality of a man with a woman, in the ſeveral particulars which ſhall be immediately ſpecified.

Equality neceſſary in marriage,

IN marriage regard is had to equality, becauſe the prophet has commanded, ſaying, "*Take ye care that none contract women in mar-*" *riage but their proper guardians, and that they be not ſo contracted* "*but with their equals*; and alſo, becauſe the deſirable ends of marriage, ſuch as cohabitation, ſociety, and friendſhip, cannot be completely enjoyed excepting by perſons who are each others equals, (according to the cuſtomary eſtimation of equality,) as a woman of high rank and family would abhor ſociety and cohabitation with a mean man; it is requiſite, therefore, that regard be had to equality with reſpect to the huſband; that is to ſay, that the huſband be the equal of his wife; but it is not neceſſary that the wife be the equal of the huſband, ſince men are not degraded by cohabitation with women who are their inferiors.—It is proper to obſerve, in this place, that one

reaſon

reaſon for attending to equality in marriage is, that regard is had to that circumſtance in confirming a marriage and eſtabliſhing its validity; for if a woman ſhould match herſelf to a man who is her inferior, her guardians have a right to ſeparate them, ſo as to remove the diſhonour they might otherwiſe ſuſtain by it.

in point of *tribe* or *family*.

EQUALITY is regarded with reſpect to lineage, this being a ſource of diſtinction among mankind; thus it is ſaid "a *Kooraiſh* is the equal "of a *Kooraiſh* throughout all their tribes;" that is to ſay, there is no pre-eminence among them, between *Haſhmees* and *Niſlees*, *Teyemees* or *Adwees*; and in like manner they ſay, "an *Arab* is the equal "of an *Arab*."—This ſentiment originates in a precept of the prophet to this effect; and hence it is evident that there is no pre-eminence conſidered among the *Kooraiſh* tribes: and with reſpect to what *Imâm Mohammed* has advanced, that "*pre-eminence is not regarded among* "*the* KOORAISH *tribes or families, excepting where the ſame is notorious, ſuch as the houſe of the* KHALIFS," his intention in this exception was merely to ſhew that regard ſhould be had to pre-eminence in that particular houſe, out of reſpect to the *Khilâfet*, and in order to ſuppreſs rebellion or diſaffection; and not to ſay that an original equality does not exiſt throughout. The *Kooraiſhes* are the deſcendants of *Nâzir* ſon of *Kanâan*, as is univerſally known.—*Ibn-Hijr* has ſaid that the *Kooraiſhees* are deſcended of *Kibr* the ſon of *Mâlik*. The term *Kooraiſh* is a diminutive of *Kurſh*, which means a body of people, or congregation; and this appellation was originally applied to them, becauſe they were accuſtomed to trade through different cities and countries, and after being thus ſcattered, uſed to re-aſſemble at *Mecca*. The *Arabs* are thoſe who derive their deſcent from a ſtock anterior to *Izir*, or (according to *Ibn-Hijr*) anterior to *Kibr*.

THE *Binno Bahala* tribe are not the equals of *Arabs* of any other deſcription whatſoever, they being notorious throughout *Arabia* for

every ſpecies of vice; and none of thoſe before mentioned eſteem them as upon an equality with themſelves.

Mawâlees, that is to ſay, *Ajims*, who are neither *Kooraiſhees* nor *Arabs*, are the equals of each other throughout, regard not being had among them to *lineage*, but to *Iſlâm*.—Thus an *Ajim* whoſe family have been *Muſſulmans* for two or more generations is the equal of one deſcended of *Muſſulman* anceſtors;—but one who has himſelf embraced the faith, or he and his father only, is not the equal of an *Ajim* whoſe father and grandfather were *Muſſulmans*; becauſe a family is not eſtabliſhed under any particular denomination (ſuch as *Muſſulman*, for inſtance,) by a retroſpect ſhort of the grandfather.—This is the doctrine of *Haneeſa* and *Mohammed*. *Aboo Yooſaf* ſays that an *Ajim* whoſe father is a *Muſſulman* is the equal of a woman whoſe father and grandfather are *Muſſulmans*.

in point of *relig on*;

An *Ajim* who is the firſt of his family profeſſing the faith is not the equal of a woman whoſe father is a *Muſſulman*.

Equality in point of *freedom* is the ſame as in point of *Iſlâm*, in all the circumſtances above recited, becauſe bondage is an effect of infidelity, and the properties of meanneſs and turpitude are therein found.

in point of *fr.edom*;

Regard is to be had to equality in piety and virtue, according to *Haneeſa* and *Aboo Yooſaf*; and this is approved, becauſe virtue is one of the firſt principles of ſuperiority, and a woman derives a degree of ſcandal and ſhame from the profligacy of her huſband, beyond what ſhe ſuſtains even from that of her *kindred*.—*Mohammed* alleges that poſitive equality in point of virtue is not to be regarded, as that is connected with religion, to which rules regarding mere worldly matters do not apply, excepting where the party, by any baſe or degrading miſconduct,

in point of

(ſuch

(ſuch as a man expoſing himſelf naked and intoxicated in the public ſtreet, and ſo forth,) may have incurred deriſion and contempt.

EQUALITY is to be regarded with reſpect to *property*, by which is underſtood a man being poſſeſſed of a ſufficiency to diſcharge the dower and provide maintenance; becauſe if he be unable to do both, or either, of theſe, he is not the equal of any woman; as the dower is a conſideration for the carnal uſe of the woman, the payment of which is neceſſary of courſe; and upon the proviſion of a ſupport to the wife depends the permanency of the matrimonial connexion; and this is therefore indiſpenſable *a fortiori*.—This, according to ſome, is found in the ability to ſupport a wife for *one month* only; but others ſay for *a year*. By a man poſſeſſing ſufficient to enable him to diſcharge the dower, is underſtood his ability to pay down that proportion of it which it is cuſtomary to give immediately upon the marriage, and which is termed *Modjil*, or *prompt*; the remainder, termed the *Mowjil*, or *deferred*, it is not uſual to pay until a future ſeaſon; and hence it is that the ability to pay that part of the dower is not made a condition.—*Aboo Yooſaf* teaches that regard is to be had only to the man's ability to ſupport his wife, and not to the diſcharge of the dower, becauſe the latter is of a nature to admit of delay in the payment, but not the former; and a man is ſuppoſed to be ſufficiently enabled to pay the dower where his father is in good circumſtances. According to the doctrine of *Haneefa* and *Mohammed*, however, the fortune of the man is to be conſidered *in general*, (without regard to any particular ability,) inſomuch that a man who may even be qualified both to pay the dower and to provide ſubſiſtence, yet may not be held the equal of a woman poſſeſſed of a large property; ſince men conſider wealth as conferring ſuperiority, and poverty as inducing contempt. *Aboo Yooſaf*, on the other hand, maintains that wealth is not to be regarded in this reſpect, ſince it is not a thing of a ſtable or permanent nature, as property may be acquired in the morning and loſt before night.

in point of *fortune*;

and in point of *profeſſion.*

EQUALITY is to be regarded in *trade* or *profeſſion*, according to *Aboo Yooſaf* and *Mohammed.*—There are two opinions recorded of *Haneeſa* upon this point; and there is alſo an opinion related of *Aboo Yooſaf*, that the profeſſion is not to be regarded, unleſs where it is of ſuch a degrading nature as to oppoſe an unſurmountable objection; ſuch for inſtance as barbers, weavers, tanners, or other workers in leather, and ſcavengers, who are not the equals of merchants perfumers, druggiſts, or bankers.—The principle upon which regard is to be had to trade or profeſſion is, that men aſſume to themſelves a certain conſequence from the reſpectability of their callings, whereas a degree of contempt is annexed to them on account of the meanneſs thereof.—But a reaſon, on the other hand, why trade or profeſſion ſhould not be regarded is, that theſe are not *abſolute* upon a man, ſince he is at liberty to leave a mean profeſſion for one of a more honourable nature.

Caſe of a woman contracting herſelf on an inadequate dower.

IF a woman contract herſelf in marriage, conſenting to receive a dower of much ſmaller value than her *proper* dower *, the guardians have a right to oppoſe it, until her huſband ſhall agree either to give her a complete *proper* dower, or to ſeparate from him.—This is according to *Haneeſa.*—The two diſciples maintain that the guardians are not poſſeſſed of any ſuch authority; and their argument is, that whatever the dower may be above ten *Dirms* is the right of the woman, and no perſon is to be oppoſed in relinquiſhing that which is her own; as where a woman, for inſtance, chuſes to relinquiſh a part of the dower, after the amount of it has been ſpecifically ſtipulated.—To this *Haneeſa* replies, that the guardians aſſume a certain degree of reſpect and conſideration from the magnitude of the dower; and its ſmallneſs is an occaſion of ſhame to them; wherefore regard is had to that, as well as to equality: contrary to the caſe of a woman relinquiſhing her claim to any part of her dower after it has

* The nature of the *proper* dower is fully explained in the next chapter.

been

been ſpecifically ſtipulated, becauſe no diſgrace falls upon the guardians from ſuch dereliction.

Caſe of a father contracting his infant child on a diſproportionate dower.

IF a father ſhould contract in marriage his infant daughter, agreeing to a very inadequate dower; or, if he ſhould contract his infant ſon, engaging for an extravagant dower, yet this is legal and valid with reſpect to them.—This, however, is not lawful to any excepting a father or grandfather, according to all the doctors.—The two diſciples have ſaid that diminution or exceſs in the dower is illegal only where it is very apparent; that is to ſay, a contract of marriage, involving any very diſproportionate exceſs or deficiency of dower, is not held by them to be legal; becauſe the authority of a father or grandfather to contract infants in marriage is founded upon the ſuppoſition of their regard for the intereſt of thoſe infants, and therefore, where this regard does not appear, the contract is null; and in agreeing for a *deficient* dower on behalf of a female infant, or for an *exceſſive* one on behalf of a male, no regard to their intereſt whatever is manifeſted.—Similar to this is a caſe of purchaſe or ſale; that is to ſay, if a guardian were, on behalf of an infant, to ſell a thing for leſs than its value, or to buy a thing for more than it is worth, at an exceſſive diſproportion, ſuch ſale or purchaſe would be invalid; and ſo alſo in marriage:—and hence it is that no perſon is empowered, with reſpect to deficient or exceſſive dowers, excepting a father or grandfather.—To this *Haneefa* replies, that the law here reſts ſolely upon whatever affords an argument of tenderneſs for the infant, and that is found in nearneſs of affinity; and in marriage there are many conſiderations of more weight and moment than the dower, whereas, in tranſactions which concern *property*, that only is a conſideration; and where that which is the *end* appears to be defeated, their authority is done away.—But with reſpect to others than the father and grandfather, no regard is had to affinity as an argument of tenderneſs in the preſent caſe, ſince that exiſts in them in a ſmaller degree.

A father may contract his infant child to a slave.

If a man contract his infant daughter to a slave, or his infant son to a female slave, it is lawful.—The compiler of the *Hedáya* observes that this is according to *Haneefa*, who argues that the father's neglect of equality in this instance must be supposed to arise from some other considerations of greater weight, wherefore the said contract of marriage is lawful; but if it should appear that the parent has adopted such a match without any view to a particular advantage, the contract is in that case null: and the two *Elders* coincide with *Haneefa* in this opinion.—According to the two disciples the contract is illegal, because it involves a twofold disadvantage with respect to the infant;—a want of equality in the first instance; and secondly, a want of residence, as a slave cannot be or remain any where but with the owner's consent.

## SECTION.

### *Of a Power of* Agency *to contract* Marriage.

Agents in marriage and others.

Agents in matrimony are persons employed and authorized by the parties concerned to enter into contracts of marriage on their behalf; and the power so delegated is

It is lawful for a nephew to contract the daughter of his uncle in marriage with himself.—*Ziffer* alleges that this is unlawful.

If a woman give authority to a man to contract her in marriage with himself, and he accordingly execute the contract in the presence of two witnesses, it is lawful. *Ziffer* and *Shafei* affirm that this is illegal, because no person is competent to transfer and make himself the

the proprietor of that which is transferred; as in a caſe of *ſale*, for inſtance, where, if the proprietor conſtitute a perſon his agent of ſale with reſpect to any particular property, and the agent ſell the ſame to himſelf, both the agency and the ſale are void, no man being competent to act as the transferrer of property, and to become himſelf the maſter of that property.—*Shafei*, however, alleges that a guardian may lawfully contract his ward to himſelf on the plea of *neceſſity*, ſince, if he were not allowed this privilege, ſhe might never be married; but a mere *agent* has no ſuch plea, becauſe in this caſe her guardian will contract her*.—Our doctors, on the other hand, argue that an agent in matrimony is merely a *negotiator*, and the obligations of the contract do not, in any reſpect, affect the contractor of a marriage; neither would any objections which may ariſe apply to the ſimple negotiation, but to the rights and obligations which it involves: contrary to the caſe of *ſale*, as cited by *Ziffer* and *Shafei*, becauſe there the agent appears to be acting not merely as a *negotiator*, but alſo as a *principal*, in the contract of ſale, and is conſequently affected by its obligations. It may be remarked in this place, that as the contractor of a marriage is merely a *negotiator*, ſo where a perſon becomes empowered to contract on both ſides, his ſingle declaration "I have contracted" comprehends both the declaration and the acceptance, and conſequently there is in this inſtance no occaſion for two ſeparate ſentences †.

Cafes of a contract executed by an

IF a man ſhould contract in marriage the ſlave of another without the owner's conſent, the validity of the deed is ſuſpended upon the will of the Owner: if he approve, it is lawful; if he diſapprove, it is null.

per

IN the ſame manner, if a man contract a woman in marriage without her knowledge in the preſence of two witneſſes, or if a

* This proceeds upon a ſuppoſition that the guardian is not within the prohibited degrees, and that no other proper perſon offers.

† See the beginning of this Book.

woman

woman contract a man in marriage without his conſent, the validity is ſuſpended upon the ſame circumſtance.—This is an opinion of our doctors; becauſe they hold that in a caſe of a contract entered into by a *Fazoolee*, or unauthorized perſon, and to which there exiſts any perſon who has a right to aſſent, the ſame ſtands as a complete contract, the validity of which is ſuſpended upon that perſon's approbation.—*Shafeï* maintains that all acts whatever of a *Fazoolee* are null; becauſe the uſe of a contract is for the purpoſe of eſtabliſhing its effect, like that of *ſale*, for inſtance, which is uſed for the purpoſe of eſtabliſhing a right of property, and that of *marriage*, for the purpoſe of eſtabliſhing a right of enjoyment; and a *Fazoolee* is incapable of eſtabliſhing the effect, on account of his want of authority; wherefore the act of the *Fazoolee* is nugatory.—The argument of our doctors is, that the foundation of the contract, namely, declaration and acceptance, has proceeded from a competent perſon, (that is, from one who is ſane and adult,) and has reference to its proper ſubject; neither can any injury be ſuſtained if the contract be executed, inaſmuch as there exiſts, in reſpect to it, a perſon who has a right of aſſent, and who, if he think proper, will ſignify ſuch aſſent, and give the contract force; or, if otherwiſe, will reject it: and in reply to what is urged by *Shafeï*, we obſerve that the effect of a contract is ſometimes deferred to a period ſubſequent to the time or date of the contract; as in a contract of ſale under a condition of option, where poſſeſſion is deferred until ſuch time as the condition of option drops.

If an unauthorized perſon ſay to two perſons "Be ye witneſs "that I have married ſuch a woman who is abſent;" and afterwards the woman ſhould hear of it, and conſent, yet the marriage is void: but if, on the unauthorized perſon ſpeaking as above, a third perſon were to ſay "I have married that woman to that man," and the woman on hearing of it ſhould conſent, the marriage is lawful. And, in like manner, if a woman ſhould ſay "Be ye witneſs that I have "contracted myſelf to ſuch a man who is abſent," and the man

ſhould afterwards hear of it and conſent, the marriage would notwithſtanding be void; but if, on the woman thus ſpeaking, a byſtander were to ſay, "Be ye witneſs that I give conſent on behalf of ſuch a "perſon;" and the man, on hearing of it, ſhould give his conſent, the marriage is valid. This is the doctrine of *Haneefa*. *Aboo Yooſaf* alleges that if a woman were to ſay "I have contracted myſelf to "ſuch a man," (he being abſent,) and the man, on afterwards receiving intelligence of this, were to declare his aſſent, the marriage is valid. In ſhort, according to *Haneefa* and *Mohammed*, one perſon is not competent to act as a *Fazoolee* in a contract of marriage, either on behalf of both parties, or as a *Fazoolee* on one ſide, and a principal on the other; whereas *Aboo Yooſaf* holds a contrary opinion. But, if two unauthorized perſons enter into a contract of marriage on behalf of both parties,—that is to ſay, one on the part of the man, and the other on that of the woman,—or, if the perſons enter into ſuch a contract, one as a *Fazoolee*, and the other as a principal,—it is lawful, with our doctors (*Haneefa*, *Mohammed*, and *Aboo Yooſaf*.) The argument of *Aboo Yooſaf*, in the caſe before ſtated, is that one perſon may in marriage ſtand as two, and the declaration of that perſon may be conſidered as two declarations *, (whence it is that if one perſon be authoriſed by both parties, the marriage is effected by his ſingle declaration;) and, in the caſe of an unauthorized perſon, the only difference is, that the validity of the contract remains ſuſpended upon the ultimate conſent of the parties, as in a caſe of *Khoola*, where, if a man were to declare that "he had repudiated his wife by the form of "*Khoola* for ſuch a conſideration," (the wife being abſent,) and ſhe were afterwards to receive intelligence of this, and to aſſent, the *Khoola* is lawful; and ſo alſo, in a caſe of *divorce* or of *manumiſſion*, where, if a man were to declare that he had divorced his wife for one thouſand *Dirms*, (ſhe being abſent,) and intelligence of this reach her, and ſhe conſent,—or, if a man declare that "he has emancipated

* That is to ſay, "as the *propoſal* and the *acceptance*, or, in other words, "as the "*declaration* and the *conſent*."

"ſuch

" ſuch an one, his ſlave, for a recompenſe of one thouſand *Dirms*," (the ſlave being abſent,) and the latter, hearing of this, aſſent, the proceeding is lawful.—To this *Haneefa* and *Mohammed* reply that, in the caſe before recited, the declaration of the unauthorized perſon, " I have contracted ſuch a woman to ſuch a man," or, " I have " married ſuch a woman," amounts to a contract on *one* part only, which is not valid, wherefore the legality of it is not ſuſpended upon the conſent of the parties, as its completion reſts on the reply, which is not approved, unleſs it proceed from a perſon preſent in the aſſembly or company where the contract is made, and during the continuance of that company; and, like a ſale, it is incapable of being protracted to any period beyond that aſſembly: but where a perſon, on the contrary, acts on the authority of both parties, the contract is valid, becauſe here his declaration applies equally to both; and where the contract is entered into by two unauthorized perſons, (acting for, or, as it were, *repreſenting* the reſpective parties,) it is complete, as it here poſſeſſes all the eſſential properties of a contract; and ſo alſo in caſes of *Khoola*, or of divorce, or manumiſſion for a compenſation, (as cited by *Aboo Yooſaf*,) becauſe in ſuch inſtances the declaration ſtands as a *conditional vow* on the part of the huſband or the maſter, ſo as to be binding upon him, and from which he cannot with propriety retract; and hence the engagement is completed ſolely by *him*.

Caſes of the matrimonial agent exceeding or acting contrary to his commiſ-

If a man commiſſion another, as his agent, to procure him a wife, and the agent ſhould contract him to two women, by one declaration*, his marriage is not valid with either, for, being unlawful with both, on account of its contradicting the tenor of the commiſſion with which he was charged, and uneſtabliſhed with either, on account of unſpecified *priority*, a ſeparation from both muſt neceſſarily enſue.

* That is to ſay, by one *contract*.

If

If a perſon commiſſion another, as his agent, to contract him in marriage to a woman, and the agent ſhould contract him to a female ſlave the property of ſome third perſon, it is valid, (according to *Haneefa*,) becauſe here the agent appears to have acted in ſtrict conformity with the tenor of his commiſſion, as the term *woman* is general, applying equally to the whole ſex, to ſlaves as well as to others; nor can there be any doubt, ſince the caſe ſuppoſes the ſlave to be the property, *not* of the *agent*, but of ſome *third* perſon;—neither is there any impropriety in it, as the caſe ſuppoſes the authorizer not to be previouſly married to a free woman.—The two diſciples allege that a marriage thus made by an agent is illegal, unleſs it be contracted with a woman who is the equal of the conſtituent; becauſe, by the term *woman*, generally expreſſed, is to be underſtood ſuch as it is cuſtomary to wed, and men commonly marry their *equals*; the term *woman*, therefore, thus indefinitely expreſſed, means ſuch a woman as it is uſual for ſuch a man to marry.—To this *Aboo Haneefa* replies, that in cuſtom there is an indefinite latitude, it being common for men, even of conſiderable rank, to marry female ſlaves, as well as free women who are their equals; and ſuch being the caſe, the agent is not reſtricted to any particular deſcription of women, as the term *woman* muſt be taken generally: and even admitting that cuſtom does thus prevail in marriage, it may be replied that cuſtom is of two different deſcriptions, one applying to *words*, (as *Dæba*, for inſtance, a term applying to beaſts in general, but which cuſtom hath reſtricted to *a horſe*;) and the other to *actions*, (ſuch, for inſtance, as men clothing themſelves in new garments on the feſtival of *Yd*;) now, in the preſent caſe, cuſtom applies to *facts*, and not to *terms*, and therefore does not admit the conſtruction of being reſtrictive.—It will hereafter be ſhewn, in treating of *Agency*, that the two doctors regard equality, in the preſent caſe, upon another principle, to wit, that a man not being neceſſitated to marry any woman, of courſe his deſire of being married by an agent relates only to a woman who is his equal.

## CHAP. III.

## Of the *Mihr*, or *Dower*.

Marriage without a dower is valid.

A MARRIAGE is valid, although no mention be made of the dower by the contracting parties, becauſe the term *Nikkah*, in its literal ſenſe, ſignifies a *contract of union*, which is fully accompliſhed by the junction of a man and woman; moreover, the payment of dower is enjoined by the law, merely as a token of reſpect for its object (the woman,) wherefore the mention of it is not abſolutely eſſential to the validity of a marriage:—and, for the ſame reaſon, a marriage is alſo valid, although the man were to engage in the contract on the ſpecial condition that there ſhould be no dower: but this is contrary to the doctrine of *Málik*.

Ten *Dirms* the loweſt legal dower.

THE ſmalleſt dower is ten *Dirms* *.—*Shafei* ſays that whatever ſum may be lawful as the price of a commodity in purchaſe and ſale, is lawful as a dower, becauſe the dower is the right of the woman, and conſequently it muſt depend upon herſelf to determine the amount of it. The arguments of our doctors in this caſe are twofold; FIRST, a precept of the prophet, which expreſsly declares "*There is no dower* "*under ten* DIRMS;" SECONDLY, the law enjoins a dower with a

* The value of the *Dirm* is very uncertain. Ten *Dirms*, according to one account, make about ſix ſhillings and eightpence ſterling.

view to manifeſt reſpect for the wife, wherefore it muſt be fixed, in its ſmalleſt degree, at ſuch a ſum as may be reſpectable; and this is ten *Dirms*, that being the loweſt amount of a theft inducing the puniſhment of amputation of a limb, which ſhews that ſuch ſum is the leaſt that can be regarded in an important or reſpectable light.

Caſe of a dower of ten *Dirms*.

IF a man aſſign, as a dower, a ſum under ten *Dirms*, yet his wife ſhall receive the whole ten *Dirms*, according to our doctors.—*Ziffer* alleges that ſhe ſhall receive a *Mihr-Miſl*, or *proper* dower; becauſe where the ſum ſpecified is ſo ſmall as not to bear the conſtruction of a dower, it is the ſame as if none whatever had been named.—The argument of our doctors is, that the impropriety of naming or ſtipulating ſo ſmall a ſum is on account of the injunction of the law, which cannot be fulfilled with leſs than ten *Dirms*, and the woman will certainly be ſatisfied with ten *Dirms*, as ſhe had agreed to accept of *leſs* than ten: neither is it proper to take an example, in this caſe, from that in which no dower whatever has been named, becauſe it may ſometimes happen that a woman may grant the right of poſſeſſion without any return, and out of pure love; but no woman will agree to a *trifling* return. And here, if the huſband were to divorce the wife before conſummation, her due on account of the dower is five *Dirms*, according to our three doctors. *Ziffer* holds that ſhe is in this caſe entitled only to a *Matât*, or preſent, the ſame as would be due where no dower had been named.—The meaning of the term *Matât* ſhall be hereafter fully explained.

The wife entitled to her whole dower,

IF a perſon ſpecify a dower of ten or more *Dirms*, and ſhould afterwards conſummate his marriage, or be removed by death, his wife, in either caſe, has a claim to the whole of the dower ſpecified, becauſe, by *conſummation*, the delivery of the return for the dower,



namely, of the huſband;

namely, the *Booza*, or *woman's perſon* *, is eſtabliſhed, and therein is confirmed the right to the conſideration, namely, the dower; and, on the other hand, by the deceaſe of the huſband the marriage is rendered complete, and every thing becomes eſtabliſhed and confirmed by its completion, and conſequently is ſo with reſpect to all its effects.

and to one half, upon divorce before conſummation.

If the huſband, in the caſe now ſtated, were to divorce his wife before conſummation, or *Khalwat Saheeh* †, ſhe, in this caſe, receives half her ſpecified dower; God having commanded, ſaying, "If ye "divorce them before ye have touched them, and have "already settled a dower on them, ye shall pay them "one half of what ye have settled."

Objection.—It would here appear that the whole dower ſhould of right drop, becauſe the object of the contract reverts to the woman untouched, the ſame as in ſale, where the whole price drops, if the buyer and ſeller break off the contract.

Reply.—There are two analogical concluſions applicable to this ſubject; first, what is recited in the above objection; secondly, it would appear that the whole dower is due, becauſe the huſband did not make uſe of his poſſeſſion, but ſuffered it to paſs from him untouched of his own choice; as in ſale, where the whole price of a purchaſe is due, if the purchaſer ſuffer the goods to periſh in the hands of the ſeller; and theſe two concluſions directly contradicting each other, they are both abandoned, and we adhere to the ſacred text as above.—This caſe ſuppoſes the divorce to take place before *Khalwat*, or retirement, becauſe that with a wife is held, by our doctors, to amount to carnal knowledge, as ſhall be hereafter explained.

* Literally, *Genitale arvum Mulieris.*

† Retirement, *ſolus cum ſola*, where there is no legal or natural impediment to the commiſſion of the carnal act. It is elſewhere tranſlated *complete retirement.*

If

Where no dower is ſtipulated in the contract, the wife receives her *proper* dower

IF a man marry a woman without ſpecifying any dower, or on the expreſs ſtipulation that ſhe ſhall not have a dower, and he either have carnal connexion with her, or die, ſhe is in that caſe entitled to her *Mihr-Miſl*, or *proper* dower.—*Shafei* alleges that where the huſband dies, nothing whatever remains due: but many of his diſciples and followers admit that the woman's *proper* dower is due in caſe of carnal connexion.—The argument of *Shafei* is that the dower is purely a right of the woman; whence it is in her power to relinquiſh it *a priori*, for the ſame reaſon as ſhe is at liberty to remit it afterwards.—To this our doctors reply that in the dower are involved rights of three different deſcriptions; the FIRST, the right of the law, which is that it ſhall not conſiſt of leſs than ten *Dirms*, (as has been already ſaid;) the SECOND, the right of the guardians, which is that it ſhall not be ſhort of the woman's *proper* dower; and the THIRD, the right of the woman, which is that it ſhall become her property. Now the right of the *law* and the right of the *guardians* are to be regarded in the *execution* of the contract, but not its *continuance*; conſequently, in the continuance, the dower is the right of the woman ſolely; and hence it is that ſhe is empowered to give it up or relinquiſh it in the *continuance* of the contract, but not *a priori*.

in caſe of divorce before conſummation.

IF a man marry a woman without any ſpecification of a dower, or on condition of there being no dower, and divorce her before carnal connexion, the woman in this caſe receives a *Matát*, or preſent;—GOD having commanded, ſaying, "GIVE HER A PRESENT, THE "RICH ACCORDING TO HIS WEALTH, AND THE POOR ACCORDING "TO HIS POVERTY:" thus a preſent is incumbent upon the huſband, on the authority of the ſacred writings:—but this is contrary to the doctrine of *Málik*.—The *Matât*, or preſent, here mentioned, is to conſiſt of three pieces of dreſs, compoſed of ſuch materials as are ſuitable to the woman to whom it is given; and theſe are, the *Dirʼa*, or ſhift; the *Khoomár*, or veil; and the *Mulhaffet*, or outer garment. The quantity is determined at three pieces of dreſs, on the authority of

of *Ayſha* and *Ibn Abbas*.—From the reſtriction of the preſent to ſuch materials as are ſuitable to the woman, it would appear that, in the adjuſtment, regard ſhould be had to the *woman*'s ſtate and condition, (and ſuch is the doctrine of *Koorokhee*,) becauſe it is a ſort of ſubſtitute for the woman's *proper* dower:—but the more approved doctrine on this point is, that regard be had ſolely to the ſtate and condition of the *huſband*, becauſe of the words of the ſacred text before quoted, "—THE RICH ACCORDING TO HIS WEALTH, AND THE POOR ACCORDING TO HIS POVERTY."—It is to be remarked, that the preſent muſt not exceed in value one half of the woman's *proper* dower, nor be worth leſs than five *Dirms*: the ſame is recorded in the *Mabſoot*.

Caſe of a dower ſpecified after marriage.

IF a man marry a woman without naming any dower, and the parties ſhould afterwards agree to a dower, and ſpecify its amount, ſuch dower goes to the woman, if the huſband either conſummate the marriage or die; but if he divorce her before conſummation, ſhe receives only a preſent. With *Aboo Yooſaf* ſhe, in this caſe, receives one half of the dower ſpecified, (and ſuch alſo is the opinion of *Shafeï*,) becauſe here the dower has been made obligatory and ſpecifically determined, and conſequently one half is due, according to the words of the text, "YE SHALL PAY THEM ONE HALF OF WHAT YE HAVE SETTLED." The argument of our doctors is that, in the preſent caſe, the ſpecification of the dower identifies a thing which was due on account of the contract, to wit, the woman's *proper* dower; and as this is incapable of ſubdiviſion, conſequently that which is its ſubſtitute cannot be halved.—With reſpect to the text above quoted, it is to be regarded as applying ſolely to what has been agreed to and ſpecified at the period of the contract: this being agreeable to what is cuſtomary.

Caſe of an addition made to the

IF a man make any addition to the dower in behalf of his wife ſubſequent to the contract, ſuch addition is binding upon him.—This

dower after marriage.

is contrary to the doctrine of *Ziffer*, as ſhall be demonſtrated in treating of an increaſe of price in a contract of ſale.—But although ſuch after-addition to the dower be thus approved, yet it drops in conſequence of divorce before conſummation.—According to an opinion of *Aboo Yooſaf*, the woman is entitled to the half of the *additional*, together with that of the *original*, dower.—The cauſe of this difference of opinion is that, with *Hanceſa* and *Mohammed*, nothing is halved but what has been rendered obligatory, and ſpecifically determined; whereas *Aboo Yooſaf* holds whatever is engaged for *after* the contract to be the ſame as that which is made obligatory *in* the contract, and therefore conſiders it as ſubject to the ſame rule.

A wife may remit the whole dower.

IF a woman exonerate her huſband from any part, or even from the *whole*, of the dower, it is approved; becauſe, after the execution of the contract, it is her ſole right, (as was already explained,) and the caſe ſuppoſes her dereliction of it to take place at a ſubſequent period.

Caſe of *Khalwat-Saheeh*, or retirement.

IF a man retire with his wife, and there be no legal or natural obſtruction to the commiſſion of the carnal act, and he afterwards divorce her, the whole dower in this caſe goes to her.—*Shafei* maintains that ſhe is here to receive no more than her *half* dower, becauſe the huſband cannot obtain poſſeſſion of the object of the contract but by actual coition; and the right to the dower is not corroborated and confirmed without enjoyment.—The argument of our doctors is, that the woman has completed her part of the contract, by delivering up her perſon, and by removing all obſtructions, which is the extent of her ability; her right to the recompenſe is therefore confirmed and corroborated; in the ſame manner as in a caſe of ſale, where if the ſeller have offered delivery of the goods ſold, and there be nothing to obſtruct ſeizin on the part of the purchaſer, and the latter neglect to make ſeizin, he is conſidered as having made ſeizin, and the purchaſe is

afterwards as a truſt in the hands of the ſeller, and the whole of the price is obligatory upon the purchaſer.

Circumſtances in which retirement does not imply conſummation.

If a man retire with his wife whilſt one of them is ſick, or faſting in the month of *Ramzán*, or in the *Ihrâm* of a pilgrimage, whether obligatory * or voluntary, or of a viſitation at the ſhrine of the prophet, (termed an *Amrit*,) or whilſt the woman is in her courſes,—this is not regarded as a *Khalwat-Saheeh*, or *complete retirement*, inſomuch that if the man were to divorce his wife after ſuch a retirement, the woman is entitled to her half dower only; becauſe all the above circumſtances are bars to the carnal act;—ſickneſs, from the weakneſs and imbecility with which it is attended, or from its rendering the commiſſion of the carnal act injurious to one or other of the parties;—and faſting in *Ramzán*, becauſe it would induce upon the party a neceſſity of expiation and atonement;—and pilgrimage, or viſitation, becauſe it would induce a neceſſity of atonement by ſacrifice;—and the woman's courſes, becauſe they oppoſe an obſtruction both natural and legal.—But if one of the parties be obſerving a *Nifl* [voluntary] faſt only, the woman is entitled to her whole dower, becauſe the breach of ſuch a faſt is a matter of indifference: a faſt of atonement, or in conſequence of a vow, is the ſame as a voluntary in this reſpect, and for the ſame reaſon.

Exception.

Caſe of retirement of an eunuch.

If a *Majboob* eunuch retire with his wife, and afterwards divorce her, ſhe is entitled to her whole dower, according to *Haneefa*.—The two diſciples maintain that the half dower only goes to her, on account that a *Majboob* is ſtill more incapacitated than a ſick perſon: contrary to the caſe of an *Ineen*, (or one naturally impotent,) becauſe the point of law reſts upon the exiſtence of the inſtrument of generation, which is there found, but not in the former caſe.—*Haneefa*, on

* All *Muſſulmans* are required, once in their lives, to make a pilgrimage to *Mecca*, which is termed *Hidj-Farz*, or *ordained* pilgrimage.

the

the other hand argues, that all which is due on the part of the woman is the delivery of her perſon, (by admitting the huſband to feel and touch her,) and this being, to the extent of her ability, completely performed, it follows that the conſideration is completely due to her.

IT is incumbent upon the woman to obſerve an *Edit*, (or appointed term of probation,) after the divorce, in all the caſes here recited, for the ſake of caution, on a principle of propriety, from the apprehenſion or poſſibility of her womb being occupied by ſeed.—The *Edit* is, moreover, a right of the law and of the *fœtus*; and credit is not to be given to the parties that they have not committed the carnal act, becauſe this (in precluding the neceſſity of *Edit*) would amount to an extinction of rights (as above ſpecified) diſtinct and ſeparate from theſe of the parties: but it is otherwiſe with the *dower*, becauſe that is a matter of *property*, the right in which cannot be decided upon principles of caution, (like the *Edit*,) nor under any circumſtance admitting of doubt; the dower, therefore, is not due, where retirement is not of the deſcription of *Khalwat-Saheeh*.—*Kadooree*, in his commentary upon his own work, has obſerved that, if the obſtruction to the carnal act be merely of a *legal* nature, (ſuch as *faſting*,) the obſervance of *Edit* is incumbent, becauſe here the natural ability to the performance of the act is ſuppoſed: but if the obſtruction be of a *poſitive* nature, (ſuch as *ſickneſs* or *infancy*,) the *Edit* is not requiſite, becauſe the ability to perform the act does not here exiſt.

*Caſes in which the preſent to the wife is laudable, or in-*

IT is laudable to beſtow a *Matât*, or *preſent*, upon every woman divorced by her huſband, excepting two deſcriptions of women, namely, one whoſe dower has been ſtipulated, and whoſe huſband divorces her before conſummation,—and one whoſe dower has not been ſtipulated, and who is alſo divorced before conſummation; for in their behalf a preſent is not merely *laudable*, but *incumbent*.—*Shafei*

ſays that a preſent is incumbent in behalf of every divorced woman, excepting one whoſe dower has been ſtipulated, and who is divorced before conſummation; becauſe the preſent is made incumbent in the way of a gratuity, or compenſatory gift, from the huſband, on account of his having thrown the woman into a forlorn ſtate by his ſeparation from her; but, in the excepted inſtance, the half dower is a ſubſtitute for the preſent, as divorce is here a diſſolution of the contract, and the preſent need not be beſtowed repeatedly. The argument of our doctors is, that the preſent is a ſubſtitute for the *proper* dower in the caſe of a *reſigned* woman, (that is, a woman who reſigns herſelf to her huſband without a dower,) on account that, as the *proper* dower drops, the *preſent* becomes incumbent; becauſe, in a contract of marriage, a return is eſſential: the *preſent*, therefore, is a ſubſtitute for the *proper* dower; and ſuch being the caſe, it muſt not be required in addition either to the whole dower, which is the *original* thing, or to any part of it: whence the *preſent* is not incumbent where any part of the dower is due. As to what *Shafei* advances, that "the *preſent* is made incumbent in the way of a gratuity, "or compenſatory *gift*, from the huſband, on account of his having "thrown the woman into a forlorn ſtate by his ſeparation from her," —we reply that this act of his does not amount to an *offence*, as the huſband is privileged by the law ſo to do, wherefore no recompenſe is due from him on that account; and hence it is that the *preſent* is regarded merely as *reſpectful* and *laudable*.

Caſe of a reciprocal bargain between two contractors.

If a perſon contract his daughter, or his ſiſter, in marriage to another, on the condition of the other beſtowing a ſiſter or daughter in marriage upon him, ſo as that each contract ſhall ſtand as a return for the other, reſpectively, both the contracts are lawful.—*Shafei* maintains that both the contracts are null, as they make one half of the woman's *perſon*, reciprocally, a *dower*, and the other half the ſubject of marriage; becauſe, where the perſon marries his daughter to the other, and alſo conſtitutes her the dower for the other's daughter, it follows

follows that the daughter's perſon * is divided between the other perſon and his daughter,—one half to that perſon, as huſband, in virtue of the marriage, and the other half to his daughter as her dower; and as the matrimonial poſſeſſion, or propriety, is incapable of being participated, (ſince it is ordained as a *complete* enjoyment, and not as a *participated* one,) it follows that the bargain is nugatory.—To this our doctors reply, that the contractor has named, as a dower, a thing incapable of being ſo, (ſince a woman's perſon, in the ſenſe it here bears, is incapable of being the property of a *woman*;)—but yet the contract holds good, and a *Mihr Miſl*, or *proper* dower, remains due, [to each of the women,] the ſame as where *wine* or a *hog* are aſſigned as a dower.—With reſpect to what *Shafeï* urges, that "the matrimonial propriety is incapable of being participated,"—it is admitted; but this participation is not induced in the preſent caſe, as the perſon of either of the daughters is not made the right of the other daughter in virtue of the contract.

Caſe of marriage on a condition of

IF a free man marry a woman, on the condition, in return, of ſerving her for a ſtated time, (*a year*, for inſtance,) or of teaching her the *Koran*, yet her *proper* dower is incumbent upon him notwithſtanding, according to *Haneefa* and *Aboo Yooſaf*. *Mohammed* has ſaid that ſhe is, in this caſe, to receive a ſum amounting to the eſtimated value of his ſervice for one year. But if a ſlave, by his owner's conſent, marry a woman on the ſame terms, it is lawful, and the woman is entitled to the ſtipulated ſervice only.—*Shafeï* is of opinion that the woman is entitled merely to the ſervice ſtipulated in either of theſe caſes; becauſe whatever may be lawfully received as a fixed return, is capable of conſtituting a dower, ſince a mutual exchange may be thereby effected, and conſequently the caſe is the ſame as if the man had married the woman on condition of a ſtated ſervice to be performed by *another perſon*, or on a ſtipulation of himſelf watching her flocks for a ſtated period. The arguments of our doctors, on this point, are

* Arab. *Booza*, i. e. *Genitale Mulieris*.

twofold;—FIRST, the poſſeſſion of a woman's perſon is not to be ſought, (that is to ſay, *to deſire*, it is not lawful,) except in lieu of property; and teaching the *Koran* is not property; neither does *uſufruct* conſtitute *property*, (according to the ſentiments of our doctors,) becauſe that is not ſubſtantial or permanent, whereas *property* is a thing of a *permanent* nature, and what conſtitutes *actual wealth*; ſervice, therefore, not being property, to ſeek the poſſeſſion of a woman's perſon, in return for the ſervice of a freeman, is unlawful:—contrary to a caſe where a *ſlave* obtains a woman in marriage on the condition of his ſerving her, ſince *here* poſſeſſion is ſought for that which is actual property, the ſervice of a ſlave being conſidered as ſuch, becauſe this comprehends a ſurrender or delivery of the ſlave's perſon, and the perſon of a ſlave is actual property, and of courſe the *uſufruct* thereof; wherefore it is analogous to the beſtowing of the ſlave himſelf as a dower: but with a huſband who is free this cannot be the caſe: SECONDLY, it is not lawful that a woman ſhould be in a ſituation to exact the ſervice of her huſband who is a freeman, as this would amount to a reverſal of their appointed ſtations, for one of the requiſites of marriage is, that the woman be as a ſervant, and the man as the perſon ſerved; but if the ſervice of the huſband to the wife were to conſtitute her dower, it would follow that the *huſband* is as the ſervant and the *wife* as the ſerved; and this being a violation of the requiſites of marriage, is therefore illegal: but it is otherwiſe with the ſervice ſtipulated to be performed by another free perſon, with that perſon's conſent, as this offers no violence to the requiſites of the contract; and ſo alſo, in the caſe of ſervice of a ſlave, becauſe the ſervice performed by a ſlave to his wife is, in fact, performed to his *maſter*, by whoſe conſent it is that he undertakes it; and the ſame with the caſe of tending flocks, becauſe this is a ſervice of a permanent nature, and admitted to be performed for wives, and therefore does not violate the requiſites of marriage; for the ſervice of the huſband to his wife, as a dower, is prohibited only as it may be degrading to the former; but the tending of flocks is not a degrading office. *Mohammed*, according to his tenets, holds (as was already obſerved) that the woman

is, in this caſe, entitled to receive a ſum amounting to the eſtimated value of the ſervice, becauſe he maintains that what was ſtipulated (to wit, the ſervice) is property, but of ſuch a nature as it is not in the huſband's power to make delivery of, ſince by ſuch an act he would violate the requiſites of marriage; the caſe, therefore, is the ſame as if a man were to marry a woman, aſſigning, as a dower, a ſlave, the property of another, in which caſe he would have to pay the woman the value of ſuch ſlave.—*Haneeſa* and *Aboo Yooſaf*, on the other hand, hold that the woman is entitled to a *proper* dower; becauſe they maintain that the ſervice here ſtipulated is not property, as a woman cannot legally exact ſervice of her huſband, being a freeman, in any ſituation whatever, leſt a reverſal of ſtations ſhould be induced, as was juſt obſerved; the naming, therefore, of *ſervice* as a dower, is the ſame as naming wine, or a hog; for, not being capable of legal delivery, it is not a ſubject of appreciation; and ſuch being the caſe, recourſe is had to the original rule in defect of any dower, and this dictates a *proper* dower.

Caſes of a wife remitting or relinquiſhing either or *in*

IF a man marry a woman on a dower of one thouſand *Dirms*, and the woman make ſeizin of the ſaid thouſand, and then preſent the ſame to him, and he take poſſeſſion of ſuch gift, and afterwards divorce her before conſummation, the huſband, in this caſe, has a claim upon his wife for five hundred *Dirms*, becauſe he is not conſidered, in law, as having received, in the form of the *gift*, that identical thing which becomes obligatory upon his wife in conſequence of divorce before conſummation, ſince money is incapable of identification either in the fulfilment or the annulment of contracts. So alſo, if the dower conſiſt not of money, but of articles of weight or meaſurement of capacity, as *iron* or *copper*.—But if the wife were to make a gift to her huſband of the thouſand *Dirms*, without having herſelf been in poſſeſſion of the ſame *, and he were afterwards to divorce

* That is to ſay, *relinquiſhes her right to it.*

her before conſummation, in this caſe neither party has any claim whatever upon the other. This proceeds upon a favourable conſtruction; for anology would ſuggeſt that the huſband ſhould receive from his wife the amount of half the dower, becauſe the whole dower remains untouched with the huſband in conſequence of the gift, which amounts to a diſcharge, but the wife does not appear to be diſcharged from what becomes obligatory upon her in conſequence of divorce before conſummation.—The reaſon for a more favourable conſtruction of the law upon this point is, that the identical thing which becomes obligatory upon the wife in favour of the huſband, in conſequence of divorce before conſummation, has come to him, in his being diſcharged from half the dower, (through the wife's gift,) and the end being thus obtained, any difference in the manner in which it is obtained will not be regarded,—that is to ſay, the end was, that the huſband ſhould recover half the dower after divorce before conſummation, and that end has been obtained, not indeed through *divorce*, but through *antecedent gift*, which anſwers the ſame purpoſe.

If a man marry a woman on a dower of one thouſand *Dirms*, and the woman make ſeizin of five hundred *Dirms*, and afterwards make a gift to her huſband of the whole thouſand,—as well of the portion in her poſſeſſion, as of that which ſhe has not received,—or of the latter only,—and the huſband afterwards divorce her before conſummation, neither party, in this caſe, has any claim upon the other, according to *Haneefa*.—The two diſciples maintain that the huſband has, in this caſe, a claim upon the wife for one half of that proportion of which ſhe had poſſeſſion; becauſe they conceive of a *part* from the *whole*;—that is to ſay, if the wife were to make a gift of the *whole* dower to her huſband, without having herſelf made previous ſeizin of any part thereof, the huſband has no claim to reſume any thing out of it;—and, on the contrary, if ſhe were firſt to make ſeizin of the dower, and then to make a gift of the ſame to her huſband, he would have a

claim of reſumption upon her for *one half*; and conſequently, when ſhe has made ſeizin of any particular *part* or *portion* of it, he has a claim of reſumption upon her for the half of that part of which ſhe had made ſeizin; and again, on the other hand, becauſe a gift of any part of the dower to the huſband amounts to an abatement with reſpect to that part, and is therefore altogether excluded from the contract *; and conſequently, when the gift is of that half which had remained unſeized, it is the ſame as if the contract had regarded the *half* only; (as where a ſeller, for inſtance, makes a gift of half the price of the commodity ſold, in which caſe it is the ſame as if the price agreed upon were no more than the remaining half;) and ſuch being the caſe, it follows that the proportion of abatement (in conſequence of gift) becomes altogether excluded from the dower, and that the half of which ſeizin had been made ſtands as the complete dower;—and as, where ſeizin had been made by the wife of her whole dower, and ſhe had preſented the ſame to her huſband, he would ſtill (upon divorce before conſummation) have a claim of reſumption upon her for one half, (as has been ſhewn in a former caſe,) ſo here, in like manner, he has a claim of reſumption for a moiety of the ſeized proportion, that ſtanding as the *complete dower*. The argument of *Aboo Haneeſa* in this caſe is, that the end of the huſband hath been already obtained, in a moiety of the dower remaining untouched with him without any return; wherefore, upon divorcing his wife before conſummation, he would have no occaſion to make any reſumption: and with reſpect to what the two diſciples advance, that "an abatement becomes altogether excluded from the contract," it may be replied, if this were to be admitted, it would follow that, in a caſe where a man marries a woman on a dower of twenty *Dirms*, (for inſtance,) and the

* The phraſe in the original is remarkable, "LEHAZA YEWLUKKO B'ASSIL AL "AKID,"—"*and [therefore is connected with the origin of the contract*;—that is to ſay,—with a period *antecedent* to the contract, and conſequently not *included* in it. The term here adopted appears to be the cleareſt by which the tranſlator could expreſs the ſenſe.

woman

woman makes a gift to him of fifteen *Dirms* out of the twenty, ten *Dirms* would remain obligatory upon the huſband; becauſe, the abatement being excluded from the contract, it would be the ſame as if he had married her upon a dower of five *Dirms*; and if he had married her upon ſuch a dower, he would be bound for ten *Dirms*, on the principle of law, that if a man marry a woman on a dower of fewer than ten *Dirms*, ten *Dirms* are obligatory upon him: this idea would conſequently lead to an unjuſt and unfounded concluſion, and is therefore inadmiſſible.

If a man marry a woman on a dower of one thouſand *Dirms*, and ſhe make a gift to him of a part leſs than the half,—two hundred, for inſtance,—and take poſſeſſion of the remainder, and the huſband afterwards divorce her before conſummation, he has, in this caſe, (according to *Aboo Haneefa*,) a claim of reſumption upon her for ſuch a ſum as, together with what ſhe had previouſly beſtowed upon him, makes a moiety of the whole, namely (in the ſuppoſition before mentioned) three hundred *Dirms*:—according to the two diſciples, on the contrary, his claim of reſumption is for the half of what the woman had made ſeizin of, namely, four hundred *Dirms*.

The ſame

If a man marry a woman on a dower conſiſting of certain ſpecified effects, and ſhe make a gift of the ſame to him, either before or after ſeizin, and he afterwards divorce her before conſummation, he, in this caſe, has no claim of reſumption whatever upon the woman. —This proceeds upon a favourable conſtruction.—Analogy would ſuggeſt that he ſhould have a claim to the amount of the value of half the effects, becauſe here it becomes obligatory upon the woman to make reſtitution of half the dower, as was already explained, and ſhe is incapacitated from making reſtitution by delivery of half the actual effects, in conſequence of her gift; wherefore it would appear that ſhe ſhould make it by paying the eſtimated value of one half.—But the reaſon for a more favourable conſtruction of the law

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in this caſe is, that the huſband, who is entitled to recover from the woman one half of what ſhe had taken poſſeſſion of, in conſequence of his having divorced her before conſummation, has already actually obtained this, (through her gift;) whence it is that the woman would not be at liberty to give her huſband any other thing in lieu of thoſe effects, becauſe the conſideration conſiſts of a thing capable of identical ſpecification, and of courſe the ſaid effects, which have been in poſſeſſion of the woman, and by her made over in gift to her huſband, conſtitute a dower of a certain ſpecific deſcription; thus the huſband appears to have received that actual thing which had been rendered obligatory upon the wife by divorce before conſummation:—contrary to the caſe of a dower conſiſting of a *debt*; for here, if the wife were to make ſeizin of ſuch debt, and then to make a gift of the ſame to her huſband, and he afterwards to divorce her, as above, he would, in this caſe, have a claim of reſumption upon her for the value of one half of the dower, becauſe a debt of this nature is, like money, incapable of identical ſpecification:—and contrary, alſo, to a caſe where a woman, having taken poſſeſſion of effects, as a dower, (as was ſtated in the preceding caſe,) *ſells* ſuch effects to her huſband, becauſe, in this caſe, they have come back to him for a conſideration, and his claim is to the recovery of the half of her dower without *any* conſideration.—And if the dower conſiſt of an animal, or of effects, which are a debt upon the huſband *, the rule is the ſame as in the caſe of one conſiſting of ſpecified effects; becauſe the thing ſeized by the woman is of ſuch a nature as, if ſhe had herſelf borrowed it, muſt be reſtored by her in ſubſtance; and articles of this deſcription are all capable of identical ſpecification.

IF a man marry a woman on a dower of one thouſand *Dirms* †,

* That is to ſay, an animal, or effects, which had been borrowed or procured upon credit by the huſband.

† This caſe proceeds on the ſuppoſition of one thouſand *Dirms* being of leſs value than the woman's *proper* dower.

behalf of the wife

on a condition that he is not to carry her out of her native city,—or that he is not to marry, during his matrimonial connexion with her, any other woman, in this caſe, if he obſerve the condition, the woman is entitled to the above ſpecified dower only, as that conſiſts of a ſum ſufficient to conſtitute a legal dower, and ſhe has agreed to accept it; but if he ſhould infringe the condition, by either carrying her out of her native city, or marrying another wife, ſhe is in this caſe entitled to her *proper* dower, becauſe he had acceded to a condition on behalf of the woman which was advantageous to her, and that not being fulfilled, the woman is not ſuppoſed to be ſatisfied with the thouſand *Dirms*, and muſt therefore be paid her complete *proper* dower; the ſame as in a caſe where a woman had agreed to accept of one thouſand *Dirms* as a dower, on condition of being treated with reverence, and not ſubjected to any laborious work; or, of being preſented with a rich dreſs, and ſo forth.

If a man marry a woman, ſtipulating the dower at *one* thouſand *Dirms*, provided he ſhould not carry her out of her native city, but ſtay and reſide there with her,—or at *two* thouſand, if he ſhould carry her thence,—in this caſe, if he continue to reſide with her in the ſaid city, ſhe is entitled to the thouſand *Dirms* only; but if he carry her thence ſhe becomes entitled to her *proper* dower, where that does not exceed *two* thouſand, nor fall ſhort of *one* thouſand.—This is according to *Haneefa*. The two diſciples ſay that both conditions are equally valid, inſomuch that, as if he were to continue to reſide with her in the city aforeſaid, ſhe would receive the *one* thouſand *Dirms* only, ſo if he carry her thence, ſhe becomes entitled to *two* thouſand.—*Ziffer*, on the other hand, maintains that both the conditions are null, and that the woman ſhall, in either event, receive her *proper* dower, where that does not exceed *two* thouſand *Dirms*, nor fall ſhort of *one* thouſand.—This caſe is founded upon what occurs in the book of *Hire*, where a man ſays to a taylor "If you make me up this robe "within the day, I ſhall pay you one *Dirm*; or if you finiſh it "by

" by to-morrow, you ſhall have half a *Dirm:*"—as will be hereafter explained.

Caſes of a dower conſiſting of pro-

If a man marry a woman, agreeing to give her, as a dower, either of two ſlaves unſpecified,—as if he were to ſay—" Make one of theſe " two the dower,"—and the ſlaves be of different value,—in this caſe, where the woman's *proper* dower is under the rate of the ſlave of leſs value, ſhe receives that one; or if it exceed the rate of the more valuable ſlave, ſhe receives that one; and if it exceed the former, and fall ſhort of the latter, ſhe then receives her *proper* dower. This is according to *Aboo Yooſaf*.—The two diſciples allege that the leaſt valuable ſlave goes to her, in all theſe circumſtances. But if the huſband divorce her without conſummation, ſhe in that caſe becomes entitled to half the price of the leaſt valuable ſlave only, according to all the doctors.—The argument of the two diſciples, in this caſe, is that the *proper* dower is not to be held obligatory, unleſs where the *ſtipulated* dower is of ſuch a nature as renders an obligation with reſpect to that impoſſible; but it *is* poſſible with reſpect to the *leaſt valuable* ſlave, becauſe that one is *undoubted* *, and is therefore obligatory; the ſame as in a caſe of *Khoola*, or of manumiſſion, for a compenſation " of " *one* thouſand, or of *two* thouſand," or " of *this* ſlave, or of *that* " ſlave †;" in which caſe, whatever is the leaſt value named is held to be the compenſation either for *Khoola* or for manumiſſion, as there can be no doubt concerning it; and ſo in this caſe alſo.—The argument of *Haneeſa*, in reply to the two diſciples, is that the *proper*

* That is to ſay, although, with reſpect to the ſlave of *greater* value, a doubt might be entertained, yet with reſpect to the *other* there can be none, ſince that is the loweſt terms offered by the party himſelf.

† This relates merely to the point of law in caſes of vague and indefinite expreſſion; for inſtance, in *Khoola*, where the wife may ſay to her huſband, " I will give you one or " two thouſand *Dirms*, or either of my ſlaves, *Zeyd* or *Amir*, for my divorce,"—in which caſe the law always determines the propoſed compenſation at the loweſt value mentioned.

dower is the radical obligation in a contract of marriage, like the price of a purchaſe, in a contract of ſale, as that is the moſt equitable, being a medium adjuſtment, neither over nor under, and conſequently it is not to be deviated from, except in caſes where the ſpecification of the dower is perfect and complete; but here the ſpecification is not complete, ſince neither ſlave has been particularly mentioned by the huſband, in ſettling the dower, but both indefinitely: contrary to a caſe of *Khoola*, or of manumiſſion for a compenſation, ſince in neither of theſe is there any radical compenſatory obligation underſtood, independent of ſome particular previous agreement; for if a ſlave were to ſay to his maſter, "emancipate me," and the maſter were to reply "thou art free;" or if a wife were to ſay to her huſband, "grant me "*Khoola*," and the huſband were to reply "I have granted *Khoola*," no obligation whatever would remain upon the ſlave or the wife; whereas, on the contrary, if a woman were to ſay to a man "marry "me," and he were to reply "I have married you," her *proper* dower would be incumbent upon him; but where the rate of the more valuable ſlave falls ſhort of the *proper* dower, the wife has virtually acceded to the abatement; and, in like manner, where the rate of the leaſt valuable ſlave exceeds the *proper* dower, the huſband has virtually agreed to the exceſs; and ſhe then receives one or other of the ſlaves, as the caſe may be.—It is here to be obſerved that, if divorce take place before emancipation, the wife is to receive from her huſband a preſent in addition to half the price of the leaſt valuable ſlave: this is a rule eſtabliſhed by cuſtom, and muſt be complied with, as an obligation on the part of the huſband, although the value of the preſent ſhould even exceed the half price of ſuch ſlave.

If a man marry a woman, aſſigning her, as a dower, an animal undeſcribed, it is approved, and the woman ſhall receive an animal of a middling ſtandard; but the huſband has it at his option, inſtead of this, to pay her the value of ſuch an animal in money.—The compiler of the *Hedayâ* obſerves that this is to be underſtood only where a man names the ſpecies of the animal in general, without any ſpecific

cific deſcription, (as if he were to ſay "I will give you as a dower a "*horſe*," or "an *aſs*," without deſcribing whether it is to be an *Arabee* or a *Toorkee*;) but where he does not mention the *ſpecies* of the animal, (as if he were to ſay "I will give, as a dower, a *qua-* "*druped*,") it is not lawful, and he in that caſe becomes liable to make good to the woman her *proper* dower.—*Shafei* maintains that a *proper* dower is obligatory in either of the above caſes, he holding that nothing is fit to be aſſigned as dower, in a contract of marriage, but what would be capable of appreciation in a contract of ſale; and an animal undeſcribed is incapable of appreciation, as being unknown, and conſequently cannot conſtitute a dower.—The argument of our doctors is, that a contract of marriage includes an exchange of property for that which is not property, (for the uſe of the woman's perſon, which is the return, cannot be termed ſuch;)—now the law admits that animals may be a debt upon the perſon, in the courſe of an exchange, where there is no property in return, as in the caſe of *Deeyat*, where an hundred camels are rendered obligatory in law, their deſcription being undefined: the dower is therefore to be conſidered, in this reſpect, as a *property*, concerning which the man has taken an obligation upon himſelf *a priori*, in the manner of an acknowledgment; now ignorance, with reſpect to the actual property, does not invalidate an acknowledgment by which a perſon takes upon himſelf, *a priori*, an obligation concerning it; as for example, if a perſon were to acknowledge that he owed a ſlave, or any thing elſe undeſcribed, his acknowledgment would be good, and the ſpecification would reſt with him.

OBJECTION.—If the nomination of a dower be to ſtand the ſame as an acknowledgment, it follows that the nomination of an animal on account of dower is approved, although the ſpecies remain unknown,—the ſame as in an acknowledgment reſpecting property unknown,—which is not the caſe.

REPLY.—A knowledge of the *ſpecies* of the animal is made a condition, in conformity with the rule, that a ſpecified dower ſhall con-

ſiſt

ſiſt of property, the medium of which may be known, for the ſake of both the parties; now this cannot be aſcertained, except where the ſpecies is known, which comprehends a *beſt*, a *worſt*, and a *medium* of the kind, for if this be unknown, the diſtinction cannot be made, ſince no medium can be aſcertained amidſt an infinite variety of ſpecies.—But (as was already obſerved) the huſband has it at his option, in diſcharging the dower, either to give the woman a medium animal of the ſpecies mentioned, or to pay her the value in money, becauſe the medium cannot be aſcertained preciſely except by appreciation, and conſequently the value of the animal is the ſtandard of payment; and, on the other hand, the actual animal is the ſtandard according to nomination.

If a man marry a woman, aſſigning her a dower of cloth, undeſcribed, ſhe, in this caſe, receives her *proper* dower. This is where the term *cloth* alone is mentioned by the man without any addition; and the reaſon is, that the ſpecies of cloth is here unknown and unaſcertainable, ſince of that there are a variety of ſpecies.—But if he were to name the ſpecies of cloth, as if he were to ſay "I will give, "as a dower, a piece of *Hirrooey* *," this manner of deſcription is approved; and the huſband has it in his option either to give a piece of *Hirrooey* of a middling quantity, or to pay the value in caſh, for the reaſons already ſtated. In like manner he has it at his option either to give the cloth or to pay the value, where he has been ſtill more particular in his deſcription, mentioning the *length*, *breadth*, and *quality* of it, in a way ſuch as would ſuffice in a *Sillim* ſale.—This is according to the *Záhir Rawáyet*; and the ground upon which it proceeds is that *cloth* is not of the claſs of things denominated *Zooâtal-Imſál*, or things compenſable by an equal quantity of the ſame ſpecies. In like manner he ſhall have the ſame option where the dower is aſſigned of goods, the quantity of which is aſcertainable by weight

* A particular ſpecies of cloth manufactured in *Herat*, a city of *Khoraſan*.

or

or meaſure, provided he ſhould not have particularly deſcribed the *quality*, but only the *ſpecies*: but if he ſhould particularly deſcribe the *quality*, he then has no option, and muſt pay the actual thing mentioned, becauſe, under ſuch deſcription, it becomes a debt upon him, of the ſpecific weighable or meaſurable articles deſcribed.

Caſe of articles.

IF a *Muſſulman* marry a woman, agreeing to give her, as a dower, *wine* or a *hog*, the woman has her *proper* dower, becauſe a condition of aſſenting to receive ſuch articles is invalid; but as a contract of marriage is not rendered null by a nugatory condition being comprehended in it, it holds good, in this caſe, though the condition be null: contrary to a caſe of *ſale*, which is rendered null by an invalid condition.—The aſſignment of the dower in either of the articles aforeſaid is diſapproved, becauſe what is named is not property with *Muſſulmans*; and on this principle it is that a *proper* dower becomes due.

Caſes of falſe aſſignment.

IF a man marry a woman, aſſigning her, as a dower, a caſk of vinegar, and the caſk ſhould afterwards appear to contain wine, ſhe, in this caſe, has her *proper* dower, according to *Haneeſa*.—The two diſciples allege that, in this caſe, ſhe is to receive vinegar of a medium quality, and the ſame in quantity as the wine.—And if the man were to name, as a dower, a certain ſpecified ſlave, (as if he were to ſay "I aſſign this ſlave as a dower,") and it ſhould afterwards appear that the perſon ſo mentioned as a ſlave was at that time *free*, in this caſe a *proper* dower is due, according to *Haneeſa* and *Mohammed*. *Aboo Yooſaf* ſays that here the huſband owes the eſtimated value of the free perſon aforeſaid, ſuppoſing he were a ſlave; for he argues that the man has filled the woman with the expectation of a certain property, the delivery of which he afterwards finds impoſſible; the value therefore is obligatory upon him, or an article ſimilar to that agreed for, if it be of the ſpecies of *Zooâtal Imſâl*, as in a caſe where a man marries a woman on a dower conſiſting of a ſpecified ſlave, and the

ſlave

ſlave dies before delivery.—*Aboo Haneeſa*, on the other hand, ſays that where nomination and pointed reference * are united, regard muſt be had to the latter, becauſe indication is more clear and expreſs under that form, and hence the caſe is the ſame as if the man had engaged to give, as a dower, wine or a hog †. *Mohammed* (coinciding with *Haneeſa* with reſpect to the ſlave, and diſſenting from him with reſpect to the vinegar, as aforeſaid,) ſays that it is a rule, that if the thing named be of the ſame ſpecies with the thing ſpecified by pointed reference, the contract is connected with the latter; but if the thing named be of a ſpecies diſtinct and different from the thing pointedly ſpecified, it [the contract] is connected with the thing named; becauſe indication is more effectual from *naming* a thing, than it is from pointing that thing out, inaſmuch as it is thereby known what that thing is, whereas by pointing it out the *ſubſtance* only is known;—on which principle it is that if a man purchaſe a ring ſtone, on the condition of its being a *ruby*, and it ſhould prove to be only a *garnet*, the bargain is void, on account of the difference of ſpecies; but if a perſon were to purchaſe a ſtone on condition of its being a *ruby*, and it ſhould prove to be an *emerald*, yet the bargain holds good, becauſe theſe are held by lapidaries to be of the ſame ſpecies:—now, in the preſent inſtance, the ſlave and the free perſon are of one and the ſame ſpecies; the contract, therefore, is connected with the thing identically ſpecified or pointed out, and on this principle her *proper* dower is due to the woman; but *wine* and *vinegar* being of diſtinct ſpecies, and totally different from each other, (inaſmuch as the latter is lawful in uſe, and the former prohibited,) the contract is there connected

* *Taſmeeat* and *Iſhâret*: the former term means ſimply *naming* a thing, or (as expreſſed above) *nomination*; by the latter is underſtood pointing a thing out, ſuch as "*This* ſlave," &c.

† That is to ſay, the condition is altogether void, and a *proper* dower is of courſe due; for, if the man were to ſay "I will give as a dower this ſlave," and the perſon ſo ſpoken of ſhould appear to be free, it is evident (regard being had to the relative "this," denoting pointed reference) that the condition or agreement is *ipſo facto* null, as regarding a *thing* which does not exiſt.

with

with the thing nominally ſpecified, and conſequently the woman is entitled to vinegar equal in quantity to the wine.

IF a man marry a woman, agreeing to give her, as a dower, two ſlaves ſpecified, as if he were to ſay "I aſſign, as a dower, thoſe "two ſlaves;" and it ſhould happen that one of the perſons ſo ſpecified as *ſlaves* is *free*, in this caſe, according to *Haneefa*, the woman is not entitled to more than the ſingle ſlave remaining, provided the value be equal to ten *Dirms*, becauſe the ſlave is particularly aſſigned, and where the *aſſigned* dower is admitted to be incumbent, this prohibits the obligation to a *proper* dower;—as where a man, for inſtance, marries a woman, aſſigning her, as a dower, a piece of cloth of the value of five *Dirms*, in which caſe the woman gets the piece of cloth aforeſaid, together with five *Dirms* in money, in ſuch a manner as that the whole ſhall amount to ten *Dirms*, being the loweſt legal dower, beyond which nothing is incumbent. *Aboo Yooſaf* alleges that, in this caſe, the woman gets the ſlave, together with the amount of the eſtimated value of the other perſon, ſuppoſing he were a ſlave, becauſe here the man has filled her with expectation of *two* ſlaves, the delivery of one of which afterwards appears to be impoſſible; wherefore the value of the latter is obligatory upon him. *Mohammed* has ſaid (and there is alſo one opinion recorded of *Haneefa* to the ſame effect) that the woman gets the ſlave, together with a property ſufficient to complete her *proper* dower, if that ſhould exceed the value of the ſlave; becauſe, if both the perſons named as ſlaves by the huſband, in ſpecifying the dower, were actually *free*, the whole *proper* dower (according to *Mohammed*) would be due; and conſequently, where *one* only is a ſlave, that ſlave is due, together with ſuch property as (along with the ſlave) amounts to a *proper* dower.

IF the *Kdzee* ſeparate a man from his wife, before cohabitation, on account of their marriage being invalid, the woman is not entitled to any part of her dower, becauſe, where the marriage is invalid, no

A woman is not entitled to any dower under an invalid marriage dif-

folved before conſumma-tion;

no obligation with reſpect to dower is involved in the contract, as that, in ſuch a caſe, is alſo null; nor is the dower held to be due on any other ground than the fruition of the connubial enjoyment, which is not found in the preſent inſtance.—In the ſame manner no dower is due after *Khalwat Saheeh*, or *complete retirement*, becauſe, on account of the invalidity of the marriage, the law does not conſider retirement as indicating the commiſſion of the carnal act, and conſequently it does not ſtand as ſuch.—It is however to be obſerved that in an invalid marriage a ſeparate dower is not due on account of every repetition of the carnal act, becauſe here the right of poſſeſſion is doubtful, and the caſe is therefore the ſame as where a man has repeated carnal connexion with the ſlave of his ſon,—or where a man has repeated carnal connexion with his wife, and it ſhould afterwards appear that he had ſuſpended the divorce of that woman upon the circumſtance of his marrying her,—in either of which caſes one dower only is due, becauſe of a doubt reſpecting the right of poſſeſſion: contrary to a caſe where a man has repeated carnal connexion with the ſlave of his father, his mother, or his wife, and pleads his conception of the ſame being lawful; for in this caſe a dower is incumbent upon him for every repetition of the act, becauſe here no doubt exiſts, as he appears, on every repetition, to have had carnal connexion with a ſlave who is the abſolute property of another:—and contrary, alſo, to a caſe where a man has repeated carnal connexion with a female ſlave held in partnerſhip between himſelf and another, for in this caſe an *half fine* is incumbent upon him for every repetition (according to the determination in the *Burhánal Aima* of *Abdal-azeez-Bin Amroo*,) becauſe he has every time committed the carnal act in the ſhare of his partner.

but in caſe of conſummation, ſhe is entitled to her *proper*

If a man engage with a woman in an invalid marriage, and have carnal connexion with her, ſhe is in this caſe entitled to her *proper* dower: but ſhe is not entitled to more than the *ſpeci-*



*fied*

*fied* dower *, according to our doctors.—This is contrary to the opinion of *Ziffer*, who conceives an analogy between this and an invalid ſale; that is to ſay, in an invalid ſale, if the ſtipulated price of the thing ſold be ſhort of its actual value, the latter is due to whatever amount; and ſo alſo in the preſent caſe.—The argument of our doctors, in this caſe, is that the thing which the huſband has received (namely, the poſſeſſion of the woman's perſon) is not *property*, and therefore is not appreciable in any other way than by the aſſignment of a dower; now if the dower aſſigned ſhould exceed the *proper* dower, the exceſs is not incumbent, becauſe of the invalidity of the aſſignment, for that is a part of the contract, which being invalid, the aſſignment is ſo likewiſe; and, on the other hand, if the dower aſſigned be *ſhort* of the *proper* dower, the difference is not incumbent, becauſe, with reſpect to that, aſſignment has not been made: contrary to an *invalid ſale*, becauſe there the thing ſold is appreciable, and conſequently the amount of the return will be adjuſted by its value.

dower, not exceeding what is ſpecified in the contract;

THE obſervance of an *Edit*, after ſeparation, is incumbent upon a woman with whom a man has had carnal connexion in an invalid marriage. And here the *Edit* is to commence as from the date of ſeparation, and not from that of the laſt carnal connexion.

and ſhe muſt obſerve an *Edit* after ſeparation.

THE deſcent of a child born of a woman enjoyed in an illegal marriage is eſtabliſhed [in the reputed father,] becauſe in this regard is had to the child's preſervation, ſince if the deſcent were not to be eſtabliſhed, the child might periſh for want of care.—*Mohammed* holds (and decrees are paſſed agreeable to this doctrine) that, in the eſtabliſhment of genealogy under an invalid marriage, the time † is calculated

A child born in an illegal marriage is eſtabliſhed in favour of deſcent.

* That is to ſay, if her *proper* dower ſhould exceed in value the dower ſpecified in the contract, yet the woman is entitled to the *ſpecified* dower only, and not to her *proper* dower.

† The probable term of pregnancy, by which the child's deſcent is to be judged of and aſcertained. (For a further elucidation of this point ſee Book of Divorce, Chap. XIII.)

from the *firſt carnal connexion*, not from the *date of the marriage*, becauſe one which is *invalid* does not give a claim to the carnal act, ſo as to ſtand as ſuch, whereas the reverſe is the caſe in a *valid* marriage, as that eſtabliſhes ſuch claim: and hence, in the eſtabliſhment of genealogy, the time is calculated from the date of the marriage.

of the *Mihr Miſl*, or dower.

THE *Mihr Miſl* (or *proper* dower) of any woman is to be regulated, in its amount or value, by that of the dower of her paternal relations, ſuch as her paternal *ſiſters* or *aunts*, or the daughters of her paternal *uncles*, and ſo forth, according to a precept of *Ibn Muſſâood*, "*To the* "*woman belongs ſuch a dower as is uſually aſſigned to her female pa-* "*ternal relatives:*"—moreover, men are accounted of the claſs of their *paternal* tribe, and the value of a thing cannot be eſtimated but by attending to the value ſet upon its *claſs*.

A WOMAN'S *proper* dower is not to be eſtimated by the dower of her mother or her maternal aunt, where they are not deſcended of her father's family, on account of the precept of *Ibn Maſſâood* already recorded: yet if her mother ſhould be deſcended of her father's family, (being, for inſtance, the daughter of his *paternal uncle*,) in this caſe a judgment may be formed from *her* dower, as being deſcended from the family of the *father*.

IN regulating the proper dower of a woman, attention muſt be paid to her equality with the women from whoſe dowers the rule is to be taken, in point of age, beauty, fortune, underſtanding, and virtue, becauſe it varies according to any difference in all theſe circumſtances; and, in like manner, it differs according to place of reſidence, or time, (that is to ſay, times of trouble and confuſion, as oppoſed to times of tranquillity;)—and the learned in the law have obſerved that equality is alſo to be regarded in point of virginity, becauſe

becauſe the dower is different according as the woman may be a virgin or otherwiſe.

A woman's guardian may become ſurety for her dower.

IF the *Walee* [guardian] of a woman become ſurety for her dower, it is approved, becauſe he is competent to ſuch reſponſibility, (that is, to take ſuch obligation upon himſelf,) and he is ſurety in a thing which is a legal ſubject of bail, (namely, the dower,) ſince that is a *debt*, in which bail is approved: and the woman is afterwards at liberty to require her dower either of her *huſband* or of her *guardian*, as in all other caſes of bail: and if the guardian pay the dower, he ſhall take the ſame from the woman's huſband, where he has become ſurety at his deſire, as is the invariable rule in bail. The bail is in like manner approved, if the wife be an *infant*: contrary to where a father ſells the property of his infant child, and becomes bail for the amount, which is not lawful, becauſe a guardian is, with reſpect to marriage, a *negociator* merely; but, in *ſale*, he is the executor of the contract, (whence it is that its obligations reſt upon him, and its rights appertain to him;) and the father's diſcharge is alſo approved, if he clear the purchaſer of the whole price of the infant's property; and he is moreover at liberty to take poſſeſſion of the price after the infant ſhall have attained maturity; wherefore, if his bail were to be approved, it would admit the principle of a man becoming ſurety in his own behalf, which is abſurd.

OBJECTION.—A father is at liberty to take poſſeſſion of the dower of his infant daughter, in the ſame manner as of the price of his infant child's property; wherefore if the bail of the father with reſpect to the dower be approved, it follows that he is bail in his own behalf.

REPLY.—The authority veſted in a father to take poſſeſſion of the dower is becauſe of his parental relation, and not on account of his being a party in the contract, (for which reaſon it is that he is not at liberty to take poſſeſſion of the dower after the maturity of his

his child,) ſo that he does not, in this caſe, appear to be bail in his own behalf.

A woman may refuſe to admit her huſband to a carnal connexion until ſhe receive her dower of him, ſo as that her right may be maintained to the return, in the ſame manner as that of her huſband to the object for which the return is given, as in *ſale*.

A woman may refuſe until ſhe receive her dower

A woman is alſo at liberty to reſiſt her huſband carrying upon a journey until ſhe ſhall have received her dower of him, for the ſame reaſon.

A woman is alſo at liberty to reſiſt her huſband carrying upon a journey until ſhe ſhall have received her dower of him, for the ſame reaſon.

On the other hand, the huſband has no power to reſtrain his wife from going on a journey, or from going abroad, or viſiting her friends, until ſuch time as he ſhall have diſcharged the whole of the *Mihr Moájil*, or *prompt* dower, becauſe a huſband's right to confine his wife at home is ſolely for the ſake of ſecuring to himſelf the enjoyment of her perſon, and his right to ſuch enjoyment does not exiſt until after the payment of the return for it.

What is here advanced proceeds upon a ſuppoſition of the whole dower, or a certain portion of it, being *Moájil*, or *prompt*; but if the whole be *Mowjil*, or *deferred**, the woman is not at liberty to refuſe the embraces of her huſband, as ſhe has dropped her right by agreeing to make her dower *Mowjil*,—the ſame as in a caſe of ſale, where, if the price of the article ſold be made *deferable*, the ſeller is not at liberty to detain the article ſold on account of the price.—*Aboo Yooſaf* controverts the doctrine which is here advanced, and maintains that, in this caſe alſo, the wife is at liberty to refuſe to admit her huſband to carnal connexion, as long as he omits to make payment of the dower.

unleſs the whole dower be *deferable*.

It is further to be obſerved, that even if the huſband ſhould have

alſo reſiſt a

* That is to ſay, if the ſtipulation fixes the payment of the dower at ſome future period, as *a year*, or ſo forth.

committed

committed the carnal act, or ſhould have been in complete retirement with the wife, yet the rule is the ſame; that is to ſay, ſhe is ſtill at liberty to refuſe to admit him to carnal connexion, or to reſiſt his carrying her upon a journey, until ſuch time as ſhe ſhall have received the whole of her prompt dower from him.—This is the doctrine of *Haneeſa*.—The two diſciples, on the contrary, allege that woman, in this caſe, has no ſuch liberty of refuſal or reſiſtance.

repetition of the connexion, after conſummation, in the

It is to be remarked, however, that this difference of opinion ſubſiſts only where the original carnal act, or complete retirement, has taken place *with the woman's conſent*; but if ſhe have been enjoyed by force, or if ſhe be an infant or an idiot, her right of refuſal or reſiſtance, as above, does not ceaſe, according to the united opinion of all our doctors.—It is proper to obſerve, that where the woman refuſes to admit the huſband to a repetition of the carnal act, as above ſtated, yet ſhe has, nevertheleſs, (according to *Haneeſa*,) a claim to her *ſubſiſtence*, as her refuſal does not, in this caſe, proceed from any *ſtubbornneſs* or *diſobedience*, ſince it is not exerted in *reſiſtance* to a right, but rather in *maintenance* of one.—The two diſciples hold that ſhe is not entitled to any ſubſiſtence;—and their argument on this occaſion is, that the ſole object of the contract has been duly delivered to the huſband, either by the ſingle carnal act, or by the ſingle complete retirement, as aforeſaid; on which account it is that her right to her whole dower is confirmed and eſtabliſhed, and conſequently no right of further detention of her perſon remains with her; as in a caſe of ſale, where the ſeller having delivered the article ſold to the purchaſer, before receiving the price, has no farther right over it.—*Haneeſa*, on the other hand, reaſons that the woman in reſiſting refuſes and withholds a thing which ſhe has oppoſed to a *return*, and over which ſhe has, of courſe, a right of detention, until ſuch return ſhall have been duly made to her: and with reſpect to what the two diſciples allege, that "her right to her whole dower is confirmed "and eſtabliſhed by the ſingle carnal act, and ſo forth,"—it may be replied, that the whole becomes confirmed to her by a ſingle com-

but ſhe is, notwithſtanding, entitled to her ſubſiſtence.

miſſion of the carnal act, or a ſingle inſtance of complete retirement, neceſſarily, becauſe every thing beyond that is then unknown, and conſequently cannot obſtruct the operation of what is known; but the right of reſiſtance ſtill remains, becauſe the dower is oppoſed to the *whole*, the ſame as to the *ſingle inſtance*, of enjoyment.

The huſband obtains full authority over his wife upon payment of her dower.

When the huſband has duly paid to his wife the whole of her dower, he is at liberty to carry her wherever he pleaſes, becauſe the word of God ſays, "Ye shall cause them to reside in your "own habitations."—Some have alleged that the huſband is not at liberty to carry his wife to another city different from her own, although he ſhould have paid her the whole dower, becauſe journeying and travelling may be injurious to her; but he is at liberty to carry her to the villages in the vicinity of her city, as this does not amount to *travelling*.

Caſes of diſpute between the parties concerning the amount of dower;

If a man marry a woman, and they afterwards diſpute concerning the rate of her dower, the declaration of the wife is to be credited to the amount of her *proper* dower, and that of the huſband, with reſpect to any *exceſs*.—This proceeds upon a ſuppoſition of his having had carnal connexion with her:—but if he ſhould have divorced her *before* conſummation, his declaration alone is to be credited with reſpect to the *half* dower.—This is the doctrine of *Haneeſa* and *Mohammed*. *Aboo Yooſaf* alleges that the declaration of the huſband is to be credited, whether before divorce or after, unleſs where it goes to eſtabliſh ſomething trifling,—that is to ſay, ſomething ſo ſmall as is known to be ſhort of what ſuch a woman has a right to expect in marriage according to general uſage; and this is approved. The argument of *Aboo Yooſaf* is that, in the caſe in queſtion, the woman is plaintiff ſuing for an exceſs, and the huſband defendant; and the declaration of a defendant, when made upon oath, is to be credited; wherefore that of the huſband, in the preſent inſtance, muſt be ſo, unleſs he teſtify to ſomething ſo ſmall as that apparent circumſtances

argue againſt him: and the ground upon which this proceeds, is that the appreciation of the woman's perſon is a matter of neceſſity; and, therefore, ſo long as it is poſſible that any thing can be decreed from the *ſtipulated* dower, the *proper* dower is not regarded.—The argument of *Haneefa* and *Mohammed* in this caſe is that, in all claims, credit muſt be given to the declaration of that perſon in whoſe favour apparent circumſtances bear teſtimony, and apparent circumſtances *do* bear teſtimony with one who atteſts the *proper* dower, as that is the ſtandard object in marriage;—ſimilar to a caſe where a diſpute ariſes between a dyer and the owner of a piece of cloth, concerning the charge for dying, in which caſe the declaration of that perſon will be credited in whoſe behalf the value of the *dye* or *colour* bears teſtimony*. Concerning what is here advanced, that "if the huſband ſhould divorce his wife "before conſummation, his declaration alone is to be credited with "reſpect to the half dower;" it is to be obſerved that this (which is recorded by *Mohammed* in the *Jama Sagheer* and *Mabſoot*) apparently contradicts what he has advanced in the *Jama Kabeer*, to wit, that "the woman muſt, in this caſe, be decreed a proportionable *Matât*, "or *preſent*,"—(which is conformable to the inference of *Haneefa* and *Mohammed*, who hold that, as a preſent is due, on account of a contract of marriage, *after* divorce, the ſame as a *proper* dower, *before* divorce, the one muſt be decreed her in the former caſe, as well as the other in the latter;)—but this apparent contradiction between the above authorities may be reconciled, by adverting to the different manner in which the caſe is put in them reſpectively; thus, in the *Mabſoot*, the caſe ſuppoſes *one* thouſand *Dirms* and *two* thouſand,—that is to ſay, the huſband declares that the dower is only *one* thouſand *Dirms*, and the wife claims *two* thouſand; now the value of a cuſtomary preſent does not equal the *half* of thoſe ſums, and of courſe, to decree a preſent here would be no advantage to the plaintiff:—in the *Jama Kabeer*, on the other hand, the caſe ſuppoſes *ten Dirms*, and *one hundred Dirms*,—that is to ſay, the huſband avers the dower to be

* Becauſe, as different colours bear a different price, the value of the *colour* uſed is certainly the only ſtandard by which the amount of the charge for dying can be judged of.

only *ten Dirms*, and the wife claims *one hundred*; and her *proper* * preſent may be eſtimated, ſuppoſe at twenty *Dirms*; here therefore a proper preſent may with propriety be decreed to her: and what occurs upon this ſubject in the *Jama Sagheer* being deſtitute of any mention of the amount of the dower, that reſts upon what is ſaid in the *Mabſoot*. —As a more full expoſition of the doctrine of *Haneeſa* and *Mohammed*, in a caſe where a diſpute ariſes between the huſband and wife concerning the amount of the dower on the continuance of the marriage, let us ſuppoſe that the huſband declares *one* thouſand *Dirms*, for inſtance, and the wife claims *two* thouſand; in which caſe, if the *proper* dower of the woman do not exceed *one* thouſand, the declaration of the huſband is to be credited; but if it be *two* thouſand, or upward, that of the wife; and whoever of the two produces evidence in ſupport of his or her declaration, the ſame is to be credited, under either of the above circumſtances; and if they both produce evidence under the firſt of the above circumſtances, (that is, the woman's *proper* dower not exceeding *one* thouſand *Dirms*,) the evidence on the part of the wife is to be credited, becauſe by ſuch evidence her right to the exceſs is eſtabliſhed;—but if, under the *ſecond*, (that is, the woman's *proper* dower being *two* thouſand or upwards,) the evidence on the part of the huſband is to be credited, becauſe that goes to prove that the wife has made an abatement in her dower: but if the *proper* dower be *one thouſand five hundred Dirms*, both parties muſt be required to make oath, after which one thouſand five hundred are to be decreed to the woman. This is according to the *Takhreej* of *Rázi*. *Koorokhee* ſays that the oath muſt be tendered to both parties in all the three circumſtances, after which the *proper* dower muſt be decreed.—All this applies to a caſe where the huſband and wife diſpute with reſpect to the amount of the dower itſelf, and not with reſpect to its ſpecification: but if their diſpute reſpect the latter, one of the parties aſſerting that a dower had been named, and the other denying, in this caſe the *proper* dower muſt be decreed, according to all

* Arab. *Miſl:* that is, proportionable to her rank and circumſtances, in the ſame manner as the *proper dower*.

the

the doctors, that being the original dower independant of any ſpecification.

IF, after the death of the huſband or wife, a diſpute ſhould ariſe between the ſurvivor and the heirs of the deceaſed, concerning the amount of the dower, the rule in this caſe is the ſame as when the diſpute ariſes between the parties during life, becauſe a claim to the woman's *proper* dower does not ceaſe in conſequence of the demiſe of either. or between one of the parties, and the heirs of the other;

AND if both huſband and wife were to die, and a diſpute to ariſe between their heirs with reſpect to the amount of the dower, in this caſe the declaration of the huſband's heirs ſhall be credited, although they ſhould declare a ſum leſs than the uſual and cuſtomary dower of ſuch a woman as the wife deceaſed.—This is according to *Haneefa*. *Mohammed* holds that the rule is the ſame here as where the diſpute ariſes between the parties during life.—And if the heirs diſpute with reſpect to the *ſpecification* of the dower, one party inſiſting that a dower had been named, and the other denying, the declaration of the latter is to be credited, according to *Haneefa*. In ſhort, with *Haneefa*, the woman's *proper* dower is not at all regarded after the deceaſe of both parties, as ſhall be hereafter demonſtrated. The two diſciples, on the other hand, maintain that the *proper* dower ſhould in that caſe be decreed. or between the heirs of *both* parties.

IN caſe of the death of both huſband and wife, it belongs to the heirs of the latter to take the dower out of the eſtate of the huſband, where it has been ſpecifically named; but if it ſhould not have been ſpecified, they cannot claim any thing whatever, according to *Haneefa*. The two diſciples maintain that the woman's heirs are entitled to her dower in either caſe,—that is to ſay, to the ſpecified dower, in the former caſe, or to the woman's *proper* dower, in the latter;—in the *former*, becauſe the ſpecified dower was a debt upon the huſband, con- The heirs of the amount of the ſpecified dower out of property

firmed by the circumſtance of his deceaſe, and conſequently muſt be paid out of his eſtate, unleſs it ſhould be known that the wife had died firſt, in which caſe the huſband's portion of inheritance would drop from the dower [that is, muſt be deducted from it,] on account that he alſo is an heir;—and, in the *latter*, becauſe the woman's *proper* dower had become a debt upon the huſband, the ſame as a *ſpecified* dower, and therefore does not drop in conſequence of his death, any more than where only *one* of the parties dies.—*Haneeſa* argues that, in this caſe, a ſuppoſition of the death of both huſband and wife affords a concluſion that their peers and cotemporaries are all already cut off by death, and no longer remain, becauſe it is moſt probable that they would not both die until after a length of time; and after the lapſe of ſuch a period, their peers and cotemporaries no longer remaining, from whom can the *Cawzee* judge of or decide what the value of the woman's *proper* dower ought to be?—*Haneeſa*, however, holds alſo that where the huſband and wife both happen to die before the lapſe of any length of time, ſo as that their peers and cotemporaries are ſtill remaining, her heirs are entitled to her *proper* dower.

Caſe of a diſ- ---- his wife.

If a huſband were to ſend any thing to his wife, and ſhe were to denominate it a *preſent*, while he aſſerts that he has given it in part payment of her *dower*, in this caſe the declaration of the huſband muſt be credited, becauſe he is the giver, and conſequently muſt be ſuppoſed to know his own intentions beſt;—moreover, it is evidently the buſineſs of the huſband to liquidate the obligation which lies againſt him, before he proceeds to perform gratuitous acts; his declaration, therefore, muſt be credited, except where the thing ſent conſiſts of victuals ready dreſſed for eating, (ſuch as *roaſted*, or *boiled*, or *ſtewed*, and ſo forth,) in which caſe the aſſertion of the woman muſt be credited, becauſe it is uſual and cuſtomary for huſbands to ſend ſuch articles as preſents to their wives, not counting it in the dower; but in reſpect to *wheat* or *barley*, the declaration of the huſband

ſhould be credited for the reaſon abovementioned.—Some have obſerved that articles, the ſupply of which is generally held incumbent upon the huſband, ſuch as *ſhifts*, and *robes*, and *veils*, are not to be counted in the dower, apparent circumſtances arguing againſt this.

## SECTION.

Of the dower of infidel ſubjects, and of aliens, where none has been ſtipulated, or

IF a Chriſtian man marry a Chriſtian woman without ſtipulating any dower, or making it conſiſt of carrion *, ſuch as may be deemed lawful by thoſe of their profeſſion, and have carnal connexion with her, or divorce her before conſummation, or die and leave her, the woman is not entitled to any dower whatever, although both parties ſhould have embraced the faith within the interim.—And the law is the ſame where the parties are aliens married on like terms in a foreign country. The opinion of the two diſciples concerning aliens is the ſame as that of *Aboo Haneefa*: but with reſpect to *Chriſtians*, being *Zimmees*, (that is, ſubjects of the *Muſſulman* government,) they hold that the woman is entitled to her *proper* dower, where the huſband either conſummates the marriage by committing the carnal act, or dies; and that ſhe is entitled to a preſent when he divorces her before conſummation.—*Ziffer* alleges that the alien woman is entitled to her *proper* dower in either caſe, (that is, in the event either of the huſband's death, or of divorce,) becauſe the law does not hold it allowable to ſeek or deſire marriage but in return for property, and this rule equally affects *Infidels* and *Muſſulmans*, as marriage forms a part

* Meaing the fleſh or carcaſs of any animal which dies a natural death.—The original word ſignifies the fleſh of any fowl or quadruped (not being *Game*) which has not been lawfully ſlain.

of

of the temporal law, the obligations of which extend to all alike. To this the two diſciples reply, that aliens do not take upon themſelves any obligation to the obſervance of the laws of *Iſlám*, neither are they capable of ſo doing, on the account of a difference of country: contrary to the caſe of *Zimmees*, who are ſubject to the *Muſſulman* law in all temporal concerns, or acts to which the temporal law has reference, (ſuch as *whoredom*, *uſury*, and ſo forth,) ſince they are fully capable of taking upon themſelves an obligation to the obſervance of thoſe laws, as being native ſubjects of the *Muſſulman* country. *Haneefa* reaſons upon this, that *Zimmees* do not ſubject themſelves to any of the laws of *Iſlám*, either with reſpect to things which are merely of a religious nature, (ſuch as faſting and prayer,) or with reſpect to ſuch temporal acts as, though contrary to the *Muſſulman* law, they may hold to be legal, (ſuch as the ſale of wine, or of ſwine's fleſh,) becauſe we are commanded to leave them at liberty, in all things which may be deemed by them to be proper, according to the precepts of their own faith; wherefore, with reſpect to all ſuch acts, *Zimmees* are the ſame as aliens; but from theſe is to be excepted whoredom, that being held univerſally, and by all ſects, to be a criminal act; and as to *uſury*, no ſuch thing can have legal exiſtence, it being excepted from all the obligations to which the perſon can be ſubject, becauſe of a ſaying of the prophet, "*Obſerve that between us, and* "*whoſoever takes uſury, no engagements exiſt.*"—The compiler of the *Hedáya* remarks that what *Mohammed* has advanced in the *Jama Sagheer*, "If a *Chriſtian* man marry a *Chriſtian* woman without any "dower,"—and ſo forth,—may be underſtood in two ways,—one, the abſolute exception of a dower, (that is, eſpecially ſtipulating that *there ſhall be none*;) and the other, merely the omitting to mention it in the contract. Some have ſaid, concerning this caſe, that where the dower is either made to conſiſt of unlawful articles, or is not mentioned in the contract, there are two traditions; according to one, the woman is entitled to her *proper* dower, (as maintained by the two diſciples,) and according to the other, nothing whatever is due: and

and it is from this variance in the traditions that the difference of opinion ariſes between *Hanceſa* and *Mohammed*.

Of the dower of infidel ſubjects, where it conſiſts of *wine*

IF a *Zimmee* marry a *Zimmeea*, making the dower to conſiſt of wine or pork, and *one* or *both* ſhould afterwards embrace to the faith, yet the woman is nevertheleſs entitled to the unlawful article ſettled upon her, although the converſion take place previous to ſeizin, provided the unlawful article had been identically ſpecified; but if this be not the caſe, the woman, in the inſtance of wine, is to receive the eſtimated value of ſuch wine, or in that of pork, her *proper* dower. —This is according to *Haneeſa*. *Aboo Yooſaf* alleges that the woman is entitled to her *proper* dower in either inſtance. *Mohammed*, on the contrary, maintains that ſhe is in either inſtance entitled to the eſtimated value of the unlawful article ſpecified, whatever it be.—The reaſoning upon which the opinion of the two diſciples proceeds in this caſe is, that by ſeizin, or poſſeſſion, the right in the thing poſſeſſed becomes fully eſtabliſhed and confirmed; ſeizin, therefore, is ſimilar to a contract of marriage, ſince, like that, it produces a right which had not before exiſted; and conſequently the ſeizin of *wine* or *pork* by a *Muſſlima*, as a dower, is illegal, the ſame as a contract itſelf including a ſpecification of ſuch unlawful articles, as a dower; and this, whether thoſe articles may have been identically ſpecified, or only generally mentioned.—*Aboo Yooſaf* further remarks that as, where the time of ſeizin is connected with the time of the execution of the contract, if both parties were then to embrace the faith, her *proper* dower would become due to the woman, ſo in the preſent inſtance likewiſe:—with *Mohammed*, on the other hand, the mention of the unlawful article, as a dower, is approved, as being held, by the ſect of the parties, to be property; but yet the delivery is forbidden, on account of the parties having embraced the faith; wherefore the value becomes obligatory upon the huſband, the ſame as where a man makes dower of a ſlave who dies before the delivery.—The argument of *Haneeſa*, on this ſubject, is that a dower identically ſpecified becomes the

property of the woman on the inſtant of the contract of marriage being executed, for which reaſon it is that a woman is empowered to make what uſe of her dower ſhe may think expedient, by giving it away, or transferring her property in it, either *for* or *without* a return; and the only difference that poſſeſſion makes is, that the huſband is thereby exonerated from reſponſibility with reſpect to it, this being ſimply a tranſition of it from the poſſeſſion of the huſband to that of the wife, which does not become prohibited here by the *Iſlám* of the parties, any more than in the caſe of a claim of reſtitution of wine which had been forcibly ſeized;—that is to ſay, if a perſon were to make a forcible ſeizure of wine from a *Zimmee*, and this *Zimmee* ſhould afterwards become a *Muſſulman*, he is nevertheleſs ſtill at liberty to claim reſtitution of the wine thus forcibly ſeized; and ſo likewiſe in the preſent caſe: (contrary to a caſe where a *Zimmee* purchaſes wine or a *hog*, and afterwards becomes a *Muſſulman* before he has taken poſſeſſion of his purchaſe; for in this caſe it is unlawful for him to take poſſeſſion, and the bargain becomes void, becauſe, in *ſale*, a right of tranſaction with reſpect to the property ſold does not take place until after ſeizin is made of it by the purchaſer, which becomes forbidden by his ſubſequent *Iſlám*:)—but where the unlawful article is not identically ſpecified, nothing but actual poſſeſſion can eſtabliſh a property in it, and this becoming prohibited by the ſubſequent *Iſlám* of the party, and being thereby precluded, the price or value of the pork would not be due to the woman, becauſe the receipt of that is the ſame as of the property itſelf,—hog's fleſh being of the claſs of things denominated *Zooâtal-Keem*, whereas wine is not of this nature, being of the claſs of *Zooâtal-Imſâl*, for which reaſon, if the huſband were to offer the value before *Iſlam*, the wife would be compelled to accept of that of the *pork*, but not of that of the *wine*.—It is to be remarked that if the huſband, in the preſent inſtance, were to divorce his wife before conſummation, the ſame difference of opinion exiſts among our doctors; thoſe who (as above) determine for a *proper dower*, decreeing her a preſent; and thoſe who make the *value* of the article obligatory upon the huſband, decreeing her an half of ſuch value.

## CHAP.

## Of the *Marriage* of *Slaves*.

THE marriage of a male or a female ſlave is not lawful without the maſter's conſent. *Mâlik* has ſaid that the marriage of a male ſlave is valid independant of the conſent of his maſter, becauſe he is competent to pronounce divorce, and is therefore equal to the contracting of marriage.—The arguments of our doctors on this ſubject are twofold;—FIRST, a precept of the prophet ſays "*Whatever ſlave marries without* "*his owner's conſent is an adulterer*;"—SECONDLY, marriage, with reſpect either to male or female ſlaves, is a blemiſh *, on which account they are not at liberty to enter into ſuch a contract without the approbation of their owners.

**Slaves cannot marry without the conſent of their proprietor;**

NEITHER is it lawful for a *Mokâtib* to enter into a contract of marriage without his owner's conſent; becauſe a ſlave of this deſcription, although he be, by virtue of his contract of *Kitâbat*, rendered free with reſpect to acquiſition, of neceſſity, yet remains, with reſpect to matrimony, ſubject to the laws of bondage. And, for the ſame reaſon, it is not lawful for a *Mokâtib* to contract his own male ſlave in marriage without the conſent of his owner; but he may lawfully contract his *female* ſlave, as hence ariſes an acquiſition, in her dower.—In like manner, it is not lawful for a *Mokâtiba* to marry without her owner's conſent; but ſhe may lawfully contract her female ſlave in marriage, as hence ariſes an acquiſition to her as above. Neither is it lawful for a *Modabbir* or *Am-Walid* to marry

(although ſuch may contract their

nor

(although they have

* As tending to depreciate their value.

the ſame privilege.)

without their owner's conſent, becauſe his authority with reſpect to them ſtill exiſts.

be ſold for the diſcharge of his wife's dower

If a ſlave marry with his maſter's conſent, the dower [to the woman whom he marries] is a debt upon his perſon, for the payment of which he may be ſold, becauſe the debt has become obligatory upon the ſlave on account of the exiſtence of its cauſe, (namely, *marriage, proceeding from a competent perſon,*) and the obligation of the debt extends to the maſter alſo, he having conſented thereto, and accordingly devolves upon him, in order that the creditor may be protected from injury; as in the caſe of debts contracted by a ſlave in mercantile dealing

are to diſcharge it by labour.

*Modabbir* or *Mokátib* (in caſe of marriage,) muſt diſcharge the dower by labour, as not being liable to be ſold, becauſe the property in them is not capable of being transferred from one to another; this debt of the dower, therefore, is to be diſcharged by their acquiſitions, ſo that the wife may not be ſubjected to loſs; but their perſons are not liable to be attached for payment.

How far a maſter's deſiring his ſlave to divorce his wife, is an argument of his aſſent to the ſlaves marriage.

If a ſlave marry without his owner's conſent, and the latter afterwards ſhould ſay to him "divorce" [*your wife,*] or "put her away," his [the owner's] aſſent to the marriage is not implied, becauſe ſuch a mode of addreſs bears the conſtruction of *obſtructing* or *reſiſting* the *execution* of the contract, as the terms *divorce* and *ſeparation* apply to *that*, as well as to the diſſolution of the contract of marriage already executed; it is therefore to be thus conſtrued, either becauſe this is ſuitable to the ſtate of a diſobedient and refractory ſlave, or becauſe the *prevention* of a marriage is an act of leſs magnitude than the *aſſenting* to it. But if the owner were to ſay to his ſlave "repudiate "her *by a divorce reverſible*," this implies his aſſent to the marriage, becauſe a reverſible divorce is not ſuppoſed but in a caſe of

marriage, [already executed,] wherefore aſſent to the marriage is hereby ſignified.

Obligation of the dower in a caſe of *invalid* marriage, contracted by a ſlave at the deſire of his owner.

IF a perſon deſire his ſlave to marry ſuch a femal ſlave, and he accordingly wed her by an invalid marriage *, and have carnal connexion with her, *Haneeſa* holds that the ſlave ſhall be ſold for the diſcharge of her dower. The two diſciples, on the contrary, maintain that the dower ſhall be exacted of him (the ſlave) upon his becoming free.—The foundation of this difference of opinion is that, with *Haneeſa*, aſſent applies equally to a legal and to an invalid marriage, and conſequently the debt [of the dower] is upon the owner; but with the two diſciples, aſſent applies to a *valid* and *regular* marriage only, wherefore the debt is not upon the owner, (whence it is that it may be required of the ſlave on his becoming free at any ſubſequent period,) for they argue that the intent of marriage is to guard againſt incontinence, and that end is obtained by *regular*, but not by *invalid* marriages, wherefore if a perſon were to make a vow that he will not marry, his vow applies ſolely to *regular* marriage: contrary to a caſe of *ſale*; that is to ſay, if a perſon were to empower another in ſale, ſuch power extends both to *regular* and to *invalid* ſale, a variety of privileges being therein involved, ſuch as the right of emancipation, and ſo forth: *Aboo Haneeſa*, on the other hand, argues that the word "*marry*" [in the owner's deſire expreſſed to his ſlave] is general, and is therefore to be conſidered as having a general application, the ſame as ſale; and there are a variety of points involved in an irregular marriage, as well as in ſale, ſuch as genealogy [of children born in ſuch marriage,] and the obligations to the payment of dower, and to the obſervance of *Edit*; and with reſpect to the inſtance of a *vow*, as produced by the two diſciples, it is not admitted as applicable by *Haneeſa*.

* That is, under ſuch circumſtances of affinity &c. as invalidates the marriage.

Caſe of an indebted *Mazoon*, contracted in marriage by his owner.

If a man contract his *Mazoon*, or *privileged ſlave*, who is a debtor, to any woman in marriage, it is lawful; and the wife [in virtue of her right to her dower] becomes a joint creditor with the others; that is to ſay, the ſlave is to be ſold for the diſcharge of all his debts, and the price ariſing from the ſale is to be divided between his wife and the other creditors, in proportion to their reſpective claims.—The compiler of the *Hedaya* obſerves that this rule holds only where the marriage has been effected upon a *Mihr Miſl*, or leſs; but if the dower exceed the *Miſl* proportion, the other creditors are, in that caſe, on an equality with the wife, ſo far as the amount of her *Mihr Miſl*, or *proper* dower, and the payment of the exceſs muſt be poſtponed till after the diſcharge of the debt to the creditors; the ground of which is, that the owner's authority over his ſlave, with reſpect to matrimony, is founded on his having the property of his perſon, (as ſhall be hereafter explained,) and that right of property ſtill remaining, the marriage of the ſlave is completely *legal* and *valid*.

Objection.—In conſequence of the marriage, the right of the creditors is rendered null, both *by deſign*, and *in effect*; wherefore it would be requiſite that, in diſcharging the debts of the *Mazoon*, thoſe due to the firſt creditors ought to be firſt paid; whereas it is otherwiſe in this caſe, for they are all put on an equality.

Reply.—The right of the creditors is not deſignedly rendered null by the marriage; but the marriage being held valid, the debt of dower is due in conſequence of the exiſtence of its cauſe; and there is nothing to invalidate its exiſtence; the dower, therefore, is the ſame as a debt of damage;—that is to ſay, where a *Mazoon* ſlave, being already in debt, deſtroys or waſtes the property of a ſtranger, the latter comes in as a joint creditor; and the ſlave is as a ſick debtor;—that is to ſay, if a ſick perſon, being in debt, marry a woman, ſhe comes in as a joint creditor with the others, to the amount of her *proper* dower, and ſo in this caſe likewiſe.

