THE

HEDAYA, OR GUIDE;

A

COMMENTARY

ON THE

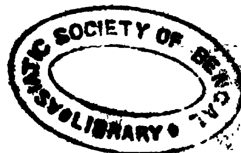
MUSSULMAN LAWS:

TRANSLATED BY ORDER OF THE

GOVERNOR-GENERAL AND COUNCIL

OF

BENGAL,



BY

CHARLES HAMILTON.

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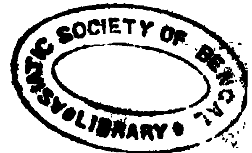

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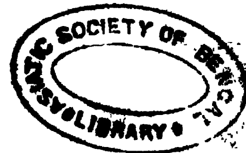
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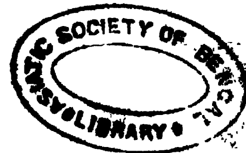

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TRANS-

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BOOK XXXIX.

Of *KISSMAT*, or *PARTITION**.

Chap. I. Introductory.

Chap. II. Of Things which are fit Objects of Partition.

Chap. III. Of the Mode of accomplishing Partition.

* Partition, in the *Mussulman* law, applies to joint property in whatsoever manner, obtained or acquired. It more immediately relates, indeed, to the distribution of inheritance: but as the *Mussulman* doctors make no distinction, in terms, between a *partner* and a *parcener*, (an inheritance being defined to be one mode of partnership, Vol. II. p. 269.) the translator uses the terms *partner* and *partnership* throughout.

Chap. IV. Of Pleas of Error in Partition; and of Claims of Right in regard to it.

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CHAP. I.

Partition involves a *separation* in articles of weight or measurement of capacity,

THE partition of things held in joint property is lawful and valid; becauſe the prophet was accuſtomed to make a partition of plunder and hereditaments; and it is moreover a practice which no one pretends to controvert. It is to be obſerved, however, that partition may be received in two ſenſes; for, conſidered in one view, it is a *ſeparation*, as it ſeparates or diſtinguiſhes the right of one man from that of another; and conſidered in another view it is an *exchange*; becauſe, the ſhare or portion which falls to *one* of the parties in conſequence of the partition is partly his own original right; but part of it was the right of the *other* during their joint property; and this he receives in lieu of that part of his own right, which remains involved in the other's ſhare. It is more particularly a *ſeparation* with reſpect to articles of weight or meaſurement of capacity, ſuch as wheat or ſilver, becauſe of the ſimilitude of their parts; for as theſe articles do not differ in their properties, the end to be anſwered by one parcel of wheat or ſilver being juſt the ſame as by another, (ſince there is nothing in the one that was not in the other,) it follows that each perſon receives his entire right, and nothing is left in the ſhare of the one which of right belongs to the other;—whence it is that one partner may lawfully take his ſhare during the abſence of the other; and alſo, that if two men make a joint purchaſe of any article of weight or meaſurement of capacity, and afterwards divide it, each may

may ſeparately ſell the ſhare which falls to him for a determinate profit on half the original price. It is, on the other hand, more particularly an *exchange* with reſpect to articles diſſimilar in their parts or unities, ſuch as animals or houſehold goods;—whence it is that one of two partners in ſuch articles cannot lawfully take his ſhare in the abſence of the other; and alſo, that if two men buy any thing of this ſpecies, and afterwards make a diviſion, they cannot ſeparately ſell their reſpective ſhares at a determinate profit on half the original coſt. Here, however, if thoſe articles be all of one particular ſpecies, ſuch as a herd of goats, the *Kâzee*, at the requiſition of only *one* of the partners, muſt enforce a partition; for the properties of all the goats being nearly the ſame, ſuch a partition is, in effect, only a *ſeparation*;—and the intention of ſuch a requiſition being, that the partner who makes it may enjoy the uſe of his own ſhare ſolely, without any other perſon being able to interfere in his property, it is incumbent on the *Kâzee* to comply with his requiſition. Where, on the contrary, the joint property conſiſts of articles of different ſpecies, the *Kâzee* muſt not enforce a partition, as it cannot be made equitably where each particular thing differs from the reſt in its properties.—If, however, both the partners conſent to a partition of things of various ſpecies, it is lawful.

and an *exchange*, in articles of diſſimilar parts or unities.

It is incumbent on the *Kâzee* to appoint a perſon to make partitions, and to ſettle on him an allowance from the public treaſury, ſo as that partitions may be made for the people without his receiving any hire; becauſe, as the making of partitions is a part of the duty of the *Kâzee* himſelf, (it being neceſſary in order to terminate diſputes,) the allowances of the perſon appointed for this purpoſe muſt be defrayed from the public treaſury, in the ſame manner as thoſe of the *Kâzee*; and alſo becauſe, as the appointment of a perſon to make the partition is a benefit which extends to all *Muſſulmans*, the charge of his maintenance muſt be defrayed from the public treaſury, which is the property of all. If it be not in the power of the *Kâzee* to ſettle the

The magiſtrate muſt appoint a public partitioner; and muſt appoint him a ſalary,

or eſtabliſh a particular

rate of hire for his work.

the allowance from the public treasury, he must at all events appoint a person who will make the partition for a certain rate of hire, to be paid by the parties who are concerned and particularly benefitted by the division. In this case, the rate must be moderate and fixed, so that the partitioner may not be able to make exorbitant demands.—It is, however, more eligible that his allowances be paid from the public treasury, as this is easier for the people in general, and precludes, in a greater degree, the imputations of corruption and injustice.

The partitioner must be just, and skilful;

THE partitioner must be a man noted for justice and integrity; and he must also possess a knowledge of that particular business.

but must not always be the same person.

THE magistrate must not compel the people always to accept of one particular person for their partitioner; because the transaction which passes betwixt the partners and the partitioner is a species of contract; and it is not lawful to compel any person to enter into a contract;—and also, because, if such a practice were admitted, the person possessing the exclusive appointment would demand an immoderate rate of hire.

The partners may agree to a partition, procuring (if one be an infant) an order from the magistrate.

IT is lawful for several partners to agree amongst themselves, and to make a division of their joint property. But if there be an *infant* among them, it is requisite that they procure an order from the magistrate; for they possess no power over the infant.

One public partitioner cannot be concerned with another.

THE *Kázee* must not suffer the persons employed in making partitions to be concerned together in the hire or profit arising from their business, such a conjunction tending to raise the hire to an exorbitant rate; for each of them, when applied to, will make some excuse for declining the employment, and they will refer the party who has occasion for their services from one to another, until at length he be constrained to consent to immoderate terms;—whereas, if every

every man is concerned only for himſelf, each will readily conſent to be employed for a moderate hire, rather than loſe it altogether.

The partitioner is paid in proportion to the number of claimants.

THE rate of wages to a partitioner is regulated by the number of perſons for whom the diviſion is made, according to *Haneefa*. The two diſciples maintain that it is determined in proportion to their reſpective ſhares, the wages of the partitioner being on account of their property, and therefore determined according to its extent, like the wages of a public weigher, of a meaſurer, or of a perſon who digs a well to be held in joint property,—or like the maintenance of a ſlave belonging to ſeveral partners. The argument of *Haneefa* is, that the wages of the partitioner are given to him for diſcriminating and ſeparating the ſhares, in doing which it ſignifies not whether the ſhares be large or ſmall, ſince the ſhare of the inferior partner is diſtinguiſhed and ſevered by his work, as well as that of him who holds a large proportion. It moreover ſometimes happens that the labour in calculating a *ſmall* ſhare is more than in aſcertaining a *large* ſhare; and ſometimes the reverſe: hence it is difficult to determine how far the one or the other is attended with the moſt trouble; and therefore the hire muſt be referred to the mere act of *dividing off* or *diſcriminating*. It is otherwiſe in *digging a well*; for, in that inſtance, the wages are on account of digging and carrying away the earth, in which there is difference in the labour performed for each partner's proportion. With reſpect to *weighing* or *meaſuring*, if thoſe be performed in order to effect a partition of any thing, (ſuch as *wheat* held in partnerſhip,) it is affirmed by ſome that the ſame difference of opinion ſubſiſts betwixt *Haneefa* and the two diſciples:—but if they be performed merely to aſcertain the quantity of the whole, or for any other purpoſe than partition, the wages are then on account of the weighing or meaſuring, which is greater in the larger than in the ſmaller ſhare. There is alſo another opinion maintained upon the authority of *Haneefa*,—that the hire of the partitioner falls entirely upon the one who ſolicits the partition, and not

not on the one who has not ſolicited it, becauſe of its being advantageous to the one, but not to the other.

In the diſtribution of hereditaments, the magiſtrate muſt previouſly aſcertain the circumſtances:

When ſeveral co-partners appear before the *Kâzee*, and repreſent that a tenement or piece of ground which is in their poſſeſſion has devolved to them as the heirs of a certain perſon, the *Kâzee* muſt not make a partition of the houſe or ground until they have proved by witneſſes the death of the perſon, and the number of his heirs. This is according to *Haneefa*. The two diſciples ſay that if they all concur, the *Kâzee* may make the partition, taking care, however, to inſert in the *Kiſſmat Námma*, or deed of partition, that it was made in conſequence of their declarations. If, on the contrary, the joint property be *moveables* and not *lands* or *tenements*, and the parties repreſent that it is their inheritance, the *Kâzee* may, on their repreſentation, order the partition; or, if the joint property be lands or tenements, and they repreſent that they acquired it by *purchaſe*, the *Kâzee* may order a partition. The argument of the two diſciples is, that poſſeſſion is an apparent proof of property, and the concurrent declaration of all the parties with reſpect to their ſeveral claims is a proof of their veracity. Beſides, there is no perſon who either diſputes or denies their allegations; and where there is no denier the LAW requires no evidence. Hence the *Kâzee* muſt order the partition in the inſtance above-mentioned, as well as in caſes which relate to moveable property acquired by inheritance, or landed property acquired by purchaſe. It is requiſite, however, that he ſpecify, in the deed of partition, that it has been made in conſequence of their declarations, in order that his decree may extend only to thoſe who have attended, and not to others who may (perhaps) afterwards appear. The argument of *Haneefa* is, that the order which the *Kâzee* gives for the partition is in fact a decree againſt the defunct, by which his right is terminated; for until a partition take place, the hereditaments are ſtill conſidered as his eſtate, inſomuch that if any increaſe be produced upon it, ſuch increaſe is ſubject to the will of the deceaſed declared

but not if the property conſiſt of *moveables*;

nor in the caſe of property acquired by purchaſe;

clared

clared in his teſtament, or is appropriated to the payment of his debts, neither of which could be the caſe after partition has been made. The partition, therefore, being in fact a decree of the *Kâzee* affecting the defunct, the concurrence of a part of the claimants to the ſuits of the others is not admitted as an argument of ſufficient weight; and hence they muſt ſupport their claims againſt the defunct by evidence; in which caſe a part of the heirs are conſidered as litigants on behalf of the defunct.

OBJECTION.—A part of the heirs cannot be conſidered as litigants on behalf of the defunct, ſince each individual acknowledges the claims of the others, and a man who acknowledges another's claim cannot be regarded as his opponent.

REPLY.—A part of the heirs may be conſidered as litigants on behalf of the defunct, although they do acknowledge the claims of the others, their acknowledgment being of no weight;—in the ſame manner as where a man ſues for a debt againſt an eſtate, and an heir or executor acknowledges his claim, in which caſe ſuch acknowledgment, as being to the detriment of the others, is not ſufficient, but the claimant muſt produce evidence before the *Kâzee* in his ſuit, even againſt that heir or executor, before he can eſtabliſh his claim againſt the eſtate in general to the prejudice of the whole of the heirs. The acknowledgment of the heir or executor being therefore of no weight, he may, with propriety, be conſidered as an opponent or litigant.

—What is here mentioned is the law with reſpect to *immoveable* property*. It is otherwiſe with reſpect to *moveable* property †; becauſe that requires care in keeping, and there is an advantage ariſing from the immediate partition of it; whereas *im*moveable property, being by its nature ſafe, requires no care:—beſides, the perſon in whoſe

* Arab. *Akkâr*; meaning *houſes, tenements*, &c. ſuch as is termed, in our law, *real* property.

† Arab. *Mankool*; comprehending every ſpecies of *perſonal* property.

possession

possession moveable property remains is responsible for it; whereas (according to *Haneefa*), he is not so with regard to *im*moveable property. It is also otherwise with respect to landed property acquired by *purchase*; because an article sold is no longer accounted the property of the seller, although it still remain undivided; and the partition of it, therefore, cannot be regarded as a decree of the *Kâzee*, passed against an absent person, by which his right is terminated.

nor in case of a partition being demanded without the parties specifying the manner in which the joint property was acquired.

If the joint owners of a property request a partition of it, without specifying whether it was acquired by inheritance, or by purchase, or by any other means, the *Kâzee* may order the partition, this being, in fact, not a decree against another person, since no other is acknowledged by them. The author of this work says, that this adjudication is to be found in the *Kitâb al Kissmat* *.—It is mentioned in the *Jama Sagheer* that when two men apply for a partition of lands which they prove by witnesses to be in their possession, the *Kâzee* must not order the partition until they also prove, by evidence, that the lands are their property; for otherwise it is possible that they may belong to another person. Some say that this is agreeable to the opinion of *Haneefa* alone:—but others aver that it is agreeable to the opinion of all the learned; and this is approved, since it is unnecessary to order the partition of landed property in order to preserve it. Besides, the right of property being the ground on which partition is made, it cannot take place until that right be established by evidence.

A partition may be granted on the requisition and testimony of any two heirs; but an agent or guardian must be ap-

Where two heirs appear, and produce evidence to prove the death of their ancestor, and the number of his heirs, and the house or other inheritance is in their possession, but one of the heirs is absent,—in this case the *Kâzee* may order a partition, if the heirs who attend require it, appointing an agent to take possession of the portion of the absentee; or if, under the same circumstances, one of the

* A collection of laws compiled by *Mohammed*, the disciple of *Haneefa*.

heirs

heirs be an infant, the *Kázee* may order a partition, appointing a *guardian* to take poſſeſſion of his portion;—becauſe, in ſo doing, the intereſt of the infant or abſentee is promoted.—(But here likewiſe the production of evidence is indiſpenſable, according to *Haneefa*, in oppoſition to the opinion of the two diſciples, as before ſtated.) It would be otherwiſe if they had become proprietors of the houſe by *purchaſe*; for in that caſe no partition could be made in the abſence of any of the partners. This diſtinction between the caſe of property acquired by inheritance and property acquired by purchaſe is made on the following grounds.—An heir is maſter of his anceſtor's eſtate as his ſubſtitute, inſomuch that he has the power of returning (on diſcovering a defect) any thing which his anceſtor may have bought, or, in like manner, he may be compelled (on the diſcovery of a defect) to take back any thing which his anceſtor may have ſold; and he is likewiſe ſubject to become *deceived** in conſequence of the purchaſes of his anceſtor;—(that is to ſay, if the anceſtor purchaſe a female ſlave and die, and the heir afterwards have a ſon by her, and the ſlave then prove the property of another perſon, the ſon born of her is free, but the heir muſt pay the value of him to the proprietor of the ſlave, and he may again recover it from the perſon who ſold the ſlave, in the ſame manner as if he were the anceſtor who made the purchaſe.) One of the heirs, therefore, ſtands as litigant on behalf of the anceſtor, and the other is litigant on his *own* behalf; and the partition, under ſuch circumſtances, is in fact a decree paſſed in the preſence of both the parties. The purchaſer, on the contrary, becomes the proprietor of the thing bought by a recent title of property, and not in the manner of a ſubſtitute, inſomuch that he cannot, on diſcovering a defect, return the article to the perſon from whom the late ſeller had before bought it. Hence neither of the two preſent purchaſers can ſtand as litigant on behalf of an abſentee. Thus there is an evident difference between the two caſes.

pointed to the charge of the ſhares of the *abſent* or *infant* heirs;

* Arab. *Magroor*. The meaning of this term has been fully explained elſewhere.

and it cannot be granted where the property, or any part of it, is held by an *absent* heir, or his trustee, or an infant.

If the land *, or a part of it, be in the possession of the absent heir, or of his trustee, or in that of an infant heir, the partition must not be ordered, whether the heirs who are present produce the evidence or not. This is approved; for the partition, in such a case, would in fact be a decree of the *Kâzee* against an absentee, or an infant, divesting them of something they possess without any litigant appearing on their behalf;—nor can the trustee of the absentee stand as litigant on his behalf in any thing which may be attended with loss to him;—and it is illegal in the *Kâzee* to pass a decree without all the litigants being present.

If only *one* heir appear, a partition must not be ordered, although he produce the necessary evidence, for it is requisite that both the litigants be present; and one man cannot stand as litigant on both sides. It is otherwise where two appear, as has been already shewn.

The partition may be ordered although one of the requiring parties be an *infant*, or, one an infant heir, and the other a legatee.

If two heirs appear, one an adult, and the other an infant, the *Kâzee* must appoint a guardian to the infant, and order the partition as soon as evidence is produced; and in the same manner, if an adult heir appear, and also a legatee of one third of the estate, and they demand a partition, and produce evidence (one to prove that he is heir, and the other that he is legatee,) the *Kâzee* must order the partition; for in each of these cases the litigating parties are both supposed to appear,—the adult heir being litigant on the part of the deceased, and the legatee on his own behalf,—and, in the same manner, the guardian being litigant on behalf of the infant,—whence it may be said that the infant (as it were) has appeared in his own proper person as an adult, because of the guardian being his substitute.

* Arab. *Akkâr*; meaning *any* immoveable property; (and in this sense is the term *land* to be understood throughout.)

CHAP.

CHAP. II.

Of Things which are fit Objects of Partition.

An estate may be distributed on the requisition of any one partner, whose share separately is capable of being converted to use.

WHERE the respective share of each of the partners is capable of being separately converted to use, if any one of them demand a partition it must be granted; because partition is an indisputable right, when required in any article capable of partition, as has been before explained. If, on the contrary, the share of one partner only be fit for use, and not that of the other, because of its being extremely small, and the owner of the greater share demand a partition, the *Kázee* must grant it; but he must not grant it at the requisition of the other partner; for as the former can reap a benefit from his share, his demand is worthy of regard; but as the latter can have no other motives for his requisition than malice, and a desire of giving trouble, it is not to be attended to. *Khasâf* holds the reverse of this doctrine, "because (says he) the *great* partner, in making his de-"mand, occasions an injury to another, whereas the *small* partner, "in making his demand, submits to his own injury."—*Hâkim Shaheed*, on the other hand, mentions, in his abridgment, that "the "*Kázee* must order the partition at the request of either of the part-"ners; for the great partner is desirous of enjoying the use of his "share, and the small partner voluntarily submits to his own in-"jury." The first of these opinions, however, is the most authentic.

If the shares be separately useless, the assent of all the parties is requisite.

IF the shares of each of the partners be so very small that they would separately be of no use, the *Kázee* must not order a partition unless both partners acquiesce; for whenever partition is compul-

 sively

ſively made, it is with a view to promote utility; but, in the preſent inſtance, all utility would be deſtroyed by it, and therefore it cannot take place without the conſent of both the partners, as they muſt neceſſarily be the beſt judges in a matter which concerns themſelves, and the *Kâzee* can only be guided by appearances.

A partition muſt be ordered where the property conſiſts of articles of one ſpecies, (not being *land* or *money*;)

WHEN the joint property is *Arooz* *, (that is, neither *dirms*, *deenars*, *lands*, or *houſes*,) the *Kâzee* muſt order the partition, provided it [the property in queſtion] be all of one ſpecies, ſuch as articles of weight or meaſurement of capacity, or ſimilars of tale, or gold, ſilver, iron or copper, or *cattle* of one ſpecies, whether camels, oxen, or goats; for as, in this caſe, there can be no difference in the deſign, the partition may be effected with equity, and utility may thereby be accompliſhed.

but not where it conſiſts of *various* ſpecies,

THE *Kâzee* muſt not order a partition when the joint property is of various ſpecies, ſuch as a camel and a goat, or a houſe and an aſs; becauſe, as articles of different ſpecies cannot be indiſcriminately blended, the partition, in this inſtance, would not be a *ſeparation* and *diſtinction*, but rather an *exchange*, which muſt always be effected by a mutual concurrence of the parties, not by the decree of a magiſtrate.

or of houſehold veſſels.

THE *Kâzee* muſt not order a partition of houſehold veſſels, as thoſe are ſubject to the rule of diverſity of ſpecies, becauſe of difference of workmanſhip. He may make a partition of *Herat* cloths, as thoſe are all of one quality; but he muſt not make it of a ſingle piece of cloth which is not uniformly alike throughout, for the diviſion of one piece of cloth occaſions an injury, as it cannot be effected without cutting it; neither muſt he make a partition of two pieces of cloth where they are of unequal value. It is otherwiſe where there are three pieces,

A partition may be made of *cloth* of an equal quality;

* Some lexicographers define *Arooz* to ſignify *houſehold furniture*. (*Sooràj-al-Loghàt*).

pieces, the value of one of which is equal to that of the other two; or where the value of one of them is one *dirm*, that of another one *dirm* and a quarter, and that of the third one *dirm* and three quarters; for, in the firſt caſe, he muſt give one piece to the one partner, and the other two to the other partner; and, in the ſecond caſe, he muſt give to one of the partners the ſecond piece, valued at one *dirm* and a quarter; to the other the third piece, valued at one *dirm* and three quarters, and muſt leave the firſt ſtill to be held in partnerſhip, one fourth appropriated to one partner, and three fourths to the other, as it is lawful to divide a *part* of a joint property, and to leave a part undivided.

but not of *jewels* or *ſlaves*.

HANEEFA is of opinion that ſlaves and jewels muſt not be divided by the *Kâzee*, becauſe of the great difference which is to be found amongſt them. The two diſciples hold, that he may make a diviſion of ſlaves, for this reaſon, that they are of one ſpecies, like camels, or goats, or captives taken in war. The argument of *Haneefa* is, that among the individuals of the human ſpecies there is a wide difference, becauſe of their various characteriſtics; and hence ſlaves are, in effect, of *different* kinds. It is otherwiſe among animals, for with them there is little difference to be found betwixt the individuals of the ſame genus; and although the male and female of the human race be held as different ſpecies, yet the male and female amongſt animals are reckoned as the ſame ſpecies. It is alſo different with reſpect to ſlaves taken in war, as it is in their *value* that the captors hold a right, whence it is lawful for the Sultan to ſell them and make a diviſion of the price; whereas, in a caſe of *partnerſhip*, the right of the partners is connected with the *ſubſtance* of the article, as well as with the property it involves. Hence there is a difference betwixt plunder and partnerſhip property.—Some are of opinion that jewels cannot be divided when they are of different ſpecies, ſuch as pearls and rubies. Others ſay, that where the jewels are of *large* grains they cannot be divided, becauſe of the great difference that may be betwixt them;

 but

but that when the grains are ſmall, the difference being inconſiderable, the jewels may be divided. Others, again, maintain that no jewels, whether of ſmall or large grains, can be divided, becauſe the difference betwixt them, and the difficulty of aſcertaining their value, is greater than in the caſe of ſlaves, inſomuch that if a man marry a woman, and in general terms ſtipulate to give pearls or rubies as her dower, ſuch ſtipulation is invalid;—whereas, if he ſtipulate, in general terms, to give *ſlaves*, it is valid. The *Kâzee*, therefore, is not to exert his authority in making a partition of jewels.

Partition cannot be made of a *bath*, *mill*, or *well*, without the conſent of all the parties.

THE *Kâzee* muſt not order the partition of a joint mill, bath, or well, unleſs with the concurrence of all the partners; (and ſuch alſo is the rule with reſpect to a wall which ſtands betwixt two houſes;) for if, in theſe caſes, a partition were to take place, it would be injurious to all parties, as the individual ſhare of each would then be uſeleſs.

Partition of *houſes* and *tenements*.

IT is proper to remark, that a ſingle roofed place, ſurrounded with walls, with a door or entry, is termed a *Bait*, or *room*. A *Manzil*, or tenement, on the contrary, is a place compoſed of different rooms, a roofed court *, and a kitchen, ſuch as a man may reſide in with his family. A *Dâr*, or houſe, on the other hand, is a place conſiſting of various rooms or tenements, with an *open* court. A tenement is therefore ſuperior to a room and inferior to a houſe. Theſe are the definitions of *Shims-al-Ayma* in his book on *Shaffa*. In this work, whenever the general word *Khanna* [houſe] is uſed, we mean ſuch an one as we have now deſcribed, under the denomination of *Dâr*, excepting only where we mention an *under* houſe in contradiſtinction to an *upper* houſe, and then we only mean a *Bait* or a *Manzil*.

* Arab. *Sahn*; meaning the interior ſquare of a dwelling, common to all the family, and which, in *large* edifices, is open, but in ſmall ones is covered in.

IF

If there be ſeveral houſes held in partnerſhip or coparcenary in one city, each houſe muſt be ſeparately divided according to *Haneefa*. The two diſciples ſay, that if it be expedient for the partners the whole of the houſes muſt be united in one general partition, and not divided ſeparately. All the houſes, therefore, muſt be conſidered merely as one houſe, conſiſting of various apartments, and all the ſhares of each partner muſt conſequently concentre in one of the houſes, ſo that it may be his entirely. The ſame difference of opinion alſo ſubſiſts regarding the caſe of lands held in partnerſhip or coparcenary, and diſperſed in different ſituations. The argument of the two diſciples is, that all the houſes are, on the one hand, of *one* ſpecies with reſpect to name, appearance, and original deſign; as, on the other hand, they are of *different* ſpecies with regard to their particular qualities, and their commodiouſneſs for habitation, which depends on ſize, and ſo forth; whence it muſt be left to the *Kâzee* to determine their different degrees of ſuperiority.—The argument of *Haneefa* is, that regard ſhould be paid only to what they are in reality, with reſpect to their qualities; and that in them they may greatly differ on account of the difference of the cities, lanes, or neighbourhood, in which they are ſituated, and their proximity to or diſtance from water or a moſque; and that therefore it is impoſſible to obſerve an equality in the partition without dividing each houſe ſeparately;—whence it is that a man cannot appoint an agent to purchaſe a *houſe* in general terms;—and ſo likewiſe, that if a man marry, aſſigning as a dower "*a houſe*," (in general terms) his mention of the houſe is invalid,—in the ſame manner as holds where a man aſſigns "cloths" (generally) as a dower, or appoints an agent to purchaſe "cloths."—It is otherwiſe with reſpect to a ſingle houſe, held in partnerſhip or coparcenary, compoſed of different rooms; for as, in ſuch caſe, to divide each room amongſt the co-partners would be productive of inconveniency to all, the whole houſe is therefore divided at once.