If a maſter contract his female ſlave in marriage to another man, he is not under any obligation to ſend her to the houſe of her huſband, ſhe ſtill remaining attached in ſervice to her maſter; and the huſband ſhall be deſired to viſit his wife at opportune ſeaſons, at her maſter's houſe; becauſe his right to her ſervice ſtill remains in virtue of his property in her, and if he were under any obligation to ſend her to the houſe of her huſband, his right would be rendered null.—And if the maſter ſhould give permiſſion to his female ſlave to dwell in the houſe of her huſband, her ſubſiſtence and lodging are incumbent upon the huſband; but if he ſhould not permit this, nothing whatever is incumbent, becauſe ſubſiſtence is the recompenſe for the matrimonial reſtraint, and if ſhe live in the houſe of her huſband ſhe is under this reſtraint, but not otherwiſe.—And if the maſter thus permit her to dwell with her huſband, ſtill he is at liberty, notwithſtanding, to call for and require her legal ſervice at any ſubſequent period; becauſe his right of uſufruct ſtill continues, in virtue of his property in her; and this right is not relinquiſhed by ſuch permiſſion any more than by her marriage.

A maſter may withhold permiſſion from his female ſlave to dwell in the houſe of her huſband; and if he ſo permit, her huſband muſt

wife

THE compiler of the *Hedáya* remarks that *Imám Mohammed* has ſaid, "*A maſter contracting his male or female ſlave in marriage is lawful*,"—without making any mention of the conſent of the ſlave to ſuch marriage, which ſhews that this conſent is not a condition; and ſuch is the opinion of our doctors, who hold that a maſter is empowered to contract his ſlaves in marriage by compulſion,—that is to ſay, that the marriage of ſuch, where it is contracted by the maſter, holds good independant of their conſent. According to *Shafeï*, a maſter is not empowered to contract his *male* ſlave in marriage by compulſion; and there is alſo an opinion of *Haneefa* recorded to this effect: this doctrine proceeds upon the principle that marriage is a natural privilege of man, and a ſlave is a poſſeſſion of his owner by the laws of *property*, but not by the laws of *nature*; wherefore the maſter is not endowed with any abſolute authority with reſpect to his marriage:

contrary

contrary to the caſe of a *female* ſlave, whoſe owner, as being entitled to the carnal uſe of her perſon, is at liberty to transfer the ſame to any other.—The argument of our doctors on this ſubject is that a maſter, in cauſing his ſlave to marry, acts with a view to the preſervation of his property, becauſe, by marrying, the ſlave is withheld from the commiſſion of whoredom, which is a cauſe of deſtruction or damage *; the maſter, therefore, is fully empowered with reſpect to the marriage of his male ſlaves, the ſame as of his females; but he is not thus empowered with reſpect to his *Mokátib*, or *Mokátiba*, becauſe theſe are, as to privileges, the ſame as free perſons, and their conſent is therefore a condition; for if it were otherwiſe, their privileges and po.ers of action would be totally annulled.

An owner ſlaying his female ſlave before conſummation has no claim to her dower.

If a man marry his female ſlave to another perſon, and afterwards put her to death, before her huſband has had carnal connexion with her, no part of the dower whatever is, in this caſe, due from the huſband, according to *Haneeſa*. The two diſciples hold that, in this caſe, the dower is due from the huſband, in the ſame manner as it would be if the female ſlave had died a natural death; and the foundation of their opinion is that a perſon who is ſlain dies by his own fate, death implying merely the termination of life, and life being terminated by the act of killing; the caſe, therefore, is here the ſame as if the female ſlave had been ſlain by a ſtranger,—that is to ſay, if the female ſlave had been ſlain by a ſtranger, her dower would remain due from the huſband, and ſo alſo in the preſent caſe.—The argument of *Haneeſa* is that the owner of the ſlave, who (as being her *Mawla*) claims the conſideration, has by his act prevented the delivery of the return, (to wit, the perſon of the woman,) and conſequently his right to the conſideration is extinguiſhed, in the ſame manner as when a free woman apoſtatizes;—that is to ſay, if a free woman apoſtatize from the faith before ſhe has admitted her huſband to the carnal embrace, no dower whatever is due to her, ſhe [by her act of apoſtaſy]

* On account of the puniſhment which attends it.

having prevented the delivery of the return; and ſo likewiſe in the preſent inſtance. With reſpect to what is advanced by the two diſciples, that "a perſon who is ſlain dies by his own fate," it may be anſwered, that although this be admitted, yet it holds with reſpect to a future ſtate only, and not with reſpect to this world, murder, according to worldly inſtitutes, being in the eye of the law conſidered as an act of deſtruction, inducing retaliation, fine, and ſo forth; and it is therefore to be regarded as an act of deſtruction with reſpect to the dower, that alſo being a temporal inſtitution.

The dower of a free woman is due although ſhe

If a free woman kill herſelf before ſhe has admitted her huſband to carnal connexion, her dower is nevertheleſs due from him:—contrary to the opinion of *Ziffer*, who conceives an analogy between this caſe and that of a woman apoſtatizing before carnal connexion, or of a maſter ſlaying his female ſlave; for he argues that no dower whatever is here due from the huſband, as the wife, to whom the conſideration belongs, has by her act of ſuicide prevented the delivery of the return. —The arguments of our doctors are that, in worldly inſtitutes, no regard is paid to the offence committed by a man upon his own perſon, wherefore ſuicide is to be held as dying a natural death: contrary to the caſe of a man killing his female ſlave, that being an act to which worldly inſtitutes have regard, and, as ſuch, ſubjecting the perpetrator of the murder to the performance of acts of expiation.

If a man marry the female ſlave of another, and be deſirous of committing the act of *Azil* with her, (i. e. *emiſſio Seminis in Ano, vel inter Mamillas*,) this ſhall depend upon her maſter's permiſſion, according to *Hanceſa*; and ſuch alſo is the *Záhir Rawáyet*.—According to the two diſciples, the permiſſion to this act reſts with the ſlave, becauſe [as being the man's wife] carnal connexion is her right, but by *Azil* that carnal connexion which is her right is fruſtrated; her conſent, therefore, is a requiſite condition to the legality of the act, the ſame as that of a free woman: contrary to the caſe of a

female

female ſlave, who is the property of the perſon having ſuch connexion with her *, becauſe carnal connexion is not her right, (whence it is that ſhe is not entitled to claim the carnal act of her maſter or owner,) and conſequently her conſent is not a condition.—The principle upon which the *Zâhir Rawâyet* proceeds in this caſe is, that the act of *Azil* defeats the intention of marriage, which is the production of children, and this is a right of the maſter †; whence it is that *his* conſent is a condition, and not that of the *ſlave*.—And herein appears a diſtinction between the ſtate of a free woman and that of a ſlave [in marriage.]

A female ſlave, upon obtaining her freedom, has a right to annul the marriage contract, where it was executed with her owner's conſent;

If a female ſlave marry with her owner's conſent ‡, and afterwards become free, ſhe is then at liberty either to break off the marriage, or to continue it, whether her huſband be a ſlave, or a freeman, becauſe, upon *Barreera* (who was a *Mokâtiba* of *Ayſha*) becoming free, the prophet ſaid to her "*You are now miſtreſs of your own perſon, and therefore at your own diſpoſal*,"—which tradition evinces that ſhe is at liberty as above, whether her huſband be a ſlave or a freeman; ſince the cauſe of her right of option, as there mentioned, (that is, her being miſtreſs of her own perſon,) exiſts equally in either caſe.—*Shafei* maintains that ſhe has no ſuch right of option, where her huſband is a freeman: the tradition above quoted, however, is in proof againſt him: moreover, the power of the huſband with reſpect to his wife is greater after her emancipation than it was before, becauſe before ſhe was free he had power to pronounce only a *double* ſentence of divorce, whereas afterwards he is authorized to pronounce *three* divorces, on which account ſhe is juſtly empowered to ſet aſide the contract of marriage, ſo as that her huſband may not obtain any additional authority with reſpect to her in conſequence of

* As where a maſter has connexion with his female ſlave in virtue of *propriety*.

† Becauſe he has a property in the children born of his ſlave.

‡ That is, *at his inſtigation*.

her

her emancipation. And the rule is the ſame where a *Mokâtiba* marries with her owner's conſent, and afterward becomes free.—*Ziffer* ſays that a *Mokâtiba* has no right of option, becauſe the contract of marriage proceeded by, and was executed with, her eſpecial conſent, and ſhe receives the dower *, and ſuch being the caſe, ſhe can have no ſubſequent right of option: contrary to the caſe of an abſolute ſlave, whoſe conſent in marriage is not regarded.—The argument of our doctors is that the reaſon for her right of option, (to wit, the acceſſion, to the huſband, of an *additional authority* with reſpect to her,) appears in the caſe of a *Mokâtiba*, the ſame as in that of an abſolute ſlave, for before freedom the term of her *Edit* was only *two* menſtruations, and ſhe was ſubject to no more than a duplicate ſentence of divorce; whereas, in her ſtate of freedom, her *Edit* includes *three* menſtruations, and ſhe is ſubject to *three* divorces.

but not otherwiſe.

IF a female ſlave marry without her owner's conſent, and be afterwards made free, her marriage then becomes legal and valid, becauſe, being of ſound mind and mature age, ſhe is competent to the declaration and acceptance; moreover, the illegality of the marriage was on account only of the owner's right, which being done away, it remains lawful: and the woman has not any option, as in the former caſe, becauſe the marriage is not in this caſe valid until after emancipation, which conſequently occaſions no acceſſion of power to the huſband; and hence the caſe is the ſame as if ſhe were to beſtow herſelf in marriage after emancipation.

Caſe of a man marrying a female ſlave without her owner's conſent

IF a man marry a female ſlave, without her owner's concurrence, on a dower of a thouſand *Dirms*, her *proper* dower being one hundred *Dirms* only, and he have carnal connexion with her, and her owner afterwards emancipate her, the ſpecified dower goes to him [the

* In oppoſition to the caſe of an *abſolute* ſlave, whoſe dower is received by her or proprietor, and by him appropriated.



owner,]

owner,] becauſe the huſband has here obtained poſſeſſion of an article which was the property of the owner, who is therefore entitled to the return: but if the marriage be not conſummated until *after* emancipation, the ſpecified dower goes to the woman, becauſe in this caſe the huſband appears to have obtained poſſeſſion of an article which was her property, and ſhe of courſe is entitled to the return, ſince the marriage, in conſequence of her emancipation, takes effect from the period of the contract; and hence the ſpecification of the dower is valid, and that which was ſpecified is incumbent; and accordingly, no other dower is due on account of carnal connexion previous to the efficiency of the marriage, where that has been ſuſpended [upon the event of the owner's approbation, or the ſlave's freedom,] becauſe the marriage deriving its legality from the original contract, its efficiency is conſidered as exiſting from the inſtant the marriage takes place; nothing, therefore, but one dower can be due.

Caſe of a father cohabiting with the of his *ſon*.

If a father enjoy the female ſlave of his ſon, and ſhe produce child, and he [the father] claim it, the ſlave becomes his *Am Walid*, and he is anſwerable to his ſon for her value; but he is not ſo for her dower, becauſe a father being at liberty to poſſeſs himſelf of the property of his ſon, whenever that may be requiſite to his own preſervation, it follows that he may poſſeſs himſelf of his ſon's ſlave, where he requires her for the preſervation of his progeny, ſince he thereby provides for his own continuance, he being virtually continued in his offspring; but the preſervation of his progeny being a matter of leſs immediate importance than that of his *life*, he muſt pay a price in exchange for the ſlave, whereas he might take his ſon's *victuals* without paying any price.—And here the father's property in the ſlave is eſtabliſhed antecedently to his claim of the child, poſſeſſion being a condition eſſential to ſuch claim, which does not hold good unleſs he be either fully poſſeſſed of her in all reſpects, or at leaſt have a right of poſſeſſion in her; and neither of theſe exiſt in him, (inſomuch that he might legally *marry* her;)—it is therefore requiſite that his property

perty in her be conſidered as exiſting *a priori*; and this being admitted, the father appears to have had carnal connexion with his own ſlave, and conſequently is not ſubject to the payment of an *Akir*.—*Ziffer* and *Shafeï* maintain that the ſlave's dower is a debt upon the father; becauſe they hold that his property in her is a conſequence of his *Iſteelad*, or claim of the child,—that is, that his right of poſſeſſion is is thereby eſtabliſhed, the ſame as in a partnerſhip ſlave; now the effect of a thing is not found until after that thing has taken place; and ſuch being the caſe, as the carnal connexion appears to have been had, in the firſt inſtance, with the property of another, a dower is due.

Caſe of a ſon contracting his female ſlave in marriage to his father.

IF a man marry his female ſlave to his father, and ſhe produce a child, ſhe does not become *Am Walid* to the father, neither is her price a debt againſt him, becauſe he is anſwerable for her dower: and the child born of her is free, ſuch a marriage being approved by our doctors.—This is contrary to the doctrine of *Shafeï*, according to whom a marriage of this kind is illegal. The argument of our doctors is, that the ſlave is not at all the property of the father, becauſe, the ſon being her proprietor in every reſpect, it is impoſſible that the father ſhould be ſo in any view; the ſon, moreover, is endowed with privileges [in regard to her] which do not appertain to his father, ſuch as ſelling or beſtowing her in marriage, or emancipating her, which evinces that the father is not in any reſpect her proprietor, although, in a caſe where he has carnal connexion with her, puniſhment drops, on account of erroneous poſſeſſion; and his marriage with her being admitted as legal, the conſervation of his ſeed is effected by means of *marriage*, [not by means of *Iſteelad*,] ſo that his property in her is no way eſtabliſhed [by the circumſtance of her bearing a child to him,] and conſequently ſhe does not become his *Am Walid*.—And here the father is not anſwerable for the value either of her or of her child, as he does not become proprietor of either; but he owes her dower, he having taken that upon him by his marriage; and the child is free, be-

cauſe his owner would otherwiſe be his brother; and he is virtually emancipated of courſe.

The marriage of a free woman with a ſlave is annulled by her procuring his emancipation.

If a free woman, being the wife of a ſlave, ſhould ſay to the proprietor of ſuch ſlave, "Emancipate him on my behalf for a thouſand "*Dirms*," and he accordingly emancipates him, the marriage is annulled.—*Ziffer* maintains that it is not annulled.—Our doctors argue, on this occaſion, that the ſlave obtains his freedom from the woman, whence it is that the right of *Willa* reſts with her, and alſo, that if ſhe were under obligation to perform an expiatory act, and intend her huſband's releaſe to ſtand as ſuch, her expiation is thereby fulfilled.—With *Ziffer* the emancipation is held to proceed from the owner, becauſe the woman has required him to emancipate the ſlave "*on her* "*behalf*," which is abſurd, ſince manumiſſion cannot take effect upon a ſlave who is not the property of the emancipator; conſequently, her requiſition being improper, emancipation is to be regarded as proceeding ſolely from the owner.—Our doctors, on the other hand, ſay that there is *one* mode in which the requiſition of the woman may be rendered proper, *viz.* by conſidering her property in the ſlave to have exiſtence previous to emancipation, as an eſſential, (for her right of poſſeſſion is a condition of the validity of emancipation on her behalf,) and ſuch being the caſe, her requiſition "*emancipate him*, &c." bears the conſtruction of her deſiring the owner firſt to transfer to her his property in the ſlave for ſuch a conſideration, and then to emancipate him "*from her*;" and the reply of the owner, "*I have emancipated* "*him*," is as if he were to ſay that he had transferred him, and then ſet him free "*from her*;" and upon the woman's property in him being eſtabliſhed, it neceſſarily follows that the marriage is annulled, the marriage of a free woman with her ſlave being illegal, ſince poſſeſſion by right of property is irreconcilable with poſſeſſion by matrimony.—But if the woman were to ſay to the owner of her huſband "emancipate him from me," without mentioning any conſideration, in this caſe the marriage is not annulled, and the *Willa* reſts with the maſter.

maſter. This is according to *Haneeſa* and *Mohammed*.—*Aboo Yooſaf* ſays that this and the preceding caſe are the ſame, and that the marriage is here likewiſe annulled, becauſe in this inſtance alſo the tranſfer muſt be ſuppoſed to have previouſly taken place, (though without any return,) in order that the act may be lawful.

OBJECTION.—Transfer of property, without a return, amounts to *gift*, and that is not valid without *ſeizin*; now here ſeizin does not appear; conſequently how can the transfer be valid?

REPLY.—Seizin is not in this caſe regarded, any more than in *Zihâr*; thus, if the expiation of *Zihâr* were incumbent upon any perſon, and he were to deſire another to give the victuals *, *as from him*, and the other do accordingly, the gift is underſtood independant of *ſeizin*; and ſo here likewiſe.—The argument of *Haneeſa* and *Mohammed* is that ſeizin being declared, in the ordinances of the prophet, to be a condition of gift, cannot be diſpenſed with; neither can it be eſtabliſhed merely by ſuppoſing or aſſuming it, as an eſſential, becauſe ſeizin is a *ſenſible act*,—contrary to *ſale*, which is a legal tranſaction: and in the caſe of expiation, as cited by *Aboo Yooſaf*, the poor ſtand as the deputies of the expiator, in the *ſeizin* of the victuals, but the ſlave (in the caſe here treated of) cannot ſtand as the wife's deputy, becauſe nothing is received by him, ſo as to conſtitute him her deputy in ſeizin.

* Book of Divorce, Chap.

CHAP.

## CHAP. V.

## Of the *Marriage* of *Infidels*.

The marriage of an *Infidel* couple is not diſſolved by their jointly embracing the faith,

If an *Infidel* man and woman marry without witneſſes, or whilſt the woman is in her *Edit* from a former *Infidel* huſband, and this be no objection by the rules of their own ſect, and they afterwards embrace the faith together, their marriage remains valid.—This is according to *Haneeſa*.—*Ziffer* maintains the marriage to be invalid in either caſe,—(that is to ſay, whether it be entered into without witneſſes, or during the woman's *Edit*,) but that *Infidels* are not liable to be called to an account until they embrace *Iſlâm*, or until they appeal to the law,—that is to ſay, carry the matter before the judge.—The two diſciples coincide with *Haneeſa* in the firſt caſe, [the defect of witneſſes,] but agree with *Ziffer* in the laſt [the *Edit*.] The argument of *Ziffer* is that the word of the ſacred writings extends to all men alike, and conſequently to *Infidels*; but the parties, as being *Zimmees*, are not liable to moleſtation; but this exemption from moleſtation is an effect of indulgence, and does not proceed from any idea of the marriage being legal; and of courſe, where it becomes a ſubject of litigation, or the parties become *Muſſulmans*, ſeparation muſt enſue, the illegality of their marriage ſtill remaining.—The arguments of the two diſciples are that the illegality of *Poliandry* is univerſally admitted amongſt *Muſſulmans*, and that *Infidel* ſubjects have engaged to follow the temporal law in all ſuch points as are univerſally admitted; but with reſpect to the illegality of marriage without witneſſes there ſubſiſts a difference of opinion among the *Muſſulmans*; and *Infidels* have engaged only to follow ſuch temporal laws of *Iſlâm* as are *univerſally* admitted, and not ſuch as are *diſputed*; hence, in the caſe

caſe of *Poliandry* a ſeparation becomes neceſſary, but not in the caſe of marriage without witneſſes.—*Haneeſa* argues that the marriage is not rendered illegal by the injunctions of the law, becauſe thoſe injunctions are not addreſſed to *Infidels*; neither does any reaſon exiſt why the *Edit* ſhould be obligatory on account of the right of a huſband who has no faith in the neceſſity of it: contrary to a caſe where the *Infidel* woman is the wife of a *Muſſulman*, becauſe he has faith in the neceſſity of *Edit*; and therefore the illegality of her marriage [with the *Infidel*] ſhould in this caſe be eſtabliſhed, on account of his [the *Muſſulman's*] right; and the marriage being valid *abinitio*, on account of no illegality appearing therein, continues to exiſt as ſuch, ſince teſtimony is not a condition with reſpect to the period of its exiſtence; and the circumſtances of appeal to the law, or of converſion to the faith, take place during the exiſtence of the marriage: neither does the circumſtance of the *Edit* forbid the continuance of the marriage; as when a man (for inſtance) has carnal connexion, erroneouſly, with the wife of another, in which caſe an *Edit* is incumbent upon the woman, but the marriage continues to hold good.

unleſs it be a marriage within the prohibited degrees;.

IF a *Majooſee* wed his mother or his daughter, and they afterwards become *Muſſulmans*, they are to be ſeparated. This holds with the two diſciples, becauſe a marriage within the prohibited degrees is univerſally admitted to be null, on which account the rule extends to *Infidels* as well as *Muſſulmans*, (as before mentioned, from them, in the caſe of *Edit*,) and the parties, upon their converſion, being neceſſarily liable to moleſtation on account of ſuch marriage, it follows that a ſeparation muſt take place upon that event; and it holds alſo with *Haneeſa*, becauſe, although ſuch marriage be deemed *lawful* in the *Rawáyet Saheeh*, yet the circumſtance of the wife being within the prohibited degrees forbids the continuance of it after converſion, on which account ſeparation is to take place: contrary to the circumſtance

ſtance of *Edit*, which (according to *Hanceſa*) does not forbid the continuance of the marriage.

but if *one* of them only be converted, a ſeparation takes place.

If only one of the parties be converted to the faith, a ſeparation follows; but if one only appeal, *Hanceſa* holds that ſeparation does not take place: contrary to the opinion of the two doctors, according to whom ſeparation takes place in this caſe alſo.—The reaſon, with *Hanceſa*, for making this diſtinction between theſe two caſes is, that the right of one party is not invalidated by the appeal of the other, as the faith of the one is not altered by the appeal of the other: but where one of the parties becomes a *Muſſulman*, although the faith of the other be not altered by that event, yet the faith of an *Infidel* is not ſufficient to controvert or oppoſe the *Iſlâm* of a *Muſſulman*, as *Iſlâm* is the *ſubjector* and cannot be *ſubjected*.—But where both the parties enter into a litigation, it is univerſally agreed that ſeparation takes place, becauſe this mutual litigation amounts to both authorizing any third perſon to effect a ſeparation between them, which if they were to do, the ſeparation ſo effected would be legal.

Apoſtates are incapacitated from marrying.

It is not lawful that an apoſtate marry any woman, whether ſhe be a believer, an *Infidel*, or an apoſtate, becauſe an apoſtate is liable to be put to death; moreover, his three days of grace are granted in order that he may reflect upon the errors which occaſion his apoſtacy; and as marriage would interfere with ſuch reflection, the law does not permit it to him.

In like manner, it is not lawful that a female apoſtate marry any man, whether *Muſſulman* or *Infidel*, becauſe ſhe is impriſoned for the purpoſe of reflection, (as above,) and her attention to her huſband would interfere therewith: moreover, this circumſtance of her impriſonment neceſſarily prevents the matrimonial intercourſe; —now marriage is lawful, not in reſpect to *itſelf*, but to its *ends*,

and conſequently, where theſe are defeated, it cannot be deemed in any reſpect legal.

If either the father or mo

WHENEVER either the huſband or the wife is a *Muſſulman*, their children are to be educated in the *Muſſulman* faith. And if either one or other [of an *Infidel* couple] become a *Muſſulman*, and they have infant children, thoſe are to be conſidered as *Muſſulmans*, in virtue of the *Iſlam* of one of their parents, becauſe this is tenderneſs to the children.

or where one is of a ſuperior order of

an inferior, their childrer are of the *ſuperior* order.

IF one of a married couple be a *Kitâbee*, and the other a *Majooſee*, their children are to be regarded as *Kitâbees*, becauſe, in this alſo there is a degree of tenderneſs with reſpect to the children, as a *Majooſee* is worſe than a *Kitâbee*. This is contrary to the doctrine of *Shafei*, who holds the infidelity of a *Majooſee*, and that of a *Kitâbee*, to be equal: but with our doctors a *Kitâbee* is held ſuperior to a *Majooſee*.

Upon the converſion o one of the parties, the magiſtrate is to require the other to embrace the faith; and muſt ſeparate them, in caſe of recuſancy

WHEN the wife becomes a convert to the faith, and her huſband is an *Infidel*, the magiſtrate is to call upon the huſband to embrace the faith alſo; if he accede, the woman continues his wife; but if he refuſe, the magiſtrate muſt ſeparate them; and this ſeparation, with *Haneefa* and *Mohammed*, is a *divorce*.—In like manner, if the huſband become a *Muſſulman*, and his wife be a *Majooſee*, the magiſtrate is to call upon her to embrace the faith alſo; if ſhe accede, ſhe remains his wife; but if ſhe refuſe, the magiſtrate muſt ſeparate them; but this ſeparation is not *divorce*.—*Aboo Yooſaf* has ſaid that the ſeparation is not divorce in either caſe.——What is here advanced of the magiſtrate calling upon the party to embrace the faith, is an opinion of our doctors.—*Shafei* maintains that the magiſtrate is not to make any ſuch requiſition, becauſe this is *moleſtation*, and we have engaged not to moleſt *Zimmees*, as they have entered into a contract of ſubjection to us.

Objection.—It would hence appear that the matrimonial right of poſſeſſion ſhould not terminate in this caſe; whereas *Shafei* alſo holds that it is terminated.

Reply.—The matrimonial intercourſe is not admiſſible between a *Muſſulman* and an *Infidel*; for which reaſon it is that the matrimonial right of poſſeſſion is terminated on the inſtant of converſion, where either party embraces the faith, before conſummation, becauſe in this caſe the right has not been confirmed; but, on the other hand, if converſion take place after conſummation, the termination is delayed until the end of three menſtruations, becauſe the right has on this occaſion been confirmed; as holds in divorce.—The argument of our doctors is, that, upon either party embracing the faith, the ends of marriage are defeated, on account of difference of religion; hence it is abſolutely neceſſary that recourſe be had to ſome means by which a ſeparation may be effected;—now *Iſlâm*, as an act of piety, is incapable of being rendered a cauſe of ſeparation; the *Infidel* party is therefore to be called upon to embrace the faith, in order that the ends of marriage may be anſwered by converſion, or that a cauſe of ſeparation may be eſtabliſhed in caſe of refuſal. The reaſon upon which *Aboo Yooſaf* founds his opinion is that the occaſion of ſeparation, to wit, *refuſing the faith*, may proceed from either the man or the woman; a ſeparation, therefore, on account of ſuch refuſal, is not *divorce*, any more than on account of a right of property;—that is to ſay, if, of huſband and wife, either become the owner of the other, a ſeparation enſues; but this ſeparation is not divorce; and ſo alſo in the preſent caſe.—In reply to this, *Haneefa* and *Mohammed* argue that the huſband, when he refuſes the faith, wilfully withholds the cuſtomary benevolence from his wife, where he has it ſtill in his power to continue it to her, by becoming a *Muſſulman*; and ſuch being the caſe, the magiſtrate acts merely as his ſubſtitute, in effecting the ſeparation; in the ſame manner as where a huſband is *impotent*, or deprived of his *penis*; but a woman is not empowered to divorce, for

which

which reaſon the magiſtrate cannot be regarded as her ſubſtitute in effecting the ſeparation when ſhe has refuſed the faith.

IT is to be obſerved, that where the ſeparation takes place on account of the woman's refuſal of the faith, ſhe is ſtill entitled to her dower, provided her huſband has conſummated the marriage, as in this caſe her right has been confirmed by the carnal act; but if the marriage ſhould not have been conſummated ſhe cannot receive any dower, becauſe the ſeparation has proceeded from her, and her right to the dower is not confirmed; thus the caſe here is the ſame as where a woman apoſtatizes, or admits the ſon of her huſband to carnal connexion.

And if the converſion of either happen in a ſe-

IF the wife embrace the faith in a foreign country, and her huſband be an *Infidel*,—or, if a foreigner there become a *Muſſulman*, and his wife be a *Majooſeea*,—the ſeparation between them does not take place until the lapſe of three terms of the wife's courſes, when ſhe becomes completely repudiated.—The reaſon of this is, that *Iſlám* cannot be made an occaſion of ſeparation, (as has been before obſerved;) and the requiring the other party to embrace the faith is impracticable, as the authority of the magiſtrate does not extend to a foreign land, nor is it acknowledged there; yet ſeparation is indiſpenſable for the removal of evil; the condition, therefore, of ſeparation, (to wit, the lapſe of three terms of the woman's courſes,) muſt ſtand in the place of ſeparation effected by the magiſtrate; and in this rule no diſtinction is made between a woman *enjoyed*, and one *unenjoyed*.—*Shafeï* makes a diſtinction, on this occaſion, between a woman enjoyed and one unenjoyed, in the ſame manner as he diſtinguiſhes between them when they reſide in a *Muſſulman* territory, and one of them embraces the faith; as has been before explained.

tion takes place upon the lapſe of the woman's term of probation.

WHEN a ſeparation takes place between huſband and wife, in conſequence of the converſion of the former, and the latter is an

If the wife be a

is

from separation, in consequence of her husband's conversion.

alien, she is not subject to any observance of *Edit*, according to all the doctors.—*Haneefa* holds the rule to be the same, where the woman becomes a convert and her husband is an alien; that is, that the woman, in this case also, is not subject to any observance of *Edit*, but the two disciples maintain that she must here observe an *Edit* the same as would be incumbent upon her if she were to come into the *Mussulman* territory; as shall be hereafter demonstrated.

The conversion of the husband of a *Kitâbeea* does not occasion separation.

If the husband of a *Kitâbeea* become a *Mussulman*, their marriage still endures, because the marriage of a *Mussulman* with a *Kitâbeea* being legal *ab initio*, its continuance is so *a fortiori*.

Case of a convert removing from a foreign land into a *Mussulman* territory.

If either husband or wife become a convert to the faith in a foreign country, and afterwards remove thence into the *Mussulman* territory, a separation takes place between them:—this is contradicted by *Shafeï*:—but if either party be brought, as a captive, out of the foreign country, separation takes place between them, according to all the doctors: if, however, both the parties be brought captives together, we hold that there is no separation; whereas *Shafeï* says that separation takes place.—Hence it may be collected that the circumstance of the parties residing apart in different countries is held to be a cause of separation by our doctors, but not that of their *capture*; and that *Shafeï* maintains the reverse of this opinion.—The argument of the latter is that separation of country is a cause of termination of authority, but has no effect in occasioning an absolute separation in this case, any more than where an alien resides under protection in a *Mussulman*t erritory, whilst his wife remains in her own country; or where a *Mussulman* goes under protection into a foreign land, leaving his wife in the *Mussulman* territory; in neither of which cases would separation take place, and so in this instance likewise:—capture, on the other hand, leads to this, that the captive is the sole and exclusive property of the captor, which cannot be established without a termination of the former's marriage, as it is on the same principle that a

captive ſtands virtually releaſed from all his debts.—Our doctors, in ſupport of their opinion, argue that by ſeparation of country all matrimonial intercourſe between the parties, whether actual or conſequential, is entirely broken off, and thus this ſeparation reſembles illegality by affinity; capture, on the other hand, occaſions property in the perſon, which does not forbid marriage at firſt, for if a man contract his ſlave in marriage, it is lawful; and ſo, alſo, it does not forbid the continuance of the marriage; as in the caſe of purchaſe, where if a perſon ſhould purchaſe a female ſlave, the wife of another, the marriage does not, on that account, become null.—And in reply to what *Shafei* has advanced with reſpect to capture,—it is admitted that this makes the captive the excluſive property of the captor, in reſpect to *ſubſtance*, but the object of marriage, (to wit, the uſe of the woman's perſon,) is not *ſubſtance*, and therefore capture does not annul the marriage: moreover, between a protected foreigner and his wife ſeparation of abode does not virtually take place, as his ultimate intention is to return home, whence he may be regarded, virtually, as in a foreign country, during his reſidence in the *Muſſulman* territory.

A woman, retiring from a foreign into a *Muſſulman* country, is at libery to marry;

IF a woman come out of a foreign country into the *Muſſulman* territory, and there become either a *Zimmee*, or a convert to the faith, it is lawful for her to marry *; and *Haneeſa* holds that ſhe is not under any obligation to obſerve an *Edit*.—The two diſciples ſay that ſhe muſt obſerve an *Edit*, becauſe ſeparation takes place upon her entering the *Muſſulman* territory, and ſhe then becomes ſubject to the *Muſſulman* laws.—The argument of *Haneeſa* is that the *Edit* is a conſequence of an antecedent marriage, enjoined on account of the importance of the matrimonial tie; but this tie is of no importance whatever with reſpect to foreigners, for which reaſon it is that *Edit* is not enjoined upon a woman who is a captive.

* Although ſhe be already married in the foreign country.

IF

but, if pregnant, ſhe muſt wait until her delivery.

If the woman in queſtion be pregnant, ſhe muſt not marry until ſhe be delivered.—This is the doctrine of the *Zâhir Zawâyet*.—It is recorded from *Haneeſa* that her marriage is approved; but her huſband muſt not have carnal connexion with her until after her delivery, as is the rule with women pregnant by fornication.—The ground of the former opinion is that the parentage of the *fœtus* is aſcertained [as from ſome *alien*,] and therefore the former matrimonial tie is regarded, with reſpect to the eſtabliſhment of parentage, and muſt conſequently be ſo, with reſpect to forbidding her marriage likewiſe, on a principle of caution.

In a caſe of apoſtacy, ſeparation takes

If either huſband or wife apoſtatize from the faith, a ſeparation takes place, without divorce, according to *Haneeſa* and *Aboo Yooſaf*.—*Mohammed* alleges that, if the apoſtacy be on the part of the huſband, the ſeparation is a *divorce*, becauſe he conceives an analogy between this caſe and that of the huſband refuſing the faith; for as, in the latter inſtance, he by his refuſal appears wilfully to withhold the cuſtomary benevolence from his wife, where he has it ſtill in his power to continue it to her, ſo likewiſe in the former, by his apoſtacy.—*Aboo Yooſaf* holds here to his opinion as before recited in the caſe of *refuſal*.—*Haneeſa* makes a diſtinction between refuſal of the faith and apoſtacy from it; and his reaſon for this diſtinction is that apoſtacy annuls marriage, becauſe the blood of an apoſtate no longer remains under the protection of the law, and his life is *Mobah* [free to any one to take;] now divorce is uſed for the purpoſe of diſſolving a marriage which actually exiſts; and hence apoſtacy cannot poſſibly be conſidered as divorce: contrary to the caſe of refuſal of the faith, becauſe it is on account of the ends of matrimony being thereby defeated that ſeparation is enjoined, in that inſtance, as has been already ſaid; and for this reaſon it is that the ſeparation is there ſuſpended upon a decree of the magiſtrate, whereas in apoſtacy it takes place without any ſuch decree.—It is to be obſerved, however, that if the apoſtacy be on the part of the *huſband*, his wife is entitled to her whole dower where he has had

carnal

carnal connexion with her, or to *half* her dower in defect of this:—and where the apoſtacy is on the part of the *wife*, ſhe is in like manner entitled to her *whole* dower, if her huſband has had carnal connexion with her; but if not, ſhe has no claim whatever either to dower or alimony, becauſe the ſeparation is in this caſe a conſequence of her own act.

apoſtatize together, their marriage ſtill continues.

If the huſband and wife ſhould both apoſtatize together, and afterwards return to the faith at the ſame time, their marriage is, by a favourable conſtruction of the law, permitted to endure.—*Ziffer* ſays that it is annulled, becauſe the apoſtacy of any one of them forbids the duration of it, and where that appears in *both*, it is found in *one* of them:—but our doctors, in ſupport of their opinion, cite an inſtance recorded to have happened in the time of the bleſſed companions [of the prophet,] when the tribe of *Binney Haneefa*, after having apoſtatized, returned to the faith, and the companions did not direct them to renew their marriage; and their apoſtacies were all conſidered as having taken place at the ſame time, becauſe of the uncertainty of the dates.—But if, after their joint apoſtacy, either the huſband or wife were ſingly to return to the faith, their marriage is diſſolved, becauſe here one of them perſiſts in apoſtacy, and that forbids the continuance of marriage, the ſame as it does the matrimonial engagement at firſt.

CHAP.

## CHAP. VI.

## Of *Kiſſm*, or *Partition* *.

A man muſt cohabitequally with all his wives:

If a man have two or more wives, being all free women, it is incumbent upon him to make an equal partition of his cohabitation among them, whether he may have married them as *virgins* or as *Siyeebas*, or whether ſome of them be of the former deſcription, and others of the latter;—becauſe the prophet has ſaid, "*The man who* "*hath two wives, and who, in partition, inclines particularly to* ONE "*of them, ſhall in the day of judgment incline to one ſide*," (that is to ſay, *ſhall be paralytic*;) and it is recorded by *Ayſha* that he made ſuch equal partition of cohabitation among his wives,—ſaying "*O* God, "*I thus make an equal partition as to what is in my power; do not* "*therefore bring me to account for that which is not in my power*," (by which he means the *affections*, theſe not being optional.)

The wife of a prior marriage, and a new wife, are alike in this point, becauſe the tradition above cited is general in its application, and alſo, becauſe partition is one of the rights of marriage, and in theſe both deſcriptions of wives are equal.

but the mode of partition is left to himſelf.

It is left to the huſband to determine the meaſure of partition; that is to ſay, if he chooſe, he may fix it at one day of cohabitation with each of his wives, ſucceſſively, or more: and it is alſo to be remarked that by the equality of partition incumbent upon the huſband

* By *Kiſſm* is underſtood that equal partition of cohabitation which a huſband is required, by law, to make among his wives, where he has a plurality of them.

is

is to be underſtood ſimply *reſidence*, but not *coition*, as the latter muſt depend upon the erection of the virile member, which is not a matter of option, and therefore, like the affections, not always in the huſband's power.

IF a man be married to two wives, one of them a free woman, and the other a ſlave, he muſt divide his time into three portions, cohabiting two portions with the former and one with the latter, becauſe the ſame is recorded of *Alee*; and alſo, becauſe, as it is lawful to marry a free woman upon a ſlave, but not a ſlave upon a free woman*, it hence appears that the rights of the former in marriage are ſhort of thoſe of the latter.—And a *Mokâtiba*, *Modâbbira*, or *Am-Walid*, are, with reſpect to their right of partition, the ſame as *ſlaves*.

wives are of different rank or degree, muſt be adjuſted accordingly.

WOMEN have no right to partition whilſt their huſband is upon a journey, and hence, during that period, it is at his option to carry along with him whomſoever he pleaſes; but it is preferable that he cauſe them to draw lots, and take with him on the journey her upon whom the lot may happen to fall.—*Shafei* ſays that the determination of this point by lots is *incumbent* upon the huſband, becauſe it is recorded of the prophet, that whenever he intended a journey he cauſed his wives thus to draw lots.—Our doctors, however, alledge that the prophet's reaſon for this was only that he might ſatisfy the minds of his wives; wherefore drawing lots is *laudable* merely, becauſe a man's wives have no claim whatſoever to partition during the period of their huſband being on a journey, ſince he is at liberty not to carry *any* of them along with him, and conſequently it is lawful for him to take any *one* of them.

Partition is not incumbent whilſt the is on ney.

THE time of a journey is not to be counted againſt a huſband;—that is to ſay, he is under no obligation, on his return, to make up

* By marrying one woman upon another is to be underſtood a man marrying a woman when he is already poſſeſſed of a wife; the expreſſion is merely idiomatical.

for the partition loſt within that time, by a proportionable cohabitation with the wife or wives whom he may have left at home, they having no claim whatever to his cohabitation with them during ſuch period.

If one wife beſtow her turn [of cohabitation] upon another, it is lawful; becauſe *Soolah* the daughter of *Zooma* gave up her turn to *Ayſha*: but if a woman give up her turn, ſhe is not at liberty to reſume it, becauſe ſhe drops a right which is not as yet eſtabliſhed in her, and abſolute derilection cannot take place unleſs it be of a right already eſtabliſhed,—wherefore her reſumption here is as if ſhe to *withhold* from beſtowing her turn upon the other.

# HEDÂYA.

## BOOK III.

### *Of* RIZA, *or* FOSTERAGE.

RIZA, in its legal ſenſe, means a child ſucking milk from the breaſt of a woman for a certain time, which is termed the *period of foſterage**. Definition of the term.

PROHIBITION is attached to foſterage, in whatever degree, if it be found within the uſual period of infants ſubſiſting at the breaſt.—*Shafei* ſays that prohibition is not eſtabliſhed unleſs the child have Degree of foſterage which occaſions *prohibition.*

* Foſterage, with reſpect to the prohibitions occaſioned by it, is of two kinds; FIRST, where a woman takes a ſtrange child to nurſe, by which all future matrimonial connexion between that child and the woman, or her relations within the prohibited degrees, is rendered illegal; SECONDLY, where a woman nurſes two children, male and female, upon the ſame milk, which prohibits any future matrimonial connexion between them.

ſucked the breaſt at leaſt five different times, inſomuch that if an infant were to ſuck for any particular ſpace of time, whether a *day* or an *hour*, uninterruptedly, this would not occaſion prohibition, becauſe the prophet has ſaid "*Sucking, or giving ſuck, for once or twice, does not render prohibited.*"—Our doctors ſupport their opinion upon the authority of the ſacred text, God ſaying, in the *Koran*, "YOUR MOTHERS WHO HAVE SUCKLED YOU ARE PROHIBITED UNTO YOU;"—and alſo upon a precept of the prophet, that "*whatever is prohibited by conſanguinity, is alſo prohibited by foſterage*,"—where no diſtinction whatever is made between a ſmaller and a greater degree of it.

Objection.—A greater degree of foſterage is eſſential to the eſtabliſhment of prohibition, becauſe the latter is here founded ſolely in an apprehenſion of a participation of blood*, on account of the growth and increaſing bulk of the body, which cannot take place without foſterage, in a conſiderable degree; moreover, it occurs in the traditions that foſterage is the ſource of a child's growth.

Reply.—Although prohibition be founded in an apprehenſion of a participation of blood, on account of growth, yet that is a point which is incapable of being abſolutely aſcertained, and hence prohibition by foſterage is attached, *not* to the *degree*, but to the *mere act* of foſterage, which is the occaſion of ſuch increaſe of growth: and with reſpect to the ſaying of the prophet, as mentioned by *Shafeï*, our doctors reply that if the date of deſcent † of the text [of the *Koran*] before quoted was *poſterior* to that of this ſaying, its authority is thereby ſuperſeded, and if it was *prior* thereto, yet the ſaying is rejected, becauſe it contradicts the text.

* Arab. *Jazeeyat*, a term which has no ſenſe in our dictionaries in any manner applicable to the preſent caſe. It appears, from the context, to ſignify a participation of bodily ſubſtance, cauſing two perſons to partake of one common nature.

† The *Koran* was declared by *Mohammed* to have been delivered down to him in different portions at various times, and thoſe he termed the *Noozools*, or deſcents.

The period of fosterage is *thirty months*, according to *Haneefa*.—The two disciples hold it to be *two years*, and of the same opinion is *Shafei*.—*Ziffer* maintains that it is *three* years, because something in addition to *two* years is absolutely requisite, (according to what shall be hereafter shewn,) and such addition is fixed at one year, because that space admits of the child's state undergoing a complete alteration.—The argument of the two disciples is the word of God, to wit, "his [the child's] time in the womb *, and [until] his weaning is thirty months:"—now the smallest space of pregnancy is six months, and hence two years remain for fosterage; moreover, the prophet has said that "*after two years there is no fosterage.*"—The arguments of *Haneefa* are twofold; first, the text already quoted, where it appears that God makes mention of two things, one the *Hamal*, [or time of gestation,] and the other the *Fisâl*, [or weaning,] for both of which he indiscriminately mentions one period, namely, *thirty months*, wherefore it applies to each *in toto*; the same as in a case of two debts; that is to say, if a man (for example) were to make a declaration that he owed such a person "one thousand *Dirms*, "and five bushels of wheat, payable within two months," this period of two months applies to each debt equally, and so in this case likewise. It may indeed be objected that, admitting this, it would follow that the time of being in the womb is also *thirty months*, whereas it is otherwise,—pregnancy being by law restricted to *two years*: but to this we reply, that there is a cause of restriction short of that period operating upon *Hamal*, (it being recorded in the traditions that a child does not remain in the womb of the mother above two years,) whereas there is none upon *Fisâl*, which of course stands as it appears to be: moreover, as a sucking child is nourished at the breast for *two* years, so is it also after the expiration of that term; for the weaning is not precisely determined to any particular period, but is effected by de-

terage

* Arab. *Hamal*. By this is generally understood *pregnancy*; but as the text here quoted has reference to the *child*, and not to the *mother*, the translator is under the necessity of rendering it in a phraze applicable to the *former*.

grees,

grees, as the child inſenſibly forgets the breaſt and inclines to other food; it is therefore neceſſary that ſome ſpace for foſterage be allowed in addition to the two years, and this additional ſpace is fixed at ſix months, being the ſhorteſt term of pregnancy, as the lapſe of that period affords a reaſon for altering the manner of the child's ſubſiſtence, becauſe the ſubſiſtence of a *fœtus* is irreconcilable with that of a *ſuckling*.* ; and with reſpect to the traditionary ſaying of the prophet, as cited by the two diſciples, it has reference ſolely to the period of the *claim* of foſterage; that is to ſay, it only goes to ſhew that no obligation ariſes from foſterage, ſo as to render payment or hire for the ſame obligatory upon the [child's] father, beyond the ſpace of *two years*; and the text of the *Koran*, which ſays "MOTHERS SHOULD SUCKLE "THEIR CHILDREN FOR TWO YEARS," has alſo reference to the period of the claim of foſterage.

beyond the term of foſterage is not an occaſion of prohibition

If a child continue to ſuck after the proper period of foſterage is elapſed, prohibition is not hereby eſtabliſhed †; becauſe the prophet has declared that there is no foſterage after the expiration of the proper period; and alſo, becauſe prohibition is not eſtabliſhed by any foſterage, except ſuch as is a cauſe of growth and increaſe, which are obtained only by the foſterage within its proper period, ſince grown up perſons would not find any effectual nouriſhment from ſucking.

A child's forſaking the breaſt before the expiration of the period of foſterage is not regarded; that is to ſay, if a child withhold from taking its milk before the period of foſterage has elapſed, and there be

* That is to ſay, it is to be ſuppoſed that within the laſt ſix months the woman may have conceived, and may, at the end thereof, produce a child; and a woman cannot, without injuring the fœtus, give ſuck to another, either during or after her pregnancy.

† That is to ſay, if, after the expiration of the proper period of foſterage, another child be brought to the breaſt, and the former nurſling ſtill continue to ſuck, theſe two are not hereby prohibited to each other in marriage, although they would have been ſo if they ſucked together during the foſterage of the firſt child.

ſtill

ſtill milk in the mother's breaſt, and any other infant ſuck the milk before the expiration of that period, in this caſe prohibition by foſterage is eſtabliſhed between thoſe children.—This is the *Záhir Rawáyet*.—*Haſan* has recorded it as an opinion of *Haneeſa*, that this is the caſe only where the firſt child has not as yet become attached to another ſpecies of food, ſo as to be capable of ſubſiſting altogether without milk; but if the child have adopted intirely another ſpecies of food, this circumſtance is to be conſidered as a weaning, and prohibition by foſterage cannot in this caſe be eſtabliſhed, becauſe where the child is arrived at ſuch a ſtate as that other food ſuffices, the manner of its ſubſiſtence is altered, and that growth and increaſe which the child derived from ſucking is at an end, wherefore the property of *participation of blood*, which is the occaſion of prohibition, is not afterwards found.

Is the ſuckling of a child, after the expiration of the period of foſterage, allowable or not?—Upon this point there are various opinions: ſome have ſaid that it is not ſo, becauſe the act of ſuckling at all is permitted ſolely out of neceſſity, the milk being a conſtituent part of the woman's frame, the uſe of any portion of which, except as a matter of *neceſſity*, is prohibited; and this neceſſity ceaſes upon the expiration of the period of foſterage.

Exceptions to prohibition by foſterage

"*Whatever is prohibited by* CONSANGUINITY *is ſo likewiſe by* FOSTERAGE," (according to the ſaying of the prophet already quoted,) except a ſiſter's mother by foſterage*, whom it is lawful for a man to marry, although he cannot lawfully marry his ſiſter's mother by blood, as ſhe muſt either be his own mother, or the enjoyed of his father, both of whom are prohibited to him; contrary to her mother by foſterage.—A ſiſter's mother by foſterage may be conceived in three different ways;

* This is a very equivocal and vague expreſſion, as appears by the ſucceeding tion of the various deſcriptions to which it applies.

FIRST

FIRST, where a man has a ſiſter by blood, who has a foſter-mother, whom he may lawfully marry;—SECONDLY, where a man has a foſter-ſiſter, who has a mother by blood, whom he may likewiſe lawfully marry;—and THIRDLY, where a male and female infant, between whom there is no affinity, ſuck at the breaſt of one woman, and the female infant alſo ſucks at the breaſt of another woman, in which caſe the male infant may lawfully marry the laſt woman, who is the foſter-mother of the female infant, (that is to ſay, of his foſter-ſiſter.)

A MAN may alſo lawfully marry the ſiſter of his foſter-ſon, although it be not lawful for him to marry the ſiſter of his ſon by blood, as ſhe muſt be either his own daughter, or the daughter of his enjoyed wife, both of whom are prohibited to him.

Caſes of illegality induced by foſterage.

IT is not lawful for a man to marry the wife of his foſter-father, or of his foſter-ſon, (in the ſame manner as he is prohibited from marrying the wife of his *natural* father or ſon,) becauſe of the tradition before quoted.

OBJECTION.—It has been declared, in the ſacred writings, that it is lawful for men to marry the wives of their ſons by blood, and this particular reſtriction to *blood* ſhould ſeem to imply that marriage with the wives of foſter-ſons was lawful; whereas it is otherwiſe.

REPLY.—The reſtriction above mentioned refers to the excluſion of the wives of children by *deſcent*, and not to the excluſion of the wives of *foſter-ſons*, for the reaſons already mentioned.

PROHIBITION is attached to the milk of the man, (that is to ſay, to the milk of which he is the cauſe;) if, for example, a woman nurſe a female child, the latter is prohibited to her huſband, and to his father and ſon, becauſe the huſband, through whom the woman's breaſts have been filled with milk, is as a father to that child.—It is recorded, as an opinion of *Shafei*, that prohibition is not attached to the

the milk of a man; becauſe this prohibition ariſes from an apprehenſion of participation of blood, and the milk is a ſecretion from the blood of the *woman*, and not of the *man*.—The arguments of our doctors in this caſe are threefold; FIRST, the ſaying of the prophet, as before quoted, "*Whatſoever is prohibited by conſanguinity is alſo pro-*" *hibited by foſterage*,"—and prohibition by conſanguinity being found in both father and mother, it follows that it is found in both theſe relations by foſterage;—SECONDLY, the prophet once ſaid to *Ayſha*, (who had complained to him of *Afla*, the brother of *Aboo Keis*, appearing before her whilſt ſhe had only a ſingle cloth upon her,) "*The* "*act of* AFLA, *in thus approaching you, is of no conſequence, as he is* "*your paternal uncle by foſterage*;" which proves that affinity by foſterage is eſtabliſhed on the *paternal* ſide, and that as the woman who ſuckles is the child's mother, ſo is her huſband its father, by foſterage;—THIRDLY, the man is the *cauſe* of the entrance of the milk into the woman's breaſts, and therefore the milk is, out of caution, to be regarded (with reſpect to the point of prohibition) as deriving its exiſtence from *him*.

A MAN may lawfully marry the ſiſter of his foſter-brother, it being allowed to him to marry the ſiſter of his brother by blood, (that is, the maternal ſiſter of his paternal brother.)

IT is to be obſerved as a rule that when a male and female infant ſuck from one breaſt, they are prohibited to each other in marriage, becauſe they have one common mother, and are therefore as *brother* and *ſiſter*.

IT is not lawful for a female to marry any of the ſons of the woman who has ſuckled her, becauſe they are her brothers,—nor the ſons of thoſe ſons, becauſe they are her *nephews*.

IT is not lawful for a male to marry the huſband's ſiſter of the

woman who has ſuckled him, as ſhe is his paternal aunt by foſterage.

Caſes of admixture of the milk with any foreign ſubſtance;

If the milk be drawn from the nurſe's breaſt, and mixed with water, prohibition is ſtill attached to it, provided the former exceed the latter in quantity; but if the water exceed, prohibition is not attached.—*Shafei* maintains that prohibition is attached, in the latter caſe alſo, becauſe there is actually ſome of the milk in that water, and therefore it is indiſpenſably to be regarded, eſpecially in a point of prohibition, that being a matter of caution.—To this our doctors reply that any thing leſs in quantity than that with which it is mixed is regarded as virtually non-exiſtent, as in the caſe of a *vow*, for inſtance, where, if a man ſwear that "he will not drink *milk*," and he afterwards drink it mixed with a greater proportion of water, he is not forſworn.

If the milk be mixed with other food, prohibition is not attached to it, although the former exceed the latter in quantity. This is according to *Haneefa*. The two diſciples ſay that if the milk exceed, prohibition is attached.—The compiler of the *Hedaya* remarks that this opinion of the two diſciples proceeds upon a ſuppoſition that the milk and victuals do not undergo any culinary preparation after admixture; but that, if they be boiled, or otherwiſe prepared by fire, all the doctors admit that prohibition is not then occaſioned.—The two diſciples argue that regard is to be had to that which exceeds, (as in the caſe of mixing milk with water,) provided it have not undergone any change by boiling or other cauſe.—The argument of *Haneefa* is that the food is the *ſubject*, and the milk only a *dependant*, with reſpect to the end it is intended for, to wit, *ſuſtenance*; the caſe is therefore the ſame as if the proportion of the *food* exceeded that of the *milk*.

If the milk be mixed with medicine in a proportion exceeding

the latter in quantity, prohibition is attached to it, becauſe the milk is deſigned for ſuſtenance, which is the *end*, and the purpoſe of the medicine is only to ſtrengthen the child's ſtomach, or to forward digeſtion.

If the milk of the nurſe be mixed with that of an animal, in a proportion exceeding the latter in quantity, prohibition is attached to it; but not if the milk of the animal exceed the other; regard being here had to that which exceeds; as in the admixture of milk with water.

or with the milk of another woman.

If the milk of one woman be mixed with that of another, in this caſe *Aboo Yooſaf* holds that regard ſhould be had to the exceſs,—that is to ſay, that prohibition is attached to that woman's milk which exceeds the milk of the other in quantity,—becauſe here the two milks, when mixed together, become as one ſubſtance, and hence the ſmaller quantity is to be conſidered, (in the effect produced,) as a dependant on the greater quantity.—*Mohammed* and *Ziffer* contend that prohibition is attached to both milks equally, as both are of the ſame nature, and a thing cannot be ſaid to exceed a homogeneous thing, becauſe the admixture with any article of a *homogeneous* nature adds to the *ſum*, but does not occaſion any deſtruction or change in the *matter*; and the end intended is the ſame in both.—There are two opinions recorded from *Haneeſa* upon this ſubject, one coinciding with *Aboo Yooſaf*, and the other with *Mohammed*.

Prohibition i

If the breaſts of a virgin ſhould happen to produce milk, prohibition is attached to it,—that is to ſay, if a male child were to ſubſiſt upon it, the virgin becomes his mother by foſterage, and his marriage with her is prohibited, according to the word of God in the *Koran*, "YOUR MOTHERS WHO HAVE SUCKLED YOU ARE PROHIBITED "UNTO YOU," which text being generally expreſſed, applies to all women alike:—moreover, the milk of the virgin is a cauſe of

growth in the child, which induces an apprehenſion of *participation of*

*or of a corpſe.*

If milk be drawn from the breaſts of a deceaſed woman, prohibition is attached to it.—This is contrary to the opinion of *Shafei*, who ſays that, in the eſtabliſhment of prohibition by foſterage, the primary ſubject of ſuch prohibition is the woman whoſe milk has been ſucked by the child, the prohibition pervading through the medium of that woman to others [her relatives,] but, by her deceaſe, the original ſubject of prohibition is removed, ſhe being then a dead ſubſtance; whence it is that if a man were then to commit the carnal act with her, he would not be ſubject to the puniſhment of fornication, nor would prohibition by affinity be by that act eſtabliſhed. The argument of our doctors is that prohibition by foſterage ariſes from an apprehenſion of participation of blood, which appears in the increaſing growth of the [child's] body, and this laſt is occaſioned by milk; as in the preſent caſe.

**Caſes in which milk does not occaſion prohibition.**

If a woman's milk be adminiſtered to a child in a glyſter, prohibition by foſterage is not attached to it.—This is the doctrine of the *Záhir Rawáyet*.—It is recorded from *Mohammed* that prohibition is thereby eſtabliſhed, in the ſame manner as a faſt would be vitiated by it:—but the reaſon of this apparent inconſiſtency (according to the *Záhir Rawáyet*) is that the cauſe of violating the faſt is the reſtoration of the body, which is effected by the glyſter; whereas the cauſe of prohibition by foſterage is the increaſe of the body's growth, which is not thereby effected, nothing being ſuſtenance to men except what is adminiſtered by the *mouth*.

If a man's breaſts ſhould happen to produce milk, prohibition is not attached to it, becauſe the ſubſtance thus produced is not, in fact, *milk*, and conſequently increaſe of growth is not obtained by means of it.—The principle upon which this proceeds is that *milk* cannot

cannot be ſecreted in the breaſts of any perſon but one who is capable of child-bearing.

Prohibition by foſterage is not attached to the milk of a goat (or other animal;)—that is to ſay, if two infants, a male and a female, were to ſubſiſt together, upon the milk of one goat, prohibition by foſterage is not eſtabliſhed between them, becauſe between mankind and brutes there can be no participation of blood, (that is to ſay, ſuch participation as would occaſion affinity,) and prohibition by foſterage ariſes from participation of blood.

If a man marry an infant and an adult, and the latter ſhould give milk to the former, both wives become prohibited with reſpect to that man [their huſband,] becauſe, if they were to continue united in marriage to him, it would imply the propriety of joint cohabitation with the foſter-mother and her foſter-daughter, which is prohibited, in the ſame manner as joint cohabitation with a *natural* mother and daughter. —It is to be obſerved on this occaſion, that if the huſband ſhould not have had carnal connexion with the adult wife, ſhe is not entitled to any dower whatever, becauſe the ſeparation has proceeded from her, before conſummation:—but the infant has a claim to her *half* dower, the ſeparation not having proceeded from her. Caſe of one other

Objection.—The ſeparation proceeds from her, becauſe ſucking the milk from the breaſt was her act.

Reply.—Although the ſucking was certainly her act, yet the act of ſuch an one is not conſidered as deſtructive of her right, for which reaſon it is that if ſhe ſhould happen to kill her heir, this would not ſet aſide her right of inheritance.—If, moreover, it ſhould appear that the adult had acted with any ſiniſter view of diſſolving the marriage, the huſband is in this caſe empowered to take from her the half dower which he pays to the infant; but not unleſs ſhe have acted with ſuch a view, even though ſhe were aware of the infant being the wife of her huſband. It is recorded from *Mohammed*, that the huſband is autho-

rized

rized to take the infant's half dower from the adult, in either caſe,—that is to ſay, whether a diſſolution of the marriage may have been her intention or not; but the former (which is the *Zâhir Rawâyet*) is the more orthodox opinion, becauſe, although the adult has by her act fixed and rendered binding upon the huſband the half dower aforeſaid, (which had before ſtood within the poſſibility of dropping *,) and her ſo doing amounts to a damage, yet ſhe here ſtands (*not* as the *actual perpetrator*, but) as the cauſe of the damage, ſince the act of giving her milk to the infant is not the occaſion of diſſolving the marriage any further than as it induces a conſequence of joint cohabitation with a *ſtep-mother* and *ſtep-daughter*:—moreover, the annulling of a marriage is not what renders a dower obligatory, but is rather the occaſion of its dropping; but the *half* dower is incumbent, in the manner of a *Mâtat*, or preſent, in compliance with eſtabliſhed cuſtom; and the annulling of the marriage is the condition of its becoming incumbent; and in this view the adult is the *cauſe* of the damage; and as being the *cauſe* only, and not *the actual perpetrator*, tranſgreſſion is made a condition of her reſponſibility, the ſame as in the caſe of digging a well,—that is to ſay, if a perſon were to tranſgreſs, in digging a well, by ſinking it in another perſon's ground, or in the highway, he is reſponſible for the *Deeyat* of any one who might happen to fall into it, whereas, if the well were ſunk in his own ground, he would not be reſponſible:—now this tranſgreſſion is not found in the adult, unleſs where ſhe is aware of the infant being the wife of her huſband, and that her view in ſuckling it is a diſſolution of the marriage; but where ſhe is not aware of that circumſtance, or being ſo, yet gives her milk, *not* with any view of diſſolving the marriage, but rather, of preſerving the infant from periſhing, in neither of theſe caſes is tranſgreſſion ſuppoſed to exiſt; and, in the ſame manner, it

* That is to ſay, the obligation of which might poſſibly have been annulled or cancelled by the occurrence of ſome accident previous to the payment of it, ſuch as the deceaſe of the infant before conſummation of the marriage,

loes

does not exiſt, if ſhe knew that the infant is the wife of her huſband, but be not aware that her ſuckling it will occaſion a diſſolution of the marriage.

Objection.—No regard is paid to ignorance of the law in a *Muſſulman* territory; how, therefore, can ignorance be pleaded in her excuſe in the preſent caſe?

Reply.—Regard is here paid to her ignorance, not in order to avert the ſentence of the law, (which induces reſponſibility upon her,) but ſolely to avert the conſtruction of intent of diſſolution, or of wilful tranſgreſſion, to which her act might otherwiſe be liable, and which being thus diſproved, ſhe is exonerated from reſponſibility, as theſe are the only cauſes thereof, and neither of them can apply to her.

Evidence

full number of witneſſes

The evidence of *women* alone is not ſufficient to eſtabliſh foſterage; nor can it be eſtabliſhed but on the teſtimony of two men, or of one man and two women.—*Imám Málik* has ſaid that it may be eſtabliſhed on the evidence of one woman, provided ſhe be an *Adil*, becauſe prohibition is one of the rights of the law, and may therefore be eſtabliſhed upon a ſingle information,—as, for inſtance, where a perſon purchaſes fleſh meat, and any one bears teſtimony to its being part of a *Majooſee* ſacrifice, in which caſe prohibition is eſtabliſhed with reſpect to it.—The argument of our doctors is that the eſtabliſhment of prohibition in marriage is in no reſpect different from the extinction of a right of poſſeſſion; and the annulling of a right of poſſeſſion cannot take place but upon the evidence of two men, or of one man and two women:—contrary to the caſe of *fleſh meat*, as the prohibition to the eating may be eſtabliſhed without affecting the proprietor's right of poſſeſſion, it ſtill remaining his property under that prohibition:—the prohibition of this article, therefore, appears to be merely a matter of *religion*, and in which, conſequently, a ſingle evidence ſuffices.

*HEDÂYA.*

# HEDÂYA.

## BOOK IV.

### Of *TALÂK*, or *DIVORCE*.

Definition of the term.

TALÄK, in its primitive ſenſe, means *diſmiſſion*:—in law it ſignifies the diſſolution of a marriage, or the annulment of its legality, by certain words.



Chap.

## CHAP. I.

### Of *Talâk-al-Sonna*, or *Regular Divorce* *.

DIVORCE is of three kinds;—FIRST, the *Ahſan*, or *moſt laudable*;—SECOND, the *Hooſn*, or *laudable*; (which are the diſtinctions of the *Talâk-al-Sonna*;)—and THIRD, the *Biddât*, or *irregular*. of divorce.

THE *Talâk Ahſan*, or *moſt laudable divorce*, is where the huſband repudiates his wife by a ſingle ſentence, within a *Tohr*, (or term of *Talâ*

* *Talâk-al-Sonna* literally means "divorce, according to the rules of the *Sonna*," in oppoſition to *Talâk Biddât*, which ſignifies a *novel*, *unauthorized*, or *heterodox* mode of divorce: the terms *regular* and *irregular* are here adopted, as being the moſt familiar.

purity *,) during which he has not had carnal connexion with her, and then leaves her to the obſervance of her *Edit*, or preſcribed term of probation. This mode of divorce is termed the *moſt laudable*, for two reaſons;—FIRST, becauſe the companions of the prophet chiefly eſteemed thoſe who gave no more than one divorce until the expiration of the *Edit*, as holding this to be a more excellent method than that of giving three divorces, by repeating the ſentence on each of the two ſucceeding *Tohrs*;—SECONDLY, becauſe in purſuing this method the huſband leaves it ſtill in his power, without any ſhame, to recover his wife, if he be ſo inclined, by a reverſal of the divorce during her *Edit*: this method is, moreover, the leaſt injurious to the woman, as ſhe thus remains a lawful ſubject of marriage to her huſband, even after the expiration of her *Edit* †, which leaves a latitude in her favour unreprobated by any of the learned.

*ılâk Hooſn.* THE *Talâk Hooſn*, or *laudable divorce*, is where a huſband repudiates an enjoyed wife by three ſentences of divorce, in three *Tohrs*. *Imâm Mâlik* aſſerts that this method claſſes with the *Biddât*, or *irregular*, and that no more than one divorce is admitted as unexceptionable, becauſe, as being in itſelf a dangerous and diſapproved procedure, it is only the urgency of releaſe from an unſuitable woman that can give a ſanction to divorce; and this urgency is fully anſwered by a ſingle *Tohr*.—The arguments of our doctors on this topic are twofold; FIRST, a precept of the prophet delivered to *Ebn Amir*, "*One thing* "*required by the* SONNA *is that ye wait for the* TOHR, *and pronounce* "*a divorce in each* TOHR;"—SECONDLY, the propriety of a divorce reſts merely upon the *proof* of the urgency, and not upon the eſtabliſhment of the actual urgency itſelf, that being a matter concealed and unaſcertainable [but by virtual proof,] and the act of proceeding to

* Meaning the ſpace which intervenes between the menſtrual fluxes.

† Contrary to any other mode of divorce, as a wife repudiated in any other way cannot be again married to her firſt huſband, unleſs ſhe be previouſly married to, and divorced by another man.

divorce

divorce at a time when the deſire of coition with the woman is freſh renewed, (to wit, at the recommencement of her *Tohr*,) is a proof of the urgency; and the repetition of divorce at the two ſubſequent returns of the *Tohr* amounts to no more than a repetition of the proof, and is therefore allowed of.—Some of the learned have ſaid that, in this ſpecies of divorce, it is moſt adviſeable that the huſband delay pronouncing the firſt ſentence of it until towards the termination of the *Tohr*, ſo as that the *Edit* may not be too much protracted; but it is evident that the huſband ſhould rather pronounce the divorce at the *commencement* of the *Tohr*, becauſe, if he were to delay it, he might probably be tempted to have carnal connexion with the woman in the interim, under an intention of divorcing her, and then divorce her after ſuch carnal connexion, which is forbidden.

The *Talâk Biddât*, or *irregular divorce*, is where a huſband repudiates his wife by three divorces at once,—(that is, included in one ſentence,)—or, where he repeats the ſentence ſeparately, thrice within one *Tohr*; and if a huſband give three divorces in either of thoſe ways, the three hold good, but yet the divorcer is an offender againſt the law.

Shafei has ſaid that all theſe three deſcriptions of divorce are equally unexceptionable and legal, becauſe divorce is in itſelf a lawful act, whence it is that certain laws have been inſtituted reſpecting it; and this legality prevents any idea of danger being annexed to it: moreover, divorce is not prohibited, even during the woman's courſes, the prohibition there applying to the protraction of the *Edit*, and not to *divorce*.—Our doctors, on the other hand, ſay that divorce is in itſelf a dangerous and diſapproved procedure, as it diſſolves marriage, an inſtitution which involves many circumſtances as well of a temporal as of a ſpiritual nature; nor is its propriety at all admitted, but on the ground of urgency of releaſe from an unſuitable wife; and there is no occaſion, in order to procure this releaſe, to give three divorces at

once, whereas there is an excuſe for giving three divorces ſeparately in three *Tohrs*, as this exhibits repeated proofs of the urgency of it:—and with reſpect to what *Shafei* advances, that "the legality of "divorce prevents any idea of danger being annexed to it," we anſwer, that the legality of divorce, in one reſpect, (that is to ſay, inaſmuch as it is a *deſtroyer* of *ſubjection*,) does not admit the idea of its being dangerous, but that, in another reſpect, (to wit, its occaſioning the diſſolution of marriage, which involves concerns both of a ſpiritual and temporal nature,) it muſt be conſidered as attended with danger.

THE pronouncing of two divorces within one *Tohr* comes under the deſcription of *Biddât*, or *irregular*, the ſame as that of three divorces, as already intimated.

A QUESTION has ariſen among the learned, whether the pronouncing of a ſingle divorce irreverſible within one *Tohr* be of the deſcription of *Biddât* or not?—*Mohammed*, in the *Mabſoot*, has ſaid,—"Whoever gives an irreverſible divorce, although it be within the "*Tohr*, forſakes the *Sonna*, as there is no urgent neceſſity for ſuch a "ſentence to effect releaſe from the wife, ſince by the lapſe of the "*Edit* that end is obtained;" but again, in the *Zeeadât*, he ſays that this method is not to be reprobated, on account of the occaſional urgency of immediate releaſe, which by an irreverſible divorce is obtained, it not being then ſuſpended upon the lapſe of the *Edit*.

Points to be attended to in adhering to the *Sonna* divorce.

SONNA, [that is, attention to the mode preſcribed by in divorce, appears in two ſhapes, adherence to *number*, and to —to the former, by reſtricting the ſentence to that of a ſingle divorce reverſible, in which the enjoyed and the unenjoyed wife are the ſame;—and to the latter, (in which the *enjoyed* wife is ſolely conſidered,) by pronouncing the divorce in a *Tohr* during which the huſband has not had

had carnal connexion with her;—becauſe it is the *proof* of urgency that is regarded; and the act of proceeding to a divorce at a time when the deſire of coition with the woman is freſh renewed, (as at the recommencement of her *Tohr*,) is the beſt proof of ſuch urgency; for during the actual time of the courſes the woman is not an object of deſire, and in a *Tohr* where ſhe has been enjoyed deſire is leſſened towards her.—With reſpect to an unenjoyed wife, the *Tohr* and the courſes are equal,—that is to ſay, the pronouncing of divorce upon her whilſt ſhe is in the latter ſituation is not irregular, nor reprobated, any more than whilſt in the former. This is contrary to the opinion of *Ziffer*, he conſidering an unenjoyed wife in the ſame point of view as one enjoyed:—but our doctors obſerve that the deſire of coition, with reſpect to an *unenjoyed* woman, is ever freſh, and is not leſſened by the circumſtance of her courſes, ſo long as the huſband's object, (namely, *coition*,) remains unobtained; whereas, with reſpect to an *enjoyed* wife, deſire is renewed upon the

Mode of adherence to the *Sonna* in repudiating a wife not ſubject to the courſes;

If the wife be a perſon who, from extreme youth or age, is not ſubject to the courſes, and her huſband be deſirous to repudiate her by three divorces in the regular way, he is firſt to pronounce a ſingle ſentence of divorce upon her, and at the expiration of one month another, and in like manner a third at the expiration of the next ſucceeding month; becauſe the term of one month correſponds with a return of the courſes, as is mentioned in the Koran.—It is here to be obſerved that if the firſt divorce be given in the beginning of the month, the three months from that period are to be counted by the *lunar* calendar, and if in the middle of it, by the number of days, with reſpect both to the completion of *divorce* and of the *Edit*.—This is the rule with *Haneefa*.—The two diſciples maintain that the ſecond and third months are to be invariably counted by the *lunar* calendar, the deficiency of the firſt month to be taken from the fourth ſucceeding month, ſo as to complete it. And it is alſo to be obſerved that it is lawful for the huſband to divorce this wife immediately after carnal

nal connexion, without the intervention of any time between the embrace and the divorce.—*Ziffer* ſays that the huſband ought to allow the intervention of a month, becauſe that term correſponds with a return of the courſes, and alſo, becauſe in conſequence of the embrace deſire becomes languid, and is not renewed until after the lapſe of ſome time.—Our doctors argue that there can be no apprehenſion of pregnancy with reſpect to the woman in queſtion; and divorce, after the carnal embrace, in the caſe of a woman who is ſubject to the courſes, is not reprobated on any other account than as it induces a poſſibility of pregnancy, which renders the duration of her *Edit* dubious, that of a pregnant woman being determined by her delivery, and, of one not pregnant, by courſes: and as to what *Ziffer* alleges, that "deſire becomes languid in conſequence of the embrace," it may be replied, that although this be admitted, yet in the preſent inſtance deſire is greater than in common caſes, as the huſband can indulge his carnal appetite with ſuch a wife without any apprehenſion of her producing children, the ſupport of whom might fall upon him; ſhe therefore is an object of deſire to him at all times equally, ſo that this ſtate [of a woman not being ſubject to the courſes] is the ſame as the ſtate of actual pregnancy; now it is lawful to divorce a *pregnant* wife immediately after carnal connexion with her, becauſe no doubt is induced with reſpect to the duration of her *Edit*, and the time of pregnancy is a time of deſire, as a huſband feels deſire towards a pregnant wife, either becauſe ſhe produces a child to him, or becauſe the embrace with her does not occaſion pregnancy; his deſire therefore is not leſſened towards ſuch a wife by enjoyment.

or one who is *pregnant*.

If a man be deſirous of repudiating his pregnant wife by three divorces in the regular way, [that is, according to the *Sonna*,] he is firſt to pronounce a ſingle ſentence of divorce upon her, and at the expiration of one month another, and in the ſame manner a third at the expiration of the next ſucceeding month. This is according to *Hanceſa* and *Aboo Yooſaf*.—*Mohammed* and *Ziffer* ſay that the *Talák-al-Sonna*,

*al-Sonna*, with reſpect to a *pregnant* woman, conſiſts in giving her a *ſingle divorce* only, becauſe divorce is in itſelf a dangerous and diſapproved procedure; moreover, the only rule inſtituted by the law in effecting a triplicate divorce is, that the huſband firſt pronounces one divorce, and at the expiration of a month, or the paſſing of the next courſes, another, and in the ſame manner a third at the expiration of the following month, or the paſſing of the next ſucceeding courſes; now the courſes do not occur to a *pregnant* woman, nor does the lapſe of a month ſtand in place of a return of her courſes, (as with a woman whoſe youth or age prevents her having them,) her whole period of pregnancy being as one long *Tohr*; and hence it follows that it is improper to pronounce more than a ſingle ſentence, the rule of the *Sonna* being reſtrictive to *one* divorce in *one Tohr*.—To this *Haneeſa* and *Aboo Yooſaf* reply that, although divorce be in itſelf a dangerous and diſapproved procedure, yet it is admitted on the ground of *urgency*, and the lapſe of a month is the proof of that urgency, and is therefore to be regarded here, the ſame as in the caſe of a woman whoſe youth or age prevents her having the courſes: the foundation of this is that the period in queſtion is ſuch a time as affords a renewal of deſire to perſons in health and vigour, and therefore the act of divorce being proceeded in at ſuch a ſeaſon affords proof of the urgency of it, with reſpect to a pregnant woman, the ſame as to any other: contrary to a woman whoſe *Tohr* is *long*, [that is, by conſtitution or accident protracted to any unuſual length,] as the lapſe of a month is not a proof of neceſſity with reſpect to ſuch an one; this proof of neceſſity being found in her only on the renewal of the *Tohr* after the courſes, the recurrence of which, with regard to her, is at all times poſſible, whereas, with regard to a *pregnant* woman, it is impoſſible.

Caſe of divorce pronounced during menſtruation.

IF a man repudiate his wife during her courſes, it is valid; becauſe, although divorce within the term of the courſes be diſapproved, yet it is lawful nevertheleſs, as the diſapproval is not on account of any thing

thing essential, but merely because a divorce given during the courses occasions a protraction of the *Edit*.—This kind of disapproval, or interdict, is termed *Nihee-le-ghirehee* *, and does not forbid *legality*, whence a divorce given during the courses is valid; but yet it is laudable that the husband reverse it, as it is recorded that the son of *Omar* having divorced his wife during her courses, the prophet desired *Omar* to *command* his son to take her back again; which tradition shews that divorce during the courses is *valid*, but that reversal is in this case laudable.—This doctrine of the *laudability* of reversal is maintained by many of our modern doctors; but it is certain that, in this case, reversal is not only *laudable*, but *incumbent*, for three reasons; FIRST, in the tradition above quoted, the prophet desires *Omar* positively "to *command* his son," and *command* is always *injunctive*;—SECONDLY, the pronouncing of divorce during the courses is an *offence*, which it is incumbent upon a man to expiate by every means within his power; and this may be effected, in the present instance, by doing away its consequence, namely, the *Edit*;—THIRDLY, the protraction of the *Edit* is injurious to the woman, wherefore reversal is incumbent, in order that she may not be subjected to injury:—thus it is indispensably incumbent upon the husband to reverse the divorce, when given during the courses; after which, when she has become purified from her courses, and has again had them, he may then either divorce her on the commencement of her second succeeding *Tohr*, or suffer her to remain. The compiler of the *Hedáya* observes that this last is what is said in the *Mabsoot*. *Tehávee* has said that, if the husband chuse, he may regularly divorce his wife on the commencement of the *Tohr* immediately succeeding the courses in which he had given divorce, and reversed it, as above. *Koorokhee* says that what is thus mentioned by *Tehávee* is the doctrine of *Haneefa*. That which is taken from the *Mabsoot* is the opinion of the two disciples; and the ground of it is that the regularity of divorce depends upon the intervention of a complete menstrual discharge between every two

* This may be rendered *prohibition for another reason*.

sentences;

ſentences; and the firſt of theſe is defective, on account of divorce having been pronounced in the middle of it, ſo that as part had previouſly elapſed, whence it would appear neceſſary to complete it from the next following return; but it is not lawful to have regard to *one* part only of the courſes, and not to the *other*; conſequently, regard muſt be had to the next returning courſes *in toto*.—The ground of *háwee*'s opinion is that the divorce, with its effects, having been annulled entirely by the reverſal, it is the ſame as if no divorce whatever had taken place during the woman's courſes; and hence it is perfectly regular to pronounce divorce in the *Tohr* next immediately ſucceeding.

IF a man were to addreſs his wife, ſaying "You are divorced "*thrice*, according to the *Sonna*,"—and he have no particular intention in ſo doing, then, ſuppoſing the wife to be one with whom he has had carnal connexion, and alſo ſubject to the courſes, ſhe becomes once divorced in that and each of the two ſucceeding *Tohrs*: and if the huſband intended, in ſo ſaying, either that *three* divorces ſhould take place collectively upon the inſtant, or, that a *ſingle* divorce ſhould take effect at the end of each ſucceeding month, the divorce, in each inſtance, takes effect according to his intention, whether ſhe be in her courſes or her *Tohr* at the period of its thus taking effect upon her. —And if ſhe be one whoſe *Edit* is calculated by *months*, (ſuch as a woman, for inſtance, whoſe courſes are ſtopt through age,) and the huſband have no particular intention in thus addreſſing her, in this caſe a ſingle divorce takes effect upon the inſtant, another at the expiration of a month, and a third at the expiration of the next ſucceeding month; becauſe the term of a month correſponds, in ſuch an one, with the *Tohr* of a woman who is ſubject to the courſes, as was formerly obſerved; or, if he intended that three divorces ſhould take place collectively upon the inſtant, the three take place accordingly, in the manner already ſtated. But if the huſband were only to ſay,

"You are divorced according to the *Sonna*," omitting the word "*thrice*,"—in this caſe the intention of three divorces collectively is not efficient. The proofs and arguments upon this paſſage are all drawn from the *Arabic*, and derive their weight from certain peculiarities in that idiom.

## SECTION.

Of the perſons who are competent to pronounce divorce.

THE divorce of every huſband is effective, if he be of ſound underſtanding, and mature age; but that of a boy, or a lunatic, or one talking in his ſleep, is not effective, for two reaſons;—FIRST, becauſe the prophet has ſaid, "*Every divorce is lawful, excepting that* "*of a boy or a lunatic*;"—SECONDLY, becauſe a man's competency to act depends upon his poſſeſſion of a ſound judgment, which is not the caſe with infants, or lunatics:—and one *talking in his ſleep* is the ſame, in this point, as a boy or a lunatic, ſince his words in this caſe are not the reſult of a deliberate option.

A divorce pronounced by compulſion, is effective.

THE divorce of one acting upon compulſion, from threats, is effective, according to our doctors.—*Shafei* maintains that it is not effective, becauſe a perſon who is compelled has no option, and no formal act of law is worthy of regard unleſs it be purely optional: contrary to the caſe of a *jeſter*, who, in mentioning divorce, acts from option, which is the cauſe of its validity.—Our doctors, on the other hand, alledge that the perſon here mentioned pronounces divorce under circumſtances of complete competency, [maturity of age and ſanity of intellect,] the reſult of which is that the divorce takes effect equally with that of a perſon uncompelled, for with him *neceſſity* * is the reaſon of its efficiency; and the ſame reaſon applies to the

* Namely, the *neceſſity* of ſeparation from a wife who may be odious or diſagreeable to him.

divorce

divorce of a compelled perſon, as he is alſo under neceſſity of divorce, in order that he may be releaſed from the apprehenſion of that with which he was threatened by the compeller.—The foundation of this is that the man alluded to has the choice of two evils; one, the thing with which he is threatened or compelled; and the other, divorce upon compulſion; and viewing both, he makes choice of that which appears to him the eaſieſt, namely, divorce; and this proves that he has an option, though he be not deſirous that its effect ſhould be eſtabliſhed, or, in other words, that divorce ſhould take place upon it; nor does this circumſtance forbid the efficiency of his ſentence; as in the caſe of a *jeſter*; that is to ſay, if a man pronounce a divorce *in jeſt*, it takes effect although he be not deſirous that it ſhould; and ſo likewiſe the divorce of one who is compelled.

or in a ſtate of inebriety, is valid:

IF a man pronounce a divorce whilſt he is in a ſtate of inebriety from drinking any fermented liquor, ſuch as *wine*, the divorce takes place. *Koorokhee* and *Tehâvee* hold that divorce ought not to take place in this caſe; and there is alſo an opinion recorded from *Shafeï* to the ſame effect. The argument upon which they maintain this doctrine is that reality of intention is connected with the exerciſe of reaſon, which is ſuſpended during intoxication from *wine*; in the ſame manner as where a perſon has taken any allowed but inebriating medicine, ſuch as *laudanum*, in which caſe a divorce pronounced would not take effect, and ſo in this caſe alſo. But to this our doctors reply that, in the caſe now under conſideration, the ſuſpenſion of reaſon being occaſioned by an *offence*, the reaſon of the ſpeaker is ſuppoſed ſtill to remain, whence it is that his ſentence of divorce takes effect, in order to deter him from drinking fermented liquors, which are prohibited. But yet if a man were to drink wine to ſo great a degree as to produce a delirium or inflammation of the brain, thereby ſuſpending his reaſon, and he in that ſituation pronounce divorce, it will not take effect.

So, alſo, ..... of a *dumb* perſon.

THE divorce of a dumb perſon is effectual, if it be expreſſed by poſitive and intelligible ſigns, becauſe ſigns of the dumb are authorized by cuſtom, and are therefore admitted to ſtand in the place of ſpeech; in the preſent inſtance, in order to anſwer the neceſſity of him who makes them. The various ſpecies of ſigns uſed by the dumb in divorce ſhall be ſet forth hereafter.

Number of divorces in reſpect to *free* women and *ſlaves*.

THE utmoſt number of divorces, with reſpect to a female ſlave, is *two*, whether her huſband be a ſlave or free: and the ſame with reſpect to a free woman is *three*.—*Shafei* has ſaid that, in the *number* of divorces, reſpect is to be had to the ſtate of the *man*; that is to ſay, if the huſband be free he is empowered to pronounce three divorces, although his wife be a ſlave; whereas, if he be a ſlave, he is not authorized to give more than two divorces, although his wife ſhould be a free woman, the prophet having ſaid "*In divorce the ſtate of the* "HUSBAND *is to be regarded, and in* EDIT *that of the* WIFE:"—moreover, perſonal conſequence is an eſſential circumſtance in all points of authority, and that appertains to a freeman in a higher degree than to a ſlave, whence his authority is moſt extenſive.—The arguments of our doctors are twofold upon this topic;—FIRST, a precept of the prophet, declaring, "*The divorces of a ſemale ſlave are* "TWO, *and her* EDIT *is* TWO *courſes*;—SECONDLY, it is the *woman* who is the ſubject of *legality*, and this legality entitles her to benefits; but ſlavery entitles only to half of theſe benefits; hence it follows that the divorce of a female ſlave ſhould not exceed *one and a half*, but ſuch ſubdiviſion of it being impoſſible, her divorces extend to *two*.—As to the ſaying of the prophet quoted by *Shafei*, that "in divorce "the ſtate of the huſband is to be regarded," it means no more than that the efficiency of divorce proceeds from him.

A maſter cannot divorce the wife of his ſlave.

THE divorce of a ſlave upon his wife takes place; but that of a maſter upon the wife of his ſlave is of no effect, becauſe the matrimonial propriety being a right of the ſlave, the relinquiſhment of it reſts with the *ſlave*, not with his *maſter*.

CHAP.

# CHAP. II.

## Of the *Execution* of *Divorce*.

DIVORCE (in reſpect to the execution of it) is of two kinds; *Sareeh* or *expreſs*, and *Kináyat*, or *by implication*:—and firſt of *expreſs* divorce.

The manner

TALÂK SAREEH, or expreſs divorce, is where a huſband delivers the ſentence in direct and ſimple terms, as if he were to ſay "I have "divorced you," or "you are divorced," which effects a *Talak Rijai*, or *divorce reverſible*,—that is to ſay, a divorce ſuch as leaves it in the huſband's power lawfully to take back his wife at any time before the expiration of the *Edit*: and theſe forms are termed *Sareeh*, or *expreſs*, as not being uſed in any ſenſe but divorce; and it appears in the ſacred writings that reverſal after an expreſs divorce is lawful.—The *intention* is not a condition of divorce taking place from theſe forms, for the ſame reaſon as was already aſſigned, to wit, becauſe they directly expreſs divorce, as not being uſed in any other ſenſe.—And it is to be obſerved that a *reverſible* divorce only is effected by theſe forms, although the intention of the huſband be a *complete* divorce, becauſe his intention is here to effect that upon the inſtant which the law ſuſpends upon the lapſe of the *Edit*, and is therefore unworthy of regard: and if his intention ſhould be merely to expreſs *a delivery from bondage*, (which the term *Talák* is occaſionally uſed to imply,) and he make a declaration to this effect before the *Kázee*, it is not admitted, as it diſagrees with his apparent deſign:

but

but yet it is admitted before God, becauſe he intended in thoſe words a meaning which they are capable of bearing: and if his intention be to expreſs *a releaſe from bodily labours*, his declaration to this effect is not at all admitted, either before the *Kazee*, or before God, as the word *Talâk* does not bear the conſtruction of releaſe with reſpect to *bodily labour*, although it may occaſionally bear that conſtruction with reſpect to *bondage*: and it is alſo to be remarked that no more than a ſingle divorce can be effected by theſe forms, although the intention be more.—*Shafei* alledges that divorce takes place according to whatever the intention may be.—The proofs on each ſide are drawn from the *Arabic*.

Different *formulas* of expreſs divorce.

If a may ſay to his wife "You are [under] divorce," or "You "are divorced by divorce," or, "You are divorced according to "divorce*," without any particular intention, or intending thereby *one* divorce, or *two* divorces, a ſingle divorce reverſible takes place; and if his intention be three divorces, a triple divorce takes place accordingly.—The proofs are drawn on this occaſion from the *Arabic*.

If a man were to ſay to his wife (as above) "You are divorced "by divorcement," and declare that by the word "*divorced*" he meant *one* divorce, and by the word "*divorcement*" a *ſecond* divorce, his declaration is credited, becauſe each of theſe words are capable of being conſtrued into an intention of effecting divorce, and hence two reverſible divorces take place, provided the woman has been enjoyed by him.

* Theſe and the ſucceeding forms of divorce, literally rendered, are moſt of them apparently unintelligible, or abſurd: they are each, however, to be conſidered as having ſome peculiar *force* or *effect*, which it is impoſſible to expreſs, or to convey an idea of, in *tranſlation*.

IF a man apply divorce to the whole woman, by ſaying (for inſtance) "You are divorced," in this caſe divorce takes place, on account of its application to its proper ſubject, namely, the woman, the relative "*You*" implying the woman's perſon *in toto*: and the rule is the ſame where he applies it to any particular part or member, from which the whole perſon is neceſſarily underſtood, as if he were to ſay, "your *neck*," or "your *trunk*," or "your *head*," or "your "*body*," or "your *vulva*,"—"is divorced,"—for by ſuch words the whole perſon is implied, the terms *trunk* and *body* bearing that ſenſe evidently, and the others in common uſe; and they moreover occur, both in the *traditions*, and alſo in the *Koran*; and, according to one tradition, the term *blood* may alſo be uſed in the ſame ſenſe. Divorce takes place alſo where it is applied to any general portion of the wife, as if the huſband were to ſay to her "your *half*," or "your *third*, is "divorced,"—becauſe any general portion is a proper ſubject of all acts, ſuch as *ſale*, *purchaſe*, and ſo forth, and is therefore equally ſo of divorce; but the ſubject in queſtion (to wit, the woman) is incapable of diviſion, and hence divorce is eſtabliſhed upon her *in toto*, and is not reſtricted to the portion mentioned.

IF the huſband ſay to his wife "your *hand*," or "your *foot*, is "divorced," divorce does not take place.—*Ziffer* and *Shafeï* maintain that it does: and the ſame difference of opinion ſubſiſts where the divorce is applied to any other ſpecific member, or organ, ſuch as does not imply the whole perſon, as the *ear* or the *noſe*, &c.—The argument of *Ziffer* and *Shafeï* is, that thoſe members contribute to the matrimonial enjoyments, ſuch as kiſſing, touching, and ſo forth, and whatever is of this deſcription, as being a ſubject of the laws of marriage, is a proper ſubject of divorce, and as ſuch, when divorce is applied to it, it takes place upon it, and conſequently extends to the whole perſon, in the ſame manner as where it is applied to any general portion, ſuch as an *half*, and ſo forth: contrary to the application of *marriage*, to any ſpecific member, ſuch as the *hand* or the *foot*, in which caſe

Divorce, when applied to any ſpecific part or member of the body, ſuch as does not (in common uſe) imply the w[illegible] is

the marriage is not valid, becauſe it is not conceivable that legality ſhould be eſtabliſhed in that particular member, and extend, in conſequence, to the whole perſon, as the illegality exiſting in the other members exceeds the legality in that particular member,—whereas the reverſe holds in divorce.—To this our doctors reply, that a ſpecific member, ſuch as the *hand* or *foot*, not being in itſelf a proper ſubject of divorce, the application of that to it is null, the ſame as to a woman's *ſpittle*, or to her *nails*, the ground of which is that the ſubject of divorce muſt be ſomething upon which a bond or connexion may exiſt, (as divorce implies the diſſolution of a bond or connexion,) and there is no bond upon the *hand*; for which reaſon it is that the application of marriage to that part is invalid: contrary to a general portion of the body, which being (with our doctors) a proper ſubject of marriage, the application of that to it is valid, and it is conſequently a proper ſubject of divorce alſo. There is a ſimilar difference of opinion where the divorce is applied to the *belly* or the *back*: but it is evident that here divorce does not take place, as theſe parts are never uſed to imply the whole perſon.

A partial divorce is complete in its effect.

If a man pronounce upon his wife an *half* divorce, one divorce takes place, becauſe divorce is not capable of diviſion, and the mention of any portion of a thing of an indiviſible nature ſtands as a mention of the whole: and the *fourth*, or *fifth*, or any other proportion of divorce, is analogous to the *half*, in what is now ſaid, for the ſame reaſon.

Equivocal

If a huſband ſay to his wife "you are under three moieties of two "divorces," three divorces take place, becauſe the half of *two* is *one*, and conſequently *three* moieties of *two* divorces amount to *three*.—And if he were to ſay "you are under three moieties of one divorce," ſome are of opinion that two divorces take place, this amounting to one and a half; but others alledge that it produces three divorces, becauſe every moiety, amounts to one complete divorce, on the

the principle already ſtated: various doctors agree in approving the former opinion.

forms. IF a man ſay to his wife "you are under divorce, from *one* to "*two*," or "between *one* and *two*," in this caſe *one* divorce takes place; and if he were to ſay,—"from *one* to *three*," or "between "*one* and *three*," two divorces take place.—This is the doctrine of *Haneeſa*.—The two diſciples aſſert that by the firſt form *two* divorces take place, and by the laſt *three*.—*Ziffer*, on the other hand, maintains that by the firſt form *no* divorce takes place, and by the ſecond *one* divorce only, this being conformable to analogy, becauſe the boundaries of a thing are not included in the contents; as for example, where a man ſays "I have ſold ſuch a piece of ground, from *this* "wall to *that* wall," in which caſe neither wall is included in the ſale.—The ground of opinion of the two diſciples is that, in ſuch a mode of ſpeaking, the *whole* is by cuſtom underſtood, as for example, where one man ſays to another, "take, of my property, from "one *Dirm* to an *hundred*," which implies the whole hundred."—The argument of *Haneeſa* is that, in this indefinite mode of expreſſion, no particular number is implied, any more than where a man, in diſcourſe, ſays "my age is from ſixty to ſeventy years," or "between "ſixty and ſeventy," by which he means ſome indefinite term between theſe two: and in reply to the argument of the two diſciples, it is ſufficient to obſerve that the whole is to be underſtood only where the expreſſion relates to a thing of an indifferent nature, as in the inſtance cited by them; but divorce is in itſelf a dangerous and diſapproved procedure: and to what is advanced by *Ziffer* it may be anſwered, that it is neceſſary that the *firſt* boundary be in exiſtence, ſo as that the *ſecond* may bear a relation to it; but in the preſent caſe the *firſt* boundary (to wit, *divorce*,) is not in being, nor can be ſo, unleſs by divorce taking place, which it accordingly does of this neceſſity: contrary to the caſe of ſale, cited by *Ziffer* as appoſite to this, becauſe *there* both boundaries (underſtood by the two walls) do

do actually exiſt previous to the ſale.—It is to be obſerved on this occaſion, that if the huſband, ſpeaking in the ſecond form, intend only a ſingle divorce, it is admitted with God, as he may be allowed to intend whatever conſtruction the words will bear, but it is not admitted with the magiſtrate, as being contrary to apparent circumſtances.

If a man ſay to his wife "you are divorced once by twice," intending the multiple or multiplied product thereof, or not having any particular intention, a ſingle divorce reverſible takes place.—*Ziffer* ſays that two divorces take place, ſuch being the number underſtood from this mode of ſpeaking in arithmetic; and this opinion is adopted by *Háſn-Bin-Zeeâd*.—But if, in ſpeaking as above, he intend to ſay "you are divorced once and twice," three divorces take place accordingly, becauſe this way of ſpeaking is capable of that conſtruction, as the word *fee* [by] has alſo [in the *Arabic*] the ſenſe of *and*: if, however, the woman be unenjoyed, no more than one divorce takes place, as in the caſe where a man ſays to his unenjoyed wife "you are divorced once and twice;"—but if he intend to ſay, "you are divorced once *with* twice," three divorces take place, although ſhe ſhould be unenjoyed;—and if he mean to expreſs himſelf in a ſenſe which implies that the one is contained in the other, as if he were to ſay, "you are divorced once *in* twice," one divorce takes place, the ſuperadded words *in twice* being held to be redundant, becauſe divorce is incapable of being a container *.

If a huſband ſay to his wife "you are divorced *twice* by intending the multiple, yet no more than *two* divorces take place.—

* The words in the original are "Ante Taliktoon wahdetoon *fee* Sinnatinee," which is an indefinite or equivocal mode of expreſſion, as the word *fee* (among various other ſenſes) bears thoſe of *by*, *with*, or *and*, as well as *in*,—which accounts for the diſtinctions here made, and the latitude permitted.

With

With *Ziffer* three divorces take place, becauſe from this *multiplying* mode of expreſſion is to be underſtood *four* divorces, and three conſequently take place, as being the greateſt lawful number.

Divorce, with a reference to

IF a man ſay to his wife, " you are divorced from this place to *Syria*, a ſingle divorce reverſible takes place.—*Ziffer* ſays that it occaſions a complete or irreverſible divorce, becauſe, where he thus gives the divorce a deſcription of *length*, it is the ſame as if he were to ſay, " you are under a *long* divorce," and if he were to ſay ſo, a complete divorce would take place, and conſequently the ſame in the preſent inſtance.—Our doctors, on the other hand, alledge that the ſentence does not affix any deſcription of *length* to the divorce, but rather the reverſe, becauſe when divorce takes effect in any *one* place it does ſo in *all*.

IF a man were to ſay, " you are under divorce in *Mecca*," divorce takes place upon her immediately in every country; and ſo alſo if he were to ſay " you are divorced *in this houſe*," becauſe divorce is not reſtricted to any particular place;—and if he were to intend, by thus ſpeaking, that " ſhe ſhall become divorced *if ever ſhe ſhould enter Mecca*, or that houſe," his declaration to this effect is admitted with GOD, but not with the *Cawzee*, as the tenor of his words apparently contradict this conſtruction.

IF a man ſay to his wife, " you are under divorce when you enter " *Mecca*," in this caſe no divorce takes place until ſhe enter *Mecca*, he having ſuſpended the divorce upon that circumſtance.—And if he ſay, " you are divorced in entering the houſe," this means " if you enter " the houſe," becauſe the containing particle frequently ſtands expreſſive of a condition, and not being applicable here in its *containing* , it neceſſarily aſſumes the meaning of a *condition*.

## SECTION.

### *Of* Divorce *with a Reference to* Time.

If a man ſay to his wife, "you are divorced this day to-morrow," or "you are divorced to-morrow this day," in the firſt inſtance divorce takes place on the inſtant, and, in the ſecond, on the beginning of the morrow; and the ſecond word is in both caſes redundant; becauſe, where he firſt ſays "this day," divorce takes place immediately on the *preſent day*, and conſequently is not procraſtinated to the morrow,—and, on the other hand, where he firſt ſays "to-morrow," the divorce is procraſtinated to the *morrow*, and does not take place immediately on the preſent day; the ſecond word is therefore redundant in both caſes.

Where a man ſays to his wife, "you are divorced *to-morrow*," the divorce takes place on the dawn of the next morning; and if he ſhould intend by the word "to-morrow" the *end* of the morrow, it is ſo admitted with God, but not with the *Kâzee*, becauſe this contradicts appearances: but if he were to ſay "you are divorced *in* "to-morrow," declaring his intention therein to be "at the *end* of "the *morrow*," it is admitted with the *Kâzee*, according to *Haneefa*. The two diſciples ſay that it is not admitted with the *Kâzee*, although it be ſo with God, becauſe the words *to-morrow* and *in to-morrow* are one and the ſame thing, as the word *to-morrow* is mentioned in an *incluſive* ſenſe * in both caſes, whence it is that, from the expreſſion "in to-morrow," divorce takes place on the firſt inſtant of the en-

* This is an *Arabic* mode of expreſſion, implying no more than that here the particle *in* is underſtood.

ſuing

ſuing day, where the huſband has no particular intention.—The argument of *Haneefa* on this ſubject is that the huſband may be allowed to have intended ſome ſuch meaning from his expreſſion, becauſe the word *in* is introduced as a *Zirf*, or particle of containance, which does not require that the *whole* of the container ſhould be underſtood from it; and the reaſon why divorce takes place, in the preſent inſtance, from the beginning of the enſuing day, where the huſband had *no* particular intention, is, that as nothing appears to the contrary, its commencement is neceſſarily determined to that period; and regard being thus had to neceſſity in the determination of it, it follows that if the ſpeaker fix it at the *end* of the day, this determination muſt be regarded, *a fortiori:* contrary to his ſaying, "you are under di-"vorce to-morrow," (omitting the word *in*,) in which caſe, if he ſhould have intended the *end* of to-morrow, his declaration to that effect is not admitted with the *Kázee*, becauſe the word *to-morrow*, without *in*, occaſions the woman to fall under the deſcription of being divorced for the *whole* of to-morrow, which cannot be effected but by the divorce taking place upon her in the beginning of the day; and conſequently the end of the day, in this caſe, contradicts appearances.

IF a man ſay to his wife "you are under divorce yeſterday," and it ſhould ſo be that he was married as *this* day, divorce does not take place at all, becauſe he has here referred divorce to a period in which he was not competent to pronounce it, and therefore his divorce is nugatory, the ſame as if he were to ſay, "you are under divorce "*before my exiſtence.*"—But, in the preſent caſe, if he had married her *before* the time of which he ſpeaks, divorce takes place at the time of his ſpeaking; becauſe, if a man ſignify a divorce in the *preterite* form, it is an indication in the *preſent*, and hence the divorce takes place accordingly, this expreſſion being an indication of what is *now*, and not a relation of what is *paſt*, as it does not appear that he pronounced

nounced any divorce yesterday, so as that he should now give
gence thereof *.

If a man say to his wife "you are under divorce previous "to your marriage with me,"—divorce does not take place, because he applies the divorce to a period which forbids it, the same as if he were to say "you are under divorce in my infancy," or "in "my sleep."

If a man say to his wife, "you are under divorce *upon* my not "divorcing you," or "*when* I do not divorce you," and then remain silent, divorce takes place, because he has here applied it to a time which appears the moment he ceases to speak.—But, if he were to say, "you are under divorce *if* I do not divorce you," divorce does not take place until near the period of his decease, because here the condition does not become established until life be despaired of.

If a man say to his wife "you are divorced, whilst I do not di- "vorce you, you are divorced †," she becomes divorced on account of the last repudiation, to wit, "you are divorced."—This is where the last words of the sentence are uninterruptedly connected with the first part of it, and proceeds upon a favourable construction, for analogy would suggest that the first divorce takes place also, (to wit, "you are divorced whilst I do not divorce you,") and thus both divorces would take place, provided the woman be enjoyed; and such is the opinion of *Ziffer*; but the reason for the more favourable construction here, is that it is the intention of the vower to fulfil

* The reasoning here turns solely upon certain idiomatical peculiarities in the construction of the *Arabic* language, in which the preterite is frequently adopted, by the law, in a *creative* sense. (See Book II. Chap. I.)

† This is one of the forms under which divorce *by vow* is conceived.

his vow, in ſuch a manner that he may not be forſworn, which is impoſſible in the preſent caſe, unleſs that portion of time which may enable him to pronounce the divorce be excepted from his ſpeech, "you are divorced whilſt I do not divorce you;" and being thus excepted, divorce takes place, on account of the words which follow. Caſes correſpondent to this occur in the Book of *Eimán*.

IF a man ſay to a ſtrange woman, "you are under divorce the "day upon which I marry you," and he afterwards marry her in the *night*, ſhe is divorced; becauſe by *day* is ſometimes meant the *day time*, and this ſenſe alone it bears where it relates to a matter of continuance, (ſuch as *faſting*, for inſtance,) and ſometimes it is meant to expreſs *time* in general, which ſenſe it bears where it relates to a *tranſient* or *momentary* tranſaction, and of this nature is the act of *divorce*; and conſequently by the word *day*, in the preſent caſe, is to be underſtood *time generally*, applying equally to *day* and *night* both. —But if the huſband were to ſay that by *day* he meant the *daytime*, and not *time generally*, his declaration is admitted with the *Kázee*, as he may be allowed to have intended that conſtruction which is applicable to the word *day*, ſince, according to cuſtom, *day* applies to the *daylight*, and *night* to *darkneſs*.

## SECTION.

IF a huſband ſay to his wife "I am divorced from you," by this nothing is eſtabliſhed, although divorce be the intention: but if he were to ſay "I am *ſeparated* from you," or "I am *prohibited* to "you," intending divorce, ſhe becomes divorced.—*Shafei* holds that divorce takes place in the former inſtance alſo, where ſuch is the intention,

tention, becauſe the matrimonial right of poſſeſſion is equally participated by the huſband and the wife, inſomuch that the latter is entitled to demand coition of the former, and the former to demand admiſſion to coition from the latter, and the legality of the carnal enjoyment alſo appertains equally to both; and divorce being uſed for the purpoſe of diſſolving the right, and the legality, the application of it to the huſband holds good, as well as to the wife, and conſequently divorce takes place under the *firſt* of the above forms, as well as under the *ſecond* or *third*.—The argument of our doctors is that divorce is uſed for the *removal of reſtraint*, and this is found in the woman, but not in the man, (whence it is that a married woman cannot go out of the houſe:) and admitting that divorce were uſed for the purpoſe of diſſolving the matrimonial right of poſſeſſion, (as advanced by *Shafei*,) it may be replied that the huſband is the poſſeſſor of the wife, and the wife the poſſeſſed of the huſband, (whence the woman is called the *married*, and the man the *marrier*,) and conſequently poſſeſſion applies to the woman: contrary to *ſeparation* or *prohibition*, the *firſt* of theſe being a total diſſolution of *connexion*, and the *ſecond* of *legality*, both of which equally appertain to each of the parties; and hence the application of them to either is equally forcible, whereas that of divorce is of no force except when applied to the wife.