WHEN two houſes, held in partnerſhip, are ſituated in different towns, we learn from *Hillâl* that it is the concurrent opinion of

Haneefa and *Aboo Yoosaf* that both houſes ſhall be divided ſeparately. *Mohammed*, on the contrary, maintains that they muſt be divided at once, as well as the houſes ſituated in the ſame town.

Rooms, whether ſituated all in the ſame quarter, or in different quarters, muſt be divided at once, for the difference amongſt them is inconſiderable. *Manàzil Molàziká* (that is to ſay, adjoining tenements, or ſuch as are in the ſame houſe, one part of them being contiguous to another,) are conſidered as rooms; whereas, *Manàzil Motbàyéná* (which is the term uſed for apartments not adjoining, in contradiſtinction to the other,) are conſidered as *houſes*,—a *Manzil* or tenement being the middle term betwixt a houſe and a room, and reſembling both.

If there be a partnerſhip in immoveable property of two ſpecies, ſuch as in a houſe and a piece of ground, or in a houſe and a ſhop, the *Kâzee* muſt divide each ſeparately, they being of different ſpecies.

CHAP. III.

Of the Mode of accompliſhing Partition.

The partitioner muſt draw a *plan*; and muſt make the diſtribution equitably by meaſurement or appraiſement.

It is incumbent upon the partitioner to draw on paper a plan of the thing which he divides, ſo that it may remain on his memory.—He muſt likewiſe obſerve an equality in the partition, that is to ſay, he muſt divide the article into due proportions; and it is alſo recorded that he ought to ſeparate each ſhare and meaſure it, ſo that its extent may be known. He muſt, moreover, *appraiſe* the article, as it is requiſite, for his further guidance, that the value be aſcertained. Sup-

Partition of *houſes* how accompliſhed.

poſing the article to be a *houſe*, in ſeparating the ſhares he muſt alſo ſeparate

the road and the drain belonging to it, if possible, so that one share may no longer have any connection with the other, in order that every cause of dispute may be terminated, and that the intention of partition may be completely accomplished. In doing this he must term one share the *first* share, that which lies next to it the *second*, and that which lies next to it the *third* share, and so on; and he must then write down their names, and draw them like lots; and he that draws the first name gets the first share, he that draws the second gets the second share, and so on to the end. The article must, moreover, be divided into fractions equal to the smallest proportion; that is to say, if the smallest proportion held by any of the partners or co-parceners be a third, the whole must be divided into three parts; or if the smallest proportion be a sixth, the whole must be divided into six parts; so that the division may be made accurately. Thus, if an estate is to be divided betwixt two heirs, the one being the son and the other the daughter, it must be divided into three shares, one termed the *first*, the next to it the *second*, and the next the *third*; and the partitioner is to write the names upon billets, and cause them to be drawn like lots; and if the *son*'s name come up first, he gets the first share, and the one next to it, and the third goes to the daughter;—or, if the daughter's name come up first, she gets the first share, and the other two fall to the *son*.

THE drawing of lots is proposed in order to give satisfaction to the parties, and to prevent the partitioner from being influenced by partiality or favour. It is not, however, absolutely necessary; and if the partitioner chuse to appoint a particular share to each, it is valid; for the making the partition is an act of magistracy, and the authority of the partitioner must therefore be enforced.

In the partition of landed property, a composition in money can-

THE partitioner, in making a division of landed property, must not annex a consideration in *dirms* or *deenars* without the concurrence of the parties; that is to say, if he make one share less than the other,

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not be admitted.

other, and, as a compenſation, annex to it a ſum in *dirms*, it is not valid, unleſs they conſent;—for the partnerſhip is not in *dirms*, and partition is one of the rights of the partnerſhip. Beſides, if *dirms* be admitted into the tranſaction, it deſtroys the equality of the partition; becauſe one of the partners gets the property, and is liable for the *dirms* which have become the right of the other; and there is a poſſibility that he may never pay them, by which means the other would loſe his right.

Partition of a houſe, with a piece of ground.

If the partnerſhip property conſiſt of two things, namely a houſe, and a piece of ground, each, according to *Aboo Yooſaf*, muſt be divided ſeparately, agreeably to its value; for it is only by aſcertaining the value of each that an equality can be obſerved in the partition. It is recorded from *Haneefa* that the ground may be divided agreeably to its meaſurement, and afterwards he on whoſe ſhare the houſe is ſituated, or whoſe ſhare is the moſt eligible, muſt pay a ſum in *dirms* to the other, ſo that an equality may be effected;—and that therefore *dirms* may be introduced as auxiliaries in the diviſion when neceſſity requires it. *Mohammed* in this caſe maintains that the perſon on whoſe ſhare the houſe is ſituated muſt give to the other partner a ſpace of ground equal in value to it. If, however, his ſhare (from its containing the houſe) be ſtill the moſt valuable, and it be impoſſible for him to effect an equality for want of enough of ground to compenſate for the value of his houſe, he may then give *dirms* equivalent to the exceſs; for as the neceſſity exiſts only in that degree, the original rule of *partition by meaſurement* muſt not in any greater degree be abandoned. This is conformable to the opinion delivered in the *Aſſil* [the *Mabſoot*].

Partition of land where there is a *road* or *drain*.

If the partitioner ſo divide the property, that the road or drain of one runs through the ſhare of the other, and no condition had been expreſſed regarding this matter, the caſe then admits of two predicaments.—I. It is poſſible for him to turn the road or drain another way,

way, ſo that it paſs not through the ſhare of the other;—in which caſe the partition is valid;—for it is not proper that he let the road or drain of one man paſs through the ſhare of the other; on the contrary, it is incumbent on him to turn it another way, even though each individual may have mutually ſtipulated that they were to enjoy their reſpective ſhares "*with all the rights and immunities belonging to* "*them*;" becauſe the intention of *partition* is to ſeparate and diſcriminate the proportions of each partner; and as it is poſſible, in the preſent inſtance, without injury to either, to effect ſuch a ſeparation and diſcrimination completely, ſo as that no connection or dependance may remain betwixt the ſhares, this is therefore indiſpenſable.—It is otherwiſe with reſpect to lands ſold with an expreſs condition that "they are ſold with their *immunities*," for here, notwithſtanding the connection or dependance which may ſubſiſt betwixt them and the lands of another, the intention of *ſelling*, which is to transfer the right of property, is nevertheleſs fully accompliſhed.—II. It is (or may be) impoſſible to turn the road or drain another way, ſo that it paſs not through the ſhare of the other:—and this may happen under two different circumſtances:—FIRST, where the parties have not ſtipulated to one another the enjoyment of their ſhares "*with all the rights and* "*immunities belonging to them*;—in which caſe the partition muſt be annulled, on account of the connection and mixture of property, which renders it inefficient, the ends of partition (namely, ſeparation and diſcrimination) not being thoroughly accompliſhed;—the partition muſt therefore, in this inſtance, be made anew, in ſuch a manner, that the road and water-drain of each may be ſeparate. (It is otherwiſe with reſpect to lands ſold; for the object of a ſale is to tranſfer the right of property, which the purchaſer may fully poſſeſs without being able to enjoy immediately the uſe of it, whereas the intention of partition is that the uſe of the property may be enjoyed in the fulleſt degree, which it cannot be unleſs a ſeparate road be made.) —SECONDLY, where all the parties have ſtipulated that they ſhall enjoy their reſpective ſhares *with all the rights and immunities belonging*

to them; in which caſe, the partition is valid, and the road and water-drain are included in it, ſince the end of partition is that each may enjoy the uſe of his property, and it is impoſſible perfectly to enjoy the uſe of the grounds without a road and water-drain. The road and water-drain are therefore, in this inſtance, included in the partition, provided the parties mutually ſtipulate to each other the enjoyment of their ſhares with all their reſpective rights: as, however, the object of partition is to *diſcriminate*, which requires a complete ſeparation of all connection in their reſpective ſhares, the road and water-drain are not included, unleſs ſuch a ſtipulation be particularly made. It is otherwiſe with reſpect to lands farmed; for the intention of *farming* being to enjoy the uſe of the lands, which cannot be done without having a road and water-drain, it follows that if theſe articles ſhould not have been expreſſed, they are nevertheleſs included in the farm.

In caſe of a diſpute concerning the road it muſt be divided.

If the parties differ regarding the road, ſome of them deſiring that it ſhould remain, as formerly, in common, but that all the reſt of the property be divided, and others of them oppoſing this, in ſuch caſe, provided it be practicable, the magiſtrate muſt divide the road, and aſſign a part of it to each particular ſhare;—or, if this be impracticable, he muſt leave the road out of the partition, which muſt nevertheleſs be made, in order that the parties may enjoy the full uſe of all their property excepting the road.

If the parties differ regarding the extent of the road, (that is, regarding the height and breadth which ought to belong to each) the *Kâzee* muſt regulate their proportions by the breadth and height of the doors of their reſpective houſes, as that is ſufficient to anſwer their neceſſary occaſions. The advantage of this arrangement is, that if any of them be deſirous of making a projection or terrace from his houſe over the ſtreet he may do it *above* the height of his door, but not *below* it; and the road will ſtill remain in common, according to

to their ſeveral proportions, in the ſame manner as before the partition; for the partition (as we have obſerved above) did not take place regarding the *road*.

The parties may make a private agreement with regard to it.

If two partners, in dividing a road, agree that the one ſhall have two thirds and the other only one third, ſuch a partition is valid, although the houſe be held betwixt them in equal proportions; for in partition it is lawful to give more or leſs than his proportion to one partner, provided both of them agree to this.

Complicated partition of different houſes and tenements.

If two partners hold a houſe, the *upper* floor of which is held by a ſtranger, or which has no upper floor, and likewiſe another houſe, the under floor of which is held by a ſtranger, and alſo a complete houſe (that is, one of two ſtories), in this caſe the *Kazee* muſt appraiſe each houſe ſeparately, and make his diviſion accordingly. *Mohammed* alleges that this is the only lawful mode. *Aboo Yooſaf* and *Haneefa* are of opinion, that he ought to make the partition according to *meaſurement*. The argument of *Mohammed* is, that the lower floor has many advantages and conveniences which the upper floor cannot poſſeſs, ſuch as wells, neceſſary houſes, ſtables, and ſo forth; and that therefore the equality of partition cannot be effected but by an appraiſement. The argument of the two diſciples, on the other hand, is, that the partition, if poſſible, ought to be made by a meaſurement, ſince the partnerſhip ſubſiſts in a thing capable of meaſurement, and not in the value of that thing. They afterwards, however, differed regarding the mode of meaſurement; *Haneefa* contending that one ſpan of the lower floor ſhould be held equivalent to two ſpans of the upper floor; and *Aboo Yooſaf* maintaining that a ſpan of the one is equivalent to a ſpan of the other. Some have thought that the contradictory opinions of theſe three ſages ought to be aſcribed to their different places of abode, and the periods in which they lived; for during the time of *Haneefa* the inhabitants of *Kooſa* (the place of his reſidence) preferred the under floor to the upper;

upper; whereas afterwards, in the time of *Aboo Yoosaf*, the people of *Bagdad* (where he lived) held the upper and the under floor in equal estimation; and *Mohammed* observed that, on the contrary, the taste of mankind differed, some preferring the upper and some the under floor, and others holding them in equal estimation. There are again some who, instead of ascribing the opinions of the three sages to the prevailing customs and notions of the ages and places in which they lived, are rather for deriving the origin from different principles of law. Thus, in support of *Haneefa*'s doctrine, it is argued, that the advantages of an under floor are double those of an upper one; for the advantages of the under floor remain after the upper one is ruined and destroyed, whereas those of the upper floor do not remain after the destruction of the under one. In the under floor, moreover, there are not only the advantages of *habitation*, but also those of *foundation*; for the proprietor of the under floor may build if he pleases, but the proprietor of the upper floor can only enjoy the advantages of habitation, as it is not lawful for him to erect any buildings without the consent of the proprietor of the ground floor; and upon these considerations a span of the *under* floor should be reckoned equivalent to two spans of the *upper*. In favour of *Aboo Yoosaf*'s opinion, on the other hand, it is alleged, that *habitation* is the great end of both, and that both are equally fit to answer that end; whence it is lawful for the proprietor of either of them to erect any buildings that are not productive of injury to the other. Lastly, it is urged, on the part of *Mohammed*, that the advantages of an upper and an under floor are according to the seasons of summer or winter, the violence of the wind, the temperature of the air, and the different climates or countries in which they are situated; whence it is impossible to establish any just rule of partition, but by appraisement. In modern times the law is administered agreeable to the adjudication of *Mohammed*, which does not require any comment or elucidation.—The mode of partition prescribed by the doctrine of *Haneefa*, in the case in question, is as follows.—The partitioner must first

first set against the upper floor house (which we shall suppose measures one hundred spans) a part of the complete house equal to thirty-three one-third spans; because an upper floor is rated at half the value of an under floor; consequently thirty-three and one-third spans of the under floor of the complete house are equal to sixty-six and two-thirds of the upper floored house; and as those sixty-six and two-thirds, together with the thirty-three and one-third spans of the under floor, form the complete house, the whole amount exactly to the one hundred spans of the upper floor house. The partitioner must then set sixty-six and two-thirds spans of the complete house against the under floor house (supposing it to measure one hundred spans), for the upper floor of the complete house is rated at only half the value of the under floor house, and sixty-six and two thirds spans of both the floors of the complete house are equal to the one hundred spans of the under floor house. The mode, on the other hand, of making the partition according to *Aboo Yoosaf*'s doctrine is as follows. Let one hundred spans of the upper floor house be set against fifty spans of the complete house; or, let one hundred spans of the under floor house be set against fifty spans of the complete house; for, according to him, the upper and the under floor are held in equal estimation; wherefore fifty spans of the complete house, comprehending fifty spans of the under floor, and fifty spans of upper floor, must be equal to one hundred spans.

In disputes after partition, the evidence of two partitioners must be admitted,

IF the partners differ after partition, one pleading that "he has not "received the whole of his share, a part of it still remaining in the possession of the other,"—and the other denying this, and the two partitioners (or any other two persons,) testify that "they have made a "partition," their evidence, according to the two disciples, must be admitted. *Mohammed* says that it cannot be admitted, because the evidence they give relates to their own act, and is consequently inadmissible, in the same manner as the evidence of a man relative to some act of his own, on the occurrence of which a person may have

formerly suspended the emancipation of his slave. The argument of the two disciples is, that the witnesses, in fact, testify to the act of *others*, (namely, the act of *seizing* and *possessing*,) and not to their own act; because their act was merely *discriminating* and *separating*, to which evidence is not required; hence their testimony must be admitted. *Tabáwee* observes, that where the partitioners receive pay for making the partition, it is universally allowed that their evidence cannot be admitted; and indeed several doctors of our sect are of the same opinion; alleging that as, in that case, their evidence tends to prove that they have fully and accurately performed the work for which they received pay, it is in the nature of a representation on their own behalf. Our author, however, does not subscribe to this reasoning; for he remarks, that the two partitioners could not have a view to their own interest in their evidence, as the partners have agreed that they fully and accurately performed the work of partition for which they receive their pay, the only question in dispute being the *seizin* and *possession*; wherefore no imputation of falsehood ought to fall on them.—If only *one* partitioner give evidence, it must not be admitted; for the evidence of one man alone against another is not sufficient.

but not that of one partitioner.

CHAP. IV.

Of Pleas of Error in Partition; and of Claims of Right in regard to it.

A plea of error cannot be admitted, where the party ac-

WHERE one of the partners complains of an error in the partition, and that a part which ought to have fallen to him by the partition is in the possession of another, in this case, if he have before acknowledged

ledged that he had received his ſhare, his complaint muſt not be admitted unleſs ſupported by evidence; for it is, in fact, ſuing to cancel the partition after it has been accompliſhed; and it is to be preſumed that there is no error, and that his complaint is falſe. If the complainant cannot ſupport it by evidence, the others muſt be required to deny the complaint upon oath; and if they refuſe to ſwear, their refuſal is conſtrued as proof in favour of the complainant, and the *Kazee* muſt cauſe their property to be divided anew, agreeably to their ſeveral proportions, as this is dealing with them according to their own ſuſpicions. The author of this work thinks that in the above caſe the complainant's ſuit ſhould, on account of his contradicting himſelf, be wholly rejected.

knowledges having received his ſhare, unleſs it be ſupported by evidence.

IF the complainant allege that he *did* receive his whole right, but that the other afterwards took a part of it, the denial of the other, on oath, muſt be credited, as this is in fact a complaint of *uſurpation.*

A complaint of after-aſſumption is a complaint of *uſurpation.*

IF he allege that "a certain village fell to him in conſequence of "the partition, but that the other had not delivered it up to him," in this caſe, provided he have not previouſly acknowledged the obtaining poſſeſſion of his ſhare, and the other contradict him, both muſt be required to ſwear;—becauſe the diſpute is with reſpect to the quantity which the complainant received in conſequence of the partition; and hence the difference in the preſent inſtance is analogous to a diſpute concerning the quantity of an article of ſale,—in which caſe a mutual oath is tendered to the parties (as has been fully explained under the head of SALES;) and ſo here likewiſe.

In caſe of a complaint of non-delivery, both parties are ſworn, and the partition is diſſolved and made anew.

IF one of the parties complain that an *error* took place in the diviſion, his complaint muſt not be attended to, it being held in the ſame light as a complaint of a fraudulent bargain, which in caſes of *ſales* concluded by the principals themſelves cannot be heard. In partition, therefore, as in *ſales*, ſince both parties have mutually con-

A plea of error cannot be heard, if the partition was made by the parties.

 curred,

curred, ſuch a complaint cannot be heard. If, however, the partition was made by the order of the *Kázee*, and *extreme* fraud be alleged, the complaint muſt be heard, as the ſtability of the *Kázee*'s authority depends on juſtice.

Caſe of a claim laid to a particular room in a houſe, after partition.

If a houſe be divided betwixt two partners, each receiving a part, and afterwards one of them claim a room in the poſſeſſion of the other, alleging, that "it is one of the things which ought to have "fallen to him in conſequence of the partition," and the other deny this,—in this caſe, as the plaintiff complains of *uſurpation*, it is requiſite that he bring proper evidence; and if both bring evidence, that adduced on the part of the plaintiff, who is *not* in poſſeſſion, muſt be admitted in preference to that of the other; for it is a maxim of the law that the evidence on the ſide of the party who is *out* of poſſeſſion is preferable to that on the ſide of him who is *in* poſſeſſion.

If the complaint above-mentioned be previous to an avowal of the plaintiff's having ever acquired poſſeſſion, both parties muſt be required to ſwear, and the partition muſt be annulled, and performed anew. In the ſame manner, alſo, if two partners differ regarding their boundaries, the one alleging that "a certain boundary belongs "to him, but has fallen into the poſſeſſion of the other," and the other alleging the ſame thing regarding another boundary, and both produce evidence, the *Kázee* muſt decree, in favour of each, that boundary which is in the poſſeſſion of the other. If only *one* produce evidence, the *Kázee* muſt paſs a decree only in his favour; but if neither of them produce evidence, they muſt both be required to ſwear, in the ſame manner as in caſes of ſale.

SECTION.

SECTION.

Of the Laws which prevail in a *Claim of Right* *.

IF a houſe (for inſtance) held in partnerſhip be divided, and afterwards an undefined part of the whole, (ſuch as a *half* or a *third*), prove the right of another, the partition, according to all our doctors, is null, and muſt be made anew.

In a caſe of claim ſet up to an indefinite part, after partition, it muſt be diſſolved and made anew.

IF a particular and defined part of what has fallen to one of the partners, in conſequence of partition ſhould prove the right of another perſon, the partition is valid, according to all our doctors, and becomes not void with reſpect to what remains after the right of the other perſon has been ſeparated:—but the party from whoſe ſhare that right is taken has it in his option either to diſſolve the partition, (thereby reſtoring the property to the ſtate in which it ſtood previous to the partition) and then to demand a new one,—or, if he chuſe, he may let the partition hold good, and exact from his partner's ſhare a compenſation for that part of which he has been deprived by its proving the right of another.

If a *definite* part be claimed, after partition, it muſt be compenſated for from the ſhares of the other partners, or, the partition muſt be diſſolved and executed anew;

IF, after partition, an undefined part of the ſhare of one of the partners (ſuch as an *half*), prove the right of another perſon, the partition is valid with reſpect to the remainder, and does not become void according to *Haneefa* and *Mohammed*; but the partner upon whoſe ſhare the claim operates has it in his option to annul the partition;

and ſo likewiſe, if an *undefined* part be claimed.

* Arab. *Iſtihkâk*; meaning a claim ſet up to the ſubject of a deed or contract, by ſome perſon not concerned in ſuch deed or contract.

(restoring the concern to the state in which it previously stood,) and then to demand a new partition;—or, if he chuse, he may let the partition hold good, and exact from his partner a compensation for the half of his share which he has lost, and which is equivalent to one fourth of the share in that partner's possession. According to *Aboo Yoosaf*, the partition is in this case null, since by an undefined proportion of one of their shares proving the right of another person, a third partner is created, without whose concurrence the partition is void;—in the same manner as where an undefined part of the *whole article* proves the right of another person. The reason of this is, that where an undefined proportion of one of their shares becomes the right of another, one of the objects of partition (namely, *separation*) is destroyed, since the share of one of the partners by that means becomes in itself a matter of partnership; and he must have recourse to the share of the other for an undefined part, equal to that proportion of his right of which he has been deprived. It is otherwise in the preceding case, where a particular and defined part of one of their shares proves the right of another; for in that case the object of partition (namely, *separation*) still exists with respect to the remainder. The argument of *Haneefa* and *Mohammed* is, that the object of partition, namely separation, is not defeated by an undefined proportion of one of the partner's shares becoming the right of another person. Hence a partition of this nature, *originally* made, would be valid;—as where, for instance, the first half of a house is jointly held by two partners, *Zeyd* and *Amroo*, and by a third person, named *Khàlid*, one half thereof by *Khàlid*, and the other half betwixt *Zeyd* and *Amroo*; the second half being held jointly between *Zeyd* and *Amroo*, *Khàlid* holding no share therein;—in which case *Zeyd* and *Amroo* might lawfully make a partition betwixt themselves, *Zeyd* getting the whole of their joint share in the first half of the house, and one-fourth of the second half; and *Amroo* getting three fourths of the second half; and it is in the same manner *ultimately* valid; the case becoming similar to that in which a *defined* proportion of one of the

ſhares proves the right of another. It is otherwiſe where an undefined proportion of the *whole* houſe, including *both* ſhares, proves the right of another; becauſe, in this latter caſe, ſuppoſing the partition to be valid, an injury is ſuſtained by the third perſon, whoſe right was manifeſted after the partition, ſince he muſt then accept his proportion, *not* in a *compact* manner, but *diſperſed*, from the ſhares of each of the others; whereas, in the former caſe, (in which an undefined proportion of one of the ſhares proves the right of another,) he ſuffers no injury. Thus there is an evident difference between the two caſes. In ſhort, the nature of the caſe in queſtion is this, that one of two partners takes one third of a houſe, and the other takes the remaining two thirds, the value of the firſt third being equal to that of the other two thirds; and afterwards one half of the firſt third proves the right of another perſon;—in which caſe, (according to *Haneefa* and *Mohammed*,) the firſt partner has it in his option to annul the partition; for if it continue valid, his ſhare is defective, becauſe of its being diſperſed, part in the *firſt* third of the houſe, and part in the two *laſt* thirds;—or, if he pleaſe, he may take one fourth of the ſhare which fell to the ſecond partner; for if the *whole* of his [the firſt partner's] ſhare had proved the right of a third perſon, he would have been entitled to take one half of the ſecond partner's ſhare; wherefore (arguing of a part from the whole) ſince one *half* of his ſhare proved the right of the third perſon, he is entitled to take one half of an half of the ſecond partner's ſhare, which is equal to one fourth.

If the partner to whoſe lot the *firſt* half falls ſhould *ſell* a moiety of it, and afterwards the other moiety prove the right of another, he is ſtill entitled to one fourth of the *ſecond* half in the poſſeſſion of his co-partner, for the reaſons before aſſigned; and his option of annulling the partition drops, becauſe of his having ſold a part of his ſhare. This is according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* maintains that the *ſecond* half, in the poſſeſſion of the co-partner,

ner, muſt be divided equally betwixt them; and that the firſt partner forfeits to his co-partner one half of the price for which he ſold a part of his ſhare; for (agreeably to his tenets) the original partition is invalid; and as an article of which a perſon obtains poſſeſſion by an invalid deed becomes his property, he may lawfully diſpoſe of it by ſale: but he is reſponſible for the value of it; and hence, in the caſe in queſtion, the firſt partner is reſponſible for the value of an half of what he has ſold, as that is a moiety of the other's half.