If a man ſay to his wife, "you are divorced once or not," divorce does not take place. The compiler of the *Hedáya* obſerves that the ſame is ſaid in the *Jama-Sagheer*; nor is any difference of opinion recorded there. This is what is ſaid by *Haneefa*, and in one place by *Aboo Yooſaf*. According to *Mohammed* (with whom *Aboo Yooſaf* in another place coincides) a ſingle divorce reverſible takes place; and in the book of divorce in the *Mabſoot* it is recorded that, where the huſband ſays to his wife, "you are divorced once or no-"thing," a ſingle divorce reverſible takes place, according to *Mohammed:* now between this and the preceding form there is no ſort of difference, and conſequently, if the caſe cited in the *Jama-Sagheer* be

be the opinion of *all* the doctors, it follows that there are *two* opinions recorded from *Mohammed* upon this point.—The argument of the latter is that the number is rendered dubious on account of the particle of doubt "*or*" intervening between the word "*once*" and the negative "*not*," wherefore regard to the former drops, and his words remain, "*you are divorced:*" contrary to a caſe where he ſays "you are divorced or not," in which inſtance divorce does not take place, ſince in this laſt caſe the doubt exiſts with reſpect to divorce itſelf.—The arguments of *Haneefa* are drawn from the *Arabic* idiom.

If a man ſay to his wife "you are divorced after my death," or "after your death;" no conſequence whatever enſues from this expreſſion, becauſe, in the firſt inſtance, he has applied the divorce to a time which forbids it, ſince a huſband is not competent to the execution of divorce after death; and, in the ſecond, the woman no longer remains a fit ſubject of it; and both theſe circumſtances are eſſential to a legal divorce.

Separation takes place upon either of the other as a *ſlave:*

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

or, upon a huſband purchaſing his wife.

If a man purchaſe his own wife, [as a ſlave,] and afterwards divorce her, divorce does not take place, becauſe without the continuance of marriage it cannot exiſt, and in the preſent caſe the marriage has

ceaſed in every ſhape whatever, ſince it does not continue even with reſpect to *Edit*; and in the ſame manner, when a wife becomes poſſeſſor of her huſband, either *wholly* or in *part*, if the latter were to divorce her, his divorce does not take effect, becauſe in this caſe alſo the marriage has ceaſed, for the reaſons before aſſigned.—*Mohammed* ſays that in the latter caſe divorce holds good, becauſe the woman is enjoined an *Edit*, and hence the marriage continues in one ſhape: contrary to a caſe where the huſband purchaſes his wife, for then the marriage totally ceaſes, becauſe ſhe is not under any obligation of *Edit* with reſpect to her huſband, who is now her proprietor, and has a right to continue carnal cohabitation with her in that capacity.

The divorce of a wife (being a ... upon the emancipation of her owner, ... es place ... n the occurrence of the condition.

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

If the perſon in queſtion were to ſay to the female ſlave, his wife, "when to-morrow arrives you are under two divorces," and her owner were to ſay, "when to-morrow arrives you are *free*," in this caſe it is not lawful for the huſband to marry her again, until ſuch

* Three divorces being the utmoſt number to a free woman, and two to a ſlave, it follows that if two divorces take place upon a woman as a *ſlave* ſhe becomes *irreverſibly* divorced. (See Chap. I. )

time

time as ſhe has been married to another man, and repudiated by him, and her *Edit* (which is three terms of her courſes) has elapſed.—This is the doctrine of the two *Elders*.—*Mohammed* ſays that the huſband is at liberty to reverſe the divorce, ſince the execution of the divorce is connected with the maſter's manumiſſion, becauſe the huſband has ſuſpended his repudiation upon the ſame circumſtance on which the maſter has ſuſpended his manumiſſion; hence the *repudiation* is (as it were) aſſociated with the *emancipation*; and freedom being alſo aſſociated with the emancipation, it follows that the execution of divorce is, of courſe, aſſociated with freedom, and the divorce takes place upon the ſlave after freedom, (whence it is that the *Edit* of the woman here treated of is fixed at *three* terms of her courſes, whereas, if ſhe were a *ſlave*, her *Edit* would be *two* terms only,) and ſuch being the caſe, reverſal is approved, in this, as well as in the preceding, example. The argument of the two *Elders* is that the huſband has ſuſpended *divorce* on the ſame circumſtance upon which the maſter has ſuſpended *freedom*; and as that takes place upon the woman whilſt ſhe is yet a ſlave, ſo does divorce likewiſe; now the ſlave becomes forbidden, [in marriage to her huſband,] in conſequence of two divorces, by the *rigorous prohibition*, wherefore reverſal is not approved; nor does it become lawful to him to marry her till ſuch time as ſhe ſhall have been poſſeſſed by another huſband; but this reaſon does not apply to the *Edit*, ſince that is a matter of caution, which is evident from fixing its duration to *three* terms of the courſes, ſo as that the complete fulfilment of it may be indubitable: and with reſpect to what *Mohammed* ſays, that, "as repudiation is connected with freedom, divorce takes place "*after* freedom," it is of no weight, becauſe, if freedom be connected with manumiſſion, on account of the one being the cauſe of the other, and if the repudiation and manumiſſion be aſſociated together in ſuch a manner that repudiation and freedom muſt take place at the ſame time, we reply that divorce is alſo aſſociated with repudiation, on account of the *latter* being the cauſe of the *former*; whence it follows, that freedom is aſſociated with divorce, and not that divorce takes place ſubſequent to freedom.

## SECTION.

### *Of* Divorce *by Comparison, and the ſeveral Deſcriptions of it.*

If a man ſay to his wife, "you are under divorce *thus*," holding up his thumb and fore and middle finger, three divorces take place, becauſe, from the holding up of the fingers number is cuſtomarily underſtood, where the ſign is aſſociated with a relative to number; and the word "*thus*" is of this kind; and the fingers held up are three in number; whence three divorces are to be underſtood:—and if the ſign be given with *one* finger, a ſingle divorce takes place: if with *two* fingers, *two* divorces.—It is to be obſerved that the ſign is to be underſtood from the fingers which are *extended*, and not from thoſe which are *clenched*. Some of our modern doctors, however, ſay that, if it be made with the *back* of the fingers, it is underſtood from thoſe which are *clenched*.—And if the divorcer were to ſay "I have given "the ſignal with the two clenched fingers," whilſt at the ſame time he had actually given it with the *extended* fingers, his declaration is credited with God, but not with the *Kâzee*; and ſo alſo where he ſays "I have intended the ſignal by the *palm* of my hand, and *not* "by the *fingers*;" inſomuch that two divorces take place in the *firſt* inſtance, and one in the *laſt*, in a religious view; becauſe ſigns are made with the ſhut fingers, or the palm of the hand, as well as with the extended fingers, and hence he may be allowed to have intended to expreſs the number of divorce by ſigns capable of that conſtruction: but it contradicts appearances. And in the caſe now under conſideration, if the word "*thus*" be omitted, and the ſign be made with the thumb and fore and middle finger, yet one divorce only takes place, becauſe the *ſign* is not aſſociated with the *relative*, and hence the

*termined by ſigns made with the fingers;*

*but not unleſs it be expreſſed with a relation to number.*

the *words* only remain, to wit, "you are divorced," from which one divorce only reſults.

IF a man give to the divorce which he is pronouncing a deſcription of particular *vehemence* or *amplification*, as if he were to ſay, "you are divorced *irreverſibly*," or "you are divorced *to a certainty*," an irreverſible divorce takes place, whether the wife whom he ſo addreſſes may have been enjoyed or not.—*Shafei* ſays that the divorce is reverſible where ſhe has been enjoyed, becauſe reverſal during *Edit*, after divorce from a wife already enjoyed, is ſanctioned by the precepts of the law, and bringing it under the deſcription of *irreverſibility* is contrary to them; thus a huſband is not at liberty to pronounce, upon an *unenjoyed* wife, a divorce irreverſible; the word "*irreverſibly*," therefore, is nugatory on this occaſion, as much as if he were to ſay "you are divorced, with this condition, that no right of reverſal re-"mains to me."—The argument of our doctors on this point is, that the man has pronounced the divorce under a deſcription which it is capable of bearing, becauſe divorce takes place irreverſibly upon a wife unenjoyed, (and alſo upon any other, at the expiration of the *Edit*;) and ſuch being the caſe, the divorce takes place in this caſe irreverſibly upon an *enjoyed* wife, the ſame as upon one *unenjoyed*, the huſband having, by his deſcription, ſpecified a circumſtance which is really applicable to divorce. And with reſpect to the caſe of reverſal being mentioned as an *additional condition*, (as cited by *Shafei* in ſupport of his doctrine,) it is not admitted; becauſe there alſo a divorce irreverſible takes place, where it is pronounced either *without* intention, or with the intention of *two divorces*; but where three divorces are intended, that number muſt take place, as irreverſibility bears the conſtruction of three divorces.

an of vehemence is irreverſible in its effect.

IF a man ſay to his wife "you are divorced irreverſibly," or "you are divorced to a certainty," and intend by his words "you "are divorced" to expreſs *one* divorce, and by the additional words "irreverſibly,"

"irreverſibly," or "to a *certainty*," *another* divorce, two divorces irreverſible take place, as theſe expreſſions are of themſelves capable of effecting divorce.

If a huſband ſay to his wife "you are under a *moſt enormous* di-"vorce," a divorce irreverſible takes place, becauſe divorce is thus deſcribed only with a view to its effect in the immediate diſſolution of the marriage, and hence the deſcription of it by *enormity* is the ſame as by *irreverſibility*. And it is the ſame if he were to ſay, "A *moſt* "*baſe* divorce," or "*the worſt kind* of divorce:" and ſo alſo, if he were to ſay, "a *diabolical* divorce," or "an *irregular* divorce:" becauſe reverſible divorce is reſtricted to thoſe of the *regular* deſcription, [or *Talák-al-Sonna*,] and conſequently all others are of an irreverſible nature.—It is recorded as an opinion of *Aboo Yooſaf*, that, where the huſband ſays "an irregular divorce," a divorce irreverſible does not follow, unleſs ſuch be the intention, becauſe irregularity [*Biddát*] in divorce is of two kinds,—*one* originating in the circumſtance under which divorce is executed, (as where it is pronounced upon the wife during her courſes,)—the *other*, in the nature of the ſentence, (as where the huſband pronounces the divorce irreverſible in direct terms,) and hence it is indiſpenſably requiſite that the intention be regarded. It is alſo recorded as an opinion of *Mohammed*, that from the uſe of the deſcriptions *irregular* or *diabolical* a divorce reverſible takes place, as divorce may be thus deſcribed, *not* with any view to *irreverſibility*, but merely to the *irregularity* of the circumſtances under which it is pronounced, (as where it is pronounced upon the woman during her courſes;) and hence the divorce is not irreverſible, unleſs ſuch be the intention.

If a man ſay to his wife "you are under a divorce *like a moun-*"*tain*," a divorce irreverſible takes place, according to *Haneefa* and *Mohammed*.—*Aboo Yooſaf* holds that the divorce is reverſible, becauſe a *mountain* is a ſingle thing, and hence the compariſon of divorce with a mountain

a mountain gives the former a deſcription of *unity*.—The argument of the other two ſages is, that *ſimile*, in divorce, is always uſed in an *amplifying* ſenſe; and *amplification* implies *irreverſibility*; whence a divorce irreverſible is the effect.

IF a man ſay to his wife "you are under a *moſt vehement* divorce," or "you are divorced like a *thouſand*," or "a *houſeful*,—one divorce irreverſible takes place, unleſs his intention be three divorces, in which caſe three take place accordingly.—The divorce is irreverſible from the firſt of theſe forms, becauſe it is there mentioned under a deſcription of *vehemence*, which occaſions irreverſibility, as applying ſomething in its nature deciſive, and incapable of recall,—whereas, divorce reverſible is capable of recall, and therefore the deſcription of *vehement* does not apply to it; and it is irreverſible from the *ſecond* form, becauſe this ſimile ſometimes expreſſes *force*, and ſometimes *number*, (as it is ſaid, for inſtance, that ſuch a man is like *a thouſand*, —by which it is to be underſtood that he is poſſeſſed of *uncommon ſtrength*,) and hence the intention applies with equal propriety to either ſenſe; and where no intention exiſts, the leaſt extenſive meaning of the two is adopted, to wit, *one divorce irreverſible*;—and from the *third* form, becauſe a houſe may be filled either by the *magnitude* of its contents, or by the *number*, and hence the intention applies with equal propriety to either circumſtance; and where no intention exiſts the leaſt extenſive ſenſe is adopted, as above.

IT is a rule, with *Hanceſa*, that whenever divorce is thus pronounced with a *ſimile*, it produces a divorce irreverſible, whatever the thing may be with which it is compared, and whether the magnitude of that thing be mentioned or not; it having been before remarked that ſimile in divorce is always uſed in an *amplifying* ſenſe; and amplification implies irreverſibility. *Aboo Yooſaf*, on the other hand, holds, that if the *magnitude* of the ſubject of ſimile be mentioned, the divorce is irreverſible, but not otherwiſe, whatever that may be, becauſe

Divorce, when pronounced a *ſimile*, is always *irrever-*

cauſe a ſimile may ſometimes be introduced merely to expreſs *unity*; wherefore indefinite compariſon is not to be taken in an amplifying ſenſe: but where the *magnitude* is mentioned, *that* undoubtedly is to be conſtrued *amplification*; and hence irreverſibility is eſtabliſhed.—Again, *Ziffer* maintains that if the ſubject of ſimile be of ſuch a nature as conveys an idea of magnitude, the divorce is irreverſible, but otherwiſe not.—Some commentators alledge that *Mohammed* coincides with *Haneeſa* on this point: others, that he agrees with *Aboo Yooſaf*.—The nature of theſe diverſities of opinion is exemplified in a caſe where a man ſays to his wife "you are under a divorce like a needle's eye," or "like the *ſize* of a needle's eye," or "like a mountain," or "like "the *ſize* of a mountain;" for under the *firſt* of theſe forms the divorce is held to be irreverſible by *Haneeſa* alone; under the *ſecond* it is ſo with *Haneeſa* and *Aboo Yooſaf*, and not with *Ziffer*;—and under the *third* it is ſo with *Haneeſa* and *Ziffer*, and not with *Aboo Yooſaf*; but under the *fourth* form it is irreverſible with them all.

If a man ſay to his wife "you are repudiated by a *heavy* divorce," or "by a *broad*," or "by a *long* divorce," one divorce irreverſible takes place; becauſe a thing of which the reparation is *impracticable* is called *heavy*, and an irreverſible divorce is of this kind, inaſmuch as the reparation of it is difficult; and with reſpect to thoſe things of which the reparation is difficult, it is common to ſay "they are *long* "and *broad*."—It is recorded from *Aboo Yooſaf* that the divorce thus occaſioned is reverſible, becauſe the deſcriptions of *difficulty*, *length*, or *breadth*, do not apply to divorce, and are therefore nugatory.—And if the man ſhould, by any of theſe ſentences, intend *three* divorces, it is approved, becauſe ſeparation is divided into two kinds, the *light* and *heavy*, ſo that when the *heavy* (which is three divorces) is particularly ſpecified, it is held to be efficient.

SECTION.

## SECTION.

### *Of* DIVORCE *before* COHABITATION *.

WHEN a man divorces a woman before cohabitation, by ſaying to her "you are divorced thrice," three divorces take place upon her, becauſe he has here given three collectively; but if he pronounce the three ſeparately, ſaying "you are divorced,—divorced,—divorced," one divorce irreverſible takes place from the *firſt*, but nothing from the *ſecond* or *third*, becauſe each repetition of the word "*divorced*" is a ſeparate *execution* of divorce; and the firſt of them having already rendered the woman *deciſively* and *irreverſibly* divorced, it follows that the ſecond and third cannot take effect upon her.—And it is the ſame where he ſays, "you are divorced *once* and again," (where a ſingle divorce takes place,) becauſe the woman becomes completely divorced by the firſt part of the ſentence.

Three divorces take place upon them when they are pronounced *together*, but only the *firſt* when they are pronounced *ſeparately*.

IF a man ſay to his unenjoyed wife, "you are divorced *once*," and the woman ſhould happen to die before the word *once* be pronounced, in this caſe divorce does not take place, becauſe he has here aſſociated the number with the divorce, which conſequently ought to take place accordingly; but the woman dying before the number is mentioned, no ſubject of divorce remains at the time when it ſhould take place, and hence the execution of it is null: and ſo alſo, where he ſays, "you are divorced *twice*" or "*thrice.*"

* Divorce pronounced upon a woman *before* cohabitation is in all caſes complete and irreverſible. An attention to this rule is neceſſary to the underſtanding of ſeveral caſes in this ſection.

If a man ſay to his unenjoyed wife, "you are divorced *once* "before *once*," or "*once*, and, after that, *again*," a ſingle divorce takes place; but if he were to ſay, "you are divorced *once*, and pre- "vious thereto *once*," two divorces take place; and ſo alſo if he were to ſay "you are divorced *once* after *once*."—The proofs are all drawn, in this caſe, from the *Arabic* idiom.—And if the man ſay "you are divorced once with once," or "once along with once," two divorces take place, becauſe of the aſſociating particle *with*, which makes the ſentence appear as of two divorces collectively.—*Aboo Yooſaf* ſays that, under the ſecond form, one divorce only takes place: his proof is drawn from the *Arabic* idiom.—In all theſe inſtances it is to be remarked that two divorces would take place upon an enjoyed wife.

If a man ſay to his unenjoyed wife, "if you enter the houſe you "are divorced once and again," and ſhe afterwards enter the houſe, a ſingle divorce only takes place upon her, according to *Haneefa*:—The two diſciples ſay that two divorces take place.—But if he were to ſay, "you are divorced *once* and *again*, if you enter the houſe," and ſhe afterwards enter it, two divorces take place upon her, according to all.—And if he declare the ſame ſentence, with a variation in the conſtruction of it, thus, "you are divorced once,—and again "if you enter the houſe,"—*Koorokhee* has ſaid that here alſo there is a difference of opinion, one divorce only taking place with *Haneefa*, and two with the two diſciples:—*Aboo Lays*, however, obſerves that here one divorce only takes place, according to all the doctors, as under this conſtruction the *laſt* member of the ſentence is utterly diſtinct and ſeparate from the *firſt*, and this is approved.

In *implied* divorce

The *ſecond* kind of divorce, namely *Taláḳ-Kináyat*, or divorce by *implication*, is where a man repudiates his wife (not in *expreſs* terms

terms but) by the mention of ſomething from which divorce is underſtood; and divorce does not take place from this but by *intention* or *circumſtantial proof*, becauſe the implication is not uſed to expreſs *divorce* alone, ſince it may mean divorce, and alſo ſomething elſe, and hence *intention* or *circumſtantial proof* are requiſite to determine the conſtruction in which it is to be taken.

THE compiler of the *Hedâya* obſerves that implication is of two kinds.—The FIRST is that from which a ſingle divorce reverſible takes place; and this conſiſts of three forms of words,—to wit, "Count!"—"Seek the purification of your womb!"—"You are "ſingle!"—of the FIRST, becauſe to *count* means *enumeration*, and hence the word "*count!*" bears two conſtructions, one, "count! (the courſes that are incumbent upon you;") and the other, "count! (the bleſſings of Almighty GOD;") and if the ſpeaker intend the former meaning, divorce is the aſcertained conſtruction of the word, in virtue of ſuch his intention; and here the divorce takes place, of neceſſity, from his having deſired her to count her courſes; which order is of no force except where he has divorced her, becauſe previous to the divorce, the counting of her courſes was not incumbent upon her, and hence it is the ſame as if he had ſaid, "you are divorced, "and count!" and as this neceſſity is ſufficiently anſwered by a reverſible divorce, a reverſible divorce accordingly takes place: and of the SECOND, becauſe "*ſeek the purification of your womb!*" may either mean, "ſee that your womb be free from progeny, in order to "your getting another huſband," (ſince this expreſsly applies to the ſame thing as is deſigned by the preceding word, "*count*," and therefore may, in the preſent caſe, ſtand inſtead of it,) or it may mean, "ſee that your womb be free from progeny, in order that I may di-"vorce you;" and where the huſband intends the former meaning, a divorce reverſible takes place, the ſame as in the preceding caſe:—and of the THIRD, becauſe "*you are ſingle!*" may either mean, "you are repudiated by a ſingle divorce," (and where ſuch is the intention,

are *three* forms which effect a *reverce*,

tention, a ſingle divorce reverſible takes place, as by this form ſuch a divorce is effected,) or it may mean " you are ſingle (having no other along with you,") or " you are ſingle (among women, in " beauty, and ſo forth:") thus, theſe words bearing a variety of conſtructions, intention is eſſentially requiſite to their effect:—and it is to be obſerved that thoſe forms occaſion no more than a *ſingle* divorce, becauſe ſuch forms amount to " you are divorced;"—and as, where the words " *you are divorced*" are expreſsly mentioned, no more than a ſingle divorce takes place, ſo alſo, in this caſe, a ſingle divorce only takes place *a fortiori*, becauſe mere implication is weaker in its effect than the expreſs mention of any thing *.—And from all other implications of divorce beſides thoſe three, where divorce is the huſband's intention, a ſingle complete (or irreverſible) divorce takes place; or, if he intend *three* divorces, *three* divorces take place; or if *two*, *two* divorces: and theſe expreſſions of implication of divorce are as follow;—" you are ſeparated!"—" you are cut off!"—" you " are prohibited!"—" the reins are thrown upon your own neck!" —" be united unto your people!"—" you are devoid!"—" I give " you to your family!"—" I ſet you looſe!"—" your buſineſs is in " your own hands!"—" you are free!"—" veil yourſelf!"—" be " clean!"—" go forth!"—" go to!"—" go!"—" ariſe!"—" ſeek " for a mate!"—all which expreſſions are implicative of divorce, as each of them bears a conſtruction either of divorce or otherwiſe;— ſince " *you are ſeparated!*" may either mean, " you are ſeparated (from me in marriage,") or " you are ſeparated (from your family.") In the ſame manner, " *you are cut off!*" may either mean " you are " cut off (from marriage,") or " you are cut off from (your family " and friends;") and ſo alſo " *you are prohibited!*" may either mean " you are prohibited (in marriage,") or " you are prohibited (to me " as a companion becauſe of your evil diſpoſition.") In the ſame man-

and ſeventeen which effect divorce.

* An obſervation is here introduced in the text, which, as it turns upon a point of grammatical criticiſm, is incapable of tranſlation, and is therefore neceſſarily omitted.

ner,

ner, "*the reins are thrown upon your own neck!*" may either mean "you are at liberty to go where you pleaſe, (as I have divorced you,") or "you may go (to viſit your parents," and ſo forth;) and ſo alſo, "*be united unto your people!*" may either mean "return to your fa-"mily (as I have divorced you,") or ("as you are unfit for ſociety "on account of the badneſs of your diſpoſition.") "*You are devoid,*" may, in the ſame manner, either mean "you are devoid (of mar-"riage,") or "you are devoid (of virtue and religion;) and ſo alſo, "*I give you to your family!*" may either mean, "I return you to "your family (as I have divorced you,) or "I return you to your "family (on account of your evil diſpoſition, in order "that you may "remain there;") agreeably to the ſame mode of reaſoning, "*I ſet "you looſe!*" may either mean "I ſet you looſe (from the reſtraint "of marriage, as having divorced you,") or "I ſet you looſe (to go "where you pleaſe;") ſo alſo "*your buſineſs is in your own hands!*" may either have reſpect to *divorce*, or to any other circumſtance; and "*you are free!*" may either imply "you are free (from the bond of "marriage,") or, "you are free (as not being a ſlave;") and ſo alſo "*veil yourſelf!*" may either mean "veil yourſelf (from me, as I have "divorced you,") or "veil yourſelf (that you may not be ſeen by a "ſtranger;") in the ſame manner "*be clean!*" may either mean "aſcertain whether your womb be free from ſeed, that you may be "enabled to marry with another man," or "that the deſcent of a "child begotten upon you may be known;" and ſo alſo "*go forth!*" may either mean "go forth (as I have divorced you,") or "go forth "(to viſit your parents;") and "*go to!*"—"*go!*"—"*ariſe!*" may either ſignify "go to (and ſo forth) as I have divorced you," or "go "to (and ſo forth) and do not provoke me to divorce you;" ſo alſo "*ſeek for a mate!*" may either mean "ſeek for a huſband, as I have "divorced you," or "ſeek for a proper companion to ſit with you:" ſince therefore all thoſe expreſſions admit the conſtruction either of divorce or otherwiſe, the intention is eſſential to their effect, except where the huſband uſes them in reply to a requiſition of divorce made

by

by his wife, in which caſe the *Kâzee* is to decree a divorce, but yet it does not exiſt as a divorce between the huſband and God, unleſs ſuch was his intention *.

The compiler of the *Hedâya* obſerves that *Kadooree* has not made any diſtinction whatever between theſe expreſſions in divorce: on the contrary he has ſaid, "from all thoſe expreſſions, "when "uſed in reply to a requiſition of divorce, a divorce takes place, "independant of the intention, in a *legal* view, but not in a *religious* "view," whereas it is not ſo, this rule being confined to ſuch expreſſions as are incapable of being conſtrued into a denial of the requiſition of divorce.

It is to be obſerved as a rule, that there are three poſſible ſituations in which the perſon making uſe of theſe expreſſions may ſtand; FIRST, a *general* ſituation, that is, where he is neither ſwayed by *anger*, nor by any requiſition of divorce, but acts from an unbiaſſed volition; SECONDLY, where divorce is the ſubject of diſcourſe at the time of ſpeaking, (as, for inſtance, where it is demanded of him by his wife;)—THIRDLY, where he is under the impulſe of anger. The expreſſions of implication are alſo of three kinds;—FIRST, thoſe which equally bear a conſtruction either of *denial* or *aſſent*;—SECONDLY, thoſe which can be conſtrued into *aſſent* only;—and, THIRDLY, thoſe which may be conſtrued either into *aſſent*, or into exclamations of *contumely* and *reproach*: and, in the *firſt* of theſe ſituations, divorce does not take place from any of thoſe expreſſions but by intention; and if the huſband declare that he had no ſuch intention, his declaration is to be credited, becauſe they all bear a double conſtruction, and

* That is to ſay, although divorce take place in point of *law* from the judicial decree, yet *in foro conſcientiæ* the man muſt continue to hold himſelf married, inſomuch that he cannot, without ſin, marry another woman, in lieu of her who is thus divorced. This is the diſtinction between *law* and *religion* in divorce throughout.

hence

hence the intention is neceſſary to eſtabliſh the effect: and, in the *ſecond* ſituation, divorce takes place independant of the intention in a *legal* view, and the declaration of the huſband is not to be credited, where he has uſed expreſſions bearing a conſtruction of *aſſent* only; which are as follow:——

" You are diſengaged!"
" You are ſeparated!"
" You are cut off!"
" You are prohibited!"
" Count!"
" Your buſineſs is in your own hands!"
" Chooſe!"

The reaſon of which is, that the evident meaning of the huſband, in uſing them in reply to a requiſition of divorce, is *divorce*, as they do not bear a conſtruction of *denial*; but if, in this ſituation, the huſband uſe any of theſe expreſſions which may be conſtrued equally into *denial* or *aſſent*, divorce does not take place but by intention; and the declaration of the huſband, with reſpect to his intention is to be credited. The expreſſions alluded to are as follow:

" Go!"
" Get up!"
" Veil yourſelf!"
" Get out!" and ſo forth;

becauſe theſe words may all be conſtrued into denial of the requeſt; and as the denial of a requeſt is a circumſtance leſs forcible than the act of divorce, they are rather to be taken in the *former* ſenſe; but yet, as they alſo bear a conſtruction of *aſſent*, they occaſion divorce, where ſuch is the intention. Thoſe expreſſions may be conſtrued into a denial of the requeſt, on account that " *Go!*" may mean " quit " thus ſpeaking;" and in like manner " *Get up!*" may mean " *Be* " *gone!* and do not talk thus;" and the ſame of " *veil yourſelf!*" as a direction *to put on the veil* ſometimes implies an order to *go away*;

wherefore it may imply on this occaſion "go away, and leave off "ſpeaking in this manner;" and the ſame alſo of "*get out!*"—but, in the *third* ſituation, divorce does not take place without the intention of the ſpeaker, from the uſe of any expreſſion of implication, except ſuch as may be equally conſtrued into aſſent, and into exclamations of *contumely* and *reproach*; and thoſe are the three following:

"Count!"
"Chooſe!"
"Your buſineſs is in your own hands!"

from all of which, when uſed in anger, divorce takes place in point of *law*, independant of intention; and the declaration of the huſband, denying ſuch intention, is not to be credited, becauſe the circumſtance of anger proves the intention to be divorce.—It is recorded from *Aboo Yooſaf* that if the huſband were, in anger, to ſay, "I have no pro-"perty in you!" or "I have no controul over you!" or "I give "you your own way!" or "I have ſeparated from you!" or "join "yourſelf to your people!" his declaration is credited, even where he denies having intended *divorce*, becauſe theſe expreſſions may all be conſtrued into exclamations of *contumely* or *reproach*, as well as of divorce; as his words "*I have no property in you!*" may mean "be-"cauſe you are ſo baſe that you are incapable of being conſidered as a "property;" and, in the ſame manner, his words "*I have no con-*"*troul over you!*" may mean "becauſe of the wickedneſs and ſtub-"bornneſs of your diſpoſition;" and ſo alſo "*I give you your own* "*way!*" may mean "becauſe I cannot direct you;" and, in like manner, "*I have ſeparated from you!*" may mean "becauſe of your "vicious diſpoſition."

What has juſt been ſtated, *viz.* that "where the huſband ſays, *you* "*are ſeparated!* or, *you are cut off!* divorce irreverſible takes place," is the opinion of our doctors.—*Shafeï* has ſaid that the divorce occaſioned by theſe words is *reverſible*, becauſe the reaſon why thoſe expreſſions

preſſions occaſion divorce is, that they are *implications* of divorce; whence it is that the intention is a condition of their effect, and alſo, that the divorce occaſioned by them is complete in part of number, the ſame as in an *expreſs* divorce, where the huſband is authorized to pronounce three divorces, and having given one, his authority remains with reſpect to two other;—and alſo, that if he intend *three* divorces, *three* take place accordingly; and ſuch being the caſe, reverſal is lawful here in the ſame manner as in an *expreſs* divorce, the thing which is implied.—The argument of our doctors on this point is, that the act of irreverſible divorce has proceeded in this caſe from a competent perſon, and is exerciſed upon a fit ſubject of it, according to the power by law eſtabliſhed over the wife, which enables her huſband to put her away in ſuch a manner as that ſhe ſhall be deciſively and irreverſibly ſeparated from him; and here the huſband is competent to the act of irreverſible divorce, as being of ſound mind and mature age; and the wife is a fit ſubject of it, as being lawfully liable to irreverſible divorce *before* cohabitation, (and alſo *after* it where her huſband pronounces it for a compenſation;) and this power, like many others, is inſtituted by the law with a view to the convenience of the individual, which ſometimes requires a deciſive ſeparation to be effected *ſlowly* and *deliberately*, (as in divorce reverſible,) whereas, at other times, it requires that ſuch a ſeparation ſhould take place on the inſtant, without any continuance of connexion with the ſubject of it, (as in the triple form of divorce,) and at other times it alſo requires ſeparation to be completely effected on the inſtant, admitting a continuance of connexion with the ſubject; and it is indiſpenſably neceſſary that this laſt ſpecies of irreverſible ſeparation be alſo countenanced by the law, in order that the door of reparation may not be cloſed againſt the huſband if he ſhould repent; (that is to ſay, that it may remain in his power again to marry his wife, without her being previouſly married to another;) and alſo, in order that the woman's delicacy may be preſerved from the effect of a divorce, by the man taking her back without the intervention of marriage with another; and ſuch being the

caſe, divorce irreverſible enſues from thoſe expreſſions.—In reply the aſſertion of *Shafei*, we obſerve that thoſe expreſſions are not *poſitively* implications, ſince each of them may alſo be uſed in its own literal ſenſe:—and as to what he further alledges, that "the intention is a condition of their effect," (thence inferring that they are undoubtedly implications of *divorce*,) the inference is not admitted, becauſe the intention is made a condition for the purpoſe of aſcertaining one of two ſpecies of ſeparation; and it is thus made a condition for the purpoſe of aſcertaining one of two ſorts of a ſeparation, which is a ſeparation from marriage, and not for the purpoſe of divorce taking place: with reſpect to what *Shafei* further advances, that "the divorce "occaſioned by any of thoſe expreſſions is incomplete in point of "number," (thence inferring that they are implications of divorce,) we reply that the paucity of the number of divorces is not on account of thoſe expreſſions being *implications* of divorce, but becauſe divorce is eſtabliſhed on account of the connexion of marriage becoming diſſolved; that is to ſay, on account of thoſe expreſſions the tye is diſſolved, and divorce ſignifies the diſſolution of a tye, wherefore divorce is neceſſarily eſtabliſhed; the inference, therefore, is that the taking place of divorce is involved; but not that the aforeſaid expreſſions are *implications* of divorce:—and with reſpect to what he further ſays, that "if the huſband intend three divorces from the uſe of any of "thoſe expreſſions, three take place accordingly," (inferring that they are implications of divorce,) we reply that the intention of *three* divorces from thoſe expreſſions is approved only as three divorces is one ſpecies of ſeparation, (for ſeparation is of two ſpecies,—the *mild* and the *rigorous* *,) and, where there is no intention, the leaſt forcible is eſtabliſhed.—It is to be obſerved that an intention of two divorces is

* By the *mild* ſeparation is meant that ſpecies of complete divorce which admits of the huſband remarrying his repudiated wife without the neceſſity of her intermediate marriage with another. By the *rigorous* ſeparation is meant that ſort of complete divorce which does not admit of the man remarrying his repudiated wife until ſhe ſhall have been married to, enjoyed, and repudiated by another man. They have been already fully explained.

not

not approved with our doctors: contrary to the opinion of *Ziffer*: but this has already been treated of.

IF a man ſay to his wife "count!—count!—count!" and afterwards declare that by the firſt of theſe words he meant divorce, and by the others the repetition of the woman's courſes [requiſite to its completion,] his declaration is credited in point of *law*, as he appears to have intended theſe laſt words in their true ſenſe, it being cuſtomary for a huſband, where he divorces his wife, to deſire her to count the courſes neceſſary to the completion of her *Edit*; and hence apparent circumſtances bear evidence to his intention: but if he were to confeſs that in theſe laſt words he had no particular intention, three divorces take place, becauſe, from his intending divorce by the firſt word, it follows that he repeated it a *ſecond* and *third* time, in a ſituation where divorce is the ſubject of diſcourſe, and this ſituation proves his intention in theſe repetitions to be divorce alſo; wherefore, if he were to deny this intention, yet he is not credited, circumſtances bearing evidence againſt him: contrary to where he declares that he had no intention of divorce in any of the three words, for there divorce does not take place at all, becauſe circumſtances do not tend to diſprove his declaration: and contrary, alſo, to where he declares divorce to be his intention in the *third* word, but not in either of the *two* preceding, in which caſe no more than one divorce takes place, becauſe, as he does not put the conſtruction of divorce upon the two *preceding* words, it does not appear that divorce was the ſubject of diſcourſe at the period of his ſpeaking the *laſt*.—It is to be obſerved that the declaration of the ſpeaker in denial of his intention is not to be credited, unleſs it be given upon oath, becauſe he relates what, having paſſed ſolely in his own mind, cannot be known to any other perſon,—and hence he is the *Ameen*, or inquiſitor, with reſpect to the intelligence he gives; and the declaration of an inquiſitor is credited upon oath.

## CHAP. III.

## Of *Delegation* of *Divorce*.

Definition of the phraſe.

TAFWEEZ AL TALÂK, or delegation of divorce, is where the huſband delegates or commits the pronouncing of divorce to his wife, deſiring her to give the effective ſentence, and it is comprehended under three different heads, termed *Option*, *Liberty*, and *Will*.

### SECT. I.

### *Of* IKHTIYÂR, *or* OPTION.

Delegation by option conferson the wife a power of divoreing herſelf; but this right of option is re- to the in which ſhe receives it,

IF a man ſay to his wife "chooſe!" (thereby meaning divorce,) or "divorce yourſelf!" the woman has a power to divorce herſelf ſo long as ſhe remains in the preciſe ſituation * in which ſhe received it; but if ſhe remove, or turn her attention to any thing elſe, the power thus veſted in her is done away, and her option no longer remains, becauſe the exerciſe of the optional power thus committed to the woman is held, by all the companions, to be reſtricted to the preciſe ſituation in which it is received; and alſo, becauſe this ſpecies of delegation is *a tranſfer of power*, not *a commiſſion of agency*, and to give effect to the former, the reply is required on the ſpot of declaration,

* Arab. *Majlis*.—This term is treated of at large elſewhere.

the

the ſame as in ſale, ſince all the moments of one ſituation are accounted as a ſingle moment; but a ſituation may be altered, ſometimes by change of place, at other times by chance of employment, becauſe a ſituation of eating and drinking (for inſtance) is not that of diſputation; and a ſituation of buſineſs, on the other hand, is neither a ſituation of eating or drinking, nor of diſputation.—The right of option of the woman is annulled upon the inſtant of her riſing from her ſeat, as that circumſtance proves her rejection of it: contrary to the caſe of a *Sillim* or a *Sirf* ſale, which does not become null upon the inſtant of riſing or removing, the cauſe of invalidity there being *removal without ſeizin.*—And where the huſband thus addreſſes his wife, an intention of divorce is a condition requiſite to the effect, (as mentioned in the preceding chapter,) becauſe the word "*chooſe!*" is one of the implications of divorce, as it is capable of two conſtructions, by one it deſires the woman to chooſe *herſelf*, and by another to chooſe *her clothes*, and ſo forth: and if ſhe chooſe *herſelf* *, a divorce irreverſible takes place. Analogy would ſuggeſt, in this caſe, that from *chooſing herſelf* nothing whatever ſhould enſue, although divorce be the intention of the huſband, becauſe he cannot himſelf effect divorce by the uſe of ſuch words; that is to ſay, if he were to ſay to his wife "I have "choſen myſelf from you," nothing whatever would follow, and conſequently how can he give a delegation of this nature?—But here divorce takes place upon a more favourable conſtruction, for two reaſons;—FIRST, all the companions agree that divorce takes place from the uſe of this expreſſion;—SECONDLY, the huſband has it at his option either to continue the marriage with his wife, or to put her away, and hence it follows that he may conſtitute her his ſubſtitute with reſpect to that rule; and where the woman is thus left to her option, and ſays "I chooſe myſelf," a divorce irreverſible takes place, becauſe the woman's *chooſing of herſelf* cannot be eſtabliſhed but by her becoming

and is annulled by her removal.

Intention, on the part of the huſband, is requiſite to conſtitute a delegation.

* This is an idiomatical phraſe in the *Arabic*, ſignifying that *ſhe chooſes her liberty from the matrimonial tye.*

ſale

ſole and independant, which can only be the caſe in irreverſible divorce, as, where it is *reverſible*, the huſband is at liberty to take her back without her conſent at any time during the continuance of her *Edit*, and thus ſhe would not become ſole and independant on the inſtant, which the nature of the caſe requires.

Under this form a *ſingle* divorce only takes place, whatever may be the intention:

It is to be obſerved that, in the caſe at preſent under conſideration, *one* divorce only can take place, and not *three*, although the huſband ſhould actually have intended the latter option not being of different deſcriptions:—contrary to *complete ſeparation*, for if the huſband were to ſay "you are completely ſeparated," intending three divorces, the three take place accordingly, where ſuch is his intention, becauſe this complete ſeparation is of two deſcriptions, the *mild* and the *rigorous*, and it follows that intention with reſpect to one of theſe holds good.

and, to effect divorce, it is requiſite that the perſonal pronoun be mentioned by one or other of the parties,

It is alſo to be obſerved that, where the huſband uſes the expreſſion "chooſe!" it is requiſite that the perſonal pronoun *ſelf* be mentioned either by the huſband or the wife, inſomuch that if the huſband were to ſay "chooſe!" and the wife anſwer "I have choſen," divorce does not take place, becauſe the effect of divorce is eſtabliſhed by all the doctors upon the condition of the mention of the perſonal pronoun by one of the parties; and alſo, becauſe the pronoun cannot be underſtood under any circumſtances of *ambiguity*, and theſe words of the woman bear two conſtructions; one, that ſhe chooſes *her huſband*, (which would not occaſion divorce;) and another, that ſhe chooſes *her ſelf*, (which would occaſion irreverſible divorce;) divorce, therefore, does not take place in defect of the pronoun, on account of the ambiguity.

that is, either declaration,

If a man ſay to his wife "chooſe yourſelf," and ſhe anſwer "I have choſen," a divorce irreverſible takes place, becauſe the word *ſelf* here occurs in the words of the huſband, and the words of the

woman are in reply to him; and hence her words virtually comprehend *herſelf*.—And, in the ſame manner, if the huſband were to ſay "chooſe an option," and ſhe reply "I have choſen," a divorce irreverſible takes place: the proofs here are drawn from the *Arabic*.

IF a man ſay to his wife "chooſe!" and ſhe reply "I have choſen "myſelf," divorce takes place, where ſuch was the huſband's intention, becauſe the word *ſelf* here occurs, in the reply given by the woman, and the expreſſion of the huſband bears the conſtruction of that which he intended.

or, wife, in her reply:

IF a huſband ſay to his wife "chooſe!" and ſhe reply to him in the *Mozâree* tenſe, [which, in the *Arabic*, is common to the preſent and future,] ſaying "I do (or will) chooſe myſelf," divorce takes place, on a favourable conſtruction.—Analogy would ſuggeſt in this caſe that no divorce takes place, becauſe, if the woman's reply be taken only in the *future*, it ſtands as a *promiſe*, and bears that conſtruction alſo, if taken in the *preſent*; and hence divorce does not take place, from her anſwer amounting only to a *promiſe* in the *former* ſenſe, and from its *ambiguity* in the *latter*; as if a man were to ſay to his wife "divorce yourſelf," and ſhe were to reply *Atliko Naſſſe* ["I "do (or will) divorce myſelf,"] in which caſe divorce does not take place, and ſo in this caſe likewiſe: but the reaſons for the more favourable conſtruction are twofold;—FIRST, it is recorded that, upon the deſcent of the paſſage of the *Koran* relating to option, *viz.* "O, "MY SON! SAY TO YOUR WIVES, *If you deſire the life of this world*," (to the end,)—the prophet ſaid to *Ayſha*, "I have ſomething to men-"tion to you, but do not reply to it until ſuch time as you conſult "your parents," after which he read to her the above paſſage, and then gave her an option; and *Ayſha* ſaid "in ſuch a matter as this "I ſhall not conſult my father or mother, but will (or do) chooſe

and divorce

option of it be expreſſed in the *Mozâ-*

to

"GOD

"God and his prophet," which words the prophet conſidered as a reply, importing "I *do* chooſe;"—SECONDLY, the word *Akhtarto*, ["*I do* (or *will*) chooſe myſelf,"] expreſſes the *preſent* literally, and the *future* figuratively, the ſame as the word *Aſhado*, [*I do* (or *will*) teſtify,] in giving evidence before a magiſtrate: contrary to where a woman anſwers *Atliko Naffee*, [*I do* (or *will*) divorce myſelf,] for here it is impoſſible to receive her words in a *preſent* ſenſe, as they do not relate to a thing now exiſting; whereas the expreſſion *Akhtarto*, [*I do* (or *will*) chooſe myſelf,] on the contrary, relates to a thing now preſent, to wit, the woman chuſing *herſelf*.

Where the huſband gives a power of option thrice repeated, and the wife make only a *ſingle* reply, yet three divorces take place from it, independant of the huſband's *intention*.

IF a man ſay to his wife "chooſe!—chooſe!—chooſe!" and ſhe reply "I have choſen the *firſt*, or "the *ſecond*," or "the *third*," three divorces take place, according to the doctrine of *Haneefa*, and the intention of the huſband is not requiſite, although the word here uſed be an implied expreſſion, becauſe his repetition of the word "*chooſe!*" proves his intention to be divorce, as the option given to the woman is repeated only with that view *.—The two diſciples ſay that only one divorce takes place in either caſe; but they agree with *Haneefa*, that the intention is not eſſential, for the reaſon above aſſigned.—And, in the ſame manner, if the woman were only to reply "I have choſen," it is effective of *three* divorces. And ſo alſo, if ſhe were to reply "I have choſen a choice."—This is admitted by all the doctors; becauſe, where ſhe only ſays "I have choſen," it is productive of three divorces; and, conſequently, when ſhe ſpeaks in a way to give this additional force, it produces the ſame *a fortiori*.—And if ſhe were to reply "I have divorced myſelf," or "I have "choſen myſelf with reſpect to one divorce," one divorce reverſible takes place.

Where the word *divorce*

IF a man ſay to his wife "one divorce is at your option," or

Some grammatical reaſoning, incapable of tranſlation, is omitted in this part.

"chooſe

" chooſe with reſpect to a ſingle divorce," and ſhe reply " I have " choſen myſelf," one divorce reverſible takes place, becauſe the man has given the woman an option ſo far as one divorce, and expreſſing it in *direct* terms (as above) the divorce proceeding from it is reverſible *.

is by the huſband, the divorce which follows is

## SECT. II.

### *Of* AMIR-BA-YED †, *or* LIBERTY.

IF a man ſay to his wife " your buſineſs is in your own hands," intending three divorces, and the woman anſwer " I have choſen " myſelf with one choice," three divorces take place. The proof of this is drawn from the nature of theſe expreſſions in their original idiom.

In tion of liberty divorce takes place according to the number mentioned by the wife, independent of the huſband's intention: and the divorce which follows is *ir-*

BUT if the woman were to reply " I have divorced myſelf with " one divorce," or " I have choſen myſelf by one divorce," one divorce only takes place; and this divorce is *irreverſible*, although the reply be delivered in *expreſs* and not in *ambiguous* terms, becauſe it bears relation to the words of the huſband, which being an implication, amount to a delegation of *irreverſible* divorce, and not of *reverſible*. —The reaſon why an intention of three divorces is admitted in the preſent inſtance, is that the words " your buſineſs is in your own

* Becauſe an *expreſs* divorce is uniformly reverſible, unleſs otherwiſe ſpecified.

† This is a contraction of *Amir-ke-ba-Yed-ke*, literally " your buſineſs is in your own " hands," *i. e.* " you are at liberty to do as you pleaſe."—The word *liberty* is adopted ſingly, for the ſake of *brevity*.

" hands" are capable of both a *reſtrictive* and an *extenſive* conſtruction, and hence may imply *three* divorces, as well as *one*; an intention to that effect therefore holds good, ſince that is one of the ſenſes in which the words may be taken: contrary to the expreſſion conſidered in the preceding ſection, to wit, " *chooſe!*" that being incapable of bearing an extenſive conſtruction, as was there demonſtrated.

a man ſay to his wife " your buſineſs is in your own hands " this day, and after to-morrow," the night is not included:—and if the woman reject the liberty thus given to her for *this* day, it is, with reſpect to *this* day, annulled; but it ſtill remains to her for the day after the morrow, becauſe the huſband has expreſsly ſpecified two particular periods, with the intervention of a ſimilar period, to which the liberty does not extend, (to wit, *to-morrow*;) and hence it appears that thoſe are two diſtinct liberties, and the rejection of one does not amount to a rejection of the other.—*Ziffer* ſays that both amount only to a ſingle liberty, this being analogous to a caſe where a man ſays to his wife " you are divorced this day and the day after to-mor- " row," which implies *one* divorce only, and not *two*, (on the idea of one taking place this day, and the other the day after the morrow;) and hence, in like manner, one liberty only is implied.—But to this it may be replied that divorce is not of a nature to admit reſtriction to any particular time, whereas liberty is capable of ſuch reſtriction; and hence that which regards the *firſt* period mentioned is reſtricted to *that* period, and that which regards the *ſecond* period commences *de novo*.

be reſtricted to a particular time, or to ſeveral different ſpecified periods of time:

If a man ſay to his wife " your buſineſs is in your own hands to- " day and to-morrow," the night is comprehended in it: and, if the woman ſhould reject the liberty on the inſtant, it is totally annulled, and does not return on the morrow, (according to the *Zâhir Rawâ-*

as this amounts only to one liberty, becauſe that between the

two periods ſpecified no ſimilar period intervenes to which the liberty does not extend.

OBJECTION.—Although a period ſimilar to the two ſpecified does not intervene, yet *night* intervenes, from which it would follow that the liberty given for to-day and to-morrow is not a ſingle liberty.

REPLY.—Two diſtinct liberties are not occaſioned by this circumſtance, becauſe the intervention of *night*, although it may interrupt or ſuſpend a matter, does not divide or terminate it, as in a public court, for inſtance, which may, on account of the night coming on, be adjourned, without any actual breach in the ſeries of its proceedings; thus it is the ſame as if the man were to ſay "your buſineſs is in your "own hands for *two days*," in which caſe a ſingle liberty only is underſtood.

IT is recorded, from *Aboo Haneefa*, that although the woman ſhould reject the liberty on the inſtant, yet it ſtill remains with her for the following day, as ſhe is not empowered to reject it, (that is to ſay, ſhe cannot refuſe her aſſent to receiving it,) it becoming eſtabliſhed in her upon the huſband ſaying "your buſineſs is in your own "hands," independent of her conſent; (as in the direct execution of divorce, for inſtance, where, if the huſband were to ſay "you are "divorced," divorce takes place independent of the conſent of the wife;) and ſuch being the caſe, liberty remains ſtill with her for the morrow, when ſhe may lawfully make uſe of it by chuſing divorce. The ground upon which the *Záhir Rawáyet* proceeds, is that as, if ſhe were to chooſe divorce as *this* day, no liberty remains with her for *to-morrow*, ſo if ſhe reject the liberty this day, no right of choice remains with her for to-morrow, becauſe a perſon who has a choice of two things is not authorized to chooſe more than *one* of them.

and it is not annulled by the wife's rejection of it until the time or times mentioned be fully expired,

It is recorded, from *Aboo Yooſaf*, that if a huſband ſay to his wife "your buſineſs is in your own hands for this day, and the "ſame for to-morrow," this amounts to two liberties, becauſe here the delegation applies to two portions of time, diſtinctly and ſeparately expreſſed: contrary to the preceding caſe, where the times are not thus diſcriminated, but are both mentioned under one head.

The time of occurrence of any ſpecified event.

If a man ſay to his wife "your buſineſs is in your own hands on day on which ſuch an one arrives," and the perſon mentioned arrive, but his arrival be not known to the wife until night, her right of choice no longer remains, becauſe liberty is a thing of continuance, and hence the word *day*, with which it is aſſociated, is reſtricted to the *day* time, and that having paſſed away, it diſcontinues.

It is not annulled by *delay*, (where there is no ſpecification of time,) nor until the wife riſes from her ſeat, &c

If a man ſay to his wife "your buſineſs is in your own hands," or "chooſe!" and ſhe delay anſwering the whole day, and do not riſe from her ſeat, her right of option remains to her ſo long as ſhe does not employ herſelf in any other matter, becauſe a delegation of divorce by the forms of *liberty* or *option* is *a transfer of power* to execute divorce, (that is, the huſband by that delegation empowers his wife to give divorce, as perſons are termed *empowered* who act for *themſelves*, and the act of the woman here is *pronouncing divorce upon herſelf*, wherefore this property is ſuppoſed to reſide in her,)—and *in transfer of power* a privilege of reply continues to the end of the ſituation of declaration, as has been demonſtrated in the beginning of this chapter. And if the woman *hear* the declaration, reſpect is had to the ſituation in which ſhe hears it; but if ſhe ſhould not *hear* it, reſpect is, in that caſe, had to the ſituation in which ſhe is informed of it, becauſe, although *Amir-ba-Yed*, or *liberty*, be a transfer of power to execute divorce, yet the property of *ſuſpenſion* is alſo allowed to exiſt in it, as it is a *ſuſpenſion* of the event of divorce upon the

the act of the wife in pronouncing it, and hence it comprehends two things, a transfer of *power*, and a *ſuſpenſion*;—in the ſenſe of a *ſuſpenſion*, it continues in force beyond the *Majlis*, or continuance of the ſituation of declaration, to the *Majlis* or ſituation in which the woman underſtands or is informed of it, where ſhe is abſent, or in the ſenſe of a *transfer of power*, it is annulled, on her riſing from her ſeat, where ſhe is *preſent*; but the ſituation of the huſband is not regarded, becauſe the ſuſpenſion is *abſolute* with reſpect to *him*: contrary to a caſe of *ſale*, as in that the declaration of ſale does not remain in force beyond the *Majlis* of declaration, ſince in a ſale the *Majlis* or ſituation of the *ſeller* is regarded as well as that of the *purchaſer*; and the retraction of the *ſeller*, at any time previous to the conſent of the purchaſer, is admitted, as *ſale* is merely a *transfer of property*, in which ſuſpenſion is not at all underſtood; now ſince it appears that the ſituation of the *wife* alone is regarded, and not that of her *huſband*, we muſt recollect that her ſituation may be altered in various ways, ſometimes by removal from one place to another, and ſometimes by her employing herſelf in any other matter, as was previouſly ſtated.

THE option of a woman who is left at liberty to chooſe is annulled on the inſtant of her riſing from her ſeat, as this act proves rejection, becauſe by getting up the attention is deranged and withdrawn from the preſent ſubject: contrary to a caſe where ſhe delays anſwering for a whole day, for inſtance, and does not riſe from her ſeat, nor employ herſelf in any thing elſe; for here her option remains to her, as a *Majlis* or ſituation is ſometimes of a *ſhort* and ſometimes of a *long* duration, wherefore her right of option continues until ſuch time as ſomething appears ſufficient to terminate the *Majlis*, or to prove *rejection*.—And here it is to be obſerved, that by *employing herſelf in any thing elſe* is to be underſtood ſuch a thing as is, in its nature, terminative of her *ſituation*, and *not* any *general* thing.

but it is annulled on the inſtant of her riſing from her ſeat.

It is not annulled by a change of poſture from a mere *active*

If the woman be *ſtanding*, at the period of receiving the liberty of option from her huſband, and afterwards ſit down, her option remains, and is not annulled, as her *ſitting* does not imply *rejection*, but rather the contrary, ſince her attention is thereby more collected.—And the rule is the ſame where the woman, being ſeated, leans upon a *pillow*, or having leaned upon her pillow, (at the time the huſband ſpeaks,) ſits up *without* a pillow, becauſe theſe are no more than changes from one mode of ſitting to another, and do not import rejection any more than where a perſon ſitting upon *one* part changes and ſits upon *another*.—Our author remarks that this is the doctrine of the *Jama Sagheer*,, and is moſt approved.—It is elſewhere ſaid, that where the woman is ſitting up *without* a pillow, and then *leans* upon a pillow, option no longer remains, as this ſhews an indifference reſpecting it amounting to a rejection.

A wife may ſignify her with to conſult her friends, without prejudice to her right of option.

If the woman, on receiving a liberty of option, ſay that ſhe wiſhes to ſee her father, in order to conſult him, or to get witneſſes, in order to have their evidence, her option remains, becauſe counſel is expedient in every buſineſs, and witneſſes are requiſite to controvert the huſband's denial of the fact; and hence neither of theſe withes expreſſed on her part is a proof of rejection.

If the woman be riding upon a quadruped, or in a camel-litter, and ſtop the animal on her huſband's offer of liberty, ſtill the right of option is not annulled: but if ſhe proceed upon her journey, it is annulled, becauſe the *going* on or *ſtopping* of the *animal* is the ſame with thoſe acts in the *woman*, ſince its motions depend upon the *rider*.

A boat or ſhip is the ſame as a houſe, as by the going on of the veſſel the woman's option is not annulled, becauſe its motion does not always depend upon the perſon whom it carries.

SECT.

## SECT. III.

### *Of* MASHEEAT, *or* WILL.

IF a man ſay to his wife "divorce yourſelf," not having any particular intention, or intending *one* divorce, and the woman reply "I have divorced myſelf," a ſingle divorce reverſible takes place: and if ſhe were to ſay "I have given three divorces," three accordingly take place, where ſuch is the intention of the huſband: the reaſon of this is that divorce, being a general expreſſion, takes place in the loweſt ſpecies; but as, like other generic nouns, it alſo applies to the *whole*, an intention of three divorces is admitted: and, where there is no particular intention, a ſingle divorce reverſible takes place, becauſe the power of divorce is delegated to the wife in expreſs terms, and expreſs divorce occaſions a divorce reverſible.—If the huſband ſhould in this caſe intend *two* divorces it is not admitted, becauſe a generic noun does not bear that conſtruction, where the woman is *free*; but, if ſhe be a *ſlave*, an intention of *two* divorces is admitted, that being conſidered as the *whole*, with reſpect to *her*.

Where a man empowers his wife to divorce herſelf in expreſs terms, the divorce which follows is reverſible,

IF a man ſay to his wife "divorce yourſelf,"—and ſhe reply "I have ſeparated myſelf," a divorce reverſible takes place, becauſe ſeparation is of the ſame nature with divorce, ſince, if a huſband were to ſay to his wife "I have irreverſibly ſeparated you [from me,] intending *divorce*, a divorce irreverſible takes place:—and, in the ſame manner, if the woman were (as here) to ſay "I have ſeparated myſelf," and her huſband reply "I have conſented thereto," ſhe becomes irreverſibly divorced; and hence the expreſſion of the woman "I have "irreverſibly ſeparated myſelf," ſtands the ſame as the huſband's delegation, which is of *ſimple* divorce: but here the deſcription of *irreverſibility*

although her form of an *irreverſible* divorce.

*verſibility* which the woman has added to the *ſimple* divorce is held to be *nugatory*; and the ſimple divorce only takes place; as if ſhe had replied "I have repudiated myſelf by one irreverſible divorce," in which caſe a divorce *reverſible* only would take place: contrary to a reply of option, for if ſhe were to anſwer "I have choſen myſelf," no divorce whatever would take place, as theſe words are not of the ſame nature with divorce, for which reaſon it is that if a man were to ſay to his wife "I have choſen you," or "chooſe!" intending divorce, no divorce whatever takes place; and in like manner, if the woman were to ſpeak firſt, ſaying "I have choſen myſelf," and her huſband reply "I have conſented," no divorce whatever takes place: yet it is an univerſally received doctrine that if the woman ſay "I have choſen myſelf," in reply to a delegation of option, divorce takes place; but the words of the huſband in the preſent caſe, namely, "divorce yourſelf," is not a delegation of option, and hence the reply of the woman, as above ſtated, "I have choſen myſelf," is nugatory.

It is recorded, as an opinion of *Haneeſa*, that in the preſent caſe divorce does not take place from the reply of the wife, "I have ſeparated myſelf," becauſe the woman acts contrary to the power veſted in her, by taking upon her to pronounce a thing different from that delegated to her by her huſband, as the expreſſion "ſeparated" is different from divorce, the one being *implicative* and the other *expreſs*; huſband delegated *expreſs* divorce only.

The power, If a huſband ſay to his wife "divorce yourſelf," he is not at liberty to retract, as his expreſſion involves a vow *, becauſe he has,

* Literally, "*his words expreſs* (or amount to) *a Yameen*," that is to ſay, ſuſpend the matter ſpoken of upon the occurrence of ſome condition on the event of which that matter takes place, independant of any farther volition on the part of the ſpeaker; and it is therefore, with reſpect to him, abſolute and unretractable. *Yameen* is here tranſlated *vow*, as the above is one definition of vow.

in this inſtance, ſuſpended divorce upon the execution of it by his wife, and a vow is an obligatory act, for which reaſon a man is not allowed to recede from it. If, however, the woman riſe from her ſeat, or remove from the place, the words of the huſband, as above, transferring the power of divorce to her, are annulled, their force being confined to the ſituation where the offer is made:—contrary to where he ſays to her "divorce your *Zirra*, [fellow-wife,"] as this is *a commiſſion of agency*, which is not reſtricted to *place*, and may be therefore retracted by the conſtituent whenever he pleaſes. not be retracted.

IF a huſband ſay to his wife "divorce yourſelf when you pleaſe," ſhe is at liberty to divorce herſelf either upon the ſpot or at any future period, becauſe the word *when* extends to all times; and hence it is the ſame as if he were to ſay "divorce yourſelf at whatever time "you like." The power may be granted *gene-*

IF a man ſay to another "divorce my wife," the perſon thus addreſſed may divorce her either upon the ſpot or at any other time, and the huſband may alſo retract, becauſe this is a commiſſion of agency, and therefore is not abſolute, nor reſtricted in point of place: contrary to where he ſays to his wife "divorce yourſelf," this being a *tranſfer of power*, not a *commiſſion of agency* *, as the woman thus addreſſed acts from herſelf and not from another. But if a man ſay to another "divorce ſuch an one my wife," (adding) "if you pleaſe," the man is empowered to divorce the wife upon the ſpot only; and here the huſband cannot retract.—*Ziffer* ſays that this and the preceding caſe are alike, the addition of "*if you pleaſe*" in the *one* inſtance, or the omiſſion of it in the *other*, making no difference, becauſe the perſon ſo commiſſioned afterwards acts from his own will, like an

* That is to ſay, after being thus empowered, ſhe ſtands as a *principal* in the execution of divorce, and not as an *agent*; and a commiſſion of agency may be annulled at pleaſure, whereas the power devolved to another to act as a principal cannot be ſo.

agent in ſale, to whom it may have been ſaid "ſell this thing, *if you* "*pleaſe.*"—The argument of our doctors is that the words of the huſband are a transfer of power, as he ſuſpends the divorce upon the will of the perſon whom he addreſſes, and he is the principal who acts from his own will; divorce, moreover, admits of ſuſpenſion, whereas ſale does not.

A wife empowered to give herſelf three divorces may give herſelf but one divorce:

If a man ſay to his wife "give yourſelf three divorces," and ſhe herſelf *one* divorce only, it takes place accordingly, becauſe, having been empowered ſo far as *three* divorces, it neceſſarily follows that ſhe is enabled to give a *ſingle* one.

but, when empowered to give herſelf *one* divorce only, ſhe cannot give herſelf *three*.

If a man ſay to his wife "divorce yourſelf once," and ſhe give herſelf three divorces, nothing whatever takes place, according to *Haneefa*.—The two diſciples ſay that a ſingle divorce takes place, becauſe the woman has done that to which ſhe *was* empowered, together with that to which ſhe was *not* empowered; and hence it is analogous to a caſe in which a huſband ſays to his wife "I repudiate you by a "thouſand divorces" where three divorces take place, becauſe he has pronounced that to which he *is* empowered along with that to which he is *not* empowered; conſequently the former takes effect, but the latter is nugatory; and ſo likewiſe in the preſent caſe.—The argument of *Haneefa* is that the wife has, in this caſe, attempted to do an act, the power of doing which has not been delegated to her by her huſband, and hence ſhe appears to divorce herſelf, *firſt*, and not *in reply* to the deſire expreſſed by him, as he has empowered her ſo far as *one* divorce only, and between *three* divorces and *one* there is a contradiction, the word *three* expreſſing a compound number, and *one* a ſingle unit: contrary to where a man pronounces *a thouſand* divorces upon his wife, as here *three* take place, becauſe he acts in conſequence of the deſire of another:—and contrary alſo to the preceding caſe, (viz. where the huſband deſires his wife to repudiate herſelf by *three* divorces, and ſhe declares *one* only,) for here one divorce takes place on account

account of her being empowered ſo far as *three*; whereas, in the preſent caſe, ſhe is not empowered ſo far as *three*, and having acted contrary to the power veſted in her, what ſhe does is nugatory.

If a man deſire his wife to repudiate herſelf by a *reverſible* divorce, and ſhe divorce herſelf *irreverſibly*, or the contrary, that mode of divorce takes place which was deſired by the huſband: thus, if a man ſay to his wife "give yourſelf one divorce reverſible," and ſhe reply "I have given myſelf a divorce *irreverſible*," a divorce reverſible takes place, becauſe the woman has declared a divorce in expreſs terms, but with an additional deſcription, and the *latter* is nugatory, as being contrary to the deſire expreſſed by the huſband; but the *former* (which is in its nature *reverſible*) takes place, as being in conformity to the huſband's deſire:—and, on the other hand, if the huſband ſay to his wife "give yourſelf one divorce irreverſible," and ſhe reply "I have given myſelf a divorce reverſible," a divorce irreverſible takes place, becauſe the deſcription of *reverſibility* attached to the divorce by the wife is nugatory, ſince the huſband, having himſelf affixed a deſcription to it, does not require more of his wife than ſimply *divorce*, without any deſcription; hence it is the ſame as if ſhe had pronounced the divorce itſelf in a defective way: thus the divorce takes place under whatever deſcription may have been affixed to it by the huſband, whether *reverſible* or *irreverſible*.

Where the wife's reply diſagrees with the huſband's declaration in reſpect to the *nature* of the divorce, it takes place according to his declaration, not according to her reply.

If a man ſay to his wife "divorce yourſelf thrice, *if you pleaſe*," and ſhe give herſelf one divorce, no effect whatever follows, becauſe the meaning of his words is "if you deſire *three* divorces, repudiate "yourſelf," and the woman giving *one* only, it appears that ſhe does not deſire *three*, and hence, the condition not being fulfilled, the divorce does not take place.

Where the power is conditional upon the pleaſure of the wife, it is annulled by her reply diſaccording with the huſband's declaration;

If a man ſay to his wife "divorce yourſelf once, *if you pleaſe*," and ſhe give herſelf *three*, no divorce whatever enſues, according to

*Haneefa*, becauſe a deſire of *one* divorce only is eſſentially different from a deſire of *three*, this being analogous to a caſe of execution as before mentioned, that is to ſay, as the execution of *three* divorces in that inſtance was demonſtrated to be a ſenſible contradiction to that of *one*; ſo, in the preſent inſtance, a wiſh for *three* is contradictory to a wiſh for *one*; and, from the woman pronouncing upon herſelf *three* divorces, it appears that ſhe was not deſirous of *one*; and hence the condition is not fulfilled.—The two diſciples ſay that one divorce takes place on this occaſion, becauſe a deſire for one divorce is comprehended in a deſire for *three*, on the ſame principle as the execution of *three* divorces comprehends that of *one*, (agreeably to their doctrine before mentioned;) and hence the condition is virtually fulfilled.

by her ſuſpending her

If a man make a delegation of divorce to his wife, by ſaying to her, "you are divorced if you be deſirous of it," and ſhe reply "I "am deſirous, if you deſire it," and he reply, in return, "I am de- "ſirous," (intending divorce,) the delegation is void, becauſe the huſband has ſuſpended the divorce upon the will of the woman where that is unreſtricted, that is to ſay, independant of any thing elſe; but, from the converſation, it appears that ſhe ſuſpends her will upon that of her huſband, and hence the condition of divorce, namely, the independant will of the woman, is not fulfilled; thus ſhe does not act from option; and the delegation is void of courſe.—The words of the huſband, in the laſt reply, namely, "I am deſirous," are not effective of divorce, although ſuch be his intention, becauſe there is no mention whatever of divorce in the words of the woman, from which the huſband's wiſh to that effect might be inferred in his anſwer, and the *intention* alone does not ſuffice, as it has no operation with reſpect to a thing not mentioned; whereas, if he were to ſay, "I am deſirous "*of your divorce*," it takes place if he ſo intend it, becauſe he in this caſe appears to give divorce *de novo*, as a deſire expreſſed with reſpect to any thing implies the exiſtence of that thing, and hence his expreſſion "*I am deſirous* of your divorce," is as if he were to ſay "I

*cauſe*

"*cauſe* your divorce," which accordingly takes place: contrary to what would follow, if he were to ſay "I intend your divorce," in which caſe divorce would not take place, becauſe an intention expreſſed does not imply the exiſtence of the thing intended.—If, moreover, in the caſe now recited, the woman were to reply "I am de-"ſirous if my *father* be ſo," or "if ſuch a circumſtance happen," (meaning a circumſtance which does not yet exiſt,) and the father afterwards ſignify his deſire, or the circumſtance upon which ſhe has ſuſpended the divorce come to paſs, yet divorce does not take place, and the delegation is void:—but if ſhe, in ſaying "if ſuch a thing "happen," mean a thing which has already paſſed, divorce takes place, becauſe ſuſpenſion upon a condition already fulfilled amounts to immediate or unſuſpended divorce.

When the power is expreſſed with (in reſpect to time,) it is perpetual, places:

IF a man ſay to his wife "you are divorced *when* you pleaſe," or "*whenever* you pleaſe," and ſhe reject his offer, ſaying "I am "not deſirous of it," her rejection is not final, for here the power veſted in her is not confined to the place or ſituation where it is delegated, on which account ſhe is at liberty to uſe it either *there* or *elſewhere*, becauſe the terms *when* and *whenever* are uſed with reference to *all* times, and extend to every time indiſcriminately, and hence the ſenſe of the expreſſions "when you pleaſe," and "when-"ever you pleaſe," is "at whatever time you pleaſe," and they are, therefore, not confined to *place*. And if the woman reject at preſent, ſtill it is not a final rejection, becauſe her huſband has empowered her to divorce herſelf *at whatever time ſhe pleaſes*, wherefore the power does not apply to the time when ſhe does *not* pleaſe.—But it is to be obſerved that the woman is not in this caſe authorized to pronounce upon herſelf more than one divorce, becauſe the words *when* and *whenever* apply to all times, but not to more than a ſingle divorce; thus ſhe is authorized to divorce herſelf *at whatever time* ſhe pleaſes, but not to pronounce divorce *as often* as ſhe pleaſes.

*a man ſay to his wife "you are divorced as often as you "pleaſe," ſhe is at liberty to divorce herſelf time after time, until three divorces,* becauſe the expreſſion *as often* admits a repetition of the act:—but it is to be obſerved that this ſuſpenſion of divorce upon the woman's will is reſtricted ſolely to the marriage at preſent exiſting, and does not extend to that which may afterwards occur; and hence if the woman give herſelf three divorces, and be again married to the ſame man, after being rendered lawful to him, and then pronounce divorce upon herſelf, it does not take place, becauſe a marriage has then occurred *de novo*;—and it is alſo to be remarked that the woman is not at liberty to pronounce the three divorces upon herſelf in one ſentence, becauſe the expreſſion "*as often as*" implies *unity*, and does not admit of the circumſtances to which it relates being taken collectively, and hence it is lawful for the woman to pronounce three divorces upon herſelf at *three ſeparate times*, but not at *once*.

but not when it is expreſſed with an un- ed par- re. ce.

If a man ſay to his wife "you are divorced *wherever* you pleaſe," yet the woman cannot divorce herſelf but in that place; and if ſhe riſe from her place before ſhe pronounce it, her will is not regarded afterwards, becauſe the words *wherever*, or *whereſoever*, are adverbs of place, and divorce has no connexion with place; the word *whereever* is therefore nugatory, and the will only remains, which is confined to the preciſe place: contrary to the caſe of *time*, (that is, where the huſband ſays "*when* you pleaſe,") to which divorce has a relation, as it may take place at *one* time and not at *another*, and hence the mention of time in divorce is regarded, whether it be *particular*, as "you are divorced *to-morrow*;" or *general*, as "you are divorced "*when you pleaſe.*"

If a man ſay to his wife "you are divorced *how* you pleaſe," and ſhe remain ſilent, a divorce reverſible takes place, whether ſhe be s or not: or, if ſhe break ſilence, and ſay "I am deſirous of

" one divorce reverſible," and the huſband reply " ſuch alſo is my " deſire," divorce takes place accordingly, becauſe a conformity is eſtabliſhed between the will of the wife and the intention of the huſband; but where the wife deſires three divorces, and the huſband only *one* divorce irreverſible, or the contrary, a divorce reverſible takes place, becauſe her act is rendered nugatory by the non-conformity of her will with that of her huſband, and his words (viz. " you are divorced,") remain, which are effective of a divorce reverſible: but if the huſband have no particular intention, the will of the wife alone is regarded, inſomuch that, whether ſhe deſire *three* divorces, or only *one irreverſible* divorce, it takes place accordingly, in the opinion of our modern doctors, as this is what a right of option requires.—The compiler of the *Hedáya* obſerves that *Mohammed*, in the *Mabſoot*, ſays that the taking place of one divorce independant of the will of the wife, as above, is the doctrine of *Haneefa*; but that, with the two diſciples, divorce does not take place ſo long as the woman does not divorce herſelf; thus ſhe has her option of either *one* divorce *reverſible* or *irreverſible*, or of *three* divorces: and the ſame difference of opinion ſubſiſts with reſpect to manumiſſion; that is to ſay, if a maſter ſay to his ſlave " you are emancipated *how* you pleaſe," the ſlave is free upon the inſtant, according to *Haneefa*; whereas, according to the two diſciples, he is not free, ſo long as he is not deſirous of being ſo.—The argument of the latter is that the huſband has delegated to his wife a power to effect divorce upon herſelf under whatever deſcription ſhe pleaſes, whether a *ſingle* divorce *reverſible* or *irreverſible*, or *three* divorces; and hence it is indiſpenſably requiſite that the divorce itſelf be alſo ſuſpended upon her will, ſo that a will ſhall be confirmed to her in all circumſtances, that is, both *before* carnal connexion and after it; for, if the divorce itſelf were not ſuſpended upon the will of the wife, it would follow that the wife could have no will with reſpect to the deſcription of the divorce before carnal connexion, as before conſummation ſhe cannot give herſelf three divorces, ſince in ſuch caſe the wife becomes irreverſibly repudiated by a

ſingle divorce before the paſſing of her *Edit*, and no longer remains a ſubject of divorce.—The argument of *Haneeſa* is that the word "*how*" implies a requiſition of deſcription; now delegation of the deſcription of a thing requires the exiſtence of the ſubject of it, and divorce cannot have exiſtence but by taking place.

If a man ſay to his wife "you are divorced by *as many as* you "pleaſe," or "by *what* you pleaſe," ſhe is empowered to divorce herſelf by whatever number ſhe pleaſes, as the expreſſion *as many as* and *what* are uſed with relation to number; and hence the huſband appears to have delegated apower to the woman with reſpect to whatever number ſhe may approve. If, however, ſhe riſe from her place before pronouncing any divorce the delegation is void; or if ſhe reject, her rejection is final, becauſe this ſort of *ſingular* delegation does not argue or admit a repetition of the act; and the addreſs implying a thing required to be *immediately* determined upon, conſequently demands an *immediate* anſwer.

If a man ſay to his wife "divorce yourſelf *what* you pleaſe, out "of *three*," ſhe is empowered to give herſelf *one* or *two* divorces, but not *three*, according to *Haneeſa*.—The two diſciples, on the contrary, maintain that ſhe may give herſelf *three* divorces, if ſo inclined.—The arguments on both ſides are drawn from the *Arabic*.

CHAP.

## CHAP. IV.

### Of *Divorce* by a *Yameen*, or *Conditional Vow*.

*Yameen* is here underſtood the ſuſpenſion of divorce upon a circumſtance which bears the property of a *condition*, and this ſuſpenſion is termed *Yameen*, becauſe *Yameen*, in its primitive ſenſe, ſignifies *ſtrength* or *power*; and the ſuſpenſion is a motive to the ſuſpender to be ſtrong in the avoidance of the condition, in ſuch a manner that he may not be ſubjected to the *conſequence* or *penalty*, which is *divorce* or *manumiſſion*.

Definition of the term *Yameen* as applied to divorce.

WHERE a man refers or annexes divorce to marriage, (that is, ſuſpends it upon marriage,) by ſaying to any ſtrange woman "If I "marry you, you are divorced," or by declaring "any woman "whom I may marry is divorced," in this caſe divorce takes place on the event of ſuch marriage.—*Shafei* maintains that divorce does not take place, the prophet having ſaid that there is no divorce antecedent to marriage.—The argument of our doctors is that the annexing of divorce to marriage is a *Yameen*, or ſuſpenſion, as appears from its containing a condition and a conſequence, and preſent authority is not requiſite to its propriety, becauſe the divorce does not take place until the occurrence of the condition, at which time the authority neceſſarily takes place; and the end which it anſwers, before the occurrence of the condition, is, that it reſtrains the vower from marrying that woman, as his meaning in the expreſſion is "I will not marry you, "or, if *I do*, you are divorced." With reſpect to the ſaying of the prophet cited by *Shafei*, it goes to the prohibition of immediate

Divorce, pronounced with a reference to a future marriage; the reference of ſu

divorce only, and not of that which is ſuſpended upon the occurrence of a future poſſible event.

or upon the occurrence of any *other* circumſtance on which it may be conditionally ſuſpended;

If a man annex divorce to a condition ſpecified, by ſaying to his wife "if you enter this houſe you are under divorce," the divorce takes place upon the occurrence of the condition. This is univerſally admitted by the learned, becauſe of the exiſtence of the matrimonial authority, at the time of the huſband's declaration; and it is evident that this declaration remains in force until the condition be accompliſhed.

provided it be pronounced during an *actual*, or with reference to an *eventual*, poſſeſſion of authority.

But the annexing of divorce to marriage is not lawful, unleſs the vower be either authorized at the time, or annex divorce to a future poſſeſſion of authority; as it is indiſpenſably requiſite that the penalty be a thing of probable occurrence, in order that the apprehenſion of it may operate upon the fears of the vower, and that thus the property of *Yameen*, (viz. reſtraint from the apprehenſion of penalty,) do really exiſt at the time of declaring the condition, in virtue either of *preſent* authority, or of a reference to a *future* authority.

Objection.—What is now ſaid appears to contradict the doctrine advanced in the preceding caſe, of a man annexing divorce to marriage, by ſaying to a ſtrange woman "if I marry you, you are divorced," for in that caſe he is neither in *preſent* authority, nor does he annex divorce to the future poſſeſſion of it.

Reply.—Although he does not annex the divorce to an exiſting right, yet he annexes it to the cauſe of a right which may exiſt, (namely, marriage *,) and annexation to the cauſe is the ſame as to the right itſelf, becauſe in the former the latter is involved.—But if a man ſay to a ſtrange woman "if you enter ſuch an houſe you are "divorced," and he afterwards marry her, and ſhe then enter the

* Marriage being the cauſe of the right to divorce.

ſaid

ſaid houſe, divorce does not take place, becauſe in this caſe he is neither inveſted with any preſent right, nor does he annex the divorce either to a future right or to the *cauſe* thereof.

Five conditional particles of various effect.

THE conditional particles are as follows, viz. "*if*,"—"*when*,"—"*whenever*,"—"*whenſoever*,"—and "*as often as*."—Of theſe the particle "*if*" is ſolely conditional; in the uſe of the others condition is implied.—And under the four firſt of theſe expreſſions, upon the condition being fulfilled, the *Yameen*, or vow, is completed, and no longer exiſts; that is to ſay, if the condition ſhould again occur, the penalty is not incurred a ſecond time, becauſe the words abovementioned do not involve all future acts of the kind expreſſed in the condition, nor do they demand a repetition of the penalty; and hence, where the act which conſtitutes the condition is once found to occur, the condition is fulfilled, and no longer remains; and the vow does not continue in force without the condition; but from this rule muſt be excepted the expreſſion "*as often as*," which applies univerſally, and ſuch being the caſe, it is requiſite that the penalty be repeatedly incurred;—in every caſe, therefore, where divorce is the penalty derived from the uſe of "*as often as*," it repeatedly takes place upon the recurrence of the condition.

IF a man ſay to his wife "you are divorced *as often as* you enter "the houſe," and ſhe enter it *three times*, and then marry another man, and afterwards again marry her firſt huſband, and the condition ſhould then occur, divorce does not take place, as no penalty remains on account of its having been completely incurred in the three divorces which followed the repetition of this act in the firſt marriage; and as the continuance of a *Yameen*, or conditional vow, depends upon the continuance of the condition and the penalty, when theſe no longer remain the vow diſcontinues alſo.

If the words "*as often as*" be introduced in reference to marriage, by a man ſaying "as often as I marry any woman ſhe is divorced," divorce takes place upon every inſtance of his marrying afterwards, though he ſhould marry the woman a *ſecond* time, after her having been in the interim married to another, becauſe here the penalty is referred to the power he poſſeſſes of divorce, which is a conſequence of marriage; and as this power is not reſtricted to any particular inſtance, but invariably accompanies every marriage, it follows that the penalty muſt take place upon every occurrence of the condition.

A conditional vow of divorce is not annulled by the extinction of property.

A conditional vow of divorce is not annulled by the extinction of the right; that is, if a man ſay to his wife "you are divorced, "when you enter this houſe," and he afterwards give her one or two divorces, and her *Edit* be completed, the force of the vow ſtill continues under the extinction of right occationed by ſuch divorce; becauſe the condition ſpecified, namely, her entrance into the houſe, has not yet been accompliſhed, and therefore ſtill continues to exiſt; and the penalty remains, becauſe of the continuance of its ſubject; wherefore the vow alſo continues: thus, if the condition take place during the *exiſtence* of right, the vow is accompliſhed, and divorce takes place, becauſe of the occurrence of the condition, and becauſe the ſubject is liable to the penalty; and if it occur under the *extinction* of right, as above, the vow is done away, on account of the condition having occurred: but no divorce takes place, becauſe in this caſe the woman is not a ſubject of divorce; for a ſubject of divorce is a woman who is a property according to the right of marriage.

Caſe of a diſpute between the parties concerning the occurrence of the condition;

If a huſband and wife differ concerning the condition, the former aſſerting that it had not yet occurred, and the latter that it had, the declaration of the huſband is to be credited, unleſs the woman produce proof in ſupport of her allegation, becauſe the huſband is as the defendant, denying the exiſtence of divorce, and the conſequent extinction of his right; whereas the wife is as the plaintiff, affirming it.

This relates to a caſe where the condition is of ſuch a nature that its occurrence may be aſcertained by other means than by the teſtimony of the wife herſelf; but if it be of ſuch nature that no evidence but her own is competent to the aſcertaining of the condition, her declaration is to be credited in preference to that of her huſband. This, however, holds with reſpect to herſelf only, and not with reſpect to any other woman; for if a man ſay to his wife "upon the "coming on of your courſes you are divorced,—and alſo ſuch an one "my other wife," and the woman afterwards declare her menſtruation to have commenced, divorce takes place upon *her* only, and not upon the *other* wife. This proceeds upon a favourable conſtruction.—Analogy would ſuggeſt that divorce does not take place upon her either, becauſe ſhe is in this caſe in the character of plaintiff, affirming the occurrence of the condition, and the conſequent divorce, and the huſband is as the defendant, denying; and the declaration of a plaintiff is not to be credited but upon proof; but the reaſon for the more favourable conſtruction of the law in this inſtance, is that the woman is inquiſitor with reſpect to herſelf, as the occurrence of her courſes cannot be known but through her; and hence her declaration is credited on this occaſion as well as in caſes of *Edit*, or of carnal conjunction; that is to ſay, if a woman, having been divorced, ſhould declare that "her *Edit* having paſſed, ſhe had then been married to a "man, who having duly conſummated, had then divorced her, and "that her *Edit* from that huſband had alſo elapſed,"—this her declaration is credited, ſo as to render her lawful in marriage to her firſt huſband; and in the ſame manner the declaration of the wife is credited with reſpect to herſelf in the preſent inſtance; but it is not ſo with reſpect to the *other* wife, becauſe this one is only in the character of a *witneſs* with reſpect to the other, and the declaration of a ſingle witneſs is not to be credited, eſpecially where ſhe is liable to ſuſpicion, which muſt be the caſe in the preſent inſtance, on account of the enmity ſubſiſting between her and the other from the latter being

her

her *Zirra*, or fellow-wife; whence her declaration reſpecting ſuch an one is not credited.

In the ſame manner, if a man ſay to his wife "if you be deſirous "that God ſhould torment you with hell fire, you are divorced, and "this my ſlave is free," and ſhe reply "I am deſirous of ſuch tor- "ment," or if he ſhould ſay "if you love me you are under divorce, "and this my other wife along with you," and ſhe reply "I love "you," in both caſes divorce takes place upon the woman who is addreſſed in theſe terms; but the ſlave is not emancipated in the *former* inſtance, nor is the fellow-wife repudiated in the *latter*, for the reaſons mentioned in the preceding caſe.

Objection.—It would appear that divorce ought not to take place in the former of theſe inſtances, as the falſehood of the woman's reply is evident, ſince no one can be ſuppoſed deſirous of *hell fire*.

Reply.—The falſehood is not certain, as it is poſſible that her hatred of her huſband may be ſufficiently violent to induce her to wiſh for a releaſe from him at the expenſe even of infernal tor- ments. But notwithſtanding that the penalty, (to wit, divorce,) be annexed to her reply, with reſpect to this woman, although ſhe ſpeak falſely; yet, with reſpect to the *other* perſon who is named, divorce or manumiſſion are not ſo annexed, and conſequently that per- ſon is unaffected by it.

Rule in caſe of divorce ſuſpended upon the courſes

If a huſband ſuſpend divorce upon the coming of his wife's courſes, ſaying "upon the coming of your courſes you are divorced," and ſhe afterwards perceive the ſigns of the menſtrual diſcharge, the divorce does not take place until the diſcharge ſhall have con- tinued for *three days*, as that which terminates within a leſs time is not a regular diſcharge; but where the diſcharge has con-

tinued

tinued for *three days*, divorce is decreed from the period of its commencement.

BUT if a man ſay to his wife "you are divorced upon *one term* of "your courſes," ſhe is not repudiated until ſhe become clean from her next ſucceeding courſes, and her *Tohr*, or term of purity, arrive; becauſe by *one term* of the courſes is to be underſtood a complete menſtruation, and menſtruation is not completed until the return of the term of purity.

AND if he ſay to her "you are divorced when you faſt a day," ſhe becomes divorced on the ſunſet of the firſt day on which ſhe faſts: but if he only ſay "you are divorced when you *faſt*," her divorce takes place from the firſt time that ſhe begins a faſt.—The proofs are drawn on this occaſion from the term of thoſe expreſſions in the original idiom.

IF a man ſay to his pregnant wife "if you bring forth a male child you are divorced *once*, and if a female *twice*," and ſhe ſhould happen to produce twins, a ſon and a daughter, and it be unknown which of them was firſt born, the *Kázee* is here to decree a ſingle divorce; but caution dictates that it be regarded as *two* divorces.—In this caſe the woman's *Edit*, or term of probation, is accompliſhed by her delivery; for if ſhe brought forth the *ſon* firſt, a ſingle divorce would take place, and her *Edit* would be accompliſhed by the birth of the daughter, after which no other divorce could take place on account of the birth of the latter, as the accompliſhment of the mother's *Edit* includes a complete diſſolution of her marriage, under which divorce cannot take place; and, on the other hand, if ſhe brought forth the *daughter* firſt, two divorces take place, and her *Edit* is accompliſhed by the birth of the ſon, after which no other divorce could take place, for the ſame reaſon; hence, in the firſt inſtance, *one* divorce only would take place, and in the ſecond *two* divorces; but in

the

the preſent caſe the ſecond divorce is not decreed, on account of the doubt in which the matter is involved; yet (as was already obſerved) caution dictates that this be conſidered as amounting to *two* divorces.

Caſes of divorce ſuſpended upon acts which admit of frequent repetition.

* If a man ſay to his wife "if you converſe with *Zeyd* and *Amroo*, "you are under three divorces," and he afterwards give her a ſingle divorce, and ſhe become ſeparated by the accompliſhment of her *Edit*, and ſhe then converſe with *Zeyd*, and afterwards again marry her former huſband, and then converſe again with *Amroo*, ſhe falls under two divorces together with the firſt.—In all three divorces,—*Ziffer* maintains that on this occaſion no divorce whatever takes place.—This caſe may be conſidered in four different views:—FIRST, where both the conditions appear, to wit, converſe with both *Zeyd* and *Amroo within* marriage, in which caſe divorce would follow evidently;—SECONDLY, where both conditions appear *without* marriage, in which caſe divorce does not take place, the reaſon of which is alſo evident;—THIRDLY, where the firſt condition exiſts *within* marriage and the ſecond *without* †, in which caſe likewiſe divorce does not take place, as that penalty cannot follow without the exiſtence of the marriage;—and FOURTHLY, where the firſt condition exiſts *without* the marriage, and the ſecond *within* it ‡;—and this is the caſe concerning

* In this and the ſucceeding paſſages a matter muſt be adverted to which it is neceſſary to underſtand, in order that their ſenſe may be fully comprehended.—When a man pronouces two or three conditional divorces, theſe remain ſo far in force that they recur upon the recurrence of the condition, even after an intervening marriage; but any divorce by which that marriage may have been diſſolved is then counted in with that which thus recurs upon the recurrence of the condition.

† That is to ſay, where the firſt occurs within the firſt marriage and the ſecond intermediately between the diſſolution of that and the commencement of the ſecond marriage.

‡ That is to ſay, where the *firſt* occurs intermediately between the diſſolution of marriage, and the commencement of the *ſecond*, and the *ſecond* within the *ſecond* marriage.

which

which *Ziffer* differs from our doctors.—The argument of *Ziffer* is, that as the exiſtence of marriage is conditional to the divorce taking place at the time of the occurrence of the *laſt* condition, ſo it is in the ſame manner conditional at the time of the occurrence of the *firſt* condition, becauſe they are both (with reſpect to the rule of divorce) as *one thing*, ſince that divorce cannot poſſibly take place without the concurrence of both of them.—To this our doctors reply that the caſe now under conſideration is a *vow*, which, being an act affecting the maker of it, reſts upon his competency; now the exiſtence of marriage, at the period of ſuſpenſion, (that is, of making the vow,) is made conditional, in order that the penalty may to a certainty enſue at the period of the conditions ſpecified taking place: and, in the preſent caſe, marriage actually exiſting at the period of ſuſpenſion, the vow holds good; and the exiſtence of marriage is alſo rendered conditional at the time of the condition being completely fulfilled, in order that the penalty may take place *within* marriage; becauſe this penalty is *divorce*, which cannot take place but within marriage: but, in the preſent caſe, the time of the occurrence of the firſt condition is neither a period within which the vow has any force, nor in which the penalty can take place; wherefore that interval is conſidered merely *as the time of the continuance of the vow*, to which the exiſtence of marriage is not abſolutely neceſſary, as it depends upon the vower, a vow being an act peculiarly affecting the maker of it, as was already remarked.

Caſe of a man firſt pronouncing *Talak* and then repudiating his wife by two expreſs divorces;

*If a man ſay to his wife "if you enter this houſe you are under "three divorces," and he afterwards repudiate her by two expreſs divorces, and her *Edit* be fulfilled; and ſhe be afterwards married to another man, and he have carnal connexion with her, and divorce her; and ſhe be then married to her firſt huſband, and after that

* This and the following are termed *caſes of obliteration*. They are more fully treated of under the article *Ila*.

enter the ſaid houſe, three divorces take place upon her, according to the two *Elders**.—*Mohammed* ſays that no more can take effect upon her than the one divorce remaining after the two which ſhe had already received, as above; and ſuch alſo is the opinion of *Ziffer*.—The foundation of this difference, in point of doctrine, is that the two divorces are held, by the *Elders*, to have been entirely annihilated by the circumſtances of the intervening marriage, and hence the firſt huſband ſtill continues empowered with reſpect to the three divorces [conditionally declared as above] upon the woman returning to him: —contrary to *Mohammed* and *Ziffer*, who hold that they are not annihilated, and therefore that in ſuch event he continues empowered only with reſpect to the remainder of the three (as ſhall be hereafter explained.) The effect of this difference of opinion appears in a caſe where a huſband, having ſuſpended *one* divorce upon the circumſtance of his wife's entering a certain houſe, afterwards repudiates her by two divorces, and the woman, after having married another man, returns to her firſt huſband, and then enters the houſe, in which caſe ſhe falls under the *rigorous* prohibition, according to *Mohammed*, the two former divorces not having been annihilated by the intermediate marriage; but, in the opinion of the two *Elders*, ſhe does not fall under the *rigorous* prohibition, as they conceive the two former divorces to have been annihilated.

or by three di-

If a man ſay to his wife "you are under three divorces if you "enter this houſe," and he afterwards repudiate her by three expreſs divorces, and ſhe marry another man upon the expiration of her *Edit*, and, after being divorced by him, be again married to her former huſband, and then enter the ſaid houſe, no effect whatever enſues.—*Ziffer* ſays that three divorces take place, becauſe three divorces are ſuſpended generally upon the condition, whether in virtue of the right from the preſent exiſting marriage, or of that which recurs after the

* *Haneefa* and *Aboo*

intervening

intervening marriage with another; and the expreſſion is *general*, and not *reſtrictive*; hence therefore the occurrence of the three ſuſpended divorces may ſtill be conceived poſſible after the three divorces before given; for which reaſon the vow alſo continues in force, as the permanence of that is implied in the poſſibility of ſuch occurrence.—The argument of our doctors is that the penalty does not conſiſt of three divorces *generally*, but of the three *ſuſpended* divorces, with reſpect to which the huſband is authorized, in virtue of the preſent exiſtence of marriage, becauſe he has impoſed the vow upon himſelf for the purpoſe of determent, and it is only the three divorces therein mentioned which can operate in that way, not thoſe with reſpect to which he may be authorized by a ſubſequent marriage, an event the occurrence of which is not probable, the chances being ſo much againſt it; and the penalty conſiſting of thoſe three particular divorces being done away by the three divorces, (in conſequence of which the ſubject of divorce no longer remains,) the vow is alſo done away: but it would be otherwiſe if, after a vow expreſſed as above, the huſband were to repudiate his wife by a *ſingle irreverſible* divorce, for there the vow remains in force, becauſe of the permanence of its ſubject *.

Caſe of divorce ſuſp

IF a man ſay to his wife "when I have carnal connexion with "you, you are under three divorces," and he afterwards have carnal knowledge of her, divorce takes place upon the inſtant of ſuch carnal connexion taking place; and here, although he ſhould not immediately ceaſe ſuch connexion, yet he does not become liable for either a fine † or a proper dower; but the fine or dower becomes obligatory upon him if, after the ſhorteſt ceſſation, he ſhould *again* have carnal connexion with her.—This is analogous to a vow made with reſpect to a female ſlave; for if a maſter ſay to his female ſlave "when *I*

the wife

* The ſubject ſtill remains, becauſe, after a *ſingle* divorce, a wife continues a legal ſubject of two other divorces, until the expiration of her *Edit*.

† Meaning the *Akir*, or fine of *treſpaſs*.

"have carnal connexion with you, you are free," and he afterwards have carnal knowledge of her, ſhe is emancipated on the inſtant of ſuch connexion; yet ſhe has no claim to a fine, although he ſhould not immediately ceaſe; but if, after a ceſſation, he again renew the connexion, ſhe has then a claim to a fine.—This is the doctrine of the *Zâhir-Rawâyet*.—It is recorded from *Aboo Yooſaf* that a fine is due where he delays, although he ſhould not entirely retreat and again renew the connexion, becauſe this amounts to carnal conjunction after divorce or emancipation, on account of his continuing the act; but puniſhment is not due, ſince the whole is only *one act*, in which, as the *commencement* affords no cauſe for puniſhment, ſo neither is puniſhment incurred by the *accompliſhment* of it; but yet the fine is incumbent, as the commiſſion of the carnal act upon a prohibited ſubject cannot be free from both puniſhment and fine. The grounds on which the *Zâhir-Rawâyet* determines in this caſe, is that by *Jama* [the carnal act] is underſtood *the commencement of the act*; and *continuation* is not commencement; wherefore carnal connexion *de novo* is not implied: contrary to a caſe of ceſſation and renewal, becauſe in that caſe the connexion takes place after divorce; but yet, even in this inſtance, puniſhment is not incurred, on account of the doubt occaſioned by the unity of place and of paſſion; but, ſuch being the caſe, the fine is incumbent, as the commiſſion of the carnal act upon a prohibited ſubject cannot be free both from puniſhment and fine.

If, moreover, in the caſe now recited, the huſband had ſuſpended a reverſible decree upon his commiſſion of the carnal act, the divorce is virtually reverſed by his delay, agreeably to *Aboo Yooſaf*; but if he ceaſe and again renew, it is then reverſed, according to all the doctors.

SECTION.

## SECTION.

### *Of* ISTISNÂ; *that is*, RESERVATION *or* EXCEPTION.

IF a man ſay to his wife "you are divorced (adding) *if it pleaſe* "*God*," without any ſtop between, divorce does not take place, becauſe the prophet has ſaid "*where a man makes a vow of divorce or* "*manumiſſion, ſaying*, IF IT PLEASE GOD, *he cannot be forſworn*;" and alſo, becauſe the huſband has here introduced the words "*if it* "*pleaſe* GOD" in the form of a condition, and hence the divorce is ſuſpended upon the will of GOD, and does not take place until the occurrence of the condition: but, the will of GOD not being known, nothing can be decreed which is ſuſpended upon it.—And here, as the ſuſpenſion deſtroys the effect of the preceding words, it is a condition that the ſame follow them *connectedly*, and without pauſe, as in other ſimilar caſes: and the words "*if it pleaſe* GOD" are here ſaid to be introduced in *the form* of a condition, becauſe they are not *actually* conditional, as by a condition is underſtood a thing not at preſent exiſting, but the future occurrence of which is conceivable; wherefore a thing now exiſting cannot be termed a *condition*; nor a thing the exiſtence of which is impoſſible; and the will of GOD is of one or other of theſe deſcriptions.

Divorce, with a reſervation of the will of GOD, does not take place,

WHAT is here ſaid proceeds upon a ſuppoſition that the words "if it pleaſe GOD" follow the preceding words immediately, and *without* ſeparation, by a pauſe; but if the man ſhould firſt ſay "you "are divorced," and remain a moment or two ſilent, and then ſay "if it pleaſe GOD," the virtue of the former words is eſtabliſhed, becauſe in that caſe the additional words come in as a retraction from the firſt words which is not held legal.

unleſs it be pronounced with a

the reſervation.

IF

If a man ſay to his wife "you are divorced, *if it pleaſe* God," and ſhe die before the utterance of the latter words, divorce does not take place, becauſe on account of the reſervation "*if it pleaſe* God," the words preceding do not ſtand or operate as a deſire expreſſed.

Objection.—As death prevents divorce, that is to ſay, as it is on account of death that divorce cannot take place, it follows that the ſame circumſtance in the preſent caſe precludes the words "*if it pleaſe* "God" and thereby prevents them from operating to annul the firſt words in their effect, and thus it would appear that on account of the woman's dying as above, the divorce ſhould take place upon her, ſhe not having expired until after the words "*you are divorced*," and before the utterance of the reſervation "*if it pleaſe* God."

Reply.—Death operates to the prevention of divorce on account of its cutting off the ſubject of it; but it does not prevent the effect of the reſervation in the preſent caſe, as the validity of reſervation depends upon that of the declaration, which reſts upon the huſband, who is ſtill living: but it would be otherwiſe if *he* ſhould die before having uttered the reſervation, as in that caſe it is not added to the preceding words.

Divorce pronounced with an exception in point of number, takes place accordingly.

If a man ſay to his wife "you are under three divorces all but "*one*," *two* divorces take place;—and if he ſay "all but *two*," *one* divorce takes place; for it is a rule that this figure of ſpeech termed *Iſtiſnâ*, is expreſſive of a remainder from the whole of a given number from which an exception is made; and this is approved, becauſe there is no difference whatever between a man's ſaying (for example) "I "owe ſuch an one nine *Dirms*," or "I owe ſuch an one ten *Dirms* "all but one;" wherefore this mode of ſpeaking by the exception of a part from the whole is approved, becauſe it amounts to a mention, ſimply, of what remains after the exception is made, as in the preſent inſtance.

But

BUT the exception of the *whole* from the *whole* is diſapproved, ſince, after exception of the *whole*, nothing whatever remains, the mention of which might be eſtabliſhed; and hence, if a man ſay to his wife "you are under three divorces *all but three*, the three divorces take place upon her, becauſe the exception of a *whole* from a *whole* is nugatory, and therefore not admitted to have any effect.

AND here, as in the preceding caſes, the exception is of no effect, unleſs it be immediately connected with what goes before, namely, the *ſentence of divorce.*

## CHAP. V.

### Of the *Divorce* of the *Sick.*

IF a man, lying on his deathbed, repudiate his wife either by one irreverſible divorce, or by three divorces, and die before the expiration of her *Edit*, ſhe is ſtill intitled to her inheritance from his eſtate: but, if he ſhould not die until after the accompliſhment of her *Edit*, ſhe has no claim.—*Shafeï* maintains that ſhe is not an inheritreſs in either caſe, as the matrimonial connexion, which was the cauſe of her inheritance,

A wife diband inherits if he die before the expiration of her *Edit*,

* By the *Muſſulman* law, a woman, on the death of her huſband, is entitled to an inheritance from his eſtate; but it is poſſible that the huſband may ſometimes be induced, from perſonal diſlike, or other motive, where he finds himſelf dying, to repudiate his wife, in order to exclude her from her right of inheritance, in the event of his death; an injuſtice which the rules and cautions laid down in this chapter are intended to counteract and guard againſt: ſome of them are alſo deſigned to counteract any fraudulent colluſion between the wife and her dying huſband, to the prejudice of his heirs.

is

is diſſolved by the divorce; whence it is that if this man were to repudiate his wife by an irreverſible divorce, and ſhe were to die within her *Edit*, before the deceaſe of her huſband, the huſband does not inherit of her, the matrimonial connexion which was the cauſe of that relationſhip which intitled to inheritance no longer remaining.—To this our doctors reply that the matrimonial connexion at a time of a mortal illneſs is a cauſe of inheritance with reſpect to the wife; but where the huſband is deſirous of defeating this right by giving an irreverſible divorce, his intention is reſiſted, by poſtponing the effect of his ſentence of divorce to the expiration of his wife's *Edit*, in order to ſhield her from injury; and ſuch procraſtination is poſſible, as a marriage is accounted ſtill to ſubſiſt during the *Edit*, with reſpect to various of its effects, ſuch as the obligations of alimony, reſidence, and ſo forth; and hence it may lawfully be accounted to continue in force with reſpect to the woman's inheritance: but, as ſoon as the *Edit* is accompliſhed, a further procraſtination is impoſſible, becauſe the marriage does not then continue in any ſhape whatever.—The caſe, however, is very different where the wife happens to die before her huſband, (as mentioned by *Shafei*,) for in this inſtance the connubial connexion is not a cauſe of inheritance in the huſband, (in virtue of his right as connected with her property,) becauſe ſhe was not *ſick* but in *health* at the time of his pronouncing divorce: and the connexion is diſſolved with reſpect to his right, eſpecially where he himſelf manifeſts his deſire that it ſhould be ſo, by pronouncing upon her an *irreverſible* divorce; ſince, as the connexion would be diſſolved though he were not deſirous of the annullment of his right, it follows that it is ſo where he *is* deſirous, *a fortiori*. The mode in which the connexion may be diſſolved without the conſent of the huſband is by the wife, upon her deathbed, admitting the ſon of her huſband to carnal connexion and dying within her *Edit*, in which caſe the huſband would not inherit of her, the matrimonial connexion with reſpect to him becoming null, notwithſtanding he does not conſent to ſuch annulment.

If

unleſs ſhe be divorced at her own requeſt, or by her own option, a corruption.

IF a woman require her huſband, who is ſick, to repudiate her by an irreverſible divorce, and he accordingly pronounce the ſame upon her,—or, if he deſire her to chooſe, and ſhe chooſe herſelf,—or, if ſhe procure divorce of him in the manner of *Khoola*, that is, for a compenſation, and he afterwards die before the expiration of her *Edit*,—ſhe does not inherit of him, becauſe the only reaſon for poſtponing the effect of the divorce is a regard for her right, to the deſtruction of which ſhe in this caſe conſents.—But if ſhe require him to repudiate her by a *reverſible* divorce, and he pronounce *three* divorces upon her, ſhe inherits, becauſe a reverſible divorce does not diſſolve the marriage; and hence her requiſition of ſuch a divorce does not imply her conſent to the deſtruction of her right.

IF a man, upon his deathbed, declare that he had repudiated his wife by three divorces, at ſuch a time, during health, and that her *Edit* had paſſed, and ſhe confirm this, and he afterwards make an acknowledgment of his being indebted to her in a certain ſum, or bequeath her a legacy, ſhe will, in the event of his deceaſe, be entitled to that ſum of the three which is the leaſt, the *legacy*, the *debt*, or her proper inheritance;—that is to ſay, if her *inheritance* be of ſmaller amount than the *debt* or the *legacy*, it goes to her, and ſo of the others.—This is the doctrine of *Haneefa*.—The two diſciples ſay that the acknowledgment or bequeſt are either of them legal, and therefore that the woman is entitled either to the *whole* of the acknowledged debt, or to the *entire legacy*, (provided that does not exceed the third, or deviſable proportion of his property *,) as the caſe may be.—And if the huſband, in conformity with the requiſition of his wife, pronounce three divorces upon her on his deathbed, and afterwards acknowledge himſelf indebted to her in a certain ſum, or bequeath her a legacy, ſhe is in this caſe entitled to whatever is of leaſt value, the debt, the legacy, or the *inheritance*, according to all except *Ziffer*, who ſays

ſuſion between the parties, by the huſband, after a declared divorce, acor bequeathing her a legacy, ſhe reof leaſt value, for inheritance, debt, or legacy.

* This, which is termed *Sils Mâl*, is fully explained in the Book of Wills, Vol.

that ſhe is entitled to the whole bequeſt, (not exceeding the third of his property,) or to the whole of the debt acknowledged, becauſe her right to inheritance being annulled by her requiſition of divorce, the obſtruction to the legality of the acknowledgment or bequeſt (namely, the matrimonial connexion,) is removed.—The argument of the diſciples, with reſpect to the former caſe, is that when the huſband and wife agree reſpecting his having divorced her, and her *Edit* having paſſed, ſhe from that period becomes a ſtranger to him, and he no longer remains liable to ſuſpicion, (that is to ſay, in the preſent caſe, ſuſpicion of his preferring her before his other heirs, and giving her more than her *right*, which is *inheritance*,) whence it is that his evidence to her advantage is credited; and it is alſo lawful for him to pay her his *Zakât*, or to marry her ſiſter, or for her to marry another man: contrary to the *ſecond* caſe, as there the *Edit* ſtill remains unaccompliſhed, and the continuance of that affords ground for ſuch ſuſpicion: now the ſubject of ſuſpicion is a circumſtance as yet concealed and unknown, wherefore the *ground* for ſuſpicion is regarded, and not the *actual fact* ſuſpected or apprehended; and as the continuance of the *Edit* affords ground of ſuſpicion, the effect of ſuſpicion is eſtabliſhed, namely, the invalidity of acknowledgment, or bequeſt; and hence alſo is eſtabliſhed the incredibility of the evidence of huſband or wife reſpecting each other; as well as the incredibility of evidence, in reſpect to relations either by blood or by marriage; ſince marriage and affinity are grounds of ſuſpicion.—The argument of *Haneefa* is that ſuſpicion exiſts in either inſtance; in the *ſecond*, becauſe a woman may chooſe divorce, in order to open to her the door of acknowledgment, or bequeſt, ſo that ſhe may receive more than her proper inheritance; and in the *firſt*, becauſe it may happen that the huſband and wife may form a colluſion, and agree to hold forth their ſeparation and the completion of her *Edit*, in order that he may be enabled to favour her, by giving her more than her juſt inheritance; and the ſuſpicion is confirmed where the ſubſequent acknowledgment or bequeſt appears to be of more value than the inheritance, on which account it is that

ſuch

eſtabliſhed in the *latter* circumſtance, but not in the *former*.—There are various caſes recorded correſponding with theſe at preſent recited, and which proceed upon the ſame rules.—It is to be obſerved, however, that what is here ſaid, *viz.* "where he dies that way, or is "ſlain," ſhews that there is no eſſential difference betwcen the two caſes, where he dies in the way mentioned, or in any other way, the ſame as a huſband confined to a ſick bed, who happens to be ſlain.

**A conditional divorce pronounced in ſickneſs, does not cut off the wife from her inheritance, unleſs the condition be her own act;**

If a man, being in health, ſay to his wife "when the firſt of "ſuch a month arrives"—(or)—"when you enter this houſe"—(or)—"when ſuch an one repeats evening prayers"—(or)—"when "ſuch an one enters this houſe,"—"you are under divorce," and the thing mentioned take place at a time when he is *ſick*, ſhe does not inherit of him:—but if he were to make ſuch a condition upon his deathbed, ſhe inherits in all theſe caſes except one, namely, "when "you enter this houſe."—It is to be obſerved that the ſuſpenſions now treated of are of four different kinds;—FIRST, where divorce is ſuſpended upon the arrival of a ſpecified time;—SECONDLY, where it is ſuſpended upon the act of a ſtranger;—THIRDLY, where it is ſuſpended upon the act of the huſband himſelf;—and FOURTHLY, where it is ſuſpended upon the act of the woman; and each of theſe again are of two deſcriptions; *one*, where the ſuſpenſion is declared in health, and the condition occurs in ſickneſs; the *other*, where both take place in ſickneſs. In the two *firſt* inſtances, namely, where the huſband ſuſpends the divorce upon the arrival of a ſpecified time, by ſaying "when the "firſt of ſuch a month arrives you are under divorce," or where he ſuſpends it upon the act of a ſtranger, by ſaying "when ſuch an one "enters the houſe," (or) "when ſuch an one repeats evening "prayers," if the ſuſpenſion and the condition both occur in ſickneſs, the woman is entitled to inherit of her huſband, becauſe his intention here appears to be evaſion, from the circumſtance of his ſuſpending divorce at a time when the wife's right is inſeparably connected with his property: but if the *ſuſpenſion* take place in *health*, and the *condition* in *ſickneſs*,

*ſickneſs*, the woman does not inherit of him.—*Ziffer* ſays that in this laſt caſe alſo ſhe inherits, becauſe whatever is ſuſpended upon a condition takes place on the occurrence of that condition, and is then like the fulfilment of a promiſe; and alſo, becauſe in this caſe divorce occurs during *ſickneſs*.—The argument of our doctors is that the antecedent ſuſpenſion induces divorce at the time of the occurrence of the condition *conſequentially*, but not *deſignedly*, and injury is not eſtabliſhed but from *deſign*; the act of the huſband, therefore, is not to be ſet aſide by the annulment of its effect, namely, *non-inheritance*.—And, in the *third* inſtance, (that is, where the huſband ſuſpends the divorce upon his own act,) he is conſidered as an *Evader*, and the woman inherits of him, whether the ſuſpenſion take place in health, and the condition in ſickneſs, or both occur in ſickneſs; and alſo, whether the act be of an avoidable or an unavoidable nature; the reaſon of which is, that the huſband on this occaſion evidently deſigns to defeat his wife's right, whether by the *ſuſpenſion*, or by producing the condition during a mortal illneſs.

OBJECTION.—It would ſeem that the huſband is not an evader where the condition is an act of an *unavoidable* nature.

REPLY.—In the caſe now under conſideration, although the act of condition be unavoidable by him, yet it is in his power to avoid the ſuſpenſion of divorce upon that act, and hence his act is ſet aſide, in order that the woman may not be injured.—And in the *fourth* inſtance, (that is, where the huſband ſuſpends divorce upon an act of the wife,) if the ſuſpenſion and condition both occur in ſickneſs, and the act be of ſuch a nature as may be avoided by the woman, (ſuch as ſpeaking to *Zeyd*, for inſtance,) ſhe does not inherit, as ſhe in this caſe conſents to the divorce; but if the act be of a nature unavoidable by her, (ſuch as *eating* and *drinking*, or *prayer*, or *converſing with her parents*,) ſhe is entitled to inherit of her huſband, as ſhe is compelled to the performance of ſuch acts, ſince, if ſhe were *not* to perform them, there is fear of her periſhing either in this world or the next; and conſent cannot exiſt where ſhe acts from unavoidable neceſſity; but

nature.

but if the ſuſpenſion take place in *health*, and the condition in *ſickneſs*, and the act be of a nature *avoidable* by the woman, ſhe does not inherit, for evident reaſons. And where the act is of an *unavoidable* nature, the rule is the ſame, with *Mohammed* and *Ziffer*, (that is, ſhe does not inherit,) becauſe, on this occaſion, no act appears on the part of the huſband, after the connexion of the wife's right with his property.—With the two *Elders*, on the contrary, ſhe does inherit, becauſe the huſband in this caſe obliges her to the commiſſion of that act, and for that reaſon the act becomes his own, ſhe being only as his inſtrument; as in a caſe of compulſion, a compellee being one who is ſtraitened between two things, in which predicament the wife here ſtands, ſince, if ſhe perform the act of condition, ſhe ſuſtains the injury of divorce, and if ſhe refrain ſhe is in danger of periſhing either here or hereafter.

Where recovery intervenes between a ſick-bed divorce and the death of the huſband, the wife is cut off from inheritance;

If a man pronounce upon his wife three divorces in ſickneſs, and afterwards recover his health, but happen to die before the expiration of her *Edit*, ſhe does not inherit.—*Ziffer* ſays that ſhe inherits, becauſe the huſband in this caſe appears to have intended evaſion; but to this our doctors reply that the ſickneſs in which divorce was pronounced having been removed by the intermediate recovery of health, the laſt ſickneſs, which follows, is the ſame as *health*, whence it appears that her right is not connected with his property, and therefore the huſband is not an evader in divorcing her.

and ſo alſo her tervenes; but not where

If a ſick perſon pronounce three divorces upon his wife, and ſhe afterwards apoſtatize from the faith, and again return to it, and the huſband then die before the expiration of her *Edit*, ſhe does not inherit of him: if, however, ſhe were *not* to apoſtatize, but ſhould admit the ſon of her huſband to carnal connexion, ſhe inherits.—The difference between thoſe two caſes is, that by apoſtacy her capacity

pacity of inheritance is deſtroyed; whereas, by admitting the ſon of her huſband to the commiſſion of the carnal act it is not ſo, for although this renders her prohibited to her huſband, yet it does not forbid her competency of inheritance, ſince prohibition and inheritance may be united in the ſame perſon, (as, for inſtance, in a *mother* or a *ſiſter*,) wherefore ſhe inherits in this caſe: but it would be different, if ſhe were to admit the ſon of her huſband to carnal connexion during the exiſtence of marriage, becauſe ſeparation is the conſequence, whence it appears that ſhe conſents to the deſtruction of the matrimonial connexion, which is the occaſion of her inheritance, whereas, if ſhe admit the ſon of her huſband to carnal connexion after the latter having pronounced *three* divorces upon her, prohibition is not eſtabliſhed by that act as it had been already eſtabliſhed by divorce.

Divorce occaſioned by the ſlander of a dying huſband does not cut off his wife from inheritance.

IF a man, being in health, ſlander his wife, that is, accuſe her of adultery, and afterwards make aſſeveration reſpecting the ſame on his deathbed, ſhe inherits of him.—*Mohammed* ſays that ſhe does not inherit: but if the ſlander be alſo declared upon his deathbed, ſhe inherits, according to all our doctors.—The reaſon of this is that the ſlander amounts to the ſuſpenſion of divorce upon a thing unavoidable by the woman, as it conſtrains her to oppoſition *, that ſhe may remove from herſelf the ſcandal of the imputation.

and ſo, alſo, of a deathbed divorce occaſioned by an *Aila*.

IF a man make an *Ajla* †, or vow of abſtinence, from his wife, during health, and ſhe become divorced, in conſequence of it when he is upon his deathbed, ſhe does not inherit of him; becauſe *Aila* is a vow of abſtinence, from carnal connexion with her for the ſpace

* That is to ſay, forces her to require her huſband to verify his accuſation by a or *ſolemn aſſeveration*, before the magiſtrate, which, if he does ſo, occaſions divorce.—For a full explanation of this ſee Chap. X. treating of *Laân*.

† See Chap. VII.

of four months, which at the end of that period occaſions divorce, and hence it amounts to a ſuſpenſion of divorce upon the arrival of a ſpecified time, being the ſame as if he had ſaid to her "upon the "lapſe of *four months*, if I have not carnal connexion with you "within that period, you are divorced;" which was already explained.

Where a deathbed divorce is *re-* in every caſe.

If a man upon his deathbed repudiate his wife by a *reverſible* divorce, ſhe inherits of him in all the caſes here recited, becauſe the marriage is not finally diſſolved, ſince it continues lawful for him to have carnal connexion with her; and ſuch being the caſe, the principle upon which ſhe inherits ſtands ſtill unimpeached.

*Note.*—In all theſe caſes where it is ſaid that *the wife inherits*, it means, "*in caſe of the deceaſe of the huſband, before the ex-* "*piration of her Edit*,"—the reaſon of which has been already mentioned

CHAP.

## CHAP. VI.

### Of *Rijaât*, or returning to a divorced *Wife*.

RIJAÂT in its primitive ſenſe means *reſtitution*; in law it ſignifies a huſband returning to, or receiving back, his wife after divorce, and reſtoring her to her former ſituation, in which ſhe was not liable to ſeparation from the paſſing of her courſes, or of the ſpace of time correſponding with their periods, and which ſhe recovers by *Rijaât*; this is the definition of it in the *Jama Ramooz*: from what occurs reſpecting it in the preſent work, it appears ſimply to mean *the continuance of marriage*. Definition of *Rijaât*.

IF a man give his wife one or two divorces reverſible, he may take her back any time before the expiration of her *Edit*, whether ſhe be deſirous or not, GOD having ſaid in the *Koran* "YE MAY RETAIN THEM WITH HUMANITY," where no diſtinction is made with reſpect to the wife's pleaſure, or otherwiſe; and by the word *retain* is here underſtood *Rijaât*, or *returning to*, according to all the commentators. A man reſtores wife ſibledivorces

THE exiſtence of the *Edit* is a condition of *Rijaât*, becauſe by *Rijaât* is underſtood a continuance of the marriage, (whence the term *retain* is applied to it,) and this cannot be eſtabliſhed but during the *Edit*, ſince after *that* is paſt the marriage no longer remains. provided he do ſo the

two kinds; *expreſs*, and *implied*.

RIJAÂT is of two ſpecies; the FIRST is termed *expreſs*, where the huſband ſays, for example, "I have returned to, (or taken back,) "my wife," or addreſſes the ſame to her perſonally; and the SECOND *implied*, where he has carnal connexion, or takes conjugal liberties with her, ſuch as viewing thoſe parts of her which are uſually concealed, and ſo forth.—This ſecond deſcription of *Rijaât* is according to our doctors. *Shafeï* ſays that the *Rijaât* is not approved, or regular, but where it is expreſsly pronounced by the huſband, (provided he be able to ſpeak,) becauſe *Rijaât* ſtands as a marriage *de novo*; and (according to him) carnal connexion with the wife is in this caſe prohibited, on account of its legality having been annulled by the divorce, which is a diſſolver of marriage, for it would appear that the marriage is itſelf diſſolved by a divorce, although it be of the reverſible kind, were it not that the law there leaves to the huſband an option of *Rijaât*, which is the ſole reaſon why he confines its effect to the prohibition of carnal connexion, and does not extend it to a diſſolution of the marriage itſelf.—The argument of our doctors is that by *Rijaât* is underſtood a continuance of the marriage, as was before explained; and this may be ſhewn by an *act*, as well as by *words*, for *acts* ſometimes evince *continuance*; as in the caſe of aboliſhing the option of a ſeller; that is to ſay, in the ſame manner as the abolition of the option of a ſeller (which is the continuance of property) is proved by an *act*, ſo alſo in the preſent caſe; now acts peculiar to marriage are ſigns of the continuance of it; and the carnal connexion, or other acts, as before ſtated, are peculiar to marriage, eſpecially in the caſe of free women, ſince, with reſpect to *them*, they cannot be lawful but through marriage,—and, with reſpect to female ſlaves, they are ſometimes lawful by right of marriage, and ſometimes by right of poſſeſſion: contrary to *touching*, or *looking* at the *pudenda* of a woman, *without* luſt, becauſe that is ſometimes lawful without marriage, as in the caſe of a *phyſician* or *midwife*; and the ſight of *other* parts than the *pudenda* ſometimes happens to people who reſide together; and as a wife reſides with her huſband during her *Edit*, if ſuch an accident

were

were to imply *Rijaât*, he might then give her another divorce, to her injury, as it would protract her *Edit*.

The evidence of *witneſſes* to *Rijaât* in

IT is laudable that the huſband have two witneſſes to bear evidence to his *Rijaât*; yet if he have *no* witneſſes the *Rijaât* is nevertheleſs legal, according to one opinion of *Shafeï*.—*Mâlik* holds that it is not lawful without witneſſes, GOD having ſo commanded, ſaying, in the *Koran*, "RETAIN THEM WITH HUMANITY, OR DISMISS THEM "WITH KINDNESS, AND TAKE THE EVIDENCE OF TWO WITNESSES "OF YOUR OWN PEOPLE, AND SUCH AS ARE OF JUST REPUTE;" —where, the imperative being of *injunctive* import, the taking of evidence appears to be *incumbent*.—To this our doctors reply that in all the texts which occur concerning *Rijaât*, it is mentioned *generally*, and not under any reſtriction of being witneſſed; moreover, by *Rijaât* is to be underſtood (as was before ſtated) the *continuance* of marriage, to which evidence is not a neceſſary condition; as in a caſe of *Aila*, for inſtance, where it (the *Aila* or *vow of abſtinence*) is done away by the carnal act, to which there are no witneſſes:—but yet the taking evidence to *Rijaât* is *laudable*, for the greater caution, ſo as to put it out of the power of any perſon to contradict it.—With reſpect to the ſacred text quoted by *Mâlik*, the *imperative* is to be taken, *not* in an *injunctive*, but in a *recommendatory* ſenſe; for in this inſtance *retaining* them, and *ſeparating* from them, are connected by the intermediate particle "OR," the text ſaying "RETAIN THEM, *or* DIS-"MISS THEM, AND TAKE TWO WITNESSES, &c." from which it appears that the calling witneſſes is *laudable* only, and not *injunctive*, in the preſent caſe, becauſe, in *ſeparation*, it is held to be *laudable* only, by all the doctors.

the wife ſhould have due notice of it.

IT is alſo laudable that the huſband give his wife previous information of his intention of *Rijaât*, leſt ſhe fall into ſin; for, if ſhe be not aware of his intention, it is poſſible that ſhe may marry another huſband after the accompliſhment of her *Edit*, and that he may have

carnal connexion with her by an invalid marriage, which is prohibited.

A declaration of previous *Rijaât*, made after the expiration of the *Edit*, is to be credited, where both parties agree in it;

If, after the accompliſhment of the woman's *Edit*, her huſband were to declare that he had taken her back, before the expiration of it, and ſhe confirm this, *Rijaât* is eſtabliſhed: but if ſhe deny the fact, her declaration is credited, becauſe the huſband in this caſe pretends to have performed an act which is not at preſent in his power; and his declaration is therefore liable to ſuſpicion, and is not to be credited unleſs that be removed by the woman's confirmation.—It is to be obſerved that the *oath* of the woman (according to *Haneeſa*) is not neceſſary.—This is one of the ſix caſes of *Iſthilaf**, which are diſcuſſed at large in the Book of Marriage.

but not when they diſagree.

If a man, having repudiated his wife by a reverſible divorce, afterwards ſay to her "I take you back," and ſhe reply "my *Edit* is "paſt," the *Rijaât* is not valid, according to *Haneeſa*.—The two diſciples ſay that it is valid, becauſe it occurs within the *Edit*, that being accounted to continue until the woman gives notice of its completion; and in this caſe the *Rijaât* takes place before ſuch notice; hence alſo it is that if the huſband ſay to her "I have divorced you," and ſhe reply "my *Edit* is paſſed," ſtill divorce takes place.—The argument of *Haneeſa* is that the *Rijaât* appears to occur after the completion of the *Edit*, becauſe the wife is truſtee with reſpect to her declaration of her *Edit* being completed:—and as to the caſe of divorce cited by the two diſciples, it is not admitted by *Haneeſa*, for divorce in ſuch a circumſtance, according to his opinion, would not take place:—admitting however that it *did* take place, it may be replied that divorce takes place from the declaration of the huſband, after the completion of the *Edit*, (by his ſaying "that he had divorced her during

* Caſes treating of the neceſſity of a wife's confirming any queſtion reſpecting her marriage by oath.

"her

"her *Edit*,") becauſe this is a *ſeverity** upon *himſelf*, and may therefore be allowed credit: contrary to *returning* to a wife, as that cannot be eſtabliſhed by a declaration made after the expiration of the *Edit*, ſince ſuch declaration affects another perſon.

The declaration of a wife who is must be

IF the huſband of a female ſlave, after her *Edit* is paſt, declare that he had taken her back during her *Edit*, and her owner confirm his declaration, but ſhe herſelf deny it, ſhe is to be credited, according to *Hanceſa*. The two diſciples ſay that the confirmation of her owner is to be credited, becauſe her perſon is his property, and hence he makes a declaration in favour of the huſband, reſpecting a thing which is his particular right; this, therefore, is analogous to a caſe where a maſter makes a declaration concerning his ſlave's marriage;—that is to ſay, if a man aſſert that he had married the female ſlave of ſuch an one after the expiration of her *Edit*, ſhe *denying* and her maſter *confirming* his aſſertion, the declaration of the maſter is to be credited in preference to that of the ſlave; and ſo likewiſe in the caſe in queſtion. —To this our doctors reply that the efficiency of *Rijaât* is founded upon the *Edit*, becauſe, if that ſtill exiſt, the former is good and valid, but not otherwiſe; and as the declaration of the female ſlave is to be regarded concerning her *Edit*, it muſt in the ſame manner be regarded with reſpect to what is founded upon it. But if the above caſe be reverſed,—that is, if the ſlave confirm and the owner deny the huſband's aſſertion,—the denial of the owner is to be credited, according to the two diſciples, (and alſo according to *Hanceſa*, in the *Rawâyet-Saheeh*,) becauſe her *Edit* no longer remains, and the right to the *Matât*, or *preſent* †, reſts with her owner; wherefore her aſſertion is not to be credited to the prejudice of her maſter's right, as ſhe is in this caſe liable to ſuſpicion:—contrary to the *former* caſe, in

ting the termination of her *Edit*.

* Becauſe (if ſhe had been before under *two* ſentences of divorce) this is a *third* tence, which repudiates her from him by the *rigorous prohibition*.

See Book II. Chap. III.

which

which the owner, by confirming the aſſertion of the huſband, acknowledges the continuance of *Edit* at the period of *Rijaât*; and ſuppoſing this to be the caſe, his [the owner's] authority diſappears; his right, therefore, is not injured by her denial, and hence that is to be credited.—If, however, in this caſe the female ſlave aſſert that her *Edit* is paſt, and the huſband and owner unite in ſaying that it is *not* paſt, her aſſertion is to be credited, ſhe being truſtee with reſpect to what ſhe ſays, as having ſole information upon the point in diſpute.

*At what time the power of Rijaât terminates.*

When the menſtrual diſcharge, in the third courſes after divorce, continues for ten days, or upwards, the power of *Rijaât* terminates upon the ſtoppage, although the woman ſhould not yet have performed her cuſtomary ablutions: but if it ſtop within leſs than ten days, the power of *Rijaât* does not terminate till ſuch time as the ablutions are performed, or the hour of prayer is paſt. The reaſon of this is that a menſtruation is not accounted to exceed the ſpace of ten days, and hence the woman's purification is underſtood on the inſtant of the ſtoppage, at any time beyond that period; and the power of *Rijaât* conſequently terminates; whereas, when it ſtops *within* that period, it is poſſible that it may ſtill return, and hence her purification cannot be finally determined until the cuſtomary ceremonies of ablution, &c. are performed.—What is now advanced applies to the caſe of *Muſſulman* women only; but with *Kitabees* the power of *Rijaât* terminates on the inſtant of ſtoppage of the menſtrual diſcharge in the third courſes after divorce, although it ſhould happen *within* ten days, becauſe with ſuch women no other ſign is requiſite to eſtabliſh purification than the ſimple *ceſſation*, as they are not held, by our doctors, to be ſubject to the injunction of the law in this particular.

The power of *Rijaât* terminates where the woman performs the

*teyummim* *, and repeats the uſual prayers, according to *Haneeſa* and *Aboo Yooſaf*.—This proceeds upon a favourable conſtruction of the law.—*Mohammed* ſays that it terminates immediately upon the performance of *teyummim*; and this opinion is conformable to analogy, becauſe the *teyummim*, where water is not to be had, ſtands as a purification, having the ſame virtue with ablution, as being a ſubſtitute for it.—The argument of *Haneeſa* and *Aboo Yooſaf* is that ſand or duſt is rather a *defiler* than a *purifier*, as it *ſoils* the body, and the latter even adheres to it; and rubbing the body therewith is admitted to be a purification from neceſſity only; but this neceſſity does not abſolutely exiſt until the proper hour of prayer arrives; and that which is eſtabliſhed through *neceſſity* is reſtricted in its virtue to the particular point which occaſions the neceſſity; and hence the *teyummim* is regarded with reſpect to *prayer* only, and not with reſpect to the termination of the *Edit*.—Some doctors have delivered it as the opinion of the two *Elders*, that the power of *Rijaát* terminates upon the *commencement* of prayer: others ſay that it does not terminate until the *concluſion*, in order that the rule reſpecting the repetition of prayer may be fulfilled.

WHERE the woman, in performing ablution, omits any part of her perſon, if it be a *complete limb*, (ſuch as the *hand* or *foot*, for inſtance,) or more, the power of *Rijaát* does not terminate †: but if

* According to the *Muſſulman* law, no religious act can be performed without a previous purification, by *ablution*, where water is to be had, or, in defect of water, by *teyummim*, that is, rubbing the hands, face, and other parts of the body, with ſand or duſt. A woman, while in a ſtate of impurity, is incapable of any religious act; and hence this formal purification is requiſite upon the ſtoppage of the menſtrual diſcharge. The point upon which the caſe here conſidered turns is whether, as the *teyummim* is only a ſubſtitute for ablution, the power of *Rijaát* continues until her repetition of prayer, or whether it terminates immediately upon the performance of that act.

† That is, as the ablution is in this caſe *incomplete*, the power of *Rijaát* does not terminate until *prayer*; but when *that* is repeated, it terminates of courſe,—the woman's purification being then fully aſcertained.

the part omitted be leſs than a *limb* (a *finger*, for inſtance) it terminates.—The compiler of the *Hedáya* obſerves that this rule proceeds upon a favourable conſtruction of the law; for analogy would dictate, in this caſe, that if a complete limb be through forgetfulneſs omitted, the power of *Rijaát* diſcontinues, becauſe the woman has performed the oblution upon the greateſt number of her limbs, and the rule of the *whole* applies to the *greateſt number*; whereas, on the other hand, in the omiſſion of any part *ſhort* of a complete limb, it would ſuggeſt that the power of *Rijaát* ſtill remains, becauſe the laws reſpecting *Janáyat* and the courſes do not admit of diviſion, and hence, where the power of *Rijaát* remains with reſpect to *a part*, it continues with reſpect to *the whole*, as in the liberty of prayer, for inſtance; in ſhort, analogy requires that the rule be the ſame in both caſes: but the reaſon for a more favourable conſtruction is that there is an eſſential difference in the two caſes, becauſe any part *ſhort* of a complete limb ſoon becomes dry, eſpecially in hot weather, and hence it is not certain but that part may have undergone ablution together with the reſt, for which reaſon it is here ſaid that the *Rijaát* terminates; whereas a *complete* limb does not quickly become dry; neither can the omiſſion of ſo large a portion of the perſon, in ablution, be aſcribed to *forgetfulneſs*. It is recorded from *Aboo Yooſaf* that the omiſſion of ablution with reſpect to the mouth or noſtrils is the ſame, as with reſpect to a complete limb; but it is elſewhere recorded from him that theſe ſtand the ſame as any part ſhort of a complete limb, (and of this opinion is *Mohammed*,) becauſe there is a difference of opinion concerning the divine injunction directing the ablution of thoſe parts.

A huſband may take

* If a man divorce a wife who is pregnant, or who has brought

* To underſtand the ſcope of this caſe, it is requiſite to advert to one of the fundamental laws of divorce,—*that a divorce pronounced upon a woman with whom the huſband has not had carnal connexion is, in all caſes, irreverſible.* The caſe here conſidered ſuppoſes

forth a child, and declare that he has never had carnal connexion with her, he is nevertheleſs at liberty to take her back, becauſe where the pregnancy appears within ſuch time as renders it poſſible to be derived from him, to him it is to be aſcribed; and this circumſtance proves his connexion with her, whence a right of *Rijaât* is eſtabliſhed in him, as the divorce thus appears to be reverſible; and in the ſame manner, where the parentage of the child born of her is eſtabliſhed in him, his connexion with her is alſo eſtabliſhed; and it thus appearing that ſhe has been enjoyed by him, the divorce is conſequently reverſible; and his declaration is in either caſe null, as the law denies it, becauſe, by aſcribing the woman's pregnancy, or the birth of the child, to the carnal act of the huſband, it eſtabliſhes her marriage, and conſequently his right of *Rijaât*, *a fortiori*.—It is to be obſerved that by the huſband divorcing a wife who has brought forth a child is here meant *divorce after delivery*; for if the child were born after the divorce, the *Edit* would be thereby accompliſhed, and the power of *Rijaât* would terminate of courſe.

back an unenjoyed divorced wife, provided ſhe be delivered of a child within ſuch a time as eſtabliſhes its parentage in him.

If a man retire with his wife in ſuch a way as amounts to a *Khalwat Saheeh*, and afterwards divorce her, declaring that he has not had carnal connexion, he has no power of *Rijaât*, becauſe that would have been confirmed to him by his commiſſion of the carnal act; but he acknowledges that this has not taken place, and hence his declaration is credited, as it operates to the prejudice of his right; and the law does not on this occaſion deny his declaration, becauſe a woman's right to her ſtipulated dower is founded upon her making delivery of her perſon, and not upon her huſband's ſeizin of it: contrary to the former caſe, as there the law is repugnant to the huſband's declaration.

A man acknowledging that he had with his divorced wife has no power have been i retirement with her.

poſes the huſband to have repudiated his wife by a ſentence of divorce *undefined*, that is without ſpecifying whether it is *reverſible* or *irreverſible*; for if he were to declare it under the *latter* deſcription, it holds ſo at all events.

If a man divorce his wife after a retirement, and again take her back, and afterwards aſſert that he has not had carnal connexion with her, and ſhe ſhould be delivered of a child within a day ſhort of two years after divorce, the *Rijaât* is valid notwithſtanding his aſſertion, becauſe the parentage of the child is eſtabliſhed in him, as the woman had not declared the completion of her *Edit*, and a child may be ſuppoſed to continue ſo long in the womb, whence the huſband is conſidered as having had carnal connexion with her before divorce, becauſe if her pregnancy were aſcribed to ſuch connexion *after* divorce, the marriage ſtands diſſolved on the inſtant of divorce, on account of its not having been then conſummated; and of courſe the ſubſequent carnal connexion is unlawful; and *Muſſulmans* are not ſuppoſed to commit any unlawful acts.

may be eſtabliſhed by birth of a child.

If a man ſuſpend the divorce of his wife upon the circumſtance of her producing a child, and ſhe be delivered of a child, and again of another within not leſs than ſix months after, although it were *more* than two years, *Rijaât* is eſtabliſhed *, provided the woman have not declared the completion of her *Edit*, becauſe divorce taking place upon the woman in conſequence of her firſt delivery, *Edit* was incumbent upon her; and her ſecond child muſt be ſuppoſed to proceed from an embrace of the huſband during the *Edit*, which act on his part amounts to a formal reverſal of the divorce.

If a man ſay to his wife "every time that you produce a child "you are under divorce," and ſhe be delivered of three children at three ſeparate births, that is, within not leſs than ſix months of each other, *Rijaât* is eſtabliſhed by the birth of the *ſecond* child, and in the ſame manner by that of the *third*, becauſe, upon the birth of the *firſt*, divorce takes place, and *Edit* is incumbent, and upon that of the

* That is to ſay, the man is conſidered as having taken back his wife. (See the beginning of this chapter.)

ſecond

ſecond *Rijaât* is eſtabliſhed, for the reaſon before obſerved, that it muſt be ſuppoſed to proceed from an embrace of the huſband during the *Edit*; and a ſecond divorce takes place, becauſe the huſband has ſuſpended divorce upon childbirth with the expreſſion "*every time* "*that*," and *Edit* is incumbent in conſequence of this divorce; and by the birth of the third, *Rijaât* is again eſtabliſhed, for the ſame reaſon as above, and a third divorce takes place in the ſame manner as the ſecond: and in this caſe the *Edit* is to be counted by the courſes, becauſe the woman is not pregnant, but ſubject to courſes, at the period of each divorce taking place upon her.

A woman under reverſible divorce may adorn herſelf.

IT is allowed to a woman under reverſible divorce to adorn herſelf, as ſhe is lawful to her huſband on account of their marriage ſtill holding; and as *Rijaât* is laudable, and her adorning of her perſon may excite him to it, the action is therefore permitted by the law.

A man muſt not approach a reverſibly divorced wife during her intimation.

IT is not proper for a man, having a wife under reverſible divorce, to approach her without previous intimation, or letting her hear his footſteps:—this is where he has no intention of *Rijaât*; becauſe a woman is ſometimes undreſſed, and it might happen that if he were to come upon her unawares he would ſee parts of her, the ſight of which occaſions *Rijaât*; and this not being his intention, he would give her another divorce, which would protract her *Edit*.

A divorced wife cannot travel with her huſband until *Rijaât* be eſtabliſhed.

A MAN cannot carry with him, upon a journey, a wife whom he has repudiated by a reverſible divorce, until he have called witneſſes to bear evidence to his *Rijaât*.—*Ziffer* ſays that the huſband has ſuch a power, becauſe their marriage ſtill holds; which is the reaſon why he may lawfully have carnal connexion with her, according to *Haneeſa*. —The arguments of our doctors are twofold;—FIRST, the word of GOD, who has ſaid "TAKE THEM NOT FORTH FROM THEIR DWELLINGS,"

where the text applies to the women under reverſible divorce, the rying of whom upon a journey is the removal of them from their dwellings, and is therefore illegal;—SECONDLY, the only reaſon why the effect of a ſentence of reverſible divorce is poſtponed to the accompliſhment of the *Edit* is, the poſſible intention or wiſh of the huſband to take back his wife; but where he does not do ſo before the *Edit* is accompliſhed, it appears that he had no ſuch wiſh or intention, in which caſe it would be evident that the ſentence took effect upon the inſtant of his pronouncing it, and that the wife was conſequently ſeparated from that period; for if the effect of the ſentence were in reality reſtricted to the completion of the *Edit*, another *Edit* would then always be requiſite after the firſt; and hence, as it appears that the wife is, in effect, as a *ſtranger* to her huſband, from the time of the ſentence of divorce, it follows that he has no authority to carry her forth; whence it is here ſaid that he cannot carry her upon a journey until he has called witneſſes to bear evidence to his *Rijaât*; —in which caſe the *Edit* is annulled, and his authority re-eſtabliſhed.

**Cohabitation is not made illegal by a reverſible divorce.**

CARNAL connexion with a wife is not rendered illegal by a reverſible divorce, according to our doctors. *Shafeï* maintains that it is rendered illegal thereby, ſince the connubial connexion is diſſolved, becauſe of the appearance of that which terminates marriage, namely, his ſentence of divorce.—The argument of our doctors is that the connubial tie ſtill continues, inſomuch that the huſband is at liberty to take back his wife, even againſt her will, becauſe a right of *Rijaât* is reſerved to him out of tenderneſs, in order that he may be enabled to recover his wife when he becomes aſhamed of having divorced her; and this neceſſarily implying that he is empowered to recover her, his being ſo proves that *Rijaât* is a continuance of the marriage, and not a marriage *de novo*, as a man cannot marry a woman againſt her will. With reſpect to what *Shafeï* advances, that "the connubial connexion "is

" is diſſolved on account of the appearance of that which terminates " marriage, namely, his ſentence of divorce," it may be replied that the effect of the terminator is poſtponed to the completion of the *Edit*, according to all the doctors, out of tenderneſs to the huſband, as above.

## SECTION.

### *Of* CIRCUMSTANCES *which render a divorced* WIFE *lawful to her* HUSBAND.

A man may

IN a caſe of irreverſible divorce, ſhort of *three* divorces, the huſband is at liberty to marry his wife again, either during her *Edit*, or after its completion, as the legality of the ſubject ſtill continues, ſince the utter extinction of ſuch legality depends upon a *third* divorce; and accordingly, until a third divorce take place, the legality of the ſubject continues.

from him by *one* or *two* irreverſible divorces;

OBJECTION.—If the legality of the ſubject continue, it follows that it is lawful for any other perſon beſides the huſband to marry the wife during her *Edit*.

REPLY.—Her marriage with any other during her *Edit* is forbidden, on account of its inducing a doubtful parentage; but if the huſband marry her, this objection cannot exiſt.

but if *three* divorces he cannot marry her, until ſhe be previouſly married to another man

IF a man pronounce *three* divorces upon a wife who is *free*, or *two* upon one who is a *ſlave*, ſhe is not lawful to him until ſhe ſhall firſt have been regularly eſpouſed by another man; who, having duly conſummated, afterwards divorces her, or dies, and her *Edit* from him be accompliſhed,

accompliſhed, becauſe God has ſaid "IF HE DIVORCE HER, SHE IS "NOT, AFTER THAT, LAWFUL TO HIM" (that is after a *third* divorce) "UNTIL SHE MARRY ANOTHER HUSBAND." And here *two* divorces to a *ſlave* are the ſame as *three* to a *free* woman, becauſe the legality of the ſubject has only half its force in a ſlave, on account of her ſtate of bondage; and hence it would follow that, to ſuch an one, a divorce and an half ſtands the ſame as three divorces to a free woman, but as divorce is incapable of ſubdiviſion, *two* divorces are allowed.—As to what is ſaid, that the ſecond huſband duly conſummating is a condition, it is founded on the text here quoted, in which the word *Nikkah* [marriage] implies carnal connexion, as it bears two meanings, by one of which it ſignifies carnal conjunction, and by the other the legal union of the ſexes, and it is on this occaſion taken in the former ſenſe: but even admitting that the word *Nikkah*, in the text, meant ſimply the marriage contract, yet the condition is eſtabliſhed upon a well known tradition of the prophet, who being queſtioned concerning a perſon's power of marrying again a wife who, after he had repudiated her by three divorces, had been married to another man, and whom, after retiring with her, and lifting her veil, that man had divorced, replied "*the woman is not lawful to her firſt huſband until ſhe* "*has taſted the embrace of the other*;" but the condition requires only the entrance of the *penis* into the *vagina*, and not the emiſſion of ſeed, as the above tradition implies the entrance *generally*, whence that only is underſtood.

Nature of the conſummation in the ſecond marriage which renders a divorced wife again lawful to her firſt huſband.

A YOUTH under puberty is the ſame as a full grown man with reſpect to legalizing;—that is to ſay, if a man give his wife three divorces, and ſhe, after her *Edit*, marry with a youth under maturity, and he perform the carnal act with her, ſhe then [in caſe of his *deceaſe* or *divorce*] becomes lawful to her firſt huſband, becauſe the condition, namely, *entrance*, *in virtue of a regular marriage*, is neceſſarily ſuppoſed to be fulfilled.—*Mâlik* ſays that the carnal act of a *full grown man* is the condition, becauſe unleſs he be arrived at maturity the woman's

man's *taſting* (that is, *enjoying pleaſure* from) his embrace, which is the condition, is not fulfilled: but the caſes before recited in the book of marriage diſprove this diſtinction of *Mâlik*.—It is to be obſerved that it is recorded in the *Jama Sagheer*, that a boy under puberty, but who is ſuch as to be able to perform the carnal embrace, is termed a *Moorâhick*; and where ſuch an one has carnal knowledge of his wife, ablution is incumbent upon her, and ſhe is thereby rendered lawful to a former huſband, if he ſhould have repudiated her by three divorces; and the carnal embrace of ſuch an one is implied from the circumſtance of his having a priapiſm and deſire. It is alſo to be obſerved that ablution is made incumbent upon the woman, in the preſent caſe, only on account of the entrance of the boy's *penis* into her *vagina* exciting an *emiſſio ſeminis* on her part, the neceſſity thereof with reſpect to her being ſolely in conſequence of her full puberty; but it is not incumbent upon the *boy*, he not being ſubject to the neceſſity of ſuch obſervance; but yet it is required of him, that he may be habituated to a laudable cuſtom.

A FEMALE ſlave, whom her huſband has repudiated by two divorces, is not rendered lawful to him by the carnal embrace of her maſter, becauſe that which is eſſential to her legality, (namely *marriage*,) does not exiſt here.

IF a man marry a woman whoſe huſband had repudiated her by three divorces, under a condition of rendering her lawful to her former huſband, as if he were to declare to her—"I marry you under a con-"dition of rendering you lawful to your former huſband,"—or, as if ſhe were to ſay to him—"I marry with you under the condition of "my becoming lawful to my former huſband,"—this is an abominable marriage, becauſe the ſecond huſband is here termed a *Mohullil*, or legalizer, and the prophet has ſaid "let the curſe of GOD fall upon "the *Mohullil* and the *Mohallal-le-hoo**: but nevertheleſs, if the par-

The ſecond marriage, when contracted under a legalizing condition, is diſapproved; but yet the woman is rendered legal by it to her firſt huſband.

* *The thing rendered legal.* It means, on this occaſion, a thing rendered legal by ſome indirect and unapproved expedient.

ties

ties contract a marriage under this condition, and the man divorce the woman *after carnal connexion*, ſhe, upon the completion of her *Edit*, becomes lawful to her former huſband, as there undoubtedly exiſts a conſummation in a regular marriage, which is the cauſe of legality, and the marriage is not invalidated by the condition.—It is recorded from *Aboo Yooſaf* that ſuch a marriage is null, as it falls under the deſcription of a *Nikkah Mowokket*, or *temporary* marriage, becauſe the words of the huſband, "I marry you under a condition of rendering "you lawful to your former huſband," imply "I marry you until "the time of our having carnal connexion, and not for an indefinite "time,"—and is therefore the ſame as where a man ſays to a woman "I marry you for a month," and ſo forth; and the marriage being *invalid*, the woman cannot by that means be rendered lawful to her former huſband: but in reply to this our doctors urge that the reſtriction of the marriage to any ſpecified time is not expreſsly mentioned by the parties, nor does the man here marry the woman under any other condition than that of doing by her as marriage requires; and hence it does not come under the deſcription of a *temporary* marriage. —It is recorded from *Mohammed* that the marriage is legal and valid, for the reaſons before mentioned; but yet the woman is not thereby made lawful to her firſt huſband, becauſe the ſecond huſband here endeavours to *precipitate* a thing which the law *poſtpones*, (for the law poſtpones her legality to her former huſband to the death of her preſent,) and therefore meets a due return in the defeat of his deſign, (to wit, legalizing the woman to her former huſband;) in the ſame manner as in the murder of an inheritee; that is to ſay, if any perſon ſlay his inheritee, he is thereby cut off from inheritance, as having attempted to precipitate that which the law has poſtponed, and thus meets his puniſhment in the defeat of his deſign, (to wit, immediate inheritance;) and ſo alſo in the preſent caſe.

The firſt huſband, recovering his

If a man repudiate his wife by *one* or by *two* divorces, and, her *Edit* being completed, ſhe be married to another man, and afterwards return

return to her former huſband, he becomes again authorized ſo far as *three* divorces, the *one* or the *two* divorces formerly pronounced upon her by him having been cancelled and obliterated by her marriage with the ſecond huſband, in the ſame manner as *three* divorces would have been *. This is the doctrine of the two *Elders*.—*Mohammed* ſays that marriage with a ſecond huſband does not obliterate any thing ſhort of *three* divorces. The proofs on either ſide are drawn from the *Arabic*.

wife, by an intervenient marriage, recovers his full power of diover

If a man pronounce three divorces upon his wife, and ſhe afterwards declare that "her *Edit* having been duly accompliſhed, ſhe has "been married to another man, and enjoyed and divorced by him, "and that her *Edit* from him is elapſed,"—her former huſband may lawfully admit her aſſeveration, and marry her, provided that from the period of his divorcing her ſuch a ſpace of time have elapſed as affords a poſſibility of this having been the caſe, and that he actually believe her aſſertion to be true; becauſe the ſubſtance of the woman's aſſertion is either a matter of mere *temporal* concern, (as not comprehending any merit or demerit before God,) or it is a matter of *religion*, (on account of *legality* being ſuſpended upon it,) and the declaration of a ſingle perſon, either in matters of a temporal or ſpiritual nature, is worthy of credit; and the confirmation of her aſſertion is not forbidden or reprobated, where the ſpace of time which has intervened admits the poſſibility of its truth.—The learned differ concerning the ſhorteſt period which admits of this poſſibility, as ſhall be fully explained in treating of *Edit*.

The wife's declaration of her having been lized credited

* That is to ſay, one or two divorces are obliterated, the ſame as three would be, had that been the number formerly pronounced by him.—It is neceſſary to obſerve that this caſe involves a principle in divorce which is no where expreſsly mentioned; namely, that the ſame woman is not a legal ſubject of more than three divorces to any one man, and conſequently, that a man who repudiates his wife by *two* divorces, (for inſtance,) if he marry her again, unleſs the intervention of another huſband obliterate theſe two, has no power beyond *one* divorce in the ſecond marriage.

## CHAP. VII.

## Of *Aila*.

finition of term.

AILA, in its primitive ſenſe, ſignifies *a vow*.—In law, it implies a huſband ſwearing to abſtain from carnal knowledge of his wife for any time above *four* months, if ſhe be a free woman; or *two* months, if ſhe be a ſlave.

ıe mode in ich *Aila* is ıbliſhed.

IF a man ſwear that he will not have carnal connexion with his wife,—or, that he will not have ſuch connexion with her within four months,—an *Aila* is eſtabliſhed; becauſe GOD has ſaid "WHERE A "MAN MAKES A VOW [*Aila*] WITH RESPECT TO HIS WIFE, HE "MUST STAY FOUR MONTHS,"—to the end of the verſe.

breach of *la* expia- n is in- nbent:

t if it be ſerved, a ′orce irre- rſible en- :s at its ′mination.

IF a man, in a caſe of *Aila*, have carnal knowledge of his wife within four months after, he is forſworn in his vow, and expiation is incumbent upon him, this being incurred by the breach of his vow; and the *Aila* drops, as his vow is cancelled by the breach of it: but if he have not carnal knowledge of her for the ſpace of four months, a divorce irreverſible takes place, independant of any decree of ſeparation from the magiſtrate.—*Shafeï* ſays that a decree of the magiſtrate is requiſite, becauſe the huſband here withholds her right (namely *carnal connexion*) from his wife, and hence the magiſtrate acts as his ſubſtitue, in effecting a ſeparation; as in the caſe of eunuchs and impotent perſons: in ſhort, according to *Shafeï*, a right to demand ſeparation reſts

reſts with the woman, in the ſame manner as in the caſe of her marriage to one who is impotent or an eunuch; and in conſequence of a decree of the magiſtrate ſhe becomes repudiated by a divorce irreverſible.—The arguments of our doctors are twofold:—FIRST, the huſband, in abſtaining from carnal connexion for the ſpace of four months, acts unjuſtly towards his wife, by withholding from her that which is her right, for which the law makes him a due return, in depriving him of the benefit of marriage upon the expiration of that term; and this is an opinion recorded from *Othman*, and *Alee*, and *Abdoola-Ibn-Muſſaood*, and *Abdoola-Ibn-Abbaas*, and *Abdoola-Ibn-Aumroo*, and *Zeyd-Ibn-Sabit*:—SECONDLY, in times of ignorance * an *Aila* ſtood as a *divorce*, and the law afterwards conſtituted it a divorce *poſtponed to the period of four months*:—now, if a man ſwear to abſtain for *four months*, his vow drops at the expiration of that term; that is, if the ſame man ſhould afterwards marry and cohabit with the ſame woman, he is not forſworn, becauſe the vow was temporary; but if he ſhould have ſworn to abſtain *forever*, his vow continues in force, becauſe it is general, (that is to ſay, is not reſtricted to four months,) and no violation appears by which it might be cancelled: yet divorce does not take place upon it repeatedly, unleſs where marriage is repeated, becauſe, after ſeparation, the withholding of the woman's right cannot be ſuppoſed to exiſt; but if, after ſeparation, the vower were to marry her again, the *Aila* returns; and conſequently, upon carnal cohabitation in this marriage, he would be forſworn; or, if he abſtain, an irreverſible divorce again takes place upon her, at the expiration of four months, as before, becauſe the obligation of the vow continues, on account of its being *general*, and in conſequence of the man marrying her again her right to carnal connexion is eſtabliſhed, and of courſe his injuſtice in withholding it from her.—And here it is to be obſerved that the recommencement of the *Aila* is to be counted from the date of the ſecond marriage; and if this man were again, a *third* time, to marry

* That is, before the eſtabliſhment of the *Muſſulman* faith.

her, the *Aila* returns, and occaſions an irreverſible divorce at the expiration of four months, in caſe of the huſband refraining from carnal connexion for that term, for the reaſons already ſtated.—What is now advanced proceeds upon a ſuppoſition of the vower marrying the woman again without the intervention of her marriage with another man; but if, in the interim, ſhe had been married to another man, divorce would not take place in conſequence of the vower abſtaining from carnal connexion for the ſpace of four months, in the ſecond marriage, becauſe the vow is confined, in its effect, to divorce in the firſt or original propriety *, the *Aila*, in the preſent caſe, being the ſame as if the huſband were to ſuſpend divorce upon his abſtaining from carnal cohabitation for the ſpace of four months, where the effect is reſtricted to the propriety then exiſting, and ſo in this caſe likewiſe.—This caſe is grafted on the caſe of obliteration, concerning which there is a difference of opinion between *Ziffer* and our doctors; and that caſe is where a man, having ſaid to his wife "if you enter "this houſe you are under three divorces," afterwards repudiates her by an expreſs ſentence of three divorces, and ſhe is again married to him, and then enters the ſaid houſe, from which no divorce takes place, according to our doctors, whereas *Ziffer* holds that divorce takes place; as was recited at large in a former chapter.—But

* When a man marries a woman, his *Milk* (which is here and elſewhere rendered *propriety*, or *right*; that is, *peculiarity of poſſeſſion*,) continues with reſpect to her, notwithſtanding divorce, until it be abrogated by her marriage with another. In ſhort, the propriety, or peculiar right, of a huſband is a principle which is alive in the actual exiſtence of marriage, and is not *annihilated*, but remains *dormant*, or *quieſcent*, under a termination of it by divorce; and hence it is that, where a man marries a woman, after having repudiated her, he is ſaid to attain a *revival* of propriety, not a propriety *de novo*. Many of the moſt important and (apparently) unaccountable laws of divorce are to be traced to this ſource. In the preſent caſe the *Aila* is ſaid to have been reſtricted in its effect to the vower's original propriety, and conſequently, in its effect, recurs upon every revival of that propriety by marriage; but it being abrogated by the woman's intervening marriage with another, the vower's ſubſequent marriage with her is an attainment of propriety *de novo*, in which the vow cannot operate.

ſerve that, in the caſe now under conſideration, although divorce do not take place, yet the obligation of the vow remains, as it was general, and continues uncancelled by any breach of it;—and hence, if the man ſhould ever have carnal connexion with the wife at any ſubſequent period, expiation is incumbent upon him, on account of this breach of his vow.

A vow of abſtinence for a term ſhort of four months does not con-

IF a man make a vow to abſtain from carnal knowledge of his wife for *leſs* than four months, (as if he were to reſtrict it to *two* or to *three* months,) it is not an *Aila*, becauſe *Ibn Abbas* has ſaid that *Aila* is not occaſioned by a vow of abſtinence from carnal connexion with a wife for a period ſhort of four months; and alſo, becauſe a huſband who abſtains from the embrace of his wife for the ſpace of four months or upwards, has no obſtruction to plead, that being the longeſt ſpace during which any obſtruction is ſuppoſed to exiſt*; but an obſtruction may continue for a time *ſhort* of four months; and conſequently divorce will not take place from a vow of abſtinence for that time.

IF a man make a vow, ſaying to his wife "by GOD I will not "have carnal connexion with you for two months, nor for two "months after that," *Aila* is eſtabliſhed: the proofs of this are drawn from the *Arabic*.—But if a man ſwear that "he will not have carnal connexion with his wife for two months," and then remain ſilent for a day, and the next day again ſwear that "he will not have carnal "connexion with her for two months after the other two," *Alia* is not eſtabliſhed, becauſe the ſecond vow is diſtinct and ſeparate from the former, the huſband, upon his making his firſt vow, being prohibited from carnal connexion for *two* months, and upon making the

* By the *obſtruction* here mentioned is to be underſtood pregnancy for the laſt four months, during which it is not deemed lawful for a huſband to have carnal connexion with his wife.

ſecond

ſecond, for *four* months, excepting the day on which he remained ſilent, whence the term of *four months complete* (being the ſpace of time requiſite to conſtitute *Aila*) is not included in this vow.

If a man vow that "he will not have carnal connexion with his "wife for a year excepting a day," *Aila* is not eſtabliſhed.—This is contrary to the opinion of *Ziffer*, who places the *excepted* day at *the end* of the year, conceiving this to be analogous to a caſe of hire;—that is to ſay, if a man agree to let or hire an houſe to another for a year excepting a day, the day excepted is transferred to the *end* of the year, and ſo in this caſe likewiſe; and the exception being transferred to the *end* of the four months, the complete term of an *Aila* is involved in the vow.—The argument of our doctors is that the term *Mawâlee* [maker of an *Aila*] is applied only to one who cannot have carnal connexion with his wife for the ſpace of four months, without incurring a penalty, ſuch as *expiation*, for inſtance; but in the preſent caſe the huſband may have carnal connexion with his wife without incurring any penalty, becauſe the *day* excepted is not particularly ſpecified:—contrary to a caſe of *hire*, where the excepted day is tranſferred to the end of the year, from neceſſity, as the contract, or engagement of hire, would without that be void, on account of ignorance; whereas this is not the caſe in a *vow*.—But if, after this vow, the man were on any particular day to have carnal connexion with his wife, and four months or upwards of the year ſtill remain, *Aila* is eſtabliſhed, as the exception then drops.

If a man, being in *Baſra*, and his wife in *Kooſa*, ſwear that he will not go to *Kooſa*, *Aila* is not eſtabliſhed, becauſe he can ſtill have carnal connexion with his wife, without incurring any penalty *, by

* That is, without ſubjecting himſelf to any obligation of performing expiation for the breach of his vow.

bringing her from *Koofa* to the place of his reſidence, and there enjoying her.

IF a man make a vow, annexing to his breach of it *pilgrimage*, *faſt*, *alms-gift*, *manumiſſion*, or *divorce*, by ſaying to his wife "if I have "carnal connexion with you, I am under an obligation to *faſt*,"—or "to give alms,"—or "to perform a pilgrimage,"—or "ſuch an one "my ſlave is free,"—or "you are divorced,"—or "ſuch an one, my "wife, is divorced,"—*Aila* is eſtabliſhed, as in this caſe an obſtacle is oppoſed to the commiſſion of the carnal act from the terms of the vow, in the mention of the condition and the penalty, the ſeveral penalties abovementioned amounting to prohibition, as the incurring of any of them is attended with trouble or injury.—*Aboo Yooſaf* objects that ſuſpending the manumiſſion of a ſlave upon the commiſſion of the carnal act does not amount to an *Aila*, as it is poſſible for the huſband to evade the penalty, by firſt ſelling the ſlave, in which caſe he might commit the act without incurring any penalty.—To this *Haneeſa* and *Mohammed* reply that the ſale of the ſlave is not a matter of certainty, as a purchaſer is not always found, and hence this objection is of no weight.

der a penalty annexed, conſtitutes an *Aila*.

IF a man make an *Aila* with reſpect to a wife under *reverſible* divorce, the *Aila* is eſtabliſhed; but if, with reſpect to one under *irreverſible* divorce, it is *not* eſtabliſhed; becauſe the connubial union ſtill ſubſiſts in the former caſe, but not in the latter; and in the ſacred writings ſhe alone is declared to be a ſubject of a vow of abſtinence who is the wife of the vower.

*Aila* holds reſpecting a wife under vorce;

IF a man make an *Aila* with reſpect to a wife under reverſible divorce, and her *Edit* be accompliſhed before the expiration of the term of *Aila*, the *Aila* then drops, as the woman (becoming totally ſeparated by the completion of her *Edit*) no longer remains a ſubject of it.

but drops on

An *Aila* made reſpecting a woman *before* marriage is nugatory.

If a man ſay to a ſtrange woman "by God I will never have carnal connexion with you,"—or "you are to me like the back of my "mother *," and he afterwards marry her, neither *Aila* nor *Zihâr* are eſtabliſhed, as theſe expreſſions are *ipſo facto* null, the woman, at the time of his addreſſing her in theſe terms, not being a ſubject of either one or the other, ſince none are ſo but wives: but yet if a man marry a woman after having vowed in this manner, and have carnal knowledge of her, he muſt perform expiation on account of breach of his vow, which is ſtill binding upon him.

The term of *Aila*, with reſpect to a ſlave, is *two months*, this being the ſpace of time fixed for her final ſeparation; thus the term of *Aila* of a ſlave is half that of a free woman, as well as her *Edit*.

An *Aila* made reſpecting a wife at a diſtance may be orally reſcinded.

If, at the time of making an *Aila* vow, there ſhould exiſt any natural or accidental impediment to generation on the part of either the man or the woman, (ſuch as the former being ſick, or the latter being *impervia coeunti*, or an infant, incapable of the carnal act,—or their being at ſuch a diſtance from each other as does not admit of their meeting during its term,) it is, in this caſe, in the man's power to reſcind his *Aila*, by ſaying "I have returned to that "woman," upon which the *Aila* drops.—*Shafei* ſays that *Aila* cannot be reſcinded but by the carnal act, (and ſuch is likewiſe the opinion of *Tehâvee*,) becauſe, if the above declaration of the huſband amounted to a reſcindment, it would follow that a breach of the vow is therein eſtabliſhed, and conſequently that expiation is incumbent; whereas this is not the caſe.—The argument of our doctors is that, the *Mawâlee*, having wronged his wife by a vow prohibiting his carnal connexion with her, it remains with him to make her ſuch ſatisfaction as circumſtances admit of, by a verbal acknowledgment; and

* A ſpecies of abuſe, by which, in times of ignorance, the wife ſtood virtually divorced. Since the propagation of the faith, it only occaſions the wife to be prohibited to her huſband until ſuch time as he ſhall perform an expiation. See article *Zihâr*.

the wrong being thereby removed, he is no longer ſubject to the penalty annexed to it, namely, divorce.—It is to be obſerved that if the obſtruction to generation, in the caſe under conſideration, be removed during *Aila*, and after the *Mawâlee's* oral reſcindment as above, ſuch reſcindment is null, and his commiſſion of the carnal act is then requiſite to reſcind it, as he is here enabled to employ the actual means, whilſt the end remains as yet unattained.

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

If a man ſay to his wife "you are prohibited to me," let him be aſked concerning the intention of theſe words; and if he ſay "my "deſign, in thoſe words, was to expreſs a falſehood," his declaration is to be credited, as his intention coincides with their actual tenor. (Some have ſaid that his declaration is not to be credited before the *Kázee* *, as his ſpeech is apparently a *vow*, ſince the rendering prohibited that which is lawful amounts to a vow.) And if he ſay "I "intended *divorce*," a ſingle divorce irreverſible takes place, except where he deſigned three divorces, in which caſe three divorces take place, as was ſtated in treating of *Talák Kinâyat*, or divorce by implication: and if he ſay "I intended *Zihâr*," *Zihâr* is accordingly eſtabliſhed with the two *Elders*. *Mohammed* ſays that this is not *Zihâr*, becauſe it is eſſential to *Zihâr* that the huſband compare his wife to his own relation within the prohibited degrees, which is not the caſe in this inſtance.—The argument of the two *Elders* is that he has declared prohibition *generally*; and *Zihâr* alſo involves a ſort of prohibition, (namely, the prohibition of carnal connexion, until after expiation,) and a circumſtance generally expreſſed is capable of bearing a reſtricted conſtruction.—And if he ſay "I intended prohibition,"—or "I had no particular intention," his ſpeech amounts to a vow, and conſequently an *Aila* is eſtabliſhed from it, becauſe a vow is the original thing (with our doctors) in rendering prohibited that which is lawful, as ſhall be demonſtrated in treating of *Vows*. Some doctors conſtrue any expreſſion of prohibition into a divorce, where there is no particular intention, as being agreeable to cuſtom.

* That is, in point of *law*.

## CHAP. VIII.

## Of *Khoola*.

Definition of the term.

KHOOLA, in its primitive ſenſe, means to *draw off* or *dig up*. In law it ſignifies an agreement entered into for the purpoſe of diſſolving a connubial connexion, in lieu of a compenſation paid by the wife to her huſband out of her property.—This is the definition of it in the *Jama Ramooz*.

Reaſons which juſtify *Khoola*, or divorce for a compenſation;

WHENEVER enmity takes place between huſband and wife, and they both ſee reaſon to apprehend that the ends of marriage are not likely to be anſwered by a continuance of their union, the woman need not ſcruple to releaſe herſelf from the power of her huſband, by offering ſuch a compenſation as may induce him to liberate her, becauſe the word of GOD ſays "NO CRIME IS IMPUTED TO THE WIFE "OR HER HUSBAND RESPECTING THE MATTER IN LIEU OF WHICH "SHE HATH RELEASED HERSELF;" that is to ſay, there is no crime in the huſband's accepting ſuch compenſation, nor in the wife's giving it: and where the compenſation is thus offered and accepted, a ſingle divorce irreverſible takes place, in virtue of *Khoola*; and the woman is anſwerable for the amount of it, becauſe the prophet has ſaid that *Khoola* effects an irreverſible divorce; and alſo, becauſe the word *Khoola* bears the ſenſe of divorce, whence it is that it is claſſed with the implied expreſſions of it, and from an implied divorce a divorce irreverſible

which occaſions a ſingle irreverſible divorce.

irreverſible takes place;—but intention is not eſſential to *Khoola*, becauſe by the mention of a compenſation, the act is made independant of it;—and alſo, becauſe it is not to be imagined that the woman would relinquiſh any part of her property but with a view to her own ſafety and eaſe, which is not to be obtained but by a total ſeparation. What is now advanced proceeds upon a ſuppoſition of the averſion being on the part of the *wife*, and not on that of the *huſband*; but if it be on the part of the *huſband*, it would be abominable in him to take any thing from her, becauſe the ſacred text ſays "IF YE BE "DESIROUS OF CHANGING (that is, repudiating one wife, and marrying another,) TAKE NOT FROM HER ANY THING;"—and alſo, becauſe a man, by divorcing his wife from ſuch a deſire of change, involves her in diſtreſs; and it behoves him not to increaſe that diſtreſs by taking her property. If, moreover, the averſion be on the part of the woman, it is abominable in the huſband to take from her more than what he had given or ſettled upon her, namely, her *dower*. (According to the *Jama Sagheer*, if the huſband take from her more than the dower, it is ſtrictly legal, as the text of the *Koran* already quoted is expreſſed generally: but the former opinion is founded on a tradition of the prophet, to whom a woman having mentioned her hatred of her huſband, he adviſed her to give up her *dower*, as a compenſation, to induce the huſband to divorce her, to which ſhe replied "I will give that and more!" but the prophet anſwered "not more!" —and here the averſion was on the part of the *woman*.)—But yet if the huſband ſhould take *more* than the dower, it is approved in point of law;—and ſo alſo, if he were to take any compenſation, where the averſion is on his part, becauſe the ſacred text goes to eſtabliſh two points; one, the lawfulneſs of *Khoola* in a *judicial* view; and the other, its admiſſibility between the parties and GOD ALMIGHTY; now, from the tradition which has been recited, it appears that where the averſion is on the part of the wife, a *Khoola* for more than the dower is diſapproved; and, on the other hand, the text before quoted ſhews that if the averſion be on the part of the huſband, he ſhould not take any

thing, and consequently not a or than *so*
fore the ground of *admissibility* is abandoned, on account of the tradiction between the tradition and the text; and practice is established upon the other remaining ground, namely, the lawfulness of *Khoola* in a *judicial* view.

The wife is responsible for the compensation.

If a husband offer to divorce his wife for a compensation, and she consent, divorce takes place, and she becomes answerable for the compensation; because the husband is empowered, of himself, to pronounce either an *immediate* or a *suspended* divorce, and he here suspends the divorce upon the assent of the woman, who is at liberty to agree to the compensation, as she has authority over her own person, and the matrimonial authority, like retaliation, is one of those things for which a compensation is lawful, although it do not consist of property; and the divorce is irreversible for the reasons already assigned, and also because *Khoola* is understood to be an exchange of property for the person; and upon the husband being vested with a right in the property, the woman, in return, is vested with a right in her own person, in order that an equality may be established.

Difference between a wife requiring *Khoola* in lieu of an unlawful article, and requiring *divorce* in lieu of the same in express terms.

If the thing offered to the husband in return for *Khoola* be not lawful property, (as if the woman were to desire him to grant her *Khoola* in lieu of *wine* or a *hog*, and he consent, saying "I agree to a *Khoola* "in lieu of such wine," or so forth,) a divorce *irreversible* takes place, but nothing is due to the husband: but if a compensation for *divorce* consist of a thing not lawful property, (as if the woman were to desire her husband to *divorce* her for a cask of wine, and he consent, saying "I *divorce* you in consideration of such wine," and so forth,) a *reversible* divorce takes place.—The reason for divorce taking place in both instances is that the husband has suspended it upon the consent of the woman, which is already testified; and the difference between the case of *Khoola* and that of *divorce* is that, in the *former*, the compensation being null, the word used by the husband [*Khoola*] remains,

and

and that, as being a *Kináyat*, or *implied* ſentence, is effective of *i verſible* divorce; whereas, in the latter, the word divorce is *expreſs*, and conſequently occaſions *reverſible* divorce only.—And the huſband has here no claim upon his wife, becauſe ſhe has not named any appreciable article, which might be the means of deceiving him; and alſo, becauſe if the thing named be particularly ſpecified by her, it cannot be lawfully made incumbent upon her in favour of her huſband, on account of his being a *Muſſulman*; and in the ſame manner, it cannot be made incumbent if it be not particularly ſpecified, as in that caſe ſhe does not charge herſelf with it:—but it is otherwiſe where ſhe ſpecifies a thing under a falſe denomination, (as if, for inſtance, ſhe were to make a propoſal of *Khoola* to her huſband, by ſaying "divorce me for this caſk of vinegar," and he agree, and the caſk afterwards appear to contain wine,) for in this caſe he has a claim upon her for an equal quantity of vinegar of the medium ſtandard, becauſe her naming an appreciable article has been the means of deceiving him:—and it is alſo contrary to a caſe in which a maſter emancipates his ſlave, or conſtitutes him a *Mokâtib*, in return for a caſk of wine; for then the emancipated perſon is reſponſible to his emancipator for the amount of his eſtimated value as a ſlave, becauſe the owner's property in his ſlave is a thing which bears a certain eſtimable value, and which he therefore cannot be ſuppoſed willing to relinquiſh gratuitouſly; whereas the property in the wife's perſon is not of any eſtimable value in the circumſtance of the *diſſolution* of the connubial right, as the only reaſon for its being ſo, in the *attainment* of ſuch right, is its importance, and conſequent title to reſpect; whence it is that the attainment of that right without a return is not countenanced by the law; but the relinquiſhment of that right being *in itſelf* a manifeſtation of ſuch reſpect, there is then no occaſion to impoſe upon any one an obligation of property for the purpoſe of manifeſting it.

The compenſation for *Khoola* may conſiſt of any thing which is capable of being accepted as a dower, is alſo capable of being accepted as a compenſation for *Khoola*, ſince whatever is capable of being a proper return for that which is appreciable, (namely, the woman's perſon at the time of its coming into *propriety*,) muſt, in a ſuperior degree, be capable of being a compenſation for a thing *not* appreciable, (namely, the woman's perſon at the time of the deſtruction of propriety.)

quired in lieu of property

If a woman ſay to her huſband "Grant me *Khoola* for what is in "my hand," and he agree, and it ſhould afterwards appear that ſhe had *nothing* in her hand, divorce takes place; but nothing remains incumbent upon the woman, as ſhe has not deceived her huſband by any ſpecific mention of property: but if ſhe were to ſay "grant me "*Khoola* for the *property* in my hand," and he agree accordingly, and it ſhould appear that ſhe had nothing in her hand, ſhe muſt in this caſe return to him her dower, becauſe ſhe has deceived him by a ſpecification of property which did not exiſt; and hence he does not appear to conſent to a relinquiſhment of the connubial propriety without a return, and the woman cannot be legally bound to give the thing ſpecified, or its value, as its kind or ſpecies is unknown; neither can ſhe be laid under any legal obligation to render the eſtimated value of her *perſon*, (that is, her *proper dower*,) becauſe, in the circumſtance of the deſtruction of the connubial propriety, *that* is not appreciable; it is therefore fixed that there remain incumbent upon her whatever the huſband may have given in lieu of his attainment of the propriety, in order that thus he may be ſhielded from injury.—If, moreover, a woman ſay to her huſband "grant me *Khoola* for *the Dirms* in my "hand," and he agree, and it afterwards appear that ſhe had nothing in her hand, he has a claim upon her for *three Dirms*—The proofs are here taken from the *Arabic*.

*Khoola* in lieu of an abſconded ſlave.

If a man enter into an agreement of *Khoola* with his wife, in lieu of an abſconded ſlave, on the condition that, if the ſlave be recovered,

make him over to the huſband, but if not, ſhe ſhall not be anſwerable; yet ſhe is not releaſed from reſponſibility, and it remains incumbent upon her either to make delivery of the ſlave or of his value, becauſe an agreement of *Khoola* is of a reciprocal nature, (whence it is requiſite that the recompence be received on the part of the huſband;) and the condition of releaſe from reſponſibility agreed to by the parties is diſapproved, and conſequently void; but yet the *Khoola* is not ſo, as it is not rendered void by involving an invalid condition. Analogous to this is a caſe of marriage;—for if a man marry a woman, agreeing to give, as her dower, an abſconded ſlave, on the condition that if he be recovered he ſhall be made over to her—but if not, huſband is not to be anſwerable; yet the huſband is not re- from reſponſibility, and it remains incumbent upon him either to deliver to his wife the ſlave ſpecified, when able ſo to do, or to pay her his price.

Caſes of *Khoola* ed for

If a woman ſay to her huſband "divorce me thrice for one "thouſand *Dirms*," and he pronounce a ſingle divorce, there remains incumbent upon her one third of the thouſand *Dirms*, becauſe, in requiring *three* divorces for the whole ſum, ſhe has required each divorce, ſeparately, for the *third* of that ſum.—It is however to be obſerved that the ſingle divorce pronounced in this caſe is irreverſible, as being given in lieu of property.

If a woman ſay to her huſband "divorce me thrice, *upon my* "*ing you* one thouſand *Dirms*," and the huſband give her one divorce, nothing is incumbent upon the woman, according to *Haneefa*, and the huſband is at liberty to take her back. The two diſciples ſay that a divorce irreverſible takes place in return for one third of the thouſand *Dirms*, becauſe the expreſſion "*upon payment of*" is the ſame as the word "*for*" in contracts of exchange. The argument of *Haneefa* is that the expreſſion "*upon payment*" is a condition, and the thing conditioned cannot be divided according to the parts of the condition itſelf:

itſelf: contrary to the word "*for*," as that is uſed to expreſs a *return*, and as the property is not due, divorce *expreſs* (and conſequently *reverſible* remains.

If a man ſay to his wife "divorce yourſelf thrice, for (or *upon* "*payment of*) one thouſand *Dirms*, and ſhe pronounce upon herſelf one divorce, no effect whatever takes place, becauſe the huſband is not deſirous that ſhe ſhould become *ſeparated* for any thing ſhort of the whole ſum ſpecified: contrary to a caſe where the propoſal comes from the wife, (as in the preceding inſtance,) becauſe, as ſhe there appears to be deſirous of procuring ſeparation from her huſband at the whole expence ſpecified, it follows that ſhe is willing to procure it, at the *third* of that expence only, *a fortiori*.

If a man ſay to his wife "you are divorced *upon payment of* one "thouſand *Dirms*," and ſhe agree, divorce takes place upon her, and the huſband has a claim upon her for the thouſand *Dirms*, in the ſame manner as where a man ſays "you are divorced *for* a thouſand *Dirms*," and the wife conſents, in which caſe divorce takes place, and one thouſand *Dirms* are incumbent upon her:—but it is to be obſerved that in both caſes the woman's aſſent is a condition, becauſe the words of the huſband "you are divorced *for* one thouſand *Dirms*," mean "you "are under divorce *in return for* one thouſand *Dirms* due from you "to me,"—and his words "you are divorced *upon payment of* one "thouſand *Dirms*," mean "you are under divorce *on condition that* one thouſand *Dirms* be due from you to me," and the return cannot be made incumbent upon her without her aſſent; moreover, a circumſtance ſuſpended upon a condition cannot take place until the condition be previouſly fulfilled, wherefore the effect in this caſe depends upon her agreeing to what is propoſed. And here the divorce is irreverſible, for the reaſon already ſtated.

If

IF a man ſay to his wife "you are divorced, and there is againſt "you a thouſand *Dirms*," and ſhe conſent,—or, if a man ſay to his ſlave "you are free, and there is againſt you a thouſand *Dirms*," and the ſlave aſſent,—the ſlave is free, and divorce takes place upon the wife, but nothing remains incumbent upon either, according to *Haneeſa*:—the rule is alſo the ſame if they were not to aſſent.—The two diſciples ſay that the ſum ſpecified is incumbent upon them, where they aſſent; but that, if they do not aſſent, neither divorce nor emancipation take place; for they argue that the latter part of the huſband's addreſs is ſuch as is uſed in bargains of exchange; and a contract of *Khoola*, or of *Kitábat*, being a contract of exchange, is therefore to be conſidered as ſuch;—as in hire, for inſtance, where if a man ſay to another "carry this burthen, and there is a *Dirm* for you," it is the ſame as if he were to ſay "carry this burthen for a *Dirm*." —To this *Haneeſa* replies that the latter part of the ſentence has a ſeparate and detached ſenſe, and therefore is not to be connected with the preceding part, unleſs there be ſomething to ſhew that it is ſo;—but here nothing exiſts to evince ſuch connexion, becauſe divorce and manumiſſion are frequently produced without any ſubſtantial return: —contrary to caſes of *ſale*, or of *hire*, as neither of theſe are to be conceived without a ſubſtantial compenſation.

IF a man ſay to his wife "you are divorced for a thouſand *Dirms*, "on a condition of option to me (or, *to you*) for three days," and ſhe conſent, the option is invalid, where it is reſerved to *him*, but valid where it is reſerved to *her*; and if ſhe reject his propoſal within the three days, the *Khoola* is null; but if ſhe do not reject it within that time, the divorce takes place, and the ſum ſpecified by the huſband becomes incumbent upon her.—This is the doctrine of *Haneeſa*. The two diſciples ſay that the option is null in either caſe, and that divorce takes place upon the woman, and the ſum ſpecified becomes incumbent upon her, becauſe option is uſed for the purpoſe of diſſolving a contract, or other agreement, after it has been concluded,

A propoſal of *Khoola* made to the wife, with a reſerve of option to the huſband, is invalid.

and *not* for preventing the *execution* of it; and the act of the man, or of the woman, implying *proposal* on the part of the *former*, and *acceptance* on that of the *latter*, does not carry with it *dissolution* on either part; his proposal does not, as it is a *Yameen*, or suspending vow, on account of its involving a condition and a consequence, (namely, the suspension of divorce upon the woman's consent;) and a vow is in itself incapable of effecting dissolution; nor does her acceptance, as that is the condition of the vow, and as the vow is in itself incapable of effecting dissolution, so is the condition; and such being the case, the reserve of option on either part is null.—The argument of *Haneefa* is that *Khoola* on the part of the woman stands as a *sale*, since it is a transfer of property for a return, and accordingly, if it proceed first from the wife, by her saying to her husband "divorce me in return "for one thousand *Dirms*, on a condition of option to me (or, *to you*) "for three days," and she afterwards retract before her husband signifies his consent, her retractation is approved, on which account it is restricted to that *Majlis*, or situation, and does not extend beyond it, —that is, if she rise from her seat before her husband signifies his assent, it becomes null; the condition of option in it therefore, when proceeding from the wife, is approved; but when it proceeds from the *husband*, the condition of option is not approved, because it is then a *vow*, wherefore his retractation of it is not approved, and it continues in force beyond the *Majlis*; and as it is a vow on the part of the husband, he can have no option, since a vow does not admit of option. Let it be also observed that the case of a slave, with respect to manumission, is the same as that of a wife, with respect to divorce; —that is to say, manumission for a consideration is an exchange, on the part of a slave, the same as divorce for a return, on the part of a wife.

The assertion of the husband respecting *Khoola* is to be credited.

If a man say to his wife "I yesterday divorced you for a thousand "*Dirms*, but you did not consent,"—and the woman reply that she *did* consent, the assertion of the husband is to be credited: but if a man say

ſay to another "I yeſterday ſold you this ſlave for a thouſand *Dirms*, "but you did not conſent," and the other reply that he *did* conſent, the aſſertion of the purchaſer is to be credited.—The reaſon of the difference between theſe two caſes is that divorce for a compenſation is a vow, when proceeding from the huſband, and his acknowledgment of his having made the propoſal does not neceſſarily imply an acknowledgment of the condition having taken place, as the vow holds good independant of that circumſtance, whereas *ſale* cannot be effected without the conſent of the purchaſer, and hence an acknowledgment of ſale neceſſarily implies an acknowledgment of that circumſtance without which ſale cannot exiſt, namely, *conſent*, and the ſeller's denial of that circumſtance is a contradiction to his previous acknowledgment, and conſequently not to be credited.

A MOBÂRAT, or *mutual diſcharge*, (ſignified by a man ſaying to his wife "I am diſcharged from the marriage between you and me," and her conſenting to it,) is the ſame as *Khoola*,—that is to ſay, in conſequence of the declaration of both, every claim which each had upon the other drops, ſo far as thoſe claims are connected with their marriage. This is the doctrine of *Haneeſa*. *Mohammed* ſays that nothing is done away by either except what is *particularly mentioned* by both the huſband and the wife. *Aboo Yooſaf* unites with *Mohammed*, as to the *Khoola*, but with *Haneeſa* as to the mutual diſcharge.—The argument of *Mohammed* is that *mutual diſcharge* and *Khoola* are contracts of exchange, in which the circumſtances ſpecifically ſtipulated are alone regarded, and not thoſe which are *not* ſtipulated.—The argument of *Aboo Yooſaf* is that the word *Mobárat*, from its grammatical form, bears a *reciprocal* ſenſe, and therefore requires that the diſcharge be equally eſtabliſhed on both ſides; and this is general; yet the diſcharge is in this caſe reſtricted to thoſe rights connected with marriage, as the deſign proves it to be ſo; but *Khoola* only requires that the woman be freed from the reſtraint of her huſband; and as that

A mutual diſcharge leaves each party without any claim upon the other.

is obtained by the diſſolution of the marriage, it does not require that all its effects be terminated. The argument of *Haneefa* is that *Khoola* bears the ſenſe of *ſeparation*, and that is general, the ſame as a *mutual diſcharge*, and conſequently marriage is thereby terminated, together with all its rights and effects, the ſame as by a mutual diſcharge.

*Khoola* entered into by a father on behalf of his infant daughter is invalid,

If a father tranſact a *Khoola* with the huſband of his infant daughter, agreeing to pay the conſideration out of her property, the *Khoola* is not valid with reſpect to her, becauſe this exhibits no regard for her intereſt, as her perſon is not appreciable in the *diſſolution* of a marriage, whereas the conſideration is ſo: contrary to *marriage*, (as where a man contracts his infant daughter to another,) for that is valid, becauſe the woman's perſon, on entering into a marriage, is appreciable: —and the woman's perſon not being appreciable in the diſſolution of a marriage, the *Khoola* of a wife ſick of a mortal illneſs is conſidered as proceeding from the third of her property; but being appreciable upon entrance into a marriage, if a man ſick of a mortal illneſs were to marry a woman on a proper dower, it is conſidered as coming from the *whole* of his property.—The *Khoola*, therefore, being illegal, the dower of the infant does not drop, nor does the huſband acquire any right to her property.—There are two traditions with reſpect to the act of the father occaſioning divorce in this inſtance; according to one divorce does take place; but according to the other it does not; the former, however, is the better opinion, becauſe the *Khoola* is a ſuſpenſion of divorce upon the conſent of the father, which is the ſame as upon any other condition.

unleſs he engages to hold

If a father tranſact a *Khoola* on the part of his infant daughter, for a certain ſum, engaging to hold himſelf reſponſible for the payment, the *Khoola* is valid, and the ſum ſpecified becomes incumbent upon him, becauſe the engagement even of a ſtranger for the conſideration

deration of *Khoola* is valid, and conſequently that of a father in a ſuperior degree: in this inſtance alſo the infant's dower does not drop, as the father has no authority with reſpect to the relinquiſhment of it.—And if the father were to ſtipulate that his daughter is to be reſponſible for the ſum ſpecified, this will depend upon her conſent where ſhe is competent, (that is, capable of comprehending the nature of her ſituation, and that of the preſent tranſaction, and pronouncing upon them;) and if ſhe conſent, divorce takes place, on account of the condition being fulfilled upon which it is ſuſpended: but the ſum ſpecified (or *conſideration*) is not incumbent upon her, as an infant is incapable of undertaking the diſcharge of any pecuniary obligation; and if the father conſent on his daughter's behalf, there are two traditions concerning it;—according to one, divorce does not take place until ſhe ſhall eventually expreſs her conſent; and according to another, divorce takes place independant of it; but here the compenſation agreed for is not incumbent upon her at all events.—And in the ſame manner, if a father, tranſacting a *Khoola* on the part of his infant daughter, agree that the compenſation ſhall conſiſt of her dower, and he happen not to be ſurety for the ſame *, the validity of the *Khoola* depends upon the daughter's conſent, which if ſhe declare, divorce takes place; but yet her dower does not drop: and here alſo, if the father conſent on his daughter's behalf, there are two traditions concerning it, as already ſtated: if, however, he be ſurety for the dower, amounting to one thouſand *Dirms* (for inſtance,) divorce takes place, becauſe the condition (namely *conſent*) is exiſting; and five hundred *Dirms* only are incumbent upon him, according to a favourable conſtruction of the law. Analogy would ſuggeſt that he is liable for the whole thouſand, upon this ground, that where an adult woman tranſacts *Khoola* on her own behalf, before conſummation of the marriage, for any ſpecified ſum, (ſay one thouſand *Dirms*,) and her dower be alſo one thouſand, the whole ſum is incumbent upon

or refer it to his daughter's conſent.

* See Book of Marriage, Chap. III.

her

her, and is diſcharged by five hundred dropping from her dower, and her paying the other five hundred out of her own property:—but according to the more favourable conſtruction of the law, nothing whatever is incumbent upon her, becauſe the intent of the huſband, in the tranſaction, is merely to free himſelf from the obligation of her dower; and this end being obtained, nothing beyond that remains incumbent upon her.

## CHAP. IX.

## Of *Zihâr*.

Definition of the term.

THE word *Zihâr* is derived from *Zihr*, the back.—In the language of the law it ſignifies a man comparing his wife to any of his female relations within ſuch prohibited degree of kindred, whether by blood, by foſterage, or by marriage, as renders marriage with them invariably unlawful,—as if he were to ſay to her, [by a peculiarity in the *Arabic* idiom,] "you are to me like the *back* [*Zihr*] of my mother." It is eſſential to *Zihâr* that the perſon compared be the wife of the ſpeaker, inſomuch that *Zihâr* does not apply to a female ſlave; and competency to pronounce *Zihar* appertains only to one who is a *Muſſulman*, of ſound mind, and mature age, that pronounced by a *Zimmee* or an *infant* being nugatory; and its effect is to prohibit the perſon who pronounces it from carnal connexion with his wife, until he ſhall have performed an expiation.

*Zihâr* prohibits carnal connexion until expiation.

IF a man ſay to his wife "you are to me, like the back of my "mother," ſhe [the wife] becomes prohibited to him, and his carnal connexion with her is unlawful, as well as every other conjugal familiarity, until he perform expiation for the ſame, as is enjoined in the ſacred writings.

Nature and duration of *Zihâr*.

IN times of ignorance (that is, before the eſtabliſhment of the *Muſſulman* faith,) *Zihâr* ſtood as a *divorce*; and the law afterwards preſerved its *nature*, (which is *prohibition*,) but altered its *effect* to a *temporary* prohibition, which holds until the performance of expiation, but without diſſolving the marriage.—The reaſon for this is that *Zihâr* is an offence, as being a declaration founded upon a falſehood, and which amounts to a *diſowning* or *denying* of the wife; and therefore finds its proper puniſhment in her being rendered unlawful to him who pronounces it, by a prohibition which cannot be removed but by his performing expiation: and as carnal connexion becomes prohibited by *Zihâr*, ſo do all its accompanying privileges, ſuch as kiſſing, touching, and other familiarity, leſt the huſband be tempted to the commiſſion of the carnal act; in the ſame manner as is the rule with reſpect to relations within the prohibited degrees, with whom not only the carnal act itſelf, but alſo every familiarity which leads to the commiſſion of it, are prohibited: contrary to that reſpecting women faſting, or in their courſes, with whom although the commiſſion of the carnal act itſelf be prohibited, yet other liberties are not ſo, as thoſe ſituations are perpetually recurring to them, and if ſuch a rule were to hold, it would operate as an almoſt continual reſtraint upon them; whereas, with reſpect to women under *Zihar*, or within the prohibited degrees, this is not the caſe.

If the prohibition occaſioned by *Zihâr* be violated, yet no additional penalty is incurred.

IF a man, having pronounced *Zihâr* upon his wife, have carnal connexion with her before he makes expiation, it behoves him to repent and pray forgiveneſs from GOD; but nothing is incumbent upon him, except the expiation on account of his *Zihâr*, as before, and that

that he refrain from any *repetition* of the carnal act with her until he perform ſuch expiation, becauſe it is related of the prophet that he thus commanded one who had committed the carnal act with his wife after *Zihâr*, and before expiation; from which tradition it appears that nothing more is incumbent, (in conſequence of the commiſſion of the carnal act before expiation,) for if it were ſo, the prophet would ſomewhere have mentioned it.—Let it be obſerved that from the words of the huſband "you are to me like the back of my mo-"ther," nothing but *Zihâr* is eſtabliſhed, becauſe the term employed expreſsly ſignifies *Zihâr*; and if he ſhould *intend* divorce by it, yet that does not take place, as the law of divorce is broken through in this particular *, and conſequently *Zihâr* does not admit of divorce being intended by it.

*Zihâr* cannot occaſion divorce.

If a man ſay to his wife "you are to me like the *belly* of my "mother," or "the *thigh*," or "the *pudendum*,"—*Zihâr* is thereby eſtabliſhed, as *Zihâr* ſignifies the likening of a woman to a kinſwoman within the prohibited degrees, which interpretation is found in the compariſon being applied to any of the parts or members improper to be ſeen.—And *Zihâr* is in the ſame manner eſtabliſhed, by the likening of the wife to any other kinſwoman within ſuch prohibited degree as that marriage with them is at all times unlawful, ſuch as *ſiſters*, and *aunts*, and *foſter-mothers*, who are invariably prohibited, as well as a natural mother. And ſo alſo, if a man ſay to his wife—"your *head* is to me like the *back* of my mother, or "your *puden-*"*dum*," or "your *waiſt*,"—becauſe by theſe the whole perſon is figuratively expreſſed: and ſo alſo if he were to ſay—"your *half*, or "your *third*,"—becauſe in this caſe the effect is eſtabliſhed in a dif-fuſive portion †. and conſequently extends to the whole perſon, be-

is eſtabliſhed by a compariſon with any part of the body which implies the whole perſon.

* That is to ſay, *Zihâr* has been made, by the law, a thing diſtinct and ſeparate from *divorce*, and ſubject to a rule peculiarly applicable to itſelf.

† *Joozoo Shaë* is here rendered a *diffuſive* portion, in oppoſition to *Joozoo Mayeen* a *particular* or *ſpecified* portion.

cauſe

cauſe, as the diffuſive portion of any thing is a proper ſubject of all other acts, ſuch as purchaſe ſale and ſo forth, ſo is it of divorce; but divorce being incapable of diviſion, is neceſſarily eſtabliſhed in the whole perſon; and as *Zihar* reſembles divorce, it therefore, like divorce, extends to the whole alſo.

A contingent according to the huſband's explanation;

WHERE a man ſays to his wife "you are to me like my mother," it is requiſite that his intention be examined into, ſo as to diſcover the true predicament in which the wife ſtands; and if he declare that his meaning was only to ſhew *reſpect* to his wife, it is to be received according to his explanation, becauſe in ſpeech reſpect may be expreſſed by a general compariſon; or, if he declare his intention to have been *Zihár*, that is accordingly eſtabliſhed, for here appears a compariſon with the whole perſon of his mother, in which her *back* is included; but as that is not expreſsly mentioned, the ſpeaker's intention is requiſite to eſtabliſh it; and if he declare his intention to be divorce, a divorce irreverſible takes place, as his comparing his wife with his mother is likening her to one who is prohibited to him, and is therefore the ſame as if he were to ſay "you are prohibited to me," thereby intending divorce:—but if he declare that he had no poſitive intention, neither *Zihár* nor *divorce* are eſtabliſhed, (according to *Haneefa* and *Aboo Yooſaf*,) becauſe the addreſs bearing the conſtruction of *reſpect*, muſt here be taken in that ſenſe, as being of leſs importance than any other. *Mohammed* ſays that *Zihâr* is eſtabliſhed independant of intention, becauſe, a compariſon of the wife with a *limb* or member of the mother occaſioning *Zihâr*, it follows that, where it is made with *the whole*, *Zihár* is eſtabliſhed *a fortiori*.—With *Aboo Yooſaf*, if the intention of the huſband be merely *prohibition*, an *Aila* only is eſtabliſhed, becauſe the prohibition by *Aila* is leſs rigorous than by *Zihâr*.—With *Mohammed*, on the contrary, *Zihár* is eſtabliſhed: his argument is taken from the *Arabic*.

and the ſame of a compariſon in point of *prohibition*.

If a man ſay to his wife "you are to me *prohibited*, like my "mother," intending either *Zihâr* or *divorce*, it takes effect according to his intention, as this addreſs may be taken in either ſenſe,—in that of *Zihâr*, as being a *compariſon*,—and in that of *divorce*, as expreſſing *prohibition*, ſtrengthened by the compariſon. In this caſe, however, if he have no intention, according to *Aboo Yooſaf*, *Aila* is eſtabliſhed,—and, according to *Mohammed*, *Zihâr*,—as in the preceding caſe.—And if he ſay "you are to me *prohibited* like the *back* of "my mother," and thereby intend divorce or *Aila*, yet nothing but *Zihâr* is eſtabliſhed, according to *Haneeſa*.—The two diſciples ſay that whatever he may intend is eſtabliſhed, as prohibition equally implies either *Aila* or divorce: according to *Mohammed*, however, where divorce is the intention, no *Zihâr* is eſtabliſhed; whereas, according to *Aboo Yooſaf*, divorce and *Zihâr* are both eſtabliſhed together, (that is, divorce is eſtabliſhed on account of the intention, and *Zihâr* on account of the term *Zihr* [back] being expreſsly mentioned, as was ſtated in its proper place.)—The argument of *Haneeſa* is that the words above recited expreſsly ſignify *Zihâr*, and therefore do not bear any other ſenſe; and the word *prohibited*, which is introduced there, relates ſolely to the prohibition by *Zihâr* as prohibition is of various kinds, of which that by *Zihâr* is one, and is on this occaſion preferred, on account of the accompanying compariſon with the *back* of the mother; and all other kinds of prohibition being only *conſtructive*, and that by *Zihâr poſitive*, the prohibition to which the word "*prohibited*" alludes, is to be taken as relating to the *Zihâr* only.

has no

Zihâr is not eſtabliſhed with reſpect to any but the *wife* of the ſpeaker, inſomuch that if a man pronounce a *Zihâr* upon his female ſlave, it has no effect, for various reaſons;—first, God has ſaid,—"men who pronounce *Zihâr* upon their women,"—where, by *women* is underſtood *wives*; secondly, the legality of a female ſlave is of a *ſecondary* or *dependant* nature, and that of a wife of a *primary*

or

or *original nature*, and hence thoſe two perſons muſt not be confounded; THIRDLY, *Zihâr* is an imitation of divorce, and divorce does not take place upon a ſlave.

IF a man marry a woman without her conſent, and pronounce a *Zihâr* upon her before that be obtained, and ſhe afterwards ſignify her conſent, the *Zihâr* is void, becauſe the huſband, in making the compariſon, ſaid no more than what was, at that time, ſtrictly true, and hence what he ſays does not amount to a *diſowning* or *denying* of her.

OBJECTION.—It would here appear that the validity of the *Zihâr* remains ſuſpended upon the woman's conſent to the marriage, in the ſame manner as the manumiſſion of the purchaſer of a ſlave from an uſurper reſts upon the conſent of the proprietor, (that is to ſay, where a perſon purchaſes a ſlave of the uſurper of him, and emancipates him, the validity of his emancipation depends upon the proprietor's aſſenting to the ſale,) becauſe *Zihâr* is a right of poſſeſſion by marriage, in the ſame manner as manumiſſion is a right of poſſeſſion by right of property.

REPLY.—The validity of the *Zihâr* is not ſuſpended upon her conſent to the marriage, becauſe *Zihâr* is not one of the rights of marriage, as it has no place in the ordinances of the law *, whereas matrimony has a place in them, and that which is not of the law is incapable of appertaining as a right to that which is one of its ordinances: contrary to the caſe of manumiſſion proceeding from the purchaſer of a ſlave out of the hands of his uſurper, as manumiſſion is a right of property.

* That is, there are no particular rules inſtituted for it in the *Koran*, the laws reſpecting it being taken from the *Sonna*.

*Zihâr* collectively pronounced takes place upon every individual to whom it is addreſſed.

WHERE a man addreſſes all his wives collectively, ſaying "ye "are to me as the *back* of my mother," *Zihâr* is eſtabliſhed with reſpect to every one of them, he having on this occaſion applied the *Zihâr* to them all indiſcriminately,—as in divorce, where if a man direct a ſentence of divorce to the whole of his wives collectively, it takes place upon the whole. And here an expiation is incumbent upon him, on account of each wife reſpectively, becauſe prohibition has been eſtabliſhed with reſpect to each; and expiation is ordained for the purpoſe of terminating and aboliſhing the prohibition; and where that is numerous the expiation muſt be ſo likewiſe, according to the number of prohibitions:—contrary to a caſe where a man pronounces an *Aila* (or vow of four months abſtinence from carnal connexion) upon all his wives collectively, and breaks his vow by having carnal knowledge of them within the four months, for here a *ſingle* expiation only is incumbent upon him, becauſe in this caſe expiation is incumbent upon him out of reſpect to the honour and greatneſs of the name of GOD; and his name, in a vow of *Aila*, is mentioned *once* only, as it is pronounced by the man ſaying to all his wives "*by* GOD I will not have carnal connexion with you."

## SECTION.

### *Of* EXPIATION

A *Zihâr* may be expiated by the eman-

THE expiation of a *Zihâr* may be effected by the emancipation of a ſlave;—or if, from not being poſſeſſed of ſuch ſlave, this mode be impracticable, it may be effected by a faſt of two months ſucceſſively;

a

ſively *; or if the ſtate of the health do not admit of ſuch faſt, by the diſtribution of victuals to ſixty poor men; becauſe a paſſage which occurs in the *Koran*, reſpecting expiation, demonſtrates the obligation of performing it in one or other of thoſe ways: but the expiation is ſuppoſed to precede a man's touching his wife, after having pronounced a *Zihâr* upon her:—in expiation by *manumiſſion* or *faſting* this is evident, becauſe the text relates to that; and ſo alſo in expiation by the diſtribution of victuals to the *poor*;—becauſe by expiation prohibition is terminated, wherefore it is neceſſary that the expiation be firſt made, in order that carnal connexion may be lawful.

The emancipation of a ſlave of any deſcription ſuffices,

IT ſuffices for an expiation that a ſlave be releaſed, whether that ſlave be an infidel or a *Muſſulman*, an infant or an adult, a male or a female, becauſe the word *Rakba*, in the *Koran*, applies equally to all of theſe, as it ſignifies one who is poſſeſſed, in right of property, by another, under any deſcription whatever.—*Shafeï* ſays that the emancipation of an infidel does not ſuffice as an expiation, becauſe this is a right of GOD, which cannot lawfully be expended upon one who, as being an infidel, is his enemy; like *Zakât*, which is a right of GOD, and the diſburſement of which upon infidels, as being the enemies of GOD, is therefore illegal.—To this our doctors reply that the emancipation of a ſlave [*Rakba*] is what is mentioned in the text, and that is fulfilled by the manumiſſion of an infidel: and as to what *Shafeï* advances, of expiation being a right of GOD, and therefore not to be expended upon his enemies, it may be replied that the intention of the expiation is to render the ſlave equal to the fulfilment of ſuch duties as relate to GOD, that is to ſay, of *Zakât*, pilgrimage, bearing evidence, fighting for the faith, magiſtracy, and ſo forth; and if the ſlave be not a *Muſſulman*, and continue an infidel after manumiſſion,

* By *Sawm*, or faſting, is here and elſewhere underſtood an abſtinence from food and every carnal enjoyment from the riſing to the ſetting ſun of each day, within the preſcribed term.

thereby

thereby enhancing his crime of infidelity, and precluding himſelf from receiving thoſe advantages which he was qualified to enjoy through his freedom, it is to be attributed to the error of his choice, and not to any defect in the act of the expiator.

fective in one of his faculties.

It is not ſufficient, as an expiation, to emancipate a ſlave who is blind, or maimed of both the fellow-members, whether hands or feet, becauſe here ſuch a ſlave is utterly deprived of one of his bodily endowments either of *ſeeing*, *carrying*, or *walking*, and the privation of any one advantage in a ſlave renders the manumiſſion of him inſufficient as an expiation, ſince a perſon in ſuch a ſtate is accounted *dead*: but where the privation is not *entire* it does not forbid the validity of the expiation, and hence it ſuffices for that purpoſe to emancipate a ſlave who is blind of one eye, or maimed of one hand or foot, or of an hand and foot from oppoſite ſides, as this amounts not to an abſolute privation of one of the advantages, but only to a *defect*: the caſe however is otherwiſe where he is maimed of a hand and foot upon the ſame ſide, for in this caſe his emancipation would not ſuffice, as this amounts to a privation of the advantage of *walking*, ſince, without the aſſiſtance of the hand upon the lame ſide, that is impracticable.

The emancipation of a ave ſuffices

It ſuffices, as an expiation, to emancipate a *deaf* ſlave. Analogy would ſuggeſt that this is not ſufficient, as the ſlave is here deprived of one faculty; but it is admitted as ſufficient, upon a favourable conſtruction of the law, as the radical faculty ſtill continues, ſince one who is conſidered as deaf may yet be capable of hearing what is ſpoken *aloud*: if, however, he cannot hear at all, (as where a perſon is born *perfectly deaf*,) his emancipation does not ſuffice.

but not that of one who has loſt both his thumbs,

It does not ſuffice, as an expiation, to emancipate a ſlave who has loſt both his thumbs, as his power of *carrying*, which is one of his bodily endowments, is in that caſe deſtroyed.

Neither

NEITHER does it ſuffice to emancipate a ſlave who is inſane, becauſe no uſe is to be derived from the members of the body unleſs they be informed with reaſon, and therefore a privation of reaſon amounts to a privation of all the corporal endowments: but if the ſlave be one who is inſane only at intervals, his freedom ſuffices for an expiation, as this circumſtance is not an utter privation of the faculty, but only a defect in it, which does not prevent the ſufficiency.

or who is *inſane*,

(unleſs it be an *occaſional* inſanity only;)

IT does not ſuffice, as an expiation, to emancipate a *Modabbir*, or *Am Walid*, as ſuch are eventually entitled to their freedom, and hence their bondage is incomplete;—and ſo alſo of a *Mokâtib* who has fulfilled his contract of *Kitâbat* in part, becauſe in this caſe his freedom muſt be accounted as in return for the part of his ranſom already received, and conſequently does not ſuffice for an expiation, as that is an act of piety, in which *ſpeciality* is eſſential.—It is recorded as an opinion of *Haneeſa* that the releaſe of this *Mokâtib* is ſufficient, as bondage is found to exiſt in him in every ſhape, and accordingly the contract of *Kitâbat* admits of being annulled: contrary to *Am Walids* and *Modabbirs*, as a *Tadbeer* or *Iſteelad* cannot be cancelled.

nor of a *Modabbir*, or *Am* [illegible] part of his ranſom.

IF a perſon who pronounces *Zihâr* emancipate, for expiation, a *Mokâtib* who has not paid any part of his ranſom, it ſuffices.—*Shafeï* ſays that it does not ſuffice, becauſe the *Mokâtib* is a claimant of freedom, in virtue of the contract of *Kitâbat*, and is therefore the ſame as a *Modabbir*.—The argument of our doctors is that bondage exiſts in a *Mokâtib* in every ſhape, becauſe the contract of *Kitâbat* is capable of annulment; and alſo, becauſe the prophet has declared "*a* MOKÂTIB "*is a ſlave as long as a ſingle* DIRM *remains due from him.*"

IF a man purchaſe his father or his ſon, intending expiation thereby, it ſuffices.—*Shafeï* ſays that it does not ſuffice;—the ſame difference

That procured for a parent or child ſuffices;

-ence of opinion ſubſiſts in the caſe of expiation of a *Yameen*, as ſhall be recited at large in treating of *vows*.

a coparcenary ſlave.

If a man, being rich, emancipate his half of a coparcenary ſlave, and then indemnify his partner for the value of the remainder, this does not ſuffice for an expiation with *Haneeſa*.—The two diſciples hold that it ſuffices, becauſe the expiator, becoming poſſeſſed of his partner's ſhare by indemnifying him, does in effect emancipate a ſlave who is entirely his own property:—but it were otherwiſe if the expiator be *poor*, as in this caſe it is incumbent upon the ſlave to perform *Siayet*, or emancipatory labour, for the partner's ſhare; and hence the emancipation is, ſo far, *for a return*. The argument of *Haneeſa* is that in this caſe the emancipation is defective in the proportion of the partner's ſhare, until the tranſition of the property in it to the emancipator be effected by his indemnifying the other partner, and this circumſtance forbids its ſufficiency for an expiation.

The partial emancipation of the remainder,) ſuffices;

If a man emancipate half of his own ſlave, as an expiation, and afterwards emancipate the remainder for the ſame purpoſe, it ſuffices, as this amounts to no more than emancipating him by *two* ſentences inſtead of *one*; and the defect which appears in the *ſecond* half on account of the *firſt* half being already free is not regarded, ſince this defect has been induced upon the expiator's property, in conſequence of his emancipating it *on account of expiation*, and a defect like this is not regarded; but is conſidered in the ſame light as when a man, having thrown a goat on its ſide for the purpoſe of ſacrifice, happens to direct his knife into the animal's eye, ſo as to render it defective, which is not regarded, the ſacrifice of the goat being ſtill lawful, as the defect has befallen the property *on account of ſacrifice*: contrary to the preceding caſe, becauſe there the defect appears in the property of the other partner.—This proceeds upon the tenets of *Haneeſa*.—With two diſciples manumiſſion is indiviſible, and conſequently the

emancipation

emancipation of *an half* is, in effect, the emancipation of *the whole* ſlave, ſo that it is not conſidered in that inſtance as proceeding from two ſentences.

but not if connexion take placebetween the two emancipations.

IF a man emancipate *half* his ſlave, as an expiation of *Zihâr*, and then have carnal connexion with the wife upon whom he had pronounced the *Zihâr*, and afterwards emancipate the *other* half, it is not valid as an *expiation*, according to *Hanceſa*, becauſe he holds that manumiſſion admits of diviſion, and the condition of its ſufficiency, in the ſacred writings, is that it be performed *before* the man touch his wife; but here the emancipation of one half takes place *after* touching.—With the two diſciples, on the contrary, the emancipation of an *half* amounts to an emancipation of the *whole*, wherefore the emancipation in this caſe appears to take place upon the whole, *before* touching.

*Zihâr* may be expiated by months;

IF the perſon pronouncing a *Zihâr* be not poſſeſſed of a ſlave, his expiation may be made by faſting for two ſucceſſive months, provided thoſe do not include the *Ramzân*, nor the feſtival of *Fittir* *, nor the days of *Nihr* † or *Taſhreek* ‡. The faſt muſt be *ſucceſſive*, (that is, *uninterrupted*,) becauſe it is thus expreſſed in the text; and it is a condition that the *Ramzân* be not included, becauſe the abſtinence obſerved in that period is not counted in expiation; for if it were to be ſo counted, this would in effect induce the annulment of a thing ordained by GOD; and it is alſo a condition that the feſtival of *Fittir*, and the days of *Nihr* and *Taſhreek*, be not included, as (theſe

* The day of breaking Lent.

† The day of *ſacrifice*, being the tenth of the month *Zooal Hidjee*, when the pilgrims aſſemble at *Mecca*.

‡ The true ſenſe of *Taſhreek* (as here applied) the tranſlator has not been able to diſcover.

being ordained *feſtivals*) any extraordinary *abſtinence* in them is forbidden.

**but if carnal connexion take place during the faſt, it muſt be commenced *de novo*.**

If the expiator, either wilfully or through forgetfulneſs, in the *night*, or from the *latter* cauſe, in the *day time*, ſhould during the term of expiation have carnal connexion with the wife upon whom he had pronounced the *Zihâr*, he muſt again begin the faſt anew, according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* ſays that it is not incumbent upon him to begin it again, as his connexion with the wife does not amount to an interruption of the faſt, ſince that is not broken by it; and if it be ſaid that one condition of the faſt is that it precede *touching*, it may be replied that a compliance with that injunction is here rendered impoſſible; he therefore holds that it muſt in this caſe ſuffice that a *part* of it precede *touching*, for if the faſt be commenced anew (as is the doctrine of *Haneefa* and *Mohammed*) it follows that the *whole* would be ſubſequent to touching.—The argument of *Haneefa* and *Mohammed* is that the conditions of making expiation by faſt are twofold;—*one*, that the faſt precede touching;—*another*, that the two months be exempt from touching; and the ſecond of theſe being violated by the connexion, the circumſtance with reſpect to which the condition was made is not fulfilled, and therefore the faſt muſt be commenced anew, becauſe though the obſervance of the firſt condition be now rendered impoſſible, yet ſtill it remains in his power to perform the expiation in ſuch a way as may fulfil the *ſecond* condition of it.