A debt proved againſt an eſtate, annuls the partition of it among the heirs,

If the eſtate of a deceaſed perſon be divided amongſt the heirs, and afterwards a debt be proved againſt the eſtate *equal* to the whole, the partition muſt be annulled, becauſe the debt prevents the eſtate from being the property of the heirs;—and the ſame rule holds where the debt is *not* equal, becauſe the right of the creditor attaches equally to the whole fortune of the deceaſed. The partition muſt therefore be annulled, unleſs there be left after it a ſum ſufficient to diſcharge the debt, in which caſe it is not annulled, ſince the annulment of it is not neceſſary for the diſcharge of the debt.

unleſs the creditor remit it, or the heirs diſcharge it.

If the creditor, after the partition, remit the debt, or if the heirs diſcharge the debt from their own fortunes, the partition remains valid, whether the debt be equal to the eſtate or exceed it, the obſtacle to its validity being thus removed.

An heir may prefer a claim upon an eſtate after partition.

If one of the heirs prefer a claim of debt againſt the deceaſed, after the partition of the heriditaments, his claim is admiſſible; for in this caſe there is no contradiction, ſince the debt relates to the *ſpirit* or *value*, and not to the *ſubſtance* of the particular hereditaments, and it was in the *ſubſtance* of the hereditaments that the partition took place.

A claim cannot be ſet up, by an heir,

If a part of the heirs, after partition, prefer a claim for a particular thing, included in the eſtate, on whatever ground the claim be built,

built, it cannot be admitted, on account of the contradiction, which is here evident, as their acquiescence in the partition implies an acknowledgment in them that that particular thing, which has been divided, was a part of the co-parcenary.

to any particular article, after distribution.

CHAP. V.

Of the Laws of *Mahàyat*.

MAHAYAT, in the language of the LAW, signifies, *the partition of usufruct*; and it is allowed; because it is frequently impossible for all the partners to enjoy together, and at one time, the use of the thing held in partnership. *Mahàyat*, therefore, resembles the partition of property (whence it is that the *Kázee* may enforce it in the same manner,)—with this difference, however, that in the partition of property each partner enjoys the use of his respective share at the same time, whereas in the partition of usufruct each most frequently enjoys the use of the thing held in partnership only when it comes to his turn, by rotation. Partition of *property* is therefore more effectual than partition of *usufruct* in accomplishing the enjoyment of the use; for which reason, if one partner apply for a partition of property, and another for a partition of usufruct, the *Kázee* must grant the request of the former; and if a partition of usufruct should have taken place with respect to a thing capable of a partition of property, (such as a house or a piece of ground,) and afterwards one of the partners apply for a partition of property, the *Kázee* must grant a partition of property and annul the partition of usufruct.

Mahàyat is a *partition of usufruct*,

and is not annulled by the deceafe of the parties.

A PARTITION of ufufruct is not annulled by the death of one of two partners, nor even by the death of both, for if it were annulled, it muft (moft probably) be renewed, (fince the heirs of the deceafed may lawfully demand a partition of ufufruct,) and therefore it would be to no purpofe to annul it.

Partners may make it by allotting to each the ufe of a *particular part* of the joint concern;

IF two partners, by a mutual contract, make a partition of ufufruct refpecting a houfe, to this effect, that one of them fhall inhabit one part of it and the other another,—or, that one fhall inhabit the upper floor and the other the under, fuch contract is valid; for as a partition of property executed in this manner is lawful, fo likewife is a partition of ufufruct. It is proper to remark, that a partition of ufufruct, when thus executed, is in reality a *feparation*, that is, a divifion of the whole of the fhares of ufufruct of one partner from thofe of another partner, and a concentration of both into one place: but the contract does not comprehend an *exchange*, whence it is that a limitation of time is not required in it;—for if it comprehended an exchange, a limitation of time would have been requifite, becaufe of its being (in that cafe) a leafe.

(in which cafe either is at liberty to *let* his fhare;)

IT is lawful for each partner to let out on rent that part of which the ufufruct has fallen to him, and he may appropriate to himfelf the rent accruing therefrom, whether it be a condition in the agreement of partition of ufufruct or not; for every ufe which accrues from that part becomes (in confequence of the partition of ufufruct) his property, and the rent which he receives is nothing more than a compenfation given him in lieu of the ufe accruing from it.

or by ftipulating an *alternate* right to the ufe.

IF two partners make an agreement of partition of ufufruct regarding a flave, in this manner, that the one day he fhall ferve the one, and the next the other, it is lawful; (and fo likewife if they make a fimilar agreement regarding a fmall room;) for partition of ufufruct is fometimes effected by means of time, and fometimes by means

means of place; and in the present instance it is effected by means of the *former*.

A difference between the parties must be settled by the interference of the *Kázee*.

IF two partners disagree concerning the terms of their contract of partition, the one alleging that it related to *time*, and the other that it related to *place*, the *Kázee* ought to enjoin them to agree regarding one or other of these methods. The reason of this is that the partition of usufruct with respect to *place* is the more *equitable*, since by that means each partner enjoys the use at the same time that the other partner enjoys it also; but partition of usufruct with respect to *time*, (on the other hand) is the more *complete in regard to the use*, since each individual then enjoys it entire. As, therefore, the reasons in favour of these two methods are different, it is requisite that the partners agree on one of them;—and if they chuse partition with respect to *time*, the *Kázee*, to prevent the imputation of partiality, must draw lots, in order to determine which of them shall have the first turn.

Case of partition of the use of *two* slaves.

IF two partners (whom we shall suppose *Zeyd* and *Amroo*) make a partition of usufruct regarding two slaves, to this effect, that the one shall serve *Zeyd*, and the other *Amroo*, it is valid, according to the two disciples; for as (by their doctrine) partition of *property* with respect to slaves is lawful, whether performed by the authority of the *Kázee*, or by the mutual agreement of the parties, it follows that partition of *usufruct*, with respect to slaves, is also in the same manner lawful. Some (by inference from the doctrine of *Haneefa*) maintain that the *Kázee* must not *enforce* the partition of usufruct with respect to slaves; (and such is reported as his opinion by *Khasáf*;) because compulsion being (as we have formerly shewn) disallowed by *Haneefa* with respect to partition of *property* in the case of slaves, it evidently follows that the *Kázee* cannot enforce a partition of *usufruct* in a similar case. The truth is, that if the *Kázee* enforce a partition of *usufruct* in this way, it is lawful, according to *Haneefa*,—

 whereas,

whereas, if he were in this way to enforce a partition of the *substance* it would be unlawful; because in the *service* of slaves there is no great difference, but in their *persons* they differ considerably.

If a partition of usufruct be made regarding the above two slaves in this manner, that the maintenance of the one whom *Zeyd* takes for his service shall be defrayed by *Zeyd*, and the maintenance of the one whom *Amroo* takes shall be defrayed by *Amroo*, it is valid, on a favourable construction. Analogy would suggest that it is not valid, because the maintenance of each of the slaves is incumbent on both the masters;—but when it is stipulated that the maintenance of one of them shall fall solely on one of the masters, and that of the other on the other master, it may be called an *exchange*; and as the *consideration* (supposing it an *exchange*) is uncertain, it is therefore invalid. The reason for a more favourable construction, in this particular, is that in *feeding* slaves *strictness* is not particularly regarded. It were otherwise, however, if each partner stipulated to *clothe* his slave, as strictness is regarded with respect to *clothing* them.

or, of two houses,

If two partners make a partition of usufruct regarding two houses; in this manner, that the one shall inhabit the one house, and the other inhabit the other, it is valid: and the *Kâzee* may enforce it, according to the two disciples; and such is also the opinion of *Haneefa*, as mentioned in the *Zâhir Rawâyet*. The reason of this, with the two disciples, is that as (agreeably to their tenets) a partition of *property*, made in this manner, is valid, so likewise is a partition of *usufruct*. Some say that according to *Haneefa* such a partition of usufruct, when made by the mutual agreement of the parties, is valid; but that it cannot be enforced by the *Kazee*; for although a partition of *property* of this nature, by the consent of the parties, be valid, still (agreeably to his tenets) the *Kâzee* cannot enforce it; and the same of a partition of *usufruct*. There is another opinion transmitted to us from *Haneefa*, that a partition of usufruct in the manner above-mentioned

mentioned is utterly invalid, whether enforced by the *Kázee*, (for the reafons which have been ftated above,) or made by mutual agreement; becaufe it would be a fale of refidence in one houfe for refidence in another, which is not legal, as has been already fhewn in treating of HIRE. It is otherwife with refpect to partition of the *fubftance* of two houfes; for the fale of a part of the one houfe for a part of the other is lawful. The reafons for the opinion quoted from the *Zâhir Rawâyet* are, that as the difference between the ufufruct of the one and of the other is inconfiderable, a partition of the nature defcribed is in the manner of a feparation, and is therefore lawful when made by the mutual agreement of the parties, and may be enforced by the *Kâzee*. The difference, on the contrary, between the *fubftance* of the houfes may be very confiderable; hence a partition of the *fubftance* of them, in the manner defcribed, is (in effect) an *exchange*, and may accordingly be made by the confent of the parties, but cannot be enforced by the *Kâzee*.

IF a partition of ufufruct be made regarding two quadrupeds, to this effect, that the one partner fhall have the riding of the one, and the other the riding of the other, it is not valid according to *Haneefa*. According to the two difciples it is valid; fince a partition of property made in this manner is (by their doctrine) valid; and partition of ufufruct is only a branch of partition of property. The argument of *Haneefa* is, that there is a difference in the ufe and riding of one or of another quadruped, becaufe of the difference in riders, fome being expert and knowing in the art of riding, and others the reverfe. The fame difference of opinion alfo obtains concerning a partition of ufufruct, by rotation, with refpect to *one* quadruped:—in oppofition to a *flave*; for a flave ferves according to his own reafon, and will not fuffer a greater burden than he is capable of bearing, whereas a quadruped muft fubmit.

or, of two quadrupeds.

Partition of the advantage from a *houſe* may be effected by each party letting it to hire alternately,

If a partition be made regarding the produce of a houſe, to this effect, that the one partner ſhall let it out to rent for one or two months, and enjoy the produce or rent, and that afterwards the other partner ſhall let it out in the ſame manner, and enjoy the rent, ſuch a partition is valid, according to the *Záhir Rawáyat*: but a ſimilar agreement regarding a ſlave or a quadruped is not valid. The reaſon of this diſtinction is, that in the caſe of the ſlave or quadruped the equality of the ſeveral ſhares, which is a neceſſary condition, is loſt,—whereas in the caſe of the houſe it is preſerved; for ſlaves and quadrupeds are changed and prejudiced by the lapſe of time and ſevere labour, and it is probable that their hire will be leſs the ſecond than it was the firſt turn, whereas a houſe may be ſuppoſed to continue in the ſame ſtate during both turns, and the rent may be equal.

any occaſional *exceſs* in the rent being divided equally between them.

If it ſhould happen that the rent of a houſe is greater during the turn of one partner than in that of the other, they are both to participate in the exceſs, or difference betwixt the one rent and the other, ſo that an exact equality may be effected betwixt them. It is otherwiſe where they make a partition reſpecting the *uſe* of the houſe, and it afterwards yields a greater produce to the one in his turn than to the other, for as, in this caſe an equality has ſtill been preſerved in that which was the ſubject of partition, (namely, the *uſe*,) the exceſs of acquiſition, received in return for the *uſe*, is immaterial, ſince it frequently happens that there are two things exactly equal, and yet the return received for the one is greater than that received for the other.

In a caſe of partition of the advantage from *two* houſes, neither party is accountable for any exceſs of rent to the other.

A partition concerning the rent of *two* houſes is likewiſe lawful, according to the *Záhir Rawáyet*, for the ſame reaſons as have been aſſigned in the caſe of *one* houſe. If, however, one houſe yield a greater rent than the other, ſtill the partners do not both ſhare in the exceſs. The reaſon of this diſtinction is that, in the caſe of *two* houſes, when a partition of their rents is made, *ſeparation* is the prevailing

vailing principle; becauſe as each partner enjoys the rent of his particular houſe, at the ſame time, it follows that each obtains the whole of his reſpective rights, without leaving any part of them with the other,—whereas in a partition of the uſufruct of *one* houſe, the partners receive the rent by rotation, (that is, the one receives the rent the one month, and the other receives it the other,) and it may therefore be ſaid that they ſucceſſively grant to each other a *loan* of their ſhares of the rent,—the partner who holds the ſecond month lending to him who holds the firſt month his ſhare, or half of the rent for the *firſt* month, which he is again to receive out of the rent of the ſecond month;—and it may be alſo ſaid that during their reſpective months each acts as agent for the other in receiving his ſhare; and when the other has received his ſhare from the rent of the ſecond month, if there be an exceſs, it is divided betwixt them; but if, on the contrary, he be not able to recover the whole amount of his loan from the rent of the ſecond month, (it being leſs than the firſt,) the exceſs which is on the ſide of him who held the firſt month muſt be divided betwixt the partners, ſo that a perfect equality may be thus accompliſhed.

ACCORDING to the two diſciples, a partition with reſpect to the *hire* of two ſlaves, made in the manner of the preceding caſe, is lawful, as well as a partition with reſpect to the *ſervice* and *uſe* of two ſlaves. *Haneefa* maintaining that it is not valid; becauſe the difference to be found in two ſlaves is greater than that which is to be found in *one* ſlave at two ſeparate periods. As, moreover, a partition with reſpect to the gain required from a *ſingle* ſlave, by rotation, is invalid, it follows that ſuch a partition with reſpect to the gain acquired from *two* ſlaves is invalid *a fortiori*. Beſides, a partition regarding the ſervice and uſe of ſlaves is admitted from *neceſſity*, ſlaves being of themſelves indiviſible; but there is no *neceſſity* in the caſe of the *hire* of ſlaves, as that is a thing which is capable of diviſion. In the caſe, moreover, of *ſervice*, it may not be requiſite to

conſider

confider matters ftrictly;—whereas, in the cafe of *hire* (which is a *money* tranfaction) matters muft be confidered ftrictly. Hence there is no analogy between the cafes.

A partition of advantage from two quadrupeds.

A PARTITION of ufufruct concerning the hire of two quadrupeds is invalid, according to *Haneefa*, in oppofition to the two difciples. The arguments ufed on both fides are the fame as thofe which have been fet forth in the cafe of a partition of ufufruct concerning the ufe or fervice of a quadruped.

A partition of ufufruct cannot be made with regard to *productive* articles.

If two partners make a partition of ufufruct regarding an orchard of dates, or a garden containing trees, in this manner, that each fhall take a part and cultivate it, and enjoy the fruits produced from it,—or, if they make a partition of ufufruct regarding a herd of goats, in this manner, that each fhall take a certain number, and feed them, and enjoy the milk produced by them, neither of thefe partitions of ufufruct is valid; becaufe partition of ufufruct regarding *ufe*, as well as partition of ufufruct regarding *fervice*, is admitted only from *neceffity*, as being unfubftantial and therefore incapable of divifion; but, in the prefent inftances, the fruit and the milk, when once produced, are capable of divifion, being things which fubftantially exift, and therefore there is in thefe inftances no neceffity. The device here is for one of the partners to fell his fhare to the other, who may firft enjoy the fruit and milk, and afterwards, when the other's turn is expired, his partner may again purchafe the whole, and enjoy the fruit and milk in his turn. Or, one may enjoy the produce of the other's fhare in the manner of a *loan*, and afcertain the quantity thereof, for the loan of indefinite things is lawful.

HEDAYA.

H E D A Y A.

B O O K XL.

Of MOZÀREÁ, or COMPACTS *of* CULTIVATION.

Definition of the term.

MOZÀREÁ, in the language of the LAW, ſignifies a compact betwixt two perſons, one being a proprietor of land, and the other the cultivator, by which it is agreed that whatever is produced from the land ſhall belong to both in ſuch proportions as may be therein determined.

Difference of opinions concerning compacts of cultivation.

A COMPACT of cultivation is not valid according to *Haneefa*. The two diſciples maintain it to be valid; becauſe it is related of the prophet that he entered into ſuch a compact with the people of *Kheebir*, by which it was agreed that they ſhould manage the gardens

and

and lands of *Kheebir*, and enjoy one half of the fruits and grain produced from them, and that they should give the other half to him. Besides, a compact of cultivation is, in fact, a compact of partnership in regard to stock and labour, in this way, that one of the parties being the proprietor of the ground, and the other the tiller of it, the product is between them.—It is therefore valid from its analogy to a contract of *Mozáribat*; for contracts of *Mozáribat* are valid on a principle of conveniency; since, as it often happens that there are men possessed of property who have not a capacity for trade or business, and again, that there are others endowed with such a capacity who have no property, it is therefore convenient that a contract of *Mozáribat* be established betwixt them, by which means the desires of both are accomplished; and as the same reason subsists in the case of compacts of cultivation, they are therefore valid as well as compacts of *Mozáribat*. It is otherwise where one man gives to another goats, fowls, or silk worms, to take care of, on condition that he who thus takes care of them shall have one half of the produce and the proprietor the other half; for this is disapproved; because as the care and management of the keeper has no effect in creating the produce, partnership is therefore not sufficiently established in that instance. The arguments of *Haneefa* on this point are threefold. FIRST, The prophet has expressly prohibited *Mokhàberá*, which in the dialect of *Medina* has the same signification as *Mozàreá*, namely, compacts of cultivation.—SECONDLY, To make a compact of cultivation is to hire a labourer for a part of that thing which is produced by his labour: it is therefore, in effect, a *Kafeez Tehàn*, and as that is unlawful, so likewise is this.—(*Tehân* signifies a miller or grinder of wheat, and *Kafeez* a cup used for measuring; *Kafeez Tehàn* therefore means to hire a person to grind wheat into flour, in consideration of a measure of the flour for his hire.)—THIRDLY, The rate of hire, in such cases, is uncertain, when any produce is reaped; or it is annihilated when no produce is reaped; and in either case the hire is invalid. With respect, moreover, to the transaction which passed betwixt the prophet and the people

people of *Kheebir*, it was not a compact of cultivation, but was rather in the nature of a tributary revenue, allowed to be paid in kind, as an indulgence or compromise. As compacts of cultivation are thus deemed invalid by *Haneefa*, it follows that, (agreeably to his doctrine,) where the labourer waters, tills, and sows the land, and it neverthe-less proves unproductive, he is entitled to the customary rate of hire adequate to his labour, since (according to *Haneefa*) the compact of cultivation is, in effect, as an *invalid hire*. This is where the seed sown is furnished by the proprietor of the ground; for if the seed be furnished by the cultivator, he is liable for the rent of the land at the customary rate:—and if, in either case, any produce be reaped, it be-longs to him who supplied the seed, since it is an increase from his property;—and the other, if he be the cultivator, is entitled to a rate of hire adequate to his labour,—or, if he be the proprietor of the ground, to an adequate rent for his ground. In the present times, however, the adjudication of the courts is given according to the doctrine of the two disciples, both because compacts of cultivation are convenient to mankind, and also because they have become every where customary.

They require that the ground be capable of cultivation,

that the parties be duly qualified,

THE following conditions are essential to the validity of a com-pact of cultivation. I. That the ground be capable of cultivation, for otherwise the object of the compact cannot be accomplished.—II. That the proprietor of the ground and the manager be both qua-lified to make such a compact; that is to say, that they be both in their right reason, of age, and conversant in such compacts; for un-less the parties be so qualified no compact whatever is valid. III. That the period or term be expressed; for such a compact is in the nature of an agreement, either for the use of the *ground*, (as when the *culti-vator* supplies the seed,) or, for the use of the *labour*, (as when the seed is supplied by the proprietor of the ground;) and the determi-nate use of either can be ascertained only by the period. IV. That it be expresly stipulated by whom the seed is to be supplied, in order that

that the term of their continuance be expressed,

that the party be specified who is to supply the seed,

that the grounds of the compact may be known;—in other words, in order that it may be known whether it is founded on the use of the *labour*, or on the use of the *land*, and that no source of dispute may remain. V. That the particular share which is to fall to him who does *not* supply the seeds be expressed; for in consequence of the agreement he is entitled to a share; and it is requisite that the proportion be determined, because a thing which is unknown cannot be established by the compact, notwithstanding a share be in general terms stipulated. VI. That the proprietor of the land deliver up the land to the cultivator, in order to the cultivation of it; and that he himself abstain from any management or enjoyment of it; insomuch, that if it be stipulated in the compact of cultivation that he also shall manage, the compact is null, because of the invalidity of such stipulation. VII. That both parties participate in the produce of the ground after it is reaped; for a compact of cultivation is ultimately a compact of partnership; wherefore every stipulation repugnant to partnership invalidates the compact. (For example, if a precise quantity of the produce be stipulated for one of the parties, it is invalid; since, as it is uncertain whether so much will be produced, the partnership is therefore defeated.) VIII. That the particular species of seed, such as wheat, barley, &c. be expressed, in order that the species in which the hire of the labourer is to be paid may be known.

that the share of the *other* party be expressed,

that the land be delivered up to the cultivator,

that both parties participate in the produce,

and that the particular seeds be mentioned.

Of compacts of cultivation four descriptions are valid,

COMPACTS of cultivation, (according to the two disciples,) are of four different kinds:—I. Where the ground and the seed are supplied by the one, and the cattle, and the labour by the other:—and this is lawful, for the cattle are considered as implements of labour, and the case is therefore similar to that of a man hiring a taylor to sew his robe with his (the taylor's) own needle. II. Where the ground alone is supplied by one of the parties, and the labour, seed, and cattle by the other:—and this also is lawful; for in this case the labourer has hired the ground for a known proportion of its produce;

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and it is therefore lawful, in the ſame manner as if he had hired or rented it for a certain number of *dirms*. III. Where the ground, the ſeed, and the cattle, are ſupplied by the one, and the labour alone by the other:—and this likewiſe is lawful; for in this caſe the proprietor of the ground hires a labourer to work with implements belonging to him (the hirer); and it is conſequently analogous to the caſe of a man hiring a taylor to ſew his robe with his (the hirer's) needle,—or, to that of a man hiring a labourer to dig with his (the hirer's) hoe. IV. Where the ground and cattle are ſupplied by one of the parties, and the ſeed and labour by the other.—This is not valid, according to the *Zâhir Rawâyet*:—but it is reported from *Aboo Yooſaf* that this alſo is valid; for as, if it were agreed that both the cattle and the ſeeds ſhould be ſupplied by the proprietor of the land, it would be valid, it is in the ſame manner valid where he ſupplies the cattle only; being, in fact, the ſame as where the cattle are furniſhed by the cultivator. The reaſons on which the opinion in the *Zâhir Rawâyet* is grounded are, that the uſe of *cattle* is different in its nature from the uſe of *ground*; for the uſe of ground ariſes from a ſtrength in the ſoil which occaſions vegetation, whereas the uſe of cattle conſiſts in their fitneſs for labour: theſe two things, therefore, not being of the ſame ſpecies, the uſe of the cattle cannot be a dependant on the uſe of the ground. It is otherwiſe where the cattle are ſupplied by the cultivator; for the uſe of cattle and the uſe of a cultivator or labourer are of the ſame ſpecies, the product being equally derived from the work of both.

and two are *invalid*.

IT is here proper to remark, that beſides the four ſpecies of compacts of cultivation above enumerated, there are two more, which are, however, invalid. I. Where it is ſtipulated that the ſeed ſhall be ſupplied by one of the parties; and the ground, the labour, and the cattle, by the other; which is invalid, becauſe the *ſixth* condition before-mentioned is not found in it. II. Where it is ſtipulated that the ſeed and cattle ſhall be furniſhed by one of the parties, and the

 ground

ground and labour by the other; which is likewife invalid, for the fame reafon. In both thefe cafes the produce of the land (according to the one opinion *), belongs to him who fupplied the feed, upon the fame principle that it belongs to him in any other cafes of compacts of cultivation which are invalid. But according to the other opinion †, the produce belongs to the proprietor of the land; and he therefore ftands (as it were) as merely a *borrower* of the feed of which he has obtained poffeffion by its being fown in his ground.

The period of their duration muft be known, and the produce muft be participated between the parties, in indefinite proportions.

COMPACTS of cultivation are not valid unlefs the period of their duration be known;—nor unlefs the produce of the land be indefinitely participated between the parties, (fuch as in a *third*, a *fourth*, &c.) in order that partnerfhip may be eftablifhed betwixt them. If, therefore, it be ftipulated that either of them in particular fhall receive a certain number of meafures of grain from the produce of the ground, the compact is null, as in this cafe partnerfhip is defeated, (in other words, is not eftablifhed,) fince it is poffible that no more may be produced from the ground than what is thus ftipulated to one of the parties;—and the cafe is therefore fimilar to that of two men concluding a contract of *Mozáribat*, in which it is ftipulated that one of them fhall receive a certain number of *dirms*.

IN the fame manner alfo, compacts of cultivation are invalid where it is ftipulated that he who fupplies the feed fhall receive an equal quantity of grain from the produce of the ground, and that the reft fhall be divided betwixt the parties;—for, in cafe the produce exceed the quantity of feed, a ftipulation of this nature defeats the partnerfhip with refpect to that particular quantity; or, with refpect to the *whole*, in cafe the produce fhould *not* exceed the quantity of the feed. A ftipulation of this nature, moreover, is fimilar to where the parties

* The opinion of *Haneefa*, as before ftated. † The opinion of the two difciples.

agree,

agree, regarding tribute-land, that the reſt of the produce ſhall be divided after deducting the tribute. It is otherwiſe where two men agree that one tenth of the produce ſhall go to one of the parties, and that the remainder ſhall be divided betwixt both; for a ſtipulation of this nature does not defeat partnerſhip, becauſe the remaining nine-tenths ſtill continue participated between the parties; whence this is ſimilar to a ſtipulation, regarding tithe-lands, that "after deducting the "tithe, the remainder ſhall be divided betwixt the parties."