If the expiator wilfully break his faſt in the day time, within the two months, either with or without excuſe, he muſt commence it anew, according to all the doctors, as this is an interruption of the faſt, a condition of which is *that it be for two months ſucceſſively*; and this being ſtill in his power it is therefore incumbent upon him.

If

only mode in which a slave can expiate

IF a slave pronounce a *Zihâr* upon his wife, a fast of two months successively is the only mode of expiation which is allowed him, because he is incapable of possessing any thing in his own right as a proprietor, and consequently cannot expiate in any other way.—And here, if the owner of this person were to release another of his slaves, or to distribute victuals to sixty poor men, *on his behalf*, yet it does not suffice, as a slave, being incapable of possessing property, cannot be regarded as a proprietor, from his master's consignment or transfer of it.

*Zihâr* may be

IF the person pronouncing a *Zihâr* be incapable of observing a fast (from the ill state of his health or other cause) it is incumbent upon him to give victuals to sixty poor men, GOD having said "WHERE A "MAN CANNOT FAST, LET HIS EXPIATION BE MADE BY DISTRI-"BUTING VICTUALS TO SIXTY POOR MEN."—By the term *victuals* is here understood half a *Saa* * of wheat, or one *Saa* † of barley or dates, or the value thereof in money; because the prophet has said "*for each pauper there is half a* SAA *of* WHEAT;"—and also, because regard is here had to the removal of want from each *for one day*, and consequently the proportion to each is determined by the *Sadka Fitter*, or alms given on the festival of breaking Lent.—Observe that what is here said, "*or the value thereof in money*," is the opinion of our doctors, as has been related at large in the book of *Zakât*. And if the expiator bestow one *Man* ‡ of wheat, or two *Mans* of barley, or dates upon the poor, it suffices, since this fulfils the design, as wheat and barley are of one and the same genus or nature, in respect to food, and consequently to compensate the defect in one grain by an addition of the other is lawful: contrary to a case where a man fasts, and at the end of a month becomes incapable of continuing the fast, on account of sickness, for here the expiation would not be effected by giving victuals to thirty paupers, because fasting and victuals are not

* About four pounds. † About eight pounds. ‡ About eighty pounds.

 homogeneous,

homogeneous, and conſequently the completion of one by means of the other is inſufficient.

If the perſon pronouncing a *Zihâr* deſire another perſon to diſtribute the victuals for him as an expiation, and the latter do ſo, it ſuffices, as this amounts to *borrowing* ſo much; and the pauper to whom the perſon ſo commiſſioned gives the victuals appears firſt to make ſeizin of them in behalf of the expiator, and then to receive them on his own account; thus the expiator is firſt ſeized of the property, and then makes it over to the pauper.

If the pronouncer of a *Zihâr* feed ſixty paupers morning and evening it ſuffices, where they are filled, whether they eat more or leſs.—*Shafei* ſays that this does not ſuffice, as it is requiſite that the victuals be regularly conſigned to ſixty poor men, the ſame as in *Zakât* and *Sadka Fitter*, becauſe in *conſigning* their wants are more effectually relieved than by *feeding*, which is only an act of *permiſſion*, and conſequently cannot ſtand for *conſignment*.—The argument of our doctors is that the word *Itaâm*, or feeding, is what is mentioned in the text, and the literal meaning of that is *to give a power over food*, which is found in *permitting* to eat, the ſame as in *conſignment*: but in *Zakât* and *Sadka Fittir* conſignment is eſſentially requiſite, and mere permiſſion does not ſuffice, becauſe there the gift is incumbent, and by *gift* conſignment is underſtood.—In ſhort, with reſpect to whatever is mentioned in the ſacred ordinances of the law under the term *victuals*, permiſſion is ſufficient; but in what is mentioned under the terms *gift* or *payment*, conſignment is a condition.

If among the ſixty paupers thus fed morning and evening there be an infant newly weaned from the breaſt, it does not ſuffice, as the expiation is not in that caſe completely performed, a child of this deſcription not being yet able to eat a full proportion of victuals.

With

WITH barley-bread it is requiſite that ſome proviſion be beſtowed ſuch as it is uſual to eat with bread, as the appetite cannot be ſatisfied with that alone: but with *wheaten*-bread this is unneceſſary.

IF victuals be given to *one* pauper for *ſixty* days, it ſuffices, becauſe the relief of *want* is what is required, and want recurs every day, wherefore giving it to the ſame perſon a *ſecond* day amounts to giving it to a *ſecond* pauper.—But if the victuals for ſixty be given at once to a ſingle pauper, it does not ſuffice:—yet if they be given to him at ſixty ſeparate times within the day it ſuffices, according to ſome; but others alledge that it does not ſuffice.

IF the perſon pronouncing a *Zihâr* have carnal connexion with his wife within the time of his performance of expiation by alms, as above, ſtill it is not neceſſary that he ſhould recommence, as it is not ſet forth as a condition in the word of GOD that this ſpecies of expiation ſhould precede *touching*: but it nevertheleſs behoves him not to touch her until he ſhall have made expiation, as it is poſſible that in the interim he may be enabled to perform that by the manumiſſion of a ſlave, or by faſting for two months, in which caſe this would induce expiation by thoſe methods after touching, contrary to the injunction of the text.

Carnal connexion during expiation by alms does not require that the alms be diſtributed *anew*.

IF a man, as an expiation for two *Zihârs*, diſtribute to each of ſixty paupers a double proportion of victuals, (ſuppoſe one *Saa* of wheat to each,) yet this does not ſuffice for more than one *Zihâr*, according to the two *Elders*.—*Mohammed* ſays it ſuffices for both.—But if the victuals be beſtowed in this way upon ſixty paupers, as an expiation for the breach of a faſt, and for *Zihâr*, it ſuffices for both.—The argument of *Mohammed* is that what is beſtowed upon the paupers aforeſaid ſuffices for the performance of both expiations, and

the perſons upon whom it is beſtowed are alſo proper ſubjects of both expiations, and conſequently the act is effectual for two expiations, in the ſame manner as where the occaſions of expiation are different, (as in the caſe of expiation for a breach of faſt and a *Zihâr*,)—or where the expiations are ſeparately performed. The argument of the two *Elders* is that the *intention*, where things are of one and the ſame nature, is nugatory; but regard is had to it, when things are *different* in nature, becauſe a reſpect to intention is ordained, for the ſake of diſtinguiſhing between different things; and hence, if atonement were due from a perſon for the neglect or omiſſion of two days faſt, in the month of *Ramzán*, (a *Thurſday* and a *Friday*, for inſtance,) and the perſon by faſting afterwards two days *intend* atonement, it ſuffices, although the days on which he thus faſts be not the ſame with the days of omiſſion, becauſe the thing is eſſentially the ſame: contrary to where a perſon owes one day's faſt for *atonement*, and another day's faſt *in purſuance of a vow*,—for then a diſtinction is neceſſary, becauſe of the difference between the things: now as the *intention*, where the things are of the ſame nature, is nugatory, and as the thing beſtowed is capable of conſtituting a *ſingle* expiation only, (becauſe half a *Saa* of wheat to each pauper is ordained as the ſmalleſt amount ſufficient towards expiation, wherefore the expiation is vitiated by being *under*, but not by *exceeding*, the preſcribed quantity,) it follows that the diſtribution of victuals as aforeſaid is effectual towards one expiation only, the ſame as where a ſingle expiation only is intended:—contrary to where the victuals are beſtowed at ſeparate times, becauſe giving a *ſecond* time is the ſame as giving to *another pauper*.

If the man upon whom two expiations of two *Zihârs* are thus incumbent emancipate two of his ſlaves, it ſuffices, although he have no ſpecific intention as to either the ſlaves or the *Zihârs*, reſpectively:—and in like manner, if he faſt for four months, or diſtribute victuals to one hundred and twenty paupers, it ſuffices, becauſe, as the *thing* is , ſpecific *intention* is not requiſite.

If, moreover, this man emancipate a ſingle ſlave in part of expiation of two *Zihârs*, it reſts with him to ſpecify to which of the two he intends the manumiſſion of that ſlave to apply: but if he were thus to emancipate a ſlave in part of expiation of a *Zihâr*, and of a *Murder*, it is invalid with reſpect to either. *Ziffer* ſays, that the emancipation of a ſingle ſlave is totally ineffectual in either caſe.—*Shafeï*, on the other hand, maintains that it is equally efficient in both caſes, the ſpecification reſting with the expiator, becauſe all expiations are of one and the ſame nature with reſpect to their *end*, which is the covering of criminality, but as intention with reſpect to things ſimilar in nature, is unavailable, the ſimple intention remains; and as (if that were expiation) the expiator is at liberty to ſpecify to which expiation the act is to apply, ſo here alſo.—The argument of *Ziffer* is that the expiator in this caſe appears to have emancipated half his ſlave on account of one *Zihâr*, and the other half on account of the *other Zihâr*, and conſequently, that he is not at liberty afterwards to ſpecify his emancipation as applying to either *Zihâr* in particular, after having granted it as applying to *both*, ſinc he then poſſeſſes no further option. —Our doctors argue (with *Shafeï*) that ſpecification, with reſpect to things ſimilar in nature, is unavailable, and conſequently nugatory, wherefore ſimple *intention* remains; but where things are *different* in nature, (ſuch as the emancipation of a ſlave, as an expiation for *Zihâr*, and alſo for *homicide*,) the ſpecification of intention is available; and the intention being approved, the emancipation of the ſlave does not apply wholly either to the expiation for *Zihâr*, or to the expiation for *homicide*.—As to what *Shafeï* advances, that all expiations are of one and the ſame nature, in regard to their *end*, it may be replied that a difference of nature between the expiations, in the preſent caſe, ſubſiſts in regard to the *different occaſions* of them, although in reſpect to their *end* they be of one and the ſame nature.

CHAP.

## CHAP. X.

### Of *Laân*, or *Imprecation*.

Definition of the term.

LAÂN, in the language of the law, ſignifies teſtimonies confirmed by oath, on the part of a huſband and wife, (where the teſtimony is ſtrengthened by an imprecation of the *curſe* of GOD, on the part of the huſband, and of the *wrath* of GOD, on the part of the wife,) in caſe of the former accuſing the latter of adultery.

A man accuſing his wife of whoredom muſt verify his charge by an imprecation.

IF a man ſlander his wife, (that is to ſay, accuſe her of whoredom,) or deny the deſcent of a child born of her, by ſaying "this is "not my child," and ſhe require him to produce the ground of his accuſation, imprecation is incumbent upon him, provided both parties be competent in evidence,—(that is, of ſound mind, adults, free, and *Muſſulmans*,) and that the woman be of a deſcription to ſubject her ſlanderer to puniſhment, (that is, *married* *,) for if ſhe be not ſuch, (as if ſhe have been, for inſtance, enjoyed under an invalid marriage, or delivered of a child whoſe father is unknown,) the man is not under any obligation to make an imprecation, although ſhe be a perſon competent in evidence.

* Arab.—*Mahſana*.—For a full definition of this term ſee SLANDER.

Conditions under which

LAÂN, according to the tenets of our doctors, is a teſtimony confirmed by oath, as was before obſerved; and it involves, on the part of the huſband, if his accuſation be falſe, *the* CURSE *of* GOD, which ſtands as a ſubſtitute of puniſhment for ſlander,—or, on the part of the woman, *the* WRATH *of* GOD, which ſtands in the place of puniſhment for whoredom, if it be true:—it is therefore requiſite that the parties be both competent in evidence, as the ground thereof is *teſtimony*; and it is alſo requiſite that ſhe be of a deſcription to ſubject her ſlanderer to puniſhment, as the *Laân*, with reſpect to the huſband, ſtands as a ſubſtitute of puniſhment for ſlander, (whence the neceſſity of her being a *married* woman:) and *Laân* is incumbent on account of the denial of a child, becauſe the huſband, in denying the child's deſcent, accuſes his wife by implication.

OBJECTION.—The denial of the child's deſcent does not poſitively imply an accuſation of the wife, as it is poſſible that the child may not have been begotten by the huſband, and yet that the wife is not an adultreſs, (as where a man, for inſtance, has had carnal connexion with her erroneouſly, and a child is produced from it, in which caſe the child is the undoubted progeny of another,) and hence, in his denial of its deſcent from him, the huſband ſpeaks truly, without any accuſation of adultery againſt the wife being implied.

REPLY.—This poſſibility is of no weight, becauſe a ſtranger, if he were to deny the deſcent of a child from the known and reputed father, is held to be a *ſlanderer* notwithſtanding this poſſibility; and ſo in this caſe alſo.—It is alſo a condition of imprecation that the wife require her huſband to produce the ground of his accuſation, as this is her right, the demand of which is neceſſary, as well as that of all other matters of right; and if he decline it, the magiſtrate muſt impriſon him until he either make an imprecation, or acknowledge the falſity of his charge, by ſaying "I falſely attributed adultery to her," —as this is a right due from him to his wife, and which it is in his power to render to her, wherefore he is to be impriſoned till ſuch time as he does what is incumbent, or acknowledges his falſity, ſo as

that the occaſion for the imprecation may be removed, (that is, the condition of imprecation, namely, the mutual charge of falſehood,) becauſe imprecation is not incumbent except where each charges the plea of the other with falſehood, after the huſband having produced againſt his wife an accuſation of adultery. And the huſband having made an imprecation, the ſame is then incumbent upon the wife, it being ſo ordained in the *Koran*; (but imprecation commences with the huſband, as he in this caſe appears as the plaintiff;) and if ſhe decline making imprecation, the magiſtrate is to impriſon her till ſuch time as ſhe either agrees to make it, or to acknowledge her huſband's veracity, this being his right incumbent upon her, and which ſhe is able to render, wherefore ſhe is to be impriſoned until ſhe renders it.

Not incumbent upon *ſs* or *infi-*

If a ſlave, or an infidel, or one who has ſuffered puniſhment as a ſlanderer, accuſe his wife of whoredom, puniſhment for ſlander is due upon him, becauſe here imprecation is impoſſible *, and conſequently its original is due, and this is puniſhment for ſlander, that being the original ordinance in this caſe, according to the word of God,—"If "men accuse married women of whoredom, and produce "not four witnesses, scourge them with eighty stripes;" now imprecation is the ſubſtitute of puniſhment for ſlander; and where the ſubſtitute cannot be had the original is due.

nor, where the wife is a *ſlave*, an *infidel*, or a convicted *ſlanderer*;

If the accuſer be a perſon competent in evidence, and his wife be a ſlave, or an infidel, or a *Kitabeea*, or one who has ſuffered puniſhment as a ſlanderer, or of the deſcription of thoſe whoſe accuſers are not liable to puniſhment, as being an infant, or idiot, or adultreſs, puniſhment is not due, nor is imprecation incumbent upon him, as in this inſtance neither competency in evidence nor marriage

* As infidels and ſlaves, not being competent to give evidence, are incapable of *imprecation*.

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(in the ſenſe which induces puniſhment) are attached to the accuſed.

OBJECTION.—It would appear that in this caſe puniſhment for ſlander is due upon the huſband, as imprecation is a ſubſtitute for that, and where the ſubſtitute cannot be had, it follows that the original is due.

REPLY.—Puniſhment is not due upon the huſband, as he is capable of imprecation, the obſtacle to which exiſts in this caſe on the part of the wife, and this circumſtance precludes puniſhment, in the ſame manner as where ſhe acknowledges the truth of the accuſation.—The foundation of this is a ſaying of the prophet, namely, "*There are four deſcriptions of women with reſpect to whom imprecation is not incumbent, Jews and Chriſtians married to* MUSSULMANS, *and ſlaves married to freemen, and free women married to ſlaves.*"

nor where *both* parties are convicted ſlanderers.

IF the accuſer and his wife be perſons who have both already ſuffered puniſhment for ſlander, puniſhment is due upon the former, becauſe in this caſe a reaſon is found againſt imprecation on the part of the accuſer, he being incapable of making it.

Form of imprecation, and the manner of making it.

THE manner of imprecation is as follows.—The *Kâzee* firſt applies to the huſband, who is to give evidence four ſeveral times, by ſaying "I call GOD to witneſs to the truth of my teſtimony concerning the "adultery with which I charge this woman;" and again, a fifth time, "may the curſe of GOD fall upon me if I have ſpoken falſely "concerning the adultery with which I charge this woman;"—after which the *Kâzee* requires the woman to give evidence, four ſeparate times, by ſaying "I call GOD to witneſs that my huſband's words "are altogether falſe, reſpecting the adultery with which he charges "me;" and again, a fifth time, "may the wrath of GOD light upon "me, if my huſband is juſt, in bringing a charge of adultery againſt "me."—*Haſan* records it as an opinion of *Haneefa* that the huſband

ſhould, in making the imprecation, addreſs himſelf in the ſecond perſon, ſaying "by God I ſpeak truly concerning the adultery with "which I charge *you*," becauſe the uſe of the ſecond perſon does not admit the poſſibility of the addreſs affecting any other. The reaſon for the form, as above ſtated, is that the *relative*, when joined to the *third perſon*, removes doubt. And on both making imprecation in this manner, a ſeparation takes place between them; but not until the *Kâzee* pronounces a decree to that effect.—*Ziffer* ſays that ſeparation takes place upon the imprecation, independant of any judicial decree, becauſe a *perpetual prohibition* is eſtabliſhed by it, the prophet having ſaid "*the two who make imprecation can never come to-gether*,"—which proves their ſeparation, as the prophet's forbidding their ever coming together after imprecation expreſsly declares this. The argument of our doctors is that as, in conſequence of the eſtabliſhment of a prohibition between them, the retaining of the woman *with humanity* * is impoſſible, it is incumbent upon the huſband to divorce her on a principle of benevolence; but if he decline ſo doing, it then behoves the *Kâzee* to iſſue a decree of divorce, as the *Kâzee* is the ſubſtitute of the huſband in this matter for the purpoſe of removing injuſtice: and a proof of this is that *Aweemar* divorced his wife after imprecation, in the preſence of the prophet, which ſhews that the marriage ſtill continued and was not virtually diſſolved by the imprecation, otherwiſe the prophet would have prevented him from pronouncing divorce.—Obſerve that the *ſeparation* here mentioned is an irreverſible divorce, according to *Haneefa* and *Mohammed*, becauſe the act of the *Kâzee* muſt be referred to the huſband, as in caſes of *impotence*.

When both parties have

place.

The huſband,

If, after imprecation, the huſband ſhould acknowledge that his accuſation was falſe, by ſaying "I falſely laid adultery to her charge,"

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* Alluding to the words of the *Koran*,—"RETAIN THEM WITH HUMANITY, OR "DISMISS THEM WITH KINDNESS. (See *Rijât*.)

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he becomes *privileged* with reſpect to her, that is to ſay, it is lawful for him to marry her as well as any other perſon *. This is according to *Haneeſa* and *Mohammed*.—*Aboo Yooſaf* ſays that ſhe is for ever prohibited to him, and that he cannot marry her,—the prophet having ſaid "*two who make imprecation can never come together*," which ſhews the ſeparation eſtabliſhed between them to be *perpetual*; wherefore his marriage with her is illegal.—The argument of *Haneeſa* and *Mohammed* is that the huſband's acknowledgment is a retraction from his evidence, (that is, from his *imprecation*,) and evidence is by ſubſequent retraction rendered null and of no effect: and as to the ſaying of the prophet above cited, it means that the parties cannot come together *as long as they both perſevere in their imprecation*; but after the huſband's acknowledgment, the imprecation no longer remains either in ſubſtance or in effect, and conſequently they may then come together.

marry wife.

IF a huſband accuſe his wife, by denying her child, it is requiſite that the *Kâzee* iſſue a decree denying the deſcent of the child from him and affixing it upon the mother †; and the manner of the imprecation here is that the *Kâzee* firſt makes the huſband give evidence, ſaying "I teſtify in the ſight of GOD that I ſpeak truly concerning the matter I have brought againſt her, in denying the child;" after which he makes the wife give evidence in the ſame manner, ſaying "I call GOD to witneſs that he ſpeaks falſely concerning the matter he has brought againſt me, in denying the child."

Imprecation occaſions a decree of

IF a huſband accuſe his wife, both by bringing a charge of adultery againſt her, and alſo by denying a child born of her, it is neceſſary that both theſe circumſtances be mentioned in the imprecation, after

* That is, without her being previouſly married to another.

† That is, *baſtardizing* it.

which the *Kâzee* is to iſſue a decree, denying the deſcent of the child from the huſband, and fixing it upon the mother, becauſe the prophet once ſo decreed upon ſuch an occaſion, and alſo, becauſe the deſign of the imprecation in this caſe is to baſtardize the child, wherefore a decree muſt be paſſed agreeably to the deſign of it.

A DECREE of ſeparation between the parties comprehends a decree of baſtardy in reſpect to the child.—It is recorded as an opinion of *Aboo Yooſaf* that, in a decree of ſeparation, a decree of baſtardy is not comprehended, but that it is requiſite that the magiſtrate firſt effect the ſeparation, and then ſay "I throw the child upon the mother, and "remove it from the father's houſe;" becauſe ſeparation may ſometimes take place without affecting the deſcent of children, as where a man accuſes of adultery a wife who has children *, in which caſe a ſeparation is eſtabliſhed by imprecation, but baſtardy is not induced upon the children: the *Kâzee*'s mention of baſtardy is therefore requiſite.

A huſband receding from imprecation muſt be puniſhed for *ſlander*.

IF a huſband, after imprecation, contradict himſelf, by acknowledging that he had accuſed his wife falſely, let the magiſtrate puniſh him, becauſe he then acknowledges himſelf liable to puniſhment: and it is afterwards lawful for the huſband to marry her again, (according to *Haneefa* and *Mohammed*,) becauſe, having once ſuffered puniſhment for ſlander, competency to make imprecation no longer appertains to him; and the prohibition which is the effect of the imprecation is removed. In the ſame manner, if the huſband and wife make imprecation, and the huſband afterwards accuſe of adultery a ſtrange woman, who is married, and ſuffer puniſhment on that account, it then becomes lawful for him to marry his wife again, for the reaſon aforeſaid. And ſo alſo, if the wife, after divorce in conſequence of imprecation, be found in adultery, and ſuffer correction from the *Kâzee*

* Meaning, children already born, before the period of the huſband's accuſation.

on

on that account, it then becomes lawful for the huſband to marry her again, as competency to make imprecation no longer appertains to her.

Imprecation not incumbent where the huſband or wife is an *infant*, or an *idiot*;

IF a man accuſe his wife, ſhe being an *infant* or an *idiot*, imprecation is not incumbent upon the parties, becauſe the accuſer of ſuch a perſon is not liable to puniſhment for ſlander unleſs he be a *ſtranger*: imprecation, therefore, is not incumbent in the accuſation of ſuch wives by their huſbands, as it is the ſubſtitute of puniſhment for ſlander. And the rule is the ſame where the huſband is inſane, or an idiot, becauſe ſuch an one is not competent in evidence.

or where the huſband is *dumb*;

IF a dumb perſon accuſe his wife, imprecation is not incumbent, becauſe imprecation is not incumbent unleſs the accuſation be expreſſed *in terms*, as is the caſe in ſlander, where puniſhment is not incurred unleſs the accuſation has been expreſsly made.—*Shafei* oppoſes this; for he holds that puniſhment is due upon the accuſation of a dumb perſon, and conſequently, that imprecation is incumbent, becauſe his *ſigns* are the ſame as the *words* of one who has the power of ſpeech: but the argument of our doctors is that the ſigns of a dumb perſon are not altogether free from doubt, and puniſhment is removed by any circumſtance of doubt.

or where the accuſation is indirectly inſinuated.

IF a man ſay to his wife "your pregnancy is not of me," imprecation is not incumbent.—This is the opinion of *Haneefa* and *Ziffer*: and the reaſon upon which they found it is, that the circumſtance of *pregnancy* does not admit of being *poſitively certified*, wherefore the huſband's words do not convey an immediate accuſation.—The two diſciples ſay that imprecation is incumbent in this caſe, provided the woman be delivered of a child within ſix months; and it is this which is meant by what is ſaid in the *Mabſoot* that "the exiſtence of pregnancy at the time of accuſation may be certified;" but to this we reply that where the accuſation cannot be immediately eſtabliſhed, it

muſt remain ſuſpended upon a condition, in the ſame manner as if the huſband were to ſay to his wife "*if* you produce a child it is not "mine;" and the ſuſpenſion of accuſation upon a condition is nugatory.

But if he were to ſay to her "you are an adultereſs, and your pregnancy proceeds from adultery," imprecation is incumbent upon both parties, as accuſation is here eſtabliſhed in the mention of adultery. Yet the *Kâzee* is not in this caſe to iſſue any decree affecting the deſcent of the fœtus.—*Shafei* ſays that a decree of baſtardy muſt be pronounced, becauſe the prophet decreed a baſtardy in the inſtance of *Hillâl* who had accuſed his pregnant wife.—The argument of our doctors is that the effect of a decree of baſtardy cannot take place until after delivery, ſince before delivery there is a poſſibility of doubt reſpecting the pregnancy; the *Kâzee*, therefore, is not to decree a baſtardy.—As to the decree of the prophet quoted by *Shafei*, it is poſſible that the prophet may have been certified of the woman's pregnancy by *inſpiration*.

to the birth of a child does not affect that child's deſcent.

If a huſband deny the deſcent of the child upon the near approach or at the time of birth, or at the time where it is uſual to receive congratulations, and to purchaſe clothes and make preparations for it, his denial holds good, and imprecation is incumbent upon him on account of it: but if he do not deny it until afterwards, although imprecation be here alſo incumbent, yet the deſcent of the child remains eſtabliſhed in him.—This is the doctrine of *Haneefa*.—The two diſciples ſay that the denial is admitted during labour, as it is admitted within a *little* time, but not within a *long* time, and hence a diſtinction is made between the ſhorter period and the longer, by the time of labour, as the pains of labour are among the effects of breeding.—The argument of *Haneefa* is, that it is impoſſible to fix any time, becauſe time is fixed for the purpoſe of conſideration, and mankind vary in the length of time neceſſary for that purpoſe; wherefore regard is had to a thing which ſhews

ſhews the child to be his, namely, his receiving the uſual congratulations, or remaining ſilent at the time of ſuch congratulations, or purchaſing things to prepare for the birth, or letting that time paſs without denying it.—This is where he is preſent; but if he be abſent, and ignorant of the birth of the child, and afterwards come, the time aforeſaid is regarded, according to both authorities; that is to ſay, with *Haneefa*, it remains to him to deny the child within ſuch ſpace of time as congratulations are admitted,—and with the two diſciples, within the ſpace of time which correſponds with a woman's labour.

IF two children be produced at one birth, and the huſband deny the deſcent of the *firſt*-born, and admit that of the *ſecond*, in this caſe the parentage of *both* is eſtabliſhed in him, becauſe they are both ſuppoſed to be begotten from one ſeed; and puniſhment is due upon the huſband, becauſe he has contradicted himſelf in acknowledging the *ſecond* child; and if he admit the *firſt*, and deny the *ſecond*, the parentage of both is eſtabliſhed in him for the ſame reaſon: and imprecation is here incumbent, becauſe his denial of the ſecond child implies an accuſation from which he does not afterwards retract, (as in the former inſtance,) ſince his virtual declaration of his wife's chaſtity, in acknowledging the parentage of *one* of the children, here precedes the accuſation, being the ſame as if he were firſt to ſay "*ſhe is chaſte*," and then to ſay "*ſhe is an adultreſs*," in which caſe imprecation would be incumbent, and ſo here likewiſe.

## CHAP. XI.

## Of *Impotence.*

An impotent husband must be allowed a year's probation, after which separation takes place.

If a husband be *Inneen*, [impotent,] it is requisite that the *Kázee* appoint the term of one year from the period of litigation, within which if the accused have carnal connexion with his wife it is well; but if not, the *Kázee* must pronounce a separation, provided such be the desire of the wife, because the same is recorded from *Alee*, and *Omar*, and *Ebn Musood*,—and also, because the woman is entitled to the carnal enjoyment, and it is possible that the husband may be incapacitated from the performance of that act, not only by a radical infirmity, but also by some supervenient and accidental cause, whence it is necessary that some certain term be appointed, in order that the true reason of his inability may be ascertained;—and this term is fixed at one year, because that contains four seasons, and diseases are principally occasioned by an excess either of heat, cold, dryness, or humidity, qualities which are peculiar to each season respectively; and it is probable that one of these four may particularly agree with the man's constitution, so as by its influence to dissipate his disease; thus it may be ascertained, when a year has completely elapsed, whether his inability proceeded from any radical infirmity, in which case, it is impossible to *retain* the wife *with humanity* *, and hence it is incumbent upon the husband to separate from her, upon a principle of benevolence: but if he should not do so, the *Kâzee* is in that case to pronounce a separation, as his substitute; yet it is requisite that the wo-

* Alluding to the words of the *Koran* before mentioned.

man

man *deſire* ſuch ſeparation, as it is her right.—The ſeparation here mentioned amounts to the execution of a ſingle divorce irreverſible, becauſe the act of the *Kázee* is attributed to the huſband, whence it is the ſame as if he had himſelf pronounced ſuch a ſentence upon her. *Shafeï* alleges that this ſeparation is an annulment of the marriage; but with our doctors marriage is held to be incapable of being annulled *of itſelf*, although it may be annulled *by effect*, in the ſame manner as in the caſe of a huſband's apoſtacy. And this ſeparation amounts to an *irreverſible* divorce, not a *reverſible*, becauſe the intent of it is the woman's relief from a hardſhip, which cannot be effected but by complete divorce; for if it were not ſo, it would ſtill remain in the huſband's power to reverſe it, which would defeat the deſign.

and the wife retains her whole dower, if the huſband ſhould ever have been in retirement with her,—but

THE wife, in the caſe here mentioned, is entitled to her whole dower, if the huſband ſhould ever have been in *retirement* with her, becauſe retirement with an *Inneen* is accounted a *Khalwat Sahech*, or complete retirement, as well as with any other perſon; and an *Edit* is incumbent upon her, as was mentioned in a former place.—What is here advanced proceeds upon a ſuppoſition of the huſband acknowledging that he has not performed the carnal act with his wife: but if he controvert her plea, aſſerting that he has copulated with her, and ſhe have been married as a *Siyeeba*, his affirmation upon oath is to be credited, becauſe he is the defendant againſt her claim of ſeparation, and the affirmation of a defendant muſt be credited when given upon oath: moreover, the inſtrument of generation is originally created free from inability or diſeaſe, and it is natural that he ſhould perform the carnal act where no obſtruction exiſts; and the declaration of a perſon is to be credited when apparent circumſtances bear teſtimony to his veracity, and where he reſts his cauſe upon the nature of things. If therefore the huſband thus make oath, the wife's right of ſeparation is thereby defeated; but if he decline this, the term of a year is then to be appointed as aforeſaid. Where ſhe was married as a *virgin*, ſhe is to be examined by ſome of her own ſex, and if they declare her to be

the wife's claim of ſeparation may be here defeated by the huſband ſwearing that he had en-

ſtill a virgin, the term of a year is to be appointed, as above, becauſe the huſband's falſehood is then evident; but if they declare her muliebrity *, the *Kázee* is in that caſe to require the huſband to make oath, which if he do, her right to ſeparation is defeated; but if he decline, deciſion is to be delayed for a year as above.—All that has here been ſaid ſuppoſes the huſband to be merely *Inneen* or *impotent:* but if he be a *Majboob*, or complete eunuch, (that is, one deprived both of *yard* and *teſticles*, or of the *former* only,) the *Kázee* is to pronounce an immediate ſeparation, (where ſuch is the woman's deſire,) becauſe in this caſe the delay of a year can be attended with no advantage: if, however, he be only a *Khaſee*, or ſimple eunuch, (that is, *caſtrated*,) deciſion is to be deferred for a year, as in a caſe of impotency, becauſe there the yard ſtill remains, with which it is poſſible that he may perform the act.

Rules to be obſerved at the expiration of the year of probation.

Where the term of a year is appointed for the trial of a man charged with impotence by a wife whom he had married as a virgin, and he declares, at the expiration thereof, that he has had carnal connexion with her within that interval, and ſhe denies this, ſhe is then to be examined by ſome of her own ſex; if they pronounce her to be ſtill a virgin, ſhe has it at her option either to ſeparate from her huſband, or to continue with him, becauſe the teſtimony of the examiners is confirmed by her virginity, that being the original ſtate of every woman; but ſhould they declare her muliebrity, the huſband is then to be required on the other hand to make oath, which if he decline ſhe has an option, as above, her plea being ſtrengthened by the circumſtance of his declining to ſwear; but if he ſwear, ſhe has no option. If, moreover, ſhe was a *Siyeeba* originally, (that is at the time of marriage,) and the huſband declare that he has had carnal connexion with her within the year of probation, and ſhe deny this, his declaration upon oath is to be credited,—that is to ſay, the oath is to be

* Meaning *womanhood*, as oppoſed to *virginity*.

tendered to him, which if he take, ſhe has no option; but if he decline it, ſhe has then an option as already ſtated. And here, if ſhe chuſe to continue with him, ſhe has no ſubſequent option, as by ſo doing ſhe manifeſts an aſſent to the relinquiſhment of her right.

The year of probation to be calculated

THE year of probation appointed by the *Kázee* in caſes of impotence is to be counted by the *lunar* calendar; this is approved; and the days of the courſes, and of religious faſts, (ſuch as *Ramzán*,) are therein included, as theſe occur in all years alike, nor can a year paſs without them; but the days of *ſickneſs* of either party are not included, as a year may paſs exempt from ſuch an occurrence.

A huſband cannot annul the marriage, where the defect is on the part of the *wife*.

IF the defect be on the part of the *woman*, the huſband has no right to annul the marriage *.—*Shafeï* maintains that he may annul it, and put her away on account of any of the five following defects, namely, *leproſy*, *ſcrophula*, *madneſs*, *Ritk* †, or *Karrn* ‡, becauſe ſome of theſe (ſuch as the two latter) are obſtructive of generation; and others (ſuch as the three former) are cauſes of natural and inſuperable averſion, as is confirmed by a tradition of the prophet, who has ſaid "*flee from* LEPERS *as ye would from a* WILD BEAST."—The argument of our doctors is that if the enjoyment of the wife's perſon were to be totally precluded by any circumſtance, (ſuch as *death*, for inſtance, before retirement,) yet the marriage is not annulled, but is rather eſtabliſhed and confirmed, inſomuch that the whole dower remains due; and hence, where ſuch privation of the connubial enjoyment is merely *dubious*, on account of its being occaſioned only by a

* That is, *to break it off*, ſo as to deſtroy the woman's claim to her dower, which could not be done by divorce.

† *Vulva impervia coeunti.*

‡ A bone, or other unnatural excreſcence, *vulva anteriore parte enaſcens.*

*defect* in the ſubject, it remains unannulled, *a fortiori*, upon this ground, that the deſign of matrimony *is to legalize generation*, and the connubial enjoyment is the advantage propoſed in it; and the ability to perform the act, where any natural obſtruction exiſts, may be obtained, as in a caſe of *Ritk* or *Karn*, (for inſtance,) which are to be remedied by chirurgical operations; and in all other caſes the ability is evident.

A wife cannot ſue for a ſeparation on the ground of her huſband being *leprous, ſcrophulous*, or *inſane*.

If the huſband be *lunatic*, *leprous*, or *ſcrophulous*, yet his wife has no option, as in caſes where he is an eunuch or impotent. This is according to *Haneeſa* and *Aboo Yooſaf*. *Mohammed* ſays that ſhe is entitled to an option, in order that ſhe may remove an evil from herſelf: contrary to the caſe of a *huſband*, he having it in his power, in ſimilar circumſtances, to relieve himſelf by *divorce*.—The argument of the two *Elders* is that in marriage no right of option originally exiſts, for if this were allowed, it would operate to the deſtruction of the huſband's right; and it is admitted in the caſe of *eunuchs*, or of perſons *naturally* impotent, only becauſe the circumſtance of *natural* or *accidental* infirmity tends to defeat the end for which marriage was inſtituted; but with perſons of the deſcriptions now under conſideration this reaſon does not hold, as the huſband who labours under any of thoſe defects is ſtill capable of generation, whence an evident difference appears between the two caſes

CHAP.

## CHAP. XII.

## Of the *Edit*.

BY *Edit* is underſtood the term of probation incumbent upon a woman in conſequence of the diſſolution of marriage after carnal connexion: the moſt approved definition of *Edit* is, *the term by the completion of which a new marriage is rendered lawful.* Definition of the term.

WHEN a man repudiates his wife, being a free woman, either by a *reverſible* or an *irreverſible* divorce, or when ſeparation takes place between a huſband and wife, without divorce, after carnal connexion, the *Edit*, or woman's term of probation, conſiſts of three terms of her courſes, provided ſhe be one who is ſubject to the menſtrual diſcharge, GOD having ſo commanded in the *Koran*.—The ſeparation which takes place between a married couple, independant of divorce, bears the ſame conſtruction as divorce, becauſe the *Edit* is made incumbent in a caſe of divorce for the purpoſe of aſcertaining whether the woman be pregnant, and the ſame neceſſity occurs where ſeparation takes place between a huſband and an enjoyed wife without divorce.—The ſeparation without divorce may be occaſioned either by a woman admitting the ſon of her huſband to carnal connexion, or by her apoſtatizing from the faith. divorce of a *free* woman is *three* menſtru-

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and of one not ſubject to courſes, *three months*;

THE *Edit* of a woman who, on account of extreme youth, or age, is not ſubject to the menſtrual diſcharge, is three months, becauſe GOD has ſo ordained in the ſacred writings.—The *Edit* of a pregnant woman is accompliſhed by her delivery, whether ſhe be a *ſlave* or *free*, becauſe GOD, in the ſacred writings, has ſo ordained reſpecting woman in that ſituation.

and, of one who is *pregnant*, the term of her travail:

that of a ſlave is *two* menſtruations:

THE *Edit* of a female ſlave is two terms of her courſes, becauſe it is thus mentioned in the traditions, and alſo, becauſe bondage is reſtrictive to the *half*, whence it would appear that the *Edit* of a ſlave ſhould be only *one term and a half* of her courſes, but the menſtrual diſcharge being incapable of ſubdiviſion, the half is, of neceſſity, made a *whole term*, and hence the *Edit* of ſuch an one is *two* terms; and it is to this that *Omar* adverts, where he ſays "I would if poſ-"ſible fix the *Edit* of a female ſlave at *one and an half* of her courſes."

and of one not ſubject to

*and an*

—Where the female ſlave is one who from extreme youth or age is not ſubject to the menſtrual diſcharge, her *Edit* is one month and an half, becauſe *time* being capable of ſubdiviſion, the term is fixed at the *half* on account of her bondage.

*Edit* of widowhood.

THE *Edit* of a free woman upon the deceaſe of her huſband is four months and ten days, ſuch being the term mentioned in the *Koran*;—and that of a female ſlave in the like circumſtance is two months and five days, bondage being reſtrictive to the half.

Caſe of *Edit* of widowhood after divorce.

IF a man divorce his wife upon his deathbed, ſo as that ſhe ſtill inherits of him *, *Haneefa* and *Mohammed* ſay that her *Edit*, in conſequence of his deceaſe, is four months and ten days, if ſhe complete three terms of her courſes within that period; but if the three terms be not accompliſhed, as requiring a longer *time*, (*five months* for inſtance,) her *Edit* is in that caſe three terms of her courſes, what-

* See Chap. IX.

ever

ever time thoſe may require. In ſhort, here are two terms; one, that of four months and ten days; and the other, that of three menſtruations; and which ever of theſe is the longeſt, the ſame is the term of *Edit*.—*Aboo Yooſaf* ſays that the *Edit* of this woman is three menſtruations.—This difference of doctrine obtains where the ſick perſon has repudiated his wife by one divorce irreverſible, or by three divorces:—but where the divorce is *reverſible*, the *Edit* is four months and ten days, according to all the doctors. The argument of *Aboo Yooſaf*, in ſupport of his doctrine, as above, is that the marriage had been diſſolved and terminated by the divorce, previous to the deceaſe of the huſband, and the *Edit* of divorce is three terms of the courſes, whence ſuch is the *Edit* incumbent in the preſent caſe, as that of four months and ten days, (being the *Edit* of *widowhood*,) is required only where the marriage was diſſolved by the huſband's deceaſe; but in the preſent caſe it was diſſolved *before* his death, by *divorce*. To this indeed it may be objected that, if the marriage be diſſolved before the huſband's deceaſe, it would follow that the wife cannot inherit:—but the marriage is accounted to hold in reſpect to *inheritance* only, and not ſo as to alter or affect the *Edit*:—contrary to where a dying huſband repudiates his wife by a *reverſible* divorce; her *Edit* in that caſe being univerſally held to be ſtrictly an *Edit* of *widowhood*, ſince the marriage then actually continues in *every* ſhape.—The argument of *Haneefa* and *Mohammed* is that the marriage being here accounted to continue with reſpect to *inheritance*, is alſo accounted to continue with reſpect to *Edit*; and hence the longeſt of the two is regarded.—If a man be put to death for apoſtacy ſo as that his wife inherits of him, the ſame difference of opinion obtains reſpecting her *Edit* as is above recited.—Some commentators allege that her *Edit* is held to be three terms of her courſes by all the doctors, as her marriage is not accounted to continue to the time of her huſband's deceaſe with reſpect to *inheritance*, ſince a *Muſſulman* woman cannot inherit of an infidel: but yet the wife does here inherit, becauſe her claim to inheritance is

eſtabliſhed upon the inſtant of her huſband's apoſtacy;—her *Edit*, therefore, is three terms of her courſes.

A female ſlave, emancipated during *Edit*, muſt obſerve the *Edit* of a free woman.

If a maſter emancipate his female ſlave, whilſt in her *Edit* from a *reverſible* divorce, ſhe is in that caſe under *Edit* as a *free woman*, and muſt count it accordingly; becauſe, in reverſible divorce, ſo long as the *Edit* is unaccompliſhed, marriage continues in every ſhape:—but if a maſter emancipate his female ſlave, whilſt in her *Edit* from a divorce *irreverſible*, or from the deceaſe of her huſband, her *Edit* is not affected or altered by ſuch emancipation;—that is, it does not become the *Edit* of a *free woman*, becauſe her marriage has been completely diſſolved by the irreverſible divorce, or by the huſband's death.

Rule of *Edit* with a woman paſt child-bearing.

If an *Ayeeſa* * be in her *Edit*, counting it by months, and the menſtrual diſcharge ſhould chance to appear upon her, in this caſe all regard to that portion of the *Edit* which has been counted by months drops, and her *Edit* commences *de novo*, to be counted by the terms of her courſes.—The compiler of this work obſerves that this is where the *Ayeeſa* had been ſubject to the courſes before ſhe became hopeleſs of children, as in this caſe her deſpair is done away; and this is approved, becauſe it is evident that *months*, with reſpect to ſuch a woman, are not the abſolute ſubſtitutes of *Edit:* but if an *Ayeeſa* be one to whom the menſtrual diſcharge had never occurred before, and be in her *Edit*, counting it by months, and ſee the appearance of the ſanguinary diſcharge, regard to the term of the *Edit* which has been counted by months does not drop, becauſe the counting by months is the original rule with reſpect to ſuch a woman, and not merely the ſubſtitute for her courſes.

If a woman be in her *Edit*, counting it by the term of her courſes,

* Literally a *deſpairer*, that is, a woman whoſe courſes are ſtopped, and who is conſequently ſuppoſed to be paſt child-bearing.

and

and after two of thoſe they ſhould ſtop, and ſhe become an *Ayeeſa*, her *Edit* commences *de novo*, to be counted by months, and all regard to the courſes drops, ſo as that the *ſubſtitute* (which is *months*,) and the *original* (which is *the courſes*,) may not be confounded.

THE *Edit* of a woman wedded by an invalid marriage is counted by her courſes, both in caſe of her huſband's death, and alſo, of a ſeparation taking place between them; and ſo likewiſe that of a woman with whom a man has had carnal connexion erroneouſly; becauſe, in thoſe caſes, the *Edit* is incumbent merely for the purpoſe of aſcertaining whether the woman be pregnant, and not as a *right of marriage*; and as the courſes are the means of aſcertaining the ſtate of the womb, the *Edit* of thoſe women is to be counted by their returns. Rule of *Edit* in an invalid marriage.

IF the maſter of an *Am-Walid* ſhould die, or emancipate her, her *Edit* is three terms of her courſes.—*Shafei* ſays that her *Edit* is only one term, as it is incumbent upon her on account only of the extinction of the owner's propriety, and conſequently no more is requiſite to effect it than what may ſuffice to cleanſe her womb.—The argument of our doctors is, that *Edit* is incumbent upon her, on account of the extinction of *Firâſh* *, (for ſhe is the partner of her maſter's bed,) and is therefore the ſame as that uſed in the diſſolution of marriage:—moreover, *Omar* has ſaid "*the* EDIT *of an* AM-WALID *is* "*three terms of her courſes.*"—If the *Am-Walid* be not ſubject to the menſtrual diſcharge, her *Edit* is three months, the ſame as that of a married woman. *Edit* of an *Am-Walid.*

IF an infant die, leaving a wife pregnant, her *Edit* is accompliſhed by her delivery, according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* *Edit* of the widow of an *infant.*

* *Firâſh* literally means *a bed*, whence it is metaphorically uſed to expreſs a right of cohabitation or concubinage: it is alſo uſed in the ſenſe of a *wife* or a *concubine*, whence it is here and elſewhere tranſlated *partner of his bed.*

ſays that it is four months and ten days, (and ſuch alſo is the opinion of *Shafeï*,) becauſe the pregnancy cannot be attributed to the *infant*, and is, therefore, with reſpect to *him*, the ſame as if it had taken place poſterior to his deceaſe.—The arguments of *Haneeſa* and *Mohammed* herein are twofold; FIRST, the word of GOD, who has ſaid in the *Koran*, "A WOMAN, IF SHE BE PREGNANT, MUST WAIT UNTIL "HER DELIVERY,"—which is *generally* expreſſed, and therefore applies to the woman here treated of: SECONDLY, the *Edit* of a woman whoſe huſband dies is (in caſe of her pregnancy) fixed at the remaining term of her travail, whether that be ſhort or long; now the *Edit* of a *widow* is not deſigned for the purpoſe of aſcertaining the ſtate of her womb; for if it were ſo, it would not be determined by the lapſe of time, (ſuppoſing her to be one who is ſubject to the menſtrual diſcharge,) but by three terms of her courſes; whereas we ſee that the law fixes it at four months and ten days, although ſhe be a woman of that deſcription; but it is made incumbent merely as a fulfilment of one of the rights of marriage: and the ſame reaſoning applies to the wife of the infant in queſtion, although her pregnancy be not attributed to him: contrary to where pregnancy takes place, ſubſequent to the infant's deceaſe; for here her *Edit* of four months and ten days having commenced, is not afterwards to be altered by her ſubſequent pregnancy; but in the caſe now under conſideration, the *Edit* of the term of travail was due from the inſtant that *Edit* became incumbent; hence there is an evident difference between the two caſes; and conſequently there is no analogy between them.—The pregnancy is determined to have taken place after the death of the huſband, where the woman is not delivered within leſs than ſix months from the date of the huſband's deceaſe.—This is the approved rule. Some have ſaid that it is ſo judged only where ſhe is delivered within not leſs than two years. But if a huſband, being adult, ſhould die, and his wife be delivered of a child at any time between ſix months and two years from the period of his deceaſe, her *Edit* is accompliſhed by her delivery, becauſe the pregnancy is in this caſe attributed to the huſband, and hence

hence is accounted the ſame as if it had exiſted at the period of his deceaſe.—Obſerve that the parentage of a child born of the wife of an *infant* cannot be eſtabliſhed in the infant, whether her pregnancy had appeared during his life, or not until after his deceaſe, becauſe an infant, not being poſſeſſed of ſeed, cannot be conceived capable of impregnating a woman; and marriage is not held to be a ſubſtitute for ſeed *, excepting where the exiſtence of ſeed on the part of the man may be ſuppoſed.

*Edit* of divorce of a menſtruous woman.

If a man divorce his wife whilſt in her courſes, that term is not to be counted in her *Edit*, becauſe the *Edit* is fixed at *three complete menſtruations*, and if the above were to be counted, it would induce a deficiency, as part of that had paſſed previous to divorce, and therefore cannot be included.

*Edit* of a divorced woman who has a man during the term of her *Edit* of divorce.

If a man have *erroneous* carnal connexion with a woman who is in her *Edit* from divorce, another *Edit* becomes incumbent upon her, and the two are blended together,—that is to ſay, her enſuing courſes are accounted in both *Edits*; and if the former *Edit* ſhould be accompliſhed before the latter, the accompliſhment of that ſtill remains incumbent upon her. This is the opinion of our doctors.—*Shafei* maintains that two *Edits* cannot be blended together, becauſe the *Edit* is an act of piety, (as it reſtrains from taking another huſband, and ſo forth,) and *two* acts of piety are not permitted to be united in *one account*; as in *faſting* for inſtance, where no part of the abſtinence of one day can be put to the account of another.—The argument of our doctors is that the deſign of the *Edit* is to aſcertain the ſtate of the womb, and as that is anſwered by a ſingle *Edit*, the two *Edits* may be counted together; and piety is not the *deſign* of the *Edit*, but rather a *dependant* on it; whence it is that the *Edit* may be accompliſhed, even *without* the knowledge of the woman, merely by her refraining

* That is, cannot be held to amount to a virtual eſtabliſhment of *parentage*.

from

from going abroad, or from marrying another husband, or from consummating her marriage with him during the term of it.

*Edit* of a widow who admits a man during her *Edit* of widowhood.

If a man have carnal connexion with a woman who is in her *Edit* from the death of her husband, she is to complete that of four months and ten days, being the *Edit* of widowhood; at the same time counting such terms of her courses as may occur within the remainder of that time, so as that the two *Edits* may be counted together as far as is possible.

The *Edit* of a widow, or a divorced wife, may be accomplished without her knowledge.

The *Edit* of divorce commences immediately upon divorce, and that of widowhood upon the decease of the husband; if, therefore, a woman be not informed of her *widowhood* or *divorce* until such time as the term of *Edit* be passed, her *Edit* is then accomplished, because the occasion of *Edit* being incumbent is widowhood or divorce, and it is therefore held to commence upon the occurrence of the *occasion*.—Our modern doctors have decreed that the *Edit* of divorce should not be held to commence until the divorce be publicly declared, in order to guard against collusion between the parties; as it is possible that a husband and wife might privately agree to declare a divorce, and pretend that the *Edit* had already past, so as that, by this means, the marriage being dissolved, he might be enabled to acknowledge a debt in her favour, or to make her a bequest of more than her proper inheritance.

*Edit* from an invalid marriage.

In an invalid marriage the *Edit* commences immediately upon the *Kázees* decree of separation, or upon the determination of the husband, expressly signified, to refrain from carnal connexion.—*Ziffer* says it commences from the date of the last carnal connexion of the parties, because, in an invalid marriage, it is the *carnal connexion* which gives occasion for it, and not the *marriage*.—The arguments of our doctors are twofold;—FIRST, every instance of carnal connexion occurring in an invalid marriage stands only as *one single act*, as they all proceed from,

from, and originate in, *one contract*; (whence it is that one dower ſuffices for the whole;) wherefore, until the actual ſeparation, or determination ſignified, as above, *Edit* cannot be eſtabliſhed, for in every previous inſtance of carnal connexion it is poſſible that the ſame may be repeated; and hence, ſo long as the ſeparation or determination do not exiſt, no particular inſtance of the carnal act can be poſitively termed *the laſt*;—SECONDLY, the laſt inſtance of carnal connexion cannot be aſcertained to be *the laſt*, but by the huſband's ſignified determination to refrain for the future, ſince permiſſion on the part of the woman, and ability on that of the man, in a matter of ſo concealed and doubtful a nature as carnal connexion, ſtand as a continuance of it, and any other man who may be deſirous to marry the woman will require to know the effect of the *Edit*; it is therefore requiſite that ſomething known and viſible be ſubſtituted for that which is concealed, ſo as that ſuch viſible circumſtance may afford a ſtandard whereby to determine.

A woman's oath confirms the accompliſhment of her *Edit*.

IF a woman under *Edit* ſhould declare that it is accompliſhed, and her huſband deny this, her declaration upon oath is to be credited, becauſe ſhe is confided in in this point, and he has thrown an imputation upon her veracity: ſhe is therefore to ſwear in the manner of a plaintiff.

Caſe of a wo-

divorce, and again repudiated.

WHEN a man, having repudiated his wife by an irreverſible divorce, marries her again during her *Edit*, and afterwards divorces her before conſummation, a complete dower is in this caſe incumbent upon him, and upon the woman an *Edit de novo*, according to *Haneeſa* and *Aboo Yooſaf*.—*Mohammed* ſays that no more is incumbent upon the man than an half dower, nor upon the woman than the accompliſhment of her firſt *Edit*, becauſe the ſecond divorce is a divorce before conſummation, and therefore does not require either that he ſhould pay a complete dower, or that he ſhould obſerve a new *Edit*; nor does any thing remain with reſpect to her, but that ſhe complete the firſt

*Edit*

*Edit* incumbent in conſequence of the firſt divorce; for the obligation upon the woman to complete her firſt *Edit* diſappeared upon the huſband marrying her again; but this laſt marriage being done away by his divorcing her a ſecond time, her obligation to the completion of her firſt *Edit* recurs. The argument of *Haneefa* and *Aboo Yooſaf* is that the ſecond divorce is, in fact, given after carnal connexion, ſince the woman is ſtill actually within the ſeizin of the man in conſequence of ſuch connexion formerly had with her, the effect of which remains, namely, the *Edit*; and where he marries her again during her *Edit*, ſhe being ſtill within his ſeizin, ſuch poſſeſſion is the ſubſtitute of that which appertains to him in virtue of the ſecond marriage; as in the caſe of an uſurper, who if he make purchaſe of the article uſurped whilſt it is within his ſeizin, is held to be ſeized of the purchaſe on the inſtant of the execution of the contract of ſale; it is therefore evident that the ſecond divorce is a divorce after carnal connexion.—*Ziffer* ſays that no *Edit* whatever is incumbent upon the woman, becauſe the former *Edit* dropt in conſequence of the ſecond marriage, and therefore cannot recur; and no *Edit* is due on account of the ſecond divorce, as that is a divorce before conſummation: but the arguments of the two *Elders*, as above recited, are a ſufficient reply to this.

If a *Zimmee*, or infidel ſubject, repudiate his wife who is alſo an infidel ſubject, no *Edit* is incumbent upon her: and the ſame rule applies to an alien woman who having been converted to the faith, comes from the foreign into the *Muſſulman* territory *: it is therefore lawful for ſuch women to marry before the expiration of the term of *Edit*, unleſs they be *pregnant*. This is the opinion of *Haneefa* with reſpect to ſuch infidel ſubjects as do not hold or believe in the obligation of *Edit*. The two diſciples ſay that *Edit* is incumbent upon

* This ſuppoſes a woman who, having been converted to the faith in a foreign land, deſerts her infidel huſband there, and comes into the *Muſſulman* territory.

women of either deſcription;—upon infidel ſubjects, becauſe they have bound themſelves to the obſervance of all ſuch things as appertain to the temporal law; and upon aliens who, having embraced the faith, come into the *Muſſulman* territory, becauſe it is ſo upon ſuch women on other accounts, ſuch as the death of their huſbands, or their admitting the ſon of the huſband to carnal connexion, and is therefore equally obligatory on account of ſeparation of country:—contrary to the caſe where a *man*, being converted to the faith, comes from a foreign into a *Muſſulman* territory, and his wife remains in the foreign country, for upon her no *Edit* is incumbent, as the obligation of it cannot reach or affect her in a foreign land.—The argument of *Haneefa* with reſpect to infidel ſubjects is that they not being under any obligation in reſpect to the ordinances of the law, the obligation of *Edit*, as a right of the law, cannot be conceived to effect them; nor can it be ſuppoſed to do ſo on account of the right of the huſband, as he does not hold or believe in the obligation of it: and his arguments with reſpect to alien women are twofold; FIRST, GOD has commanded *Muſſulmans*, ſaying, "YE MAY MARRY FOREIGN WOMEN, WHO "BEING CONVERTED TO THE FAITH, COME INTO THE TERRITORY "OF THE BELIEVERS;" SECONDLY, wherever the *Edit* is incumbent, the right of man is connected with it; but a *Hirbee* or *alien* is not conſidered as *man*, but as *mere matter*, (whence it is that he is made a *property* or *ſlave*.)—But where the woman is pregnant the *Edit* is incumbent, on account that the *fœtus* of which ſhe is pregnant is of eſtabliſhed deſcent.—It is recorded from *Haneefa* that it is lawful to marry ſuch women, being pregnant, but that the huſband muſt refrain from carnal connexion until after delivery, in like manner as in the caſe of women pregnant and by whoredom.—The former however is the better opinion.

## SECTION.

### *Of* HIDÂD, *or* MOURNING.

Definition.

BY *Hidâd* is underſtood a woman abſtaining from the uſe of perfumes, ſuch as ſcented or other oils; or of ornaments, ſuch as dying the edge of the eyelids with antimony, and ſo forth, except on account of ſome particular pretext, or (as is ſaid in the *Jama Sagheer*) on account of aches or pains which thoſe applications may remedy.

Mourning is incumbent on the death of a huſband,

although he die during the wife's *Edit* from irreverſible divorce.

HIDÂD, or *mourning*, is incumbent upon a woman whoſe huſband dies where ſhe is of mature age and a *Muſſlima*, becauſe the prophet has ſaid "*It is not lawful for a woman who believes in* GOD, "*and a future ſtate, to obſerve* HIDÂD *for more than three days on* "*account of the death of any one except her* HUSBAND; *but for him it* "*is incumbent upon her to obſerve* HIDÂD *for the ſpace of four months* "*and ten days.*" Our doctors ſay that it is equally incumbent upon a woman whoſe huſband dies whilſt ſhe is under repudiation by irreverſible divorce.—*Shafei* aſſerts that it is not incumbent upon her, becauſe the ſole intention of its inſtitution is to ſignify grief for the deceaſe of a huſband who has faithfully adhered to the marriage contract until death; but there is no cauſe of grief for the demiſe of one who had, during life, thrown his wife into difficulty and perplexity by divorce. The arguments of our doctors, in ſupport of their opinion upon this point, are twofold; FIRST, the prophet forbad

women under *Edit* dying their hands with *Hinna* *, as it is a ſpecies of perfume; SECONDLY, mourning is incumbent as a ſign of grief for the loſs of the bleſſings of matrimony, which is not only the means of her ſupport, but alſo of the preſervation of her chaſtity; and an irreverſible divorce is a more complete termination of thoſe bleſſings than even death itſelf, ſince it is lawful for a woman to perform the laſt offices of ablution, and ſo forth, to the corpſe of a deceaſed huſband from whom ſhe is not irreverſibly divorced, whereas it is not lawful for her to perform thoſe offices to the corpſe of one from whom ſhe is completely divorced; wherefore in this caſe alſo a mourning is incumbent.—It may here be obſerved that mourning is incumbent for two reaſons; FIRST, as it is a manifeſtation of grief, (as was mentioned above;) SECONDLY, becauſe ornamenting or ſetting off the perſon by the uſe of the above articles is a means of exciting the deſires of men, and to a woman under *Edit* marriage is forbidden, wherefore ſhe muſt refrain from the uſe of ſuch things, leſt ſhe fall into that which is prohibited.—It is recorded, in the *Nakl Saheeh*, that the prophet would not permit women under *Edit* to uſe antimony upon their eyelids, or to anoint themſelves, as the former is an ornament, and the latter is one way of uſing perfume.—By what is ſaid in the definition of *Hidad*, in the beginning of this ſection, *viz.* "abſtaining "from perfumes, and ſo forth, except on account of ſome particular "pretext," is to be underſtood, that the uſe of thoſe is lawful, where there is any *ſufficient reaſon* for it, as they are then uſed of neceſſity; but it is requiſite that the intention [of the *mourner*] in the uſe of them be *medicine*, and not *ornament*.

IF a woman be accuſtomed to the uſe of unctions, in ſuch a manner that there might be an apprehenſion of her health ſuffering from the diſuſe, in this caſe, provided the cauſe for apprehenſion be in her

* A ſort of herb, the juice of which dyes the palms of the hands and ſoles of the feet of a reddiſh colour. The herb *cyprus*, or *privet*.

conception apparent and evident, it is lawful to continue the uſe of them, becauſe things of which the occurrence is ſtrongly apprehended by her are conſidered as actually exiſting and eſtabliſhed; and in the ſame manner, ſhe may wear warm furred or velvet garments, where there is a neceſſity; but it is in no wiſe lawful for her to uſe *Hinna*, becauſe of the precept of the prophet before recited; nor to wear cloth dyed with ſaffron, becauſe that gives a perfume.

upon infidel women or infants, (but it is incumbent upon ſlaves;)

Mourning is not incumbent upon an *infidel* woman, as ſhe is not bound to the obſervances required by the law; neither is it incumbent upon infants or girls under age, for the ſame reaſon: but it is incumbent upon female ſlaves, they being bound to the obſervances of the law in all ſuch points as do not affect the right of their owner, which is the caſe with mourning: it is to be obſerved, however, that the mourning, with reſpect to female ſlaves, does not include a prohibition from going abroad, ſince this would be an infringment upon the proprietor's right, which precedes the right of God, as the individual is neceſſitous, whereas God is not ſo.

*Walids*, nor upon widows

Mourning is not incumbent upon an *Am Walid* under *Edit* from the deceaſe of her proprietor; nor upon a woman under *Edit* who has been contracted in an invalid marriage, becauſe, with reſpect to ſuch women, the bleſſings of marriage cannot be ſaid to periſh ſo as to afford a reaſon for the manifeſtation of grief; moreover, ornaments and the uſe of perfumes, and ſo forth, are in their original nature allowable; and where no ſpecial reaſon appears for the prohibition of them, they neceſſarily continue to be ſo.

a woman during her *Edit* is diſapproved.

It is not decent in any perſon *publicly* or *expreſsly* to ſolicit or ſeek connexion with a woman under *Edit*; but it matters not if this be done in an indirect and ambiguous manner: yet they ſhould not paſs any ſecret promiſe of marriage to each other, this being forbidden in the *Koran*.—The ambiguous mode of propoſal abovementioned is deſcribed

ſcribed by *Ebn Abbas* to be, that the man in the woman's preſence may declare his wiſh to marry, in *general* terms, without any particular application.

IT is not lawful for a woman under divorce to go abroad, either in the night or day, whether the divorce be reverſible or irreverſible, becauſe the word of GOD in the *Koran* forbids them from appearing abroad: but a widow is at liberty to go forth during the whole day, and for a ſhort ſeaſon of the night alſo; yet ſhe muſt not paſs the night any where but in her own apartments. The reaſon of this indulgence is that as a widow has no proviſion from her huſband's property, it may be neceſſary that ſhe ſhould go forth to ſeek for a ſubſiſtence, and it may ſometimes happen that ſhe is detained abroad a conſiderable time, perhaps till after nightfal, whence the extenſion of the liberty to *a part* of the night: but it is otherwiſe with a woman under divorce, as ſhe is entitled [during *Edit*] to a ſubſiſtence from the huſband. Yet if a woman were to enter into an engagement of *Khoola* with her huſband, making the conſideration for *Khoola* to conſiſt of her ſubſiſtence during her *Edit*, ſome ſay that ſhe is at liberty to go during the day, while others maintain that ſhe has no liberty of going forth whatever, as the loſs of alimony during *Edit* is a conſequence of her own voluntary act, wherefore the prohibition, which is a right of the law, ſtill continues in force. women during *Edit*.

IT is incumbent upon a woman under *Edit* that ſhe obſerve and accompliſh the ſame in the place where ſhe was reſident at the period of divorce taking place, or of the huſband's deceaſe, whether that be her own accuſtomed dwelling, or a houſe where ſhe may be upon a viſit, (that of her *parents*, for inſtance,) becauſe this is ſo ordered in the *Koran*; and it alſo appears in the traditionary precepts of the prophet that he ſaid to a woman whoſe huſband was ſlain "*ſtay in your* "*own houſe until your* EDIT *be accompliſhed.*"

IF

A widow may remove from her husband's house, if inconveniently situated there.

If the apartment allotted to a widow, in the house of her deceased husband, be not sufficiently spacious for her accommodation, and it should happen that the heirs of the defunct exclude her from the other parts of the house, it is then lawful for her to remove elsewhere, because she has here an excuse, and any good pretext suffices in all matters appertaining to the spiritual law, of which description is *Edit*; the case is therefore the same here as where the woman has reason to fear thieves in her own house, or where there is an apprehension of its falling, or where she holds it by hire, and is unable to pay the rent; all which circumstances are a sufficient cause of removal, as well as in the present case.

A wife under irreversible divorce must be accommodated with a separate apartment.

Where a husband and wife are separated by irreversible or triplicate divorce, it is requisite that there be a curtain or partition between them; and there is no objection to their continuing to reside in the same house, provided this be attended to, as the husband has himself declared her to be prohibited to him: but if he be a *dissolute* person, one who has no command of his passions, and of whom it may be apprehended that he will commit with her that which is unlawful, it is in this case expedient that she remove to another house, (since there is evidently a sufficient excuse,) and that she continue there until the accomplishment of her *Edit*;—it is better, however, that the dissolute husband leave her in his house, and remove to another himself.—It is laudable in the parties, whether the husband be dissolute or otherwise, to engage a female friend to reside in the house with them, who may be able to prevent any improper connexion.—If the dwelling-house be so small as not to admit of their residing in it under these precautions, it is then necessary that the wife remove elsewhere; but it is better that the husband remove, and leave her to reside in the house. All this proceeds upon a supposition of the husband's having no more than *one* house.

If

Rule reſpecting a wife divorced

If a woman accompany her huſband upon a journey, or on a pilgrimage to *Mecca*, and he give her three divorces upon the way, or die, leaving her in an uninhabited place, ſhe muſt return to her own city, provided the diſtance be within three days journey, becauſe this is not to be conſidered as *going abroad*, but rather as a conſequence of her having *before* gone abroad; but if the diſtance exceed three days journey, ſhe is then at liberty either to return home, or to proceed upon the pilgrimage, whether her guardian be with her or not.—The compiler of this work obſerves that this is only where ſhe is left within three days journey from *Mecca*, where her ſtay would be more dangerous than her proceeding; but her return to her own city is preferable, in order that ſhe may there accompliſh her *Edit* in the houſe of her huſband.—But if, in the caſe under conſideration, the divorce or death occur in a *city*, or other inhabited place, the woman muſt not go forth from that place until her *Edit* be accompliſhed, after which ſhe may leave it, provided ſhe be accompanied by any male relation within the prohibited degrees.—What is here advanced is the doctrine of *Hanceſa*.—The two diſciples ſay that, if the woman be accompanied by a relation within the prohibited degrees, ſhe may leave the place before her *Edit* be paſt; for they argue that ſhe ought to be allowed liberty to return home, in order that ſhe may relieve herſelf from the diſagreeable circumſtances attending her reſidence in a ſtrange place, and alſo from the derangement and trouble of a journey, becauſe theſe are ſufficient pretexts, and the impropriety of her travelling is removed by the circumſtance of her relation accompanying her.—To this *Hanceſa* replies that *Edit* affords a ſtronger reaſon againſt removal than even the want of a relation's protection, as a woman may lawfully go to any diſtance within a day's journey, without being accompanied by a relation, whereas this is not lawful for a woman under *Edit:* and where it is unlawful for a woman to go to any greater diſtance, unaccompanied by a relation, it is ſo for one under *Edit*, *a fortiori.*

CHAP.

## CHAP. XIII.

## Of the *Eſtabliſhment* of *Parentage.*

A child born after ſix months from the date of a marriage upon which is ſuſpended a conditional divorce, is the lawful offspring of ſuch marriage.

If a man make a declaration, ſaying "if I marry ſuch a woman ſhe "is divorced," and he afterwards marry her, and ſhe produce a child after ſix months from the day of the marriage *, the parentage of the child is eſtabliſhed in him, and the dower is incumbent upon him; the former is eſtabliſhed, becauſe the wife is in this caſe conſidered as a *partner of his bed* at the period of conception, as having brought forth a child at the expiration of ſix complete months from the date of the marriage, a time conſiderably poſterior to the divorce, ſince that takes place immediately after the marriage, wherefore the conception muſt be conſidered as having taken place prior to the divorce, that is, *within* the marriage.

Objection.—It is not to be imagined that conception ſhould take place *at the time* of marriage, as it is a conſequence of the carnal act, which happens *poſterior* to it; how, therefore, can it be eſtabliſhed that the conception took place before divorce, ſince the latter occurs upon the inſtant of the marriage?

Reply.—Conception may be imagined upon the inſtant of the marriage, as it is poſſible that the man may marry the woman whilſt in the commiſſion of the carnal act, and conſequently, that marriage

* This means any time between *ſix months* and *two years* from the date of the marriage, as the former of theſe is held to be the *ſhorteſt*, and the latter the *longeſt* poſſible term of pregnancy.

and

and conception may have taken place at the ſame inſtant: and as genealogy is a matter the eſtabliſhment of which is of great moment, this ſuppoſition has therefore been adopted: and the dower is incumbent, becauſe the deſcent of the child being eſtabliſhed in him, he is *virtually* held to have cohabited with his wife; and it is due on account of conſummation.

born two years *after* reverſible

IF a man repudiate his wife by a divorce reverſible, and ſhe bring forth a child at the end of two years, or more, from the time of the divorce, the parentage of the child is eſtabliſhed in him, and the divorce is reverſed, provided ſhe had not before declared the accompliſhment of her *Edit*, becauſe it is poſſible that her pregnancy may have taken place during *Edit*, as the *Tohar* (or term of purity) of *ſome* women is much longer than that of *others*, which circumſtance may have protracted its continuance: but if ſhe be delivered of a child within *leſs* than two years from the time of divorce, ſhe becomes completely ſeparated from her huſband, on account of the completion of her *Edit* by delivery: and in this caſe alſo the parentage of the child is eſtabliſhed in the huſband, becauſe it is as poſſible that the conception may have taken place *previous* to divorce, (that is, within the marriage,) as it is that it may have taken place *after* divorce, (that is, within the *Edit*:) but yet *reverſal* is not eſtabliſhed, becauſe, as it is poſſible that conception took place *after* divorce, ſo it is alſo poſſible that it took place *before* divorce; wherefore reverſal cannot be eſtabliſhed, on account of the doubt which exiſts on this point: but where the woman is not delivered until *after* two years, reverſal is eſtabliſhed, as the conception is poſterior to divorce, and muſt be attributed to the huſband, ſince no charge of adultery has been advanced againſt the wife, wherefore it is evident that he has had connexion with her during *Edit*, a circumſtance by which reverſal is eſtabliſhed.

and ſo alſo, of a child born *within* two years

IF a man repudiate his wife either by three divorces, or by an irreverſible divorce, and ſhe be delivered of a child within leſs than two years

after *triplicate* or *irreverſible* divorce:

years from the period of the divorce, the parentage is eſtabliſhed in him, as it is poſſible that the pregnancy may have exiſted at that time; and the right of cohabitation does not poſitively appear to have been diſſolved previous to pregnancy, whence the parentage is eſtabliſhed in this manner for the ſake of caution.—But if the delivery were not to take place until after the expiration of two years from the period of ſeparation, the parentage of the child is not eſtabliſhed, as pregnancy in that caſe evidently appears to have taken place poſterior to divorce, and conſequently the child cannot be ſuppoſed to be begotten by the man in queſtion, ſince to him carnal connexion with the woman is unlawful: yet if he claim the child as his own, the parentage is eſtabliſhed in him, as he here takes it upon himſelf, and it may be accounted for by ſuppoſing him to have had connexion with the woman, erroneouſly, during her *Edit*.

and ſo likewiſe of a child born of a wife *under* within nine months after either

If a man repudiate, by an irreverſible divorce, a wife who is under the age of puberty, but yet ſuch an one as may admit of carnal connexion, and ſhe bring forth a child after the expiration of nine months from the time of divorce, the parentage of the child is not eſtabliſhed in him; but if the delivery be within *leſs* than nine months, it is eſtabliſhed.—This is according to *Haneefa* and *Mohammed*.—*Aboo Yooſaf* ſays that the parentage is eſtabliſhed in the man, although the child ſhould not be born within leſs than two years from the period of divorce, becauſe ſhe was under *Edit*, and it is poſſible that the pregnancy may have exiſted at the time of divorce, and ſhe not have declared the accompliſhment of her *Edit*, wherefore this *infant* wife is the ſame as a *full grown woman*.—The argument of *Haneefa* and *Mohammed* is that the *Edit* of the wife is in this caſe appointed to be counted by months, wherefore it is accompliſhed at the expiration of three months, by the rule of the law, independant of any declaration on her part;—if, therefore, ſhe be delivered of a child within *leſs* than ſix months from the end of that term which completes her *Edit*, the parentage of the child is eſtabliſhed; but, if ſhe bring not forth until

*after*

*after* that time, the parentage is not eſtabliſhed, as it appears to have been begotten at the time when ſhe was not a partner of the huſband's bed, for the caſe treats of a girl irreverſibly divorced under puberty, and conſequently not ſubject to the menſtrual diſcharge, and whoſe *Edit* is therefore completed by the *lapſe of time*, namely, three months, wherefore it is not poſſible that pregnancy ſhould have exiſted at the time of divorce; and the right of cohabitation appears to have undoubtedly expired before pregnancy, ſo that the deſcent cannot be eſtabliſhed. And if the wife under theſe circumſtances be repudiated by a *reverſible* divorce, the rule is the ſame (with *Haneefa* and *Mohammed*) as before recited. *Aboo Yooſaf* ſays that the parentage of the child is eſtabliſhed in the huſband if it be born within *twenty-ſeven months* from the time of divorce, as it muſt be allowed that he may have had connexion with her at the *latter end* of the term of three months, which conſtitutes her *Edit*, and ſhe be delivered within the longeſt term of pregnancy admitted by the law, namely *two years*. But if the infant wife declare her pregnancy to have taken place during *Edit*, the rule is then the ſame as with reſpect to grown women; that is to ſay, the parentage of the child is eſtabliſhed in the huſband, as her puberty is proved by her own affirmation.

divorce.

IF a widow bring forth a child, the parentage is eſtabliſhed in her huſband, provided the delivery happen within *two years* from the time of his deceaſe.—*Ziffer* ſays that if ſhe be not delivered until after ſix months from the time of the completion of the *Edit* of widowhood, in this caſe the parentage cannot be eſtabliſhed, becauſe her *Edit*, upon the lapſe of four months and ten days, is completed by the ordinance of the law, as the *Edit* is, by the law, fixed to that time, and is therefore the ſame as if ſhe were to declare the accompliſhment of her *Edit*, as in the caſe of the infant before mentioned.—Our doctors, on the other hand, ſay that the *Edit* of the woman in queſtion is not abſolutely fixed at four months and ten days, but has alſo another mode of completion, namely *delivery*, ſince marriage with an adult

The parentage of a child born of a widow within two

of her huſband is eſtabliſhed in him:

woman is conſidered as a cauſe of pregnancy: contrary to the caſe of a girl under puberty, becauſe the natural ſtate of ſuch an one is an incapacity to bear children, as an infant is not a ſubject of impregnation until ſhe attain maturity, and concerning the maturity of the infant there is a doubt.

and ſo alſo of a child born within *ſix months* after the wife declaring her *Edit* to have expired;

If a woman under *Edit* declare the ſame to be accompliſhed, and be afterwards delivered of a child within leſs than ſix months from the time of her declaration, the parentage of the child is eſtabliſhed, as it is evident that her declaration was unfounded, and is conſequently null: but if ſhe be delivered *after* ſix months from the time of her declaration, the parentage is not eſtabliſhed, becauſe nothing appears in this caſe to annul her declaration, as it is poſſible that her pregnancy may have occurred after that.—This reaſoning applies to every woman under *Edit*, whatever the occaſion may be, whether divorce reverſible or irreverſible, or the deceaſe of her huſband; or of whatever deſcription or nature, whether it be counted by months, or by the returns of the courſes.

whatever be the *occaſion*

The birth muſt be proved by evidence.

When a woman under *Edit* is delivered of a child, the parentage is not eſtabliſhed, (according to *Haneefa*,) unleſs the birth be proved by the evidence of two male witneſſes, or of *one* male and *two* female.—This is a rule where there is no apparent pregnancy, or where the ſame is not acknowledged by the huſband: but if the pregnancy be apparent, or the huſband have acknowledged it, the parentage is eſtabliſhed independant of the teſtimony of witneſſes. The two diſciples maintain that, in all caſes, the parentage is eſtabliſhed upon the teſtimony of one woman,—becauſe the huſband's right of cohabitation ſtill continues during *Edit*, and it is this right which occaſions the fixing of the parentage of a child upon the huſband, wherefore nothing more is required than that ſome perſon prove the birth, and the identity, by teſtifying "This is the child of which ſuch a woman was deliver-"ed,"—and thus much may be ſufficiently proved by the teſtimony of a ſingle

a ſingle woman, in the ſame manner as it is during marriage, in a caſe where the huſband diſputes the child's identity.—*Haneefa*, on the other hand, argues that the *Edit* is accompliſhed by the woman's declaration of delivery; but the mere completion of *Edit* is not *proof*, and the deſcent ſtill remains to be firſt eſtabliſhed, for which reaſon it is that *complete* proof (that is, the teſtimony of two men, or of one man and two women,) is made a condition: but it would be otherwiſe if the pregnancy were apparent, or acknowledged by the huſband, as in this caſe the parentage is eſtabliſhed *prior* to the birth; and the child's identity is there aſcertained by the teſtimony of one woman,—the *midwife*, for inſtance.

The parentage of a child born of a widow, when uncontroverted, is eſtabliſhed in her deceaſed huſband's evidence.

If a woman under *Edit* from the death of her huſband bring forth a child, and declare it to be his, and the heirs confirm her aſſertion, though no perſon bear evidence to the birth, the child is held to be deſcended of the huſband, according to all our doctors *. This, with reſpect to *inheritance*, is evident, as inheritance is a ſole right of the heirs, and conſequently their teſtimony or acknowledgment is to be credited in every matter which affects it.—A queſtion, however, may ariſe in this caſe whether the parentage of the child be by ſuch teſtimony eſtabliſhed with reſpect to others than thoſe heirs: and upon this the learned in the law obſerve, that if thoſe heirs be perſons of a deſcription capable of being admitted as witneſſes, the parentage is eſtabliſhed with reſpect to all others as well as themſelves, becauſe their teſtimony amounts to proof, for which reaſon ſome doctors require that their confirmation of the woman's aſſertion be delivered in the form of evidence: but the neceſſity of this is denied by others, becauſe the eſtabliſhment of parentage, with reſpect to the reſt of mankind, is a neceſſary conſequence of its eſtabliſhment with reſpect to the immediate heirs of the deceaſed by their confirmation; and where a matter is once fully eſtabliſhed upon any particular ground, no neceſſity exiſts for any further conditions with reſpect to its eſtabliſhment.

* This means, *at whatever time the child be born, after the huſband's deceaſe.*

IF

A child born within leſs than ſix months after marriage is not the offſpring of that marriage; but if *after* ſix months, it is ſo, independant of the huſband's acknowledgment; or one witneſs to the birth where he *denies* it: and is incumbent, if he perſiſt in his denial: and the wife's teſtimony is the *date* of the marriage.

If a man marry a woman, and ſhe bring forth a child within leſs than ſix months after the marriage, the parentage of the child is not eſtabliſhed in the huſband, as pregnancy in that caſe appears to have exiſted previous to the marriage, and conſequently cannot be derived from him: but if ſhe be delivered *after* ſix months, it is eſtabliſhed, whether he acknowledge it or not, becauſe then the marriage appears to have exiſted at the time of impregnation, and the term of pregnancy is complete. If, moreover, the huſband *deny* the birth, it may be proved by the evidence of one woman, after which the parentage is eſtabliſhed in virtue of the marriage; and ſuch being the caſe, if he perſiſt in denying the child, imprecation becomes incumbent, becauſe his denial then amounts to an imputation on his wife's chaſtity, ſince it implies a charge of adultery againſt her. And if, upon the birth of a child, a diſpute were to ariſe between the huſband and wife, he aſſerting that he had married her only *four* months before, and ſhe maintaining that they had been married *ſix* months, the declaration of the wife is to be credited, and the child belongs to the huſband, becauſe apparent circumſtances teſtify for the wife, as it appears that her pregnancy has been a conſequence of *marriage* and not of *whoredom*.—A queſtion has ariſen among our doctors whether the woman's aſſertion is to be credited *without* being confirmed by oath? The two diſciples hold that it requires her oath: but *Haneefa* maintains the contrary opinion.

Divorce ſuſpended upon the birth of a child cannot take place on the evidence of one woman to the birth.

If a man ſuſpend divorce upon the circumſtance of his wife's bearing a child, by ſaying to her "upon being delivered of this child "you are divorced,"—and a woman afterwards give teſtimony to her being delivered, yet divorce does not take place, according to *Haneefa*. The two diſciples maintain that divorce takes place, becauſe the evidence of a ſingle woman ſuffices in all ſuch matters as are improper to be beheld by men; and the evidence of one woman to a birth being admitted, it is alſo to be admitted with reſpect to whatever proceeds from the birth, which in the preſent inſtance is divorce.—The argu-

ment of *Haneefa* is that the woman, in this caſe, ſtands as a plaintiff for penalty againſt her huſband, and he appears as the defendant, wherefore her claim cannot be eſtabliſhed but by complete proof.—The foundation of this is that the evidence of a woman is admitted with reſpect to child-birth from neceſſity only, and has therefore no effect with reſpect to divorce, ſince that is a matter altogether diſtinct from childbirth, and unconnected with it, although ſuch connexion appear to exiſt from the peculiar circumſtances of the preſent caſe.—But if the huſband acknowledge the pregnancy, divorce takes place upon the woman independant of the evidence of others, according to *Haneefa*.—The two diſciples hold that in this caſe alſo the teſtimony of the midwife is neceſſary, becauſe proof is indiſpenſable to the eſtabliſhment of a *Dawee Hins*, or claim of penalty, and the evidence of the midwife amounts to proof, according to what was before ſaid.—The arguments of *Haneefa* are twofold;—FIRST, the acknowledgment of pregnancy amounts to an acknowledgment of that which pregnancy induces, and extends thereto, and that thing is childbirth; SECONDLY, the huſband, in acknowledging the pregnancy, declares his wife a *truſtee*, as the child is a depoſit in her poſſeſſion, and conſequently her word is to be credited in the ſurrender of the depoſit, as much as that of any other truſtee.

The term of years.

THE longeſt term of pregnancy is two years, becauſe of the declaration of *Ayſha*, "*the child does not remain in the mother's womb beyond two years:*" and the ſhorteſt term is ſix months, becauſe the ſacred text ſays "THE WHOLE TERM OF PREGNANCY AND WEANING IS THIRTY MONTHS;" and *Ibn Abbas* has ſaid that the term of ſuckling is two years, wherefore ſix months remain for the pregnancy.—*Shafeï* has ſaid that the longeſt term of pregnancy extends to four years; but the text here quoted, and the opinion of *Ibn Abbas* as above, teſtify againſt him.—It is probable that *Shafeï* may have delivered this opinion upon hearſay, as this is a matter which does not admit of reaſoning.

Caſe of a man divorcing a wife who is a ſlave, and then purchaſing her.

If a man marry a female ſlave, and afterwards divorce her, and then purchaſe her, and ſhe be delivered of a child within leſs than ſix months from the day of purchaſe, the parentage is eſtabliſhed in him; but if ſhe be delivered after ſix months, the parentage is not eſtabliſhed; becauſe, in the firſt inſtance, the child is conſidered as born of a woman under *Edit*, conception appearing to have taken place before purchaſe; but, in the ſecond inſtance, it is regarded as ſlave-born, as the length of the term of pregnancy here admits of conception being referred to a time ſubſequent to purchaſe; and the child thus appearing to be born (not of a *wife*, but) of a *ſlave*, his acknowledgment is requiſite to the eſtabliſhment of its parentage.—What is now advanced proceeds upon a ſuppoſition of the ſlave being repudiated by a ſingle divorce, reverſible or irreverſible, or by *Khoola:* but if ſhe be repudiated by *two* divorces, the parentage of the child is eſtabliſhed, if it be born within *two years* from the date of the divorce, becauſe in this caſe ſhe is rendered unlawful to her huſband by the rigorous prohibition, whence the pregnancy can be referred only to a time previous to divorce, ſince, under ſuch a circumſtance, ſhe is not rendered lawful to the man by his ſubſequent purchaſe of her.

Miſcellaneous caſes.

If a man ſay to his female ſlave "if there be a child in your "womb it is mine," upon a woman afterwards bearing teſtimony to the birth, the ſlave becomes *Am-Walid* to that man, becauſe here all that is requiſite is to prove the child's identity, by ſhewing that "ſuch a woman has been delivered of ſuch a child,"—and this is ſufficiently aſcertained by the teſtimony of the midwife, according to all our doctors.

If a man ſay of a boy, "this is my ſon," and afterwards die, and the mother come declaring herſelf to be the wife of the deceaſed, ſhe muſt be conſidered as ſuch, and the boy as his child, and they both inherit of him. It is recorded in the *Nawâdir* that this rule proceeds upon a favourable

vourable conſtruction of the law, for analogy requires that the woman ſhould not inherit, ſince deſcent is eſtabliſhed not only in virtue of a *valid* marriage, but alſo of an *invalid* marriage, or of erroneous carnal connexion, or of poſſeſſion by right of property, and therefore the man's declaration that "*this is his ſon*" does not amount to an acknowledgment of his having married the mother: but the reaſon for a more favourable conſtruction of the law here, is that the caſe ſuppoſes the woman to be one whoſe freedom and maternal right in the child are matters of public notoriety, and the validity of a marriage is aſcertained by circumſtances. But if the woman be not known to be free, and the heirs of the huſband maintain that ſhe is only an *Am-Walid*, ſhe is not entitled to any inheritance, becauſe the mere *appearance* of freedom, (ſuppoſing this caſe to occur in a *Muſſulman* territory,) although it defend the party from ſlavery, is not ſufficient to eſtabliſh a claim of inheritance.

## CHAP. XIV.

### Of *Hizânit*, or the Care of *Infant Children*.

In caſe of ſeparation, the infant children belongs to the wife.

IF a ſeparation take place between a huſband and wife, who are poſſeſſed of an infant child, the right of nurſing and keeping it reſts with the mother, becauſe it is recorded that a woman once applied to the prophet, ſaying "O, prophet of GOD! this is my ſon, the fruit of "my womb, cheriſhed in my boſom and ſuckled at my breaſt, and

" his father is desirous of taking him away from me into his " care;"—to which the prophet replied, " *thou hast a right in the* " *child prior to that of thy husband, so long as thou dost not marry with* " *a stranger:*"—moreover, a mother is naturally not only more *tender*, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child; and *Siddeek* alluded to this, when he addressed *Omar* on a similar occasion, saying " *the spittle of the mother is better for thy child than honey, O* OMAR!" which was said at a time when separation had taken place between *Omar* and his wife, the mother of *Assim*, the latter being then an infant at the breast, and *Omar* desirous of taking him from the mother; and these words were spoken in the presence of many of the companions, none of whom contradicted him:—but the *Nifka* or subsistence of the child is incumbent upon the father, as shall be hereafter explained. It is to be observed, however, that if the mother refuse to keep the child, there is no constraint upon her, as a variety of causes may operate to render her incapable of the charge.

Order of precedence in *Hizânit*, after the *mother*.

IF the mother of an infant die, the right of *Hizânit* (or infant education) rests with the *maternal* grandmother, in preference to the *paternal*, because it originates in and is derived from the mother; but if she be not living, the *paternal* grandmother has then a right prior to any other relation, she being as one of the child's mothers, (whence it is that she is entitled to a sixth of the effects of a child of her son, which is the mother's share *;) and she must moreover be considered as having a more tender interest in her own offspring than any collateral relation. If there be no grandmother living, in this case a sister is preferable to either a maternal or paternal aunt, as she is the daughter of the father and mother, or of one of them, whence it is that she would take place of the aunts in inheritance:—(according to one tradition, the maternal aunt is preferable to a half sister by the father's

* This must mean, *in case of the mother's death.*

side,

ſide, the prophet having ſaid "*the maternal aunt is as a mother.*")—A full ſiſter alſo has preference to an half ſiſter, maternal or paternal; and a maternal ſiſter to a paternal ſiſter; becauſe the right of *Hizânit* is derived to them through the mother. The maternal aunt has preference to the paternal, becauſe precedence is given, in this point, to the maternal relation. The ſame diſtinction alſo prevails among the aunts as among the ſiſters;—that is, ſhe who is doubly related has a preference to her who is ſingly related; thus the maternal aunt, who is *full* ſiſter to the mother, precedes an *half* ſiſter, maternal or paternal; and in the ſame manner, a maternal ſiſter precedes a paternal ſiſter; and ſo alſo of the paternal aunts. If however any of theſe women, having the right of *Hizânit*, ſhould marry a ſtranger, her right is thereby annulled, on account of the tradition before quoted, and alſo, becauſe where the huſband is a ſtranger, it is to be apprehended that he may treat the child unkindly; where the woman, therefore, who has charge of an infant marries, it is neither advantageous nor adviſeable that the infant remain with her, unleſs the perſon ſhe marries be a relation,—as where the mother, for inſtance, having charge, marries the child's paternal uncle, or the maternal grandmother marries the paternal grandfather,—becauſe theſe men being as *parents*, it is to be expected that they will behave with tenderneſs:—and ſo alſo of any other relation within the prohibited degrees, for the ſame reaſon.

ANY woman whoſe right of *Hizânit* is annulled by her marrying a ſtranger recovers the right by the diſſolution of the marriage, the objection to her exerciſe of it being thereby removed.

IF there be no woman to whom the right of *Hizânit* appertains, and the *men* of the family diſpute it, in this caſe the neareſt paternal relation has the preference, he being the one to whom the authority of guardian belongs: (the degrees of paternal relationſhip are treated of in their proper place:) but it is to be obſerved that the child muſt

In defect of the *maternal*, it reſts with

tion

not be entruſted to any relation *beyond* the prohibited degrees, ſuch as the *Mawla* or emancipator of a ſlave, or the ſon of the paternal uncle, as in this there may be apprehenſion of treachery.

Length of the term of *Hizânit.*

THE right of *Hizânit*, with reſpect to a male child, appertains to the mother, grandmother, or ſo forth, until he become independant of it himſelf, that is to ſay, become capable of ſhifting, eating, drinking, and performing the other natural functions without aſſiſtance; after which the charge devolves upon the father, or next paternal relation entitled to the office of guardian, becauſe, when thus far advanced, it then becomes neceſſary to attend to his education in all branches of uſeful and ornamental ſcience, and to initiate him into a knowledge of men and manners, to effect which the father or paternal relations are beſt qualified:—(*Kaſâf* ſays that the *Hizânit*, with reſpect to a boy, ceaſes at the end of ſeven years, as in general a child at that age is capable of performing all the neceſſary offices for himſelf, without aſſiſtance.)—But the right of *Hizânit* with reſpect to a girl appertains to the mother, grandmother, and ſo forth, until the firſt appearance of the menſtrual diſcharge, (that is to ſay, until ſhe attain the age of puberty,) becauſe a girl has occaſion to learn ſuch manners and accompliſhments as are proper to *women*, to the teaching of which the female relations are moſt competent;—but after that period the charge of her properly belongs to the father, becauſe a girl, after maturity, requires ſome perſon to ſuperintend her conduct, and to this the *father* is moſt completely qualified.—It is recorded from *Mohammed* that the care of a female child devolves upon the father as ſoon as ſhe begins to feel the carnal appetite *, as ſhe then requires a ſuperintendance over her conduct; and it is univerſally admitted that the right of *Hizânit* of girls is reſtricted to that period, with reſpect to all the female relations except the mother and grandmother. It is

* This is ſuppoſed by the *Muſſulmans* to commence ſometime *before* the appearance of the menſtrual diſcharge, at between eleven and twelve years of age.

written

written in the *Jama Sagheer*, that the right of *Hizânit*, with any except the mother or grandmother, diſcontinues upon the girl becoming capable of performing the natural offices without aſſiſtance, becauſe no other is entitled to require any ſervice of her, (whence it is that they cannot hire her as a ſervant to others,) and ſuch being the caſe the end, (namely, the girls education,) cannot be obtained: but it is otherwiſe with the mother or grandmother, as they are inveſted with a legal right to require her ſervices.

A ſlave has the right upon obtaining her freedom;

IF a man contract his female ſlave, or *Am-Walid*, in marriage to any perſon, and ſhe bear a child to her huſband, and the maſter afterwards emancipate her, ſhe then becomes (with reſpect to the *child*,) as a free woman;—that is, upon becoming free ſhe obtains her right of *Hizânit* which had not exiſted whilſt ſhe was a ſlave, becauſe her ſervice, as a ſlave, would neceſſarily interfere with the proper diſcharge of the duties of *Hizânit*.

and alſo an

A ZIMMEEA, or female infidel ſubject, married to a *Muſſulman*, is entitled to the *Hizanit* of her child, although he be a *Muſſulman* like the father; but this only ſo long as the child is incapable of forming any judgment with reſpect to *religion*, and whilſt there is no apprehenſion of his imbibing an attachment to infidelity; but when this is the caſe, he muſt be taken from the mother, becauſe, although it be for the child's advantage to be under her care until that period, his remaining longer with her might prove injurious.

Children, after the term of *Hizânit*, remain ſolely

A BOY or girl, having paſſed the period of *Hizânit*, have no option to be with one parent in preference to the other, but muſt neceſſarily thenceforth remain in charge of the *father*.—*Shafeï* maintains that they have an option to remain with either parent, becauſe of a tradition of the prophet to this effect. The argument of our doctors is, that young perſons from want of judgment will naturally wiſh to be with the parent who treats them with moſt indulgence, and lays them

them under leaſt reſtraint, wherefore giving them a choice in this matter would not be *tenderneſs*, but rather *the reverſe*, as being contrary to their true intereſt; and it appears in the *Nakl Saheeh* that the companions withheld this option from children.—With reſpect to the tradition cited by *Shafeï*, it may be obſerved that, in the inſtance there alluded to, where the prophet gave a boy his choice, he firſt prayed to God to direct him therein, and the boy then choſe, under the influence of the prophet's prayer.

## SECTION.

A mother cannot remove with her child to a ſtrange place.

If a divorced woman be deſirous of removing with her child out of a city, ſhe is not at liberty to do it;—but yet if ſhe remove with her child out of a city, and go to her native place, where the contract of her marriage was executed, in this caſe her removal is lawful, becauſe the father is conſidered as having alſo undertaken to reſide in that place, both in the eye of the law, and according to common uſage, for the prophet has ſaid "*Whoever marries a woman of any city is "thereby rendered a* Denizen *of that city*;" and hence it is, that if an alien woman were to come into the *Muſſulman* territory, and there to marry an infidel ſubject, ſhe alſo becomes an infidel ſubject: it is to be obſerved, however, that this rule does not apply to an alien *man*,—that is to ſay, if an alien man were to come into the *Muſſulman* territory, and there to marry a female ſubject, he is not thereby rendered a ſubject; for, if he chuſe, he may divorce this wife and return to his own country.

If a divorced woman be deſirous of removing with her child to a place which is not the place of her nativity, but in which her marriage contract was executed, ſhe is not at liberty to do it. This is

demonſtrated by *Kadooree* in his compendium, and alſo accords with what is related in the *Mabſoot*. The *Jama Sagheer* ſays that ſhe may take her child thither, becauſe where a marriage contract is executed in any place, it occaſions all the ordinances thereof to exiſt and have force in that place, in the ſame manner as ſale amounts to a delivery of the article ſold in the place of ſale; and a woman's right to the care of her children is one of the ordinances of marriage, wherefore ſhe is entitled to keep her child in the place where ſhe was married, although ſhe be not a native of that place. The principle upon which the *Mabſoot* proceeds in this caſe is, that the execution of a contract of marriage in a place merely of *caſual* reſidence, (ſuch as the ſtage of a journey,) does not conſtitute it *a home*, according to general uſage, and this is the better opinion. In ſhort, to the propriety of the woman carrying her child from one place to another, two points are eſſentially requiſite,—*one*, that ſhe be a *native* of the place to which ſhe goes; and the *other*, that her marriage contract has been there executed; this, however, means only where the places are *conſiderably diſtant*; but if they be ſo *near* that the father may go to ſee his child and return the ſame night, there is no objection to the wife going to the other place with the child, and there remaining; and this, whatever be the ſize or degree of the places, whether *cities* or *villages*; nor is there any objection to her removing from the *village* to the *city* or *chief town* of a diſtrict, as this is in no reſpect injurious to the father, and is advantageous to the child, ſince he will thereby become known and acquainted with the people of the place: but the reverſe [that is, her removal from the *city* to a *village*,] would be injurious to the child, as he would thereby be liable to acquire the low manners and mean ſentiments of villagers; wherefore a woman is not at liberty to carry her child from a *city* to a *village*.

CHAP.

## CHAP. XV.

## Of *Nifka*, or *Maintenance*.

Definition of the term.

NIFKA, in the language of the law, ſignifies all thoſe things which are neceſſary to the ſupport of life, ſuch as *food*, *clothes*, and *lodging*: many confine it ſolely to *food*.

### SECT. I.

### *Of the* NIFKA *of the* WIFE.

The ſubſiſtence of a wife is incumbent upon her huſband,

WHEN a woman ſurrenders herſelf into the cuſtody of her huſband, it is incumbent upon him thenceforth to ſupply her with food, clothing, and lodging, whether ſhe be a *Muſſulman* or an *infidel*, becauſe ſuch is the precept both in the *Koran* and in the traditions; and alſo, becauſe maintenance is a recompence for the matrimonial reſtraint; whence it is that where a perſon is in cuſtody of another on account of any demand, or ſo forth, his ſubſiſtence is incumbent upon that other,—as when a public magiſtrate, for inſtance, is impriſoned on account of any mal-adminiſtration in his office, in which caſe his ſubſiſtence muſt be provided from the public treaſury; and as the authorities upon which this proceeds make no diſtinctions between a *Muſſulman* and an *infidel*, the rule holds the ſame with reſpect to either in the preſent caſe.

IN

in proportion to the rank and circumſtances of the parties;

IN adjuſting the obligation of the *Nifka*, or maintenance of a wife, regard is to be had to the rank and condition both of her and her huſband: thus if the parties be both wealthy, he muſt ſupport her in an opulent manner; if they be both poor, he is required only to provide for her accordingly; and if he be rich and ſhe poor, he is to afford her a moderate ſubſiſtence, ſuch as is below the former and above the latter.—The compiler of this work ſays that this is the opinion adopted by *Khaſáf*; and that decrees paſs accordingly. *Koorokhee* is of opinion that the rank and condition of the huſband alone is to be regarded, (and ſuch alſo is the doctrine of *Shafeï*,) becauſe the ſacred text ſays "LET HIM SUPPORT HER ACCORDING TO HIS ABILITY.—The ground of *Khaſáf*'s opinion is a tradition reſpecting the prophet, who, on a woman applying to him for his judgment upon this point, ſaid to her "*take from the property of your huſband whatever may ſuffice* "*for the ſubſiſtence of yourſelf and your child in the cuſtomary way*;" from which it appears that the circumſtances of the *woman* are to be regarded as well as thoſe of the *man*, for maintenance is incumbent only ſo far as may ſuffice for the purpoſe intended by it, and as a woman in mean circumſtances has no occaſion for the ſame ſubſiſtence as one who is accuſtomed to live in affluence, ſuch is (with reſpect to *her*) unneceſſary; and as to the text above quoted by *Shafeï*, it means no more than that if the woman be in affluent circumſtances, and her huſband otherwiſe, he ſhall ſupport her according to his ability, and the remainder, or difference, ſhall be a debt upon him. By the expreſſion "*cuſtomary way*," in the tradition quoted by *Shafeï*, is to be underſtood a *middling* or *moderate* way, that is, a medium between the circumſtances of the wife, and thoſe of the huſband, where the former happens to be rich and the latter poor; and as the prophet in his deciſion left this to the judgment of the parties themſelves, the proportion is not ſpecifically determined by the law.—*Shafeï* has ſo determined it, ſaying that the *Nifka* or maintenance incumbent upon a huſband in behalf of his wife, if he be opulent, is two *Mids*, or about

one thouſand *Dirms* * annually,—if he be poor, one *Mid*; and if in middling circumſtances, one and a half: this, however, is not admitted, becauſe a thing declared to be incumbent "*ſo far as may ſuf-*" *fice*" cannot be legally fixed at any ſpecific rate, as the proportion muſt neceſſarily vary according to circumſtances.

and this, although ſhe withhold herſelf on account of her *dower:*

If a woman refuſe to ſurrender herſelf to her huſband, on account of her dower, (that is, on account of its not having been paid to her,) her maintenance does not drop, but is incumbent upon the huſband, although ſhe be not yet within his cuſtody, ſince her refuſal is only in purſuance of her right, and conſequently the objection to the matrimonial cuſtody originates with the huſband.

but not if ſhe be refractory,

If a wife be diſobedient or refractory, and go abroad without her huſband's conſent, ſhe is not entitled to any ſupport from him, until ſhe return and make ſubmiſſion, becauſe the rejection of the matrimonial reſtraint in this inſtance originates with her: but when ſhe returns home, ſhe is then ſubject to it, for which reaſon ſhe again becomes entitled to her ſupport as before. It is otherwiſe where a woman, reſiding in the houſe of her huſband, refuſes to admit him to the conjugal embrace, as ſhe is entitled to maintenance, notwithſtanding her oppoſition, becauſe, being then in his power, he may, if he pleaſe, enjoy her *by force*.

or an infant incapable of generation:

If a man's wife be ſo young as to be incapable of generation, her maintenance is not incumbent upon him, becauſe although ſhe ſhould be within his cuſtody, yet as an obſtacle exiſts in her to the carnal embrace, this is not the cuſtody which entitles to maintenance, that being deſcribed "*cuſtody, for the purpoſe of enjoyment*," which

* *Dirms* have varied in their value at different times, from twenty to twenty-five paſſing current for a *Deenar*. The ſum here mentioned is from about eighteen to twenty-two pounds ſterling.

does

does not apply to the caſe of one incapable of the act:—contrary to the caſe of a *ſick* woman, to whom maintenance is due, although ſhe be incapable, as ſhall be hereafter demonſtrated.—*Shafei* ſays that maintenance is due to an infant wife, becauſe he holds it to be a return for the matrimonial propriety, in the ſame manner as it is with reſpect to a ſlave for the propriety in his perſonal ſervice. To this, however, our doctors reply that the dower is the return for the matrimonial propriety, and *one* thing does not legally admit of *two* returns; wherefore, in the caſe of an infant wife, the *dower* is due, but not *maintenance*.

but it is due to an *adult* wife from an *infant* huſband.

BUT if the huſband be an infant incapable of generation, and the wife an adult, ſhe is entitled to her maintenance at his expence, becauſe in this caſe *delivery of the perſon* has been performed on *her* part, and the obſtacle to the matrimonial enjoyment exiſts on the part of the *huſband*.

It is not due where the wife is imprisoned for

IF a woman be impriſoned for debt, her huſband is not required to ſupport her, becauſe the objection to the matrimonial cuſtody does not in this caſe originate with him, whether her impriſonment be owing to herſelf (as in a caſe of wilful delay and contumacy) or otherwiſe, (as where ſhe is poor and unable to diſcharge the debt.) And, in the ſame manner, if a woman be forcibly ſeized and carried off by any perſon, ſhe has no claim to maintenance from her huſband; and ſo alſo, if a woman go upon a pilgrimage, under charge of a relation within the prohibited degrees,—becauſe ſhe is not then in cuſtody of her huſband, and her not being ſo is occaſioned by her own voluntary act. It is recorded from *Aboo Yooſaf* that a woman upon a pilgrimage is entitled to a maintenance from her huſband, as her undertaking the *indiſpenſable pilgrimage* * is a ſufficient pretext for her leaving him;

or forcibly carried off,

or goes upon

* Arab. *Hidj-Farz*.—It is incumbent upon all *Moſlamites* to perform at leaſt one pilgrimage to *Mecca*, and this one is reckoned among the *Firâyez*, or ſacred ordinances, whence the above epithet.

but he allows her only a *Nifka-Hizr*, or ſupport as in a ſettled place; and not a *Nifka-Sifr*, or ſupport as upon a journey; as the *former* only is incumbent upon the huſband, not the *latter*. But if the huſband accompany his wife upon her pilgrimage, her maintenance is then incumbent upon him according to all our doctors, becauſe in this caſe ſhe continues in his cuſtody; but ſhe is entitled to a *Nifka-Hizr* only, not to a *Nifka-Sifr*, as he is not the occaſion of her travelling, whence it is that he is not obliged to furniſh her with a conveyance.

(unleſs ſhe be accompanied by the huſband)

It continues during her ſickneſs.

If a woman fall ſick in her huſband's houſe, ſhe is ſtill entitled to a maintenance. This is upon a principle of benevolence, as analogy would ſuggeſt that ſhe is not entitled to maintenance, where ſhe falls ſick ſo far as to be incapable of admitting her huſband to the conjugal embrace, ſince in this caſe ſhe cannot be deemed *in cuſtody for the purpoſe of enjoyment:* but the reaſon for a more favourable conſtruction of the law in this caſe is, that ſhe ſtill remains in cuſtody, as her huſband may aſſociate and indulge in dalliance with her, and ſhe may continue to ſuperintend his domeſtic concerns, and the obſtacle to carnal enjoyment is (like the menſtrual diſcharge) an accidental occurrence.—It is recorded from *Aboo Yooſaf* that if a woman deliver herſelf into the cuſtody of her huſband, and then fall ſick, ſhe is ſtill entitled to maintenance; but if ſhe fall ſick firſt, and then deliver herſelf to him, ſhe has no claim to maintenance until her recovery, as the ſurrender of her perſon is not in this caſe complete: and the learned in the law admit this to be a proper diſtinction.

A huſband muſt maintain his wife's ſervants.

The maintenance of the wife's ſervants is incumbent upon her huſband, as well as that of the wife herſelf, provided he be in opulent circumſtances, becauſe he is obliged to provide his wife's maintenance, "*ſo far as may ſuffice*," (as aforeſaid,) and it is not ſufficient, unleſs her ſervants alſo be ſupported, they being eſſential to her eaſe and comfort: but it is not abſolutely incumbent upon him to provide a maintenance for more than *one* ſervant, according to *Haneefa* and *Mohammed*.

*Mohammed*. *Aboo Yoosaf* says he must provide maintenance for *two* servants, as one is required for service within the house, and the other out of doors.—The arguments of *Haneefa* and *Mohammed* on this point are twofold;—FIRST, one servant may answer both purposes, whence two are unnecessary; SECONDLY, if the husband were himself to undertake all the services required by the wife, it would suffice, and a servant would be unnecessary; and, in the same manner, it suffices if he constitute any single servant his substitute therein; wherefore a second servant is not requisite. The learned in the law say that the rate of maintenance due from an opulent husband to his wife's servants is the same as that due from a poor husband to his wife,—namely, the lowest that can be admitted as sufficient.—*Haneefa* says that a husband who is poor is not required to find maintenance for his wife's servants; and this is an approved doctrine, as it is to be supposed that the wife of a poor man will serve herself. *Mohammed* holds that it is due from a poor husband, in the same manner as from one more opulent.

If the husband be *poor*, the magistrate

IF a husband become poor, to such a degree as to be unable to provide his wife her maintenance, still they are not to be separated on this account, but the *Kâzee* shall direct the woman to procure necessaries for herself upon her husband's credit, the amount remaining a debt upon him.—*Shafei* says that they must be separated, because whenever the husband becomes incapable of providing his wife's maintenance, he cannot "*retain her with humanity*," (as is required in the sacred writings,) and such being the case, it behoves him to divorce her; and if he decline so to do, the *Kâzee* is then to effect the separation as his substitute, in the same manner as in cases of emasculation or impotence: nay, the necessity for this is more urgent in the present instance than in either of those cases, as the maintenance is indispensable. To this our doctors reply that if a separation take place the right of the husband is destroyed *in toto*, which is a grievous injury to him; whereas, if the wife be desired to procure maintenance for herself upon his credit, his right is by this means preserved with the smallest

upon his credit,

possible

possible injury; wherefore they are not to be separated, but the wife shall be directed to take up the articles necessary for her subsistence upon his credit, as was already stated:—but the wife is in this case restricted in her expences to a rate which must be determined by the *Kázee*.—The *Kázee* cannot act as the substitute of the husband in effecting a separation here, as in cases of emasculation or impotence, because property in marriage is only a dependant, or secondary consideration, the primary object being *procreation*, and that which is a *dependant* merely cannot be put in competition with the original intent, upon which principle it is that the *Kázee* is empowered to effect a separation in either of the other two instances, as there the original intent is defeated; but it is not so in the present case. The advantage of the *Kázee* desiring the woman to procure a maintenance upon her husband's credit, and of his fixing the rate thereof, is that she is thereby enabled to make her husband responsible for the amount; for if she contract any debt without this authority, the creditor's claim lies against *her*, and not against her *husband*.

at a certain specified rate,

to be varied his circumstances.

If the husband were in indigent circumstances at the time of the *Kázee* authorizing the wife as aforesaid, and he have consequently determined her maintenance at the rate of *poverty*, and the husband afterwards become rich, and she sue for a proportionable addition to her maintenance, a decree must be given in her favour, as the rate of the maintenance differs according to the poverty or opulence of the husband.

Arrears of maintenance not due, unless the maintenance have been decreed by the *Kázee*, or the rate of it previously determined on between the parties.

If a length of time should elapse during which the wife has not received any maintenance from her husband, she is not entitled to demand any for that time, except when the *Kázee* had before determined and decreed it to her, or where she had entered into a composition with the husband respecting it, in either of which cases she is to be decreed her maintenance for the time past, because maintenance is an obligation

obligation in the manner of a *gratuity* *, as by a gratuity is underſtood a thing due without a return, and maintenance is of this deſcription, it not being held (according to our doctors) to be as a return for the matrimonial propriety; and the obligation of it is not valid but through a decree of the *Kázee*, like a gift, which does not convey a right to poſſeſſion but through ſeizin, which eſtabliſhes poſſeſſion: but a compoſition is of equal effect with a decree of the *Kázee*, in the preſent caſe, as the huſband, by ſuch compoſition, makes himſelf reſponſible, and his power over his own perſon is ſuperior to that of the magiſtrate.—This reaſoning does not apply to the caſe of *dower*, as that is conſidered to be a return for the uſe of the wife's perſon.

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

IF the *Kázee* decree a wife her maintenance, and a length of time elapſe without her receiving any, and the huſband ſhould die, her maintenance drops; and the rule is the ſame if *ſhe* ſhould die; becauſe maintenance is a gratuity, reſpecting which the rule is that it drops in conſequence of death, like a gift, which is annulled by the deceaſe of either the donor or donee before ſeizin being made by the latter.—*Shafei* ſays that the maintenance is in all circumſtances to be conſidered as a debt upon the huſband, in conformity with his tenet, that it is not a *gratuity* but a *return*, wherefore it cannot drop like demands of the former deſcription.—This was before replied to.

*Advances* of maintenance cannot be reclaimed.

IF a man give his wife one year's maintenance in advance, and then die before the expiration of the year, no claim lies againſt the woman for reſtitution of any part of it.—This is the doctrine of *Haneefa* and *Aboo Yooſaf*.—*Mohammed* ſays that ſhe is entitled only to the proportion due for the term paſt, from the beginning of the year till the huſband's deceaſe, the remainder being the right of his heirs; if,

* Arab. *Sillit*. By this is to be here underſtood a preſent or gratuity promiſed but not yet paid.

therefore,

therefore, the difference remain with her *in ſubſtance*, ſhe muſt reſtore it; or, if it do not remain, ſhe is reſponſible for the value, (and this alſo is the doctrine of *Shafei*, and the ſame difference of opinion obtains in reſpect to clothes and apparel,) becauſe the wife in this caſe has received *in advance* the return for the matrimonial confinement, to which ſhe has a claim, in virtue of ſuch confinement, but her claim is annulled by the huſband's deceaſe, ſince ſhe no longer remains confined, and conſequently the return is annulled in proportion to the annulment of her claim, in the ſame manner as the ſtipend of a *Kâzee*.—The argument of the two *Elders* is that the maintenance is a gratuity, of which the claimant has already taken poſſeſſion; and reſtitution of a gratuity cannot be demanded after death, the virtue of it being completed by that event, as in a caſe of gift; whence it is that if the maintenace were to *periſh* in the woman's poſſeſſion, without her conſuming it, no part of it can be demanded of her, according to all the doctors, whereas, if it were a *return*, it might be demanded in a caſe of *deſtruction*, as well as in one of *conſumption*, nor would there be any difference between the two.—It is recorded from *Mohammed* that if the proportion advanced do not exceed that of one month, no reſtitution is required, as this proportion is inconſiderable, and ſtands as an allowance for preſent uſe.

A ſlave may be ſold for the maintenance of his wife, if the latter be *free*.

If a ſlave marry a free woman, her maintenance is a debt upon him, for the diſcharge of which he may be ſold; but this is only provided the marriage was with his owner's conſent, as her maintenance being due from the ſlave, the obligation to it muſt ultimately [illegible] his owner; the debt is therefore charged to the ſlave, in the manner as one contracted in trade by a *Mazoon*, or privileged [illegible] but his owner is at liberty to redeem him by diſcharging the [illegible] becauſe the woman's right extends to her maintenance only, not to the ſlave's perſon: and if the ſlave die, her right to any arrear of maintenance drops, (and ſo alſo where he is *killed*,) ſince it is a *gratuity*, as was already ſtated.

IF a man marry the female ſlave of another, and her owner give her permiſſion to reſide in her huſband's houſe, her maintenance is incumbent upon the huſband, becauſe ſhe is then within his cuſtody: but if ſhe have not permiſſion to reſide with her huſband, he is not reſponſible for her maintenance, as in this caſe her cuſtody is not eſtabliſhed.—The term here applied to the permiſſion granted by the maſter [*taboweeat*] means not only liberty to reſide in the huſband's habitation, but alſo an exemption from all ſervice; wherefore, if any ſervice be afterwards required of her, the maintenance from the huſband drops, as cuſtody, which is the ground of her right to maintenance from him, neceſſarily ceaſes on ſuch an occaſion.—It is lawful for the maſter to require the ſervice of his female ſlave, although he have granted her leave to reſide with her huſband, becauſe ſuch leave is not *binding* upon him, as is demonſtrated in its proper place.—But it is to be obſerved that if the female ſlave voluntarily perform her maſter's ſervice, without his calling upon her, her right to maintenance from her huſband does not drop. Theſe rules apply equally to *Am-Walids* as to abſolute ſlaves.

muſt maintain his wife, being a ſlave, where ſhe reſides with him.

## SECT. II.

IT is incumbent upon a huſband to provide a ſeparate apartment for his wife's habitation, to be ſolely and excluſively appropriated to her uſe, ſo as that none of the huſband's family, or others, may enter without her permiſſion and deſire, becauſe this is eſſentially neceſſary to her, and is therefore her due the ſame as maintenance, and the word of GOD appoints her a dwellinghouſe as well as a ſubſiſtence: and as it is incumbent upon a huſband to provide a habitation for his wife, ſo he is not at liberty to admit any perſon to a ſhare in it, as this would be injurious to her, by endangering her property, and obſtruct-

be accommodated with

ing her enjoyment of his ſociety; but if ſhe deſire it, the huſband may then lawfully admit a partner in the habitation, as ſhe by ſuch a requeſt voluntarily relinquiſhes her right: neither is the huſband at liberty to intrude upon his wife his child by another woman, for the ſame reaſon.

If the huſband appoint his wife an apartment within his own houſe, giving her the lock and key, it is ſufficient, as the end is by this means fully obtained.

but under the controul of her huſband,

A husband is at liberty to prevent his wife's parents, or other relations, or her children by a former marriage, from coming in * to as her apartment or habitation is his property, which he may lawfully prevent any perſon from entering; but he cannot prohibit them from ſeeing and converſing with her whenever they pleaſe, for if he were to do ſo, it would induce *Katta Rihm*, or a breach of the ties of kindred, and their ſeeing or converſing with her is in no reſpect injurious to him. Some have ſaid that he cannot prohibit them from *coming in* to her, any more than from *converſing* with or ſeeing her, but he may prevent them from *reſiding* with her, as this might cauſe diſturbance and inconvenience. Others have ſaid that he cannot prohibit his wife from going to viſit her parents, nor prevent the parents from viſiting her every Friday; neither can he forbid her other relations from viſiting her once a year; and this is approved.

Maintenance to the wife of an *abſentee* is decreed out of his

If a woman's huſband abſent himſelf, leaving effects in the hands of any perſon, and that perſon acknowledge the depoſit, and admit the woman to be the wife of the abſentee, the *Kâzee* muſt decree a maintenance to her out of the ſaid effects; and the ſame to the infant chil-

* Although, by the cuſtoms of the eaſt, men are not permitted to enter into the women's apartments without eſpecial permiſſion, yet it is not uncommon to converſe with a woman through a *curtain*, or (as ſome part of this paſſage ſeems to imply) through a *grate*.

dren of the abſentee, and alſo to his parents. And the rule is the ſame if the *Kâzee* himſelf be acquainted with the above two circumſtances, where the truſtee denies both or either of them.—The argument upon which this proceeds is that where the above perſon acknowledges the woman to be the wife of the abſentee, and alſo, that he has property of the latter in his hands, ſuch acknowledgment amounts to an avowal of her being entitled to receive her right out of the ſaid property, without the huſband's conſent, as a woman is authorized to it by law.

OBJECTION.—If a woman be decreed her maintenance out of the effects of her abſent huſband, in conſequence of the truſtee's acknowledgment, this admits the judgment of a magiſtrate againſt an abſentee, which is illegal.

REPLY.—The order of the *Kâzee* is not in this caſe *directly* againſt an abſentee, but only *virtually*, and *by implication*, becauſe the above perſon is the *Zoo-al-Yed*, or immediate poſſeſſor of the property, and the acknowledgment of ſuch an one is to be credited in any thing affecting his truſt, but more eſpecially in the preſent caſe, ſince if he were to deny either the marriage or the depoſit, it would not be in the woman's power to ſue him, for if ſhe do ſo, and produce witneſſes in ſupport of her plea, their evidence could not be received, as a truſtee cannot be ſued on a plea of marriage; nor can the woman appear as plaintiff againſt him with reſpect to the property in his hands, ſince ſhe is not the huſband's agent: and the truſtee's acknowledgment being credited, the *Kâzee*, in conſequence of it, iſſues a decree for the wife's maintenance, which muſt affect the huſband of courſe; and the decree of a *Kâzee*, affecting an abſentee in this way, is approved.—If, moreover, the property of the abſentee be in the hands of the perſon aforeſaid in the way of *Mozâribat*, or as a *debt*, the rule holds the ſame as if it were a *depoſit*.—What is now ſaid ſuppoſes the property to be of the ſame nature with the woman's right, ſuch as *money*, *grain*, or *cloth*: but where it is otherwiſe, a maintenance muſt not be decreed out of it, becauſe, in this caſe, it cannot be furniſhed from it

unleſs that be of a nature different from what is neceſſary to her ſupport:

but by ſelling a part, and defraying the expence of it out of the amount; and all our doctors agree that the property of an abſentee cannot be *ſold.*—*Haneeſa* is of this opinion, becauſe the *Kâzee* cannot ſell the effects even of a perſon *on the ſpot*, but muſt require him to ſell them, and diſcharge the maintenance with the amount; and conſequently he is prohibited from ſelling the property of an abſentee, *a fortiori.* The two diſciples alſo are of the ſame opinion, becauſe, although they hold that the *Kâzee* may diſpoſe of the property of a perſon on the ſpot, for the diſcharge of his wife's maintenance, without his conſent, yet this is only where he *refuſes* to do ſo; but the property of an abſentee cannot be thus diſpoſed of, as his refuſal is not known.

but ſhe muſt give ſecurity that ſhe has not already received any thing in advance.

When the *Kâzee* decrees a woman her maintenance out of the effects of her abſent huſband, it behoves him to take ſecurity from her for whatever ſhe receives for the indemnity of the abſentee, as it is poſſible that ſhe may already have received her maintenance in advance, or that ſhe may have been divorced, and her *Edit* be paſſed; and the *Kâzee* muſt alſo require her to make oath that ſhe has not received any part of her maintenance in advance: contrary to a caſe where the *Kâzee* makes a diſtribution of inheritance among preſent heirs, according to evidence, and they do not deny any knowledge of another heir, for in this caſe he does not require a ſimilar ſecurity from them in behalf of another heir, who may hereafter appear, becauſe the *Makfool-le-hoo*, or *ſuretee*, is there unknown and undefined; but in the preſent caſe the ſuretee is *known*, being the abſent huſband.

It can be decreed only to the *wife, infant children,* or *parents* of the abſentee.

A Kâzee cannot decree maintenance, out of the effects of an abſentee, in behalf of any but thoſe already mentioned, (namely, the wife, infant children, and parents of the abſentee,) as they alone are authorized to receive a maintenance independant of any decree of the *Kâzee*, (that, in the preſent caſe, being only *in aid* of their right,) whereas

whereas the other relations within the prohibited degrees are not entitled to any maintenance without a decree of the *Kâzee* previouſly obtained for that purpoſe, as the obligation of it with reſpect to them varies according to circumſtances, wherefore the *Kâzee* decreeing it to them would amount to a judgment againſt an abſentee, which is not allowed.

No decree can be i againſt abſentee's property upo[illegible] teſtimony of his *wife*.

IF the *Kâzee* himſelf be not aſſured that the woman is the wife of the abſentee, and the truſtee, factor, or debtor, do not acknowledge her to be ſo, and ſhe ſhould offer to produce witneſſes to prove that ſhe is ſo,—or, if the abſentee ſhould not have left any effects, and ſhe offer to prove her marriage by evidence, with a view to obtain a decree authorizing her to procure a maintenance upon the abſentee's credit, ſtill the *Kâzee* cannot iſſue a decree accordingly, becauſe this would be a judgment againſt an abſentee, which is inadmiſſible.—*Ziffer* ſays that it is the duty of the *Kâzee* to hear the proofs, and (although he cannot decree the marriage to be thereby eſtabliſhed) to order her a maintenance, as this is a tenderneſs due to her, and no injury to the abſentee, becauſe, if he ſhould afterwards appear and confirm her aſſertion, ſhe has only taken what was her right,—or, if he ſhould deny the marriage, an oath will be tendered to her, (in caſe of her having no witneſſes,) and if ſhe decline ſwearing, his aſſertion remains eſtabliſhed; but if ſhe prove her aſſertion by evidence, her right is eſtabliſhed; and if ſhe cannot produce any proof, and he ſwear, ſhe or her bail then remain reſponſible.—The author of this work ſays that it is the duty of the *Kâzee*, in the preſent inſtance, to decree maintenance to the abſentee's wife, from neceſſity.

SECT.

## SECT. III.

A divorced wife is entitled to maintenance during her *Edit.*

WHERE a man divorces his wife, her ſubſiſtence and lodging are incumbent upon him during the term of her *Edit*, whether the divorce be of the reverſible or irreverſible kind.—*Shafei* ſays that no maintenance is due to a woman repudiated by irreverſible divorce, unleſs ſhe be pregnant.—The reaſon for maintenance being due to a woman under reverſible divorce is that the marriage in ſuch a caſe is ſtill held to continue in force, eſpecially according to our doctors, who on this principle maintain that it is lawful for a man to have carnal connexion with a wife ſo repudiated.—With reſpect to a caſe of *irreverſible* divorce, the arguments of *Shafei* are twofold; FIRST, *Kattima Bint Kays* has ſaid, "My huſband repudiated me by three divorces, and "the prophet did not appoint to me either a place of reſidence or a ſub-"ſiſtence;"—SECONDLY, the matrimonial propriety is thereby terminated, and the maintenance is held, by *Shafei*, to be a return for ſuch propriety, (whence it is that a woman's right to maintenance drops upon the death of her huſband, as the matrimonial propriety is diſſolved by that event;)—but it would be otherwiſe if a woman repudiated by irreverſible divorce be pregnant at the time of divorce, as in this caſe the obligation of maintenance appears, in the ſacred writings, which expreſsly direct it to a woman under ſuch a circumſtance. The argument of our doctors is that *maintenance* is a return for *cuſtody*, (as was before obſerved,) and cuſtody ſtill continues, on account of that which is the chief end of marriage, namely *offspring*, (as the intent of *Edit* is to aſcertain whether the woman be pregnant or not,) wherefore ſubſiſtence is due to her, as well as lodging, which laſt is admitted by all to be her right; thus the caſe is the ſame as if ſhe were actually pregnant; moreover, *Omar* has recorded a precept of the prophet, to the effect that "*maintenance is due to a* WOMAN *divorced*

"*thrice*

"*thrice during her* EDIT:"—there are alſo a variety of traditions to the ſame purpoſe.

MAINTENANCE is not due to a woman after her huſband's deceaſe, becauſe her ſubſequent confinement [during the term of *Edit*, in conſequence of that event,] is not on account of the right of her *huſband*, but of the *law*, the *Edit* of widowhood being merely a *religious* obſervance, whence it is that the deſign of aſcertaining the ſtate of her womb is not in this inſtance regarded, and accordingly the *Edit* is not counted by the menſtrual terms, but by *time*; maintenance is moreover due to a woman from day to day, and the huſband's right in his property ceaſing upon his deceaſe, it is impoſſible that any maintenance ſhould be made due from what is, after that event, the property of his heirs.

No maintenance due to a *widow:*

WHEN the ſeparation originates with the woman, from any thing which can be imputed to her as a *crime*, ſuch as apoſtatizing from the faith, or having carnal connexion or dalliance with the ſon of her huſband, ſhe has no claim to maintenance during *Edit*, ſince ſhe has deprived her huſband of her perſon unrighteouſly, in the ſame manner as if ſhe were to go out of his houſe without permiſſion.—But it is otherwiſe where the ſeparation originates with the woman from a circumſtance which cannot be imputed to her as a crime, as in a caſe of option of puberty or manumiſſion, or of a ſeparation demanded by her on account of inequality, in all which caſes ſhe remains entitled to maintenance during *Edit*, as ſhe has here legally withdrawn herſelf from her huſband, in the ſame manner as where ſhe keeps herſelf from him on account of nonpayment of her dower.

nor to a wife in whom the ſeparation originates,

unleſs it originate in a circumſtance not *criminal.*

IF a woman under triplicate divorce apoſtatize from the faith, her maintenance drops; but if one in the ſame circumſtance admit the ſon of her huſband to carnal connexion, ſtill her right to maintenance continues, becauſe here the divorce has not been cauſed by the apoſtacy

A wife who apoſtatizes has no right to maintenance.

or

or the inceſt of the woman:—but the apoſtate is impriſoned until ſuch time as ſhe may repent; and a huſband is not under any obligation to provide a maintenance for his wife if ſhe be a priſoner, whereas a woman who admits the ſon of her huſband to carnal connexion is not liable to impriſonment on that account; which makes an eſſential difference between the two caſes.

## SECT. IV.

A father muſt provide for the maintenance of his infant children.

THE maintenance of infant children reſts upon their father; and no perſon can be his aſſociate or partner in furniſhing it, (in the ſame manner as no perſon is admitted to be aſſociated with a huſband in providing for the maintenance of his wife,) becauſe the word of GOD, in the *Koran*, ſays "THE MAINTENANCE OF THE WOMAN WHO "SUCKLES AN INFANT RESTS UPON HIM TO WHOM THE INFANT "IS BORN," (that is, upon the *father*,) from which it appears that the maintenance of an infant child alſo reſts upon the father, becauſe, as maintenance is decreed to the nurſe on account of her ſuſtaining the child with her milk, it follows that the ſame is due to the child himſelf, *a fortiori*.

A mother is not required to ſuckle her infant,

except where a nurſe cannot be procured.

IF the child be an infant at the breaſt, there is no obligation upon the mother to ſuckle it, becauſe the infant's maintenance reſts upon the father, and in the ſame manner the hire of a nurſe; it is poſſible, moreover, that the mother may not be able to ſuckle it, from want of health or other ſufficient excuſe, in which caſe any conſtraint upon her for that purpoſe would be an act of injuſtice.—What is here advanced proceeds upon a ſuppoſition of a nurſe being eaſily procured

procured; but where this is not the caſe, the mother may be conſtrained to take that office upon herſelf, leſt the infant periſh.

IT is the part of a father to hire a woman to ſuckle his infant child, as this is a duty incumbent upon him; and it is neceſſary that the nurſe ſo hired ſtay with or near the mother, if the latter deſire it, as the child muſt be with its mother, ſhe having the right

The father muſt provide a nurſe;

But it is not lawful for the father to hire the *mother* of the child as its nurſe, if ſhe be his wife, or divorced from him; and in her *Edit*,— becauſe, although ſuckling her child be not incumbent upon a mother in point of *law*, yet it is ſo in point of *religion*, the word of GOD in the *Koran* ſaying "IT BEHOVES MOTHERS TO SUCKLE THEIR CHILDREN;"—and a mother is excuſed from this duty only on the ſuppoſition of incapacity, but if ſhe agree to perform it for a *compenſation*, this is an acknowledgment of her capacity, making the duty incumbent upon her without any conſideration whatever. This rule obtains (as above obſerved) where the mother is either actually the *wife* of the father, or reverſibly divorced from him, and in her *Edit*, in which caſe the marriage ſtill continues in force; and (according to one tradition) this alſo is the rule, where the mother is in her *Edit* from *irreverſible* divorce; but another tradition ſays that ſuch a perſon may be lawfully hired by the father as a nurſe, becauſe her marriage no longer remains in force.—The argument in favour of the former tradition is that the marriage ſtill continues in force with reſpect to ſome of its obligations, ſuch as the proviſion of *food*, *lodging*, and ſo forth.

but he cannot hire the child's *mother*

BUT a father may lawfully hire, to ſuckle his child, one of his wives, who is not the child's mother, as ſuckling it is not a duty incumbent upon *her*.

yet he may hire any oth of his wives for that purpoſe;

HE may alſo lawfully hire the mother of the child herſelf for this office, where her *Edit* from divorce has been completed, becauſe when

or the child's mother, after

that is paſt the marriage no longer remains in force in any reſpect, and the woman may then be hired as well as any indifferent perſon.—In this caſe, however, if the father offer to hire any ſtrange woman to ſuckle his child, and the mother offer to perform that office either for the ſame hire, or gratis, ſhe has the prior right, as it is to be ſuppoſed that ſhe feels a tenderneſs for the child beyond any other perſon, wherefore regard for the child dictates that it ſhould be committed to her in preference to any other. But if the mother require *higher* wages than the ſtranger, the father cannot be compelled to give her a preference, as this would be injurious to him.

Difference of religion makes no difference as to the obligations of fur-

or

The maintenance of an infant child is incumbent upon the father, although he be of a different religion: and, in the ſame manner, the maintenance of a wife is incumbent upon her huſband notwithſtanding this circumſtance;—the *firſt*, becauſe the word *offspring*, in the ſacred text, (as before quoted) is of general application, and alſo becauſe the child is a partaker of the father's fleſh and blood, and conſequently is a part of him;—and the *ſecond*, becauſe the occaſion of the obligation of maintenance (namely, a *valid marriage*,) may exiſt between a *Muſſulman* and an *infidel* woman.

The maintenance of children incum-

dependent property.

It is to be obſerved that what has been aſſerted reſpecting the maintenance of infant children being incumbent upon the father obonly where the child is not poſſeſſed of any property:—but where the child is poſſeſſed of property, the maintenance is provided from *that*, as it is a rule that every perſon's maintenance muſt be furniſhed from his own ſubſtance, whether he be an *infant* or an *adult*.

SECT.

## SECT. V.

A man provide a maintenance

IT is incumbent upon a man to provide maintenance for his father, mother, grandfathers, and grandmothers, if they ſhould happen to be in neceſſitous circumſtances, although they be of a different religion;—for his father and mother, becauſe the text of the *Koran*, upon this point, was revealed reſpecting the father and mother of a *Muſſulman*, who were *infidels*;—and for his grandfathers and grandmothers, becauſe a grandfather is as a father, and a grandmother as a mother, the former being veſted with the authority of a father, in all points of guardianſhip and inheritance, in defect of the father, and the grandmother being the mother's ſubſtitute, in defect of her, with reſpect to *Hizánit*, and ſo forth: but their poverty is made a condition of the obligation, becauſe, if they be poſſeſſed of property, their maintenance muſt be provided from *that*, rather than from the property of any other perſon:—and difference of religion is no objection, with reſpect to *grand* parents, becauſe of the text abovementioned:—it is to be obſerved, however, that in the caſe of difference of religion, a man is under no obligation to provide maintenance for any except his wife, his parents, grand parents, children, and grand children, to all of whom it is due, notwithſtanding this circumſtance;—to the *wife*, becauſe (as was already ſtated) the cauſe of the obligation of maintenance to her is *cuſtody for the purpoſe of enjoyment under a valid contract*, and the eſtabliſhment of this cauſe does not depend upon unity of ſect or religion, as it perfectly exiſts where the wife is a *Chriſtian* (for inſtance) and her huſband a *Muſſulman*;—and to the parents and others, as enumerated above, becauſe between the child and the parent exiſts a common participation of blood, and he who participates of another's blood is, in fact, the ſame as the participatee himſelf; and as a man's infidelity is no objection to his providing his own mainte-

Difference of religion forbids the obligation to the

of any relations except a *wife*, *rents*, or *children*:

and to thoſe alſo it is not due if they be

nance out of his own property, it follows that the ſame circumſtance can be no objection with reſpect to one who is *a part* of him.—But if thoſe relations be *aliens*, their maintenance is in no degree incumbent upon a *Muſſulman*, although they be *Mooſtámins* *, becauſe the law has forbidden us from ſhewing kindneſs to thoſe with whom we are at war on account of religion.

*Chriſtian* and *Muſſulman* brothers are not obliged to maintain each other.

THERE is no obligation upon a *Chriſtian* to provide maintenance to his brother, being a *Muſſulman*; neither is a *Muſſulman* under any obligation to provide for the maintenance of his brother, being a *Chriſtian*; becauſe (according to what appears in the ſacred text) maintenance is connected with inheritance; and as a *Muſſulman* and *infidel* cannot inherit of each other, it follows that the maintenance of either is not incumbent upon the other:—it is to be remarked, however, that this rule does not obtain with reſpect to the other effects of conſanguinity; for if a *Muſſulman* become poſſeſſed of his *Chriſtian* brother, as a ſlave, the latter is virtually emancipated, on account of nearneſs of kindred, notwithſtanding the difference of religion.

The maintenance of a parent is excluſively incumbent on the *child*.

THE maintenance of a father and mother is incumbent upon their child alone, wherefore no man can be his partner or aſſociate in furniſhing it to them, becauſe parents have a right in the property of their child, (according to various well known traditions,) which they do not poſſeſs with reſpect to that of any other perſon; and alſo, becauſe the child is more nearly related to his parents than to any other perſon whatever.—The maintenance to parents is equally incumbent upon a *daughter* as upon a *ſon*, according to the *Zâhir-Rawâyet*; and this is approved, becauſe the principle upon which the obligation of it is founded applies equally to both.

Maintenance to other re-

IT is a man's duty to provide maintenance for all his infant male

* That is, reſiding in the *Muſſulman* ſtate, under *a protection*.

relations

relations within the prohibited degrees, who are in poverty; and alſo to all female relations within the ſame degrees, whether infants or adults, where they are in neceſſity; and alſo to all adult male relations, within the ſame degrees, who are poor, and diſabled or blind: but the obligation does not extend beyond thoſe relations, becauſe the duties of conſanguinity are not abſolutely incumbent towards any excepting the nearer (or *Karreebat*) degrees of kindred, and do not extend to the more *diſtant* degrees, as this would be impracticable: on this occaſion, moreover, the *neceſſity* is made a condition of the obligation; and tenderneſs of ſex, or extreme youth, or debility, or blindneſs, are evidences of this neceſſity, ſince perſons from theſe circumſtances are rendered incapable of earning their ſubſiſtence by labour; but this rule does not apply to parents, for if they were to labour for a ſubſiſtence, it would ſubject them to pain and fatigue, from which it is the expreſs duty of their child to relieve them; and hence it is that maintenance to parents is incumbent upon the child, although they ſhould be able to ſubſiſt by their own induſtry.

ſides the wife, parents, or children.

MAINTENANCE is due to a relation within the prohibited
in proportion to inheritance; in other words, upon him who has the greateſt right of inheritance in the ſaid relation's eſtate the largeſt proportion of maintenance is incumbent,—and upon him who has the ſmalleſt right, the ſmalleſt proportion,—and ſo of the others,—becauſe it is ſaid in the *Koran* "THE MAINTENANCE OF A RELATION "WITHIN THE PROHIBITED DEGREES RESTS UPON HIS HEIR," and the word *heir* ſhews that in adjuſting the rate of maintenance the proportion of *inheritance* is to be regarded.

THE maintenance to an adult daughter, or to an adult ſon who is diſabled, reſts upon the parents in three equal parts, two thirds being furniſhed by the father, and one third by the mother, becauſe the inheritance of a father from the eſtate of his ſon or daughter is *two*

A father and mother muſt provide a



*thirds*, (and alſo u their adult

*ſons* who are *diſabled*,) in proportion to

*thirds*, and that of a mother *one* third. The compiler of the *Hedáya* remarks that this is the doctrine of *Khaſáf* and *Háſan*. According to the *Záhir-Rawáyet*, the whole of the maintenance to theſe reſts upon the father, the word of God being thus expreſſed, "THE SUBSISTENCE OF CHILDREN RESTS UPON THOSE TO WHOM THEY ARE BORN," (as was before mentioned,) and the perſon *to whom they are born* is the *father*, wherefore their maintenance reſts upon him, in the ſame manner as that of his infant children: but the former doctrine proceeds upon the idea of there being two points which make an eſſential diſtinction between *infant* children and *adults*, with reſpect to the father; FIRST, a father is inveſted with the authority of guardianſhip over his infant child;—SECONDLY, the maintenance to his infant child is expreſsly declared to reſt ſolely and excluſively upon him: but with adults it is otherwiſe, as a father has no right of guardianſhip over them, wherefore the mother is to aſſiſt him in furniſhing their maintenance in caſe of neceſſity; and as, in the maintenance of *other* relations, the proportion of *inheritance* is regarded, ſo in the preſent caſe, in conformity with that rule.

Siſters muſt furniſh maintenance to an

THE maintenance of a brother, in poverty, reſts upon his *full*, *paternal*, and *maternal* ſiſters, in five ſhares, according to their degrees of inheritance; that is to ſay, three fifths muſt be furniſhed by the *full* ſiſters, one fifth by the *paternal* ſiſters, and one fifth by the *maternal*.—It is to be obſerved, however, that to the obligation of furniſhing maintenance to a poor relation, the *capability* of inheritance only is a condition, and not the *prior* or *more immediate right*; thus if a poor man have a rich maternal aunt, and alſo a rich paternal uncle's ſon, his maintenance reſts upon the *former* in preference to the *latter*, although the *latter* would inherit of him in preference to the *former*, for this reaſon, that a maternal aunt is within the prohibited degrees, whereas a couſin-german is not.

THE maintenance of a relation within the prohibited degrees is not incumbent upon his heirs, if they be of a different religion, becauſe, in this caſe, they are incapable of inheriting from him, which is the condition of the obligation.

THE maintenance of relations within the prohibited degrees is not incumbent upon a perſon in poverty, becauſe it is an obligation (like the other duties of conſanguinity) which cannot be fulfilled by one who, on account of his ſituation, has a claim to that very aſſiſtance from *others*. But this argument does not hold with reſpect to a *wife* or *infant child*, for whom it is incumbent upon a man to provide ſubſiſtence, notwithſtanding his poverty, becauſe in marrying he ſubjects himſelf to the expence of maintaining his wife, as otherwiſe the ends of marriage would be defeated,—and his child, from participation of blood, is a part of himſelf, (as was before obſerved,) for whom it is therefore his duty to find ſupport as much as for himſelf.

A poor man is not required to ſupport any of his relations except his *wife* or *infant children*.

ABOO YOOSAF defines the term *rich*, as uſed in this chapter, to apply to a perſon poſſeſſed of property to the amount of a ſingle *Niſáb*. *Mohammed* ſays that it means a perſon poſſeſſed of property above what may ſuffice to ſupport himſelf and family one month,—or whoſe ſuperfluity from his daily earnings enables him to afford it,—becauſe the obligation, in acts of piety, depends upon the ability *generally*, and not upon any ſpecific degree of it, *Niſáb* being a proportion invented merely for convenience: decrees however paſs according to the former opinion. By the *Niſáb* here mentioned is underſtood that which is ſo ſmall as to prohibit alms-giving; for inſtance, *two hundred* DIRMS; and *Hawlán-Hâwl*, or poſſeſſion for a year, is not a condition of it; whence, if a man were, from a ſtate of poverty, to become poſſeſſed of two hundred *Dirms* as *this day*, the maintenance of his poor relations becomes immediately incumbent upon him.

Definition of

: parents of an abſentee may be decreed out of his effects.

If an abſent ſon be poſſeſſed of property, a maintenance to his parents is to be decreed out of it, for the reaſons already mentioned: and if a father were to ſell his abſent ſon's effects, for the purpoſe of providing his maintenance, it is held by *Haneefa* to be lawful, on a principle of benevolence; but he cannot lawfully ſell his *lands*. The two diſciples ſay that the ſale of his *effects* is alſo illegal; and this is conformable to analogy, becauſe a father has no abſolute authority over his adult ſon, and therefore is not empowered to ſell his effects in his preſence on any pretence, nor to do ſo in his abſence but for the diſcharge of debts which do not include maintenance; and the ſame reaſoning applies to the *mother*. The reaſon for the more favourable conſtruction, as adopted by *Haneefa*, is that a father is authorized to take charge of his abſent ſon's effects; for as the conſervation of an abſentee's property is allowed to devolve upon his *executor*, it muſt be admitted that it appertains to his *father* in a ſuperior degree, as he is more immediately intereſted; and the ſale of moveable property is one part of conſervation; wherefore the father is at liberty to ſell his abſent ſon's moveable property: but this reaſoning does not apply to *lands*, theſe not being ſubject to conſervation, as they do not require it; neither does it apply to any other than a *parent*, as the more diſtant relations are not endowed with any abſolute authority whatever over an *infant*, nor with any power of conſervation over the effects of an *adult*.—And where a father thus ſells the property of his abſent ſon, if the price he receives for it be of the ſame nature with his right, (namely, *maintenance*,) he is at liberty to take his right therefrom: and in the ſame manner, if a father diſpoſe of the effects or lands of his infant ſon, he is at liberty to take his maintenance out of the price, that being of the ſame nature with his right.

The parents maintenance out of his effects but a

If the effects of an abſent ſon be in the hands of his parents, and take their maintenance from them, they are not reſponſible, as what they take in this manner is their right, a maintenance being their due, independant of any decree from the *Kâzee*; but if the effects

fects be in the hands of a ſtranger, and he furniſh the maintenance to the parents therefrom, without a decree from the *Kâzee*, he is reſponſible, as he in that caſe takes upon him to diſpoſe of the property of another without authority, ſince he is no more than merely the abſentee's agent for conſervation: (contrary to where he acts under the *Kâzee*'s orders, in which caſe he is not reſponſible, as thoſe are abſolute and indiſpenſable:)—and being thus reſponſible, he has no right to ſeek indemnification from the parents, becauſe in aſſuming the reſponſibility, he, in fact, becomes *proprietor*, and then appears to have given the property to the parents gratuitouſly.

truſtee cannot provide it in that manner without a decree.

If the *Kâzee* decree a maintenance to children, or to parents, or to relations within the prohibited degrees, and ſome time ſhould elapſe without their receiving any, their right to maintenance ceaſes, becauſe it is due only ſo far as may ſuffice, according to their neceſſity, (whence it is not ſo to thoſe who are *opulent*,) and they being able to ſuffer a conſiderable portion of time to paſs without demanding or receiving it, it is evident that they have a ſufficiency, and are under no neceſſity of ſeeking a maintenance from others: contrary to where the *Kâzee* decrees a maintenance to a *wife*, and a ſpace of time elapſes without her receiving any, for her right to maintenance does not ceaſe on account of her independance, becauſe it is her *due*, whether ſhe be *rich* or *poor*.—What has been obſerved on this occaſion applies to caſes only in which the *Kâzee* has not authorized the parties to provide themſelves a maintenance upon the abſentee's credit: but where he has ſo authorized them, their right to maintenance does not ceaſe in conſequence of a length of time paſſing without their receiving any, becauſe the authority of the *Kâzee* is univerſal, and hence his order to provide a maintenance upon credit is equal to that of the abſentee himſelf, wherefore the proportion of maintenance for the time ſo elapſed is a debt upon the abſentee, and does not ceaſe from that circumſtance.—The time here meant is any term beyond a *month*; and if the time elapſed be ſhort of that term, maintenance does not ceaſe.

Arrears not due in a decreed maintenance,

unleſs where it is decreed to be provided upon the abſentee's

## SECT. VI.

Maintenance of ſlaves incumbent upon their owner.

THE maintenance of male and female ſlaves is incumbent upon their owner, becauſe the prophet has ſaid concerning them, "*they* "*are your brethren, whom* GOD *has placed in your hands, wherefore* "*give them ſuch food as ye yourſelves eat, and ſuch raiment as ye your-* "*ſelves are clothed with, and afflict not the ſervants of your* GOD:" if, therefore, the owner do not provide their maintenance, and they be capable of labour, they muſt be permitted to work for their own ſubſiſtence, as this is tenderneſs not only to the ſlave, but alſo to his maſter, being equally advantageous to both, ſince the life of the ſlave is thereby preſerved, at the ſame time that the owner's property in him continues unaffected.—But if the ſlave be incapable of labour, (as where a *male* ſlave, for inſtance, is deprived of the uſe of his limbs, or where a *female* is unfit to hire on account of extreme youth or tender habit,) the owner muſt then be compelled either to provide their maintenance, or to ſell them, becauſe ſlaves are claimants of right notwithſtanding their bondage, and by ſale their right is obtained, at the ſame time that the owner's right is alſo preſerved to him by his acquiſition of an equivalent in the price for which he diſpoſes of them.—This rule does not hold with reſpect to other living property, (ſuch as *horſes*, and ſo forth,) becauſe cattle are not claimants of right, and conſequently the owner is not compelled to an alternative with reſpect to them, as in the caſe of ſlaves: but yet men are directed to furniſh their cattle with ſubſiſtence on a principle of piety, as the neglect of this is cruelty towards the creature, and at the ſame time deſtructive of property, which is forbidden by the prophet.—*Aboo Yooſaf* is of opinion that the owner of cattle may be *compelled* to furniſh them a proper and ſufficient ſubſiſtence: but it is the more approved doctrine that he is not liable to any compulſion on that head.

*HEDÂYA.*

# HEDÂYA.

## BOOK V.

## *Of ITTÂK, or the MANUMISSION of SLAVES.*

ITTÂK, in its primitive ſenſe, implies *power:* in the language of the law it ſignifies a power by effect, exiſting in a man, which endows him with competency in evidence, and alſo in authority, (ſuch as *magiſtracy*, and ſo forth,) enabling him to act with reſpect to others, and to repel the acts of others with reſpect to himſelf, in conſequence of the extinction of his bondage. Definition of the term.

Chap. I. Introductory.

Chap. II. Of Slaves of whom a portion or member is emancipated.

Chap. III. Of the Emancipation of one of ſeveral Slaves.

## CHAP. I.

The emancipation recommended.

ITTÂK, or the emancipation of ſlaves, is recommended by the prophet, who declared "*whatever* MUSSULMAN *ſhall emancipate a ſlave (being a believer,)* GOD *will, for every member of the ſlave ſo liberated, releaſe a ſimilar member of the emancipator from hell fire.*"— It is therefore laudable in a man to releaſe his ſlave, or in a woman to grant freedom to her bondmaid, in order that this deliverance of GOD may be thereby ſecured to to them *.

Conditions which render emancipation valid.

EMANCIPATION is approved, where it proceeds from a free perſon, of ſound underſtanding, and an adult, with reſpect to a ſlave who is his own property. Freedom is made a neceſſary condition in the emancipator, becauſe *Ittâk*, or manumiſſion, is not applicable to any except ſlaves, and a ſlave cannot be the proprietor of a ſlave †; and maturity of age is equally a condition, becauſe a boy (for inſtance) does not poſſeſs competency to emancipate a ſlave, as this is an act

* Arab. "*In order that the exchange of a limb for a limb may be ſecured.*"

† It is to be obſerved that the reſtriction here mentioned does not apply to *Mokâtibs* and *Mazoons*, but only to *Abids*, or others, in a ſtate of *abſolute* ſlavery.

productive

productive of evident damage to him, (whence it is that the guardians of a minor are not empowered to emancipate any of the ſlaves of their ward;) and ſanity of intellect is alſo a condition, becauſe a lunatic is incapable of any independant act.

IF an adult declare that he had in his non-age releaſed a certain ſlave, his words are to be credited, becauſe he here ſtands as a *negator* of manumiſſion *, as he refers the manumiſſion to a period in which he was not competent to pronounce it.—And in the ſame manner, if a rational perſon declare that he had releaſed ſuch a ſlave "*whilſt he* "*was inſane*," his declaration is to be credited, provided his inſanity had been a matter of notoriety, as he is a negator, on account of his referring the manumiſſion to a ſtate which forbids it.—If, on the other hand, a boy were to ſay "every ſlave of which I am poſſeſſed is free "on my majority," it is not approved, as the declaration of an infant is not binding upon him.—It is to be obſerved that one condition eſſential to manumiſſion is that the ſlave be the *actual property* of the emancipator; and hence, if a perſon were to pronounce or grant an emancipation with reſpect to the ſlave of *another*, it is ineffectual, becauſe the prophet has declared "*there is no emancipation with reſpect* "*to a thing of which* MAN *is not the proprietor.*"

referred to a time when the emancipator was incompetent, are invalid.

IF a perſon ſay to his male or female ſlave—"you are *free*,"—or, "you are *Moattick* †,"—or, "you are *Atteek* ‡,"—or, "you "are conſecrated to GOD," and ſo forth,—or, "I have emancipated "you,"—or—"rendered you a *Moattick*," or—"conſecrated you to "GOD," and ſo forth,—in this caſe ſuch ſlave becomes immediately free, whether emancipation may have been the intention of the ſpeaker

If a maſter addreſs his ſlave by any term which denotes his

is a valid

tion;

* That is to ſay, he appears as a *defendant*, pleading *againſt* manumiſſion, and not as a ſuitor pleading *for* it.

† The participle from *Ittâk*, which may be rendered either *free* or *manumitted*.

‡ The noun of quality from *Ittâk*, which bears nearly the ſame ſenſe with *Moâttick*.

or

or not, becauſe theſe modes of addreſs expreſsly ſignify manumiſſion, as being received in that ſenſe both in law, and alſo in common uſe. And ſhould the perſon thus addreſſing his ſlave afterwards declare that he had only ſpoken in *jeſt*; or that, by the terms *free*, *Moáttick*, and ſo forth, he meant no more than to intimate that he [the ſlave] was releaſed from *work* or *labour*, his declaration is ſtill to be credited in a *religious* view *, ſince theſe expreſſions bear ſuch conſtructions; but yet it is not credited with the *Kâzee*, as thoſe conſtructions contradict the evident tenor of the emancipator's words.

If a man call to his ſlave, ſaying "O, *Moâttick!*"—or, "O, "freeman!" the ſlave is thereby emancipated, as theſe are vocatives pronounced in terms expreſsly ſignifying manumiſſion, and which require the condition of *freedom* to exiſt in the perſon to whom they are addreſſed: he is accordingly emancipated,—except where the proper name of the ſlave coincides with the addreſs, as if (for inſtance) the ſlave's name be *Hoor*, (that is, *free*,) and his maſter ſhould call or ſpeak to him by that term, for in this caſe the term is intended (not as the *deſcription of a quality*, but) merely as an *appellative*.—If, however, the ſlave have a name differing in *terms* but correſponding in *ſenſe*, as if his name were *Hoor*, [that is, in the *Arabic* language, *free*,] and the owner ſhould call to him in the *Perſian* language, ſaying, "O, *Azad!* [which has the ſame ſignification,] the learned hold that the ſlave is in this caſe emancipated; and ſo alſo, if a perſon ſhould call to his ſlave whoſe name is *Azad*, ſaying "O, *Hoor!*" becauſe, in both theſe caſes, the term by which the ſlave is addreſſed is not his *appellative*, and muſt therefore be regarded as *deſcriptive*, which requires that the ſlave be *free*.

if
ıe
emancipation

If a man ſay, either to his male or female ſlave "your *neck*, (or) "*back*, (or) *head*, is free," or to his female ſlave, "your *pudendum*

* That is to ſay, *with regard to his conſcience.*



"is

" is releaſed," ſuch male or female ſlave is thereby emancipated, becauſe by theſe expreſſions the whole perſon is neceſſarily implied, as has been already explained in the Book of Divorce.—And if a man apply emancipation to any diffuſive portion of the body, ſaying to his ſlave " an half of you is free,"—ſuch portion of the ſlave becomes emancipated accordingly.—In this, however, there is a difference of opinion which ſhall be hereafter explained.

to any *part* which figuratively implies the *whole perſon*; and ſo likewiſe (proportionably) if to any *diffuſive portion* of the perſon.

IF a man apply emancipation to any ſpecific part of the body which is not explained to imply the whole perſon, (ſuch as the *hand* or *foot*, for inſtance,) it will have no effect either totally or partially. —This is the opinion of our doctors.—*Shafei*, however, oppoſes it.—The arguments reſpecting it have been recited in the Book of Divorce.

IF a man ſay to his ſlave " I have no property in you," thereby intending manumiſſion, the ſlave is emancipated;—but he is *not* emancipated if manumiſſion be not the intention, becauſe this mode of ſpeaking does not only bear the ſenſe of a ſentence of emancipation, but it may alſo imply *ſale*, or any other mode of transfer of propriety, as if the maſter were to declare " that he poſſeſſed no property in ſuch " a ſlave, having *ſold* (or *beſtowed*) him;" and neither of theſe conſtructions can be aſcertained but by the intention.—And the ſame rule obtains in all implied expreſſions of emancipation, ſuch as " I have no " property in you,"—or, " you owe me no ſervice," and ſo forth; becauſe as thoſe expreſſions bear the ſenſe of *emancipation*, ſo do they likewiſe bear the conſtruction of *ſale* or *gift*, or emancipation by *ranſom*; and hence the intention is neceſſary, in order to aſcertain which ſenſe the expreſſion is to be conſtrued into.

emancipation

IF a man ſay to his female ſlave " *Atlikto-ke*," (that is, I have *parted with* you,) it is the ſame as if he had ſaid " I leave you to your " own way."—This is recorded as an opinion of *Aboo Yooſaf*, and is merely

merely a diſtinction made by him (on account of ſimilarity of ſound) between this term and *Tálikto-ke*, (that is, I have *divorced* you,) for if a maſter were to ſpeak thus to his bondmaid, ſhe does not in virtue thereof become emancipated, although ſuch were the intention of the ſpeaker.

but intention is of no effect in the uſe of expreſſions which do not

If a may ſay to his ſlave "I have no *ſovereignty* over you," thereby intending manumiſſion, yet the ſlave is not emancipated, becauſe the expreſſion here uſed implies *power to diſpoſe of abſolutely*, and there

tion.

caſes in which property may remain without a right to the exertion of ſuch a power, as in the inſtance of a *Mokátib*; contrary to the expreſſion before alluded to, "I have no authority over you," ſince dereliction of authority cannot be underſtood independant of relinquiſhment of property, as a maſter ſtill retains authority over his *Mokátib* for the purpoſe of exacting the fulfilment of his *Kitábat*, and accordingly a ſentence which expreſſes a dereliction of authority bears the ſenſe of *an emancipation.*

A maſter declaring his be *bit*

If a man ſay of his ſlave "this is my ſon," and perſevere in his aſſertion by afterwards avowing the truth of it, ſuch ſlave is emancipated. Our author, however, obſerves that this conſequence follows only where the reſpective ages of the maſter and the ſlave are ſuch as admit of the former being ſuppoſed the father of the latter. Where it is otherwiſe, the ſubject ſhall be exemplified in another place.—It is to be obſerved, that if the *parentage* of the ſlave ſhould not be a matter of public notoriety, this alſo is eſtabliſhed in his maſter, by virtue of his declaration, becauſe a right of claim exiſts in the maſter in virtue of the right of property, and the ſlave is in need of an eſtabliſhment of parentage;—and the parentage being eſtabliſhed in the maſter, the ſlave becomes free, becauſe the exiſtence of his deſcent, as from his maſter, is connected with the inſtant of his conception,

* The property in whom cannot be transferred either by *ſale* or *gift*.

and

and hence it appears that the maſter was the owner of his *own child*, which being directly contrary to law, the freedom of the latter becomes a neceſſary conſequence.—But if the parentage of the ſlave ſhould happen to be a matter of public notoriety, (that is to ſay, if his birth and deſcent be already known and aſcertained,) it cannot be eſtabliſhed in his owner; but the ſlave is nevertheleſs emancipated, as the expreſſion in queſtion muſt be received, if not in its *literal*, yet in its *figurative* ſenſe, leſt the words of the ſpeaker, who is ſuppoſed a rational perſon, ſhould be rendered nugatory.

If a man ſay of his ſlave "this is my *Mawla* *," the ſlave becomes liberated, although the maſter ſhould have no poſitive intention in this declaration; becauſe the term *Mawla*, notwithſtanding that it bears many meanings, ſuch as an *aſſiſtant*, a *nephew*, a *redeemer*, an

and ſo alſo, if he declare him to be his.

* With reſpect to ſlaves, the mutual relation exiſting between the *emancipated* and his *emancipator*. This word has a vaſt variety of ſenſes, and has long been the occaſion of much contention between the ſects of *Alee* and *Omar*. It is related that when *Mohammed* made his laſt pilgrimage to *Mecca*, he ſtopped at a place on the road called *Ghadeer*, and having there conſtructed a pulpit of the pannels of camels, and called together his companions to the number of 70,000, he then took *Alee* by the hand, and, mounting the pulpit, aſked the people whether he was not better than them?—and on their anſwering in the affirmative, he ſaid, "*then over ſuch as I am* MAWLA *ſo alſo is* ALEE; *whoever is his friend is mine, and whoever is his enemy is mine:*" and on his deſcending, the people ſhouted applauſe; "*and* OMAR (it is added) *was one of the firſt to congratulate* ALEE *on this acceſſion* "*of power.*"—The *Shiyas* [followers of *Alee*] adduce this ſtory as a convincing proof of the juſtneſs of *Alee*'s title to the ſucceſſion; whilſt, on the other hand, the *Soonis* [followers of *Omar*] maintain that, the word *Mawla* meaning *an aſſiſtant*, this ſpeech implied nothing more than that *Alee*, after the prophet's deceaſe, ſhould *aſſiſt* the *Muſſulmans* in the manner he [the prophet] had done; which, indeed, *without* this injunction, it was his duty to have done: but the *Shiyas* again maintain that whatever doubt, from the variety of meanings, may be attached to this word, the particular circumſtances of the caſe prove it beyond a queſtion: moreover, *Mohammed*, it is allowed, knew of his approaching death, as the pilgrimage he was then upon was undertaken on that account; to what end, therefore, could he have performed a ceremony of this kind, with ſuch circumſtances of formality, were it not to declare his *ſucceſſor?* and this opinion (they allege) is corroborated by the circumſtance of his death happening ſoon after, and without his having appointed a ſucceſſor.

*emancipator*, and alſo *a ſlave emancipated*, yet is here to be taken in the laſt ſenſe only, ſince a maſter does not commonly require any aid from his ſlave;—and the parentage of the ſlave is notorious,—which forbid its being taken in the *firſt* or *ſecond* ſenſe;—and the *third* is merely figurative, whereas words are legally to be conſtrued in their *literal* ſenſe; and the application of it to a ſlave forbids its being taken in its *fourth* ſenſe; wherefore it muſt neceſſarily be received in its *laſt* acceptation; and ſuch being the caſe, the term ſtands as an expreſs manumiſſion, which is accordingly eſtabliſhed, independant of intention. And the ſame rule holds if a maſter ſhould ſay of his female ſlave, this is my *Mawlat* *, on the grounds already ſtated.—If the man alſo who uſes this expreſſion were afterwards to ſay that his intention thereby was to expreſs *Mawla-Mawalát* †, or that (acknowledging the word to bear its *laſt* acceptation, as before recited) he was not *ſerious* in ſo expreſſing himſelf, however this may coincide with his own conſcience, yet it is not to be admitted with the magiſtrate, as it contradicts appearances.

or addreſs

If, however, a man ſhould uſe the term *Mawla* to his ſlave in the *vocative*, ſaying "O, my *Mawla!*" the ſlave is liberated; becauſe, as it muſt be received in its *laſt* ſenſe (for the reaſons before mentioned) it ſtands as an expreſs emancipation; and as vocatives in other inſtances are conſidered in the light of expreſs emancipation, where the ſpeaker, addreſſing his ſlave, ſays "O, *Hoor!*" or, "O, "*Atteek!*" and ſo forth, inducing the liberation of the ſlave, ſo alſo in the preſent caſe.—*Ziffer* maintains that the ſlave is not in this caſe rendered free but through the intention of the ſpeaker, becauſe it may ſometimes happen that this expreſſion is meant merely as a mark of , or *fond regard*, in which ſenſe it is frequently uſed, the ſame

* The feminine of *Mawla*.

† A perſon connected with another in general intereſts, by a mutual compact. It is a term uſed to expreſs any *peculiar intimacy* of connexion.

as

as "*my child!*" or, "*maſter!*" the uſe of which words from a maſter to his ſlave does not conſtitute emancipation unleſs by the intention of the ſpeaker.—Our doctors, on the other hand, allege that a word muſt be taken in its *literal* ſenſe in preference to any other; and an *emancipated perſon* is the literal ſenſe applicable upon the preſent occaſion, as has been already demonſtrated; and as it is capable of bearing its *literal* ſenſe on this occaſion, it muſt be ſo received: contrary to the terms *child*, *maſter*, and ſo forth, becauſe in theſe words no meaning is found peculiarly applicable to emancipation, ſuch phraſes being uſed merely as expreſſions of kindneſs and affection.

Addreſſing the ſlave, perſonally, as if he were a *ſon* or a *brother*, does not amount to

IF a man addreſs his ſlave, ſaying "O, my ſon!" or, "O, my [illegible] the ſlave is not liberated, becauſe the intention of a vocative expreſſion is merely to diſtinguiſh the perſon who is addreſſed by it: for although, where the ſpeaker addreſſes the ſlave by a deſcriptive term, in its ſenſe applicable from him to the perſon he addreſſes, it muſt be taken as fixing that deſcription upon the latter, (the ſpeaker appearing in his own mind to apply it to the perſon he thus addreſſes, the ſame as if he were to call to him by the term *freeman*,) and the ſlave accordingly becomes liberated, for the reaſons already aſſigned,—yet where a perſon calls to his ſlave by a term not at all applicable from him to the ſlave, the intention of the addreſs appears to be merely a *diſtinguiſhing appellative*, not fixing any *particular deſcription* upon the perſon called to, as that of *ſon* is not applicable, ſince the ſlave ſo addreſſed is the progeny of another perſon and not of the ſpeaker.—It is recorded in the *Rawâyet Shaz*, as an opinion of *Haneefa*, that the ſlave in the preſent caſe becomes liberated: but the authority of the *Zâhir-Rawâyet*, as before ſtated, is the moſt worthy of credit.

IF a man ſay to his ſlave, "O, ſon!" the ſlave is not emancipated, becauſe this ſimply expreſſes a truth; to wit, that *the ſlave is the ſon of his own father.*

to be the *ſon* of his maſter under cir-

If a perſon ſhould ſay of his ſlave "this is my ſon," where the ſlave could not poſſibly be conceived to be the ſon of the ſpeaker*, yet the ſlave (according to *Aboo Yooſaf*) is emancipated, independant of his maſter's intention.—The two diſciples maintain that the ſlave is not liberated, although ſuch be the intention; and *Shafei* coincides in this opinion; for they argue that the expreſſion, in the preſent caſe, is not at all applicable, and muſt be regarded as nugatory, in the ſame manner as if a man were to ſay to his ſlave "I emancipated you before I was born,"—or, "before *you* were born."—*Haneefa* argues, in ſupport of this opinion, that although the expreſſion in queſtion cannot be taken in its *literal* ſenſe, yet it may be taken in its *figurative* ſenſe, (viz. "*this "ſlave is free from the hour I firſt poſſeſſed him,*")—becauſe, ſuppoſing the ſlave were really the ſon of the maſter, his filial relation would occaſion freedom, that being the effect of it; and as it is allowable to intend the effect by a figurative mention of that which is its cauſe, ſo the expreſſion now under conſideration muſt be taken in its *figurative* ſenſe, in order that it be not rendered nugatory: contrary to the caſe of a man ſaying to his ſlave "I releaſed you before I was born,"—or, "before you were born,"—becauſe here no figurative ſenſe can be applied, as none can be conveyed or implied under ſuch a mode of expreſſion, and hence thoſe words are to be regarded as nugatory.

If a man ſhould ſay of his bondſman "this is my father,' of his female ſlave, "this is my mother," where ſuch perſon could not have been begotten or born of ſuch male or female ſlave †, there is, in this caſe, the ſame difference of opinion between *Haneefa*'s doctrine and that of the two diſciples, as is recorded in the preceding caſe.—And if a man ſhould ſay of his ſlave, being a boy, "this is my "grandfather," ſome lawyers have ſaid that here alſo the ſame dif-

rent.

* As if (for inſtance) the ſlave were *elder* than his maſter.

† As (for inſtance) the perſon ſo ſpeaking were *elder* than the ſlave of whom he ſpeaks.

ference

ference of opinion obtains: but other authorities aſſert that the ſlave in this inſtance does not ſtand liberated, according to all the doctors, becauſe this expreſſion is not the occaſion of freedom to a ſlave, but through the intermediation of the more immediate relative, namely, the *father*, who is not here mentioned, ſo that it cannot bear the conſtruction of *freedom* by *implication*: contrary to where a man ſays of his ſlave, "this is my *father*,"—or, "my *ſon*," becauſe theſe words occaſion freedom to the ſlave without including any other intermediate perſon.

A man declaring his ſlave to be

IF a man ſay of his ſlave "this is my brother," yet the ſlave is not emancipated, according to the *Zâhir Rawâyet*.—It is recorded, as an opinion of *Aboo Haneeſa*, that the ſlave is rendered free.—The reaſons upon which the *Zâhir Rawâyet* proceeds are the ſame here as in the preceding caſe; and the opinion of *Haneeſa* is founded upon what has been already mentioned in the caſe of a man ſaying to his "*O my ſon!*"—or, "*this is my ſon.*"

Expreſſions

IF a perſon ſay of his male ſlave "this is my *daughter*," ſome authorities ſay that the learned differ in opinion concerning the effect in this caſe: others, however, aſſert that all the doctors agree in opinion, that the ſlave is not emancipated, becauſe the perſon addreſſed is not of the ſex mentioned; and as the effect is connected with the thing mentioned, and that does not exiſt, it follows that the addreſs muſt be regarded as nugatory. The arguments in this point have been already detailed under the head of *Marriage*.

and ſo alſo, formulas of divorce applied to female ſlaves.

a man ſay to his female ſlave, "you are ſimply divorced,"—or, ely divorced,—or, "veil yourſelf*," by any of theſe manumiſſion, yet ſhe is not emancipated.—*Shafei* aſſerts that ſhe becomes free, where ſuch has been the ſpeaker's in-

* See Book of Divorce, Chap. II. Sect. VI.

tention.

tention.—The ſame difference of opinion obtains in all expreſſions of divorce uſed towards a ſlave, whether *expreſs* or *implied*, according to what is alleged upon this head by the followers of *Shafei*, whoſe argument herein is, that the ſpeaker intends a thing which the expreſſion he uſes bears a conſtruction of, becauſe between poſſeſſion by marriage and poſſeſſion by right [namely, *by bondage*] there is a reſemblance, as they both amount to *ſubſtantial* poſſeſſion; the latter is evidently ſo;—and the former is alſo ſuch in effect, and not of the claſs of *uſufructuary* poſſeſſions, (whence it is that *permanency* is one of its eſſential conditions, and that rendering it *temporary* annuls it,) for if it were merely an uſufructuary poſſeſſion, like hire, it would not be annulled by reſtricting its duration to any particular time; and the effect of a ſentence of divorce in the one caſe, or of manumiſſion in the other, is to deſtroy the right of the proprietor, (whence it is that the ſuſpenſion of it upon a condition is approved,)—but it does not go to *eſtabliſh* any thing, ſince if ſuch were the caſe ſuſpenſion would not be approved, becauſe the ſuſpenſion of an eſtabliſhment of poſſeſſion upon a condition (as in ſale, where a man ſays, "I will ſell "ſuch an article provided the pilgrims arrive,") is diſapproved.

Objection.—*Ittâk* is an *eſtabliſhment* of power, not a *diſſolution* of it, whence it is that its effects take place, ſuch as competency in authority and in evidence, and ſo forth; ſo that this does not reſemble *divorce*, which is purely of a deſtructive nature.

Reply.—*Ittâk* is a deſtruction of property; but the aforeſaid effects are eſtabliſhed by it for a reaſon which had previouſly exiſted, namely, the ſlave's being in an oppreſſed ſtate.—Now there being this reſemblance between divorce and manumiſſion, expreſſions of *emancipation* and *freedom* may be figuratively uſed for *divorce*, which accordingly takes place where ſuch is the intention, and ſo *vice verſa*.—Our doctors, on the other hand, argue that the perſon here mentioned (ſuppoſing the emancipation of the ſlave to have been his intention) has meant and intended a thing which the words he uſes do not bear the ſenſe of, becauſe the term *Ittâk*, in its literal ſenſe, means "endowing

with an ellipſis of the comparitive term "*like:*" but a ſlave is emancipated by his maſter ſaying to him "your head is a free head," becauſe his *freedom* is fully acknowledged by that phraſe, ſince from the *head* the whole perſon is neceſſarily underſtood.

## SECTION.

No perſon can be a ſlave to a relation within the prohibited degrees.

If a perſon become poſſeſſed of a ſlave who is his relation within the prohibited degrees *, ſuch ſlave by that act acquires his freedom. This is recorded as an ordinance of the prophet, and comprehends all kindred within the prohibited degrees, whether ſtanding within the *parental* connexion, ſuch as *fathers*, *mothers*, *ſons*, and *daughters*, or independant thereof, ſuch as *brothers*, and ſo forth.—*Shafei* reſtricts the operation of this rule to relations of the firſt claſs only.—His argument is that the eſtabliſhment of manumiſſion independant of the conſent of the proprietor is contrary to analogy; and as the *fraternal* and other connexions are not of equal weight or moment with the *paternal*, the caſe does not admit that the former ſhould be connected with the latter, either by analogy, or by arguments drawn from the ſacred writings,—whence it is that if a *Mokâtib* were to purchaſe, as a ſlave, his *brother* or *uncle*, ſuch relation does not become a *Mokâtib* in conformity to the condition of the purchaſer, but ſtill continues an *abſolute ſlave*; whereas, if a *Mokâtib* were to purchaſe his *father* or *child*, the perſon purchaſed is no longer a ſlave, but becomes a *Mokâtib* in conformity to the condition of the purchaſer, and is rendered *free* by the *Mokâtib* himſelf obtaining his freedom in conſequence of the fulfilment of his contract of *Kitâbat*.—The arguments of our doctors are

* See *Matrimony*, Chap. II.

twofold;

twofold;—FIRST, the ordinance recorded of the prophet, as already ſtated, which comprehends all degrees of kindred under the deſcription of *prohibited*; SECONDLY, the reaſon of a parent or child being rendered *free*, in the preſent caſe, is the affinity which occaſions prohibition, and a reſtriction to the *parental* degree of kindred is nugatory and inadmiſſible, becauſe the preſervation of any connexion which occaſions prohibition is enjoined as indiſpenſable, and to break it off is forbidden,—(whence it is that a man is required, if neceſſary, to furniſh ſubſiſtence to *every* relation within the prohibited degrees, and alſo, that marriage with them is forbidden,) and the ſame reaſon applies in degrees of kindred not *parental*, ſuch as the *brother* or *uncle*. It is to be obſerved that this rule extends to *infidels* within the *Muſſulman* territories, as well as to *Muſſulmans*, and alſo to *minors* and *lunatics*, the reaſon of prohibition above mentioned applying equally to all theſe deſcriptions.—And in reply to what *Shafeï* has advanced in ſupport of the doctrine of his ſect with reſpect to *Mokâtibs*, it is to be remarked that where a *Mokâtib* purchaſes, as a ſlave, his *brother*, or any other relation of the more remote degrees, (ſuch as his *uncle* or *aunt*,) the perſon purchaſed is not rendered a *Mokâtib*, becauſe the power of a *Mokâtib* over his property is not of a full or complete nature, ſo as to enable him to perform the act of emancipation; and the preſervation of a kindred connexion is incumbent and enjoined only where ſuch a power exiſts: but the caſe is otherwiſe where a *Mokatib* purchaſes, as his ſlave, his *parent* or *child*, who thereupon becomes alſo a *Mokâtib*; for the liberation of parents and children muſt be conſidered as one deſign of the contract of *Kitâbat*,—becauſe, as the intention of a ſlave, in entering into ſuch a contract, is (eventually) to procure his own *freedom*, ſo is it to procure that of his *parents* or *children* alſo, their bondage being as grievous and degrading to him as his own; and this being the caſe, the ſale of the parent or child of a *Mokâtib* is forbidden, and they become free on the payment of the ranſom, in order that all the ends of the contract or *Kitâbat* may be obtained.—*Aboo Haneefa* makes this rule extend to the *fraternal* as

well as to the *paternal* connexions of a *Mokátib*; and in this opinion the two diſciples alſo coincide; it does not however extend to the fraternal connexion of *foſter brother* or *foſter ſiſter*, becauſe they are prohibited, *not* from connexion of *blood*, but of *foſterage*.

pendant of the *deſign* of it,

If a maſter emancipate his ſlave, whatever the prediſpoſing cauſe urging him to that act may be, whether he do it from *religious* motives, or at the inſtigation of the devil, or in obſervance of any idolatrous ſuperſtition, the emancipation is equally legal and valid, as proceeding from an authorized perſon, (the *poſſeſſor*,) and affecting its proper object,

and of the ſtate of the emancipator.

The emancipation pronounced by a profligate or a drunkard is alſo legal for the ſame reaſon.

A reference of manumiſſion to a fu- , or tion of it upon a condition, are d, in the

If a perſon refer emancipation to the act of poſſeſſion, (as if he were to ſay to the ſlave of another, "if ever I become your maſter, "you are free,")—or, if he were to ſuſpend the emancipation of his own immediate ſlave upon a condition, ſaying "if you enter ſuch a "houſe, you are free," ſuch reference or ſuſpenſion are approved, as well as in *divorce*. The reference of emancipation to poſſeſſion is held to be illegal by *Shafeï*, as is particularly ſtated in the book of divorce: all the doctors, however, coincide in the validity of the ſuſpenſion of emancipation upon a condition expreſſed, becauſe *Ittâk* is held in law to be purely a *direliction* of a right, in which ſuſpenſion is of courſe admitted:—contrary to any act amounting to a *transfer* of a right, (as *ſale*, for inſtance,) the ſuſpenſion of which is illegal, as is explained in its proper place.

Slaves deſerting from a foreign ſer-

faith, i

If the ſlave of an infidel alien, becoming a convert to the faith, retire into the *Muſſulman* territory, he is free, becauſe when the ſlaves from the countries around deſerted their maſters, and came into and

embraced the doctrines of the prophet, he declared,—"*these are the* "*freed-men of* GOD;" and alſo, becauſe the ſlave, at the time he delivers himſelf up, is a *Muſſulman*, and bondage is not eſtabliſhed in a *Muſſulman* originally.

The fœtus of a pregnant female ſl.

IF a man emancipate his female ſlave, ſhe being pregnant, the *fœtus* becomes alſo emancipated, in conſequence of the manumiſſion of the mother, as it is connected with her in the ſame manner as one of her members:—but if the maſter were to emancipate the *fœtus* only, and not the *mother*, the former alone is free.—It is to be obſerved that the *manumiſſion* of a *fœtus* is approved, but not the *ſale* or *gift*, becauſe delivery is a condition of *gift*, and the power of delivery a condition of *ſale*, and neither of theſe can take effect until after the birth; but *delivery*, or *power* of delivery, are not eſſential conditions of *emancipation*, and therefore are not requiſite to validate it.

Emancipation of a fœ-

but the return is not due.

IF a perſon agree to emancipate the *fœtus* in the womb of his female ſlave for a compenſation, the *fœtus* is free, but the compenſation is not due, becauſe it is impoſſible that any compact ſhould be made binding upon an *embryo*, as no perſon has power over it until after the birth;—nor can it be made ſo upon the mother, becauſe the *embryo* is (with reſpect to *emancipation*) altogether diſtinct from *her*, and to ſtipulate a return for freedom, binding upon any but the *perſon liberated*, is contrary to law, as has been already ſhewn in treating of *Khoola*.—It is here neceſſary to obſerve that the exiſtence of pregnancy is not ſuppoſed at the period of emancipation, unleſs the delivery follow within the ſpace of ſix months after.

The child of a maſter, born of his female ſlave, is *free*.

THE child of a female ſlave, begotten by her maſter, is free, becauſe ſuch child derives its exiſtence from the maſter's ſeed, and is therefore free, radically, as it is a rule that that which is created from the ſeed of a free perſon is itſelf free. The ſeed of the female ſlave alſo

does not in any reſpect traverſe or oppoſe that of the maſter, ſince her ſeed is the property of her maſter, becauſe the mother's connexion with her child is more intimate than that of the father, in virtue of her right of *Hizânit* *; or, becauſe the huſband's ſeed is conſumed in that of the female ſlave, as her own ſeed remains with her in its proper and original place, whereas that of the huſband, proceeding from him, mixes with her's, and is conſequently loſt and expended in it.

OBJECTION.—Reſpect is paid to preference only where two things are oppoſed to each other; but here an oppoſition between the two ſeeds is not admitted.

REPLY.—An oppoſition appears in this caſe between the two ſeeds, inaſmuch as *freedom* oppoſes *bondage*.

OBJECTION.—It would appear that the child ſhould be free, as well as the child of a *Magroor* †, ſince the father, in the preſent caſe, does not will the bondage of his child.

REPLY.—The huſband, in the above caſe, certainly wills the bondage of his child, being previouſly aware of that conſequence; for when, knowing this, he agreed to marry the mother, his conſent thereto is eſtabliſhed: contrary to the caſe of a *Magroor*, who, acting under a deception, cannot be ſuppoſed to will the bondage of his child.

A child born of a free-woman is free, under all circumſtances.

THE child of a free woman is free, whether her huſband be a freeman or a ſlave, becauſe the mother's connexion with it is more intimate than that of the father, (for the reaſon already mentioned,) ſo that a child is a dependant of its mother in freedom, as well as in bondage, or in any other leſs abſolute deſcription of ſlavery, ſuch as *Kitâbat*, and ſo forth,—that is, if the mother be an abſolute ſlave, the

* See Book of Divorce, Chap. XIV.

† One acting under a deception.

child

child is ſo likewiſe, although the father (who is the huſband of the ſlave) be *free*,—or, if the mother be a *Modábbira*, the child is born in that ſtate, as a dependant on its mother,—and ſo of the reſt.—If, moreover, a man beſtow his *Am-Walid* in marriage upon any perſon, and ſhe produce a child, ſuch child ſtands in the predicament of an *Am-Walid*;—that is, it becomes free on the death of the owner of the mother, as well as the mother:—and in the ſame manner, if the mother be a *Mokâtiba*, the child is a *Mokâtib*, as being a dependant of the mother.

## CHAP. II.

### Of *Slaves* of whom a *Portion* or *Member* is emancipated.

A ſlave partially emancipated muſt work out the

If a maſter releaſe a portion of his ſlave, (his *half*, for inſtance,) the ſlave is in ſuch proportion *free*, and muſt work out the remainder of his value by *Siâyet*, or emancipatory labour *. This is the doctrine of *Haneeſa*.—The two diſciples maintain that the ſlave, in the preſent inſtance, becomes emancipated *in toto*.—This difference of opinion is founded in the different tenets of *Haneeſa* and the two diſciples reſpect-

* By *Siâyet* is meant *work* or *labour* of any kind. It is a principle in the *Muſſulman* law that no perſon can remain *partially* a ſlave, but that any circumſtance which in its nature eſtabliſhes the emancipation of *a part*, provides for, and neceſſarily induces, the eventual emancipation of *the whole*; and hence the rule that a ſlave partially emancipated works out the remainder of his value at an aſcertained rate, being in ſome meaſure in the ſtate of a *Mokâtib*: *Siâyet* is, therefore, rendered *emancipatory labour*; and by the word *labour*, throughout this book, *emancipatory* labour is to be underſtood.

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ing the nature of emancipation; the former holding that it is capable of diviſion, and therefore that whatever part or portion of a ſlave may be emancipated by his maſter, ſuch part or portion only is immediately affected thereby,—whereas, the two diſciples hold it to be altogether incapable of diviſion or partiality, (in which opinion *Shafi'i* alſo coincides,) and hence, that the application of manumiſſion to any particular part or portion of a ſlave ſtands as an application to the whole, and conſequently that the ſlave becomes emancipated *in toto*;—for they argue that the meaning of emancipation is *the eſtabliſhment of the quality of freedom*, and the quality of freedom is a power both *real* and *virtual*, and this is eſtabliſhed by the deſtruction of its oppoſite, namely, *bondage*, which is a virtual inability; now this power and inability not being capable of diviſion, it follows that *Ittlák* or manumiſſion, which is the eſtabliſhment of this power, is alſo incapable of diviſion, in the ſame manner as *divorce*, the *remiſſion of retaliation*, and the *eſtabliſhment of parentage*.—The argument of *Haneeſa* is, that manumiſſion means the eſtabliſhment of the quality of freedom by the deſtruction of propriety, or it means ſimply the deſtruction of propriety,—becauſe the propriety is the right of the maſter, and the bondage is a right of all *Muſſulmans*, or, in other words, a right of the LAW, ſince it is the penalty of infidelity, and the infliction of this penalty is a right of GOD; but the maſter has no power to deſtroy the right of *another*, (namely, *bondage*,) being merely entitled to deſtroy *his own* right, (that is, *his propriety*,) whence it is eſtabliſhed that manumiſſion is the deſtruction of propriety; now, as it is proved that manumiſſion is the deſtruction of propriety, and as propriety is capable of diviſion, it follows that manumiſſion is alſo capable of diviſion; but it is neceſſary that the ſlave ſhould labour, becauſe the propriety of the maſter with reſpect to *a part* of the ſlave is involved in the ſlave. It is to be obſerved that a ſlave upon whom labour is incumbent is held by *Haneeſa* to ſtand in the predicament of a *Mokátib*, becauſe the application of manumiſſion to any particular part or portion occaſions the ſlave's becoming his own maſter *in toto*, (according to the arguments of the two diſciples,)

and the continuance of the owner's propriety in *a part* (as drawn from the arguments of *Haneefa*) controverting this, the matter is thus ſettled, with a regard to the reaſoning on both ſides, by placing a ſlave who is *partially* emancipated in the predicament of a *Mokâtib*, who is his own maſter, as far as reſpects a power of action, or rights of ſeizin, but not in reſpect to *bondage*; and the labour he performs for the remainder of his freedom is a ſubſtitute for ranſom; it therefore belongs to the owner of the ſlave to require this labour of him, and alſo to emancipate him, if he pleaſes, ſince a *Mokâtib* is a proper ſubject of emancipation, as well as an abſolute ſlave:—but between the ſlave in queſtion and a *Mokâtib* there exiſts this difference,—that if the ſlave ſhould not be equal to the performance or fulfilment of his labour, he is not therefore liable to revert to his former ſtate, as an *abſolute ſlave*; whereas a *Mokâtib*, when unable to perform the ſtipulation of his *Kitabât*, reverts to his original ſtate of bondage, becauſe the emancipation of a part of a ſlave is a poſitive deſtruction of propriety in ſuch part, and therefore is irreverſible,—but *Kitabât* is a *contract* capable of diſſolution or annulment:—in ſhort, a ſlave of whom a part or portion is emancipated becomes placed in a middle ſtate,—that is, in a ſtate between that of an *abſolute ſlave*, and that of an *abſolute freeman*, nearly analogous to the ſtate of a *Mokâtib*, excepting only the difference above recited, as ſuch a middle ſtate is here conceivable: contrary to caſes of *divorce* or *remiſſion of retaliation*, which do not admit of any medium, and of which a *part*, therefore, ſtands as *the whole*.—*Haneefa* holds that *Iſteelad*, or *claim of offspring*, is alſo capable of diviſion, whence, if a man were to create his portion in a female copartnerſhip ſlave an *Am-Walid* *, provided ſuch ſlave be a *Modâbbira*, ſhe becomes *Am-Walid* in the part or portion ſo conſtituted only; but if ſhe be an *abſolute ſlave*, ſhe in this caſe becomes wholly *Am-Walid* to the partner conſtituting her ſuch in part, he becoming reſponſible for the other portion of her to his partner whoſe ſhare in her he has by that act de-

* By claiming or acknowledging a child born of her. See *Iſteelad*.

ſtroyed;

ſtroyed; and ſuch being the caſe, he obtains poſſeſſion of her *in toto* in conſequence of his taking upon him this reſponſibility; he accordingly becomes *ſole proprietor*, and ſhe is his *Am-Walid in toto*.

Manumiſſion by one partner induces his ſlave indirectly to the emancipatory labour to the other partner.

If a man emancipate his portion in a copartnerſhip ſlave, ſuch ſlave becomes free *in toto*,—(that is, has a claim to ultimate freedom:)—and if the emancipator be *rich*, his partner [in the ſlave] has three things in his option; he may, if he pleaſe, agree to the freedom of his portion in the ſlave without any compenſation,—or, he may require indemnification from his partner for the value of his ſhare in the ſlave,—or, he may require the ſlave to procure the freedom of his remaining portion by labour, as before ſtated; and if he chuſe the *ſecond* of theſe, he [the emancipator] has a claim upon the ſlave for the amount; and in this caſe the *Willa** reſts ſolely with the emancipator;—or, if the other partner prefer the *firſt* or the *third* mode abovementioned, the *Willa* reſts equally with both: but, if the emancipator be *poor*, his partner in the ſlave has two things in his option,—he may either agree to releaſe his portion in the ſlave, or he may require him to perform *labour*; —and in either caſe the *Willa* reſts equally with both partners.—This is according to *Haneeſa*.—The two diſciples ſay that if the emancipating partner be rich, the other partner has no right to any thing but a compenſation for the value of his ſhare; or, if the emancipator be *poor*, to require labour of the ſlave.—The foundation of this difference of opinion reſts upon two points;—*one*, that manumiſſion is diviſible, according to *Haneeſa*, and undiviſible, according to the two diſciples; —*another*, that the circumſtance of the emancipator being *rich* is not held by *Haneeſa* to oppoſe any objection to labour,—whereas the two diſciples hold the requiſition of labour by the partner to be in this

* *Willa* is a ſpecies of right to the property of another founded upon ſome act of aſſiſtance or generoſity previouſly exerciſed towards him. Thus the emancipator of a ſlave poſſeſſes a *Willa* with reſpect to his *freedman*, in virtue of which he inherits to his eſtate in the default of other heirs: and, according to ſome, the emancipator, in virtue of his *Willa*, has alſo a right to all the ſlave's effects of the period of *emancipation*. See Book XXXIII.

caſe

caſe inadmiſſible, on the authority of a tradition of the prophet, who ſaid (concerning a perſon emancipating his portion in a coparcenary ſlave) "*If he be* RICH, *he muſt indemnify his partner for the value of his portion in that ſlave,—but if* POOR, *the ſlave muſt work out his remaining portion of bondage by* LABOUR,"—which is a proof that *indemnification* is alone admiſſible in the *firſt* of the above caſes, and *labour* in the *ſecond*.—The argument of *Haneefa* is that, as the property of the ſecond partner's portion is involved in the ſlave, it belongs to him to require indemnification for the amount from the ſlave, (in the ſame manner as where a piece of cloth is blown, by the wind, into the vat of a dyer, and the cloth becomes coloured, in which caſe the proprietor of the cloth muſt pay the coſt of dying, whether he be rich or poor, becauſe of the loſs ſuſtained by the dyer, in ſo much of his colours expended,)—but a ſlave not being poſſeſſed of any property, he is to require labour of him in lieu thereof.—It is to be obſerved that the term *rich* *, mentioned in theſe caſes, implies no more than that the emancipator be poſſeſſed of property to ſuch an amount as may enable him to be reſponſible for the value of his partner's ſhare in the ſlave, becauſe thus much ſuffices to the ſatisfaction and convenience of both parties,—in fulfilling the deſign of the emancipator by eſtabliſhing the freedom of the ſlave, which is a virtuous and acceptable act,—and alſo, in ſecuring to the other partner his right, namely, the value of his ſhare in the ſlave.—When we conſider the different tenets of *Haneefa* and the two diſciples, as aforeſaid, the ground upon which the doctrine of the latter (according to their tenets, in the preſent caſe) may be accounted for is evident;—and the expoſition of the doctrine of *Haneefa* (according to his tenets) is that an *option of manumiſſion* appertains to the other partner, becauſe of his right in his ſhare ſtill remaining, as manumiſſion is (according to *Haneefa*) capable of diviſion,

* There are two deſcriptions of wealth in the language of the law; the firſt *Yiſâr Teyſeer*, which may be tranſlated *competency*; the ſecond *Yiſâr Ghannee*, or *opulence*; the former is the deſcription which is treated of in this place.

and *option of indemnification*, becauſe of the emancipator, in deſtroying *his own* ſhare, having deſtroyed that of his partner alſo, as it is no longer transferable by ſale or gift,—and *option of labour*, becauſe of his property in his ſhare being involved in the ſlave:—with reſpect to what is further advanced by him, that if the other partner chuſe indemnification for his ſhare, the emancipator has a claim upon the ſlave for the amount, it may be accounted for in two ways; FIRST, the emancipator, in conſequence of indemnifying his partner, ſtands as his ſubſtitute; and as it would have been lawful for the other partner to take the value of his portion in the ſlave by requiring labour of him, ſo in the ſame manner it belongs to the emancipator to exact of the ſlave whatever he may have given to his partner as an indemnification for his ſhare, ſince he now ſtands in his place; SECONDLY, the emancipator, by indemnifying his partner, becomes the owner of his portion in the ſlave; and thus ſtands in the predicament of a perſon who, being ſole proprietor of a ſlave, has emancipated a part or portion of him,—and hence he is at liberty either to emancipate the remaining portion, or to require labour of the ſlave for the value thereof.—The *Willa* here reſts ſolely with the emancipator, becauſe the ſlave has obtained his freedom entirely through him, ſince he, by indemnifying his partner, became ſole proprietor.—This is ſuppoſing the emancipator to be *rich*:—but if he be *poor*, the other partner may either emancipate his ſhare, (ſince his property in it ſtill remains,) or he may require labour of the ſlave; and in either caſe the *Willa* of his ſhare appertains to him, as in *both* the freedom of that ſhare proceeds him: and here the ſlave has no claim upon the emancipator on the ſcore of labour performed by him to the other proprietor, becauſe (as *Haneefa* argues) he has performed the labour for the obtaining of his freedom, or (as the two diſciples contend) becauſe it cannot be decreed to be a debt upon the emancipator, ſince he is poor:—contrary to a caſe where the pawner of a ſlave, being poor, emancipates the ſlave whom he has pledged,—for in that caſe the ſlave has a claim upon him for the labour which he in conſequence performs to the *pawnee*:—

this

this claim he has, according to *Haneefa*, becauſe he is thus obliged to labour for his value *after being emancipated*,—and, according to the two diſciples, becauſe the earnings of his labour, which he pays to the *pawnee*, is a debt due by the pawner, from whom the ſlave is therefore entitled to demand it. The opinion of *Shafei*, upon the caſe where the emancipator of his ſhare in the ſlave is *rich*, coincides with that of the two diſciples;—but where he is *poor*, *Shafei* contends that full authority ſtill remains with the other partner, with reſpect to the diſpoſal of his ſhare, either by *ſale*, *gift*, or otherwiſe, becauſe it is not reaſonable that he ſhould demand indemnification of the emancipator, who, being *poor*, is incompetent to anſwer it,—nor can he require labour of the *ſlave*, who has not committed any offence to juſtify the exaction of extraordinary labour from him, and has no will in the act of the emancipator, ſince the will or aſſent to an act cannot be conceived without a previous knowledge of that act, which is not ſuppoſed in this caſe, as the emancipator performs it independently of him; and it is not reaſonable that the ſlave ſhould become emancipated *in toto*, as this would be an injury to the partner;—from all which it follows that the right and authority of the ſecond partner over his portion of the ſlave remains unaffected, and ſtands the ſame as before. In reply to this reaſoning our doctors contend that the requiſition of labour is reaſonable, becauſe the propriety of ſuch a requiſition does not depend upon the commiſſion of an offence, but is founded (in the preſent inſtance) on the idea of the property of the ſecond partner's ſhare being involved in the ſlave, as has been already repeatedly ſtated; there is therefore no neceſſity that *power* (namely, the exiſtence of the *quality* and *privileges* of *freedom*) and *inability* (which is incompatible with that power) be united in one and the ſame perſon.

In caſe of counter-declarations of manumiſſion, by the partners in a ſlave, he is

IF each of two partners ſhould teſtify or declare that the other had emancipated his portion, in this caſe the ſlave muſt perform labour to each partner on account of his reſpective ſhare, according to *Haneefa*, whether the parties be *rich* or *poor*, (or if one of them be *rich* and the

emancipated, and muſt perform emancipartner.

other *poor*,) becauſe each partner aſſerts that the other has emancipated his ſhare, and hence (agreeably to the doctrine of *Haneefa*) the ſlave is as a *Mokâtib* in the conception of both, ſo that it is not lawful for either to make him an *abſolute ſlave*; the declaration of both therefore is to be credited; and as neither can make him an abſolute ſlave, each partner is at liberty to require his labour for the value of his ſhare, becauſe the right of requiring labour is eſtabliſhed in each indiſputably, whether his declaration may have been falſe or true; for the ſlave is either his *bondſman* in the former ſuppoſition, or his *Mokâtib* in the latter; each partner, therefore, is to require labour of the ſlave, whatever his circumſtances may be, whether *rich* or *poor*, becauſe the right of each is one of two things,—indemnification from the emancipator, or labour from the ſlave,—the competency of the emancipator to indemnify his partner not being regarded by *Haneefa* as any obſtruction to the requiſition of labour; and as, in the caſe here ſuppoſed, indemnification cannot juſtly be required by either partner of the other, (ſince each controverts the other's aſſertion,) nothing remains but that *labour* be required.—And here it is to be obſerved that the *Willa* of the ſlave reſts equally with both partners, as each reſpectively ſays "my partner's ſhare is emancipated by his manumiſſion, and the "*Willa* of it conſequently appertains to him, and my ſhare is eman-"cipated from me by labour, and conſequently the *Willa* of it appertains "to me."—The two diſciples allege that if both the partners be rich, labour is not due from the ſlave to either, becauſe each diſcharges him from this obligation, by advancing a claim for emancipation againſt the other, (ſince they hold that competency of wealth in the emancipator forbids labour;) but the claim is not eſtabliſhed on account of the negation of the reſpondent, whereas the diſcharge of the ſlave from labour is eſtabliſhed by the declaration of each reſpectively. But if both the partners be *poor*, the ſlave muſt in that caſe perform labour to each, becauſe each advances a claim for labour againſt the ſlave, whether they ſpeak truly or falſely, as the alleged emancipator is *poor*.—And if one of the partners be *rich*, and the other *poor*, the

ſlave

ſlave muſt perform labour to the former, becauſe he cannot be ſuppoſed in this caſe to ſue for *indemnification* from his partner, who being poor is incompetent to grant it; and hence nothing remains but that the rich partner require labour of the ſlave, from which he has not releaſed him by the nature of his teſtimony; but the ſlave does not owe any labour to the indigent partner, whoſe declaration muſt be interpreted into a claim of indemnification from his partner, ſince he is *rich*.—In all theſe caſes the *Willa* of the ſlave is undetermined, (according to the two diſciples,) becauſe each of the two owners relinquiſhes it to the other, who on his part rejects it, wherefore it remains ſuſpended until ſuch time as both agree in their teſtimony reſpecting the partner who firſt emancipated his portion.

Caſe of emancipation by two partners, reſpectively, ſuſpended upon two oppoſite conditions of uncertified occurrence, with to their joint ſlave.

IF one of two partners ſhould ſay to their joint ſlave—"if ſuch a "one enter *not* this houſe to-morrow, you are free," and the other partner ſhould at the ſame time ſay "if ſuch an one *ſhould* enter this "houſe to-morrow, you are free,"—and the morrow ſhould paſs without its being known whether ſuch perſon had entered the houſe or not, in this caſe the ſlave becomes emancipated in one half, and performs labour to each of his owners for the remaining half*.—This is the doctrine of *Haneefa*; and *Aboo Yooſaf* coincides with him, provided both the partners be *poor*; but he alleges that if one of theſe be *rich* and the other *poor*, the ſlave muſt perform labour to the *former* in the proportion of one quarter of his whole value; or, if *both* be *rich*, that the ſlave has not to perform any labour to either.—*Mohammed* ſays that where both partners are *poor*, the ſlave muſt perform labour to each for his *full value*, becauſe it remains unaſcertained which of the partners has forfeited his right to this advantage, as it is unknown with reſpect to whom it may have dropped; and a magiſtrate cannot paſs a decree upon a perſon unknown;—in the ſame manner as where a man, in a company, ſays to another, "there is ſuch a debt

* That is to ſay, in the proportion of a quarter to each reſpectively.

"due

" due to you from one of us," in which caſe the *Kâzee* would not decree any thing, on account of his not knowing upon whom to paſs the decree.—If, however, in the caſe under conſideration, one of the partners be *poor*, and the other *rich*, the ſlave muſt perform labour for *half* his value to the *latter*, becauſe the *rich* partner cannot be ſuppoſed to require indemnification from the *other*, who is *poor*, and conſequently nothing remains for him but to require labour of the ſlave on account of his ſhare, which the ſlave muſt accordingly perform:—the poor partner, on the other hand, diſcharges the ſlave from any obligation of labour, and nothing remains for him but to require indemnification from his *rich* partner, which is impoſſible, on account of the doubt reſpecting the actual emancipator:—but if both partners be *rich*, the ſlave will not have to perform labour to either in any proportion whatever,—agreeably to the opinion of *Aboo Yooſaf*, as already ſtated. The argument of *Haneefa* is that one half of labour drops to a certainty, ſince it is clear that *one* or *other* of the two partners muſt be the emancipator; and with this proof of the extinction of *one half* of labour, how can the *Kâzee* decree the performance of labour *in toto*?—and the difficulty ariſing from ignorance, in the preſent caſe, is obviated by thus determining *one half* of labour to be done away with reſpect to *both* partners, indiſcriminately,—in the ſame manner as where a man emancipates *one* of *two* ſlaves indiſcriminately, or *one* of *two* ſpecifically, and afterwards forgets and dies, without (in the firſt inſtance) diſcriminating the emancipated ſlave,—or (in the ſecond) recollecting him, in either of which caſes, the ſlave who is actually emancipated being unknown, the half of both would be releaſed, and each would perform labour [to their heirs] for the remaining half. This argument of *Haneefa* is alſo uſed by *Aboo Yooſaf*, *where both the owners of the ſlave are* POOR:—but, where both the owners are *rich*, the two diſciples argue that, as the emancipator of that half of the ſlave liberated by the occurrence of the condition, whoever of them it be, is *rich*, no labour can be required of the ſlave by the other partner, (the competency of the emancipating partner's circumſtances forbidding

forbidding labour, according to the two diſciples,) and conſequently, nothing remains but to require *indemnification*, the right to which drops on account of ignorance of the proper *claimant* and *claimee*.—The argument of *Aboo Yooſaf*, in a caſe where one of the two partners is *poor* and the other *rich*, is that half the labour has dropped to a certainty, ſince ſome *one* of the two partners is undoubtedly the *emancipator*; and conſequently the other half of labour remains between both partners;—and as he who is poor does not require labour, it follows that the ſlave has to perform it to his *rich* maſter only, in the proportion of one fourth of his whole value.

Caſe of the ſame nature with reſpect to *two different* ſlaves.

IF two men make a vow, one of them ſaying—"if *Zeyd* enter "this houſe to-morrow, then ſuch an one, my ſlave, is free," and the other, "if *Zeyd* enter *not* this houſe to-morrow, then ſuch an "one, my ſlave, is free,"—and it happen that the ſlave of each ſo mentioned is diſtinct, and not common property, and the morrow ſhould paſs, and it be not known whether *Zeyd* had entered the houſe or not, neither of theſe ſlaves can become emancipated, becauſe the perſon *againſt* whom emancipation is to be decreed, (namely, one of the two owners,) and alſo the one *in whoſe favour* emancipation is to be decreed, (namely, one of the two ſlaves,) are both *unknown*, and this being a *great degree* of ignorance, no decree from the *Kázee* can poſſibly paſs reſpecting it:—contrary to the caſe before recited, becauſe as *that* ſuppoſes *one* ſlave held jointly between *two* owners, the *object* of the decree, (the ſlave,) and alſo the *ſubject* of it, (the emancipation of one half of the ſlave,) are known, and nothing, in fact, is unknown, excepting merely *who the emancipated half belongs to*,—and there, conſequently, the manumiſſion of the ſlave is decreed, becauſe the matter *known* exceeds that which is *unknown*.

A ſlave jointly [illegible] emancipated.

IF two men make a joint purchaſe of a ſlave who is the *ſon* of one of the parties, the ſlave becomes emancipated with reſpect to his *father*'s half, and the father does not owe any indemnification to his

with reſpect to his father's moiety.

partner for his ſhare, whether he (the partner) may have been aware of the circumſtance of the ſlave being the other's ſon or not. In the ſame manner, if theſe two men ſhould obtain joint poſſeſſion of the ſlave by *inheritance*, (as where a woman purchaſes the ſon of her huſband, and afterwards dies, leaving heirs her *huſband* and *brother*,) the ſlave becomes emancipated with reſpect to his father's portion in him, and the wife's brother has no claim upon the father for indemnification, but it remains at his option either freely to releaſe his portion, or to require labour of the ſlave for the ſame.—This is according to *Haneefa*.—The two diſciples allege that in the former caſe the father muſt indemnify his partner for half the value of the ſlave, if he be *rich*, or, if not, that the ſlave muſt perform labour in ſuch proportion to his father's partner.—The ſame difference of opinion ſubſiſts where theſe two perſons become poſſeſſed of ſuch ſlave, either by deed of gift, by alms-gift, or by bequeſt,—and alſo where two men purchaſe a joint ſlave, one of them having previouſly made a vow, ſaying "if I buy the half of ſuch a ſlave he is free."—The argument of the two diſciples is that the *father*, or the *vower*, has rendered void his partner's right to his portion in the ſlave, by his emancipation, as the act of purchaſe eventually leads to that iſſue; and alſo poſſeſſion obtained through *bequeſt*, *gift*, or *alms*;—thus it is the ſame as where one of two partners emancipates his portion in a copartnerſhip ſlave, in which caſe, if he be *rich*, he indemnifies his partner for his ſhare, or, if *poor*, the ſlave works out his freedom by labour:—and ſo likewiſe in the preſent caſe.—The argument of *Haneefa* is that the father's partner appears to be aſſenting to the father's deſtroying his ſhare, from the circumſtances of the caſe, as having become his partner under a *cauſe* of manumiſſion, (namely, the purchaſe of the ſlave,) which is connected therewith; and as this evinces that he is aſſenting to the deſtruction of his own ſhare, he cannot require any indemnification from the father of the ſlave, ſince that is *Zimán-al-Ifsád*, or *indemnification for damage*, the right to which is overthrown by the circumſtance of the claimant aſſenting to the damage, in the ſame manner as where a

perſon

perſon expreſsly deſires his partner in a ſlave to emancipate his ſhare,—in which caſe he has no claim to indemnification.—It is to be obſerved that what has been recited, in regard to the *father* of the ſlave not being reſponſible to his partner in either caſe, (that is to ſay, in the caſe where the partner is acquainted with the circumſtance of the ſlave being the ſon of his partner,—and alſo, in the caſe where he is not acquainted with that circumſtance,) is recorded as an opinion of *Haneefa*, and reſts upon the eſtabliſhment of an *argument* of conſent, and not upon the eſtabliſhment of the conſent *itſelf*; on the ſame principle as if a perſon ſhould ſay to another "eat this food," without knowing that the food is his own property, and the perſon accordingly eats the food, and this food afterwards proves to have been the actual property of the ſpeaker, in which caſe this perſon is not reſponſible to the other for having eaten his victuals, becauſe the deſire expreſſed by the proprietor is an argument of his conſent, although it be probable that if he had known the victuals to be his own property he would not have conſented.—It is further to be obſerved that what is now advanced proceeds upon a ſuppoſition of the father being the *firſt* purchaſer, or of the purchaſe being made by the father and the ſtranger *jointly*:—but where the *ſtranger* has firſt purchaſed an half, and the *father* afterwards purchaſes the other half, then, provided the father be rich, the ſtranger has it in his option to demand indemnification, as he does not in this caſe appear to be conſenting to the father's deſtroying his ſhare,—or to require labour of the ſlave for half his value, as his property therein is involved in the ſlave.—This is the doctrine of *Haneefa*, deduced from his tenet, that *the wealth of the emancipator does not forbid the exaction of labour*; in this again he differs from the two diſciples, who (proceeding upon the contrary tenet) contend that the other partner has no liberty of option in this caſe, and can only require indemnification of the father for the value of his half.

A man purchaſing a ſhare in his ſon does not owe indemnification.

If a man purchaſe a ſhare in his *ſon* of a perſon who was before the ſole proprietor, and he [the purchaſer] be *rich*, yet (according to *Haneefa*) he does not owe any indemnification to the ſeller, as the latter appears to be conſenting to the eventual extinction of his own property, by the act of *ſale*. The two diſciples (agreeably to their tenet, as before ſtated,) maintain that if the father be rich he muſt give indemnification.

Caſe of a ſlave held in a *tripartite* partnerſhip.

If one of three partners in a ſlave ſhould conſtitute his ſhare in ſuch ſlave *Modábbir*, (that is, free at his deceaſe*,) he being *rich*, and another partner ſhould afterwards emancipate his ſhare, he alſo being *rich*, and the third partner remain ſilent,—and the *firſt* and *third* partners be deſirous of taking indemnification, in this caſe the third partner is to take indemnification to the amount of the third of the ſlave's full value from the *firſt* partner,—*not* from the *emancipator*,—and the *firſt* partner to take indemnification from the *emancipating* partner, to the amount of a third of the value of the ſlave, eſtimating the ſame at the rate of a *Modábbir* only, and not at the full value, as taken by the *third* partner. This is the doctrine of *Haneefa*. The two diſciples allege that the ſlave devolves ſolely to the partner who had previouſly conſtituted his ſhare *Modábbir*, and who muſt indemnify his two partners for two thirds of the eſtimated value of the ſlave, whether he be *rich* or *poor*.—The foundation of this difference of opinion is, that *Haneefa* holds *Tadbeer* (or the act of conſtituting a ſlave *Modábbir*) to be *diviſible*, as well as *manumiſſion*: contrary to the tenet of the two diſciples, who holding manumiſſion to be indiviſible, maintain that *Tadbeer*, as being a *branch* of manumiſſion, is ſo likewiſe:—now, on the principle of *Haneefa*, ſince *Tadbeer* admits of partition with reſpect to the ſubject of it, it follows that the *tadbeer* granted by the firſt partner affects *his* ſhare in the ſlave only; but as it depreciates the value of both the other partners' ſhares, each has it in

* See *Tadbeer*.

his

his choice either to conſtitute his ſhare *Modábbir*,—or to emancipate or make *Mokátib* the ſame,—or to take indemnification,—or to require labour of the ſlave,—or (laſtly) to leave the matter as it is,—becauſe each ſtill remains in *full poſſeſſion* of his reſpective ſhare, but the *value* has become *depreciated* to each by the act of the firſt partner ſince in conſequence thereof their ſhares are no longer transferable by *ſale* or *gift*: and if one of them remain ſilent, and the other adopt the option of *emancipating* his ſhare, his right to emancipate is eſtabliſhed, but no further option (to take *indemnification*, and ſo forth,) remains to him: and where ſuch is the caſe, the partner who continues ſilent has *two* ſeparate grounds of claim to indemnification for the value of his ſhare,—namely, the act of *Tadbeer* on the part of *one* partner, as depreciating the value of his portion in the ſlave, and the act of *emancipation* on the part of the *other* partner, as eventually deſtructive of his right: but he is to require ſuch indemnification of the *former*, rather than of the *latter*, ſo as that it may be in the manner of *reciprocal indemnification*, by the indemnifier becoming, in conſequence thereof, poſſeſſed of the thing for which he gives the recompence; becauſe *reciprocity* is the primary idea in indemnification for property; and, in the preſent caſe, reſpect may be had to this primary idea, by the *ſilent* partner taking the indemnification from the partner who had conſtituted his ſhare *Modábbir*, and who in conſequence becomes poſſeſſed of the ſilent partner's ſhare, as the ſlave at the time of his third being conſtituted *Modábbir* is capable of going from the poſſeſſion of *one* perſon into that of *another*, ſince he is as yet an *abſolute ſlave*; whereas if, on the contrary, the *ſilent* partner were to take the indemnification from the *emancipating* partner, attention to the primary idea is defeated, as the ſlave, at the time of the emancipating partner liberating his ſhare, is a *Modábbir*, ſince his act of *emancipation* was poſterior to the others act of *Tadbeer*, which rendered the ſlave incapable of devolving from the poſſeſſion of one perſon into that of another: the *ſilent* partner muſt therefore take indemnification from the perſon who had conſtituted his ſhare *Modábbir*,—after which it belongs

to the *latter* to take indemnification of the *emancipating* partner, to the amount of one third of the value of the ſlave as a *Modâbbir*, becauſe the emancipator has injured his ſhare at a time when it is *Modâbbir*; he is therefore to take the *Modabbir*-value of one third, and not the *full* value, which devolved to him from the ſilent partner in conſequence of his indemnifying him.—The *Willa* of the ſlave is in this caſe divided between the *Tadbeer* partner and the *emancipating* partner, in the proportion of two thirds to the *former*, and one third to the *latter*, according to the proportions which they retain in the ſlave at the period of his final emancipation.—What has been advanced on this occaſion is according to the tenets of *Haneefa:* but according to the tenets of the two diſciples, (with whom *Tadbeer* is held to be *indiviſible*,) the ſlave becomes *Modâbbir in toto* to the *firſt* (or *Tadbeer*) partner, who muſt indemnify the other two for their reſpective ſhares, whether he be rich or poor, as this indemnification is a *Zimân Timmâl-look*, or *recompence for an aſſumption of property*, which is not varied by the circumſtance of *wealth* or *poverty*;—as where a man makes *Am-Walid* a partnerſhip ſlave, in which caſe he is bound to indemnify his partner for his *ſhare* in her, although he be *poor:* contrary to a caſe where a man emancipates his ſhare in a *partnerſhip* ſlave, as he is here bound to indemnify his partner for his ſhare, on the condition only of his being *rich*, becauſe the indemnification in that caſe (according to the tenets of the two diſciples) ſtands as a *Zimân Jandyat*, or *recompence for an offence:* and the *Willa* of the ſlave reſts wholly with the *Tadbeer* partner, as (arguing from the deciſion of the two diſciples) is evident.