In the ſame manner alſo, a compact of cultivation is invalid if it ſtipulate that whatever is produced on a particular ſpot, (ſuch as on the banks of a rivulet,) ſhall belong to one of the parties, and that the remainder of the produce of the whole ground ſhall be divided betwixt both; for ſuch a ſtipulation defeats partnerſhip, ſince it is poſſible that nothing may be produced except upon that particular ſpot:—and it is in like manner invalid where it is ſtipulated that the produce of one ſpot of ground ſhall go to one of the parties, and the produce of another ſpot to the other.

In the ſame manner alſo, a compact of cultivation is invalid where it is ſtipulated that the one ſhall get the ſtraw, and the other the grain; for it is poſſible that nothing may be produced but ſtraw: and it is equally invalid if it be ſtipulated that the ſtraw ſhall become their joint property, and that the grain ſhall belong to one of them only; for here a partnerſhip is not eſtabliſhed with reſpect to the *grain*, which is the particular object of cultivation.

If the grain alone be mentioned, the ſtraw goes to him who ſupplies the ſeed;

If it be ſtipulated, in the compact of cultivation, that the grain ſhall be divided equally betwixt the parties, and no mention be made of the ſtraw, ſtill the compact is valid, becauſe a partnerſhip is ſtipulated in that thing which is the chief object of cultivation; and in this caſe the ſtraw will belong to him who ſupplied the ſeeds, as of that

that the ſtraw is the produce. (The *Shiekhs* of *Balkh* * are of opinion that the ſtraw ſhould alſo be divided equally betwixt the parties; becauſe ſuch is the uſual practice when no mention is made of the ſtraw; and alſo becauſe as the ſtraw is ſubordinate to the grain, it ſhould, as well as the grain, be held in partnerſhip.)

and it may be *ſtipulated* to go to him; But it cannot be ſtipulated to go to the other.

If it be ſtipulated that the grain ſhall be divided equally, and that the ſtraw ſhall go to him who ſupplied the ſeed, it is valid; becauſe this is conſiſtent with the ſpirit of compacts of cultivation. If, on the contrary, it be ſtipulated that the ſtraw ſhall go to him who did *not* ſupply the ſeed, it is invalid, as ſuch a ſtipulation defeats the partnerſhip in caſe nothing but ſtraw ſhould be produced. The difference betwixt theſe two caſes is, that the perſon who did not ſupply the ſeed has no other claim to the ſtraw than what he acquires from the ſtipulation, whereas he who ſupplied the ſeed has a right to the ſtraw in conſequence of its being the produce of his ſeed; and whether the ſtraw be ſtipulated to him or not his right to it holds equally good.

The produce is participated according to agreement; and if *nothing* be produced, the cultivator has no claim.

When a compact of cultivation is valid, the produce of the ground is the joint property of the parties, in ſuch proportions as they may have ſtipulated, ſuch as an half, a third, or the like.—If, on the contrary, nothing be produced, the cultivator is not entitled to any thing; for he has a right only to a ſhare of what may be produced. It is otherwiſe where the compact of cultivation is invalid; for in that caſe an adequate hire falls due upon the *perſon* [of one of the parties,] not upon the *produce*; and the perſon is not abſolved by a failure of produce.

Where the compact proves inva-

When a compact of cultivation proves invalid, the crop belongs to him who furniſhed the ſeed, it being the produce of his property.

* *Balkh* is a city in *Turan*.

Beſides,

Besides, the other has no right therein except what he acquires in virtue of express conditions in the compact; and where that proves invalid, it follows of course that the entire crop belongs to the person who supplied the seed.

lid, the produce goes to him who furnishes the seed; and the other party,

If the seed be supplied by the proprietor of the ground, the cultivator is entitled to a suitable hire for his labour, provided it do not exceed what he would have received in consequence of the conditions of the compact; because, in subscribing to these conditions, he consented to relinquish his right to the excess. This is the law, as laid down by the two elders. *Mohammed* maintains that he is entitled to a suitable hire, to whatever amount; for as the master of the land has obtained his services in consequence of an invalid compact, he is of course liable for the *value* thereof, *service* not being of the class of similars;—as has been fully explained in treating of *Hire*.

if he be the cultivator, gets wages (not exceeding his right under the compact;)

If the seed be supplied by the cultivator, the proprietor of the ground is to receive a suitable rent for his ground, whether there be any produce or not. The reason of this is, that as the cultivator has acquired the use of the ground in consequence of an invalid compact, he ought therefore to restore the use itself; but that being impossible, and there being no *similar* in which he might make a return, it is therefore incumbent that he make a return in the *value* to an amount not exceeding what the other would have received in virtue of the stipulations of the compact. This is the doctrine of the two elders. *Mohammed* is of opinion that he must pay an equivalent whatever it may be.

or, if the proprietor of the ground, an adequate rent,

If the cattle be provided by the proprietor of the ground, so as that the compact, (according to the *Zâhir Rawâyet*,) becomes invalid, the cultivator is in that case liable for a suitable hire on account both of the cattle and the ground;—and this is certainly just; since the cattle are equally included in the contract of hire, (the compact of

(and also an adequate hire for the *cattle*, if supplied by him.)

of cultivation being, in fact, a contract of hire in this instance;) and the use of the cattle and the use of the ground are uses of different kinds.

If it be the *proprietor* who thus gets the produce, he may keep the whole; but if the *cultivator*, he must bestow the surplus in charity.

Where the proprietor of the ground, in consequence of having supplied the seed, is entitled to the produce, he may lawfully, on the compact proving invalid, enjoy the *whole*, since it was yielded from ground which was his own property. If, on the contrary, the *cultivator*, in consequence of having supplied the seed, be entitled to the produce, he is to reserve for his own use a quantity equal to the seed he supplied, and also a quantity equivalent to the rent he is to pay to the proprietor of the ground,—and the rest of the produce he must apply to charitable purposes; because the produce springs from the seed, but grows out of the ground, whence his right to the use of the ground is invalid; and as invalidity in regard to the use occasions a baseness in regard to the product, it follows that what remains with him as a *return* is lawful to him, and that every thing else must be bestowed in alms.

The party who agrees to supply the seed is at liberty to retract previous to the sowing;

Where two men enter into a compact of cultivation, and he who was to supply the seed afterwards retracts, previous to the sowing, the *Kázee* must not compel him to abide by the compact, because he cannot abide by it without sustaining an immediate loss from the sowing of his seed, and the case is therefore similar to where a man hires another to break down his house, in which instance, if the hirer were to retract, the *Kázee* could not compel him to abide by his agreement. If, on the contrary, the party retract who was *not* to supply the seed, the *Kázee* may compel him to fulfil the compact; for in so doing he does not sustain any loss; and compacts of cultivation, like compacts of hire, are binding, unless when some plea can be alleged sufficient to dissolve compacts of hire, in which case a compact of cultivation is also dissolved.

If

If the proprietor of the ground, being to furnish the seed, should retract, after the cultivator has tilled the ground, the cultivator is not entitled to receive any thing for the work he has performed. Some, however, are of opinion, that although, in point of law, there be no compensation due to the cultivator, still, in point of conscience, it is incumbent on the proprietor of the ground to satisfy the cultivator for the work he has performed, as he has been *deceived* in this instance.

and if the proprietor of the ground thus retract, the cultivator is not entitled to any thing.

When one of the parties dies, the compact of cultivation, like compacts of hire, becomes dissolved. (The reason of this is fully set forth in treating of *Hire*.)

The compact is annulled on the decease of either party.

If a man give up a piece of ground to another for a term of three years, and afterwards, when the first year's crop has begun to grow, but is still unfit for reaping, the man die, the ground, in this case, remains in the hands of the cultivator until the crop be fit for reaping, and the produce is then divided according to the conditions of the compact;—and the compact is dissolved with respect to the remaining two years of the term; because *analogy* would suggest that it discontinues even for the *first* year, as the duration of a compact depends on the duration of the parties; but it is continued throughout the *first* year, in order to the preservation of the rights of both parties, (that is, the cultivator and the heirs of the proprietor,) since, if it were to discontinue, the cultivator would sustain an injury. It is otherwise in regard to the *second* and *third* years, because in the discontinuance of the compact for those years no injury is sustained by the cultivator; and accordingly the compact is dissolved for those years, agreeably to analogy.

If the proprietor of the ground die, when the crop has appeared, the compact is dissolved at the end of that year;

If the proprietor of the ground die after the cultivator has ploughed the land, and dug rivulets for watering it, but previous to the crop appearing, the compact is dissolved, since in such case the

but if he die *before* that, it is dissolved immediately.

 dissolution

diſſolution of it is not injurious to the cultivator's property. (It is otherwiſe where the proprietor of the ground dies after the crop has begun to grow, and appears like graſs; for in that caſe the compact is not diſſolved, as the cultivator would then be injured in his property by the diſſolution of it.) In this caſe the cultivator is not entitled to any thing for his labour; becauſe the uſe of a perſon's ſervice cannot be appreciated but by a compact; and when the compact becomes null, the eſtimation of the ſervice no longer remains.

The proprietor of the ground may diſſolve the compacts with a view to ſell the ground for the diſcharge of his debts;

It is lawful for the proprietor of the ground to diſſolve the compact, in caſe he have occaſion to ſell the ground to diſcharge conſiderable debts which he may have incurred, for this is a pretext, which he may avail himſelf of, in the ſame manner as in *Hire* *:—and in this caſe the cultivator has no right to claim from him any expence which may have attended the tilling of the land, or the digging of drains; becauſe ſervice is not appreciable but in conſequence of a compact; and as the price ſet on the ſervice, in the preſent inſtance, was upon the ſuppoſition of a produce, it follows that upon the produce being prevented, the cultivator is not entitled to any thing. If, however, the crop have begun to grow, although it be ſtill unfit for reaping, the land muſt not be ſold for the payment of the proprietor's debts until the grain be ready to cut down; becauſe if the lands were to be ſold, under ſuch a circumſtance, the ſale would be injurious to the right of the cultivator; whereas, by waiting until the crop is ready, it only occaſions a ſmall delay in the payment of the proprietor's debts, which is the lighter evil of the two. The *Kázee* muſt alſo, in this caſe, enlarge the proprietor, if he have been impriſoned on account of his debts; for it being unlawful immediately to ſell the lands, the proprietor, in delaying to pay his debts, is guilty of no injuſtice, and impriſonment is intended as a retribution for injuſtice.

but if the crop be growing, the ſale muſt be delayed until it be ready for cutting.

* See Vol. III. p. 369.

If

Rules in case of the compact expiring before the crop is ready to cut.

If the term of the compact of cultivation ſhould expire before the crop be ready for cutting, the cultivator muſt pay to the proprietor of the land a hire or rent for his [the cultivator's] proportion of the ground until the crop be ripe; and in the mean time any work which it may require muſt be performed by both parties according to their reſpective proportions. The reaſon of this is, that in thus prolonging the compact, and ordaining the payment of a rent, a regard is paid to the benefit and intereſt of both parties, wherefore it is neceſſary that it ſhould be prolonged:—and it is alſo neceſſary that both ſhould bear their proportions of the work or expences; becauſe the compact which they entered into is expired, and the crop remains their joint property, and in caſes of joint property the work is incumbent on both parties, in the ſame manner as the ſubſiſtence of a partnerſhip ſlave. (It is otherwiſe where the proprietor of the land dies whilſt the crop is yet green; for in that caſe it is incumbent on the cultivator to perform the whole of the work that may be required; becauſe in ſuch an event the compact is continued during the remainder of its term: and it [the compact] obliges the cultivator to ſuſtain the whole burden of the work;—whereas, in caſe of the term of the compact expiring, it is no longer binding, and therefore the cultivator alone is not obliged to perform the work.) If, therefore, either party incur any expence after the expiration of the term, without conſulting the other, or without an order from the *Kázee*, he muſt bear it himſelf, as he had no right of himſelf to ſubject the other to any charges.

If, in the example above recited, the proprietor of the land ſhould be deſirous of taking the crop (which is ſtill green) after the expiration of the term of the compact, yet he muſt not be allowed to do ſo, becauſe it would be an injury to the cultivator. If, on the contrary, under the ſame circumſtance, the cultivator be deſirous of taking the green crop, the proprietor of the land has three things in his option; for he may either pull up the crop and divide it, or he may keep it altogether and make an allowance to the cultivator, equivalent to his

 ſhare

ſhare of it; or he may take care of the crop until it be fit for reaping, in which caſe he may deduct from the ſhare of the cultivator the amount of the expence incurred on that account;—becauſe if the cultivator ſhould chuſe to deſiſt from labouring, on the expiration of the term of the compact, he cannot be compelled, ſince it is prolonged with a view to his benefit, which he himſelf has forſaken; and no injury is occaſioned to the proprietor of the ground, as he has three modes in his option, by either of which injury is prevented.

If the cultivator die, his heirs may continue the cultivation, but are not entitled to wages.

If the cultivator ſhould die after the crop has begun to grow, and his heirs ſhould offer to continue the cultivation until it be fit for reaping, and the proprietor of the land ſhould not conſent, in this caſe they are nevertheleſs authoriſed to continue the cultivation, as the proprietor will ſuſtain no injury thereby; but they are not entitled to any hire or wages, as the compact is continued with a view to their benefit. If, on the contrary, the heirs ſhould deſire to pull up the crop, and not to continue to cultivate, they cannot be compelled to continue to cultivate, for the reaſon above aſſigned; but the proprietor of the ground has in his option the three modes already recited.

The incidental charges are ſuſtained by the parties in proportion to their reſpective ſhares.

The expence of cutting down the crop, of carrying it to the ſtack, of thraſhing it, and of cleaning the grain from the ſtraw, falls upon both the parties in proportion to their ſeveral ſhares. If, therefore, they were to ſtipulate in the compact that the expences ſhall fall on only *one* of them, the compact would be invalid. In ſhort, all the above mentioned charges muſt be ſuſtained by both parties in proportion to their ſeveral ſhares, and not by any one of them in particular; becauſe, when the crop is ready, the object of the compact being accompliſhed, the compact itſelf is at an end; and as the crop remains the joint property of the parties, and no compact or ſtipulation is left in force betwixt them, it follows that any expences which may be afterwards required on account of their joint property ought to fall upon both. Beſides, if they ſtipulate that thoſe expences ſhall fall on one

of

of them only, ſuch a ſtipulation is inconſiſtent with the true ſpirit of the compact, as it tends to the advantage of one party over the other; and all ſtipulations having ſuch a tendency invalidate the compact itſelf, in the ſame manner as a ſtipulation by which the cultivator is bound to *carry* the grain, or to *grind it into flour*. *Aboo Yooſaf* is, however, of opinion that where the parties agree that the operations above-mentioned ſhall fall upon the cultivator, it is lawful, becauſe of cuſtom. The ſages of *Balkh* concur in this opinion; and the *Shims-al-Ayma* obſerves, that this doctrine is authentic, and that the practice prevails in his country. In fine, every operation of agriculture, previous to the maturity of the crop, (ſuch as watering and watching it,) falls upon the cultivator; and every ſubſequent operation requiſite until the partition, (ſuch as reaping, &c.) falls equally upon both: and, laſtly, every operation that is neceſſary *after* the partition, (ſuch as carrying, watching, &c.) falls upon each of them ſeverally, for their reſpective ſhares.

General rules in compact of cultivation,

The foregoing rule holds good, alſo, in caſes of *Moſakât*, or compacts of gardening; that is to ſay, all operations previous to the maturity of the fruit, ſuch as watering, grafting, and watching the trees, fall upon the gardener; and all ſubſequent operations, ſuch as gathering the fruit, and watching it, previous to a partition, fall upon both. If, therefore, it be ſettled betwixt the parties that the trouble of gathering the fruits ſhall fall upon the gardener, it is diſapproved, according to all our doctors, as being uncuſtomary;—and all operations, after partition, muſt be performed by each with reſpect to his own ſhare.

and of gardening.

If, in compacts of cultivation, the parties be deſirous of cutting down the crop whilſt it is young,—or, in compacts of gardening, of pulling the dates whilſt they are ſour or moiſt, the labour of theſe operations falls upon both, for the intention and deſire of performing them terminates the compact, in the ſame manner as if the crop or dates had arrived at maturity.

HEDAYA.

HEDAYA.

BOOK XLI.

Of MOSAKAT, or COMPACTS *of* GARDENING *.

Nature of a compact of gardening.

MOSAKAT, in the language of the law, ſignifies, a compact entered into by two men, by which it is agreed that the one ſhall deliver over to the other his fruit-trees, on condition that the other ſhall take care of them, and that whatever is produced ſhall belong to them both, in the proportions of one half, one third, or the like, as may be ſtipulated. *Haneefa* alleges, that a compact of gardening, ſtipulating an indefinite proportion of the produce, ſuch as an *half*, or a *third*, is invalid. The two diſciples, on the contrary,

* Applying, more particularly, to the plantation and culture of *date* and other fruit-trees.

maintain

maintain that it is valid, provided a term or period be expreſſed; and this is approved. It is to be obſerved, that compacts of gardening are frequently termed *Mämilat* as well as *Moſakât*; and the ſame laws hold with reſpect to them as thoſe which have been laid down with reſpect to compacts of cultivation.

Doctrine of *Shafei* upon this ſubject.

(SHAFEI is of opinion that compacts of gardening are valid; and that compacts of cultivation are only ſo, where they happen in ſubordination to the former; as, for example, where the fruit trees grow in fertile and clean ground, which is watered for the nouriſhment of the trees, and the proprietor of them directs the cultivator to ſow a crop on the ground on condition that he ſhall get a ſhare, ſuch as one half of the produce. The reaſon he aſſigns is, that the original thing, in this point, is a contract of *Mozáribat*; and to that a compact of gardening bears a nearer reſemblance than a compact of cultivation; for as, in compacts of gardening, the partnerſhip ſubſiſts in the *produce*, and not in the *principal* thing, (namely, the *trees*,) ſo in contracts of *Mozáribat* the partnerſhip ſubſiſts in the produce or profit, and not in the principal or ſtock;—whereas, in compacts of cultivation, if it be agreed that a partnerſhip ſhall exiſt in the produce, and not in the principal, (namely, the ſeed)—in other words, if the parties agree that the one who furniſhed the ſeed ſhall receive an equal quantity of ſeeds from the crop, and that the remainder ſhall belong to them both, the compact is invalid.—As, therefore, compacts of gardening bear a nearer reſemblance to *Mozáribat* than compacts of cultivation, it follows that they are the primary object, and that compacts of cultivation are lawful only as a dependant; like a right of drawing water, which cannot be ſold ſeparately, but is included, ſubordinately, in the ſale of the land; or like a *moveable* article, (ſuch as the furniture of a houſe,) which cannot be ſeparately appropriated in *Wakf*, but is included in the appropriation of the houſe or ground on which it ſtands *.)

* It would appear that this opinion of *Shafei* is introduced merely for the purpoſe of elucidation, as it is not oppoſed to any different opinions, and his doctrines are ſeldom adduced in practice by the followers of *Alee*.

Analogy requires the ſpecification of a term; but it is not *eſſential*,

THE ſpecification of a term is requiſite in compacts of gardening, by analogy, in the ſame manner as in compacts of cultivation, the one being, in reality, a contract of *hire*, the ſame as the other. According to a more favourable conſtruction, however, compacts of gardening are lawful without any ſpecification of a term. Thus, if two men enter into a compact, by which it is agreed that the one ſhall deliver his date trees to the other, who ſhall water and nouriſh them until they produce fruit, and it become ripe, and no particular period (ſuch as a *year*, or the like) be ſpecified, the compact is nevertheleſs valid, and continues in force with reſpect to the firſt fruit that may be produced; for the ſeaſon for producing and ripening fruit is known, and ſeldom differs much. In the ſame manner alſo, if two men enter into a compact, and agree that the one ſhall deliver to the other the roots of ſhrubs, which are in the ground *, and that the other ſhall water and nouriſh them until they yield ripe ſeed, to be ſhared between them, without mentioning any term, the compact is nevertheleſs valid, and takes place, with reſpect to the firſt ſeed that ſhall be produced and arrive at maturity; becauſe as ſeed is of the ſame nature as fruit, the period of its maturity being equally known, it is, therefore, needleſs to ſettle any limited time. It is otherwiſe with regard to compacts of cultivation, which are invalid unleſs a period be ſettled; becauſe the time of commencing the cultivation differs greatly, ſome crops being ſown during the autumn, ſome during the winter, and others during the ſpring; and as there is thus a difference in the time of beginning the cultivation, the period of its ending cannot be known, for the ending depends on the beginning.

except where the trees are newly planted,

It is alſo otherwiſe in caſes of gardening, where one man delivers to another his young trees newly planted; for in that caſe the compact is not valid unleſs a period be fixed, it being very uncertain when the trees may arrive at that ſtage in which they are capable of bearing fruit, as that is a circumſtance which depends on the

* Meaning ſuch vegetables as renovate from the root every ſeaſon.

ſtrength

ſtrength and fertility of the ſoil. It is alſo otherwiſe where a man delivers to another his date garden, or his herb roots, deſiring him to water and nouriſh them always until they die, or until their roots be pulled, and their vegetation be thereby terminated,—or where he ſets no bounds whatever to the duration of the compact with reſpect to the herbs; for in this caſe the compact is invalid, its period being uncertain, becauſe herbs grow as long as their roots are ſuffered to remain in the ground.

or, where the compact is declared to be for as long as the trees, &c. ſhall laſt.

If the parties, in a compact of gardening, ſettle a period during which it is certain that the trees cannot bear fruit, it is invalid; becauſe the object of ſuch a compact, which is a partnerſhip in the produce, is thus defeated.

The ſpecification of too *ſhort* a term invalidates the compact;

If the parties ſettle a period during which the trees *may* bear fruit, although they be frequently *later* in bearing, it is valid, becauſe the object of the compact is not to a certainty defeated in this inſtance. If, therefore, the trees bear fruit within the preſcribed term, it belongs to them both in the proportions which they may have previouſly ſettled; or, if they ſhould not yield fruit until after it is expired, the gardener is entitled to a ſuitable hire for his labour, becauſe the compact has in this caſe been rendered abortive by the error of the parties, in fixing a period too ſhort for the trees to yield fruit, and which invalidates the compact in the ſame manner as if it had been *known* to be too ſhort at the beginning. It is otherwiſe, however, if the trees afterwards yield *no* fruit; for in that caſe it is ſuppoſed owing to a *blight*, and not to the ſhortneſs of the period, that the compact proves abortive: the compact therefore holds good, and neither of the parties is entitled to receive any thing from the other.

but not where it is poſſible that the end of it may be anſwered within that period.

Compacts of gardening are lawful with reſpect to date trees, vines, &c. and alſo with reſpect to herbs and roots. According to the firſt opinion of *Shafeï*, they are lawful with reſpect to date-trees and

The compact is valid with reſpect to fruit-trees, vines, herbs, and roots.

and vines only; becaufe the validity of fuch compacts is founded on the fentence of the prophet regarding *Khcebir*, which is confined folely to thefe two. The argument of our doctors is, that the validity of fuch compacts is founded on their utility, and confequently is eftablifhed regarding other things as well as dates and vines;—and in anfwer to *Shafei*, it is obferved, that the fentence of the KORAN regarding *Kheebir* does not admit of fo confined a conftruction; for the inhabitants of that country cultivated all kinds of trees and *herbs*.

The compact cannot be diffolved by either party, but under fome plea or pretext.

THE proprietor of the orchard cannot diffolve the compact unlefs he have fome plea for fo doing, fuch as when the claims of his creditors oblige him to fell it. In the fame manner alfo, the gardener cannot ceafe to work, and thereby diffolve the compact unlefs he adduce fome plea, fuch as ficknefs. It is otherwife in compacts of cultivation; for (as has been already obferved) in thofe inftances the party who fupplies the feed is at liberty to diffolve the compact at any time previous to the fowing.

A compact may be entered into whilft the fruit is *green*; but not after it is *ripe*.

IF two men enter into a compact of gardening, to this effect, that the one fhall deliver over to the other his date orchard, at a time when the fruit has already appeared, but is ftill very fmall, and may, by watering and proper care, become full and large, it is valid;—whereas, if the fruit were arrived at perfection, and were incapable of being further improved by care, it would be invalid. In the fame manner alfo, if two men enter into a compact of cultivation, by which it is agreed, that the one fhall deliver over to the other his crop, being yet green, and unfit for reaping, the compact is valid; whereas if the crop be fit for reaping it is invalid. The reafon of this is, that the labourer is entitled to a fhare of the produce on account of his labour; but if the compact were to hold good when his labour can have no effect, he would be entitled to a fhare without labour, and this is not admitted in the LAW.

WHEN

When compacts of gardening are invalid, the gardener is entitled to ſuitable wages, as an invalid compact of gardening is equivalent to an invalid contract of hire, and therefore reſembles an invalid compact of cultivation.

If the compact be invalid, the gardener gets wages.

If, in a compact of gardening, one of the parties ſhould die, the compact becomes null, becauſe it is in reality a contract of hire.—If the owner of the orchard die whilſt the fruit is yet green, the gardener may continue to work as uſual until it be ripe, notwithſtanding the diſſent of the heirs.—(This proceeds upon a favourable conſtruction; for by continuing the compact, the gardener is prevented from ſuffering an injury, and none is occaſioned to the heirs.)—But if the gardener ſhould rather chuſe to ſubmit to the injury, the heirs have in that caſe three things at their option;—in other words, they may either divide the green fruit, agreeably to the proportion ſtipulated,—or, they may keep the whole of the green fruit, and pay to the gardener the value of his proportion,—or, laſtly, they may take care of the fruit until it be ripe, and expend ſuch ſums as may be neceſſary for that purpoſe, and afterwards recover a proportionable part of the expence from the ſhare of the gardener;—for the gardener is not at liberty to occaſion an injury to the heirs.

The compact is annulled by the deceaſe of either party.—Rules in caſe of the *proprietor* dying.

If the gardener die, his heirs may continue to work, although the proprietor ſhould not conſent thereto, becauſe it tends to their mutual benefit. If, on the contrary, the heirs of the gardener decline working, and rather chuſe to gather the fruit whilſt it is ſtill green, the proprietor of the orchard has the three things in his option, as mentioned above.

Rule in caſe of the gardener dying.

If both the parties die, the heirs of the gardener may continue to work; for as, if the gardener had lived, and the proprietor of the orchard had died, he [the gardener] might have continued to work, it follows that his heirs, as being his ſubſtitutes, have the ſame thing

Rule in caſe of *both* parties dying.

 in

in their option. If, however, they ſhould decline it, the heirs of the proprietor are in that caſe at liberty to purſue either of the three ways above mentioned.

Rules in caſe of the compact expiring whilſt the fruit is yet green.

If the term of the compact ſhould expire whilſt the fruit is ſtill green and unripe, the gardener may continue in his employment until it become ripe; and in this caſe he is not liable for any rent on account of the trees, the letting of trees being unlawful. It is otherwiſe with reſpect to compacts of cultivation; for if their term expire whilſt the crop is yet green, the cultivator may continue to work until it be fit for reaping,—but he is liable for the rent of the ground, the letting of ground being lawful.

If the term of a compact of gardening expire at a time when the fruit is ſtill green, the gardener alone is obliged to perform the reſt of the work; whereas, on the contrary, if the term of a compact of cultivation expire at a time when the crop is ſtill green, both parties are obliged to work until the crop be brought to maturity.—The reaſon of this diſtinction is that, in compacts of cultivation, the cultivator being liable for the rent of the ground after the expiration of the term of the compact, it would be unjuſt that he alone ſhould afterwards perform the labour; whereas, in caſes of compacts of gardening, the gardener, as not being liable for any rent, is obliged to perform the work alone, after the expiration of the term, in the ſame manner as before.

The compact may be diſſolved by any plea or pretext.

Compacts of gardening may be diſſolved by particular pleas,—ſuch as where the gardener is a thief, and there is reaſon to be apprehenſive of his ſtealing the branches or leaves of the date trees, or the fruit, before it is ripe,—or, where he [the gardener] is diſabled from working by ſickneſs.
—A queſtion has ariſen whether, if the gardener be deſirous of relinquiſhing his work, it is lawful for him ſo to do?—concerning which two opinions are recorded, one, that it is lawful; and another, that

that it is not so.—This apparent difference may, however, be reconciled, by supposing that the former opinion alludes to cases wherein it is stipulated that the gardener shall work *with his own hands*, which condition he is, by reason of sickness, unable to fulfil.

A lease of open land, for planting, in consideration of a part of the produce, is invalid.

If a man deliver to another a piece of open ground, for a certain number of years, that he may plant trees thereon, and stipulate that the trees and the ground shall be in partnership between them, each holding an half,—it is invalid, for two reasons; First, because they have stipulated a partnership in the ground, being a thing which already exists without the previous aid of the gardener's labour; and, Secondly, because such a compact is liable to the same objection as *Kafeez Tehàn*; for in this instance the master of the orchard in effect hires the gardener, and settles, as his wages, a part of the thing produced by his labour, namely, one half of the trees.—In this case, therefore, the whole of the fruit and trees go to the master of the ground; and the gardener is entitled to the price of his trees, and also to an adequate consideration as the hire of his labour; for as it is impossible to restore to him the trees, because of their adhesion to the ground, he necessarily gets their value, and also an adequate hire;—nor is his hire included in what he receives for the trees; that is to say, they are *both* due, distinctly; the use of labour being in this case of itself capable of estimation.

HEDAYA.

HEDAYA.

BOOK XLII.

Of ZABBAH, or the Slaying of Animals for Food.*

All animals killed for food, except fish and locusts, must be slain by *Zabbah*.

ALL animals, the flesh of which is eatable, except fish and locusts, are unlawful, unless they be slain by *Zabbah*:—but when slain by *Zabbah* they are lawful, as by means of *Zabbah* the unclean blood is separated from the clean flesh,—whence it is that all animals *not* eatable, (such as *rats*, *dogs*, or *cats*,) are rendered clean † by *Zabbah*, excepting only hogs and men.

* The *Arabic* lexicographers define *Zabbah* to signify, in its literal sense, the act of *cutting the throat*; in the language of the LAW it denotes the act of slaying an animal agreeably to the prescribed forms, without which it is not considered as eatable.

† That is to say, their flesh may be used in medical compositions; but still it cannot be eaten as ordinary food.

ZABBAH

Zabbah is of two kinds;—I. *Ikhtiâree*, or *of choice*, (that is, *voluntary*, or *at pleaſure*,) which is effected by cutting the throat above the breaſt;—and II. *Iztirâree*, or *of neceſſity*, (that is, *at random, from neceſſity*,) which may be effected by a wound on any part of the animal's body.—The latter kind, however, is merely a ſubſtitute for the former, and accordingly is not of any account unleſs the former be impracticable, as the former is more effectual in extracting the blood: but the latter ſuffices where the other is impracticable; as mankind are required to act only according to their ability.

Zabbah is of two kinds, *by choice*, and *of neceſſity*.

It is one of the laws of *Zabbah* that the perſon who performs it be either a *Muſſulman* or a *Kitâbee*.—The *Zabbah* of a *Muſſulman* is therefore lawful; and ſo alſo the *Zabbah* of a *Kitâbee*, although he ſhould not be a ſubject of a *Muſſulman* ſtate,—provided, however, that it be done in the name of God, for in the Koran we find theſe words, "THE VICTUALS OF *Kitâbees* ARE LAWFUL TO YOU."

It muſt be performed by a *Muſſulman*, or a *Kitâbee*

The *Zabbah* is lawful provided the ſlayer be acquainted with the form of the *Taſmeeâ*, or invocation in the name of God, the nature of *Zabbah*, and the method of cutting the veins of the animal; and it ſignifies not whether the perſon be a man or a woman, an infant or an ideot, a circumciſed perſon or an *un*circumciſed.

(provided he be a perſon acquainted with the form of invocation,) whether *man* or *woman*, *infant* or *ideot*.

An animal ſlain by a *Magian* is unlawful; becauſe the prophet has ſaid, "*Ye may deal with them as well as with* Kitabees; *but ye* "*muſt not marry their women, nor eat of animals ſlain by them*;"—and alſo, becauſe a *Magian* is a polytheiſt, and does not acknowledge the unity of God.

It cannot be performed by a *Magian*,

The *Zabbah* performed by an *apoſtate* is unlawful; becauſe he is not permitted to continue in the faith to which he has turned, but muſt rather ſuffer death.—It is otherwiſe with reſpect to a *Kitâbee*; for if he change his religion, he is permitted (according to our doctors)

an *apoſtate*,

to continue in that which he has adopted; and the law will ſtill conſider him, with reſpect to *Zabbah*, in the ſame light as the people of that faith which he has embraced.

or an idolater.

The *Zabbah* of an idolater is unlawful; becauſe he does not believe in the prophets.

Game ſlain in any place by a *Mohrim* is unlawful, or ſlain by any other perſon in holy ground.

Any ſpecies of *game* ſlain by a *Mohrim* * is unlawful, although it be not ſlain within the holy territory†:—and in the ſame manner, any game ſlain in the holy territory is unlawful, although the ſlayer be *not* a *Mohrim*. It is otherwiſe where a *Mohrim*, or any other perſon, ſlays an animal that is not game either in the holy territory or in any other place; for this is ſanctioned by the LAW, becauſe the holy territory affords no protection to goats, and the ſlaying of goats by a *Mohrim* is not prohibited.

Rules with reſpect to the *Taſmeeá*, or invocation.

If the ſlayer wilfully omit the *Taſmeeá*, or invocation "*in the* "*name of* God," the animal ‡ is carrion, and muſt not be eaten. If, however, he omit the invocation through *forgetfulneſs*, it is lawful. *Shafeï* is of opinion that the animal is lawful in either caſe.—*Mâlik*, on the contrary, maintains that it is unlawful in both; and that *Muſſulmans* and *Kitâbees* are conſidered as the ſame, with reſpect to the omiſſion of the invocation. The ſame difference is to be found in the opinions of our doctors concerning a man omitting the invocation on letting looſe a hound or a flying hawk at game, or when he ſhoots his arrow. The opinion of *Shafeï*, in this particular, is oppoſite to that

* The appellation given to a pilgrim during his reſidence at *Mecca*.—It is alſo applied to any perſon who, having reſolved to undertake a pilgrimage, lays himſelf under particular reſtrictions.

† Arab. *Arzal haram:* the territory in the neighbourhood of *Mecca*, where no animal of the *game* ſpecies is ever put to death.

‡ Arab. *Zabeehá*, meaning (literally) *the creature ſlain*.

of

of all our ſages; for, previous to his time, it was the univerſally allowed opinion, that an animal ſlain under a wilful omiſſion of the invocation was unlawful; the only point on which they differed being reſpecting the omiſſion of it from *forgetfulneſs.* The ſect of *Abdoola Ibn Omar* were of opinion that an animal ſlain under an omiſſion of the invocation from *forgetfulneſs* is alſo unlawful; whilſt, on the contrary, the ſects of *Alee* and *Ibn Abbas* deemed it lawful, but not under an omiſſion made *wilfully.*—Hence *Aboo Yoofaf* and the other *Haneefite* doctors have declared an animal ſlain under a *wilful* omiſſion of the invocation to be utterly unlawful; and that the *Kâzee* cannot authorize the ſale of meat ſo killed, it being contrary to the current opinions of all our doctors. The arguments of *Shafeï* on this point are twofold. FIRST, the prophet has ſaid, "*Let* MUSSULMANS *ſlay* "*in the name of* GOD, *whether they mention it with their tongues or* "*not.*"—SECONDLY, If the invocation were eſſential to the legality of the animal, it could never be remitted on a plea of forgetfulneſs, any more than the purification eſſential to prayer.—Beſides, admitting the invocation to be eſſential, ſtill the *Muſſulman* faith is a ſubſtitute for it, in the ſame manner as in a caſe of omiſſion through forgetfulneſs. The arguments of our doctors, on the other hand, are threefold. FIRST, GOD has ſaid, in the KORAN, "EAT NOT ANY "THING OVER WHICH THE NAME OF GOD HAS NOT BEEN MEN- "TIONED."—SECONDLY, it is the univerſal opinion, as has been already remarked.—THIRDLY, the prophet has ſaid, regarding *Addee* the ſon of *Hâtim*, "*When thou haſt let looſe thy hound after game, and* "*repeated the name of* GOD, *thou mayeſt eat of that game*; *but if an-* "*other dog aſſiſt thine in killing the game, thou ſhalt not eat of it, be-* "*cauſe thou repeatedſt the name of* GOD *over thine own dog and not over* "*the other*:" it is therefore evident that the omiſſion of the name of GOD renders the game unlawful. The argument of *Mâlik* is founded upon a literal conſtruction of the paſſage of the KORAN, which we have quoted above, it not being particularly expreſſed therein that the *wilful* omiſſion is unlawful, and the omiſſion from *forgetfulneſs* lawful.

But the anſwer which we give to this argument is that the paſſage plainly alludes to an animal with reſpect to which the invocation has been *wilfully* omitted, the *letter* being here different from the *ſpirit* of the text, for if the ſpirit were according to the letter, the companions of the prophet (who hold the firſt rank in point of authority) would doubtleſs have drawn arguments from it, and the difference of opinion that is to be found amongſt them would not have exiſted. The anſwer to *Shafeï* is, that the analogy which he eſtabliſhes betwixt wilful omiſſion and omiſſion from forgetfulneſs, is not juſt; becauſe he that forgets acts under neceſſity, and the *Muſſulman* faith is admitted as a ſubſtitute in his behalf; whereas he who wilfully omits acts under no neceſſity. —With reſpect, moreover, to the ſaying of the prophet quoted by *Shafeï*, it evidently alludes to a caſe of omiſſion through forgetfulneſs.

In the *firſt* ſpecies of *Zabbah*, it muſt be pronounced whilſt the animal's throat is cutting;—and in the *ſecond* ſpecies, upon ſhooting the arrow, or letting looſe the dog or hawk at the game.

IT is a condition of *Ikhtiäree Zabbah*, that the invocation be pronounced over the animal at the time of ſlaying it,—whereas, in the caſe of *Zabbah Iztiräree*, (or of a man ſlaying an animal in hunting,) the condition is that the invocation be pronounced at the time of letting looſe the hound or hawk, or ſhooting the arrow, which is termed an invocation over the inſtrument. The reaſon of this diſtinction is, that in the firſt caſe the power of the man extends to the ſlaying; whereas in the ſecond it is confined to the act of letting looſe the hound or hawk, or of ſhooting the arrow, and does not extend to their reaching the animal; wherefore the invocation muſt be pronounced at the inſtant of ſuch act, which is in the power of the man.—Hence if a man throw a goat on its ſide, with an intention of ſlaying it, and then pronounce the invocation, and afterwards let that goat looſe, and then, without repeating the invocation, ſlay another, this is not admiſſible, and the meat is unlawful; whereas if a man ſhoot an arrow at an animal, and pronounce the invocation, and the arrow, inſtead of the one which he aimed at, hit another animal, it is lawful;—and the ſame law holds in the caſe of letting looſe a hound or hawk.—If

the man, having thrown the animal on its side and pronounced the invocation, should cast away the knife from his hand and take up another, and with it slay the animal, it is lawful;—whereas if he pronounce the invocation over one arrow, and then take another and shoot the game with it, it is unlawful, the instrument over which the invocation was pronounced having been changed.

It is abominable to add any other thing to the name of God at the time of performing the *Zabbah*, such as if a man were to say "O God, "accept this from me!"—This may occur in three different shapes; as, first, where he says any thing besides the name of God, without pausing between them, or making use of the conjunction "*and*," as in the example cited above,—or, where he says, *Bism Illah*, *Mohammed Rassool Illah*, "in the name of God, *Mohammed* is his prophet," which would be abominable, but the meat would not be unlawful;—secondly, where he says any thing *besides* the name of God, without making a pause, but using the conjunction; as if he were to say, "*Bism Illah wa Ism Falàn*," "in the name of God and the name of "another;" or "*Bism Illah wa Falàn*," "in the name of God and "another;"—in either of which cases the animal slain is unlawful: and, thirdly, where he says any thing besides the name of God, separately, and by itself, either before or after the invocation, and the throwing down of the animal, which is of no consequence, and does not render the meat unlawful, for it is related of the prophet, that he said prayers immediately after performing *Zabbah*.

Nothing must be said except the invocation.

It is a condition of *Zabbah* that nothing but the *invocation* be said; that is, that no prayer or other matter be mentioned. If, therefore, a man, during the *Zabbah*, instead of "*Bism Illah*," ("in the name "of God,") were to say, "*Illahoom agfar lée*," ("O God, forgive "me!") the animal slain is not lawful, as this is a *prayer* or *intreaty*. If, however, instead of "*Bism Illah*," he say "*Alhumdolillàh*," ("praise be to God,") or "*Subhànillàh*," ("God is purest,") and

mean

mean this as an invocation, it is ſufficient. But if he ſneeze during the *Zabbah*, and exclaims "*Alhumdolillah!*" ("praiſe be to GOD!") it is not ſufficient, (according to the *Rawáyet-Saheeh*,) becauſe the exclamation will then be conſidered as *thanks*, and not as the *invocation*. The method which has frequently prevailed, of ſaying "*Biſm Illah oo Illah Akbáro*," ("in the name of GOD, and GOD is the "higheſt,") during the *Zabbah*, is copied from *Ibn Abbas*.

Proper method of flaying animals.

THE place for flaying is betwixt the throat and the *libba*, [the head of the breaſt-bone,] becauſe the blood freely iſſues from a wound given in that place: the *Zabbah*, therefore, when performed any where within that ſpace, is lawful.

THE veſſels which it is requiſite to cut in *Zabbah* are four; namely, the *Halkoom*, or wind-pipe; the *Mirree*, or gullet; and the *Wadijân*, or two jugular veins.—This is founded on a ſaying of the prophet. According to *Shafeï* it is ſufficient if *two* of theſe veſſels (namely, the wind-pipe and gullet) be cut. According to *Málik*, on the contrary, three of the four do not ſuffice, but it is requiſite that they be all cut. According to *Haneefa* the animal is lawful where three of the four veſſels are cut, which ever they may be. *Aboo Yooſaf* was alſo at firſt of this opinion; but he afterwards declared it indiſpenſably requiſite that the windpipe and gullet ſhould be cut, and one of the two blood-veſſels; becauſe as the effuſion of the blood is the deſign of cutting the blood-veſſels, one of them may ſerve as a ſubſtitute for the other;—but as the gullet and windpipe, on the contrary, anſwer two different purpoſes, (the one being the channel of food, and the other the channel of reſpiration, it is requiſite therefore that they be both cut, the one being unfit to ſtand in the place of the other. The argument of *Haneefa* is that the majority repreſents the whole in many rules of the LAW; and when three of the four veſſels are cut, the majority is cut, and the object (which is the ſpeedy effuſion of the blood and deprivation of life) is effected, ſince

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upon three of the above mentioned veſſels being cut, the animal cannot remain alive. If, therefore, to avoid giving additional pain, only three veſſels be cut, it is ſufficient.—It is otherwiſe where only *two* are cut; for as, in that caſe, a cutting of the majority, repreſenting a cutting of the *whole*, does not exiſt, it follows that the animal ſo ſlain is not lawful.—*Mohammed* is of opinion that the greater part of each of the four veſſels ſhould be cut, becauſe every one of them may be conſidered as a principal of itſelf, being ſeparated from the reſt. In the *Jama Sagheer*, alſo, he alleges that if one *half* of the wind-pipe, and one *half* of each of the blood-veſſels, be cut, the animal is not lawful; but that if the *greater part* of the wind-pipe, and the *greater part* of each of the blood-veſſels be cut, previous to the death of the animal, it is lawful;—and he has not made mention of any difference of opinion.

It may be performed with nails, horns, or teeth, (detached from their native place,)

If a man ſlay an animal with nails, horns, or teeth, it may be eaten without apprehenſion, provided the nails, horns, or teeth, be detached from the place in which they grew. The act, however, is abominable *, becauſe it introduces the uſe of human members, and further, becauſe it is productive of too much pain to the animal, and we are directed to perform the *Zabbah* in ſuch a manner as may be moſt eaſy to it. *Shafeï* is of opinion that an animal ſlain in the above manner is unlawful, and carrion; becauſe the prophet has ſaid, "*the* "ZABBAH *is lawful when performed with any thing that can draw* "*blood, or cut the veſſels, excepting the teeth and the nails, which are* "*the inſtruments of the* ABYSSINIANS †;" and alſo, becauſe it is a thing not allowed by the LAW any more than if the teeth or nails had been fixed in the place in which they grew. Our arguments, on the contrary, are that the prophet has ſaid "*Spill the blood with whatever* "*thing it may pleaſe thee*;" and it is likewiſe related that he ſaid

* The force of this term is explained in a note a little farther on. † The *Abyſſinians* are held in great contempt by the *Muſſulmans*.

"*Cut*

"*Cut the vessels with what thing soever thou pleasest.*" With respect to the saying quoted by *Shafei*, it alludes to nails and teeth fixed in their native place; for it was a frequent custom amongst the *Abyssinians* to slay cattle in that manner.—Nails, moreover, when removed from their place, are instruments for cutting; and the object of *Zabbah*, namely, the effusion of the blood, may be accomplished with them, whence they are the same as a sharp iron or stone. But when they are in their place they slay by means of the force or weight applied to them, and the animal so slain is, in effect, *strangled*.

or with any sharp instrument.

It is lawful to slay with the rind of a reed, with a sharp stone, and with every thing that is sharp and capable of cutting the vessels and drawing the blood, excepting teeth and nails fixed in their native place.

Precautions to be observed by the slayer.

It is laudable in the slayer to sharpen his knife; for the prophet has said "God *has enjoined us to be merciful to all: wherefore, when ye* "*slay, let it be done in the most merciful manner; and when ye perform* "*the* Zabbah, *let one of ye sharpen your knife and do it in the easiest* "*manner for the animal.*"

It is abominable first to throw the animal down on its side, and then to sharpen the knife; for it is related that the prophet once observing a man who had done so, said to him, "*How many deaths do* "*you intend that this animal should die?—Why did you not sharpen your* "*knife before you threw it down?*"

It is abominable to let the knife reach the spinal marrow, or to cut off the head of the animal. The meat, however, in either of these cases, is lawful. The reasons of the abomination in cutting into the spinal marrow are, First, because the prophet has forbid this; and, Secondly, because it unnecessarily augments the pain of the animal, which is prohibited in our law.—In short, every thing which

which unneceſſarily augments the pain of the animal in *Zabbah* is abominable.

It is abominable to ſeize an animal deſtined for ſlaughter by the feet, and drag it to the place appointed for ſlaying it.

It is abominable to break the neck of the animal whilſt it is ſtill in the ſtruggles of death; but when the ſtruggles are over, it is not abominable to break the neck and ſtrip off the ſkin, for then it is inſenſible to pain.

The animal is lawful although it be wounded previous to cutting its throat.

If a man ſlay an animal by firſt cutting it in the back of the neck, doing it however in ſuch a manner as to cut the veſſels whilſt the animal is ſtill alive, the meat is lawful, becauſe the animal dies by *Zabbah*: but the act itſelf is abominable, as it unneceſſarily augments the pain of the animal, being in effect the ſame as if he had firſt wounded the animal, and afterwards cut its veſſels. If, on the contrary, the animal die previous to the cutting of the veſſels, the meat is not lawful, becauſe in this caſe the animal dies before the *Zabbah* has taken place.

All *tame* animals muſt be ſlain by cutting the throat; and *wild* animals by chaſing or ſhooting them.

In the caſe of all animals attached to man, and which do not fly from him, the *Zabbah* is performed by cutting the veſſels:—but in the caſe of thoſe which have become wild, and fly from him, the *Zabbah* is performed by chaſing and wounding them; becauſe where the *Zabbah Ikhtiâree*, or *Zabbah of choice*, is impracticable, there is occaſion for the *Zabbah Iztirâree*, or *Zabbah of neceſſity*; and there is ſuch an impracticability regarding the latter claſs of animals, but not regarding the former. The *Zabbah Iztirâree* is alſo lawful regarding an animal which has fallen into a well, provided the other ſort of *Zabbah* be impracticable.—*Mâlik* maintains that the meat is unlawful in both the foregoing caſes,—that is, in the caſe of a wild animal, and of one which falls into a well,—becauſe ſuch inſtances are rare. We, again,

again, say that as the impracticability of the *Zabbah Ikhtiàree*, (which is allowed to be a valid argument,) exists in both these cases, it follows that the substitute, namely, *Zabbah Iztiràree*, may be adopted: nor is what he observes (that "such instances are *rare*") admitted: on the contrary, they very frequently happen. In *Kadooree*, moreover, it is expressly said that it is lawful to use the *Iztiràree Zabbah* towards all animals that fly from man;—and it is reported, from *Mohammed*, that if a goat become wild in the plains, the *Iztiràree Zabbah* is lawful with respect to it; but if it become wild in the city, the *Iztiràree Zabbah* is not lawful, because in the city it may be caught, and consequently the *Ikhtiàree Zabbah* is not impracticable. With respect to cows and camels, however, the city and the plains are alike; because these animals attack, with their horns or their teeth, any person that attempts to catch them; whence it is impossible to catch them, even though it be in the midst of the city that they have become wild; and the *Ikhtiàree Zabbah* is therefore impracticable. When, also, these animals attack a man, they are considered as wild, provided it be not in his power to catch them; wherefore if one of them should attack a man, and he with an intention of *Zabbah* kill it, the flesh of it may be eaten lawfully.

Camels must be slain by *Nahr*, rather than by *Zabbah*.

THE most eligible method of slaying a camel is by *Nahr*, that is, spearing it in the hollow of the throat, near the breast-bone, because this is agreeable to the *Sonna*, and also because in that part of the throat the vessels of a camel are combined. It is also lawful to slay it by *Zabbah*, although this be considered as abominable, since it differs from the *Sonna*. In regard to goats and oxen, it is most eligible to slay them by *Zabbah*, as being agreeable to the *Sonna*, and also because the vessels of a goat are assembled together in the upper part of the throat:—but they may also be speared like a camel, although this method be not approved, as being contrary to the *Sonna*.

The fœtus of a slain animal

IF a person, having slain a camel or cow, should find a dead fœtus in

in the womb, ſuch fœtus is unlawful, whether it be covered with hair or not. This is the opinion of *Haneefa*; and it has been adopted by *Ziffer* and *Haſan bin Zeeyâd.* The two diſciples maintain that if the fœtus be complete in its form, it is lawful; (and *Shafeï* concurs with them in this opinion;) becauſe the prophet has ordained the *Zabbah* of a fœtus to be the *Zabbah* of the mother; that is to ſay, the *Zabbah* of the mother anſwers for that of the fœtus likewiſe. Beſides, the fœtus is, in reality, a conſtituent part of the mother, as it is joined to her until ſeparated by a pair of ſciſſars or knife, ſubſiſts on the ſame food, and lives by the ſame breath;—and it is likewiſe conſidered as ſuch in law, inſomuch that it is included in the ſale of the mother, and is rendered free by the emancipation of the mother. The fœtus, therefore, being a conſtituent part of the mother, it follows that the *Zabbah* of the mother ſerves alſo for it, when a ſeparate *Zabbah* is impracticable, in the ſame manner as a wound in the caſe of game ſerves as a ſubſtitute for *Zabbah. Haneefa,* on the other hand, argues that a fœtus is complete with reſpect to life; that is to ſay, that it has a ſeparate exiſtence, inaſmuch as it may ſurvive after the death of the mother, whence it is that a ſeparate *Zabbah* is neceſſary, in caſe of its being alive. Moreover, if a perſon deſtroy a fœtus he is ſubject to a pecuniary penalty; and the owner of it may emancipate it alone, without including the mother. It is alſo lawful to bequeath it in legacy, or to leave a legacy to it. Beſides, the object of *Zabbah* is to ſeparate the blood from the fleſh; an object which cannot be accompliſhed, in the caſe of a fœtus, by the *Zabbah* of the mother alone. It is otherwiſe with reſpect to wounding game, as in that caſe the blood is ſeparated from the fleſh, and though it be in an imperfect manner, yet as any other mode is impracticable, it is therefore conſidered as *Zabbah.* A fœtus, moreover, is included in the ſale of the mother, becauſe the ſale would otherwiſe be invalid, and from this neceſſity it is included. And it is likewiſe rendered free by the manumiſſion of the mother, in order that a bond-infant may not be born from a freed-woman.

is not lawful.