Caſe of a

If a female ſlave be held in partnerſhip by two maſters, and one of theſe ſhould declare the ſaid ſlave to be an *Am-Walid* to his partner, and the partner deny this, the female ſlave (who had uſed to perform daily ſervice to each maſter alternately) remains for the future liberated from any ſervice to either maſter every ſecond day, on which ſhe is free to work for her own ſubſiſtence, performing ſervice to her *deny-*

*ing* maſter every *intervening* day; but ſhe does not owe *emancipatory* labour to the denying partner *.—This is the doctrine of *Hayeefa*.—The two diſciples maintain that it belongs to the denying perſon, in this caſe, to require labour of her, if ſo diſpoſed; and having performed this, ſhe becomes *entirely free*;—but nothing whatever remains due from the ſlave to the partner who made the declaration as aforeſaid.—The argument of the two diſciples is that, upon the denying partner not confirming the declaration of the affirming partner, the aſſertion of the latter reverts to himſelf,—that is, it is the ſame as if he himſelf had made his ſhare in the ſlave *Am-Walid*,—in the ſame manner as where the buyer, after purchaſing a ſlave, declares that "the ſeller had releaſed ſuch ſlave previous to the purchaſe," and the ſeller denies this, in which caſe the purchaſer's declaration produces the ſame effect as if he had himſelf emancipated the ſlave. And it being thus the ſame as if the *declaring* partner had himſelf conſtituted his portion in the ſlave *Am-Walid*, the right of the other partner to the uſe of her is annihilated, becauſe, as it would not have been lawful for the denying partner to require any ſervice from her, (ſuppoſing the affirming partner to have actually made her his *Am-Walid* †,) ſo it is likewiſe unlawful where he makes her his *Am-Walid* by *conſtruction*: he is, however, at liberty to require labour of her, on account of the value of his ſhare in her, as this ſtill virtually remains his property, under a prohibition of the uſe;—ſhe therefore is emancipated, in con-

* That is to ſay, ſhe is releaſed from all ſervice to the *affirming* maſter, but continues attached in ſervice to the *denying* maſter, and performs ſervice to him every other day, in the ſame manner as before the *affirming* partner's declaration; and does not (in the manner of a ſlave *partially emancipated*) become free by the performance of *emancipatory labour*, which is a ſervice of another nature, and which the denying maſter is not at liberty to require of her, becauſe the other partner's declaration does not amount to a *partial emancipation*, but is a virtual transfer of his property in the ſlave to the denying partner, who is therefore to pay him a conſideration for the ſame, as appears a little farther on.

† It is a principle in the *Muſſulman* law, that where a female ſlave is held in copartnerſhip, and proves pregnant, and one of the partners declares himſelf to be the father of the *fœtus*, ſhe then becomes unlawful to the other partners, and an *Am-Walid* to the declarer, who indemnifies them in the value of their ſhares.

ſequence

ſequence of labour, in the ſame manner as the *Am-Walid* of a *Chriſtian* when ſhe embraces the faith.—The argument of *Aboo Haneeſa* is that, if the *affirming* partner ſpeak *truly*, the whole ſervice of the female ſlave is the right of the *denying* partner,—and if he ſpeak *falſely*, yet the *denying* partner is ſtill entitled to the *half* of ſuch ſervice, which is his undoubted right; whereas the *affirming* partner is not entitled to either *ſervice* or *labour*, as he has by his own words relinquiſhed all ſuch claim, in avowing the ſlave to be the *Am-Walid* of another perſon: but he is to receive an indemnification from the denying partner for the value of his ſhare in her.—With reſpect to what the two diſciples have advanced, it may be replied that a declaration which goes to conſtitute a female ſlave *Am-Walid*, comprehends a declaration of *lineage* or *genealogy*, which cannot be repelled by the mere repulſion of the perſon concerning whom the declaration is made,—wherefore the caſe does not admit of the *affirmer* being accounted the ſame as if he had actually himſelf conſtituted the ſlave *Am-Walid*.

The emancipator of a ſhare in a partnerſhip *Am-Walid* does not owe any indemnification to his partner.

If an *Am-Walid* become held in partnerſhip between two maſters, by both laying claim to a child born of her at the ſame time, and one of them, being *rich*, emancipate her, he does not owe any indemnification for the other partner's ſhare, according to *Haneeſa*. The two diſciples ſay that he muſt indemnify his partner for half her value.—The occaſion of this difference of opinion is that the property in an *Am-Walid* is held, by *Haneeſa*, not to be a proper ſubject of valuation, whereas the two diſciples maintain that *it is* ſo.—The two diſciples argue that an *Am-Walid* is capable of producing advantage in various ways to the poſſeſſor, by *carnal connexion*, by *hire*, or by *houſehold ſervice*; and this is an argument of valuation; and valuation does not drop in conſequence of her becoming *unſaleable*, any more than in the caſe of a *Modábbir*, who ſtill continues a ſubject of valuation, although the *ſale* of ſuch an one be *forbidden*;—moreover, the *Am-Walid* of a *Chriſtian*, upon becoming a convert to the faith, owes her maſter emancipatory labour, which is the criterion of valuation in

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an *Am-Walid*.—It is to be remarked that the value of an *Am-Walid* is eſtimated at the rate of *one third* of her *full* value as a *ſlave*, (according to what the learned have obſerved upon this ſubject,) becauſe, in conſequence of a female ſlave becoming an *Am-Walid*, the ſingle advantage of *uſufruct* only remains; but *two* advantages are *forbidden* and *periſh*; FIRST, *ſale*;—SECONDLY, the performance of labour after her maſter's deceaſe, either to his heirs, or for the diſcharge of his debts: contrary to the caſe of a *Modábbir*, the value of whom is *two thirds* of his eſtimated value as a *ſlave*; becauſe *one* advantage only is loſt by his becoming *Modábbir*, (namely, the power of diſpoſing of him by *ſale*;) but two ſtill remain, (namely, *perſonal ſervice*, and the performance of labour to the maſter's heirs after his deceaſe.)—The argument of *Haneefa* is that a thing is ſuppoſed to bear a value from the circumſtance of its being kept in cuſtody with a view to the acquiſition of wealth; but an *Am-Walid* is held in cuſtody, *not* with a view to *the acquiſition of wealth*, but for the ſake of *her offspring*, to which the acquiſition of wealth is only a *ſecondary* conſideration; whence it is that an *Am-Walid* cannot be called upon, after her owner's deceaſe, to perform labour either to his creditors or to his heirs:—contrary to the caſe of a *Modábbir*, who muſt perform labour both to the *heirs* and to the *creditors* of his deceaſed maſter.—The reaſon of this is that the *cauſe* of freedom, with reſpect to the *Am-Walid*, already exiſts, namely, the participation of blood eſtabliſhed through the means of her offspring, (as was already demonſtrated, in treating of *Hoormat Mooſáhirat*, under the head of *Marriage*;) but as the *effect* of this cauſe of *freedom* cannot *immediately* appear, with reſpect to the diſſolution of her bondage, from the neceſſity of preſerving the uſe of her to her owner, it immediately takes effect ſo far as to render her incapable of being conſidered as *a ſubject of valuation*:—with a *Modábbir*, on the contrary, the cauſe of freedom is eſtabliſhed upon the death of his maſter;—and hence appears an evident diſtinction between the caſe of a *Modábbir* and that of an *Am-Walid*.—The prohibition, with reſpect to the transfer of property in a *Modábbir* by ſale or otherwiſe, ariſes

from

from the intention of his owner *that he ſhould become free upon his deceaſe*, which could not be, if, after being made a *Modâbbir*, he were transferred to another maſter.—Labour is made due from the *Am-Walid* of a *Chriſtian* (upon her embracing the faith) with a view to the removal of injury from both; and labour ſtands as the fulfilment of *Kitâbat*, the obligation of which does not depend upon valuation in the ſubject of it, as it is due in return for that which is not property, namely, *freedom*.

## CHAP. III.

## Of the *Emancipation* of *One* of *ſeveral Slaves*.

Caſe of emancipation of *one* of *three* ſlaves undefined.

Of three ſlaves, if two come into the preſence of their maſter, he being ſole owner of the three, and the maſter ſay to thoſe two "*one* "of you is *free*," and one of theſe ſlaves ſhould after that depart from his maſter's preſence, and the *third* come in, who had before been abſent, and the maſter ſhould again repeat his words, ſaying "one of "you is *free*," and the maſter ſhould afterwards happen to die, without explaining which of his ſlaves he meant to be emancipated by the foregoing ſentences,—in this caſe, the ſlave who was twice addreſſed, as above, becomes emancipated in *three fourths*, and each of the others in *one half*, according to *Haneeſa* and *Aboo Yooſaf*.—*Imâm Mohammed* coincides in this doctrine, as far as reſpects the two ſlaves who were preſent at the firſt declaration; but maintains that the *third* ſlave is emancipated in *one fourth* only.—The argument, with reſpect to the two ſlaves firſt addreſſed is, that the firſt addreſs of the maſter equally relates

relates to both of them, ſo as to occaſion the emancipation of each in one half, which accordingly takes place in conſequence of that addreſs; and again, of him who remains in the maſter's preſence *a fourth* becomes emancipated, by virtue of his *ſecond* declaration, as this declaration is divided equally between the two to whom it is ſpoken;—but this ſlave is already entitled to freedom in one half in conſequence of the *firſt* declaration, and the other half remains *unliberated*, and he claims the emancipation of *one half* in conſequence of the *ſecond* addreſs; but this claim with reſpect to the *half* extends to *both* halves of the ſlave, and therefore the portion of it which reaches the *firſt* half goes for nothing,—but the portion which reaches the other half (unoccupied by emancipation) ſtill remains, ſo that another fourth is liberated in conſequence of the maſter's ſecond declaration; and thus *three fourths* are liberated:—moreover, if the maſter, in his ſecond addreſs, intended it to apply to the ſlave who continued in his preſence, and *not* to the *other*, who afterwards comes before him, the other half of that ſlave would ſtand emancipated; but if the maſter intended it to apply to the other ſlave, who laſt came before him, the other half of the *ſtationary* ſlave (who continued in his preſence) would not be emancipated; the half of emancipation is therefore divided: conſequently, *one fourth* of him becomes emancipated, in virtue of the *ſecond* addreſs; and as *an half* has been already emancipated, in conſequence of the *firſt* addreſs, it follows that three fourths are emancipated in all: and of the ſlave comprehended in the ſecond addreſs *one half* only is emancipated. *Mohammed* ſays (with reſpect to the *firſt* ſlave) that the ſecond addreſs affects equally, and is, in its conſequence, *divided* between him and the *ſtationary* ſlave; and as the latter is emancipated by it in *one fourth* only, it follows that the *third* ſlave is ſo likewiſe. But the two *Elders* ſay that as the ſecond addreſs comprehends both ſlaves, and conſequently requires that it be equally divided between them, it follows that the half of each ſhould thence become emancipated: but a *fourth* of the ſtationary ſlave remains unliberated, becauſe he is already entitled to freedom with reſpect to *one half*, in

virtue of the maſter's *firſt* declaration, (as already ſtated;) whereas the *third* ſlave had, as yet, obtained no ſuch right, and of courſe becomes releaſed in *one half*.—Obſerve, that if the maſter ſhould emancipate his ſlaves in the manner here recited, *upon his deathbed*, and die poſſeſſed of no other effects excepting thoſe three ſlaves, then *one third* of the three is to be diſtributed among them, agreeable to the principles already laid down;—that is, the whole number of lots (or *equal portions* of *manumiſſion*) is to be added together; and this (according to the deciſion of *Haneefa* and *Aboo Yooſaf*) amounts to *ſeven*, becauſe the bondage of each ſlave muſt be divided into *four portions*, on account of the *three fourths*, (it having been ſaid that the ſtationary ſlave ſtands emancipated in *three fourths*, and each of the others in *two fourths*;) hence the whole amounts to ſeven *lots*, or *equal portions*:—now manumiſſion granted upon a deathbed is a ſpecies of *bequeſt*,—and *bequeſt* holds good only to the amount of *one third* of the property of the teſtator;—hence it is neceſſary, in the preſent inſtance, that the portions of the *heirs* ſhould be computed at *twice* the amount of the portions of *manumiſſion*; the bondage of each ſlave, therefore, is divided into *ſeven* portions, and conſequently the whole property makes *twenty-one* portions; hence the *ſtationary* ſlave remains emancipated in *three* portions out of *ſeven*, and for the remaining *four* he muſt perform labour to the heirs;—and of each of the others *two ſeventhſ* is emancipated, and each muſt perform labour for the *five* remaining *ſeventhſ*. Upon due examination it will appear that by this computation *one third* will go to the *ſlaves*, and *two thirds* to the *heirs*, without injury to the eſſential rights of either.—But if this computation be made according to the deciſion of *Imám Mohammed*, the bondage of each ſlave muſt be divided into *ſix* equal portions; becauſe (according to *him*) there is releaſed, in the *third* ſlave, only *one* portion, namely, *a fourth*, which, with *two fourths* releaſed of *one*, and *three fourths* of *another*, makes in all *ſix fourths*; and theſe multiplied by *three* (the number of ſlaves) give *eighteen equal parts*, ſix of which remain emancipated; thus—of the *ſtationary* ſlave *three* portions become releaſed, and he muſt

perform labour for the remaining three;—of him who had ſtood along with him, during the maſter's firſt addreſs, *two* portions are releaſed, and he muſt perform labour for the remaining four portions;—and of the *third* ſlave one portion is liberated, and he muſt perform labour for the remaining *five* portions.

Caſe of ſlaves ſold.

IF a maſter ſhould ſay to his two ſlaves "*one* of you is free," and he afterwards *ſell* one of thoſe two, or if one of them *die*, or the maſter conſtitute one of them a *Modábbir*, the remaining ſlave then becomes *free*;—and if the maſter ſhould explain, ſaying "my intention "regarded *the other*," ſtill his declaration is not to be credited, becauſe, as a *declaration* of manumiſſion is *manumiſſion* in *one* ſhape, it is a condition [of credibility] that the object of ſuch declaration be, at the time of making it, a proper ſubject of manumiſſion in *every* reſpect;—now the ſlave who is ſold remains no longer a ſubject of manumiſſion to the *ſeller*; and he who dies does not remain a ſubject of manumiſſion in *any* ſhape; neither is a *Modabbir* a ſubject of *complete* manumiſſion, as he is conſtituted a claimant to that privilege on the event of his maſter's death;—the remaing ſlave is therefore to be conſidered as the perſon upon whom the maſter's declaration takes effect: moreover, from his ſelling *one* of the ſlaves, it is apparent that the ſole intention of the maſter, with reſpect to *him*, was *the acquiſition of profit*,—or, from his conſtituting one of them a *Modábbir*, it is evident that his ſole intention, with reſpect to *him*, is that *he ſhall remain in his poſſeſſion, to enjoy the uſe of him, until his death*; and as either of theſe circumſtances is repugnant to *manumiſſion*, (to the granting of which the maſter has bound himſelf by his declaration,) it is to be conſidered as applying to the remaining ſlave by conſtruction.—And in the ſame manner, if a maſter ſhould ſay to two of his female ſlaves "*one* of "you is *free*," and he afterwards make one of them an *Am-Walid*, then the other female ſlave becomes emancipated, for the reaſons above ſtated.—It is to be obſerved that what is now advanced—"and "ſhould afterwards *ſell* one of theſe two,"—is *general*; that is to ſay,

a *valid* ſale and an *invalid* ſale, a ſale *with* ſeizin and a ſale *without* ſeizin, a ſale *with* a condition of option, and a ſale *without* a condition of option,—are all alike, as the arguments adduced equally apply to all theſe caſes.—It is further recorded, as an opinion of *Aboo Yooſaf*, that the expoſure of the ſlave for ſale falls under the ſame rule as *actual ſale*; and alſo, that the diſpoſal of him by *free gift* or *alms* (with *delivery* and *ſeizin*) is the ſame as by *ſale*;—all thoſe affording proof that the declaration of the maſter was intended to effect the freedom of the *other* ſlave, as much as the *actual ſale*.

Caſe of indefinite emancipation of *one* of *two* female ſlaves.

If a man, addreſſing himſelf to his two *female* ſlaves, ſhould ſay "*one* of you is *free*," and afterwards have carnal connexion with one of them, yet the other is not emancipated, according to *Haneefa*.—The two diſciples hold that the other thereupon ſtands emancipated, becauſe the act of coition is not lawful but in a *property*; and *one* of the *two* is *free*:—now the commiſſion of the act with *one* of them evinces that the maſter ſtill conſiders *her* as his property; and hence it is manifeſt that the *other* is emancipated: and decrees paſs accordingly. *Haneefa* argues that the maſter's right of property in the ſlave with whom he has carnal connexion ſtill remains, ſince he emancipated a ſlave *undefined*, whereas ſhe is *ſpecified*, and the carnal uſe of her is lawful to him, ſo that his connexion with her does not afford any proof of manumiſſion taking place; on which ground it is that *Haneefa* holds the carnal uſe of both to be lawful to the maſter.—The foundation of this is, that the manumiſſion of *one* of *two* ſlaves does not take place until definition be obtained, whence it reſembles *Ittâk* ſuſpended upon a condition, (as *this*, when pronounced in behalf of a ſlave *undefined*, remains ſuſpended upon *definition*,) and conſequently, until ſuch definition takes place, the maſter is at liberty to have carnal connexion with both his female ſlaves. But decrees are not paſſed upon this principle.

If

Case of manumission of a female slave conditional upon her bearing a *son*.

IF a man say to his female slave "if the first child you bring forth "be a *son*, you are *free*," and she afterwards brings forth twins, a *boy* and a *girl*, and it be not known which of them was first born, in this case the mother and the daughter become emancipated in *one half* each; but the *son* is not freed at all; because there are two circumstances by which the mother and daughter are liable to be respectively affected;—under *one* they become emancipated *in toto*, and under the *other* they remain *in toto* in bondage;—in other words, they would *both* become free, supposing the *boy* to have been born first, (the *mother*, by the occurrence of the condition, and the *daughter*, as a dependant of her mother, who is free on the instant of the boy's birth,) and neither of them would be in any respect emancipated, supposing the daughter to have been first born, for in this case the condition of manumission would not exist; the *half* of the mother and daughter is therefore emancipated, and they are respectively to perform labour for the remaining *half*; but the son, not being in any respect liberated, continues a slave. If the mother should make a declaration (during the daughter's nonage) pleading that the *son* was born first, and the master deny this, his assertion, delivered upon oath, must be credited, because he denies the occurrence of the *condition* of manumission, and if a defendant swear, and the plaintiff be destitute of *proof*, his plea is defeated: but if the master *refuse* to make oath, the mother and daughter become emancipated, because, if the mother were to claim her *daughter*'s freedom only, her claim would be credited, as her *daughter*'s advantage only appears to be consulted; and the master's refusal to swear is to be taken as an acknowledgment of the freedom both of *mother* and *daughter*, whence they are both emancipated. But if the daughter become an *adult* without advancing any claim on her own behalf, and the case, in every other respect, be the same as before stated, then the *mother alone* stands emancipated by the master's refusal to swear, and not the *daughter*; because the claim of a mother for the freedom of an adult daughter is not admitted with respect to such daughter; and the effect of a refusal on the part of a defendant to swear, depends

upon the validity of the claim advanced againſt him; the refuſal of the maſter, therefore, in the preſent caſe, in no reſpect affects the *daughter*.—If, on the other hand, the adult daughter were to plead, in her own behalf, that "her mother had been firſt delivered of a *ſon*," and the mother remain ſilent, in this caſe the emancipation of the *daughter alone* is eſtabliſhed by the maſter's refuſal to ſwear, and not that of the *mother*, as her claim in behalf of her mother is *invalid*, and upon its *validity* depends the effect of the maſter refuſing to ſwear, as before obſerved.

Evidence concerning an indiſcriminate manumiſſion of male ſlaves not admiſſible,

If two *witneſſes* bear teſtimony concerning a perſon, "that he has "emancipated one of two male ſlaves," ſuch teſtimony is void, (according to *Haneefa*,) unleſs it relate to a *bequeſt**:—contrary to evidence in *divorce*, for if two witneſſes were to bear teſtimony that ſuch a man had divorced *one* of *two* wives, this teſtimony is admiſſible, and the huſband may be compelled to ſpecify which of his wives he had divorced.—This laſt is univerſally admitted; and the two diſciples maintain that the caſe of manumiſſion is ſubject to the ſame rule.—The origin of this difference of opinion between our doctors, is that *Haneefa* holds evidence to the emancipation of a *male* ſlave to be inadmiſſible, without a claim being entered by the ſlave himſelf;—whereas the two diſciples hold that it is admiſſible, independant of ſuch claim, in the ſame manner as evidence to the divorce of a wife, or the manumiſſion of a *female* ſlave, which is admitted without any claim being advanced,—as is univerſally known and allowed.—Now the claim of a *male* ſlave being held, by *Haneefa*, to be eſſential to the admiſſion of evidence to his emancipation, and this eſſential condition not exiſting in the caſe here treated of, (ſince no claim can proceed from an *unknown* perſon,) it follows (according to his tenet) that the evidence of witneſſes thereto cannot be admitted:—with the two diſciples, on the contrary, the claim of a male ſlave not being held eſſential to the admiſſion of evidence to his emancipation, it follows (according to their tenet) that the teſtimony of the witneſſes, in the caſe in queſtion,

* That is, *to a ſentence of emancipation pronounced upon a deathbed.*

the

is to be admitted, although no claim be advanced by the ſlave. It is to be conſidered, that in the caſe of *divorce* the nonexiſtence of a claim is in no reſpect prejudicial to the teſtimony of witneſſes, as *claim* is not a *condition* in that caſe.

IF two witneſſes bear teſtimony concerning a perſon that he has emancipated *one* of *two* female ſlaves, their teſtimony is not admitted, by *Haneefa*, although *claim* be not a condition of the admiſſion of evidence reſpecting the emancipation of female ſlaves; for the reaſon why claim is not a condition, is that the manumiſſion of a *female* ſlave comprehends the prohibition of her perſon, and on this account reſembles divorce; but here the manumiſſion is *indefinite*; and *indefinite* manumiſſion does not occaſion prohibition of the perſon, (in the opinion of *Haneefa*,) as was already ſtated; wherefore the teſtimony in this caſe ſtands the ſame as that given reſpecting the emancipation of *one* of *two* male ſlaves.

ALL that has been here advanced relates to evidence reſpecting the manumiſſion of one of two ſlaves by their maſter whilſt *in health*;—but where it relates to a manumiſſion of this deſcription *upon a deathbed*,—or, where two witneſſes teſtify that a maſter had conſtituted *one* of *two* ſlaves a *Modábbir*, (whether in *ſickneſs* or in *health*,) their teſtimony is valid, according to a favourable conſtruction of the law, whether it be given during the illneſs of the maſter, or after his death. The reaſons for a favourable conſtruction of the law on this occaſion are twofold;—FIRST, *Tadbeer* is a ſpecies of *bequeſt*, under whatever circumſtances it may be granted;—and, in the ſame manner, manumiſſion is a ſpecies of *bequeſt*, when granted *upon a deathbed*; and the claimant in a cauſe reſpecting a bequeſt is the *teſtator**, who is known, and a repreſentative of whom exiſts in the perſon of his *heir* or *execu-*

unleſs it relate to a *deathbed* manumiſſion.

* All claims of this nature are made, not in the name of the *legatee* or the *executor*, but of the *teſtator himſelf*, who is ſtill ſuppoſed by the law to exiſt in his *repreſentatives*.

*tor*;

;—SECONDLY, after the death of the maſter the manumiſſion pronounced by him with reſpect to *one* of *two* ſlaves unſpecified, is partaken of by *both*, and hence *each* becomes a ſpecific claimant in his own behalf.

Caſe of *poſt-obit* evidence to an indiſ-

granted during *health*.

IF, after the death of a perſon poſſeſſed of ſlaves, two witneſſes bear teſtimony that he, [the deceaſed,] whilſt he was in health, had ſaid to two of his ſlaves "one of you is emancipated!" there is in this caſe a difference of opinion:—ſome maintain that their teſtimony is not to be admitted, as the manumiſſion now under conſideration does not fall under the deſcription of *bequeſt*,—whilſt others contend that their teſtimony is to be admitted, as the manumiſſion aforeſaid, after the death of the pronouncer, extends equally to both ſlaves, and hence each becomes a ſpecific claimant in his own behalf.

## CHAP. IV.

## Of *Manumiſſion* by *Hilf*, or *Vow*.

Definition of *Hilf*.

BY *Hilf* is underſtood a *condition* and a *penalty*;—as if a man were to ſay "if I enter the houſe of ſuch a perſon, ſuch an one my ſlave is "free."—This is alſo termed *Yameen* *.

The effect of a manumiſ-

IF a man ſay "whenever I enter ſuch an houſe, then whatever

* See articles *Yameen* and *Eimân*.

"ſlave

" ſlave may *on that day* be in my poſſeſſion is *free*," and it ſhould happen that the perſon thus declaring is not, at the period of ſpeaking, poſſeſſed of a ſingle ſlave, but afterwards purchaſe one, and after that enter the beforementioned houſe, this ſlave becomes free, becauſe the intention of the ſpeaker in the words " *on that day*," applies to the day on which he ſhould enter the ſaid houſe, on which day the ſaid ſlave is in his poſſeſſion; and this is the condition. On this account, therefore, *any* ſlave who might be in his poſſeſſion, at the time of his ſpeaking as above, is free, provided ſuch ſlave ſhould be ſtill remaining in his poſſeſſion at the time when the event upon which manumiſſion was ſuſpended takes place. But if the perſon ſhould not introduce the words " *on that day*" in his ſpeech, but ſhould ſay " whenever I " enter ſuch a houſe, my ſlave or ſlaves are free," in ſuch caſe any ſlave whom he may have purchaſed after ſuch declaration is not emancipated, becauſe the ſpeech, as here expreſſed, is confined in its effect to the ſlave or ſlaves in the poſſeſſion of the ſpeaker at the period of his declaration, and whoſe emancipation is ſuſpended upon the circumſtance of his entering the houſe; they only therefore are liberated upon that event taking place,—*provided they ſtill continue in the ſpeaker's poſſeſſion*;—and the ſentence does not extend to any who may have been purchaſed *poſterior* to the time of ſpeaking.

If a man ſhould declare " whatever ſlave of mine is a *male*, the " ſame is free," and he ſhould, at the time of ſpeaking, be poſſeſſed of a pregnant female ſlave, who is afterwards delivered of a male child, yet this male child is *not* free.—This conſequence evidently follows, where the female ſlave does not bring forth her male child within leſs than ſix months after the maſter's declaration, becauſe the words above recited point only to ſuch ſlaves as may be then in the ſpeaker's poſſeſſion at the time of his ſpeaking; and it is probable that the pregnancy of the female ſlave has not, at that period, taken place, becauſe here the ſmalleſt term of pregnancy is *poſterior* to the declaration:—and the rule is the ſame where the female ſlave brings forth a

ſon within *leſs* than ſix months after the declaration, becauſe the term "*ſlave*" applies to one who is a *ſubjected* ſlave, and an embryo is not a *ſubjected* ſlave, as it is a ſlave merely as a dependancy of the father. A *fœtus*, moreover, ſtands as a member of the mother, and the term *ſlave* applies to the *whole perſon*, and not to a *member* of it, and hence it is that the owner of a female ſlave cannot ſeparately diſpoſe of the *fœtus* or *embryo* with which ſhe may be pregnant. Our author obſerves that the uſe of reſtricting the term *ſlaves* particularly to thoſe of a *male* deſcription, is that if a man were to ſpeak *without* ſuch reſtriction, ſaying "every one of my ſlaves is free," his words would extend to his *female* ſlaves alſo, and conſequently to the children with which they may be pregnant.

If a perſon ſay "every ſlave of which I am poſſeſſed ſhall become "free *to-morrow*,"—or, "every ſlave of mine ſhall become releaſed "*the day after to-morrow*,"—and it ſhould happen that, at the time of this declaration, he is poſſeſſed of *one ſlave only*, and he in the interim purchaſe *another*, and the day mentioned arrive, the ſlave of whom he was poſſeſſed at the period of ſpeaking is emancipated, but not the other whom he had purchaſed in the interim, becauſe the above ſentence does not apply to any except the *former*.

Vow of manumiſſion referred to the deceaſe of the vower.

If a perſon ſhould ſay "every ſlave of whom I am poſſeſſed, (or, "*every one of my ſlaves*) ſhall become free at my death," and it ſhould happen that, at the time of ſo ſpeaking, he is poſſeſſed of *one* ſlave only, and he afterwards purchaſe another,—the *firſt* ſlave is a *Modâbbir*, but not the *ſecond**; but in the event of the owner's *death*, both ſlaves become emancipated from the third of his property. *Aboo Yooſaf* has delivered an opinion in the *Nawâdir* that the firſt ſlave is a *Modâbbir*, but not the *ſecond* in any reſpect †: and the ſame difference of

* The difference between the two is that the *former* is no longer transferable by ſale or otherwiſe, but the *latter* remains ſo transferable until the owner's deceaſe.

† That is to ſay, the ſecond ſlave is neither conſtituted a *Modâbbir* at the time of purchaſe, nor does he (like a *Modâbbir*) become free upon the maſter's deceaſe,

opinion ſubſiſts, where the maſter ſays "every ſlave of mine, when I "die, is free."—The argument of *Aboo Yooſaf* is that the ſentences here recited relate ſolely to *the time preſent*, for which reaſon the ſlave of whom the maſter became poſſeſſed poſterior to his declaration is in no reſpect affected by it; wherefore this ſlave is not emancipated; and conſequently the *firſt* ſlave is a *Modâbbir*, but not the *ſecond*.—The argument of *Haneeſa* and *Mohammed* is that the words here recited are *a declaration of manumiſſion*, and alſo *a bequeſt*, (whence it is that the manumiſſion of a *Modâbbir* takes place from the third of the property of the deceaſed;)—now, in *bequeſt*, reſpect is had to *two periods*, namely, the *actual time* of bequeſt, and alſo *that which intervenes*, from the date of the bequeſt to the teſtator's deceaſe; (whence it is that in a bequeſt the property acquired by the teſtator after the date of the will is alſo included,—and, in the ſame manner, any child born after the date is included in a will in favour of the children of a particular perſon:)—in ſhort, theſe ſentences may be conſidered in two points of view; firſt, as a declaration of manumiſſion; ſecondly, as a bequeſt:—taking them in the *firſt* ſenſe, they apply to the ſlave who is in the perſon's poſſeſſion at the time of ſpeaking, who is conſequently a *Modâbbir*, and therefore cannot be lawfully diſpoſed of by *ſale* or *otherwiſe*; and taking them in the *ſecond* acceptation, they apply alſo to the ſlave ſubſequently purchaſed, but under the condition that he be remaining in the proprietor's poſſeſſion at the time of his deceaſe.—The foundation of this is, that ſuppoſing the maſter had ſaid, upon his deathbed, "every one of my ſlaves is free," if, before his deceaſe, he were to ſell one whom he had purchaſed ſubſequent to ſo ſaying, the ſale is lawful; but it would be otherwiſe if he were to ſay "every "one of my ſlaves is free *the day after to-morrow*," and afterwards purchaſe a ſlave, for the ſlave does not, on the *morrow*, become emancipated, as he is not included in the aforeſaid ſentence, ſince this is not in any view a *bequeſt*, but merely *a ſentence of emancipation*.

## CHAP. V.

### Of *Manumiſſion* for a *Compenſation*.

A maſter propoſing to releaſe his ſlave for a certain ſum, occaſions emancipation upon the inſtant of the ſlave's aſſent.

If a man ſay to his ſlave "you are free for four thouſand *Dirms*," the ſlave is free immediately upon conſenting to the propoſal, and before the payment of the ſum mentioned,—becauſe the propoſal of the maſter and conſent of the ſlave is a compact of exchange of property for that which is not property, ſince the ſlave cannot be ſaid to become poſſeſſed of himſelf by it; and, in *exchange*, it is neceſſary that its *effect* (which in the preſent inſtance is *freedom*) be eſtabliſhed upon the ſlave's conſenting to the return,—as in a caſe of *ſale*, where the property of the thing bought is eſtabliſhed in the purchaſer upon his conſenting thereto.—If, therefore, the ſlave conſent, he is *free*, and the compenſation is a debt upon his perſon; and this is a regular debt, whence bail may be taken for it: contrary to the caſe of a ſtipulated *Kitábat*, or ranſom, which not being conſidered as a regular debt on the part of the *Mokátib*, is not bailable, according to what is mentioned on that head in the book of *Bail*.

A ſlave may be emancipated in return for property, and extends to all deſcriptions of property, whether *caſh*, *houſehold goods*, or *cattle*,—and manumiſſion in lieu of any of theſe is approved, although the article be unſpecified, becauſe the manumiſſion of a ſlave in return for property, is an exchange of *property* for that which is *not* property, in the ſame manner as *marriage*, or *divorce for a compenſation*, or *compoſition for blood wilfully ſhed*, in all which the mention of the animal ſuffices, without identical ſpecification. Manumiſſion is

alſo

alſo in the ſame manner approved in lieu of all articles of weight or meaſurement of capacity, provided the *kind* be made known, as *wheat*, for inſtance, by a man ſaying to his ſlave "I will emancipate you for "an hundred buſhels of *wheat*,"—where the mention of the *grain* is approved, although its *quality*, whether *good* or *bad*, be unknown, becauſe ignorance of the *quality* is comparatively of ſmall importance.

If the ſuſpend the freedom of his ſlave upon the payment of a ſum of money, the ſlave is rendered a *Mazoon* upon the inſtant, and

IF a perſon ſuſpend the manumiſſion of a ſlave upon the payment of *money*, by ſaying to him "if you pay me one thouſand *Dirms*, you are *free*," the ſlave forthwith becomes a *Mazoon*, and is *free* upon producing to his maſter the above ſum; but he is not a *Mokátib*. His freedom is an evident conſequence of his payment of the ſum mentioned, as the maſter has ſuſpended it upon that circumſtance; and he becomes a *Mazoon*, becauſe the maſter, by the tenor of his declaration, excites him to the acquiſition of property, by the demanding of property from him, which implies that having acquired it by induſtry, he is to pay it to him, and *not* that he is to procure it by *begging* for that purpoſe. The ſlave is therefore a *Mazoon*, becauſe the maſter's demanding property of him argues his being ſo. And if the ſlave which the ſhould offer, or make a tender of, the ſum mentioned to his maſter, the magiſtrate may compel him to accept of it, and the ſlave becomes to free.—The reaſon for compelling the maſter to accept of the money is that he is conſidered to be virtually ſeized of it, where the ſlave lays it before him, and leaves it, without giving any obſtruction to his taking it; and by the *compulſion* here mentioned is meant *impriſonment*, to wit, that *he muſt either accept the money, or be impriſoned by the magiſtrate*.—*Ziffer* ſays that the maſter cannot be compelled to take the money; and this is conformable to analogy, becauſe the maſter's declaration amounts to a *Yameen*, or *conditional vow*, ſince he has expreſsly ſuſpended freedom upon the condition there mentioned, whence it is that it does not depend upon the ſlave's conſent, and is not conceived liable to annulment: now no compulſion is admitted reſpecting

ſpecting the completion of the condition of a vow, as the claim of any perſon (depending upon that) is not eſtabliſhed until the condition ſhall have taken place: contrary to contracts of *Kitábat*, as thoſe are contracts of *exchange*, in which the return is due, whence it is that the maſter of a ſlave may be compelled to accept of the return of *Kitábat*, (that is, of *the ranſom.*)—The argument of our doctors is that the maſter's declaration is a ſuſpenſion of emancipation in reſpect to his *words*, and an exchange in reſpect to his *deſign*; for he has ſuſpened emancipation upon the payment of a ſum, ſolely with a view to induce the ſlave to pay it to him, in order that he [the ſlave] may be free, and that he [the maſter] may thence obtain property, as in a contract of *Kitábat*;—and hence it is that where a man ſays to his wife "you are divorced if you pay me one thouſand *Dirms*," theſe thouſand are the return for divorce, and conſequently, when the woman pays them to him, a divorce irreverſible takes place upon her, and ſhe becomes completely repudiated.—In ſhort, the maſter's declaration is in this caſe a ſuſpenſion of *emancipation* with reſpect to his *words*, and an *exchange* with reſpect to his *deſign*; we therefore conſider it as a ſuſpenſion in its *commencement*, both as this form accords with practice, and alſo becauſe ſuch an interpretation of it guards the maſter againſt an inconvenience, ſince, conſidering it in the light of a ſuſpenſion, it remains in the maſter's power to diſpoſe of the ſlave by ſale or otherwiſe, until ſuch time as the money is paid; and the *ſlave* is not the proprietor of his own acquiſitions, but the *maſter*; and his freedom does not extend to a child born to him *before* he makes payment of the money: and we conſider it as an exchange in its *completion*, (that is, when the ſlave pays the money,) in order to guard the ſlave againſt an inconvenience; for when conſidered as an exchange in its *completion*, the maſter may be compelled to accept of the money upon the ſlave offering it to him.—And in the ſame manner, if the ſlave ſhould produce and make a tender of *a part* only of the ſum mentioned, the maſter may be conſtrained to accept of it, but the ſlave is free ſo long as he does not pay the whole ſum, becauſe the condition

condition of emancipation is not fulfilled by the payment of a *part* only; and hence, if the maſter were to remit a part of the ſum mentioned, and the ſlave to pay the remainder, yet he does not become free, as the condition is not fulfilled.—If, moreover, the ſlave pay his maſter the ſum mentioned, which he had acquired *previous* to the ſaid ſuſpenſion, he is *free*, as the condition is in that caſe fulfilled; but yet the maſter ſtill has a claim upon him for that ſum, becauſe the money thus given is already the maſter's right; but if the ſlave pay his maſter the ſaid ſum, having acquired it *ſubſequent* to the ſuſpenſion, the maſter in this caſe has no further claim upon him, as he is empowered, from his maſter, to pay him the money out of his acquiſitions made ſubſequent to ſuſpenſion.—It is to be obſerved, however, that as the ſuſpenſion is a *Takhyeer*, or *propoſal of option*, it is reſtricted to the aſſembly or company in which it was ſpoken, where, if the ſlave pay the money, he becomes *free*, but if not, after the riſing of the aſſembly, it is of no effect.—But if the maſter were to ſay to his ſlave "*when-ever* you pay me one thouſand *Dirms*, you are *free*," this ſuſpenſion is not reſtricted to that particular place or company, the term '*ever*" being general in its application.

Case of a pro. to the maſter's death.

If a man ſay to his ſlave "you are free, *upon my death*, for one thouſand *Dirms*," and the ſlave agree *after the death* of his maſter, this his conſent is approved, becauſe the maſter had referred the declaration of freedom to the period immediately ſucceeding his death, and hence it is the ſame as if he had ſaid to his ſlave "you are free *to-morrow* for one thouſand *Dirms*,"—in which caſe the ſlave's conſent, declared on the morrow, would be valid, and ſo on this occaſion likewiſe.—This, however, is contrary to a caſe where a maſter ſays to his ſlave "you are a *Modábbir* for a thouſand *Dirms*," becauſe there conſent is requiſite upon the ſpot, as that is a propoſal of *Tadbeer*; but the ſum mentioned is not *immediately* due, becauſe the *Modábbir* remains in bondage in the interim.—The learned have remarked that the ſlave to whom his maſter ſays "you are free upon my death, for

"one

"one thouſand *Dirms*," is not emancipated if he ſhould poſtpone his acceptance of the maſter's propoſal until after his death, becauſe upon that event he falls into the poſſeſſion of the *heirs*, and hence cannot be liberated ſo long as thoſe refuſe to emancipate him, a *dead* perſon not being competent to grant manumiſſion; and this is approved.

Caſe of a propoſal of freedom for a

If a man liberate his ſlave for a ſervice of four years, by ſaying "you are free if you perform ſervice to me for the ſpace of four years," ſlave aſſent, he becomes free immediately upon ſignifying the ſame; and ſhould the maſter, or the ſlave, at that time happen to *die*, there remains due from the ſlave, or from his effects, to the maſter, or to his heirs, (as the caſe may be,) the amount of the eſtimated price or value of ſuch ſlave, in the ſame manner as if he had been a *Maxoon*, licenced to trade, and poſſeſſed of property therein acquired.—This is the doctrine of *Haneefa* and *Aboo Yooſaf*.—*Imâm Mohammed* ſays that the value of four years ſervice only is incumbent upon the ſlave; for the reaſon of the ſlave becoming emancipated is that the maſter has made ſervice for a certain ſpace of time the return for liberty to the ſlave, whoſe emancipation is therefore ſuſpended on his conſent; and this conſent is in effect given:—the ſlave therefore becomes liberated on the inſtant of expreſſing his conſent; and the four years ſervice are incumbent upon him, as ſervice is capable of being a return, and conſequently it is the ſame as if a maſter were to emancipate his ſlave for a return of a thouſand *Dirms*, and the ſlave to conſent, and the maſter to die upon the inſtant.—The difference of opinion between the two *Elders* and *Imâm Mohammed* on the point, whether the full value of the *ſlave*, or the value of *four years of his ſervice* only remains due from him, originates in the diverſity of their opinion, in another caſe, which is as follows;—if a maſter ſhould ſell his ſlave into the hands of that ſlave*, in lieu of a female ſlave, and the

*Sic in orig.*—There is an apparent ſingularity in this expreſſion; it means, however, more than the maſter offering to emancipate his ſlave (that is, to ſell him to *himſelf*) in return for a female ſlave.

female

female ſlave happen, on the inſtant, to die, the maſter has a claim upon the male ſlave for the value of his perſon, according to the two *Elders*; but, according to *Imâm Mohammed*, for the value of the *female ſlave only*. This is a caſe well known *; and the reaſon for founding the other caſe upon it is, that, as the delivery of the female ſlave, in the *one* inſtance, is rendered impoſſible by her deceaſe, ſo is that of four years ſervice from the ſlave, in the *other*, by *his own* deceaſe; and in like manner by that of his maſter; wherefore theſe are correſpondent caſes.

Caſe of a female ſlave emancipated for a compenſation paid by a ſtranger.

IF a man ſhould ſay to another "emancipate your female ſlave for "one hundred *Dirms*, for which I ſhall be reſponſible, on condition "that you marry her to me," and the perſon thus addreſſed ſhould comply, and the ſaid female ſlave, after liberation, refuſe to be married to this man, ſhe is in this caſe free, and nothing is incumbent upon the perſon who required her freedom as aforeſaid; becauſe, if one man were to ſay to another "emancipate ſuch an one, your "ſlave, for one thouſand *Dirms*, for which I will be accountable," and the owner of the ſlave emancipate him accordingly, the ſlave is emancipated on the part of the owner, but the man who thus propoſed for his freedom is not accountable for any thing; and ſo likewiſe in the preſent caſe: contrary to a caſe where a man ſays to another "divorce "your wife in return for one thouſand *Dirms*, for which I will be "anſwerable," and the man divorces his wife accordingly; for in that caſe the thouſand *Dirms* are due from that perſon; becauſe the ſtipulating of a return for *divorce*, with a ſtranger, is lawful; but to ſtipulate a return for *emancipation*, with a ſtranger, is not lawful.—The nature of this has already been explained in treating of *Khoola*, or *divorce for a compenſation*.

* Meaning, perhaps, a *common* caſe, or a caſe much adduced in *caſuiſtry*.

Another caſe of the ſame nature.

If a man ſay to another "emancipate your female ſlave *on my be-* "*half* for a return of one thouſand *Dirms*, provided you marry her "to me," and the maſter comply, and the woman, after emancipation, object to the marriage, in this caſe the thouſand *Dirms* is divided into two parts, the *value of the ſlave*, and her *proper dower*, and that portion which appears to agree with her *eſtimated value* muſt be paid by the propoſer to the emancipator, but that which anſwers to the *proper dower* is not due.—The reaſon of this is that the man's ſaying "emancipate her *on my behalf*," amounts to a *purchaſe* of her, as much as if he had ſaid to the maſter "*ſell* your female ſlave into "my hands firſt, and then *emancipate* her, on my behalf, and marry "her to me,"—and ſuch being the caſe, he oppoſes the thouſand *Dirms* to two things,—*firſt*, to the woman's perſon as a *ſlave*, on account of the purchaſe; and, *ſecondly*, to her perſon as a *wife*, on account of marriage*. The thouſand *Dirms* is therefore allotted between both; and there is due from the man the conſideration for that which is delivered into his hands, namely, *her perſon* as a *ſlave*; and the conſideration for that which was his object, (namely, her perſon as a *wife*,) is remitted.—If the ſlave ſhould not *object* to the marriage, but *conſent* to it, the law in this caſe is not mentioned by *Mohammed:* but yet here it is a rule that, whatever the conſideration for the value of the ſlave may be, it is remitted in the *former* inſtance, (namely, where the propoſer does not uſe the expreſſion "*on my behalf*;") but, in the *ſecond* inſtance, (where this expreſſion is introduced,) the proportion allotted † for her *value* goes to her owner: and the proportion allotted for her *proper dower* goes to the ſlave in both inſtances.

* *Arab.*—"To the woman's *neck* on account of *purchaſe*, and to her *Booza* [*genitale* "*mulieris*] on account of *marriage*."—The tranſlator adopts the above mode of expreſſion, as being leſs *uncouth*.

† Out of the thouſand *Dirms*.

CHAP.

## CHAP. VI.

### Of *Tadbeer*, or *poſt obit Manumiſſion.*

TADBEER, in its primitive ſenſe, ſignifies *looking forward to the event of a buſineſs*:—in the language of the LAW, it means a declaration of a freedom to be eſtabliſhed after the maſter's death. Definition of the term.

IF a man ſhould ſay to his ſlave "when I die, be free,"—or "you are free upon my deceaſe,"—or "you are a *Modâbbir*,"—or "I have rendered you a *Modâbbir*,"—in all theſe caſes the ſlave becomes a *Modâbbir*, becauſe all theſe modes of addreſs expreſsly ſignify *Tadbeer*. Form of *Tadbeer*.

IT is unlawful to diſpoſe of, or to transfer, a *Modâbbir*, either by ſale or gift: in ſhort, it is not lawful for the proprietor to put him out of his own poſſeſſion in any ſhape whatever, except by manumiſſion, as is the rule reſpecting *Mokâtibs*.—*Shafei* maintains that the ſale and gift of a *Modâbbir* are both lawful, becauſe *Tadbeer* is merely a ſuſpenſion of the freedom of a ſlave upon a particular condition, (namely, the maſter's death,) whence no obſtacle can ariſe to the *gift* or the *ſale*,—as is the rule in all other caſes of ſuſpenſion upon a condition, (which rule, moreover, holds with reſpect to a *reſtricted Tadbeer* *;) and alſo, becauſe *Tadbeer* is a ſpecies of bequeſt; and bequeſt is not preventive of *gift* or *ſale*.—The arguments of our doctors are two-fold;—FIRST, the words of the prophet, "MODÂBBIRS *ſhall neither* A

* That is, when a man ſays to his ſlave "you are free, *if I die within ſuch a time*."

" *be ſold, nor given away, nor inherited, but are to be emancipated* " *from the third of the maſter's property:*"—SECONDLY, *Tadbeer* is the occaſion of freedom to the *Modábbir*, as he is free upon his maſter's deceaſe; and *Tadbeer* is the ſole reaſon for his being ſo.—It is to be obſerved that, although *Tadbeer* be a ſuſpenſion of manumiſſion upon the maſter's death, yet its efficiency for producing the freedom of the *Modábbir* is eſtabliſhed upon the inſtant, and it is not to be conſidered as becoming the cauſe thereof *after the maſter's deceaſe*, ſince conſtituting it a cauſe upon the inſtant is preferable, as *Tadbeer* now exiſts, whereas after the death of the maſter it is nonexiſtent, becauſe *Tadbeer* is merely *a ſpeech*, and *a ſpeech* is a *declaration*, and that is not of a *permanent* nature, (according to what appears in the *Elm-al-Kalám**;)—and alſo, becauſe its efficiency cannot poſſibly be poſtponed to a time ſubſequent to the maſter's deceaſe, ſince the maſter's competency is then no more. This is evidently contrary to ſuſpenſions of any *other* nature, for in theſe the obſtacle to the efficiency exiſts *before* the condition takes place, as ſuſpenſion is a *Yameen*; (and *Yameen* oppoſes the exiſtence of the condition, ſince the deſign of *Yameen* is to prevent that†, and of courſe to prevent its conſequence, and this it is which oppoſes the taking place of a ſuſpended *divorce* or *emancipation*;) and the poſtponement of the efficiency to a time poſterior to the exiſtence of the condition is in ſuch inſtances poſſible, as the competency of the acting party ſtill remains. Thus, between *Tadbeer* and other modes of ſuſpenſion there is an evident difference. Moreover, *Tadbeer* is a bequeſt, and bequeſt conveys a right to eventual poſſeſſion, on the inſtant, in the ſame manner as inheritance; and as it appears that *Tadbeer* is an *inſtantly eſtabliſhed* cauſe of *eventual* freedom to the *Modábbir*, and the abolition of a cauſe is illegal, it follows that the *ſale* or *gift* is illegal, as theſe would induce an abolition of the cauſe.

* A treatiſe on *rhetoric*, ſo called.

† Vide *definition of Yameen.* Book VI. Chap. I.

IT is lawful for a maſter to require any ſervice of his *Modâbbir*, and alſo to hire him; and if the *Modâbbir* be a *female* it is lawful for him to cohabit with her, or to contract her in marriage to any perſon, becauſe the property of a maſter in his male or female *Modâbbir* remains unſhaken, and on this account all the ſaid acts are lawful to him; nor is there any thing to prohibit or prevent him from the exerciſe of thoſe acts, ſo long as his property continues. Power of a maſter over

A MODÂBBIR, on the deceaſe of his maſter, is made free, from the third of his property, becauſe of the tradition before quoted; and alſo, becauſe *Tadbeer* is a ſpecies of bequeſt, as being a gratuitous act, referred to a time poſterior to death.—And if he [the maſter] be poſſeſſed of no other property than this *Modâbbir*, he [the *Modâbbir*] muſt perform emancipatory labour to his maſter's heirs for two thirds of his eſtimated value, provided the maſter be not involved in debt: but, if he die inſolvent, the *Modâbbir* muſt in that caſe perform ſuch labour for his whole value, becauſe the diſcharge of debts precedes the payment of bequeſts; and, as the emancipation of the *Modâbbir* cannot be *annulled*, his value is to be received in this mode. ter's deceaſe.

THAT the child born of a female *Modâbbir* becomes a *Modâbbir*, is allowed by all the companions. A child born

*dâbbir.*

IF a man conſtitute his ſlave a *Modâbbir*, by a *reſtricted Tadbeer*, by ſaying to him "if I die of this diſeaſe, you are free,"—or "if I "ſhould die *upon this journey*, &c."—or "*of ſuch a diſeaſe*,"—or "*upon ſuch a journey*,"—ſuch ſlave becomes a *Modâbbir Mokâyed*, or *reſtricted Modâbbir*, whom it ſtill continues lawful to diſpoſe of by ſale or otherwiſe, becauſe a reſtricted *Tadbeer* has no inſtant operation in eſtabliſhing the freedom of the ſlave, on account of the uncertainty and ſuſpenſe reſpecting the *manner* or *time* to which the *Tadbeer* is re- :—contrary to an *unreſtricted Modâbbir*, as his freedom is ſuſ- A *reſtric* otherwiſe transferred.

pended upon the death of the maſter, *when* or *howſoever* that may happen; and death is *inevitable*.—If, however, the maſter ſhould die in the manner, or within the time, deſcribed by him in his declaration, the *Modâbbir* becomes free, in the ſame manner as an *unreſtricted Modâbbir*, (that is, from the third of the maſter's property,) becauſe in this caſe the effect of the *Tadbeer* in queſtion is eſtabliſhed upon the laſt moment of the maſter's exiſtence, ſince the *manner* is then certified; whence it is that the *Modâbbir*'s freedom is conſidered as proceeding from the third of the maſter's property. Let it be remarked that it is a form of reſtricted *Tadbeer* for a maſter to ſay to his ſlave "if "I die within *one year*,"—or, "within *twenty years*,"—you are free," as his death within ſuch a time is *dubious*:—contrary to where a man ſays to his ſlave "if I die within *one hundred years*, &c." he being of ſuch an age as affords no probability of his living to that period, for then the ſlave becomes an *unreſtricted Modâbbir*, becauſe his deceaſe within ſuch a time is *inevitable*, and does not admit of doubt, being the ſame as if he had mentioned his death in general terms, without any reſtriction to the *time* or *manner* of it.

## CHAP. VII.

## Of *Iſteelâd*, or *Claim of Offspring*.

Definition of the term.

ISTEELÂD ſignifies a man having a child born to him of a female ſlave, which he claims or acknowledges as of his own begetting; and the mother of ſuch a child is termed an *Am-Walid*.

If

IF a female ſlave bring forth a child begotten by her maſter or owner, ſhe becomes forthwith an *Am-Walid**; and it is afterwards unlawful for her maſter to ſell, or in any other manner to transfer or diſpoſe of her, becauſe the prophet has ſaid, with reſpect to an *Am-Walid*, who cannot be ſold, and is *free* upon his

" *her child hath ſet her free*;"—and the prophet having thus ordained her freedom, one of its effects, namely, the illegality of diſpoſal by ſale or otherwiſe, undoubtedly becomes eſtabliſhed;—and alſo, becauſe a participation of blood has ariſen between the *Am-Walid* and her maſter through means of their child, (according to what has been obſerved upon that ſubject in the book of *Marriage*, treating of *illegality by affinity:*) and, although this virtual participation of blood, as not being a cauſe of a very *cogent* or *forcible* nature, does not occaſion the effect until after the maſter's death, yet the right of claim founded upon it is eſtabliſhed *on the inſtant*, and hence it is unlawful for the maſter to *ſell* her, or in ſhort to put her out of his own poſſeſſion in any mode but by *emancipation*.

IF one of two partners in a female ſlave make her an *Am-Walid*, ſhe becomes his *Am-Walid in toto*, becauſe *claim of offspring* does not admit of diviſion, as that is a branch of *parentage*, and as *parentage* is indiviſible, ſo likewiſe is every *branch* of it.

IT is lawful for a maſter to require ſervice of his *Am-Walid*, or to hire her out to work, or to contract her in marriage, becauſe an *Am-Walid* is the property of her owner, in the ſame manner as a *Modâbbir*. but her maſter may ſtill require ſervice of her.

parentage of a child born of a female ſlave is not eſtabliſhed until the maſter ſhall have acknowledged and claimed it.—*Shafei* alleges that the parentage of the child is eſtabliſhed in the maſter, although he ſhould *not* claim it; becauſe, as the parentage of a child born in marriage is eſtabliſhed in virtue of the contract of marriage, although the huſband lay no claim to it, it follows that the parentage The parentage of a child born of a ſe-

*of a child.*

of a child born of a ſlave, where her owner has had carnal connexion with her, is eſtabliſhed *a fortiori*; the carnal act being a ſtill ſurer ground for this than ſimple *marriage*, without any ſuch connexion known or aſcertained.—The argument of our doctors is that the deſign in holding carnal connection with a female ſlave is merely *the gratification of appetite*, and *not the procreation of children*, as, in conſequence of a female ſlave bearing a child to her maſter, ſhe is no longer an appreciable property, inſomuch that *ſale*, and other acts of property, with reſpect to her are prohibited; and hence the ſimple circumſtance of the maſter's having had carnal connexion with his female ſlave is not ſufficient to eſtabliſh the parentage of a child born of her, without his claiming it, any more than the circumſtance of his being poſſeſſed of ſuch female ſlave without this connexion: contrary to a *contract of marriage*, as the evident deſign of marriage is *progeny*, for which reaſon the huſband's claim is not requiſite to eſtabliſh the parentage of a child born to him in *wedlock*.

The parentage of a child born of an *Am-Walid* is eſtabliſhed

If a female ſlave become an *Am-Walid* to her maſter, in conſequence of his claiming her child, and ſhe afterwards bring forth *another* child, the parentage of the latter child is eſtabliſhed in the maſter, independent of any claim on his part, becauſe the woman, in conſequence of his claiming the firſt child, becomes a partner of his bed, and ſtands as his *wife*:—but if the maſter were to *deny* the parentage of the ſecond child, declaring it *not* to be *his*, the child's parentage is not to be eſtabliſhed in him, becauſe the *Am-Walid* is partner of his bed in an *inferior* degree, (whence it is lawful for her maſter to contract her in marriage to another perſon:)—contrary to a *wife*, the parentage of whoſe child is not diſproved by her huſband's denial, until he make an *aſſeveration* *, becauſe the wife is partner of his bed in a *ſuperior* degree, whence it is that he cannot contract her in marriage to any other perſon.—What is now alleged relates merely to the decree of the ma-

* See Vol. I. Page 382.

giſtrate:

giſtrate: but in a *religious* view, if the maſter has had carnal connexion with his female ſlave, and has kept her from ſuch connexion with *others*, and has not performed the act of *Azil** with her, it is incumbent upon him to acknowledge the child born of her, and to claim it as his own, becauſe it is apparent that the child is his;—if, however, he have indulged in *Azil* with her, or have not kept her up, he may lawfully deny the child, as it is probable, in this caſe, that it may have been begotten upon the ſlave by ſome other perſon in *fornication*.—This is recorded from *Haneefa*.—*Aboo Yooſaf* alleges that, in caſe the maſter has had any carnal connexion with his female ſlave, it is laudable in him to claim the child born of her, whether he may have kept her up from connexion with others, or *not*, or whether he may have indulged in the act of *Azil* with her, or otherwiſe; becauſe, having had carnal connexion with her, there exiſts a poſſibility that the child may be *his*; whence it behoves him not to deny it, on account of the *doubt*.—*Mohammed* ſays that if the maſter be not under a *conviction* that the child is his, no obligation reſts upon him to claim it;—but yet that it is laudable in him to liberate the child, and that, enjoying the mother whilſt he lives, he liberate her alſo, at his *death*, becauſe the acknowledgment of any child, under any circumſtance of doubt, is not incumbent: but it is nevertheleſs requiſite to emancipate both the *child* and its *mother*, ſince, if this be not done, and it be poſſible that the child is *his*, a conſequence would be induced of rendering a *free* perſon a *ſlave*, on a principle of *doubt*.

The child of the deceaſe of the maſter.

IF a maſter contract his *Am-Walid* in marriage to any perſon, and ſhe bring forth a child to her huſband, ſuch child is ſubject to the ſame law with his mother,—that is, becomes free upon the death of her maſter, and (like the mother) without any obligation of emancipatory labour,—becauſe the right to eventual freedom, eſtabliſhed in the mother, extends *through her* to the child, in the manner of a *Tadbeer*;

* For an explanation of this, ſee book of *Marriage*, p. 167.

(whence it is that the child of a *free*-woman is *free*, and that of a *bond*-woman a *ſlave*;)—the *child*, therefore, becomes *free*, in the ſame manner as the *mother*; but the *parentage* of the child is eſtabliſhed in the *huſband* of the *Am-Walid*, and not in the *mother*, becauſe ſhe is the partner of her huſband's bed *ſolely*, even though the marriage be invalid, as an *invalid* marriage ſtands as a *valid* one, with reſpect to all its *effects*.

Caſe of a child born of who is *married*.

If a maſter contract his female ſlave in marriage to another perſon, and ſhe bring forth a child to her huſband, and the maſter afterwards claim the child, yet its parentage is not eſtabliſhed in him, as the child is held, in *law*, to be the legitimate offspring of *another*; but yet, in virtue of ſuch claim, the child becomes *free*, and the mother becomes an *Am-Walid* of her maſter in conſequence of his acknowledgment.

*Valid*, upon the deceaſe of her owner, becomes emancipated *in toto*.

When the maſter of an *Am-Walid* dies, ſhe becomes emancipated from his *whole* property, becauſe it is recorded of the prophet that he ordained that *Am-Walids* ſhould be *free*, and ſhould not be ſold on account of the owner's *debts*, nor be conſidered as, in any reſpect, included in his *Sils Maal* *, as the deſire of men to beget children is inſtinctive, and is therefore preferred to the right of heirs, in the ſame manner as a preference is given to the payment of the debts and funeral charges of the deceaſed: contrary to the caſe of *Tadbeer*, which is in the nature of a *bequeſt*, and not of an *inſtinctive deſire*.—It is neceſſary to obſerve, that no emancipatory labour is incumbent upon an *Am-Walid* for the ſatisfaction of her deceaſed owner's creditors, becauſe of the ordinance above recited,—and alſo, becauſe an *Am-Walid* is not eſtimable property, (whence it is that if any perſon were to make a forcible ſeizure of an *Am-Walid*, and ſhe to periſh in the uſurper's hands, he would not be reſponſible, according to *Haneefa*;)—the

* For an explanation of the phraſes here uſed, ſee *Bequeſts*.

claims, therefore, of the owner's creditors, do not affect *her*:—contrary to a *Moddábbir*, as he is held to be *eſtimable property*.

The *Am-Walid* of a *Chriſtian* on becoming a *convert*, is *free*, after

IF the *Am-Walid* of a *Chriſtian* be converted to the *Muſſulman* faith, ſhe muſt perform emancipatory labour to her maſter for her *full value*, for ſhe ſtands as a *Mokátib*, and conſequently does not become free until ſuch time as ſhe ſhall have paid her whole value by the performance of emancipatory labour.—*Ziffer* ſays that ſhe becomes free *immediately*, the performance of emancipatory labour remaining as a *debt* againſt her. This difference of opinion ſubſiſts where the maſter is called upon to embrace the faith and refuſes: but if he do *not* refuſe, but embrace the faith, the *Am-Walid* continues attached to him as ſuch, in the ſame manner as before, according to all the doctors.—The argument of *Ziffer* is that it is indiſpenſably requiſite to remove degradation from the *Am-Walid*, as ſhe is now a *Muſſulman*, and it is not lawful for her to continue any longer the ſlave of an *infidel*, and thereby remain in a ſtate of *degradation*; and, as the removal of her degradation by purchaſing her of the *infidel* is not practicable, it follows, of neceſſity, that ſhe muſt become *free*.—The argument of our doctors, on the other hand, is that, in placing her in the ſame predicament with a *Mokátib*, attention is paid to the intereſt of both parties, as in this caſe her degradation is done away by her becoming *free* with reſpect to *privileges* and *acquiſitions*, in the ſame manner as a *Mokátib*; and, by making her liberty depend upon her performance of *labour*, ſhe in ſo doing indemnifies her maſter for her value, and under this idea it is to be expected that ſhe will labour *diligently*, ſo as to become free; the maſter, therefore, is in this manner aſſured of a compenſation for his property in her; whereas, if ſhe were to become free upon the inſtant, (ſuppoſing her to be *poor*,) it is to be expected that ſhe would be negligent in acquiring property, or performing labour, and this would be injurious to the maſter.

OBJECTION.—The obligation of emancipatory labour upon the *Am-Walid* is not admiſſible, according to the tenets of *Haneefa*, for *him* an *Am-Walid* is held not to be *eſtimable property*.

REPLY.—The *Am-Walid* is *eſtimable property* in the faith of her maſter, who is a *Zimmee*, and we are enjoined to leave thoſe to their own faith, and to act reſpecting them according to it.

—IT is to be obſerved that if the maſter ſhould die before the *Am-Walid* completes her mancipatory labour, ſhe becomes free without the performance of it, becauſe ſuch is the rule reſpecting *Am-Walids:* and if ſhe ſhould become incapable of performing emancipatory labour during her maſter's life, yet ſhe does not return into the ſtate of an *abſolute ſlave*; for if this were the caſe, it would follow that ſhe again ſtands in the predicament of a *Mokátib*, as the reaſon for her ſo doing (namely, her *Iſlám*) ſtill ſubſiſts.

Where a man obtains poſſeſſion, as a ſlave, of a wife who has borne children to him, ſhe becomes his *Am-Walid*

IF a man marry the female ſlave of another, and ſhe bring forth a child to him, and he afterwards obtain poſſeſſion of her as a *ſlave*, ſhe forthwith becomes an *Am-Walid* to him.—*Shafeï* ſays that ſhe does not become *Am-Walid* to him.—If, on the other hand, a man become poſſeſſed of a female ſlave—and make her an *Am-Walid*, and ſhe afterwards appear to be the right of *another perſon*, and the aforeſaid man again obtain poſſeſſion of her, ſhe becomes his *Am-Walid*, according to our doctors:—but *Shafeï* has two opinions upon the ſubject. In this caſe the child born of the ſlave is a *Walid Magroor* *, and is therefore emancipated in return for his value, paid by the father to the perſon whoſe property ſhe was diſcovered to be after he firſt became poſſeſſed of her.—The argument of *Shafeï* is that the ſlave had conceived the child at a time when ſhe was the property of her maſter, and therefore cannot be the *Am-Walid* of the perſon aforeſaid, (in the ſame manner as where a female ſlave becomes pregnant from fornication, and afterwards becomes the property of the fornicator, in which caſe ſhe is not *Am-Walid* to him,)—upon this principle, that a ſlave cannot become *Am-Walid*, except where ſhe brings forth a

* Literally, *a child of a deceived perſon*, for the father begat the child, whilſt under a deception with reſpect to his right in the *mother*.

child who was free from the inſtant of conception, for the child is then a part of the *mother*, and a *part* cannot be oppoſed to the *whole*. The argument of our doctors is that the cauſe of the ſlave's becoming *Am-Walid* is *Jazeeyât*, (or *participation of blood*,) as has been mentioned in treating of *marriage*: now *participation of blood* is eſtabliſhed between the copulating parties, from the circumſtance of the child's deriving exiſtence, *in toto*, from each *reſpectively*; and as (in the caſe in queſtion) the child's parentage is eſtabliſhed, a participation of blood is eſtabliſhed between the parties through the medium of the child:—contrary to a caſe of *whoredom*, as there the child's parentage is not eſtabliſhed in the *fornicator*.

OBJECTION.—From this it would appear that, upon a fornicator becoming poſſeſſed of his baſtard, as a ſlave, the baſtard is not free, whereas a baſtard is free in ſuch a caſe.

REPLY.—The emancipation of the baſtard, in this caſe, is on account of his partaking of the blood of the fornicator, *a certiori*, without any medium; but no participation of blood can ſubſiſt between a fornicator and fornicatreſs, except through the medium of their *baſtard*; and he is not of eſtabliſhed parentage.—Correſpondent to this is the caſe of a man purchaſing, as a ſlave, his *brother*, the baſtard of his *father*,—for then the baſtard brother does not become *free*, becauſe the affinity of the baſtard with the purchaſer has no exiſtence but through the medium of the father, and the parentage is not eſtabliſhed in the father.

IF a man have carnal connexion with the bondmaid of his ſon, and ſhe produce a child to him, and he claim it, the parentage of the child is eſtabliſhed in him, and the mother becomes an *Am-Walid* to him, and he remains reſponſible to his ſon [her owner] for the amount of her eſtimated value:—but he will not have to account with him, either for her *Akir**, or for the value of the child which is born of her. This caſe, with the arguments upon it, are recited at large under the head

A man having a child by the ſ of his *ſon* makes her his *Am-Walid*, and he muſt indemnify the ſon for her

* The portion due to a woman (in the manner of a *dower*) in a caſe of *erroneous* connexion.

of

of *marriage*.—The reaſon why the value of the child is not due is that it is free, *ab origine*, in the mother's womb, becauſe the father had obtained a right in the female ſlave previous to carnal connexion, in the manner of ſucceſſion *, wherefore the child appears to be a child of the *ſlave* by her *proprietor*.—But if a *grandfather* were to have connexion with the female ſlave of his *grandſon*, the ſon [the father of the latter] being living, the parentage of the child born of her is not eſtabliſhed in the *grandfather*, becauſe he has no right or authority over the female ſlave during the exiſtence of the intermediate relation.—If, however, this intermediate relation be not exiſting, the parentage is, in that caſe, eſtabliſhed in the *grandfather*, as a *grandfather*'s right over his *grandſon*'s property appears upon the demiſe of the *ſon*. And here it is to be obſerved that the *infidelity* or *bondage* of the father [the intermediate relation] is the ſame as his death, [in removing the bar to the grandfather's right of uſufruct over his grandſon's poſſeſſions,] ſince theſe two predicaments are of either of them terminative of authority in the ſame manner as *death*.

A *claim of* two partners in a female ſlave eſtabliſhes the parentage in *Am-Walid*;

If a female ſlave, held between two men in partnerſhip, bring forth a child, and one of the partners claim it, the parentage is eſtabliſhed in that partner; becauſe parentage being eſtabliſhed in him, with reſpect of *one* half, in virtue of his moiety of right in the mother, the remainder is neceſſarily ſo, parentage not being capable of partition, as the cauſe thereof (namely, *conception*) can have proceeded from *one* father only: and the female ſlave becomes an *Am-Walid* to the ſaid partner, becauſe *claim of offspring* (in the opinion of the two diſciples) is indiviſible.—*Haneefa* contends that the female ſlave becomes *Am-Walid* in the ſhare of the above partner only, who afterwards obtains poſſeſſion of the ſhare of the other partner, by paying him a compen-

* The father is, in virtue of his parental rights, inveſted with authority to the *uſe* of all his ſons poſſeſſions, but not to the *deſtruction* of them; and hence it is that, having *deſtroyed* his ſons property in his ſlave, by rendering her *Am-Walid*, he is made reſponſible to him for her value.

ſation,

ſation, (as an *Am-Walid* is capable of being obtained as property,) and he is moreover reſponſible to his partner for an half *Akir*, as having held carnal connexion with a copartnerſhip ſlave, which therefore appears to be committed *upon the property of another*. But he is not reſponſible for the value of the child, becauſe the parentage is eſtabliſhed in him from the inſtant of conception, and hence the other never had any authority of poſſeſſion over it, ſo as to require his being reſponſible.—If both partners ſhould claim the child at once, its parentage is eſtabliſhed in both.—*Shafei* ſays that, in this caſe, the parties muſt have recourſe to the judgment of a phyſiognomiſt, and whomſoever he may adjudge to be the father, by ſimilitude of features, in him the child's parentage muſt be eſtabliſhed, becauſe it is impoſſible to conceive the parentage of *one* child from *two* fathers, ſince *one* conception cannot proceed from the ſeed of *two* different men; the point therefore muſt be decided by *compariſon*; eſpecially as the prophet, in the caſe of *Aſſáma*, expreſſed his approbation of this mode of deciſion.—Our doctors reſt their opinion, in this point, upon the authority of *Omar* the *Khalif*, who is recorded to have written, concerning a caſe of this nature, to the *Kazee Sareeh* *, as follows—"If they cannot produce "any proofs in ſupport of their aſſertion, you muſt decline paſſing any "judgment upon the caſe; but if they reſpectively produce their "proofs, you may then alſo produce your deciſion; namely, that *the "ſaid child is to be regarded as the offspring of* BOTH, *and has a right in "each reſpectively, as they alſo both have in him; but if one of the partners "happen to outlive the other, he is the ſole heir of the child.*" This ſentence *Omar* wrote in the preſence of a number of the companions of the prophet, none of whom controverted it: and the ſame is alſo related as the opinion of *Alee*.—Another argument of our doctors, in proof of their opinion, is that as both the claimants, in reſpect to the *foundation* of their claim, (namely, a property in the female ſlave, and a right in the child,) are exactly upon a level, they are likewiſe ſo in re-

or, if the claim be advanced by

is eſtabliſhed in *both*,

* At that period chief magiſtrate of *Koofa*, a city of *Chaldea*.

ſpect

ſpect to the claim itſelf; and, although parentage be *indiviſible*, yet there are effects attending it which are of a *diviſible* nature, (ſuch as *inheritance*, and ſo forth;)—hence, ſuch of theſe effects as are *diviſible* are eſtabliſhed with reſpect to *both*, in the manner of *diviſion*, and ſuch of them as are *indiviſible* muſt be determined to each of them reſpectively, *in toto*, and as if he had no partner.—What is now advanced relates to a caſe where the partners ſtand in no degree of affinity to each other, and are both *Muſſulmans*:—but where they happen to be *father* and *ſon*,—or one of them a *Muſſulman* and the other a *Zimmee*,—and both lay claim to the child born of the female ſlave as aforeſaid, the deciſion muſt be given in favour of the *father*, (in the former caſe,) or of the *Muſſulman*, (in the latter caſe,) becauſe the father's claim preponderates, in virtue of his right over his ſon's property; and the *Muſſulman*'s faith gives him a preference to the *Zimmee*.—As to the circumſtance of the prophet expreſſing his approbation in the caſe of *Aſſáma*, (as cited by *Shafeï*,) it is to be accounted for from the infidels ſcoffing, and calling in queſtion *Aſſáma*'s birth, their ſcoffs being terminated by the deciſion of a phyſiognomiſt, which cauſed the prophet to expreſs his pleaſure.—It is to be obſerved that, where the claims of both partners to the child are admitted, the mother becomes *Am-Walid* to *both*,—becauſe, where the claim of both is approved, and the child is decreed to belong equally to *each*, it follows that the mother is the *Am-Walid* of *each*, and upon each is incumbent one half of the *Akir* to his *copartner*; and *each* is, in every reſpect, upon an equal footing with the *other*.—It muſt alſo be remarked that the child is entitled to receive, from the eſtate of each partner, the full inheritance of a *complete child*, becauſe each has, in his claim, made an acknowledgment in the child's behalf to this effect, which is a proof in his favour.—And the two partners are entitled to receive, from the eſtate of the child, the full inheritance of a father, ſince they are both upon a footing with reſpect to the *cauſe* of inheritance,—in the ſame manner as where *two* perſons advance evidence reſpecting a *third* perſon of unaſcertained parentage, by each declaring—"*this is my child.*"

provided both are upon an

If

The parentage of a child, born of the ſlave of a *Mokâtib* is eſtabliſhed in the *Mokâtib*'s maſter, if he claim it.

IF a perſon have carnal connexion with the female ſlave of his *Mokâtib*, and ſhe bring forth a child, and the perſon abovementioned claim it, in this caſe (provided the *Mokâtib* confirm the claim) the parentage of the child is eſtabliſhed in that perſon.—This is the doctrine of the *Zâhir Rawâyet*.—It is recorded, from *Aboo Yooſaf*, that the confirmation of the *Mokâtib* is not requiſite, in the ſame manner as that of the ſon is not required where the father lays claim to his ſon's female ſlave.—The principle upon which the *Zâhir Rawâyet* proceeds is, that a maſter has no power of action over his *Mokâtib*'s acquiſitions, ſo long as he does not attain ſuch power by the *Mokâtib*'s inability to fulfil the contract of *Kitâbat*, or by his breach of that contract:—contrary to the caſe of *father* and *ſon*, as a father has an undiſputed power of action over his ſon's property; wherefore they are not analogous caſes.—And here the maſter is reſponſible to his *Mokâtib* for the *Akir* of the female ſlave, as he has no actual property in her until *after* carnal connexion; becauſe he *had* a certain right in her, [in virtue of her being the ſlave of his *Mokâtib*,] which right is of itſelf ſufficient to the admiſſion of the *claim of offspring*, whence there is not any neceſſity for conſidering his property in her to have exiſted *previous* to the embrace. In the ſame manner, he is reſponſible to his *Mokâtib* for the value of the child, becauſe it ſtands as the child of a *Magroor* *; ſince the maſter, in having carnal connexion with the ſlave of his *Mokâtib*, proceeded upon a *preſumptive proof*, namely, that of her being the property of his property, (as the *Mokâtib* is his property,)—and where he (under a perſuaſion founded upon preſumptive proof) has carnal connexion with the *ſlave*, it is not ſuppoſed that he is conſenting to his *child* being a *ſlave:* hence the child is made free, in return for the

* *Magroor* literally ſignifies a perſon who is under a deception.—In the language of the law it is applied to a man holding carnal intercourſe with a woman whilſt under a miſconception with reſpect to his right in her, or her ſituation:—for inſtance, a maſter of a female ſlave marries her to a man who conceives her to be *free*; in which caſe, if ſhe has a child by her huſband, (which would, in common courſe of law, be a ſlave to the owner of the mother) the father has a right to inſiſt on purchaſing his child's freedom.

value; and its deſcent is eſtabliſhed in the maſter, as aforeſaid:—but yet the mother does not become *Am-Walid* to the maſter, as he is not her *actual proprietor*, although he proceeded upon a preſumptive proof that he was ſo; in the ſame manner as a *Magroor*, who has carnal connexion with a female ſlave, under the conception of her being his property, where ſhe is not *actually* ſuch.—What is here ſtated relates to a caſe where the *Mokâtib* confirms the child's parentage, and the maſter's claim: but if he deny theſe, the child's parentage cannot be eſtabliſhed in the *maſter*, according to what has been already obſerved concerning the neceſſity of the *Mokâtib*'s confirmation;—yet, if the maſter ſhould, at any future period, become *proprietor* of the child*, the deſcent is then eſtabliſhed in him, becauſe the ground thereof (namely, his former claim) ſtill exiſts, and the right of the *Mokâtib*, which was the obſtacle, is annihilated.

* By the demiſe of the *Mokâtib*, before the fulfilment of the contract of *Kitâbat*; or, by the contract becoming null in conſequence of a breach of it on the part of a

# HEDÂYA.

## BOOK VI.

### *Of* EIMÂN, *or* VOWS.

EIMÂN is the plural of *Yameen.—Yameen*, in its primitive ſenſe, means *ſtrength* or *power*; alſo the *right hand*:—in the language of the law it ſignifies an obligation by means of which the reſolution of a vower is ſtrengthened in the performance or the avoidance of any thing; and the man who ſwears or vows is termed the *Haliff*, and the thing ſworn to or vowed the *Mahloof-ali-hee*. Definition of *Eimân*.

Chap. I. Introductory.

Chap. II. Of what conſtitutes an *Oath* or *Vow*, and what does *not* conſtitute it.

## CHAP. I.

Oaths [of a kinds,

OATHS are of three different kinds;—FIRST, *Ghamoos*;—SECOND, *Moonâkid*, (which is alſo termed *Makoodat*;)—and THIRD, *Lighoo*.

*Perjury*,

A *Yameen Ghamoos* * ſignifies an oath taken concerning a thing already

* Literally, *a falſe oath*, or *perjury*.—It is here proper to obſerve that the diſtinctions explained in this chapter relate ſolely to ſuch oaths or vows as, being *falſe* or *broken*, are ſinful, and conſequently ſuppoſed to excite the divine anger, which muſt be appeaſed by expiation:

already paſt, in which is conveyed an *intentional falſehood* on the part of the *ſwearer*:—and ſuch an oath is highly ſinful; the prophet having declared—"*whoſoever ſweareth falſely, the ſame ſhall* GOD *condemn to hell.*"

KAFÂRA, or expiation, is not incumbent (that is to ſay, is of *no avail,*) in a *Yameen Ghamoos*; but a repentance and deprecation of the anger of heaven are incumbent.—*Shafeï* alleges that expiation is incumbent, becauſe that was ordained for the purpoſe of doing away any diſreſpect ſhewn to the name of GOD, which is ſinful; and this diſreſpect is evident in a *Yameen Ghamoos*, as it is calling GOD to witneſs to a falſehood; a *Yameen Ghamoos* is therefore the ſame as a *Yameen Moonâkid*; and as, in that, expiation is incumbent, ſo in this likewiſe. The argument of our doctors is that a *Yameen Ghamoos* is a crime of *great magnitude*, (or *deadly ſin*,)—and expiation is an act of piety, (whence it may be fulfilled by *faſting*, and intention is a condition of it;) but there is no expiation for a *deadly ſin*, and conſequently there is none for a *Yameen Ghamoos:* contrary to the caſe of a *Yameen Moonâkid*, as that falls under the claſs of *Mobah*, or things indifferent.

OBJECTION.—The deſcription of *Mobah*, or indifferent, applies to things in which there is no offence; now as a *Yameen Moonâkid* is of an offenſive nature, how can it be *Mobah?*

REPLY.—The offence, in a *Yameen Moonâkid*, occurs ſubſequently to the declaration of it, and is occaſioned by a diſreſpect ſhewn by the vower to the name of GOD, of his own free option; whereas the offence, in a *Yameen Ghamoos*, exiſts from the firſt; and ſuch being the caſe, a *Yameen Ghamoos* is not to be confounded with a *Yameen Moonâkid.*

expiation: contrary to *true* oaths, or to vows *duly fulfilled*, as the former of theſe are frequently required for the ſake of juſtice, and the latter are permitted, whence neither an *oath* nor *vow*, ſimply *as ſuch*, can be ſuppoſed to require expiation.

A YAMEEN.

*vows*, (when not fulfilled,)

A YAMEEN MOONÂKID * ſignifies an oath taken concerning a matter which is to come.—Thus a man ſwears that he will do ſuch a thing, or he will not do ſuch a thing;—and where the pronouncer fails in this,—(that is, where he does not act according to the obligation of his oath,)—expiation is incumbent upon him: and this is eſtabliſhed upon the authority of the ſacred writings.

and *inconſiderate oaths*.

A YAMEEN LIGHOO † is an oath taken concerning an incident or tranſaction already paſt, where the ſwearer believes that the matter to which he thus bears teſtimony accords with what he ſwears, and it ſhould happen to be actually otherwiſe: and from the divine mercy it may be hoped that the ſwearer will not be condemned for ſuch an oath, ſince GOD has declared, in the *Koran*, "I WILL NOT CALL YOU "TO ACCOUNT FOR AN INCONSIDERATE OATH." An inſtance of *Yameen Lighoo* is where a perſon ſees *Amroo* paſſing at a diſtance, and, ſuppoſing him to be *Zeyd*, ſays—"by GOD that is

Expiation is incumbent, whether the vow be *wilful* or *compulſatory*, or although the oath be taken under a deception of the memory.

A WILFUL vow, and a compulſatory vow, and an oath taken under a deception of the memory, are all the ſame, and on account of each expiation is incumbent ‡, becauſe the prophet has ſaid "*there are three* "*points of ſerious import, the ſporting with which is alſo ſerious, to wit,* "MARRIAGE, DIVORCE, *and a* VOW."—*Shafei*, controverts this doctrine.—His arguments will be hereafter recited at large under the head of *Ikrâh*, or *compulſatory proceſs*.

The violation of a vow, whether by compulſion or through forgetfulneſs, requires expiation.

IF a man do a thing which breaks his vow, either by compulſion, or through forgetfulneſs, theſe are both the ſame, and expiation is incumbent upon him in either caſe, becauſe the ſpecified act which is the condition of expiation is not made void by the circumſtances of com-

* Literally, *a contracted oath*, or *vow*.

† Literally, a *nugatory* oath, or (ſometimes) a *raſh* oath.

‡ That is, if the thing ſworn to be *falſe*, or the vow be *violated*.

pulſion

pulſion or forgetfulneſs:—and ſo alſo, if the thing ſhould be done by a *maniac* or an *idiot*,—becauſe there likewiſe the condition is actually fulfilled.

OBJECTION.—Expiation is not incumbent but for the purpoſe of obliterating a ſin; now no ſin can be imputed to *maniacs* or *idiots*, as ſuch are not made anſwerable; it would therefore follow that expiation is not incumbent upon them.

REPLY.—Although expiation be intended for the purpoſe of expunging ſin, yet the obligation of it in this caſe reſts upon the *argument* of a ſin, (namely, the breach of a vow,) and not upon the actual *ſin itſelf*, ſo that, wherever the breach of a vow appears, expiation is incumbent.

## CHAP. II.

### Of what conſtitutes an *Oath*, or *Vow*, and what does *not* conſtitute it.

YAMEEN (that is, an *oath* or *vow*) is conſtituted by the uſe of the name of Almighty GOD, or of any of thoſe appellations by which the Deity is generally known and underſtood, ſuch as *Rihmân* and *Rheem**. An oath may alſo be expreſſed by ſuch attributes of the Deity as are commonly uſed in ſwearing, ſuch as the *power*, or the *glory*, or the

An oath be expr by uſing the name of *God*, or any of his cuſtomary attributes;

* Anglice, the *merciful*, and the *benificent*.—Thoſe attributes are affixed to the name of the Deity at the beginning of the *Koran*, and (in imitation thereof) at the beginning of every *Muſſulman* book.

*might*

*might* of God, becauſe an oath is uſually expreſſed under one or other of thoſe qualities; and the ſenſe of *Yameen*, namely, *ſtrength*, is by this means obtained, ſince as the ſwearer believes in the *power*, *glory*, *might*, and other attributes of the Deity, it follows that the mention of theſe *attributes* only is ſufficient to ſtrengthen the reſolution in the performance of the act vowed, or the avoidance thereof.

excepting his *knowledge*, *wrath*, or *mercy*.

If a man ſwear "by the knowledge of God," it does not conſtitute an oath, becauſe an oath expreſſed by the *knowledge* of God is not in uſe:—moreover, by *knowledge* is frequently implied merely *that which is known*; and in this ſenſe the word knowledge is not expreſſive either of the name of God, or of any of his attributes.—In the ſame manner, ſhould a perſon ſwear "by the *wrath* of God," or "by the *mercy* of God," it does not conſtitute an oath, becauſe an oath is not commonly expreſſed by any of theſe attributes:—moreover, by the word *Rihmat* [mercy] is ſometimes underſtood *rain*, and *heaven* is alſo occaſionally expreſſed by that term; and by the word *Ghazb* [wrath] is underſtood *puniſhment*; and none of theſe are either *appellations* or *attributes* of the Deity.

It is not conſtituted by uſing any *other* name.

If a perſon ſwear by any other name than that of God,—ſuch as *the prophet*, or *the holy temple*, this does not conſtitute an oath,—as the prophet has ſaid "*if any man among ye take an oath, he muſt ſwear "by the name of* God, *or elſe his oath is void.*"—If a perſon alſo ſwear by the *Koran*, it does not conſtitute an oath, although the *Koran* be the word of God, becauſe men do not ſwear by the *Koran*.—The compiler of the *Hedâya* obſerves that this is where the ſwearer only ſays "by the prophet," or "by the temple," or "by the *Koran*,"—but if the ſwearer ſay "if I act contrary to what I now ſay, may I be de-"prived of the prophet," or "of the temple," or "of the *Koran*," this conſtitutes an oath, becauſe ſuch privation would reduce the ſwearer to the ſtate of an infidel, and the ſuſpenſion of infidelity upon a condition amounts to *Yameen*.

Particles of ſwearing.

AN oath is confirmed by the uſe of the particles of ſwearing; and theſe (in the *Arabic*) are *three*, namely, the letters *waw*, and *be*, and *te**, as oaths are commonly repeated and underſtood under this form; and in this ſenſe theſe particles occur in the *Koran*. Let it be alſo obſerved that the particles of ſwearing are ſometimes *underſtood*, though not *expreſſed*, that is, are omitted in the expreſſion, although implied in the ſenſe; and this conſtitutes an oath; as if a man were to ſay—"GOD, I will not do this,"—becauſe [in the *Arabic*] it is common to reject the particle for the ſake of brevity:—ſometimes indeed the letter *lam* is uſed for the ſwearing particle, as it is capable (according to *Mooktâr*†) of being ſubſtituted for *be*.

Swearing by the *truth* of

HANEEFA alleges that if a man ſhould ſwear "by the *truth* of "GOD," this does not conſtitute an oath, and in this *Imâm Mohammed* coincides. There are two opinions of *Aboo Yooſaf* recorded on this point:—according to *one* it is not an oath; but according to the other it *is* an oath, becauſe truth is one of the attributes of the Deity, ſignifying the certainty of the divine exiſtence, and hence it is the ſame as if the ſwearer were to ſay "by GOD, the *truth!*" and as oaths are common under this mode of expreſſion, ſo an oath is here conſtituted. The argument of *Mohammed* and *Haneefa* is that the term "*the truth*," as here expreſſed, relates merely to the identity of the godhead as the object of obedience, and hence an oath thus expreſſed appears to be taken by that which is neither an *appellation* nor an *attribute* of GOD. The learned, however, ſay that if a perſon expreſs himſelf thus "by "the truth I will do ſo and ſo," this conſtitutes an oath, becauſe the *truth* is one of the appellatives or proper names of GOD.—But if a perſon were to ſay "I will do this *truly*," it does not amount to an oath, becauſe the word *truly* can only be taken, in this caſe, as a *corrobora-*

* Each of theſe letters, prefixed to the name of GOD, is expreſſive of the Engliſh *by*.

† A celebrated *Arabic* grammarian and rhetorician.

*tion* or *confirmation* of the promiſe contained in the ſpeech, being the as if he were to ſay "I ſhall do this *indeed*."

The expreſſions "I ' or conſtitute an oath, without the name of *God*.

If a man ſay "I *ſwear*," or "I *vow*," or "*teſtify*," whether the words "*by* God" be ſuperadded or not, it conſtitutes an oath, becauſe ſuch words are commonly uſed in ſwearing: the uſe of them in the *preſent* tenſe is undiſputed; and they are alſo ſometimes uſed in the *future* tenſe, where the context admits of a conſtruction in the *preſent*; and atteſtation amounts to an oath, as in that ſenſe it occurs in the ſacred writings: now ſwearing *by the name of* God is both cuſtomary and conformable to the divine ordinances, but *without* the name of God it is forbidden; when it ſo occurs, therefore, it muſt be conſtrued into a lawful oath *:—hence ſome ſay that intention is not requiſite in it; others, however, allege that the intention is eſſential, becauſe the words here recited bear the conſtruction of a *promiſe*,—that is, they admit of being received as applying *to the future*, and alſo of being taken as a vow without the name of God.

If a perſon, ſpeaking in the *Perſian* language, were to ſay "I "ſwear by God," it amounts to an oath, becauſe here the idiom confines the expreſſion ſolely to the preſent: but if he were to ſay ſimply "I ſwear," ſome allege that this does not conſtitute an oath.—If he were to ſay "*I ſwear by the divorce of my wife*," this is not an oath, as an oath is not ſo expreſſed in practice.

Swearing by the *exiſtence* of *God* makes an *oath*.

If a man, in ſwearing, ſay "by the *age*," or "the *exiſtence*" (of God,) it conſtitutes an oath, becauſe the age or exiſtence of God ſignifies his eternity, which is one of his attributes. [*Several other forms of ſwearing are here recited, but of no conſequence, as their validity or nullity depends altogether upon certain peculiarities in the* Arabic *idiom.*]

* That is, the ſuperaddition of the expreſſion "by God," muſt be underſtood in it, ſo as to make it appear an oath made conformably to the divine ordinance, leſt the ſpeaker, by ſwearing in a way that is *forbidden*, be found guilty of an *offence*.

A vow may be contracted by the imprecation of a conditional penalty.

If a perſon ſhould ſay "If I do this may I be a *Jew*," or "a "*Chriſtian*," or "an *infidel*," it conſtitutes an oath; becauſe, as the ſwearer has made the condition a ſign of infidelity, it follows that he is conſcious of his obligation to avoid the condition; and this obligation is poſſible, by his making it an oath, in ſuch a way as to render unlawful to himſelf that which is lawful.—And if the oath relate to any thing which he has done in the *time paſt*,—as if he were to ſay "If I have done ſo may I be a *Jew*," or "an *infidel*," and ſo forth, this is a *Yameen Ghamoos*, or perjury. The ſwearer is not, however, in this caſe made a *Jew* or an *infidel*, becauſe the words "may I be an "infidel," (and ſo forth,) relate to ſome future indefinite period.—Some, on the contrary, have alleged that he becomes actually as an infidel *, becauſe the penalty which the ſwearer imprecates upon himſelf relates to the preſent inſtant of his teſtimony, being the ſame as if he were to ſay "I am a *Jew*, &c."—But the fact is, the ſwearer does not become a *Jew* or infidel in either of the caſes before us, (that is, in that of a *vow* with reſpect to the *future*, or an oath regarding the *paſt*,) provided he conſider this merely as a *form of ſwearing* †: but if he believe that by thus ſwearing he fully ſubjects himſelf to the penalty expreſſed, he ſuffers accordingly, in either inſtance, becauſe he appears conſenting to infidelity, on account of having ventured upon a thing by the commiſſion of which he conceives that he may be rendered an infidel ‡.

If a perſon ſay "If I do thus, may the anger of God fall upon "me," this does not conſtitute a vow, as not being a cuſtomary mode of expreſſion for that purpoſe. And ſo alſo, if a perſon were to ſay "may I be an *adulterer*," or "a *drunkard*," or "an *uſurer*," becauſe theſe are not generally underſtood or received as forms of ſwearing.

* That is, becomes ſubjected to the penalties of actual apoſtacy from the faith.

† Where no other penalty than that of *expiation* can be incurred.

‡ All theſe caſes ſuppoſe the thing ſworn to be *falſe*.

## CHAP. III.

## Of *Kafâra*, or *Expiation* *.

A vow may be expiated by means of a

THE expiation of a vow † is effected by the emancipation of a ſlave; and the emancipation of ſuch a ſlave as ſuffices in *Zihâr*, ſuffices alſo in the caſe of a vow:—or if the ſwearer chuſe, let him clothe ten paupers, giving to each one piece of cloth, or more; (the ſmalleſt quantity to each is as much as is neceſſary in prayer ‡:)—or if he pleaſe, let him diſtribute victuals among ten paupers, the ſame as in the expiation of *Zihâr*.—All theſe modes of effecting the expiation of a vow are authorized in the *Koran*, according to the words in the text,—"THE EXPIATION THEREOF MAY BE EFFECTED BY FEEDING TEN "POOR PERSONS WITH SUCH FOOD AS IS USUALLY CONSUMED IN "YOUR FAMILIES, OR BY CLOTHING TEN POOR PERSONS, OR BY "THE RELEASE OF A SLAVE."—It is manifeſt, therefore, that, in the preſent inſtance, one of theſe three modes is indiſpenſable. But if the delinquent (from his poverty, or other cauſe) ſhould not be able to effect his expiation in any of theſe three modes, he may do it by faſting three days ſucceſſively.—*Shafei* ſays that he has an option; if he think proper, he may faſt for three days *ſucceſſively*, or for any

or faſting.

* The term *Kafâra* means not only an expiatory atonement for the breach of an abſolute vow, but alſo the ſubſtitution of an expiatory act for the penalty impoſed by a vower upon himſelf in the caſe of a vow ſuſpended upon a condition, by which he had deſigned to reſtrain himſelf from the commiſſion of any particular act.

† Meaning expiation for the breach or violation of a *vow*,—or for any other deſcription of *Yameen* which admits of expiation, ſuch as a *Yameen Lighoo*, &c.

‡ *Muſſulmans* muſt be clothed in prayer at leaſt from the waiſt *downwards*.

three

three ſeparate days,—becauſe the words of the *Koran* are, "IF HE BE "UNABLE TO DO THIS, LET HIM FAST FOR THREE DAYS," which expreſſion is general.—The *Haneefite* doctors, in ſupport of their opinion upon this point, quote the authority of the reading of *Abdoola Ibn Maſſaood*, who expounds the text to mean *three days ſucceſſively*; and this accords with what occurs in the *Hadees Maſhhoor* *.—With reſpect to what has been ſaid of the ſmalleſt quantity of cloth ſufficient in expiation, it is recorded from *Imâm Mohammed*.—*Haneefa* and *Aboo Yooſaf* aſſert that the ſmalleſt quantity of cloth proper upon this occaſion is as much as may be ſufficient to clothe nearly the whole body; for a mere *Shilwâr* † is not ſufficient; and this is the more authentic doctrine; becauſe one who is only thus clothed is regarded as *naked*.—That portion of cloth, however, which may not ſuffice in regard to *clothing* may be ſufficient in *eating*, according to its value; that is, if a perſon were to beſtow, as an expiation, ſuch a quantity of cloth as, although it may not ſuffice for the proper *clothing*, yet is equal in value to the feeding of ten poor men, it ſuffices as a *feeding* expiation, whether ſuch may have been the intention or not.—Thus if the perſon to make expiation were to give to each poor perſon the *half* of a proper dreſs, (for inſtance,) this would not be ſufficient for an expiation by *clothing*; but if the value of the cloth thus diſtributed to each be equal to the price of three pounds of wheat, it ſuffices as an expiation by *feeding*.

Previous expiation does not ſuffice.

IF a perſon perform the expiation *before* the violation of his vow, it does not ſuffice.—*Shafei* maintains that it ſuffices, where the expiation is effected by means of *property*, and not by *faſting*, becauſe the expiator makes his atonement poſterior to the occaſion of it, (namely, his vow,) and hence the caſe is the ſame as that of a pilgrim performing

* A collection of traditions ſo called.

† A ſpecies of drawers which are a ſufficient clothing for prayer.

expiation

expiation for wounding game *;—that is, if the pilgrim perform expiation after the act of wounding, it ſuffices; and ſo alſo in the preſent caſe. The argument of our doctors is that expiation is ordained as an atonement for offence; but in the caſe before us no offence has yet appeared.—In reply to what is advanced by *Shafei*, they obſerve that the vow is not the *occaſion* of the offence, as nothing can be conſidered in any degree the occaſion of an offence, but what neceſſarily leads thereto, and a vow does not neceſſarily lead to its own violation, but is rather prohibitory of it; hence the vow is not the cauſe of the offence in the preſent inſtance: contrary to the caſe of the *pilgrim*, adduced by *Shafei*, in which the wound inflicted upon the deer leads to its deſtruction, by ultimately occaſioning its death; theſe therefore are not analogous caſes.—It is to be obſerved that whatever the expiator may have given to the poor before the violation of his vow, he muſt not take back again, becauſe this is *alms*, and it is not lawful for a man to take back his *alms*.

*il* vow muſt be broken and expiated.

If a man bind himſelf, by a vow, to the commiſſion of a ſin, as if he were to ſwear "by God I will not pray," or "I will not converſe father," or "I will murder ſuch an one in ſuch a month," it is incumbent upon him to violate his vow, and perform an expiation, becauſe it is recorded in the traditions, that if a man vow a thing, knowing that the neglect is preferable to the fulfilment, he ought to act accordingly, performing an expiation for the breach of his vow.

The vows of

cannot be held as *vio-*

If an infidel ſhould make a vow, and afterwards violate the ſame, either as an *infidel* or as a *Muſſulman*, (ſuppoſing him to have been converted to the faith in the interim,) ſtill he is not forſworn, becauſe he was not competent to make a vow; as a vow is contracted (that is, is made binding) by a reverence for the name of God, and the vower,

* Pilgrims are forbidden to deſtroy game of any kind within a certain diſtance of *Me* termed the *Ihrâm* [forbidden ground] of pilgrimage.

whilſt he was an infidel, cannot be ſuppoſed to have entertained any reverence for the name of GOD:—an infidel, moreover, is not competent to the performance of expiation, as that is an act of piety.

Vows of abſtinence.

IF a man make certain articles unlawful to him *, which are in their own nature lawful, as if he were to ſay "I have made this cloth (or, *this proviſion*) unlawful to me †," yet ſuch article does not actually become unlawful to him, but he muſt perform expiation when he happens to put on that cloth, or to eat that proviſion.—*Shafei* ſays that expiation is not incumbent upon him, becauſe rendering unlawful that which is lawful does not amount to a vow, as a vow is an act authorized by the law.—The argument of our doctors is that the words "I "have made unlawful," evince the eſtabliſhment of illegality in the thing: now there is a poſſibility of eſtabliſhing illegality in a thing that is really otherwiſe, by ſuppoſing that the ſpeaker had taken an oath that he would not wear the clothes, or eat the proviſions; and this ſuppoſition is adopted, in order to eſtabliſh the illegality declared by the ſpeaker; and it follows that whenever he does that thing which he has rendered illegal to himſelf, he becomes forſworn, whether the matter be great or ſmall, becauſe when unlawfulneſs is once eſtabliſhed in a thing, the illegality pervades every part of it.

IF a man were to ſay "every thing lawful is unlawful to me," every ſpecies of food and drink forthwith becomes unlawful to him, unleſs where the intention or deſign of the vow has regarded ſomething elſe.—This proceeds upon a favourable conſtruction. Analogy would ſuggeſt that the vower, as ſoon as he has uttered his vow, muſt become forſworn, as being unavoidably and continually placed in the performance of ſome lawful act, ſuch as *breathing*, *moving*, *reſting*, or

* This is a phraſe by which is underſtood a vow of *abſtinence* from the thing expreſſed.

† In reciting theſe forms of vows, the addreſs ["*by God*," or "*I ſwear*," &c.] is, for the ſake of brevity, omitted; it is always however to be underſtood.

ſo

ſo forth; and ſuch is the opinion of *Ziffer* upon it;—but the more favourable conſtruction is that the deſign of the vow is to eſtabliſh ſomething, the commiſſion of which ſhall be a crime; and as this cannot be effected where the intention, from the words of the vow, appears to be *general*, regard to its univerſality drops, and ſuch being the caſe, the vow will be conſtrued as reſpecting *meat* and *drink*, for the ſake of general application, as it is in practice commonly applied to the articles of cuſtomary ſubſiſtence. A vow of this nature does not include the uſe of women, unleſs by the intention of the vower; but in this caſe it conſtitutes an *Aila*, becauſe the form of words here recited is a *vow*, bearing the interpretation of "by God, I will not have carnal connexion with my wife:" and it is to be obſerved that, where the vower, by the words "*every thing lawful*," intends *woman*, yet meat and drink are not excluded from the vow, but ſtill remain and are to be conſidered as conſtituting a part of it.—What is now advanced is taken from the *Zâhir-Rawâyet*.—Our modern doctors have ſaid that divorce follows a vow of this form, independant of the intention, as the aforeſaid words are frequently uſed in divorce; and there are decrees upon record to this effect. It is alſo proper that the ſame rule ſhould hold where the vow is pronounced in the *Perſian tongue*, for the ſake of general application.—Let it be obſerved, however, that if a man were to ſay "whatſoever I have in my right hand is unlawful to me," there is a difference among caſuiſts concerning the effect of it;—ſome doctors ſay that the intention is a condition, whilſt others maintain that it is not ſo; it is evident, however, that divorce takes place from it, independent of the intention, on account of cuſtom.

A vow is binding without any condition annexed.