SECTION.

Of the Things which may lawfully be eaten, and of those which may not.

All beasts and birds of prey are unlawful.

ALL quadrupeds that seize their prey with their teeth, and all birds which seize it with their talons, are unlawful, the prophet having prohibited mankind from eating them.—The reason of this prohibition is because MAN is held particularly dear, and it is to guard him, lest by eating of these animals their bad qualities might be communicated to him, and affect his disposition.

HYENAS and foxes, being both included under the class of animals of prey, are both unlawful.—(*Shafeï* maintains that they are both lawful.)—Elephants and weasels are also accounted animals of prey *: and pelicans and kites are abominable, because they devour dead bodies.

Rooks are neuter: but carrion crows and ravens are unlawful.—Magpies, the crocodile, otter, all insects, and the ass and mule are unlawful.—Horses.

CROWS which feed on grain [rooks] are neuter †: but the crow of the wilderness [the *carrion* crow] and the raven, are not lawful.—According to *Haneefa* the magpie is neuter, like poultry; although it be said (upon the authority of *Aboo Yoosaf*) that it is *abominated*, because it frequently eats dead bodies.—The crocodile and the otter, wasps, and in general all insects, are abominated. The ass and the mule are unlawful, because they are prohibited by the prophet.—The flesh of horses is held in abomination by *Haneefa* and *Mâlik*. According to the two disciples and *Shafeï* it is neuter; for it is mentioned in the *Hadees Joâbir* that the prophet permitted it; and some are of opinion that the milk of mares is also neuter.—According to *Haneefa*, the

* Arab. *Zoo-Nâb*; meaning, literally, *creatures which have canine teeth.* The elephant (although certainly not a beast of *prey*) is perhaps classed with those, because of his tusks.

† It is here proper to remark that, in the *Mussulman* law, there are four gradations from legality to illegality. I. *Hilâl*, or positively *lawful.* II. *Mobâh*, or neuter: (that is, *indifferent*, and which may either be pursued or avoided.) III. *Mâkrooh*, or abominable: (that is, *reprobated*, but which is nevertheless lawful.) IV. *Hirâm*, or positively *unlawful:* (that is, *prohibited.*)

the flefh of hares is neuter, becaufe the prophet eat it, and commanded his companions to eat of it.

Hares are neuter.

The flefh and fkin of all unlawful animals become pure after they have been killed according to the laws of *Zabbah*, excepting only men and hogs.—According to *Shafeï* they do not become pure.

No aquatic animal is lawful except fifh.

No animal that lives in water is lawful except fifh. *Málik* and a number of other learned men are of opinion that all water animals are lawful. Others again fay that fea-dogs, fea-hogs, and mair-men, are unlawful.

Fifh which perifh of themfelves are not lawful.

Fishes which, dying of themfelves, float upon the furface of the water are abominated. According to *Shafeï* and *Málik* they are neuter. The rule obferved amongft our fect is this.—Fifhes which are killed by any accident are lawful, like thofe which are caught; whilft, on the contrary, fuch as die of themfelves without any accident are unlawful, like thofe which are found floating on the furface of the water. There are, however, different opinions regarding fuch as die of extreme heat or cold. Fifhes and locufts are lawful without being killed by *Zabbah*.

HEDAYA.

BOOK XLIII.

Of UZHEEA, or SACRIFICE.

Sacrifice must be performed at the *Eed Kirbàn*.

IT is the duty of every free *Mussulman*, arrived at the age of maturity, to offer a sacrifice on the *Eed Kirbàn*, or festival of the sacrifice *, provided he be then possessed of a *Nisâb* †, and be not a traveller. This is the opinion of *Haneefa*, *Mohammed*, *Ziffer*, and *Hasan*; and likewise that of *Aboo Yoosaf*, according to one tradition.—According to another tradition, and also in the opinion of *Shafeï*, sacrifice is

* This festival happens on the tenth of *Zee-hidjâ*, and was instituted in commemoration of *Abraham* having offered up his son *Ishmael* as a sacrifice to God, in consequence of a vision he had.—See *Sales's Korân*, Vol. II. p. 312.

† For the amount of *Nisâb*, see Vol. I. p. 1, to 27.

not

not an indiſpenſable duty, but only *laudable*. *Tabâvee* reports that in the opinion of *Haneefa* it is indiſpenſable; whilſt the two diſciples hold it to be in a *ſtrong degree* laudable.

It is incumbent on a man, for himſelf, and for his infant children.

THE offering of a ſacrifice is incumbent on a man on account of himſelf, and on account of his infant child. This is the opinion of *Haneefa* in one tradition. In another (which is recorded in the *Zâhir Rawâyet*) he has ſaid that it is not incumbent on a man to offer a ſacrifice for his child.—In fact, according to *Haneefa* and *Aboo Yooſaf*, a father or guardian are to offer a ſacrifice at the expence of the child, (where he is poſſeſſed of property,) eating what parts of it are eatable, and ſelling the remaining parts that are valuable in their ſubſtance, ſuch as the ſkin, &c. *Mohammed*, *Ziffer*, and *Shafei*, have ſaid that a father is to ſacrifice on account of his child at his own expence, and not at that of the child.

The victim for *one* perſon is a goat; and for any number from one to ſeven, a cow or camel.

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

An animal held in joint property may be jointly offered in ſacrifice.

IF a camel that is jointly and in an equal degree the property of two men, ſhould be ſacrificed by them on their own account, it is lawful, according to the moſt authentic traditions:—and in this caſe they muſt divide the fleſh by weight, as fleſh is an article of weight. If, on the contrary, they diſtribute it from conjectural eſtimation, it is not lawful; unleſs they add to each ſhare of the fleſh part of the head, neck, and joints.

Others may be admitted to a ſhare in

IF a perſon purchaſe a cow, with an intent to ſacrifice it on his own account, and he afterwards admit ſix others to an aſſociation with him

an animal purchased for sacrifice.

him in the sacrifice, it is lawful.—It is, however, most adviseable that he associate with the others at the time of purchase, in order that the sacrifice may be valid in the opinion of all our doctors; as otherwise there is a difference of opinion.—It is related, from *Haneefa*, that it is abominable to admit others to share in a sacrifice after purchasing the animal; for, as the purchase was made with a view to devotion, the sale of it is therefore an abomination.

It is not incumbent on the poor or travellers.

SACRIFICE is not incumbent on either a *poor* man or a *traveller*; for *Aboo Bickir* and *Omar Farook* did not offer the sacrifice of the *Eed* during their travels; and it is, moreover, related that *Alee* said, "*neither the prayers of Friday, nor the sacrifice of the* EED *are incumbent on travellers.*"

The time of performing it.

THE time of the offering is on the morning of the day of the festival; but it is not lawful for the inhabitants of a city to begin the sacrifice until their priest shall have finished the occasional prayers. Villagers, however, may begin after break of day. The place, in fact, must regulate the time. Thus, where the place of celebration is in the country, and the performers of it reside in the city, it is lawful to begin in the morning: but if otherwise, it must be deferred until the prayers be ended.

IF the victim be slain after the prayers of the mosque, and prior to those offered at the place of sacrifice, it is lawful; as is likewise the reverse of this.

SACRIFICE is lawful during three days,—that is, on the day of the festival, and on the two ensuing days.—*Shafei* is of opinion, that it is lawful on the *three* ensuing days. The sacrifice of the day of the festival is, however, far superior to any of the others. It is also lawful to sacrifice on the *nights* of those days, although it be considered as abominable.—Moreover, the offering of sacrifices on these days is

more laudable than the cuſtom of omitting them, and afterwards beſtowing an adequate ſum upon the poor.

If the ſacrifice be delayed beyond the proper time, the victim muſt be beſtowed in charity.

If a perſon neglect the performance of the ſacrifice during the ſtated days, and have previouſly determined upon the offering of any particular goat, for inſtance; or, being poor, have purchaſed a goat for that purpoſe;—in either of theſe caſes it is incumbent on him to beſtow it alive in charity. But, if he be rich, it is in that caſe incumbent on him to beſtow, in charity, a ſum adequate to the price, whether he have purchaſed a goat with an intent to ſacrifice it, or not.

The ſacrifice of a *blemiſhed* animal is not admitted:

It is not lawful to ſacrifice animals that are blemiſhed,—ſuch as thoſe that are blind, or lame, or ſo lean as to have no marrow in their bones, or having a great part of their ears or tail cut off. Such, however, as have a great part of their ears or tail remaining may lawfully be ſacrificed.—Concerning the determination of a *great part* of any member, there are indeed various opinions reported from *Haneefa.*—In ſome animals he has determined it to be the *third*; in others *more* than the third; and in others, again, only the *fourth.*—In the opinion of the two diſciples, if more than the half ſhould remain, the ſacrifice is valid; and this opinion has been adopted by the learned *Aboo Lays.*

but a *trifling* blemiſh does not render it exceptionable.

If an animal have loſt the third of its tail, or the third of its ear, or eye-ſight, it may be lawfully ſacrificed:—but if, in either of theſe caſes, it ſhould have loſt *more* than a third, the offering of it is not lawful.—The rule which our doctors have laid down to diſcover in what degree the eye-ſight is impaired, is as follows. The animal muſt firſt be deprived of its food for a day or two, that it may be rendered hungry; and having then covered the eye that is impaired, food muſt be gradually brought towards it, from a diſtance, until it indicate, by ſome emotion, that it has diſcovered it.—Having marked the particular ſpot at which it obſerved the food, and uncovered the weak

weak eye, the perfect eye must then be bound, and the same process carried on, until it indicate that it has observed it with the defective eye. If then the particular distance from those parts to where the animal stood be measured, it may be known, from the proportion they bear to each other, in what degree the sight is impaired.

An animal wanting a horn, or *mad*, or *castrated*, may be sacrificed.

If a person sacrifice an animal without a horn, it is lawful;—and so likewise where the horn is broken, or where the animal is mad or castrated.—Many, however, have said, that it is not lawful to sacrifice a mad animal, unless it eat food, in the same manner as it is not lawful to sacrifice a *Gurgeen* [the offspring of a wolf and goat] unless it be fat. With regard to animals that want teeth, it is reported from *Aboo Yoosaf* that they may be lawfully sacrificed, provided they be able to chew,—or (according to another report) provided the greatest of their teeth be remaining. Animals, however, that are born without an ear cannot lawfully be sacrificed. What is here said respects such blemishes as may have existed in the animal, previous to the purchase of it; for if it be perfect at the time of purchase, and afterwards contract such a blemish as to render the sacrifice of it unlawful, and the proprietor be rich, it is in that case incumbent on him to sacrifice another; whereas, if he be poor, he may lawfully sacrifice the same. The reason of this is, that as an offering is incumbent on a rich man originally, and not on account of his purchase, the animal therefore which he buys is not particularly set aside for the offering; whereas, on the contrary, an offering not being incumbent on a poor man, except when he purchases an animal with that intent, the animal so purchased is therefore particularly destined for the purpose:—and accordingly, our doctors hold that if an animal, purchased with a view to be offered, should die, it is incumbent on the proprietor, if he be rich, to substitute another, but not if he be poor;—or, if the animal be either lost or stolen, and the purchaser, having bought another, should then recover the first, in such case it is incumbent on the proprietor, if he be rich, to sacrifice one of them, whether it be the first

firſt bought or the ſecond; but if he be poor, he is under an obligation to ſacrifice both.

Any accident befalling the victim at the time of ſlaying it does not invalidate the ſacrifice.

If it ſhould happen that the goat, having been turned over in order that the ſacrifice might be performed, in the ſtruggle breaks one of its legs, in that caſe, provided the ſacrifice be immediately made, it is lawful and ſufficient. So alſo, it is lawful, if the animal, in that ſituation, having received any hurt, ſhould run away, and having been immediately and without delay taken, ſhould then be ſacrificed. *Mohammed* has likewiſe judged the ſacrifice lawful, if, in this caſe, the animal ſhould not be retaken until after ſome delay:—in oppoſition to the opinion of *Aboo Yooſaf*.

Goats, camels, and cows alone are lawful in ſacrifice.

It is not lawful to offer a ſacrifice of any animal except a camel, a cow, or a goat; for it is not recorded that the prophet or any of his companions ever ſacrificed others. Buffaloes, however, are lawful, as being of the ſpecies of a cow. Every animal of a *mixed* breed, moreover, is conſidered as of the ſame ſpecies with the mother.

Age at which an animal is fit for ſacrifice.

The ſacrifice is lawful of any animal of the three ſpecies above mentioned, although it be only a *Soonee* *: but not if younger; excepting, however, a ſheep, which may be ſacrificed when a *Judday*, or ſo young as to have no teeth; and in this caſe our doctors have made it a condition that the ſheep be of large ſtature, inſomuch as to have the appearance of a *Soonee* at a little diſtance. The period of *Judday* in ſheep (according to our doctors) is at the expiration of ſix months, and the commencement of the ſeventh. The time of *Soonee* in goats or ſheep is at the age of one year; in cows, at the age of two; and in camels at the age of five years.

* The ſheep and the goat are held to be of the ſame ſpecies.

If one of feven joint facrificers die, the confent of his heirs is requifite to the facrifice.

If feven perfons purchafe a cow for facrifice, and one of them afterwards die, and his heirs defire the other fix to facrifice a cow on account of themfelves, and on account of the dead, it is lawful;—whereas, if they facrifice it without the confent of the heirs it is not lawful.

If a Chriftian, or any perfon whofe object is the flefh, and not the facrifice, be a fharer with fix others, the facrifice is not lawful on the part of any.

Rules with refpect to the difpofal of the flefh, &c. of the victim.

It is lawful for a perfon, who offers a facrifice, either to eat the flefh, or to beftow it on whomfoever he pleafes, whether rich or poor: and he may alfo lay it up in ftore.

It is moft advifable that the third part of the flefh of a facrifice be beftowed in charity.

It is lawful either to beftow the fkin of a facrifice in charity, or to make any utenfil of it, fuch as a bucket, fieve, or the like. It is likewife lawful to barter it for any unconfumable article that yields profit in its fubftance:—but it is not allowable to barter it for any thing *confumable*, as vinegar, and fuch like. Flefh, in thefe refpects, is confidered in the fame light as the fkin, according to the moft authentic traditions.

If the flefh of a facrifice be fold along with the fkin of it for money, or for any thing that is not profitable but in confumption, it is incumbent on the feller to devote the price to the poor; and the fale is valid.

It

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

It is abominable to take the wool of the victim and ſell it before the ſacrifice be performed; but not after the ſacrifice. In the ſame manner, it is abominable to milk the victim and ſell the milk.

It muſt be ſlain by the ſacrificer, or in his preſence.

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

A *Kitâbee* may be employed to ſlay it, but not a *Magian*.

It is abominable to commit the ſlaying of the victim to a *Kitâbee*. If, however, a perſon order a *Kitâbee* to ſlay his victim, it is lawful. It is otherwiſe where a perſon orders a *Magian*, or worſhipper of fire, to ſlay his victim, for this is inadmiſſible.

Two perſons ſlaying each other's victim by miſtake muſt make a mutual compenſation.

If two perſons commit a miſtake, each ſlaying the offering of the other, it is lawful; and no compenſation is on that account due from either. If, alſo, having erred in this manner, they ſhould eat the fleſh, and then diſcover the miſtake, in this caſe it is requiſite that they ſanctify the act of each other, and ſacrifice is then fulfilled. If, on the contrary, they refuſe to do ſo, and diſpute the matter, each is in that caſe entitled to take a compenſation for the value of the fleſh of his offering from the other, and muſt then beſtow ſuch compenſation in alms, as it is a return for the fleſh of his offering: and the ſame rule alſo obtains where a perſon *deſtroys* the fleſh of the offering of another.

Caſe of ſacrifice of an *uſurped* animal.

If a perſon uſurp a goat, and ſacrifice it, he is in that caſe bound to compenſate for its value, and his offering is thereby rendered

valid;

valid; becaufe upon paying the compenfation he is held to have been proprietor of the goat from the time of his having ufurped it. It is otherwife where a perfon facrifices a goat committed to him as a depofit; for this is not valid; becaufe he is obliged to compenfate for it (not on account of the *animal*, but) on account of the *facrifice*, and hence his property in it is not eftablifhed until after he has facrificed it.

HEDAYA.

HEDAYA.

BOOK XLIV.

Of KIRAHEEAT, or ABOMINATIONS.

Difference of opinions concerning the extent of the term *Makrooh*.

THE author of the *Hedaya* remarks that our doctors have disagreed concerning the extent in which the term *Makrooh* * is to be received.—*Mohammed* was of opinion that every thing *Makrooh* is unlawful; but as he could not draw any convincing argument from the sacred writings in favour of this opinion, he renounced the general application of ***unlawfulness*** with respect to such articles, and classed them

* *Makrooh* is the participle passive of *Kuribá*, to *abominate*; this word is frequently taken in a milder sense; and may relate to any thing *improper* or *unbecoming*.

them under the particular deſcription of *Makrooh*, or abominable.—It is recorded, on the other hand, from *Haneefa* and *Aboo Yooſaf*, that *Makrooh* applies to any thing which, in its qualities, nearly approaches to *unlawful*, without being *actually* ſo.—This article is comprehended under a variety of heads or ſections.

SECT. I.

Of EATING *and* DRINKING.

It is abominable to eat the fleſh or to drink the milk of an *aſs*, or to take the urine of a *camel*, unleſs medicinally;

HANEEFA has ſaid that the fleſh and milk of an aſs, and the urine of a camel, are abominable.—According to *Aboo Yooſaf* the urine of a camel may be taken as a medicine; but with reſpect to milk, it is a ſecretion from the blood, and is therefore ſubject to the ſame rule with the fleſh of the animal from which it is produced.

or to uſe veſſels of *gold* or *ſilver*.

IT is not allowable, either to men or women, to uſe a veſſel of gold or ſilver in eating, drinking, or in keeping perfumes; becauſe the prophet has ſaid, with reſpect to any perſon who drinks out of a veſſel of ſilver or gold, that "*the fire of hell ſhall enter into his belly*;" and it is alſo related, that a perſon having brought water for *Aboo Hareerá* in a ſilver veſſel, he refuſed to drink, declaring that the prophet had prohibited him from drinking out of ſuch a veſſel. The prohibition, therefore, being eſtabliſhed with reſpect to drinking, it follows that the rule extends to the uſing of oils, and ſimilar articles, that being in effect the ſame with drinking, ſince in both caſes the *uſe* of a veſſel of gold or ſilver is induced,—whence it is that the uſe of a golden or ſilver ſpoon is abominable, as alſo the uſe of a ſilver or

7 golden

golden bodkin for drawing antimony along the eye-lids, or of boxes for holding antimony, or any other thing, made of thofe metals.

It is allowable to ufe veffels of lead, glafs, cryftal, or agate;

The ufe of veffels of lead, glafs, cryftal, and agate, is permitted. *Shafeï* maintains that thofe are abominable, becaufe they refemble gold or filver in point of fplendor.

or to drink out of veffels, or ride upon a faddle, or fit upon a chair or fopha, ornamented with gold or filver.

It is allowable, according to *Haneefa*, to drink out of an wooden veffel ornamented with filver, provided the particular part to which the lip is applied be void of it. In the fame manner, alfo, it is permitted to ride upon a faddle interwoven with filver, provided the fpace allotted for the feat be plain; and this rule likewife holds with refpect to a couch or fopha.—According to *Aboo Yoofaf*, on the contrary, all thofe are abominable.—From *Mohammed* there are two traditions on this point; one correfponding with the opinion of *Haneefa*, and the other with that of *Aboo Yoofaf*. After the fame manner they have difagreed concerning the ufe of a *veffel* or *chair* adorned both with gold and filver; concerning fwords, mofques, frames of glaffes, and books, when they are ornamented either with gold or filver; and alfo concerning ftirrups, bridles, or cruppers of that defcription.—Thefe differences of opinion, however, exift only where the gold and filver is fo applied, in any of thefe cafes, that it is to be feparated only by means of fome difficult procefs: but the gilding of things, either with gold or filver, in fuch a manner as to require art to feparate it, is unanimoufly allowed.—The argument of the two difciples is that the ufe of one part of a veffel includes the ufe of the whole; wherefore they hold it equally abominable as if the part applied to ufe were likewife of gold or filver. *Haneefa*, on the other hand, argues that *ornaments* of gold or filver, when not applied to ufe, are merely appendages, and therefore not to be regarded; whence the ufe of the article is allowable, in the fame manner as wearing a garment which is trimmed with filk, or a ring which has a piece of gold fet in it.

If

The information of an infidel may be credited with regard to the lawfulness of any particular food.

If a person send his servant, or a hireling, being a *Mugian*, to purchase meat, and he purchase meat accordingly, and acquaint his master that he had bought it from a *Jew*, a *Christian*, or a *Mussulman*, it is lawful for him [the master] to eat the food so purchased; because the word of an infidel is creditable in all matters of a temporal nature, as he is presumed to be possessed of reason, and falsehood is prohibited in his religion: besides, there is a necessity for believing his assertion in temporal concerns, from their frequent occurrence. If, on the contrary, the servant inform his master, that "he purchased the "meat from an infidel who is not a scripturist, and it was slain by "one who was neither a scripturist nor a *Mussulman*," it is in that case unlawful for the master to eat the flesh so purchased; for as the word of an infidel is credited with respect to the *legality* of meat, it is credited with respect to the *illegality*, in a superior degree.

A present may be accepted by the hands of a slave or an infant.

If a slave, either male or female, or an infant, should carry something to a person, saying "such an one has sent this to you as a pre-"sent," in that case the person may justly credit the information, as it is a frequent custom to send presents by such messengers. In the same manner, if either of these should intimate to a slave that his master had given him a licence to trade, he is allowed, accordingly, to accept of it; because it is perhaps impossible for them to bring witnesses to attest the intention of the master, whence, if their word were not credited, it would occasion an obstruction to business, and an unnecessary restraint amongst mankind.—It is related, in the *Jama Sagheer*, that where a slave girl comes to a person and says, "my "master has sent me as a present to you," it is lawful for that person to accept of her.

The word of a *reprobate*

In all temporal concerns the word of a reprobate * may be taken;

* Arab. *Fasik*, in opposition to *Adil*, a *just* or *upright* person.—The distinction between these terms has been fully explained elsewhere.

but

but in matters of a *spiritual* nature the word of an upright man only is to be credited. The reaſon of this diſtinction is, that affairs of a temporal nature are of frequent occurrency amongſt every ſect of men; whence if, in the tranſaction of them, any thing more than maturity of age and ſanity of intellect (ſuch as integrity, &c.) were required, it would occaſion a reſtriction in buſineſs; to obviate which, the word of one perſon, in ſuch caſe, is creditable, whether that perſon be virtuous or diſſolute, a *Muſſulman* or an infidel, a man or a woman. Concerns of a *ſpiritual* nature, on the contrary, are not of ſuch frequent occurrency; hence it is requiſite that in relation to them a greater caution be uſed. The word, therefore, of none but an upright *Muſſulman*, is admiſſible in ſpiritual matters; becauſe an unjuſt man lies under a ſuſpicion of falſehood; and an infidel, as not following the LAW himſelf, has no right of enforcing it upon others. The caſe is different with reſpect to *temporal* matters; for an infidel is permitted to reſide in a *Muſſulman* territory purely on account of his temporal buſineſs, for which he would be incapacitated if his word in temporal matters were to be rejected. From this neceſſity, therefore, credit is given to it.—A perſon, alſo, whoſe character is unknown, is conſidered in the ſame light as an unjuſt man or reprobate; and his word relative to matters of faith is inadmiſſible. It is, however, related in the *Zâhir Rawâyet*, that *ſuſpicion* and probable *conjecture* are the grounds on which it is lawful to determine in this point;—in other words, practice muſt accord with the conjecture which appears moſt probable or beſt ſupported. There is alſo another tradition from *Haneefa*, that the word of a perſon of unknown character may be believed in matters of a ſpiritual nature.

may be taken in all *temporal* concerns; but not in *ſpiritual* matters; and the ſame of a perſon of *unknown* character.

THE word of a freeman or ſlave, whether male or female, is admitted in ſpiritual concerns, provided they be upright *; for, in conſequence of integrity, veracity preponderates; and this is a cauſe of

The word of an *upright* perſon, whether freeman or ſlave, may

* Arab. *Adil*; in oppoſition to *Fâſik*.

 belief.

be taken in ſpiritual matters.

belief.—It is to be obſerved, that what was before related, of licencing a ſlave to trade, ſending preſents and meſſages, and the like, are of the claſs of *temporal* matters; as is alſo the inveſting of another with the power of agency.—Information, on the contrary, concerning the impurity of water (for inſtance) is a matter of a *ſpiritual* nature. In this inſtance, therefore, if the informer be an upright *Muſſulman*, the perſon who receives the information is at liberty, in performing his purification, to ſubſtitute ſand for the water, in the manner of *teyummim* *, and muſt not perform it with the water.—If, on the contrary, the informer be a profligate, or of unknown character, it is incumbent on the perſon who receives the information to conſider the matter deliberately; when, provided he conclude the informer to be a perſon of veracity, he muſt perform *teyummim* inſtead of ablution.—(In this caſe, however, he ſhould uſe the precaution of firſt pouring out a little of the water, and may then perform *teyummim*; whereas, if the informer be of an upright character, as there is in that caſe no ſuſpicion of falſehood, the pouring out the water by way of precaution, is entirely unneceſſary.)—If, on the contrary, the reſult of his reflection be that the information was falſe, he muſt perform ablution, but not *teyummim* with the water. This is what the law enjoins; but in this caſe alſo it is a requiſite precaution that, after ablution, he perform *teyummim*, as the judgment he has formed in this caſe is entirely from conjecture. It is alſo to be obſerved that legality and illegality are conſidered as of a ſpiritual nature where they affect not the *property* of any perſon. Where, on the contrary, the teſtimony of one upright perſon tends to injure the property of another, it is not in ſuch caſe of any weight;—as where, for inſtance, an upright perſon teſtifies that a certain perſon has married his own foſter-ſiſter; in which caſe his teſtimony is not creditable, as tending to hurt the property of the huſband, inaſmuch as he would be deprived of the effects of the woman, to which the marriage had entitled him;—or where a

* For a further explanation of this, ſee Vol. I. p. 295.

perſon informs another, who had purchaſed a ſlave-girl, that ſhe is his own foſter-ſiſter, or that ſhe is a free woman.

If a perſon be invited to a marriage-feaſt, and, upon going there, obſerve the company to be engaged in wanton amuſement, or in ſinging, ſtill it is laudable in him to ſit down and partake of the entertainment; for the acceptance of ſuch invitation is ſtrictly orthodox, as the prophet has ſaid, "*whoſoever refuſes an invitation, is certainly not* "*obedient to me.*"—He is not, therefore, to leave the entertainment on account of any irregularities committed by others; in the ſame manner as, at the ceremony of a funeral prayer, a perſon is not to abſent himſelf, although people hired for the purpoſe of lamentation may there be preſent.—If, however, he have power to prohibit theſe irregularities, it is incumbent on him to exert it: but if he poſſeſs not ſuch power, he muſt then remain with patience.—This is where the perſon invited is not a *Mooktiddà* *, or holy man; for, if ſuch a perſon ſhould be preſent and have it not in his power to reſtrain theſe irregularities, it is then incumbent on him to withdraw, as his preſence in ſuch a place ſhews a relaxation of religion. If, alſo, irregularities be committed during the time of eating, it is improper that any perſon ſhould remain there, whether he be a *Mooktiddà* or not; God having prohibited us, in the Koran, from ſitting in company with the wicked. All this proceeds on the ſuppoſition of the invited perſon being actually preſent at the marriage-feaſt, before he is aware of thoſe irregularities; for if he be previouſly aware of ſuch irregularities being practiced, it it is incumbent on him to ſtay away, whether he be a *Mooktiddà* or otherwiſe.

It is laudable to accept an invitation to a marriage-feaſt,—notwithſtanding any irregularities which may be practiced there;

unleſs thoſe irregularities be known beforehand.

* Literally, an *exemplary* perſon, as being eminent for ſanctity of character,—whence the term is applied to prieſts, or other perſons who exerciſe a holy office.—The *Perſians* term ſuch a perſon a *Peiſhwa*, or *one who leads the way.*

SECT. II.

Of Dress.

Women may drefs in filk; but *men* muft not,

A dress of filk is not lawful for men; but women are permitted to wear it; for it is related by feveral of the companions of the prophet, of whom was *Alee* in particular, that one day the prophet appeared with a piece of filk in one hand, and of gold in the other, and faid, "*Both thefe are prohibited to the* MEN *of my tribe, but are lawful* "*to the* WOMEN."

farther than what is merely *ornamental*.

A small quantity of filk, fuch as three or four fingers breadth, ufed as a fringe or border to a garment, or applied to any fuch purpofe, is allowable; becaufe it is related that the prophet prohibited the wearing of filk, excepting a fhred of the breadth of three or four fingers in a garment; and it is moreover related, that the prophet wore a robe with an edging of filk to it.

A *pillow* of filk is allowable;

According to *Haneefa*, it is allowable to make a pillow of filk, and to fleep upon it. The two difciples, on the contrary, hold this to be abominable; and the fame difference of opinion obtains concerning making curtains of filk, and hanging them upon doors. The arguments of the two difciples on this point are twofold. First, the ufe of filk in general is profcribed by the prophet. Secondly, the making pillows and curtains of filk is a cuftom of the proud; and the imitation of fuch is forbidden.—The argument of *Haneefa*, on the other hand, is that the prophet fat upon a pillow of filk; and that there was one laid upon the fopha of *Abdoola Ibn Abbàs*.

It

It is allowed to warriors, in the opinion of the two disciples, to wear a dress of silk or sattin in the time of war; because there is a tradition, recorded by *Shaaby*, that the prophet permitted the wear of silk during the time of battle. Moreover, it is in a manner necessary, as being best adapted to counteract the hard pressure of armour, and tending to excite horror in the eyes of the enemy. *Haneefa*, on the contrary, holds this to be abominable, because the traditions which point out its illegality are absolute, without distinguishing between any particular period or juncture, such as war, or the like; and the necessity may be answered in a dress of *Makhloot*,—that is, having the woof of silk, and the warp of any thing else. Besides, silk, and every other thing that is proscribed, becomes allowable in no case but that of necessity;—and with respect to the tradition recorded by *Shaaby*, it alludes to a dress of *Makhloot*.

and a dress of silk to warriors,

A garment of cloth, the woof of which consists of silk, and the warp of any thing else, such as wool or cotton, is allowable to wear during war, because of its being necessary: but it is abominated at any other juncture, because then there is no necessity for it. The same rule also obtains with respect to cloth of which the warp is silk and the woof wool or cotton; and for the same reason.

or of mixed cloth.

SECT. III.

Of Ornaments.

Men are prohibited from the use of ornaments of gold, such as rings, and the like, because of a saying of the prophet to that effect. Ornaments of silver are likewise unlawful; because silver is, in effect, the same as gold. An exception, however, is made with respect to

Men are not to wear ornaments of gold or silver,

except on ſignet rings, girdles, and ſwords.

ſignet-rings, girdles, or ſwords; the uſe of ſilver in ornamenting thoſe being approved.—In the *Jama Sagheer*, it is related that *ſilver* rings only ſhould be uſed; whence it may be inferred that rings of ſtone, iron, or braſs, are forbidden. It is alſo related, that the prophet, on ſeeing a ring of braſs upon the finger of a man, ſaid, "*I* "*perceive the ſmell of an image;*" and again, that having ſeen, upon the finger of another perſon, a ring of iron, he ſpoke to him thus, "*I ſee upon your finger the ornament of the people of hell.*"—What is here ſaid reſpects the circular hoop, and not the *ſetting* or *beazel* of the ring. Hence it is lawful that the ſetting be of ſtone. It is proper, however, that men, in wearing rings, turn the ſetting or beazel towards the palm of the hand, and women otherwiſe, becauſe, with reſpect to them, rings are conſidered as ornaments.—Sovereigns and judges, moreover, wear rings, only as having occaſion to ſeal with them; but with reſpect to other people, it is moſt adviſeable that they never wear rings, as a like reaſon does not operate with them.

The ſetting of a ring may be of gold.

If a piece of gold be inſerted in the ſetting of a ring, it is allowable; for, in that caſe, the gold is only a dependant on the ring, in the ſame manner as a ſhred of ſilk upon a garment.

Gold is not to be uſed in any caſes of neceſſity, where ſilver will anſwer equally well.

It is forbidden, in the opinion of *Haneefa*, to bind the teeth * with a thread of gold. *Mohammed*, on the other hand, maintains that this practice is unobjectionable. Of *Aboo Yooſaf* there are two opinions recorded; one correſponding with the opinion of *Haneefa*, and the other with that of *Mohammed*. The two diſciples, in ſupport of their opinion, quote the caſe of *Ariſjá* the ſon of *Aſſád*, who, having loſt his noſe by a wound he received at the battle of *Goolab*, made a

* This poſſibly means where a *ſuppoſititious* tooth is placed in the head to ſupply the loſs of one.

falſe

falſe one of ſilver, which occaſioning a very offenſive ſmell, the prophet commanded him to make another of gold. The argument of *Haneefa* is, that gold is in its nature unlawful, whence the uſe of it is allowable only in a caſe of neceſſity; and as the neceſſity may in general be equally well anſwered by ſubſtituting ſilver, gold therefore remains ſubject to its original ſtate [of prohibition:] this neceſſity, however, could not be anſwered, in the caſe of *Arijja*, but by a ſubſtitution of gold, becauſe of the ſilver occaſioning a nauſeous ſmell.

Infants muſt not be ſumptuouſly apparelled.

It is abominable in any perſon to clothe his infant child in a dreſs of ſilk, with ornaments of gold; for, ſince that dreſs is proved to be prohibited to men, they are conſequently forbidden to dreſs others in it; in the ſame manner as it is unlawful to *give* wine to drink, becauſe of the illegality of drinking it.

Vain ſuperfluities are not allowable.

The cuſtom of keeping handkerchiefs, as is frequently practiced, is abominable. Many, however, hold that it is allowable, if done from motives of neceſſity. This is approved; for the practice is abominable only when done oſtentatiouſly, in the ſame manner as the mode of ſitting with the knees on a line with the chin, and the hands folded round the legs *.

It is allowable to bind the finger with a ſtring, or a ring, with a view to aid the memory concerning ſome buſineſs relative to another perſon.

* Meaning, that when a perſon ſits in the manner ſo deſcribed, from oſtentation, it is abominable, but that it is allowable when done with a view to obtain reſt.

SECT.

SECT. IV.

Of the COMMERCE *of the* SEXES; *and of looking at or touching any Person.*

Men muſt not look at ſtrange women, except in the face, hand, or foot.

IT is not permitted men to look at ſtrange women, except in the face, and palm of the hands, which is allowable, becauſe women being frequently concerned in buſineſs with men, ſuch as giving, taking, &c. it would therefore ſubject them to great inconvenience if theſe parts were veiled, whence there is a neceſſity for leaving them bare.—It is reported, from *Haneefa*, that it is allowable to look at the feet of a woman, becauſe of there being ſometimes occaſion for it. From *Aboo Yooſaf* there is a tradition that the ſeeing of the ſhoulder is likewiſe allowed; becauſe that, from the influence of cuſtom, it is left expoſed. If, however, a man be not ſecure from the impulſe of luſt, it is not allowable to look even at the *face* of a woman, except in caſes of abſolute neceſſity.

A man (if young) muſt not *touch* a ſtrange woman.

IT is not lawful for a man to touch the hand of a ſtrange woman, notwithſtanding he have a controul over his luſt; becauſe the prophet has ſaid, "*whoſoever toucheth a ſtrange woman, ſhall be ſcorched in the* "*hand with hot cinders on the day of judgment.*"—This, however, proceeds on a ſuppoſition of the woman being young; for if ſhe be old, inſomuch as to be inſenſible to luſt, in that caſe it is lawful to touch her at the time of ſalutation. The caſe is ſimilar where the man, being old, is inſenſible to paſſion himſelf, and not ſuch as to excite it in the woman he touches.

IT

It is lawful to touch or look at a young girl insensible of the carnal appetite; as in that case there is no apprehension of seduction.

A female infant may be touched or looked at.

A Kâzee may look in the face of a strange woman, when he passes a decree upon her, notwithstanding there be an apprehension of lust; because he is under a necessity of so doing, for the purpose of expediting his decrees, in order that the rights of mankind may sustain no injury.—Witnesses, also, are under the same necessity, in order to their giving evidence; and hence it is lawful for them likewise to look in the face of a strange woman, where they are desirous of giving evidence concerning her.—With respect, however, to looking merely *in order* to bear testimony, it is certain that this is not allowable where there is any apprehension of lust, since others might be found free from such influence; which argument does not apply at the time of *actually giving* evidence.

Rules to be observed by a magistrate with respect to women, when acting in his judicial capacity;—or by a *witness*.

A man may without blame look on a woman whom he has an inclination to marry, notwithstanding he knows that it will inflame his passion.

A woman may be looked at with a view to marriage.

A physician, in administering to a strange woman, is permitted to look at the part affected. It is, however, most adviseable that he instruct another woman how to apply the remedy, as the circumstance of an individual of one sex looking at another of the same is of less consequence. If he should not be able to procure a fit woman to instruct, it is in that case incumbent on him to cover all the members of the woman, leaving exposed only the particular part affected, when he may look towards it; refraining from it however as much as is possible, since any thing the sufferance of which is prompted by necessity, ought to be exercised with as much restriction as the circumstances of the case will admit.—In the same manner also, it is lawful for a man, in administering a glyster to a man, to look at the proper part.

Rules to be observed by a physician in prescribing for women.

A man may view or touch any part of another man, except his nakedneſs.

One man may, without blame, look at any part of another, except from beneath the navel up to the knee; becauſe the prophet has ſaid, "*the nakedneſs of a man is from the navel to the knee*;" and as, in another tradition, it is ſaid, "*from beneath the navel*," it may thence be inferred that the navel is not included, but that the knee is ſo.—Still, however, in this a gradation is obſerved; for the expoſure of the knee is of leſs conſequence than that of the thigh, as on the other hand the expoſure of the thigh is not ſo bad as that of the *poſitive* nakedneſs, or genitals; wherefore a perſon is to be reproved mildly when he leaves his knee bare; to be treated more harſhly when he covers not his thigh; and, in the caſe of expoſing his genitals, muſt be compelled by puniſhment to cover them.

Every part of a man, which it is proper for another to look at, may likewiſe, without blame, be touched by him; for the ſight and the touch of thoſe parts of a man which are not *nakedneſs* are conſidered in the ſame light.

A *woman* alſo, may look at any part of a man except his nakedneſs, (provided ſhe be free from luſt,)

Women may lawfully look at a man, except in the ſpace from the navel to the knee; provided, however, they be ſecure from luſt; for men and women are conſidered as alike, in looking at parts not private, the ſame as in looking at a dreſs or a quadruped. (In the *Mabſoot*, under the head of *Hermaphrodites*, it is related that a woman looking at a ſtrange man reſembles a man looking at his female relation, in which caſe it is unlawful that he look at her back or belly *, leſt he thereby excite luſt.)—If, however, a woman be enflamed with luſt, or harbour a ſtrong ſuſpicion that looking at a man would create it, or be in any degree doubtful about it, in either of theſe caſes it is moſt becoming that ſhe ſhut her eyes, and avoid looking at a ſtrange man; and if a man alſo be thus circumſtanced, it is incumbent on him to cloſe his eyes, nor muſt he look at a ſtrange woman; becauſe luſt

* The reaſon of this is explained hereafter.

having

having great power over women, is confidered as always operating upon them; and when men are alfo fubject to a paffion of that nature, it exifts then on the part of both; and this is a weighty reafon for rendering their looking at each other illegal. It is otherwife where the woman is influenced and not the man, for then there is not an equally cogent reafon to render it unlawful, one party only being in that cafe enflamed with luft.

A WOMAN is permitted to look at any part of another except from under the navel to the knee. This is according to one tradition of *Haneefa*; but according to another tradition, the looking of one woman at another of her fex, is the fame as that of a man at his female relation; that is, they are not permitted to look at the back or belly. The firft tradition is however the moft authentic.

or at any fuch part of an other woman

IT is lawful for a man to look at his flave girl in any part, provided fhe be not related to him within the prohibited degrees; and alfo at his wife in any part, even in the *pudenda*, if he pleafe; becaufe the prophet has faid, "*fhut your eyes from all excepting your wives and* "*female flaves.*" Neverthelefs, it is moft becoming that a hufband and wife fhould neither of them look at the genital parts of the other, as the prophet has faid, "*when ye copulate with women of your own* "*tribe, you muft conceal as much as poffible; and be not then naked, as* "*that favours too much of the cuftom of affes.*"

A man may view his wife or his flave in any part.

IT is lawful for a man to look at his female relation either in the face, head, breaft, fhoulder, or legs; for as it is ufual with relations to vifit one another without any previous intimation, and unattended with any retinue, and as women, in their houfe, generally wear a drefs adapted to fervice, if, therefore, the fight of thefe parts were culpable, it would impofe too great reftraint upon them. It is different with refpect to other parts; and hence proceeds the illegality of looking at the *back* or *belly*. (It is proper to obferve that by the term

A man may look at the perfon of his kinfwoman.

 relation,

relation, [*Mohrim*,] as here uſed, is to be underſtood any perſon between whom and the beholder marriage is utterly and perpetually illegal, in conſequence of affinity by either blood or marriage.)

Male and female relations may touch each other (if there be no apprehenſion of paſſion.)

Every part in a relation which it is lawful to look at may likewiſe be touched; unleſs, however, there be a dread of its enflaming the paſſion of either, in which caſe neither the ſight nor the touch is approved.

or ſit in private, or travel together.

There is no impropriety in a man ſitting in private with his female relation, or travelling with her; becauſe the prophet has ſaid, " *No woman ſhall travel more than three days and three nights, unleſs* " *accompanied by her huſband, or her relation; and if, in this caſe, the* " *woman ſhould have occaſion to mount upon, or deſcend from, a horſe,* " *the man may then, in aſſiſting her, without blame, touch her back or* " *belly, if covered, and provided he be ſure of his paſſion; but otherwiſe* " *he muſt beware of touching her.*"

A man may look at the female ſlave of another, in the ſame manner as at his kinſwoman;

Every part which it is lawful for a man to look at in his female relation, may likewiſe be viewed by him in the female ſlave of another, whether ſhe be an abſolute ſlave, a *Modàbbirá*, a *Mokâtibá*, or an *Am-Walid*; for as a ſlave is neceſſitated to wear clothes adapted to ſervile employments, that ſhe may diſcharge the buſineſs of her maſter, and attend upon his gueſts, her condition without the houſe is therefore the ſame, in relation to a ſtranger, as that of a free woman without the houſe, in regard to her kinſman.—With reſpect to privacy, or travelling with the female ſlave of another, many have ſaid that it is allowed, in the ſame manner as in the caſe of a female relation.—Some, however, declare it improper, as not being juſtified by neceſſity. *Mohammed*, in the *Mabſoot*, has ſaid, that the aſſiſting of a female to aſcend or deſcend from a horſe is approved, provided it be in a caſe of neceſſity.

IT is permitted to a man to touch a female ſlave when he has an inclination to buy her, notwithſtanding he may be apprehenſive of luſt. It is ſo related in the abridgment of *Kadooree*; and *Mohammed*, in the *Jama Sagheer*, has given a ſimilar abſolute opinion in this caſe, without making any exceptions as to the circumſtance of luſt. The two diſciples, on the other hand, maintain that although, on account of neceſſity, it be proper for a perſon to *look* at a ſlave girl when he is about to purchaſe her, notwithſtanding it may be the means of inflaming his paſſion, ſtill it is improper to *touch* her when under the impulſe of paſſion, or where there is a probability of its being excited. In caſe of an exemption from paſſion, however, they hold it allowable either to touch or look at her.

and may alſo touch her with a view to purchaſe.

WHEN a female ſlave arrives at maturity, it is improper to leave her in *drawers* only: on the contrary, it is requiſite that ſhe have two clothes, in order that her back and belly may be covered, as theſe, with regard to her, may be conſidered as privy parts. It is moreover reported, from *Mohammed*, that when a female ſlave reaches the age of puberty, ſhe muſt not be expoſed in *drawers* only, as that may occaſion luſt.

An adult female ſlave muſt be put in a decent habit.

A KHASEE, or *ſimple* eunuch, is conſidered in the ſame light with a man, whence any thing prohibited to a man is ſo likewiſe to him, for he poſſeſſes virility, and is not diſabled from copulation; and the ſame, alſo, of a *Majboob*, or *complete* eunuch; for he is likewiſe capable of friction, and has the power of paſſing ſemen; and ſo likewiſe of an hermaphrodite, as he is merely a defective man.

An eunuch or hermaphrodite are the ſame as a man with reſpect to thoſe rules.

IT is not lawful for a male ſlave to view his miſtreſs, except in the face, or palm of the hands, in the ſame manner as a ſtranger's. *Malik* maintains that a ſlave is in the predicament of a kinſman within the prohibited degrees; (and ſuch alſo is the opinion of *Shafeï*;) becauſe his miſtreſs is ſubject to his entering her apartment frequently with-

A male ſlave muſt not view his miſtreſs but in the face, or hands.

out intimation. The arguments of our doctors are, that the slave is a man neither related to her as a kinsman nor husband; that he is liable to be influenced by a passion towards her, as marriage may eventually be lawful between them; (that is, in case of his emancipation;) and that there is no necessity for his approaching her without leave, as the business of a slave properly lies without the house.

A man may gratify his passion with his female slave in whatever way he pleases.

It is lawful for a man to perform the act of *Azil** with his female slave without her consent, whereas he cannot lawfully do so by his wife, unless with her permission.—The reason of this is that the prophet has forbidden the act of *Azil* with a free woman without her consent, but has permitted it to a master, in the case of his female slave. Besides, carnal connexion is the right of a free woman, for the gratifying of her passion, and the propagation of children, (whence it is that a wife is at liberty to reject a husband who is an eunuch or impotent,) whereas a slave possesses no such right.—A man, therefore, is not at liberty to injure the right of his wife, whereas a master is absolute with respect to his slave.—If, also, a man should marry the female slave of another, he must not perform the act of *Azil* with her without the consent of her master.

* For a definition of *Azil*, see Vol. I. p. 167.

SECT.

SECT. V.

Of ISTIBRA, *or waiting for the* PURIFICATION *of* WOMEN *.

A man must not have connexion with his purchased female slave until one term of her courses have elapsed:

A MAN, when he purchases a female slave, is not permitted either to enjoy her, or to touch, or kiss her, or look at her *pudenda*, in lust, until after her *Istibra*, or purification from her next ensuing courses; for when the captives taken in the battle of *Autass* were brought thence, the prophet ordained that no man should have carnal connexion with pregnant women until after their delivery, or with others until after one menstruation; which evinces that the abstinence so enjoined is incumbent on a proprietor; and further, that the *occurrence* of right of property and of possession is the occasion of its being incumbent. The end proposed in this regulation is, that it may be ascertained whether conception has not already taken place in the womb, in order that the issue may not be doubtful.

but this rule operates only on the *purchaser*, not on the *seller*.

ABSTINENCE until after purification is incumbent on the *buyer*, but not on the *seller*; for the true reason of its necessity is the desire of copulation; and as the buyer is presumed to possess this desire, and not the seller, the observance of it is therefore enjoined him, and not the other. If, moreover, desire be an internal operation of the mind, the obligation of the law, in this particular, rests upon the *argument*

* A phraseology runs throughout this section which renders the translation of it into *English* particularly difficult, as the precise meaning of the term *Istibra* cannot be expressed by any single word in our language.—The best *Arabic* lexicons define *Istibra* to signify "*the purification of the womb.*"—The term, however, must here be received in a more involved sense; for *Istibra* does not, in fact, mean simply *purification*, but *a desire* of, or (as rendered in the text) a *waiting for* purification; for which reason the translator renders it *purification*, or *abstinence*, as best suits the context.

of ſuch deſire. Now the mere *power* of committing the carnal act is an argument of the deſire for ſuch act; and as this power is eſtabliſhed only by property and poſſeſſion, it follows that property and poſſeſſion are the occaſions of this obligation of abſtinence.—This law, therefore, extends to a right of property, in all its different modes of being acquired, ſuch as by purchaſe, donation, legacy, inheritance, covenants, &c. whence it is that this abſtinence is enjoined upon a perſon, who buys a female ſlave, either from an infant, or a woman, or from a ſlave licenced to trade*, or from a perſon who is by law prohibited from having any carnal connexion with her. In the ſame manner, alſo, this abſtinence is incumbent where a perſon buys a female ſlave who is a virgin; for the law proceeds according to the proof of the cauſe which prompted it, and not according to the proof of the propriety or expediency, as theſe relate to what is internal and unknown.

In the purchaſe of a *menſtruous* female ſlave, the purchaſer muſt wait for another complete term.

If a perſon purchaſe a female ſlave during her menſtruation, no regard is paid to this menſtruation with reſpect to determining the abſtinence†. In the ſame manner, alſo, no regard is paid to a menſtruation which occurs between the time of taking poſſeſſion and the time of the right of property being eſtabliſhed, by purchaſe, or the like;—and ſo likewiſe, regard is not paid to the delivery of a female ſlave between the eſtabliſhment of a right of property in her, and the act of taking poſſeſſion,—(contrary, however, to the opinion of *Aboo Yooſaf*.)—The reaſon of this is, that the occurrence of right of property and poſſeſſion is the *cauſe* of purification being required; and the obligation of obſerving the purification is an *effect* of property and poſſeſſion; and the *effect* cannot take place before the occurrence of the *cauſe*. The ſame rule holds with regard to ſuch menſtruous purga-

* The ſlave licenced to trade is, in this caſe, ſuppoſed to have been prohibited from cohabiting with the ſlave, as the goods he ſells or purchaſes are preſumed to be the property of another, namely, his maſter.

† Arab. *Fee bâbal Iſtibrâ*; (literally) "*in point of purification*,"—meaning that purification requiſite to determine the abſtinence impoſed on the purchaſer of a female ſlave.

tions,

tions as may happen previous to the procuring of ſanction, in the caſe of an unauthorized ſale of a female ſlave, notwithſtanding the purchaſer may be ſeized of her;—and ſo likewiſe, where the courſes happen after the ſeizin in the caſe of an illegal contract of ſale, and before the ſlave is purchaſed by a valid contract; for in none of all theſe caſes do the preſent courſes determine the abſtinence.

A perſon purchaſing his partner's ſhare in a female ſlave muſt wait until her next purification.

ABSTINENCE is requiſite in the caſe of a *partnerſhip* female ſlave, where one of two partners purchaſes the other's ſhare; for here the *cauſe* is complete, and upon the completion of the *cauſe* the effect takes place.