If a perſon expreſs a vow in *general* terms, that is, not ſuſpended upon a condition, as if he were to ſay "I ſhall faſt upon ſuch a day for the ſake of God," he is bound to the obſervance thereof, becauſe it is ſaid, in the traditions, "*whoever makes a vow, and ſpecifies it, he is bound to the obſervance of what he has ſo ſpecified.*"

If

IF a perſon ſuſpend a vow on a condition, and the condition afterwards occur, he is bound to the performance of what he has vowed; and expiation is here of no avail, becauſe the tradition above recited is general;—that is, applies to a *ſuſpended* as well as an *un*ſuſpended vow; and alſo, becauſe a vow ſuſpended upon a condition becomes, upon the condition taking place, the ſame as one of *immediate performance*.—It is recorded of *Haneefa*, that he receded from this doctrine, alleging that if a man were to ſay (for inſtance) "if I do ſo, I am under obligation to perform a pilgrimage," or "to faſt a year," or "to beſtow all my property in alms," and then perform an expiation for his vow, it ſuffices; and ſuch is the opinion of *Mohammed*.—If, however, the vower ſhould not make an expiation, but perform the thing which he had ſpecified, he is diſcharged from the obligation of that alſo, provided the condition be of ſuch a nature as that the vower had no intention it ſhould ever take place. The reaſon of this is that, where the condition is of the deſcription now mentioned, the ſpeech of the vower, as aforeſaid, bears the ſenſe of a *Yameen*, or *ſuſpended* vow, and alſo of a *Nuzr*, or *abſolute* vow:—evidently of a *Nuzr*, becauſe ſuch a form of words is commonly uſed to expreſs a *Nuzr*;—and alſo of a *Yameen*, becauſe the deſign of the perſon, in ſo ſpeaking, is to reſtrain himſelf from doing the act which conſtitutes the condition: and ſuch being the caſe, it remains at his option either to perform expiation, regarding his words in the light of a *Yameen*, or to perform the condition ſpecified, regarding them in the light of a *Nuzr*: it is otherwiſe, however, where the thing conditioned is not of the abovementioned deſcription, but is *actually intended* by the ſpeaker,—as where a man (for inſtance) ſays "if GOD grant me a recovery "from this illneſs, I am under an obligation to perform a pilgrimage," for here expiation does not ſuffice, but it is incumbent upon him to perform the actual thing ſpecified, becauſe in this caſe the words do not bear the ſenſe merely of *Yameen*, but alſo of an abſolute vow of performance:—and this diſtinction is approved.

A vow pronounced, with a reſervation

If a perſon make a vow of any thing, adding "if it pleaſe God," as if he were to ſay "by God I will do this, God willing," he cannot be forſworn, becauſe the prophet has ſaid "*he who vows any thing*, "*adding* '*if it pleaſe* God,' *cannot be forſworn.*"—It is to be obſerved, however, that it is a condition that the words "God *willing*" do follow in immediate connexion with the words preceding, becauſe if they be pronounced ſeparately, after having uttered the vow, it is a retractation; and a retractation in *Yameen* is not lawful.

## CHAP. IV.

## Of *Vows* with reſpect to entrance into, or reſidence in, a particular *Place*.

A vow againſt entering a *houſe* is not violated by entering a *moſque*, &c.

If a perſon make a vow, that "he will not enter *any houſe*," and he ſhould afterwards enter a *moſque*, or *ſynagogue*, or *church*, he is not forſworn, becauſe a *houſe* is a place built for the purpoſe of *dwelling* in, (that is of *ſleeping*, &c.) and buildings of the above deſcription are not deſigned for this purpoſe:—the rule is alſo the ſame, if the ſwearer ſhould enter a *porch* or *portico* before the door of a houſe for the ſame reaſon.—Some have aſſerted that if the portico be incloſed, in ſuch a manner, that when the front door is ſhut, a perſon may be ſaid to be *in the houſe*, the ſwearer by entering ſuch portico violates his vow, it being cuſtomary for perſons to reſide and ſleep in ſuch a place.—If the ſwearer alſo enter an *Iwán* * he is forſworn, becauſe that is de-

* An *Iwân* is an open gallery or balcony, on the top of, or adjoining to, an houſe,—the roof of which is generally ſupported by *peirs* or *pillars*, for the benefit of the air, in the hot ſeaſon.

ſigned

ſigned as an occaſional reſidence in the hot weather, and is a ſpecies of dwelling as much as a ſummer or winter reſidence. Some have conceived that this is the caſe only where the *Iwán* has *four walls*, [that is, where it is a complete quadrangle:] this diſtinction is made, becauſe thoſe buildings in *Koofa*, and other parts of *Arabia*, are generally ſo conſtructed; whereas, with us [that is, in *Hindoſtan* and *Perſia*] they have commonly *three* walls only, being quite open in front, and therefore are not to be conſidered as a *houſe*.—Others, however, ſay that entering an *Iwán* is a violation of the vow, whether it be conſtructed of *three* walls, or of *four*; and this is approved.

IF a perſon ſwear that "he will not enter into a *place*," that is, into a *Serai*, and he afterwards enter a place which is deſolate and in ruins, he is not forſworn: but if a perſon ſwear that "he will not "enter ſuch a place," the place being then in a good and habitable ſtate, and he ſhould enter it after it had fallen to ruin, and been laid level with the plain, he is forſworn, becauſe the term *Daar*, among both the *Arabs* and *Perſians*, means any particular place, as with them it is common to ſay "ſuch a *Daar* is peopled,"—or "ſuch a *Daar* is "*deſolate*, (that is, *abandoned*;") now *an edifice* is the deſcription of the term *Daar*, and this deſcription is regarded in the *firſt* of the above caſes, but not in the *laſt*.

ent *Ser* violated by entering a *ruin*.

IF a man take an oath, ſaying "I will not enter into this *Daar*;" and the ſaid place ſhould afterwards become ruined and deſolate, and ſhould again be rebuilt, or repaired, and the ſwearer ſhould after that enter it, he is forſworn, according to what was before obſerved, that the appellation *Daar* ſtill continues to be applied to the place, after the deſtruction of the edifice which ſtood upon it:—but if this place, after having been ruined and deſolate, ſhould be rebuilt as a *moſque*, *bath*, or *dwelling-houſe*, and the ſwearer ſhould, after that, enter it, he is not forſworn, becauſe in any of theſe caſes the term *Daar* is no

longer applied to the place, as it is then called by another name, ſuch as *moſque*, and ſo forth: and the ſame rule holds where this perſon enters that place after the deſtruction of ſuch *moſque*, *bath*, or other public building, as may in the interim have been erected there, becauſe the place will not recover its original name after ſuch deſtruction.

A vow againſt entering any particular houſe is not broken by entering it when in ruins.

If a man ſwear "he will not enter ſuch a dwelling-houſe," and he ſhould enter therein after it had been deſtroyed or become deſolate, he is not forſworn; becauſe the term *dwellinghouſe* is abrogated, as no perſon then dwells in it; whereas, if the roof only ſhould have fallen in, and the walls remain, and he were then to enter it, he would be forſworn, becauſe it is ſtill conſidered as *habitable*, and the place does not loſe its appellation of a *dwellinghouſe* [*Bait*] from that circumſtance. In the ſame manner, he is not forſworn where, the houſe having been deſtroyed and laid level with the plain, another houſe is built upon the ſame ſpot, and he then enters this houſe,—becauſe the term *dwellinghouſe*, as applied to the *former* houſe, was rendered inapplicable by the circumſtance of its *ruin*.

A vow againſt *entering* a houſe is not violated by going upon the *roof*, or entering the

If a man ſwear that "he will not enter a certain houſe," and he afterwards go on the top of the houſe, from the *outſide*, he is forſworn, becauſe the roof is a part of the houſe. Some have ſaid that, with *us*, he is not forſworn.—In the ſame manner, he is forſworn if he enter the *portico* only of the houſe ſpecified in the vow. The compiler of the *Hedâya* obſerves that this caſe admits of a diſtinction: thus, if the portico be ſuch as that, if the door be ſhut, it forms a part of the houſe, and it be covered in, he is forſworn, but if otherwiſe, he is not forſworn.—If he ſtand under the arch of the doorway he is alſo forſworn, provided the arch be ſo conſtructed as that when the door is ſhut it becomes included as a part of the houſe; but if the arch be ſo ſituated as that, after ſhutting the door, it is not included as a part of the dwelling, he is not forſworn, becauſe the door is deſigned as a protection

tection to the houſe; ſo that whenever the archway is not, by ſhutting the door, included as a part of the houſe, but is without the door, it is evident that it is not included in the houſe.

Caſe of vows reſpecting ab-

IF a man ſhould ſwear "I will not enter into this houſe," and it ſhould ſo be that he is in the ſaid houſe at the time of ſwearing thus, he is not forſworn by ſitting down in that houſe, nor unleſs he go out of the houſe, and again enter it. This is upon a favourable conſtruction.—Analogy would ſuggeſt that the vower is forſworn, becauſe the effect of the *commencement* of the act and of its *continuance* is one and the ſame; and as he would be forſworn by the *commencement* of the act, ſo he is by its *continuance:* but the more favourable conſtruction is that, admitting the effect of the *commencement* and the *continuance* to be the ſame, yet this can only be where the act is of ſuch a nature as to be capable of *continuance*, which the *entrance* into a place does not allow, as the word *entrance* ſimply implies paſſing from without to within.

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IF a perſon ſwear that "he will not put on a particular garment," and ſhould happen to have the ſaid garment upon him at the very time of his ſo ſwearing, and ſhould forthwith take it off, he is not forſworn. And ſo alſo a perſon riding upon a mule [or other beaſt] if he takes an oath, ſaying "I will not ride upon this animal," and ſhould forthwith alight, he is not forſworn. In the ſame manner, a perſon reſiding in a houſe, if he ſwear that "he will not live in this houſe," and thereupon begin to remove out of it, he is not forſworn.—*Ziffer* maintains, however, that the ſwearer, in the laſt of theſe inſtances, is forſworn, as the circumſtance upon which the violation of his vow is ſuſpended, (namely, his reſidence in the houſe,) does already exiſt, however ſhort the time may be. Our doctors argue that a vow is impoſed with a view to the fulfilment of it, and therefore, that in the preſent inſtance, ſuch a ſpace of time as admits of the fulfilment muſt be excepted from the vow; and hence, if the ſwearer make any delay, he

he is forſworn, becauſe ſuch acts as are here mentioned are capable of continuance, as a man may, with propriety, ſay "I rode *a whole* "*day*," or "I wore ſuch a robe *for a day*:" contrary to the act of entrance; as a man could not ſay "I entered for a day:" and the poſſibility of continuance in ſuch acts being thus proved, it follows that the effect of the commencement and the continuance is one and the ſame:—but if the ſwearer ſhould here purely intend the *commencement* of the act, and ſay that his deſign was to vow that "he would not ride again," (for inſtance,) his declaration is to be credited, as his words admit of that conſtruction.

If a man make a vow, ſaying "I will not reſide in this houſe," and he ſhould himſelf leave the houſe, his family and effects ſtill remaining in it, although he may have no intention of returning to reſide there, yet he is forſworn, becauſe he is ſtill ſuppoſed to be an inhabitant of that houſe, from the circumſtance of his family and effects continuing therein; as merchants, who reſide in the *Bazârs*, [that is, have *ſhops* there,] ſay, notwithſtanding, "*they reſide in ſuch a ſtreet*," meaning *the reſidence of their families*.

gainſt reſiding in a city is not broken by the vower's family continuing there.

If a man make a vow, ſaying "I will not reſide in this city," and he go forth from it, reſolving not to return thither, although his family ſhould ſtill continue to reſide there, yet he is not forſworn, and his obſervance of the vow does not depend upon his carrying his family and effects out of that city, according to what is recorded from *Aboo Yooſaf*, becauſe (contrary to the preceding caſe) he is then no longer conſidered as an inhabitant thereof in the cuſtomary acceptation:—and a village is (in the *Rawâyet Saheeh*) declared to be the ſame as a city, with reſpect to this rule.—*Haneefa* obſerves, upon the preceding caſe, that the removal of the whole of the effects from the houſe is neceſſary, inſomuch that if even a *ſingle nail* of the vower's property be left therein, he is forſworn,—becauſe, as his reſidence in that houſe was underſtood from the whole of his effects being there,

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ſo will it ſtill be underſtood whilſt any part of them remains therein.—*Aboo Yooſaf* alleges that the removal of a principal part of them is ſufficient, becauſe the removal of the whole is ſometimes impracticable. *Mohammed* ſays that the removal of ſuch quantity only is neceſſary, as might be ſufficient for houſekeeping, becauſe any thing beyond that is not of a *reſidentiary* nature; and the learned have agreed that this is the moſt laudable diſtinction.—It is here requiſite that the ſwearer remove to another houſe, without delay, in order that he may obſerve his vow; for if he ſhould not remove into another *houſe*, but into the *ſtreet* or a *moſque*, the learned in the law ſay that he does not fulfil his vow; the reaſon of which is that if a perſon were to remove out of a city with his family, ſo long as he does not fix upon another place of abode, his firſt reſidence remains with reſpect to prayer *; whence, if he return to his former abode, he is ſtill accounted an inhabitant; and the ſame holds good in the preſent caſe.

## CHAP. V.

### Of *Vows* reſpecting various *Actions*; ſuch as *coming*, *riding*, and ſo forth.

IF a man ſwear that he will not go out of the moſque, and afterwards deſire another to *carry* him forth from it, and the other do ſo, he is forſworn, becauſe an act performed by the direction of any per-

An *evaſion* of a vow is a *violation* of it.

* That is, he is ſuppoſed to be included in the public prayers offered up in the moſques for the welfare of that city and its inhabitants.

ſon is attributed to the *director*, and it is here, therefore, the ſame as if he had mounted a beaſt, and rode out upon it: but if another perſon were to carry him out of the moſque *by compulſion*, he is *not* forſworn, becauſe the act of a perſon compelling cannot be attributed to the perſon who is forcibly compelled, as he gave no direction in it.—If, moreover, a perſon ſhould carry out the ſwearer *with* his *will*, but *without* his *direction*, he is not forſworn, (according to the *Rawâyet Saheeh*,) becauſe his removal cannot here be eſtabliſhed, as it can only be ſo by the circumſtance of his directing or deſiring it, and not by his *will* alone; and his *deſire* or *direction* do not appear.

If a man ſwear that he will not *go forth* [from his houſe] except to a funeral, and he afterwards go to attend the funeral, and ſome other buſineſs ſhould then occur to him, and he go upon that buſineſs, he is not forſworn, becauſe the act of going to the funeral was excepted from his vow, and his motions after that are not *forthgoings*, as by *going forth* is underſtood removing from the *inſide* of a houſe to the *outſide*.

If a man ſwear, ſaying "I will not go forth towards *Mecca*," and he afterwards go forth with a deſign of going to *Mecca*, and return, he is forſworn; becauſe his *going forth* with a deſign of going to *Mecca* (which is the condition) is here found, ſince, by *going forth* is underſtood removal from the *inſide* of the houſe to *without*, which has here occurred. But if he ſhould have ſworn, ſaying "I will not "*come* to *Mecca*," and he afterwards go *towards Mecca*, and return, he is not forſworn, nor until ſuch time as he actually enters *Mecca*, becauſe *coming* implies *arriving*, and that has not taken place. If a man ſwear alſo "that he will not *go* towards *Mecca*," ſome lawyers ſay that the caſe will be the ſame as this laſt recited, whilſt others aſſert that it correſponds with the preceding caſe; this laſt, however, is the more approved doctrine, becauſe going implies removal, and *arrival* is not neceſſary to conſtitute *removal*.

If

IF a man make a vow that "he will go to *Mecca*," and he ſhould not go to *Mecca* during his life, he is forſworn: but he will not be accounted forſworn until after his death, becauſe whilſt life remains there is a hope of his fulfilling his vow. An undetermined vow of performance death of the vower.

IF a man make a vow, ſaying to his wife "if you go out unleſs "by my permiſſion, you are divorced," and he ſhould afterwards once grant ſuch permiſſion, and the woman go out accordingly, and ſhe ſhould *again* go out without her huſband's permiſſion, the conſequence of his vow is incurred, (that is, the woman becomes divorced,) becauſe permiſſion is requiſite each time that ſhe goes out, as he has excepted from his vow the act of her going out *with* his permiſſion, and any other act of going out beyond that is included in the inhibition, wherefore the conſequence is induced by her going forth without his permiſſion.—If the vower explain, ſaying "I intended *one* per- "miſſion only," his declaration is to be credited in a *religious view*, but not in point of *law*, becauſe, although his words, as above, are capable of this conſtruction, yet it is contrary to their apparent tendency. Vows made with a view

IF a woman be deſirous of going out, and her huſband ſay "if "you go out, you are divorced," and ſhe thereupon ſit down, and afterwards go out, the conſequence is not induced,—that is, divorce does not take place:—and ſo alſo, if a man be deſirous of beating his ſlave, and another vow "if you beat him, ſuch an one my ſlave is "free," and the man, deſiſting only for a momentary ſpace, beat his ſlave, the ſlave of the other perſon does not become free. The reaſon of this is that the deſign of the ſpeaker in what he vows is to prevent that going forth of the woman, or that which (according to what then appears) the *woman* or the *maſter* is intent upon doing, and of courſe the vow is reſtricted to *that* beating, or *that* going forth, as the *foundation* of vow reſts upon what appears at the particular criſis.—This ſpecies of vow is termed *Yameen Fowr*, or a *ſudden* vow: Caſe of a reſtricted, in its ſenſe, to ſome parti- occa-

and *Haneefa* is the firſt who makes any mention of this kind of vow; for previouſly vows were deſcribed as of two ſpecies, one *general*, (as where a man ſays "I will not do ſo,")—and the other *reſtricted*, (as where a man ſays "I will not do ſo *this day*:")—but *Haneefa* deduced from theſe a *third*, ſaying "the *third* ſort is that which is *gene-* "*ral* with reſpect to the *words*, but *reſtricted* with reſpect to the

If a man invite another to ſit down and eat breakfaſt with him, and the other make a vow, ſaying "if I eat breakfaſt my ſlave is free," and he ſhould then proceed to his own houſe, and there eat his breakfaſt, he does not incur the penalty of his vow, becauſe what he ſaid, as being an anſwer, relates ſolely to the ſpeech of the other perſon, and is therefore conſtrued as regarding that breakfaſt to which the other had invited him. But if the perſon thus invited were to anſwer "if I eat breakfaſt *this day* my ſlave is free,"—upon his breakfaſting either there or elſewhere at any time during that day the penalty is incurred, becauſe here he has ſuperadded to his reply the expreſſion, "*this day*," and hence what he has ſaid is rendered a ſeparate ſentence and not a reply.

If a man ſwear that he will not ride upon the beaſt of any other perſon, and he ſhould afterwards ride upon a horſe, the property of one of his ſlaves, who is a *Mazoon*, he is not forſworn, (according to *Haneefa*,) whether ſuch *Mazoon* be involved in debt or not *.—If the *Mazoon*, however, ſhould be *very much* involved in debt, the vower is forſworn, although he ſhould not intend it, as the maſter, in ſuch caſe, is not held (by *Haneefa*) to be poſſeſſed of any property in the animal. If, on the contrary, the debts of the *Mazoon* be of trifling conſequence only, or if he ſhould not be in debt at all, the maſter is not forſworn, where he does not intend it, becauſe in either caſe, he

* Becauſe all the effects of his ſlave are virtually his own property, provided the ſlave be not involved in debt.

is

is himſelf the virtual proprietor of the animal:—but the animal is held to belong to the *Mazoon*, both in the eye of the law, and alſo by common uſage, and hence concerning his belonging to the maſter there is no doubt; wherefore his intention in the act is requiſite. *Aboo Yooſaf* ſays that he is not forſworn in any of thoſe caſes, unleſs he be ſo *intentionally*, becauſe whether the animal be the property of the maſter or not is dubious. *Mohammed*, on the other hand, ſays that he is forſworn, although he be ſo unintentionally, ſince the animal is his property, as the two diſciples hold that debt is in no reſpect repugnant to a ſlave being the property of his maſter.

## CHAP. VI.

### Of *Vows* with reſpect to *Eating* or *Drinking*.

Vows with

IF a perſon ſwear that "he will not eat of ſuch a date-tree," his vow relates to the *fruit* of that tree only, becauſe he has referred his vow to a thing which is not *eatable*, namely, the *tree*; wherefore his vow is metaphorically taken to regard the article which is the *product* of the tree, namely, the *dates*; and the ſubject admits the metaphor, as the date-tree is the cauſe of that article exiſting.—But it is a condition that the dates do not undergo any change by a new operation; for if he were to drink a *Nabbeeza* (or infuſion) prepared from theſe dates, or juice expreſſed from them, yet he would not be forſworn.

A vow of abſtinence from any thing is not broken by eating that thing when it has acquired a new deſcription,

If a man ſwear that "he will not eat of thoſe *Booſrs*," [half ripe dates,] and ſhould afterwards eat of them when they have become ripe, he is not forſworn; and ſo alſo, if he ſhould ſwear that "he will "not eat of thoſe *Ritbs*," [ripe dates,] "nor drink of this milk," and he afterwards eat of theſe mixed together, after the *Ritbs* ſhall have become *mellow*, and the milk *coagulated*; becauſe the deſcription of *half ripe* or of *ripe* is the motive of the vow, and thoſe deſcriptions are no longer applicable; and in the ſame manner, the milk being in the ſtate of *milk* is the motive of the vow, wherefore the vow is taken reſpecting it *in that ſtate*; milk, moreover, is ranked among eatables, wherefore, by *milk* is not underſtood any thing which may be produced from it.—It is otherwiſe where a man vows that "he will not con-"verſe with ſuch an *infant*," or "with ſuch a *youth*," and he converſes with the infant after he becomes a man, or with the youth after he has become aged,—for here he is forſworn; becauſe refraining from converſe with a *Muſſulman* is forbidden by the law, whether ſuch *Muſſulman* be an infant or a youth; hence the deſcriptions of infancy or adoleſcence are not regarded, in the eye of the law, as motives of the vow; conſequently the vow is underſtood to reſpect *ſuch a perſon*; and the vower is accordingly forſworn if he converſe with that perſon after he arrives at years of maturity.

or denomination.

If a perſon ſwear that "he will not eat of ſuch a kid," and he ſhould eat thereof after the ſaid kid ſhall have become a *goat*, he is forſworn, becauſe the deſcription of *kid*, in ſuch an animal, is not the motive of the vow, ſince a perſon who avoids eating the fleſh of *kids* ſtill more avoids eating the fleſh of *goats*.

If a man make a vow that "he will not eat *Booſrs*," (unripe dates,) and ſhould afterwards eat *Ritbs*, (ripe dates,) he will not be forſworn, becauſe *Ritbs* are not *Booſrs*.

If

IF a perſon make a vow that "he will not eat *Ritbs* or *Booſrs*," and he ſhould afterwards eat *Mozennibs*, (dates which are beginning to ripen,) he is forſworn according to *Haneeſa*.—The two diſciples ſay that he is not forſworn by eating *Booſr-Mozennibs*, in a caſe where he may have ſworn not to eat *Ritbs*; neither does he violate his vow by eating *Ritb-Mozennibs*, in a caſe where he has made a vow againſt eating *Booſrs*; becauſe *Ritb-Mozennibs* are termed *Ritbs*, and *Booſr-Mozennibs* are termed *Booſrs*. Thus it is the ſame as if a man were to make a vow with reſpect to *buying*;—that is, if a man were to ſwear that he will not this day buy *Ritbs*, (or *ripe* dates,) and he ſhould afterwards on that ſame day purchaſe *Mozennibs*, (or *half* ripe dates,) he is not forſworn; and ſo in this caſe likewiſe.—The argument of *Haneeſa* on this point is that *Ritb-Mozennibs* are ſuch as rather incline to *Booſrs*, and *Booſr-Mozennibs* are the reverſe,—(that is, ſuch as rather approach to *Ritbs*,) wherefore eating either of thoſe is eating *Booſrs* or *Ritbs*, and the vow regards one or other of them:—contrary to the caſe of *buying*, as the buying relates to every ſpecies, wherefore the *inferior* ſpecies is a dependant of the *ſuperior*.

IF a man vow that "he will not buy any ripe dates," and he ſhould afterwards purchaſe a cluſter of *unripe* dates, among which there may chance to be ſome *ripe*, he is not forſworn; becauſe the purchaſe relates to the *whole*, and the *ſmaller* quantity is a dependant of the *greater*:—but if the vow were made with reſpect to *eating*, he is forſworn; becauſe the eating of them relates to *from time to time*, wherefore the vow regards *every one* of them. This caſe is therefore the ſame as if a man were to vow that he would not purchaſe any *barley*, and he ſhould afterwards buy *wheat*, having among it ſome grains of *barley*, in which caſe he is not forſworn:—but if he ſhould vow that he would not *eat* any *barley*, and he ſhould afterwards eat *wheat*, among which are ſome grains of *barley*, he is forſworn, for the reaſon here ſtated.

IF a man vow that "he will not eat fleſh," and he ſhould after-

wards eat the fleſh of fiſh, he is not forſworn, on a favourable conſtruction of the law.—Analogy would ſuggeſt that he is forſworn, becauſe the meat of fiſh is termed *fleſh*, and ſo it is denominated in the *Koran:* but the reaſon for the more favourable conſtruction of the law is that the meat of fiſh is only termed fleſh *metaphorically*, as *fleſh* is produced from *blood*, and there is no blood in *fiſh*, on account of their inhabiting the water. If the vower, on the contrary, were to eat of the fleſh of a *hog* or a *man*, he would be forſworn; becauſe that is actually *fleſh*, although the uſe of it be *forbidden*, and a vow is ſometimes made with reſpect to forbidden things: and in like manner he is forſworn if he were to eat of the *liver* or the *paunch* of any animal, becauſe that is in reality *fleſh*, as being produced from *blood*, and is, moreover, uſed in the ſame manner as fleſh. Some ſay that, in our times, the vower is not forſworn by eating of *liver* or *paunch*, as theſe articles are not among us accounted

If a perſon ſwear that "he will not eat or buy *fat*," (that is, he is not forſworn by eating or purchaſing fat, unleſs it be the fat or tallow of the *belly*.—The two diſciples allege that the ſwearer would violate his vow by purchaſing or eating the fat of the *back*; becauſe the peculiar quality of tallow, which is *melting in the fire*, exiſts in this ſpecies, as well as in that of the belly.—The argument of *Haneefa* is that the fat of the back is in reality *fleſh*, as being produced from *blood*; and it is, moreover, uſed as fleſh, and thence the fleſh derives its value and goodneſs; for which reaſon a perſon eating it would violate his vow, where he had ſworn not to eat *fleſh*, and is not forſworn by ſelling the fat of the *back*, where he had ſworn that "he would "not ſell *fat*."—Some allege that this difference ſubſiſts only where the vower has ſworn concerning *fat*, but not where he has ſworn concerning *tallow*, as that is never uſed in the way of *fleſh*.

If a man make a vow that "he will neither eat nor buy fleſh or "fat," and he ſhould afterwards either eat or purchaſe the fat tail of ſheep, yet he is not forſworn; becauſe this part is altogether diſtinct from

from both fleſh and fat, as not being uſed for the ſame purpoſe as either of them.

IF a man ſwear that "he will not eat of this wheat," he does not violate his vow, unleſs he *chew* it; and if he ſhould eat *bread* made of the *wheat*, he is not forſworn, according to *Haneefa*.—The two diſciples maintain that by eating the ſaid bread he is forſworn, ſince by the terms of the vow is alſo underſtood *wheaten bread*, according to common uſage.—The argument of *Haneefa* is that, the eating of wheat is a thing actually practiſed, as men eat wheat boiled and dreſſed in other modes, and the *literal* acceptation muſt (according to his tenets) always be preferred to the *metaphorical*, although that be ſanctioned by cuſtom.—If the ſwearer ſhould *chew* the wheat, the two diſciples coincide in opinion with our doctors, that he is forſworn; and this is approved, ſince the *eating* of the wheat comprehends the *chewing* of it, in the common form of *Metonymy*, as where a man vows that he will not *ſet his foot* in the houſe of ſuch a perſon, and afterwards enters that houſe, in which caſe he is forſworn, whether he *rides* into the houſe, or goes in *on foot*.

IF a man make a vow, ſaying "I will not eat of this flour," and he ſhould afterwards eat *bread* made thereof, he is forſworn; becauſe flour is not eaten in its ſimple ſtate, and hence it is conſtrued to mean ſuch articles of food as are prepared from it.—If, on the contrary, he were to eat the actual flour, he is not forſworn; and this is approved; becauſe here it is certain that the words were intended in their *metonymical* ſenſe, and with that ſenſe the eating of flour in its ſimple ſtate does not accord.

IF a perſon ſwear that "he will not eat *bread*," by this is to be underſtood, ſuch bread as is commonly eaten in that place; and this is, in general, either *wheaten* or *barley* bread, one or other of which is almoſt univerſally uſed. If, alſo, the ſwearer ſhould eat *walnut* or

*almond*

*almond* bread in *Irâk** he is not forſworn; becauſe ſuch bread is not common in that region; whereas, if he were to eat ſuch bread in *Tabriſtân*†, or any other place where it is the uſual diet, he would violate his vow.

If a perſon ſwear that "he will not eat *Shawâ*," (or *ſtew*,) then the oath relates to the *fleſh* of the ſtew, and not to the *vegetables* or *eggs* that may be mixed with it; becauſe the term *Shawâ* means the *meat* of the ſtew, and is therefore to be conſtrued in its *literal* meaning, unleſs where the ſwearer may have intended by the word *Shawâ* to expreſs and include the abovementioned articles alſo, when the abſtinence ought to be conformable to the intention.

If a perſon ſwear that "he will not eat *Tabbeekh*," (or *boiled meat*,) his vow reſpects *boiled fleſh*‡. This proceeds upon a favourable conſtruction of the law, according to general uſage; and the ground of it is, that the *unreſtricted* ſenſe of *Tabbeekh* cannot be admitted, on account that this would preclude the vower from the uſe both of *food* and of *medicine*, which is not his deſign. The term *Tabbeekh*, therefore, is here conſtrued to mean the particular thing uſually underſtood by it, (namely, *fleſh cooked in water*,) unleſs where the intention of the vower may have extended farther, as if he were to declare that he meant thereby *every ſpecies* of boiled proviſions,—for here his declaration is to be credited, ſince this is a violence to himſelf, and a man is empowered to inflict penalties upon himſelf. If moreover, in this caſe, the vower were to ſup of the *broth* of *fleſh-meat* he is forſworn, becauſe it partakes of the quality of fleſh, and broth is alſo

* A diviſion of *Perſia:* the ancient *Chaldea.*

† A province in upper *Perſia*: the ancient *Hyrcania.*

‡ *Tabbeekh* literally means *boiled*; in common uſage it ſignifies *boiled fleſh*; but according to its *literal* meaning, the term might equally well be applied to any other food.—This whole caſe turns upon the *expreſs* and *generally accepted* meaning of the word.

termed

termed *Tabbeekh*, wherefore he would be forſworn, " as having eaten *Tabbeekh*."

IF a perſon vow that " he will not eat any *Rás*," [head,] by this is to be underſtood the head of an animal, as uſually prepared for cookery, and expoſed to ſale.—It is written in the *Jama Sagheer*, that if a perſon ſwear that he will not eat *Rás*, by this is underſtood the heads of *cows*, *bullocks*, and *goats*, according to *Haneefa*;—but that the two diſciples hold it reſtricted to the heads of *goats*.—This diverſity of opinion, however, ariſes ſolely from the difference of times; for in the time of *Haneefa* the word *Rás* was uſed to expreſs the heads of both kinds; but in the time of the two diſciples, the heads of *goats* only; and in our times, decrees are iſſued according to whatever may be cuſtomary in conformity with general uſage, as is mentioned in the abridgment of *Kadooree*.

IF a perſon vow that " he will not eat *Fákiha* *," and he ſhould afterwards eat of *oranges*, *citrons*, *dates*, *pomegranates*, or *cucumbers*, he is not forſworn; but if he ſhould eat *apples*, *melons*, or *apricots*, he violates his vow.—This is according to *Haneefa*.—The two diſciples ſay that he is alſo forſworn, if he eat *oranges*, *dates*, or *citrons*. In ſhort, *Fákiha* is a term uſed to expreſs things introduced as a delicacy before or after meals, (that is, ſuch things as are indulged in as a delicacy over and above the common food;) and it is the ſame whether the fruit of which it is compoſed be *dried*, or in the *natural* ſtate, provided it be thus indulged in, in both ways, (for the vower would not be forſworn by eating dried melons, which it is not common to uſe as a ſuperfluous delicacy,) and this is the caſe with apples, melons, and apricots, wherefore he would be forſworn by eating them; but it is

* *Fákiha* is ſaid, in the lexicons, to mean *fruit*; it in reality means any ſuperfluous delicacy which does not come under the denomination of *food*, and this generally conſiſts of *fruit*.

not the caſe with cucumbers and citrons, as theſe are conſidered merely as *vegetables* in *buying* and *ſelling*, and alſo in *eating*;—in *buying* and *ſelling*, as they are ſold by green-ſellers;—and in *eating*, as they are, at the time of meals, ſet along with other vegetables; wherefore the vower is not forſworn by eating *cucumbers* or *citrons*. With reſpect, however, to oranges, dates, and citrons, there is a difference of opinion, as above mentioned;—for the two diſciples maintain that by eating of thoſe the vower is forſworn, as the deſcription of *Fâkiha* is applicable to them, ſince they are the moſt rare of all delicacies, and a higher treat than any other: but he is not forſworn, according to *Haneeſa*, becauſe oranges and dates are eaten as *food*, and men eat citrons alſo as a medicine; wherefore the deſcription of *Fâkiha* is incomplete, ſince they are uſed for the ſupport of life; and hence it is that when dried they are uſed in *cookery*.

If a perſon vow that "he will not eat *Idâm*," by this is to be underſtood any thing which is uſually eaten in bread;—thus *Kabobs* are not conſidered as *Idâm*, whereas *ſalt* is ſuppoſed to come under this denomination.—This is according to *Haneeſa* and *Aboo Yooſaf*: but *Imâm Mohammed* ſays that whatever is moſt commonly eaten along with bread is to be regarded as *Idâm*, (and there is alſo an opinion recorded from *Aboo Yooſaf* to this effect,) becauſe *Idâm* is derived from *Mowâdemit*, or *congeniality*, and ſuch articles are uſually eaten with bread as are agreeable and congenial thereto, ſuch as ſimple fleſh, fowls, and ſo forth.—The argument of *Haneeſa* herein is that *Idâm* implies that which is eaten as a *dependant*, and dependancy is *actually* found in a caſe of *admixture* where it ſtands in the place of bread; and it *virtually* exiſts where the article uſed is of ſuch a nature as never to be eaten alone. With reſpect to what *Aboo Yooſaf* alleges of *Idâm* being derived from *Mowâdemit*, or *congeniality*, it may be replied that ſuch congeniality is completely found in *admixture*:—and *vinegar*, or other ſimlar fluids, are never eaten alone, but mixed with bread or other food; alſo, is not uſually eaten *alone*; and it moreover is liable to melt;

melt; wherefore it is a dependant: (contrary to the caſe of *fleſh*, and other correſponding ſubſtances, which are frequently eaten alone:)—and hence, by eating theſe, the vower is not forſworn, unleſs where he intends ſuch articles in his vow, for this is a violence to himſelf, and a man is empowered to inflict penalties upon himſelf. It is to be obſerved that oranges and dates are not conſidered as *Idâm:* this is approved.

IF a perſon make a vow that "he will not eat *Ghadd*," [*dinner*,] by this is underſtood eating at any time from *daybreak* till *noon*; as by *Aſha*, [ſupper,] is underſtood what is eaten between *meridian prayer* and *midnight*, becauſe any time after the ſun's declination from the meridian is the time of *Aſha*. Some aſſert that this was the diſtinction among the *ancients*; but that with the *moderns* the time of *Aſha* is from afternoon prayer; and the morning meal is that which may be eaten between midnight and daybreak, becauſe the morning is from midnight until daybreak.—It is to be obſerved that where a perſon makes a vow againſt eating dinner or ſupper, *a full and entire meal* is to be underſtood of either, ſuch as is cuſtomary: this will, of courſe, be regulated by the uſual quantity of thoſe meals in different countries reſpectively; but, to violate the vow, more than *half* the uſual quantity muſt be eaten.

IF a man make a vow, ſaying "if I clothe myſelf, or eat, or "drink, my ſlave is free," and he ſhould explain his intention, in the firſt of theſe articles, to regard a *particular kind* of cloth only, his declaration is not to be credited either with reſpect to a decree of the *Kâzee*, or in a religious view; (and the ſame is to be obſerved with reſpect to the two other articles of *eating* and *drinking*;) becauſe intention is not approved unleſs it be expreſſed, and the cloth, or ſo forth, are not mentioned in the vow.—If a man, alſo, were to make a vow, ſaying "if I put on a robe," or "eat food," or "drink wine,—my "ſlave is free," and he afterwards ſay that he meant *this* robe and

not *that* robe, or ſo forth, his declaration is not to be credited in point of law: but it is credited in a religious view, becauſe the words *robe*, *food*, and *wine*, are here mentioned; but yet an intention of *diſcrimination* with reſpect to them contradicts appearances, wherefore his declaration is not to be credited as far as regards a decree of the *Kâzee* *.

Vows reſpecting drinking

If a perſon were to make a vow that "he would not drink out of "ſuch a fountain," and afterwards lift water out of the fountain in a cup, and drink, he is not forſworn,—nor unleſs he lift it with his mouth, [that is, drink it *without* a veſſel,] in which caſe he would be forſworn.—The two diſciples ſay he is forſworn if he drink it out of a cup, as this is the uſual mode of drinking. *Haneefa*'s arguments are deduced from the *Arabic*.

If a man make a vow, ſaying "I will not drink of the water of "ſuch a fountain," and afterwards drink the water of the fountain out of a veſſel, he is forſworn, becauſe the water of the fountain, after being taken up and drank, is ſtill referred to the fountain, which is the condition; he is therefore forſworn, as much as if he were to drink water out of a ſtream which runs from the fountain.

If a man make a vow, ſaying "if I do not drink, *this day*, of "the water which is in this veſſel, my wife is divorced," and it ſhould ſo happen that there is *no* water in it, he is not forſworn; and ſo alſo (according to *Haneefa* and *Mohammed)* if there be water in the veſſel, and it ſhould chance to be ſpilled before the night of that day.

* That is, if a man, having made ſuch a vow, were afterwards to perform any of the acts therein ſpecified, pleading that he made his vow under a reſtrictive intention, and that the articles he has eaten or drank, or the robe he has put on, were meant as *exceptions* therefrom, the poſſibility of the truth of this declaration is to be admitted; but yet the (who can judge only from appearances), muſt decree the emancipation of the ſlave.

*Aboo Yoosaf* says that he is forsworn, in either case, upon the close of that day;—and the same difference of opinion subsists where a man makes a vow to GOD, (that is, where he says "by GOD I will drink "of the water which is in this cup this day;) for it is a rule with *Aboo Yoosaf* that the possibility of fulfilling the vow is not a condition, either of the *obligation* of the vow, or of its *continuance*;—whereas, according to *Haneefa* and *Mohammed*, the possibility of fulfilment is a condition of the obligation of the vow, and also of its continuance, because a vow is taken with a view to its accomplishment, and it is therefore requisite that the accomplishment be *possible* and *conceivable*, so as to be *obligatory*.—The argument of *Aboo Yoosaf* is that although the accomplishment of the vow be impossible, yet its substitute (namely, *expiation*) is possible, wherefore such a vow may be lawfully taken, inasmuch as it is the occasion of expiation: but to this we reply that it is requisite that the original act be practicable, so as to render the taking of the vow valid, since, if the original act be impracticable, how can the vow be taken so as to give occasion for a substitute?—and hence it is that a *Yameen Ghamoos*, (or false oath made respecting a thing already past,) cannot be taken in such a manner as to occasion expiation.—If, moreover, in the case now under consideration, the words "this day" should not have been mentioned, but the vow be general, as if the man had said "if I drink not of the water in this "vessel, my wife is divorced," and there should happen to be *no* water in the vessel, he is not forsworn, according to *Haneefa* and *Mohammed:* but with *Aboo Yoosaf* he is forsworn upon the instant.—But if there be water in the cup at the time of speaking, and it be spilled before night, the vower is forsworn, according to all our doctors.—*Aboo Yoosaf* makes a distinction between an *unrestricted* and a *restricted* case; for he says that, in the *restricted* case, the vower is forsworn after the day is closed; but, in the *unrestricted* case, he is forsworn the instant he ceases from speaking; the reason of which distinction is that, as the specification of a time is made for the purpose of *extension*, the act does not become absolutely incumbent until the last instant of the time; and hence the vower is not forsworn until then; but in the *un-*

*restricted*

had called to him from a place ſo diſtant as not to be within hearing, in which caſe he would not be forſworn, and ſo here likewiſe.

of the vow depends upon the meaning

If a man make a vow that "he will not ſpeak to ſuch an one "*without his permiſſion*," and the perſon mentioned ſhould permit him to ſpeak accordingly, but the vower be not certified thereof until after he ſhall have ſpoken to him, he is forſworn; becauſe the term *Izn* [permiſſion] is derived from the word *Azân*, which ſignifies *indication*; or it ſignifies *a thing received by the ears*, which can only be done by *hearing*.—*Aboo Yooſaf* ſays that he is not forſworn, becauſe *Izn* ſignifies *licence*, which is fully underſtood by *tacit* conſent alone; —that is, (like the *will*,) it does not depend upon any thing elſe: for inſtance, if one were to ſwear that "he would not ſpeak to ſuch a "perſon without his will," and the perſon ſhould *will* his ſpeaking to him, but the vower be not certified thereof until after he has ſpoken, yet he is not forſworn, becauſe the *will* is fully eſtabliſhed by the perſon being merely *willing*, and does not depend upon any thing elſe.—But to this we reply that the will is merely an act of the *mind*, whereas *Izn* it not merely ſo, for the reaſons above ſtated.

Caſe of a vow againſt converſing with a perſon for a *ſpecified time*.

If a perſon make a vow, ſaying "I will not ſpeak to ſuch an one "*for a month*,"—it is to be underſtood *from the time of making ſuch* "*vow*, becauſe if he were not to mention the words *for a month*, the vow would take place as a perpetual relinquiſhment of converſe with the perſon mentioned; the mention *of a month*, therefore, is for the purpoſe of excluding from the vow any thing *beyond* one month, and hence that which is connected with the vow muſt be included in the vow, from the argument of the ſtate in which it is pronounced, as being a ſtate of *anger*, ſince the reaſon for the obſervance of the vow is the *anger* which occurs to the vower at that inſtant, for which reaſon converſe with the perſon mentioned is prevented from that inſtant. It would be otherwiſe if a man ſhould ſay "by God I will "faſt for a month," becauſe, if the words "*for a month*" were not mentioned,

mentioned, yet the vow would not take place as inducing a *perpetual* faſt;—the mention of a month, therefore, is merely for the purpoſe of reſtricting the faſt to *a month*; and as the month is indefinite, and not ſpecified, the ſpecification of it is left to the vower.

Repetition of *prayer*, &c. at the ſtated ſeaſons, does not violate a vow

If a man make a vow that "he will not ſpeak," and he afterwards read the *Koran* at the ſtated periods of devotion, he is not forſworn; but if he ſhould, at any other time, read the *Koran*, he is forſworn. The ſame rule alſo holds with reſpect to the *Taſbeeh* *, *Tahleel* †, and *Takbeer* ‡;—that is to ſay, if he repeat any of theſe at the ſtated time of prayer, he is not forſworn; but if he ſhould repeat them at any other time, he violates his vow. This proceeds upon a favourable conſtruction.—Analogy would ſuggeſt that the vower is forſworn in either caſe, (and ſuch is the opinion of *Shafeï*,) becauſe reading the *Koran*, or repeating the *Taſbeeh*, and ſo forth, are all *actual exertions* of the ſpeaking faculty.—The argument of our doctors is that prayer does not come under the deſcription of *ſpeech*, either *generally*, or in the conſtruction of the LAW, the prophet having ſaid "*theſe prayers* "*which I teach are not capable of being conſtrued as containing any of* "*the words of men.*"—Some have ſaid that in our days the vower would not be forſworn, even at any *other* time than the ſtated periods of prayer, becauſe the perſon who repeats thoſe things is not ſaid to be but *reciting*; and decrees paſs accordingly.

A vow made reſpecting the *day* extends to the *night* alſo.

If a man were to ſay "on the day [*Yawm*] upon which I ſpeak to "ſuch an one, his wife is divorced §," this extends both to the *day* and the

* Calling upon the name of GOD in prayer by ſaying "BEESM ALLAH! *in the name of* GOD."

† Repeating the *Kalma*, or creed, "THERE IS NO GOD BUT GOD, &c."

‡ Magnifying GOD (in prayer) by ſaying "ALLAHOO AKBERO!" [*God is the greateſt.*]

§ It is to be obſerved, in this and other ſimilar modes of expreſſion, that the vow is by no

the *night*, becauſe the word *day*, where it comes in context with a thing which is not a matter of continuance, means time *generally*; and as ſpeaking to a perſon is not a matter of *continuance*, by the word *day*, is to be here underſtood *time* in *general*.—But if the ſwearer ſhould declare that his intention in the vow was confined to the *day*-time in particular, his declaration muſt be credited with the *Kâzee*, becauſe the term *Yawm* is uſed alſo in this ſenſe.—It is recorded from *Aboo Yooſaf* that his declaration is not to be credited with the *Kâzee*, as it is contradictory to general uſage.—But if the vower ſhould, in the place of the word *day*, uſe the word *night*, by ſaying "on the *night* [*Lail*] "on which I converſe," (and ſo forth,) by this is to be underſtood *night* only, becauſe the poſitive meaning of the term *Lail* is *night*, in the ſame manner as the poſitive meaning of the term *Nihâr* is *day*; but no inſtance is known of *Lail* being uſed to expreſs time generally.

Caſe of a vow of inhibition reſtricted to a particular occurrence.

If a perſon ſay "if I ſpeak to *Zeyd*, unleſs a certain perſon come, "his wife is divorced," and he ſhould afterwards converſe with *Zeyd*, before the coming of the other perſon, he is forſworn,—but, if *after*, he is *not* forſworn.—In the ſame manner if the ſwearer were to expreſs himſelf, "if I ſpeak to *Zeyd until* ſuch an one ſhall have "arrived," or "*unleſs* by permiſſion of ſuch an one," or "*until* "the permiſſion of ſuch an one,"—"his wife is divorced," and he ſhould afterwards converſe with *Zeyd*, before the arrival, or before permiſſion obtained, of the other perſon, he is forſworn;—but, if *after*, he is *not* forſworn; becauſe the arrival or permiſſion is the termination of the vow, which remains in force *until* the termination, but diſcontinues upon that taking place; and he cannot be forſworn after the vow is completed.—In the caſe here ſtated, if the perſon named ſhould happen to die, the vow ceaſes: contrary to the opinion of *Aboo Yooſaf*, for with him the vow does not drop, but the vower is forſworn if ever he ſhould ſpeak to *Zeyd*.—The argument of *Haneeſa*

no means efficient of divorce to the woman mentioned in it, but is conſidered, with reſpect to *her*, as a vague and idle ſpeech, and in itſelf void, inducing nothing more than an expiation on the part of the perſon ſpeaking.

and

is that the thing prohibited by the tenor of the oath is with *Zeyd*; and this, by his death, being rendered impoſſible, the vow drops of courſe: but with *Aboo Yooſaf* the poſſibility is not a condition, whence upon the death of *Zeyd* the vow becomes *perpetual*.

A vow againſt converſing with a perſon deſcribed is not [illegible] by converſing with that perſon after the deſcription (with reſpect to the other) is done away.

If a man make a vow, ſaying "I will not ſpeak to the ſlave of "ſuch a perſon," without intending any *particular* ſlave,—or, if he ſhould expreſs his vow "I will not ſpeak to the *wife*," or "the "*friend* of ſuch a perſon," and the perſon ſhould ſell his ſlave, or repudiate his wife, or fall at enmity with his friend, and the vower afterwards converſe with either of theſe, he is not forſworn, becauſe his vow is taken as regarding a circumſtance which has its exiſtence in a matter relative to the perſon named, whether that matter be relation by *right of property*, as in the caſe of the *ſlave*; or relation by *connexion*, as in the caſe of the *wife*, or the *friend*; and when that matter no longer remains, the vower cannot be forſworn.—The compiler of this work obſerves that what is here ſaid is taken from the *Jama Sagheer*; and other authorities agree with it, in reſpect to the relation by *right of property*: but in reſpect to the relation by *connexion* the vower would be forſworn, according to *Mohammed*, becauſe ſuch relation is purely of an *indicative* nature, and is not to be taken in a *reſtrictive* ſenſe, ſince the caſe admits the deſign of the vower to be a renunciation of converſation with thoſe perſons; as either of them is capable of being held an enemy, from injuries received, but not becauſe of the relation in which they ſtand to the perſon named; the continuance of that relation, therefore, is not a condition; and hence the effect is connected with the *identical perſon* of either, as in a caſe of pointed reference;—that is, if a perſon ſay "I will not converſe "with *this* friend, or with *this* wife, of ſuch a perſon," and he ſhould converſe with them after the falling out with the friend, or the divorce of the wife, he is not forſworn; and ſo here alſo.—The reaſon for what is recited in the *Jama Sagheer* is that it is poſſible that the

deſign of the vower may be to quit converſing with thoſe perſons on account of the relation in which they ſtand to the perſon named, (whence he has not mentioned them with any *pointed reference*,) and it is alſo poſſible that the deſign may be merely to quit converſing with thoſe perſons; thus a doubt exiſts, whether the *relation* be the *motive* to the vow or not; and ſuch being the caſe, the vower is not forſworn by converſing with any of thoſe perſons after the diſſolution of the relation in which they ſtood to the perſon named.—If, moreover, the man ſhould have made his vow with reſpect to a perſon particularly ſpecified, by ſaying "I will not converſe with *this* ſlave of ſuch an one," or "*this* wife," or "*this* friend," (and ſo forth,) and he ſhould converſe with them after the ſlave ſhall have been *ſold*, or the wife *divorced*, or the friend at enmity, he is not forſworn in the caſe of the *ſlave*, but he would be ſo in the caſe of the *wife* or the *friend*.—This is the doctrine of *Haneeſa* and *Aboo Yooſaf*.—*Mohammed* ſays that he is forſworn in the caſe of the ſlave likewiſe; and ſuch alſo is the opinion of *Ziffer*. And if a man were to make a vow, ſaying "I "will not enter into *this* houſe of ſuch an one," or "I will not ride "upon *this* beaſt of ſuch an one," and he ſhould enter the houſe, or ride upon the beaſt, after the owner has diſpoſed of them, the ſame difference of opinion prevails among the doctors as is above ſtated.—The argument of *Mohammed* and *Ziffer* is that the mention of the relation of the ſlave to his owner is for the purpoſe of indication; but pointed reference is more forcible, in indication, than the relation which a thing bears to another, as that altogether obviates doubt; wherefore regard is had to pointed reference alone, and the mention of the relation is nugatory, in the ſame manner as in the caſe of the wife or the friend.—The argument of *Haneeſa* and *Aboo Yooſaf* is that the moving cauſe of the vow, in the caſe of the ſlave, the houſe, or the animal, is ſome property which is to be found in the perſon to whom they have reference; becauſe the *houſe* or the *animal* are incapable of being of themſelves held in enmity; and ſo alſo the *ſlave*, as he does not ſtand in a rank ſufficiently reſpectable to admit his being an object of enmity;

enmity; wherefore the quitting from converſe with thoſe is on account of a property which is to be found in the *proprietor* of them; and hence the vow is reſtricted to the continuance of the right of the owner: contrary to a caſe of relation by connexion, ſuch as the relation of the wife or the friend; as enmity and ſeparation from them may be the deſign, for which reaſon the mention of the relation in which they ſtand to the perſon named is merely for the purpoſe of indication; and it is evident that the moving cauſe of the vow, with reſpect to them, is ſome property which is to be found in *themſelves*, and not in the perſon to whom they have reference; becauſe they are mentioned with a pointed reference: contrary to the caſe of the ſlave, the houſe, or the animal, as in thoſe caſes the thing mentioned is incapable of being of itſelf held in enmity, unleſs on account of ſome property to be found in the perſon in reference to whom it is mentioned, namely the *proprietor*.

If a man make a vow, ſaying "I will not ſpeak to the owner of "this *turban*," and the owner of the turban ſhould afterwards ſell it, and the vower ſhould thereafter converſe with the ſaid perſon, he is forſworn; becauſe here the mention of the relation of the thing to the perſon is purely for the purpoſe of indication, ſince men do not fall at variance with turbans; and hence it is the ſame as if he had ſpoken with a pointed reference to the owner of it, by ſaying "I will not "ſpeak to this owner of a turban;" in which caſe he would be forſworn; and ſo here likewiſe.

If a perſon make a vow, ſaying "I will not converſe with this "youth," and he ſhould afterwards converſe with him when he has arrived at an advanced age, he is forſworn; becauſe the effect is connected with the perſon mentioned; as a deſcriptive expreſſion is not neceſſary to ſpecify a perſon who is preſent, and the deſcription of youth cannot be conſidered as the motive to the vow.

lated by converſing with

SECTION.

## SECTION.

If a perſon make a vow, ſaying "I will not converſe with ſuch "an one for a *time*," [*Hyne*,]—or "for a *ſpace of time*," [*Zimân*,] by theſe modes of expreſſing time is to be underſtood ſix months; becauſe *Hyne* ſometimes means a ſhort ſpace of time, and ſometimes forty years; and it alſo is ſometimes uſed to expreſs a *few months*;—and the ſpace of *ſix months* is a medium between theſe extremes; wherefore, by the term *Hyne* is here to be underſtood ſix months. The principle upon which this proceeds is that a *very ſmall* ſpace of time cannot be deſigned for the *prevention* of *converſation*, as *prevention* may apply to a *little* ſpace of time, in *common uſage*, wherefore in ſuch a caſe a vow is unneceſſary for *prevention*; and a *very long* ſpace of time is not deſigned for prevention, as that ſtands as a *perpetuity*: moreover, if he had omitted *all mention* of time, by not introducing the word *Hyne*, his vow would be taken as meaning to quit converſe with the perſon named *for ever*; but as he mentioned *time*, it appears that his deſign is not *perpetual*; ſince if it were ſo, he would have omitted the word *Hyne*, or have uſed the word *Abid*, [for ever;] and ſuch being the caſe, it is aſcertained that his intention in the word *Hyne* is *ſix months*:—and ſo alſo of the word *Zimân*, as that is uſed in the ſame ſenſe with *Hyne*.—What is here advanced proceeds upon a ſuppoſition that the vower had no particular intention: but if he ſhould have intended to expreſs any *particular ſpace* of time, it is to be underſtood according to his intention, becauſe that is the literal meaning of the words aforeſaid *.

ence to *time*.

* Some grammatical controverſy here follows reſpecting the word *Dehr*, which does not admit of an intelligible tranſlation.

If

If a perſon make a vow in the following terms, ſaying "I will "not ſpeak to ſuch an one for days," [*Ayâm*,]—by the word *Ayâm* is to be underſtood *three* days: but if he ſhould uſe the *reſtricting article*, ſaying "I will not converſe with ſuch an one for *the* days," [*Al-Ayâm*,] by this is underſtood *ten* days, according to *Haneefa*,—and a *week*, according to the two diſciples. If the vower, alſo, were to expreſs himſelf, "I will not ſpeak to ſuch an one for *months*," [*Shoohoor*,] by this is underſtood *ten months*, according to *Haneefa*,—and a *year*, according to the two diſciples:—and if he ſhould vow, ſaying "I will not converſe with him for *weeks*," [*Joomâ*,] or "for *years*," [*Soonatine*,]—by *Joomâ*, (according to *Haneefa*,) is underſtood ten weeks,—and by *Soonatine* ten years; but the two diſciples underſtand by either of theſe the *whole life* of the ſwearer. The arguments here, on both ſides, are deduced from certain grammatical points in the *Arabic*.

If a man make a vow with reſpect to his ſlave, ſaying "if you "ſerve me for *many days* [*Ayâmoon Kaſeeritoon*] you ſhall become "free,"—by *many days* (according to *Haneefa*) is underſtood *ten* days, becauſe *ten* is the greateſt number comprehended in the term *Ayâm*, which is the plural of *Yawm*.—The two diſciples, on the other hand, ſay that by the words *many days* are to be underſtood *ſeven* days only, becauſe any thing beyond is an exceſs.—Some have aſſerted that if a man were to make this vow in the *Perſian* tongue, by *many days* is underſtood *ſeven*, with all our doctors; becauſe in the *Perſian* language there is no difference between *more* than ten days, and *leſs* than ten, for men ſay "*ten* days or *more*," without expreſſing day in the *plural* *.

* This and the preceding caſe turn upon certain points of grammar. In the ... language are four ſorts of plurals, of which one is termed a *plural of paucity*: ſome of the commentators ſuppoſe (with *Haneefa*) that this ſpecies of plural expreſſes any number up to *ten*, whilſt others maintain (with *Mahammed*) that the utmoſt number which can be expreſſed by it is *ſeven*.—In the *Perſian* language a noun is always expreſſed in the *ſingular* when preceded by a plural numeral, although it conſequently has a plural ſignification.

## CHAP. VIII.

## Of *Vows* in *Manumiſſion* and *Divorce.*

Divorce vowed on condition of the birth of a child takes place although the child be ſtill-born.

If a man ſay to his wife* "whenever you bring forth a child, "you ſhall become divorced," and ſhe ſhould afterwards be delivered of a dead child, divorce takes place upon her;—and in the ſame manner, if a man ſay to his female ſlave "whenever you bring forth a child, you ſhall become free," and ſhe ſhould afterwards be delivered of a dead child, ſhe becomes free;—becauſe the condition, (namely *childbearing*) is fulfilled, as an infant, though ſtill-born, is yet actually a *child*, and it is alſo termed a child by general uſage. Regard is moreover had, in law, to ſuch a birth, whence it is that the *Edit* is accompliſhed by it: and the diſcharge which follows the birth of a *dead* child is termed *Niffâs*, as well as that which follows the birth of a *living* child: and in the ſame manner the mother of ſuch a child, where ſhe happens to be a *ſlave*, and her owner acknowledges the child, becomes an *Am-Walid.*

Freedom vowed in favour of a child that may be born of a female ſlave takes place on her firſt *live-born* child.

If a man ſay to his female ſlave "whenever you bring forth a "child, that child is free," and ſhe be afterwards delivered, firſt of *one* child *dead*, and again of *another* child *living*, in this caſe the living child alone is free,—that is to ſay, *that* one is free, but no *other* who may be born *afterwards*.—This is the doctrine of *Haneefa*.—The two diſciples ſay that no child whatever is emancipated, becauſe the con-

* In this and all the correſponding caſes, the *form* of the vow, although omitted here for the ſake of brevity, is always to be underſtood as preceding the ſentence—thus "BY "GOD, *whenever you bring forth*, &c." or "I vow, *whenever*, &c."

dition

dition of the vow has already taken place in the birth of the dead child, for the reaſons ſtated in the preceding caſe; and hence the vow is diſſolved, without its conſequence,—(that is, the vow is accompliſhed and done away, without its conſequence taking place,)—as the diſſolution of a vow does not depend upon the induction of its conſequence: thus if a man were to ſay to his wife "if you go into ſuch a houſe, "you are divorced," and ſhe enter that houſe after having been repudiated by a complete divorce, and her *Edit* be paſt, the vow is diſſolved without its conſequence; and ſo alſo in the preſent inſtance, as a dead child is not a proper ſubject of manumiſſion.—The argument of *Haneeſa* is that the term *Walid* [a child] as expreſſed in the vow, although it be applicable to one born *dead*, yet in the preſent caſe is reſtricted to the deſcription of *living*, becauſe the deſign of the vower is to beſtow *freedom* upon a child, and as this is a power by virtue of which the deſpotic authority of others over the perſon endowed with it is removed, it cannot poſſibly be eſtabliſhed in one who is *dead*. The term *Walid*, therefore, expreſſed in the vow, is reſtricted to the *living* deſcription; in the ſame manner as where a maſter ſays to his female ſlave "whenever you are delivered of a *living* child, ſuch "child is free," and the ſlave is delivered of a dead child, and afterwards produces a living one;—in which caſe this living one is free; and ſo here likewiſe.—It is otherwiſe where *divorce* or *manumiſſion* has been ſuſpended upon the birth of a child, for there the divorce or manumiſſion ſo ſuſpended takes place; as in this inſtance it is not requiſite that the birth be reſtricted to the *living* deſcription, ſince the life of the child is not neceſſary to the divorce of the wife, or the manumiſſion of the ſlave.

Caſe of a vow of freedom to the *firſt* pur-

IF a man ſay "the firſt ſlave that I purchaſe is free," and he ſhould afterwards buy a ſlave, ſuch ſlave is free, becauſe the word *firſt* points to the prior ſingle ſlave, which applies in this inſtance:—but if the vower, in ſuch a caſe, were to purchaſe *two* ſlaves *together*, and afterwards a *third*, none of theſe ſlaves is free, becauſe ſingularity

does not apply to the *third* ſlave, wherefore he is not the *firſt*. If, however, this man had ſaid "the firſt ſlave that I purchaſe *ſingly* is free," the third ſlave would be liberated, becauſe here the vower has intended *ſingularity at the time of purchaſe*, and this one is the firſt with to ſuch ſingularity.

Caſe of a vow of freedom to the *laſt* purchaſed ſlave.

If a man ſay "the *laſt* ſlave that I buy is free," and he ſhould purchaſe a ſlave, and then die, yet the ſlave ſo purchaſed is not free; becauſe the term *the laſt* applies to the *individual adjunct* *, and as no other has preceded this one, he cannot be conſidered as *adjunct*; but if the vower were to die after having purchaſed another ſlave, this ſlave is free as being the *individual adjunct*. It is to be obſerved that this ſecond ſlave is free (according to *Haneefa*) from the day of purchaſe; and being free from the date of the purchaſe, the ſame is regarded as from the *whole* of the property of the deceaſed, on account of his having releaſed him during health.—The two diſciples ſay that he is emancipated upon the death of that perſon, and hence it is regarded as from the *third* of his property only, on account of the deceaſed having emancipated him *upon his deathbed:* for they argue that the poſteriority of that ſlave cannot be fully eſtabliſhed, until ſuch time as it becomes certain that no other can be purchaſed *after* him; and this cannot poſſibly be determined but by *death*; hence the condition is found upon the maſter's deceaſe, and the freedom of the ſlave is therefore alſo eſtabliſhed upon that event. The argument of *Haneefa* is that the poſteriority of the ſlave is aſcertained by the maſter's deceaſe, but the deſcription of poſteriority applies to him from the period of the purchaſe.—The ſuſpenſion of a *triplicate* divorce upon poſteriority is alſo ſubject to the ſame difference of opinion:—in other words, if a man vow "the laſt woman I marry ſhall be *thrice* divorced," and he firſt marry one woman, and afterwards another, and then die, three divorces take place upon the ſecond wife, according to

* Arab. *Fard Lahik.*—It is a term uſed ſolely in *grammar*.

inſomuch that ſhe cannot inherit of the deceaſed: but according to the two diſciples the three divorces take place upon her from the day of her huſband's deceaſe, and conſequently ſhe does inherit of him.

Caſe of a vow of freedom to whoever of his ſlaves ſhall congratulate child.

IF a man ſay "whoever of my ſlaves congratulates me upon the "delivery of my wife ſhall be free," and afterwards ſeveral of his ſlaves ſucceſſively ſhould inform him of his wife's delivery, the one who firſt brought the intelligence only is free; becauſe by *Biſhârit* [which is here rendered *congratulation*] is meant any *intelligence which works a change upon the countenance*, whether that intelligence be *agreeable* or *otherwiſe*, (but yet in common uſage, it is requiſite that the intelligence be *agreeable*,) and this deſcription is fully found only in the *firſt* intelligence,—*not* in the *ſecond*, or *third*, becauſe no change is by that wrought upon the countenance.—If, however, the ſlaves all bring him the news *together*, they are *all* free, as the *Biſhârit* then proceeds equally from *all*.

Expiation of a ſlave, in conſequence of a vow, does not

IF a man were to ſay "if I purchaſe a ſlave he ſhall be free," and he afterwards purchaſe a ſlave, with a view, by his releaſe, to effect the expiation of a vow, this does not ſuffice for expiation; becauſe it is requiſite that the intention of expiation be aſſociated with the occaſion of manumiſſion, which is not the caſe here, as the *vow* is the cauſe of manumiſſion in the preſent caſe, and at the time of making it expiation was not the intention of the vower; and as to the *purchaſe* of the ſlave, that is not the *occaſion* of the manumiſſion, but rather the *condition* of it.

but the emancipation of a *father*, in

IF a man purchaſe, as a ſlave, his own father, with a view to the expiation of a vow, it ſuffices, with our doctors. This is contrary to the opinion of *Ziffer* and *Shafei*, who contend that the act of purchaſing a father is the *condition* of manumiſſion, and not the *occaſion* of it, as the *occaſion* of it is *relationſhip*; (for *purchaſe* is an *eſtabliſhment* of right of property,

perty, and *manumiſſion* is a *deſtruction* of that right, and each of theſe is repugnant to the other, wherefore it is impoſſible that *purchaſe* ſhould be the *occaſion* of *manumiſſion*;) and it thus appearing that the cauſe of the manumiſſion is *relationſhip* and not *purchaſe*, the *intention* of the manumiſſion is not aſſociated with the *cauſe* of it.—The argument of our doctors is that the purchaſe is blended with the manumiſſion, as the prophet has ſaid "*no child makes ſo effectual a return to his parent* "*as one who, finding his parent the ſlave of another, purchaſes, and* "*thereby emancipates him*,"—which proves that the prophet conſtituted the *purchaſe itſelf* a manumiſſion, as there is here no other condition of manumiſſion except purchaſe, according to all the doctors.

The emancipation, (by purchaſe,) of perſon to whom ſhe ſtands in the does not ſuffice for the expiation of a vow.

If a man purchaſe, as a ſlave, a woman who has borne him a child, with a view to the expiation of a vow, it does not ſuffice.—The nature of this caſe is thus. A man marries the female ſlave of another, and ſhe produces a child to him, and he ſays to her "if I at any time "hereafter purchaſe you, you ſhall become free, as an expiation of "my vow," and he afterwards purchaſe her, when the woman becomes forthwith releaſed, becauſe of the occurrence of the condition upon which her emancipation was ſuſpended; but this does not ſuffice for the expiation of a vow, becauſe the ſlave is a claimant of freedom in virtue of *Iſteeláđ**, and hence her freedom is not purely in conſequence of the vow, and therefore does not ſuffice for the expiation of a vow.—This caſe is contrary to one where a man ſays to a female ſlave, who has not borne a child to him, "if I purchaſe you, you "ſhall become free as an expiation for my vow," and he afterwards purchaſe her; for in this caſe the ſlave becomes free, and her freedom ſuffices for an expiation of his vow, becauſe the ſlave is not in this inſtance a claimant of freedom on any other ground, ſhe being emancipated purely in conſequence of the vow, and not of any thing elſe;

* Her maſter claiming the child born of her *as his own*. (See *Claim of Offspring*.)

and

and the intention of expiation is found aſſociated with the occaſion of the manumiſſion:—ſhe is therefore emancipated; and it ſuffices for an expiation.

Caſe of a vow of freedom to a female ſlave on condition of

IF a man ſay "if I make a concubine of a female ſlave, ſhe ſhall "be free," and he ſhould afterwards make a concubine of any female ſlave, his own property, ſhe is free accordingly; becauſe the vow has been taken with reſpect to that ſlave, ſhe being the property of the vower.—The principle upon which this proceeds is founded on the grammatical conſtruction of the vower's words in the original *Arabic*; and it is accounted for thus:—the expreſſion "*a female ſlave*," in the caſe in queſtion, is *indefinite*, and an indefinite noun is comprehended, in an inſtance of prohibition, in the way of general individuality*: now here this expreſſion ſtands in the place of a prohibition, with regard to the *deſign*, (as the deſign of the vower is to prohibit himſelf from *concubinage*,) and ſuch being the caſe, the expreſſion "*a female* "*ſlave*" applies to every ſlave individually.—If, however, the vower were to *purchaſe* a ſlave, and make her his concubine, ſhe does not become free.—This is contrary to the opinion of *Ziffer*, for he maintains that ſhe alſo becomes emancipated; becauſe, as it is not allowed to a man to make a concubine of any woman who is not his *property*, it follows that the mention of *concubinage* is equivalent to the mention of *a right of property*; being the ſame as if a man were to ſay to the wife of another "If I divorce you, my ſlave is free," which is equivalent to his ſaying "if I marry you, and afterwards divorce you,"—and ſo forth;"—becauſe, as divorce cannot take place without property by marriage, the mention of *divorce* may be ſaid to amount to a mention of *marriage*;—and ſo alſo in the preſent caſe.—The arguments of our doctors on this point are, that a vow of manumiſſion is not of any effect, excepting in a caſe of *actual* right of property, or

* Literally, "in the way of *univerſality* of *ſingularity*:"—this is a technical phraſe, the ſenſe of which is beſt explained by the *context*.

where

where it is referred, either to the right of property itſelf, or to the *cauſe* of the right; and not one of theſe is found in the preſent caſe. There is no *actual* right of property, evidently; nor is there any *reference* to the right of property, as the vower did not ſay "If I *become* "*poſſeſſed* of a female ſlave, and make that ſlave my concubine;" nor is there any reference to a *cauſe* of right, as the vower has referred only to *concubinage*, and that is not a *cauſe* of right of property in a ſlave, becauſe *Haneefa* and *Mohammed* define concubinage [*Teſirree*] to ſignify merely "a man's keeping his ſlave up, and providing a dwel-"ling for her, and preventing her from going abroad, and having "carnal connexion with her, whether he claim the children born "of her or not;" (*Aboo Yooſaf* holds that the claim of children is alſo a condition, as a *concubine* is, in general uſage, one whoſe children are claimed;)—and no one of theſe particulars is a *cauſe* of right of property.—Yet a *right of property* being requiſite to concubinage, muſt, in the preſent inſtance, be taken for granted, as an eſſential, from the neceſſity of the *concubinage* (which is the condition) being *legal:* this right of property, however, is taken for granted only ſo far as is neceſſary, and does not appear with reſpect to the conſequence, (namely, *emancipation*,) becauſe whatever is eſtabliſhed merely from *neceſſity*, does not pervade beyond the point of neceſſity. With reſpect to the example of *divorce*, cited by *Ziffer*, it may be replied that the conſequence induced (namely *emancipation*) is there admitted only on account of the vow being made with reſpect to *actual property*, (for the ſlave is at the time the property of the vower;) and the *marriage*, which is there taken for granted, as a neceſſary inference, is ſo only with reſpect to the *condition*, (namely, *divorce*,) but not with reſpect to the *conſequence*; inſomuch that if the man were to ſay to the ſtrange woman "if I divorce you, you are divorced thrice," and he afterwards marry her, and divorce her, yet *three* divorces do not take place, as the condition had not been declared either under an *actual* right of property, or in *reference* to ſuch right, or to the *cauſe* of

of it:—this caſe, therefore, is analogous to the caſe in queſtion, for this reaſon, that in both of them the eſtabliſhment of the *condition* is merely for the purpoſe of admitting *that*, but does not pervade to the admiſſion of the *conſequence*.

If a man ſay "every perſon my property is free," his *Am-Walids*, and *Modabbirs*, and *Abids*, all become free accordingly, becauſe the reference to a right of property with reſpect to them is complete, as all theſe are the actual property of the ſwearer: but his *Mokâtibs* do not become free, unleſs ſuch be the intention, becauſe abſolute poſſeſſion does not apply to a *Mokâtib*, whence it is that his maſter is not the proprietor of his acquiſitions, and alſo that it is not lawful for a maſter to have carnal connexion with his *Mokâtiba:* contrary to a *Modabbira*, or *Am-Walid:*—reference to a right of property, therefore, with reſpect to a *Mokâtib*, is incomplete and deficient, for which reaſon intention is requiſite.

dom to ſlaves includes every deſcription of them.

If a man, having three wives, ſay of them "this one is divorced, "or *this*, or *this*," divorce takes place upon the laſt wife; and it remains 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*; becauſe the vow, as above expreſſed, is the ſame as if he had ſaid "one of you two is divorced,—and alſo *this* one."—The ground of this is found in the grammatical conſtruction of thoſe words in the *Arabic*.—In the ſame manner, if a maſter ſhould ſay, with reſpect to three ſlaves, "this one is free,—or *this* one,—or *this* one,"—the *laſt* becomes free, and it remains at the option of the maſter to ſpecify which of the others ſhall be free, the *firſt* or the *ſecond*.

Caſe of a vow of divorce indefinitely expreſſed.

CHAP.

## CHAP. IX.

## Of *Vows* in *Buying*, *Selling*, *Marriage*, and ſo forth.

A vow againſt the performance of certain acts is not violated by procuring an *agent* to perform thoſe acts;

If a man make a vow, ſaying "I will not *ſell*, or *purchaſe*, or *hire* "or *let out at rent*," and he ſhould afterwards appoint any perſon his agent, to buy, or ſell, or ſo forth, he is not forſworn; becauſe the *agent* is the contractor, and not his *conſtituent*, inſomuch that all the rights of the contract appertain to the agent, not to his conſtituent; (whence, if the vower himſelf were a party to the contract, he would be forſworn;)—and ſuch being the caſe, the condition of violation, namely, the *contract of the principal*, is non-exiſtent, nothing attaching to him, excepting only the *effect* of the contract, not the *contract itſelf*. He is, therefore, not forſworn, excepting where he ſo intends, (as this is injurious to himſelf,)—or where the principal is a perſon of high rank, and conſequently is not accuſtomed himſelf to make contracts, in which caſe he would be forſworn by directing another to act for him; becauſe a vow is made for the purpoſe of reſtraining from the commiſſion of ſome cuſtomary act; and it is uſual for ſuch a perſon to tranſact all concerns of purchaſe or ſale by commiſſion; hence where he gives his orders to another reſpecting ſuch tranſactions, and the other executes thoſe orders, he is forſworn.

except in a *manumit*, or *divorce*;

If a man make a vow, ſaying "I will not *marry*," or "*divorce* '*my wife*," or "*liberate my ſlave*," and he ſhould afterwards commiſſion another perſon to perform any of theſe acts for him, by a power of agency, and the ſaid agent do ſo accordingly, the vower is forſworn; becauſe the agent in ſuch concerns acts merely as the

*tiator*, or in the manner of a *meſſenger*, whence it is that he does not refer ſuch acts to himſelf, but to his employer, to whom the rights thereof appertain, and not to the agent. Here, however, if the vower were to declare that his intention in the vow was reſtricted to ſuch *marriage*, *divorce*, or *manumiſſion*, as might be executed by *himſelf* alone, yet his declaration is not to be credited with the *Kâzee*: but it is credited with GOD.—The reaſon of this ſhall be explained in a ſubſequent caſe.

IF a man make a vow, ſaying "I will not beat my ſlave," or "I will not kill my ſheep," and he ſhould afterwards order another to do either of theſe, and the other act accordingly, the vower is forſworn; becauſe a maſter has authority to beat his own ſlave, or to ſlay his own ſheep, and is therefore entitled to authorize another to do ſo; and the advantage thereof reſults to him; whence he may be ſaid to be himſelf the executor of either of theſe acts, becauſe the rights of them do not in any reſpect appertain to the perſon ſo ordered.—But if the vower ſhould explain that his intention was to reſtrain himſelf from the performance of ſuch acts *as executed by himſelf*, his declaration is to be admitted by the *Kâzee*: contrary to the preceding caſe of divorce, &c. where the declaration is not credited by the *Kâzee*. The reaſon of this difference is that divorce merely ſignifies a ſpeech which goes to the repudiation of a wife; and a commiſſion to effect divorce reſembles ſuch a ſpeech; as the vow therefore extends to both of theſe, where the vower's intention was that he would not pronounce a divorce *himſelf*, he muſt have intended a particular reſtraint only, from a thing which was general in its application, [his vow,] and hence his declaration, although it be admitted with GOD, is not to be credited by the *Kâzee*, as it contradicts appearances:—but the beating of the ſlave, or the ſlaying of the ſheep, on the other hand, are perceptible acts, viſible in their effects, and are immediately referable to the director of them in the way of an efficient cauſe, (ſince he is the cauſe of the beating or ſlaying,) and ſuch being the caſe, where he intended, by

or any appertain to the *vower*:)

his vow, to reſtrain himſelf from the commiſſion of thoſe acts *with his own hands*, he intended what is the literal meaning of the words of his vow; his declaration, therefore, is credited with GOD, and with the *Kăzee* alſo.

nor by employing another.

IF a man make a vow, ſaying "I will not beat my child," and ſhould afterwards order another to beat the child, and the other beat it accordingly, the vower is not forſworn; becauſe the advantage of the beating, namely, *inſtruction*, reſults to the child, and hence the act of the perſon directed muſt not be referred to the *director*. It is otherwiſe where a perſon directs another to beat his *ſlave*, for there the advantage (namely, *obedience*) reſults to the *director*, in conſequence of his order, and hence the act of the perſon directed may be ſaid to be the act of the *director* *.

vantage reſults ſolely to the ſubject of the vow.

A vow of freedom conditioned upon the ſale of a ſlave takes place on the inſtant of ſale, and the ſale is null.

IF a perſon make a vow, ſaying "if I ſell this ſlave he is free," and he afterwards ſell that ſlave under a condition of option †, he [the ſlave] is free, becauſe the conditions of his freedom (namely *ſale* and *poſſeſſion*) being both accompliſhed, the conſequence, which is emancipation, takes place; and the ſale is null ‡. Thus alſo, if a perſon, bargaining for a ſlave, make a vow, ſaying "if I buy this ſlave he "ſhall be free," and he ſhould afterwards buy that ſlave under a condition of option, the ſlave is free; becauſe the conditions of his freedom, namely, *purchaſe* and *poſſeſſion*, are both accompliſhed.—This, according to the tenets of the two diſciples, is evident, becauſe the freedom of the ſlave is ſuſpended upon the act of purchaſe, and the

* A long caſe is here omitted, as it is purely of a grammatical nature, turning entirely upon the different effects of the *Arabic* particle *Lâm*, according to its different poſition in conſtruction, and conſequently does not admit of an intelligible tranſlation.

† That is, upon a condition, if not approved within a trial of three days, of being returned by the purchaſer.

‡ Conſequently the maſter has no claim for the price ſtipulated in the ſale.

condition

condition of option on behalf of the purchaſer does not with them prevent the eſtabliſhment of the purchaſer's poſſeſſion;—and ſo alſo, according to the tenets of *Haneefa*, becauſe the freedom in the caſe in queſtion is ſuſpended by the ſuſpenſion of the vower, and a thing *ſuſpended* becomes the ſame as a thing *prompt*, upon the condition being found; and, as if, after purchaſe, under a condition of option, the buyer were to emancipate his ſlave *promptly*, the ſlave would become free by poſſeſſion being firſt eſtabliſhed in the purchaſer *as an eſſential*, ſo alſo in the preſent caſe.

Divorce ſuſpended upon the *not* ſelling of a ſlave takes place on emancipation or *Tadbeer*.

If a man make a vow, ſaying "if I do not ſell this ſlave (or *this* "*bondmaid*) my wife is divorced," and he ſhould afterwards *emancipate* the ſlave or the bondmaid, or ſhould grant to either a *Tadbeer*, divorce takes place upon his wife, becauſe the condition, namely, his *not* ſelling them, is fully accompliſhed, as ſale cannot now poſſibly take place, ſince the ſlave or bondmaid mentioned, in conſequence of the act of manumiſſion or *Tadbeer*, remain no longer ſubjects of ſale.

her huſband with bigamy,

the ſame manner as upon the *re*

If a woman ſay to her huſband "you have married another wo-"man, in addition to me," and the huſband, in reply, make a vow, ſaying "every wife I have is divorced," a divorce takes place (on the decree of the *Kâzee*) upon the wife who has aſſerted as above.—This is the *Zâhir-Rawâyet*.—It is recorded from *Aboo Yooſaf* that the wife here mentioned does not become divorced, becauſe the words of the huſband, as above recited, are to be conſidered merely as a *reply* to the woman, and muſt be received as ſuch: moreover, the deſign of the huſband in ſo ſpeaking may be merely to *pleaſe*, and *ſoothe* his wife; and as this would be effected by the divorce of his *other* wives, the divorce is reſtricted to the *other* wives only.—The ground upon which the *Zâhir-Rawâyet* proceeds is that the huſband's expreſſion is *general*, as he has introduced the word "*every*" (which argues *generality*) in addition to the ſimple reply, whence it appears that his intention is *generality*, and not *ſpeciality*; and it follows that the ſentence muſt be received as a ſpeech *de novo*, and not as a reply.—In reply to the arguments

of *Aboo Yoosaf*, it is to be obſerved that the words of the huſband admit of being conſtrued into a deſign of *terrifying* and *frightening* the woman, on account of her having upbraided him with that which it is lawful for him to do; and, under ſuch a conſtruction, the reſtriction to the other wives is not admiſſible.—If the huſband were to declare that his intention reſpected only the *other* wives, he is to be credited with God, but not with the *Kâzee*; becauſe he has intended a particular thing by a general expreſſion, and his words admit of being taken in this ſenſe; but it contradicts appearances; his declaration, therefore, is to be credited in a *religious* view, but not in point of *law*.

## CHAP. X.

## Of *Vows* reſpecting *Pilgrimage*, *Faſting* and *Prayer*.

Caſe of a vow

If a man make a vow "to perform a *Maſhâ* [pedeſtrian pilgrimage] "to the temple of God," it is incumbent upon him to perform a pilgrimage to the *Kâba* on foot,—or that he make the viſitation termed *Amrit*; and if he chuſe he may *ride* on his pilgrimage, or *Amrit*;—but he muſt in this caſe perform a ſacrifice. This is on a favourable conſtruction of the law. Analogy would ſuggeſt that neither pilgrimage nor *Amrit* are rendered incumbent upon him, he having engaged no farther than to walk to the temple "*on foot*," which is not incumbent as an act of piety, but is merely an *indifferent* act; neither is going on foot the original deſign, that being ſimply *the performance of pilgrimage* or *Amrit*—The reaſons for the more favourable conſtruction

ſtruction here are twofold:—FIRST, *Alee* has declared that, in a vow of this nature, either pilgrimage or *Amrit* are incumbent upon the ſwearer:—SECONDLY, from the expreſſion aforeſaid either pilgrimage or *Amrit* are univerſally underſtood; and hence it is the ſame as if he had ſaid "I owe a viſitation to the temple on foot;" wherefore it is incumbent upon him to perform his pilgrimage or *Amrit* on foot, or that, if he chuſe to perform it on *horſeback*, he alſo perform a ſacrifice *.

Caſe of a vow of non-performance of *pilgrimage*.

If a man make a vow, ſaying "if I do not perform a pilgrimage "this year, ſuch an one, my ſlave, is free,"—and after the lapſe of that year a diſpute ſhould ariſe between the maſter and the ſlave,—the ſlave alleging that the maſter had *not* performed the pilgrimage, and the maſter alleging that he *had* performed it, and the ſlave's witneſſes bear teſtimony in this manner,—"that the maſter had performed, "within that year, a ſacrifice at *Koofa*," the ſlave (according to *Haneefa* and *Aboo Yooſaf*) is not emancipated.—*Imám Mohammed* ſays that the ſlave is emancipated, becauſe the witneſſes have teſtified to the maſter having performed ſacrifice at *Koofa*, which is a well known act, and which neceſſarily implies that he has not performed *pilgrimage*, and hence the condition of the penalty, (namely, non-performance of pilgrimage,) is fulfilled.

Caſe of a vow againſt *faſting*.

If a man make a vow that he will not faſt, and he ſhould afterwards intend a faſt, and keep the ſame a ſhort time, and then break his faſt within the ſame day, he is forſworn on account of the condition of violation being fulfilled; becauſe the word *Sawm* [faſt] ſignifies abſtinence from thoſe things the uſe of which breaks a faſt kept with a pious intent, which in this caſe is evident.

* Moſt of the expreſſions here treated of are to be fully underſtood only in the original idiom; hence much of the reaſoning upon them is loſt in a *tranſlation*. Two other caſes are here omitted for the ſame reaſon, and alſo becauſe the rights of individuals are no way concerned in them.

Caſe of a vow againſt *faſting for a day.*

If a man make a vow that "he will not faſt *a day*," and he afterwards intend a faſt, and obſerve the ſame for a *few hours* (for inſtance) and then break his faſt, he is not forſworn, becauſe he intended ſuch a faſt as is regarded in the LAW, and that is not completed until it be accompliſhed by the ending of the day: moreover, the full time of *a day* is expreſsly mentioned in his words, "I will not faſt *a day*," and therefore it is to be ſo underſtood.

Caſe of a vow againſt *praying.*

If a man make a vow that "he will not pray," and he ſhould after that ſtand up and perform *Kiraát*, [reading the *Koran*,] or *Rookoo*, [a ſubmiſſive poſture uſed in prayer,] he is not forſworn: but if he perform the *Soojda* along with thoſe other ceremonies, he is forſworn. This proceeds upon a favourable conſtruction.—The ſuggeſtion of analogy is that he would be forſworn in conſequence of beginning to pray, from the correſpondence of this with a caſe of faſting; that is, if a man make a vow that "he will not faſt," and he ſhould afterwards keep a religious faſt, he would be forſworn upon the *commencement* of it; and ſo alſo in the preſent caſe. The reaſon of this is that a perſon, upon beginning to pray, is termed a *Mooſillee*, or *praying* perſon, in the ſame manner as one beginning a *religious* faſt is a termed *Sáyim*, or *faſter*: but the reaſon for a more favourable conſtruction is that prayer implies and includes a variety of ceremonies, ſuch as *ſtanding*, *kneeling*, and *proſtration*;—and hence, until the *whole* of theſe be performed, it is not termed *prayer*: contrary to *faſting*, as that conſiſts of only one ſingle obſervance, namely, *abſtinence*.

If a man vow that "he will not perform prayer according to "ordinance of the LAW," he will not be forſworn *upon* until he come to that part of the ceremony which requires the ſecond genuflection; becauſe, by the above mode of expreſſion, he appears to mean that kind of prayer which is regarded in the LAW; and the ſmalleſt degree which conſtitutes that is *two* genuflections, as the prophet has forbidden *ſhort* or *interrupted* prayer.

## CHAP. XI.

### Of *Vows* reſpecting *Clothing* and *Ornaments*.

IF a man make a vow, ſaying to his wife "if I put on any of your "work, (that is, *cloth made of thread of your ſpinning,*) ſuch cloth is "*Hiddee*, (that is, *an offering at the ſhrine of the prophet,*)" and that man ſhould afterwards buy cotton, and his wife ſpin it into thread, and of that thread cloth be woven, and the man put on the ſame, it is incumbent upon him (according to *Haneefa*) to make an offering thereof at *Mecca*. The two diſciples have aſſerted that it is not incumbent upon the vower, in the caſe in queſtion, to make an offering of his cloth, unleſs where the thread has been ſpun of cotton which was his [the vower's] property at the time of his making the vow; for they contend that a *Noozr*, or *devoting* vow, is not valid, unleſs it reſpect actual property, or be pronounced in a way which has reference to the cauſe of a right of property; and neither of theſe are exiſtent in this caſe, as the vower putting on the cloth, or the woman ſpinning the thread of which it is compoſed, are not cauſes of a right of property to the vower.—The argument of *Haneefa* is that it is cuſtomary for a wife to ſpin her huſband's cotton, and whatever is cuſtomary, the ſame is meant and intended; and the act of the wife, in ſpinning the cloth, is a cauſe of the huſband's right in it*; here there-

of his wife's manufacture

* According to the *Muſſulman* law, any change wrought in the deſcriptive quality of goods (ſuch as turning *cotton* into *thread*) cauſes in itſelf a transfer of the property from the former proprietor to the perſon who makes or effects ſuch change in it, independant of any previous contract of purchaſe, the perſon to whom ſuch transfer of property is made remaining reſponſible to the original proprietor for the value of the goods in their former ſtate. (See *Uſurpation* of Property.)

fore

fore appears a reference of the *Noozr*, or *devoting* vow, to the *cauſe* of a right of property, wherefore the vow is valid; and hence the vower is forſworn upon the wife ſpinning cotton which was his property at the time of the vow *.

If a man make a vow that "he will not ſleep on ſuch a bed," and he ſhould afterwards ſleep thereon, it having a ſheet, blanket, quilt, or ſo forth, ſpread over it, he is forſworn; becauſe ſuch covering is alſo an *appurtenance* to the bed, and hence ſleeping on the *covering* may be ſaid to be ſleeping on *ſuch bed*. But if another bed be laid upon the bed which is the ſubject of the vow, and the ſwearer ſleep thereupon, he is forſworn, becauſe a thing cannot be an appurtenance to a *ſimilar* thing, and hence ſleeping upon this bed is not to be accounted ſleeping upon the other.

If a perſon ſwear that "he will not ſit upon the ground," and he ſhould afterwards ſit upon a carpet or mat ſpread thereon, he is not forſworn; becauſe a perſon in ſuch caſe is not ſaid to be ſitting on *the ground*. It is otherwiſe where the ſkirts of his garment only are between the ground and him, as his *garment* is merely an *appurtenance* to *himſelf*, and hence is not to be conſidered as the thing upon which he ſits.

If a man vow that "he will not ſit upon ſuch a ſeat," and he ſhould afterwards ſit thereupon when there is a covering ſpread upon it, he is forſworn; becauſe the perſon who ſits upon that covering is conſidered as the occupier of that ſeat, in common uſage, as this is the uſual way of ſitting upon a bench, or other raiſed ſeat.—It is

* Here follows a long but very frivolous caſe of vows againſt wearing *Hooleea* [ſuperfluous ornaments] omitted in the tranſlation, as it turns entirely upon the acceptation of term *Hooleea*, which has been held to conſiſt of different articles at different times.

otherwiſe

otherwiſe where the ſeat which is the ſubject of the vow has another ſeat ſet over it, and the vower ſits upon the *upper* ſeat, for then he is not forſworn, becauſe the ſecond ſeat is a fellow to the firſt, and a thing cannot be an appurtenance to a *ſimilar* thing, (as has been already obſerved;) ſitting upon the *ſecond* ſeat, therefore, is not to be accounted the ſame as ſitting upon the *firſt*, which was the ſubject of the vow.

## CHAP. XII.

### Of *Vows* concerning *Striking*, *Killing*, and ſo forth.

A vow made againſt *ſtriking* a perſon is not violated by ſtriking that perſon when

IF a perſon make a vow, ſaying [to another] "if I ſtrike you, my "ſlave is free," and the vower ſhould ſtrike that man after his death, he is not forſworn; becauſe *ſtriking* is reſtricted to *life*, as being the name of an action which gives pain, and excites the feelings of the perſon ſtruck, which is not poſſible with *the dead*. So alſo, if a man were to ſay to another "if I clothe you, my ſlave is free," and he ſhould after his death clothe him, he is not forſworn; becauſe by clothing, when it is indefinitely expreſſed, is meant a complete tranſfer of property in the article of clothing, and this transfer cannot be made to a defunct; unleſs when the vower by clothing ſimply meant *covering*, in which caſe he would be forſworn, for here he intends his words in a ſenſe which they are capable of bearing.—(Some doctors ſay that, if a perſon were to make a vow in the *Perſian* tongue, ſaying to another "if I clothe you, my ſlave is free," and he ſhould clothe that perſon after his death, he is forſworn; becauſe by this, in the

to, *going* to, vulgar idiom, is meant ſimply *covering*.)—In the ſame manner, if a man were to make a vow, ſaying to another "if I *ſpeak* to you, my "ſlave is free," or "if I *come* to you," and ſo forth, and he ſhould *ſpeak* to, or *go* to, that perſon *after his death*, yet he is not forſworn; becauſe the intent of ſpeaking is *to impart ideas*, which death prevents the poſſibility of; and "*coming* to the dead" implies a *Zeeârit*, or *viſitation*, which is not to the *dead*, but to the *ſhrine* or *Mauſoleum* of the dead.

or *waſhing* a perſon. If a man make a vow, ſaying to another "if I waſh you, my "ſlave is free," and he ſhould waſh that perſon after his death, he is forſworn; becauſe to *waſh* ſimply ſignifies *to ablute with a view to purification*, which takes place in the ablution of the dead.

A vow againſt *beating* is violated by any act which cauſes pain, unleſs that act be committed in *ſport*. If a man make a vow that "he will not beat his wife," and he afterwards pull her hair, or ſeize her by the throat, or bite her with his teeth, he is forſworn; becauſe *beating* is the term for an act which cauſes pain, and pain is excited by the acts in queſtion.—Some have aſſerted that if theſe acts are done in the courſe of mutual *playing* and *dalliance*, the vower is not forſworn, becauſe under ſuch circumſtances theſe bear the conſtruction of *jeſts*, and not of *beating*.

Vow of *ſlaying* a perſon already dead incurs the penalty. If a man ſay "if I do not ſlay ſuch an one, my wife is divorced," and the perſon mentioned be not living, and the vower himſelf know this, he is forſworn; becauſe he here makes his vow reſpecting that life with which God may inſpire the deceaſed anew,—and as this is poſſible, his vow ſtands valid; and he is then forſworn, becauſe the *ſlaying* of that perſon is in the common courſe of things impoſſible. If, however, the vower be not aware of that perſon's being already deceaſed, he is not forſworn, becauſe he has here made his vow reſpecting that life which he ſuppoſes to be exiſting in ſuch a perſon, but which, in the common courſe of things, is no longer conceivable. There is a diverſity of opinion between *Haneeſa* and *Aboo Yooſaf* concerning this caſe, from the analogy it bears to the caſe of the veſſel of water;—

that

that is, if a man were to vow "if I do not drink out of this cup my "wife is divorced," and there ſhould happen to be no water in the cup, he is not forſworn, according to *Haneefa* and *Mohammed*, on account of the invalidity of the vow, from the impoſſibility of fulfilling it: but according to *Aboo Yooſaf* he is forſworn; becauſe *he* does not hold the poſſibility of fulfilment to be a condition of the validity of the vow;—and ſo alſo in the preſent caſe. In the caſe of the *veſſel of water*, however, there is no diſtinction made with reſpect to *knowledge*; that is, the vower (according to *Haneefa* and *Mohammed*) is not forſworn, whether he be aware of the cup having no water in it or not; and this is approved.—It is otherwiſe in the caſe in queſtion, for there a diſtinction is made, as has been already mentioned.

## CHAP. XIII.

## Of *Vows* reſpecting the Payment of *Money*.

IF a man make a vow, ſaying "I will diſcharge my debt to ſuch an "one *ſhortly*," this means *within leſs than one month*; and if he ſay "I will diſcharge my debt due to ſuch an one *in a length of time*," this means *more* than a month; becauſe any ſpace *within* a month is accounted a *ſhort* time, and a *month* or any term *beyond* it is accounted a *long* time; and hence it is that where two friends meet after a long ſeparation, one will ſay to the other "I have not ſeen you *this month!*" and ſo forth.

Difference, in a vow, between the terms *ſhortly*, and *in a length of time*.

A vow to discharge a debt is fulfilled by discharging it in *light* or *base* money, or in money belonging to *another*,

If a man make a vow, saying "I will discharge my debt, owing "to such an one, this day," and he pay the debt upon that day accordingly, and some of the money in which he has paid it should afterwards prove *light*, or *base*, or *the right of another person*, yet the vower is not forsworn; because *lightness* is only a *defect*, which does not destroy the *specie*, (whence it is that if one of the parties, in a contract of *Sirf* sale, should through negligence receive *base* metal in return for *pure* metal, the exchange is completely fulfilled,—and so also, the seller is fully paid his price, in a contract of *Sillim* sale, where he receives *base* coin in place of *pure* coin,)—and such being the case, the condition of fulfilment (namely *the payment of the debt*) is accomplished: the vower, therefore, is not forsworn; the receipt of the money, also, where it is the right of a *third* person, is valid nevertheless, and the fulfilment thus established is not afterwards affected by the restoration of the same to that *third* person. (If, however, any of the money, after payment, should appear to be composed of *pewter*, or *tin*, the vower is forsworn; because those metals are not regarded as *specie*, whence, if through negligence they should be accepted in a *Sillim* or *Sirf* contract, it is not a lawful payment.) If, also, the vower should sell his slave to his creditor, within the course of the day, in lieu of the debt, and the creditor accept of the same, the fulfilment of the vow is accomplished; because *liquidation* is one mode of discharging debts;—that is, the debt due to one party ceases in lieu of the debt due to the other; (for the creditor is responsible for whatever he receives, as he receives it on his own account by becoming proprietor of it, and thus the same obligation rests upon the creditor in behalf of his debtor as already rests upon the debtor in behalf of the creditor;) a mutual liquidation, therefore, takes place between them, and the debt of each is remitted in lieu of the debt of the other. (This mode of discharging the debt by *liquidation* is because the *actual* discharge is inconceivable, as the debtor does not here offer any thing but *substance*, and the right of the creditor is not to *substance*, but is merely to the debt which has been incurred by the other; and hence the

or by means of *liquidation*:

learned

learned in the law ſay "a debt muſt be diſcharged with its *like*.") *Liquidation*, therefore, being one mode of diſcharging debt, the fulfilment of the vow, in the caſe in queſtion, is eſtabliſhed, becauſe the liquidation is eſtabliſhed upon the inſtant of the ſale of the ſlave.

OBJECTION.—The liquidation being eſtabliſhed upon the inſtant of ſale, why is the purchaſer's ſeizin of the ſlave made a condition?

REPLY.—Seizin is made a condition in order that the debt due to the ſeller, namely the price of the ſlave, may be fully confirmed and eſtabliſhed, becauſe although it be incumbent upon the purchaſer from the inſtant of ſale, yet it ſtands within the poſſibility of ceaſing, as it is poſſible that the article ſold may periſh before ſeizin; but by ſeizin the debt is fully confirmed and eſtabliſhed upon the purchaſer.

—If the creditor make a gift of the debt to the debtor within the courſe of the day, the fulfilment of the vow is not eſtabliſhed; becauſe *repayment* has not taken place; and alſo, becauſe the diſcharge of the debt is an act of the *debtor* alone, and the gift of the debt implies that the creditor relinquiſhes his right to it, which is an act of the *creditor*, and not of the *debtor*, wherefore the condition of fulfilment (namely, the act of the debtor) is not accompliſhed. It is here to be obſerved, however, that although the fulfilment be not accompliſhed, yet the vower is not forſworn, but the vow becomes void; becauſe the vow was reſtricted to that day, and the creditor having *remitted* the debt within that day, the ſwearer is thereby effectually precluded from the fulfilment of his vow before the expiration of its term, which does not take place until the end of the day, whence the vow becomes void, in the ſame manner as in the caſe of the veſſel of water *.

but not by the *gift* of the *creditor*.

IF a debtor were to make an offer, ſaying to his creditor "I will "diſcharge my debt to you, by partial payments," and the creditor ſhould reply, with an oath, ſaying "I will not thus receive my due "by accepting part, and not the *whole*," and he ſhould afterwards

accept reimburſement of a *debt* in *par-*

* See Chap. VI. p. 524.

take

take a part of the debt, yet he is not forſworn ſo long as he receives not the *whole* debt thus by partial payments; becauſe here the point which produces a violation of the vow is the receiving the *whole debt*, but in *partial ſums*, and that has not taken place.—If the debt conſiſt of articles computable by weight, and the vower accept payment by two or more weighings thereof, in ſuch a manner as not to be employed in any other concern between theſe two weighings, he is not forſworn, although this be a partial mode of receiving payment, becauſe the receipt of the whole at once is ſometimes in any common way impoſſible, and hence any debt of this deſcription is an exception from the preſent caſe.

If a creditor make requiſition from his debtor of a part of what is due to him, ſuppoſe *two hundred Dirms*, and the debtor reply that "he has not ſo much money," and the creditor diſbelieve him, and he anſwer "if I poſſeſs more than one hundred *Dirms*, my wife is di-"vorced," and it ſhould happen that he is, at the time of ſaying this, poſſeſſed of *fifty Dirms* only, he is not forſworn; becauſe his deſign, in this declaration, is merely to expreſs his denial of being poſſeſſed of more than *one hundred Dirms*; and alſo, becauſe his exception of *one hundred Dirms* involves an exception of every component part or proportion of *one hundred*; and *fifty* is one of theſe proportions; wherefore *fifty* alſo are excepted, and hence he is not forſworn. And the rule is the ſame, if, inſtead of "*more* than *one hundred Dirms*," he ſhould ſay "*other* than one hundred *Dirms*," or "*beyond* one hundred "*Dirms*,"—becauſe all theſe terms equally expreſs *exception*.

CHAP.

# CHAP. XIV.

## Of *Miſcellaneous Caſes.*

IF a man make a vow, ſaying "I will not do ſo and ſo," it is neceſſary that he for ever abſtain from the commiſſion of that act, becauſe he has expreſſed the *negative* of the act *generally*, and hence the prohibition is *general*, in conſequence of the negative being *unreſtrictively* expreſſed.

doing a thing, unreſtrictively pronounced, operates as a *perpetual inhibition.*

IF a man make a vow that "he will do ſuch a thing," and he ſhould *once* do it, his vow is fulfilled, as he has not undertaken more than the commiſſion of that act in one ſingle inſtance unſpecified, becauſe ſuch is to be underſtood from the words by which he binds himſelf: fulfilment is therefore eſtabliſhed, upon his once performing a ſingle inſtance of the act in queſtion, whatever inſtance that may be, and whether ſuch performance be *voluntary* or *compulſive.* In a caſe of this nature, moreover, the vower is never conſidered as forſworn, unleſs where he may be utterly excluded from a poſſibility of performing the act, which can only be by his *death*, or by the deſtruction of the ſubject of the act.

A vow of performance is fulfilled by a ſingle inſtance

IF a ſultan, or other ſupreme governor, or magiſtrate of a kingdom or province, ſhould require an oath of a perſon that "he will "inform him of the dwelling of every evil doer, who ſhall enter that "territory," and the perſon ſwear accordingly, ſuch oath binds him to convey ſuch information to the magiſtrate aforeſaid, *during the exiſtence of his authority* only, and no longer; becauſe the intention of

An oath impoſed by a ſupreme magiſtrate's authority.

the magiſtrate, in impoſing ſuch an oath, is to repel the wickedneſs of evil-doers, or to prevent ſuch wickedneſs in others by the puniſhment of thoſe evil-doers; conveying this information, therefore, after the expiration of the magiſtrate's government and authority, is of no manner of uſe; and the expiration of the magiſtrate's authority takes place either on his *death*, or his *removal from office*.

A vow of gift is fulfilled by cepted of.

If a maſter make a vow that "he will beſtow ſuch a ſlave upon "ſuch a perſon," and he ſhould beſtow that ſlave accordingly, and the perſon refuſe ſuch gift, yet the vow is fulfilled.—This is contrary to the doctrine of *Ziffer*, who conſiders *gift* to be the ſame as *ſale*, as being equally a transfer of property; and as, if a man ſwear that "he "will ſell his ſlave to ſuch a perſon," and that perſon refuſe to buy the ſaid ſlave, the vow remains unfulfilled, ſo in this caſe likewiſe.—The arguments of our doctors on this point are twofold:—FIRST, gift is a voluntary or gratuitous deed, and hence is executed on the part of the *giver* alone, independant of the *receiver*; thus we ſay "ſuch a "perſon preſented ſo and ſo to ſuch a perſon," although the other may not have accepted it:—SECONDLY, the deſign of the ſwearer, in making ſuch a vow as the above, is to exhibit his own generoſity and liberality; and that is effected by means of the deed of gift; but a contract of ſale is a *mutual engagement*, which can be executed only by the act of both the parties concerned in it.

Vows in reſpect to odoriferous herbs or flowers have force according to the ſenſe in which the denomination of them is generally taken.

If a man make a vow that "he will not ſmell *Reehan*, and he ſhould afterwards ſmell to the *roſe* or the *jeſſamin*, he is not forſworn, becauſe *Reehan* is that ſpecies of flowers which have no ſtalk, and the roſe and jeſſamin have ſtalks or branches from which they depend.

If a man were to make a vow, ſaying that "he would not pur-"chaſe *violets*," and have no particular intention therein, the vow is conſtrued

conſtrued to mean *oil* of violets, from general cuſtom, according to which, a perſon dealing in that article is termed a *violet*-ſeller; and as *purchaſe* is founded upon *ſale*, a perſon purchaſing *oil* of violets is termed a *buyer of violets*.—(Some doctors maintain that, with us, by the term *violets* is underſtood the *flower* only, and not the *oil*.)—If the vower were to ſay that "he would not purchaſe "*flowers*," by this is to be underſtood the *leaves* only, and *not* the *oil*, as ſuch is the literal meaning of his expreſſion; and cuſtom alſo accords with this, becauſe by *flowers* is uſually underſtood the *leaves* of the flowers. In the caſe of *violets* cuſtom has eſtabliſhed it otherwiſe, as the word *violets* is commonly uſed to expreſs *oil* of violets.

END OF THE FIRST VOLUME.

# ERRATA in the FIRST VOLUME.

Page 70, line 14, for *Yawn*, r. *Yawm*.
73, —— 29, — *Iſhârit*, r. *Ijàrâ*.
96, —— 19, — *Mokâtib*, r. *Mokhâtiba*.
106, —— 11, — would, *r.* ſhould.
197, —— 25, — heir, *r.* inheritee.
281, (marg. note, l. 3 from the bottom) *dele* for.
287, line 23, for *Ajla*, r. *Aila*.
401, —— 23, — and, *r.* for.
471, —— 15, after "*aſſembly*," dele the
—— 1, for deſcent, *r.* parentage.

521, —— (note,) for aad, *r.* and.
535, —— —— — "of which one is termed a plural of paucity," *r.* "which "are termed plurals of paucity."