Other rules to be obſerved reſpecting female ſlaves.

IF a perſon purchaſe a *Magian* female ſlave, or receive her in donation, and ſhe, after his taking poſſeſſion of her, have her courſes, and then become a *Muſlimá*,—or, if a perſon purchaſe a female ſlave, and make her a *Mokátibá*, and ſhe, after his taking poſſeſſion of her, having voided her courſes, prove unable to diſcharge her ranſom,—ſuch courſes are ſufficient to eſtabliſh the requiſite purification, in either of theſe caſes, as having happened after the occurrence of the *cauſe* for waiting, namely, right of property and poſſeſſion.

IN caſes where a female ſlave, having eloped, returns to her maſter,—or, having been taken away, or hired out, is reſtored,—or, having been pawned, is redeemed,—abſtinence is not requiſite, for the cauſe of it (namely, the acquiſition of property and poſſeſſion) does not exiſt in either inſtance.

Where the carnal act is unlawful, all *incentives* to it are prohibited.

IN every caſe where abſtinence is enjoined, and carnal connexion prohibited, all ſorts of allurements and dalliance, ſuch as kiſſing and hugging, are likewiſe prohibited, as theſe lead to the commiſſion of unlawful acts. Add to this, the poſſibility of their being committed on the property of another, as may happen if the ſlave prove with

child

child and the feller lay claim to her. (It is reported from *Mohammed* that dalliance with a *captive* flave-girl is lawful.)

Pregnant women are purified by delivery, and immature females by the lapfe of one month.

The purification of a pregnant female flave is eftablifhed by her delivery, and that of a girl in whom the menfes have not yet appeared, by the lapfe of a month, that fpace being, with refpect to fuch an one, a fubftitute for the courfes, in the fame manner as holds in the cafe of a woman under *Edit**. If, however, the menftrual blood fhould difcharge itfelf *before* the expiration of the month, the purification by lapfe of time is annulled, becaufe of the ability with refpect to the *original* circumftance, prior to accomplifhing the object of the *fubftitute*.

Rule refpecting adult females not fubject to the courfes.

If the courfes be delayed in a female flave who is of age to be fubject to them, it is in that cafe requifite to refrain from any carnal connexion with her, until it appear that fhe is not pregnant, when it becomes lawful to cohabit with her. (This opinion is quoted from *Haneefa*, in the *Zâhir Rawâyet*, without fpecifying any particular *term.*)

Devices ufed to elude the abftinence required;

It is allowable, according to *Aboo Yoofaf*, to elude the abftinence by the practice of a device; in oppofition to the opinion of *Mohammed*. The arguments of each on this point have been already detailed under the head of *Shaffa*.—The opinion of *Aboo Yoofaf* has been adopted by *Kâzees* in their decifions, where it has appeared that the feller had not cohabited with the flave from the period of her courfes antecedent to the fale;—and, according to the opinion of *Mohammed*, when the contrary has been proved. The device which may be practiced in a cafe

* See *Edit*, Vol. I. p. 360.—There feems here to be a fmall miftake in the text, as the *Edit* of a female flave not fubject to the courfes is determined by the lapfe of a *month and an half*.

where

where the purchaser is not married to a free woman *, is that he may first *marry* the slave, and then purchase her †.—If, on the contrary, he be already married to a free woman, the device in that case is that the seller, previous to the sale, or the purchaser, before taking possession, give the slave in marriage to another person, (who must, however, be one in whom they can confide, that he will not cohabit with her, and that he will divorce her,) and then, that the party *purchase* the slave, in the former instance, or take possession of her, in the latter,—and the husband divorce her;—because as the purchaser was at any rate prohibited from cohabiting with the slave at the time when the cause of abstinence first operated, (that is, when he first acquired property and possession,) no abstinence is therefore required after she *did* become lawful to him, as regard is paid to the time and circumstances under which the cause takes place;—in the same manner as where a person purchases and takes possession of a slave who is in her *Edit*,—in which case, upon the expiration of the term of *Edit*, abstinence is no longer required, since in this case the slave was not lawful to the purchaser at the time of the *cause* taking place.

A person pronouncing *Zihâr* must entirely abstain from his wife until he have made expiation.

It is not lawful for a person who has given abusive language to his wife ‡, either to look at her *pudenda* in lust, or to cohabit with her, or to kiss or touch her, until such time as he have performed expiation; because, as it is unlawful for him to copulate with her until after expiation, it is, consequently, unlawful that he enter into dalliances with her, since the *cause* of an illegal act is likewise illegal;—in

* This condition is here made, because it is not lawful for a *Mussulman* to marry a slave if he should be previously married to a free woman. (See Vol. I. p. 86.)

† It is here understood that marriage exempts from abstinence.

‡ Literally, "it is not lawful for a *Mozâhir*,"—meaning a person who has pronounced a sentence of *Zihâr* upon his wife. (This whole passage will be better understood by a reference to *Zihâr*, Vol. I. p. 326.)

the ſame manner as holds in caſes of *Yttikâf* * and *Ihrâm* †; or where a perſon, by miſtake, cohabits with the wife of another,—in which caſe ſhe muſt obſerve an *Edit*; during which, as it is unlawful for the the huſband to have connexion with his wife, ſo it is likewiſe unlawful for him to uſe any of its incentives with her. It is otherwiſe during the courſes or faſting, for, although copulation be at ſuch time prohibited, yet dalliance is lawful, becauſe the courſes are frequent and of long continuance, engroſſing a great part of life, as they happen once every month, and continue ten days every time;—and, in the ſame manner, the days of faſting are protracted to one month by the divine ordinances, and (among pious perſons) voluntarily occupy a conſiderable part of life;—whence if dalliances were forbidden during thoſe terms, it would tend to reſtrain men too much in their enjoyments.

A perſon indulging in wantonneſs with two female ſlaves who are ſiſters, muſt put one of them away before he can have connexion with the other.

If a perſon, incited by paſſion, ſhould kiſs two female ſlaves who are ſiſters, he is not in that caſe permitted to have carnal connexion with either of them, or to kiſs, touch, or look at the *pudenda* of either in luſt, until he render one of them unlawful to him, either by making her the property of another, in whatever manner he may chooſe, or by giving her to another in marriage, or by emancipating her; becauſe it is not lawful either to copulate or to enter into dalliances (ſuch as kiſſing and hugging) with two ſiſters. But whenever one of them is rendered unlawful, the enjoyment of the other is permitted to him.—(The transfer of a part of the ſlave, in this inſtance,

* *Yttikâf* is a religious auſterity practiſed by the moſt pious of the *Muſſulmans* in the laſt ten days of the month of *Ramzan*; they remain during that period in a moſque, without ever departing from it but when the calls of nature abſolutely force them, abſtracting themſelves at the ſame time from all enjoyments.

† *Ihrâm* is the period during which the pilgrims remain at *Mecca*.—They are then ſubject to a number of ſtrict regulations, and are particularly enjoined to refrain from all worldly pleaſures.

is

is the ſame as a transfer of the whole, with reſpect to the illegality of enjoyment *; and ſo likewiſe the emancipating her, or rendering her a *Mokâtibá* in part.) If, on the contrary, he let one of them to hire, or pawn her, or create her a *Modabbirá*, the other is not thereby made lawful to him, as he does not by any of theſe acts relinquiſh his property in her. If, alſo, he ſhould give one of them in marriage to any perſon by an invalid contract, he does not thereby acquire a right to enjoy the other; unleſs, however, the huſband of that one conſummate the marriage, in which caſe an *Edit* is incumbent upon her, and this is the ſame as a valid marriage, with regard to rendering the enjoyment of her illegal. If, alſo, he once carnally enjoy one of them, he may afterwards continue to do ſo;—but he cannot then lawfully have connexion with the other; for if ſo, it would be a connexion with two ſiſters, which is unlawful; but this conſequence is not induced by connexion with one of them.

Any two women who are related to each other in a degree that prevents their being lawfully married to the ſame perſon, are conſidered as ſiſters, and are conſequently ſubject to the rules exhibited in the preceding caſe.

Men muſt not *kiſs* or *embrace* each other:

It is abominable for one man to kiſs another either in the face or hand, or on any other part; as it is likewiſe for two men to *embrace* each other. *Tahâvee* reports that this is the opinion of *Haneefa* and *Mohammed*; but that *Aboo Yooſaf* holds it not improper for a man either to kiſs or embrace another; becauſe it is related that when *Jaffier* came from *Abyſſinia* the prophet embraced him and kiſſed him between the eyes. The argument advanced by *Haneefa* and *Mohammed* is a tradition that the prophet prohibited both kiſſing and embracing; and

* That is to ſay, he will as completely render one of the ſiſters illegal (or forbidden) to him (and conſequently legalize his connexion with the other) by ſelling or otherwiſe tranſferring his property in a *part* of her, as by ſo transferring her *in toto*.

with

with respect to the circumstance adduced by *Aboo Yoosaf*, it must be construed as having happened prior to the prohibition. The learned, however, have said that this disagreement between our doctors concerning the act of embracing, respects only a case where men are not properly dressed, as where, for instance, they are in *drawers* only; but that those acts are allowable, in the opinion of all our doctors, when the parties are clothed with an under and upper garment.—This is the most approved doctrine.

But they may join hands.

THE joining hands by way of salutation is allowable; for the prophet has said, "*Whosoever joins his hand to that of his brother* MUSSULMAN, *and shakes it, shall be forgiven of his sins.*"

SECT. VI.

Of the Rules to be observed in SALE.

Dung may be sold; but not human excrement,

THERE is no impropriety in the sale of dung; but is is abominable to sell human excrement. *Shafeï* maintains that the sale of dung is likewise abominable, because of its being actually filthy; in the same manner as excrement, or the undressed skin of a dead animal.—The argument of the *Haneefites* upon this point is, that dung is capable of yielding profit, as it is commonly strewed upon land, in order to render it more fertile; and as it thus yields a profit, it is therefore a valuable *property*, the sale of which is lawful. It is otherwise with respect to excrement, as that is incapable of profit, unless it be mixed with

unless mixed with mud.

with mud, when the sale of it becomes lawful *, according to what is reported from *Mohammed*; which is approved.

A person may purchase and have connexion with a female slave on the faith of the seller's assertion respecting her;

If a person see another selling a female slave, he at the same time knowing her to be the property of some other person, and he be informed by the seller that "he has been empowered by that other to "dispose of her," it is in that case lawful for him to purchase her, and have carnal connexion with her; because the word of one man, although he be not *upright* †, may be received in temporal matters, provided there be no opponent to shake the credit of his testimony.—The same rule also holds if the seller allege that he had received her in donation from the other, or that he had bought her from him; with this difference, however, that he is here required to be of an upright and trustworthy character;—and so likewise if he be *not* trustworthy, provided the purchaser believe that he speaks truth; but if he disbelieve him, it is not lawful for him to purchase the slave. The law is the same, if the purchaser, not having previously known the female slave, be informed by the seller, that "she is the property of another, "who has empowered him to sell her,"—or that "he has purchased "her from such a person."—If, on the other hand, knowing her to have been in the possession of another, he do not receive any information from the seller, he cannot in that case lawfully purchase her until he know by what means the seller has acquired a property in her; for her having been in the possession of another is an argument of her being the property of another. If, on the contrary, he should not know her to have been before the property of another, he may then lawfully purchase her, notwithstanding the seller bear a bad character; because possession, even with an *unjust* man, argues property; and suspicion, or probable conjecture, lose all force in any case where a legal argument can be urged. Where it is evident, however, that a person of

* Because in this case the *mud* or *manure* is the article sold, the ordure being merely a dependant.

† Arab. *Adil*, in opposition to *Fásik*.

of ſuch appearance as the ſeller is not likely to be the proprietor of her, it is moſt prudent on that account to avoid buying her. Nevertheleſs, if the purchaſe be made, there are hopes of its being lawful, becauſe of its being ſupported by a legal argument.

but if the ſeller be a *ſlave*, precaution muſt be uſed.

If the perſon who offers the female ſlave to ſale be a ſlave, male or female, in that caſe the other muſt neither accept nor purchaſe her until he enquire into the circumſtances; becauſe, as *property* cannot be a *proprietor*, it is evident that ſome other is the proprietor of her. If, however, the ſeller inform him that "his maſter had licenced "him to ſell her," his word may in that caſe be taken, provided he be upright and truſtworthy: but if he be otherwiſe, the purchaſer muſt be guided by probable opinion; and if he have not the means of forming any opinion of him, whether good or bad, he muſt not in that caſe purchaſe her, or admit his allegation concerning her.

A woman may marry (after obſerving her *Edit*) on receiving authentic information of her widowhood or divorce.

If a perſon of an upright and truſty character inform a woman that her huſband who was abſent had died, or that he had divorced her thrice,—or, if a perſon of a *reprobate* character deliver her a letter from her huſband, wherein he acquaints her of his having divorced her, and ſhe, not knowing for certain that the letter was written by her huſband, ſhould however be led to think ſo,—in either of theſe caſes ſhe may lawfully obſerve her *Edit*, and then marry;—becauſe in this inſtance a circumſtance deſtructive of the former marriage has occurred without any perſon appearing to contradict it. In the ſame manner, alſo, if a woman inform a man that her huſband had divorced her, and that the ſtated period of her forbearance had elapſed, the man may lawfully marry her. If, alſo, a woman inform her former huſband who had divorced her thrice, that "after the lapſe of her "*Edit* ſhe had married another, with whom ſhe had cohabited, and "that having divorced her ſhe had again completed her *Edit* from "that divorce," the firſt huſband may in that caſe lawfully marry

 her

her again. The law is alſo the ſame where a woman informs a perſon that, having been a ſlave, ſhe had received her freedom.

Information tending to annul a marriage, muſt not be credited unleſs ſupported by teſtimony.

If a perſon inform a woman that her marriage had been originally unlawful, inaſmuch as her huſband was at that time an *apoſtate*, or her *foſter-brother*, his word is not in that caſe to be credited, unleſs confirmed by the evidence of two men, or of one man and two women. So likewiſe, if a perſon inform another that his wife had been an apoſtate at the time of marriage, or that ſhe is his foſter-ſiſter, he is not in that caſe permitted either to marry the ſiſter of that woman, or to marry other four women, until the information ſo given be fortified by the atteſtation of two upright men. For here the huſband is informed of an illegal circumſtance coexiſtent with the marriage; whereas his execution of the contract of marriage is an argument in favour of its validity, and a denial of its illegality; and hence the information of the other is apparently contradicted. The caſe is otherwiſe, however, if a perſon, having married a child, ſhould be informed that ſhe had afterwards ſucked the milk of his mother or ſiſter; for the information ſo given is to be believed, ſince here the bar to the marriage is ſubſequent to, and not co-exiſtent with, the contract; and the execution of the contract, being antecedent to the circumſtance of its illegality, does not therefore afford any proof of its non-exiſtence; whence the information is not controverted.

A man is not at liberty to marry a female ſlave on her informing him that ſhe is free.

If a girl, ſo young as to be unable to give any account of herſelf, being in the poſſeſſion of a man who aſſerts her to be his property, ſhould be afterwards, when ſhe arrives at the age of maturity, met in another city by a man who formerly knew her, and tell him that "ſhe is a free woman," he is not, on the ſtrength of her word, permitted to marry her, as there is an argument againſt the truth of it, namely, her having been in the poſſeſſion of another.

A *Mussulman* is not allowed to pay his debts by the sale of wine; but a *Christian* may pay his debts in this manner.

If a *Mussulman*, involved in debt, should sell wine, it is abominable in his creditor to receive payment in the money so obtained; whereas, if the debtor were a *Christian*, it would be allowable so to do. The reason of this distinction is, that in the former instance the sale was invalid, as wine is not valuable to *Mussulmans*, and the price of it being therefore the property of the purchaser, cannot be lawfully received in payment. In the latter instance, on the contrary, the sale was lawful, wine being a valuable commodity amongst *Christians*; and as, consequently, the price of it is the property of the seller, the discharge of a debt from such price is lawful.

It is abominable to monopolize the necessaries of life; or to forestall the market:

It is abominable to monopolize *, the necessaries of life, and food for cattle, in a city where such monopoly is likely to prove detrimental. So likewise is it abominable to forestall †; as where people leave a city to meet a caravan with a view to purchase goods and lay them up. This, however, is immaterial, when it tends not to the injury of any one. The argument, in this case, is a tradition of the prophet, who said "*Blessed is the* JÂLIB, *and accursed is the monopolizer.*" (By *Jâlib* is to be understood a merchant who brings camels, goats, and so forth, for sale.) Another argument is, that grain is connected with the rights of every one, whence the withholding it from sale is an invasion of the general rights of mankind, and an occasion of scarcity in their necessary food. Such an act is therefore abominable where the effects of it are extended to the people; as is the case when the monopoly is made in a small city. It is otherwise, however, where it carries not along with it any sensible detriment to the people, as where it is done in a *large* city. The law is similar in the case of forestalling. The learned, however, remark that

* Arab. *Ihtikàr*. It is explained in the text to signify, in its literal sense, the laying up of any thing; and in the language of the LAW, the purchasing of grain, or other necessaries of life, and keeping them up with a view to enhance the price.

† Arab. *Talàkkee*.

this is where the purchasers neither conceal from the merchants the price current of the market, nor deceive them in it; for if they either conceal or deceive them in the established prices, the anticipation of the market is in such case abominable, whether it be hurtful in its consequences or otherwise. The restriction of the term *Ihtikâr*, or monopoly, to the necessaries of life and the food of animals is according to *Haneefa*. *Aboo Yoosaf* has said that the hoarding of any thing, the detention of which from circulation produces bad consequences, although it be such articles as gold, silver, or cloth, comes equally within the definition of a monopoly. It is reported from *Mohammed*, on the contrary, that the withholding of cloth from the market does not constitute a monopoly. It therefore appears that, according to *Aboo Yoosaf*, regard is paid to the *actual* detriment in determining the monopoly, as that is the cause of its being abominated; whereas, according to *Haneefa*, regard is paid to the *particular* detriment. Decrees pass according to the latter opinion. It is to be observed that, if the period of detention be short, it is not a monopoly, as not being then attended with any detriment. If, on the contrary, the period be long, it becomes an abominable monopoly, as it then induces detriment. Some have said that by a *long* period is to be understood at least forty days, because of a saying of the prophet, "*Verily, whoso-*" *ever hoards victuals for the space of forty days is at variance with* "GOD, *and* GOD *is at variance with him.*" Others have said that a *month* is a long space, and that any time less is a *short* space; and that the degree of guilt rises in proportion to the necessities of the people, and the effect of the monopoly in producing a famine. Others, again have said, that although there be a fixed period for rendering it punishable in this world, still it is criminal, however short the period may be. In short, it is not good to trade * in grain, or commodities of that nature.

* By *trading* is not here to be understood simple *purchase* and *sale*, but the usual practice of merchants in keeping up their commodities, and watching the turns of the market, in order to sell to the greatest advantage.

but a person may monopolize the product of his own grounds, or what he brings from a distant place.

If a person should hoard a quantity of grain, being the product of his own cultivation, or which he had brought from another city,—in either of these cases it is not deemed an abominable monopoly:—it is not so in the first case, because such product being an unmixed right of his own, without any relation to that of other people, he is therefore permitted to hoard it up; and in the same manner as it is lawful for him not to cultivate the seed, so is it lawful for him not to sell the product:—nor is it so in the second case, according to the opinion of *Haneefa*, the reason in support of which is, that the rights of the people extend only to what is collected in the city, or what is brought thither from its dependances. *Aboo Yoosaf*, on the contrary, deems this practice abominable, because the tradition recorded on this head is absolute. *Mohammed*, also, has said that every place from which grain is *frequently* brought to a particular city may be deemed a dependancy of it; and that a monopoly of whatever may be brought from such places is forbidden, as the rights of the people are connected with it. It is otherwise, however, where goods are brought from a *distant* place, such as it is not customary to bring them from; since in that case the rights of the community are not concerned.

Sovereigns must not fix prices,

It is not the duty of sovereigns to establish fixed prices to be paid by the community; because the prophet has forbidden this, saying "*Establish not prices, as these are regulated by* God." Besides, the price is the right of the merchant, and the measure of it is therefore left to him; and sovereigns are not entitled to invade any such right, except where the welfare of the community is concerned, as shall presently be made appear.

except in cases of necessity.

A monopolizer, upon information, must be required to sell his superfluous provisions.

If a person guilty of a monopoly be brought before the *Kázee*, he must direct him to sell whatever he may have laid up more than is amply sufficient for the subsistence of himself and family, and must prohibit him from the like practice in future;—and if, after this, he

should

ſhould again monopolize, the *Kázee* may then chaſtiſe him at his own diſcretion.

A combination to raiſe the price of proviſions muſt be remedied by the magiſtrate fixing a rate.

If victuallers, taking advantage of the neceſſity of the people, raiſe the market to an exorbitant rate, and the *Kázee* be otherwiſe unable to maintain the rights of the people, he may in that caſe regulate the prices, with the aſſiſtance of men of ability and diſcernment.—Notwithſtanding this, however, if they ſhould continue to ſell their grain at a rate exceeding the fixed ſtandard, the *Kázee* muſt confirm the ſale, nor has he the power of annulling it. This, according to *Haneefa*, is evident; for he holds it unlawful to inhibit a freeman in this reſpect;—and ſo likewiſe, according to the two diſciples, unleſs the inhibition affect only ſome particular people, ſince (agreeably to their tenets) inhibition is not allowed where it is indefinite.

Is it lawful for a *Kázee* to ſell the grain of a monopolizer without his conſent?—Some ſay that upon this point there is a diverſity of opinion, in the ſame manner as in the caſe of ſelling the effects of a debtor;—whilſt others maintain that it is lawful in the opinion of all our doctors, becauſe *Haneefa* holds it juſt to inhibit a freeman, with a view to removing a common evil, as is the caſe in the preſent inſtance.

Arms muſt not be ſold to ſeditious perſons.

It is abominable to ſell arms in the time of ſedition to a perſon whom the ſeller knows to be a rebel, as this is a cauſe of evil. If, however, the ſeller ſhould not know the purchaſer to be engaged in the rebellion, he may then without blame ſell arms to him.

The crude juice of fruit may be ſold for the purpoſe of making wine.

There is no impropriety in ſelling the juice of dates or grapes to a perſon whom the ſeller may know intends making wine of it; for the evil does not exiſt in the *juice*, but in the liquor, after it has been eſſentially changed. The caſe is different with reſpect to ſelling arms at

at a time of tumult, ſince in that inſtance the evil is eſtabliſhed, and exiſts in the original thing, arms being the inſtruments of ſedition and rebellion.

A houſe may be let to hire any where out of a city for the purpoſe of a pagoda or a church.

If a perſon let a houſe to hire in a village, or in the neighbourhood of a city, in order that the leſſee may convert it into a *pagoda*, or a Chriſtian church, or that he may ſell wine in it, it is immaterial, according to *Haneefa*. The two diſciples hold ſuch leaſe to be improper, as tending to promote ſin. The arguments adduced by *Haneefa* are, that the compact is formed with a view to obtain profit from the houſe, which becomes due immediately upon the delivery; that the guilt exiſts only in the act of the leſſee; and that, as he is a free agent, no crime of his can therefore be reflected upon the leſſor. The reaſon of reſtricting the place, in this inſtance, to a village, or the neighbourhood of a city, is becauſe it is illegal to let out a houſe in a city for any of the abovementioned purpoſes, as there the light of the *Muſſulman* religion is ſuppoſed to blaze, which is not always the caſe in other places. The learned, however, have ſaid, that this refers only to the neighbourhood of *Koofa*, becauſe many infidels reſide there: but that in any other place where the *Muſſulman* religion prevails it is unlawful. This latter opinion is the moſt authentic.

A *Muſſulman* may carry wine for an infidel, and receive wages for ſo doing.

If an infidel hire a *Muſſulman* to carry wine for him, and afterwards pay him for his labour, the money ſo obtained is lawful to the *Muſſulman*. The two diſciples have ſaid that it is abominable, as being the inſtrument of ſin, and likewiſe becauſe the prophet (according to the *Rawâyet Saheeh*) has denounced curſes upon ten ſeveral people who are concerned in wine, amongſt whom are they who *carry* it. The argument of *Haneefa* is, that the ſin lies only in the *drinking* of it, which is the act of a free agent; that the carrying it is no ways allied to the drinking of it; and that the object of the porter is not that another ſhould drink it, but only that he himſelf ſhould obtain

obtain the reward of his labour:—and with respect to the tradition above alluded to, it refers only to a case where the wine is carried with intent to promote sin.

Rules respecting the ground and houses at *Mecca.*

There is no impropriety in the sale of the walls of the houses at *Mecca*, but it is abominable to sell the ground on which they stand. This is the opinion of *Haneefa*. The two disciples have said that the ground of *Mecca* may likewise be sold; and it is also related that *Haneefa* accorded in this opinion; because in the same manner as the houses are property, so likewise is the ground. The real opinion of *Haneefa*, however, is that it is improper; because the prophet has said, "Mecca *is sacred, and the houses there can neither be sold nor "inherited.*" *Mecca*, moreover, is sacred, as being a dependancy of the *Kàba*, and the place where reverence is particularly shewn to it; whence it is not lawful either to hunt at *Mecca*, or to cut the thorns or grass which grow there, (except when they have faded and become parched;) or to shake the leaves off the trees growing there.

It is abominable to let the ground at *Mecca*, because the prophet has said, "*Whosoever hires out the ground of* Mecca *is guilty of usury: "whoever has use for the ground at* Mecca, *let him reside in it; and "whoever possesses more than is sufficient for his own purposes, let him "bestow it upon others.*"

Implied usury is abominable.

If a person take from a merchant something he may have occasion for, and leave with him a certain number of *dirms* (for example) he is guilty of an abomination; because, in thus taking what he wants, he derives an advantage from a *lòan*, (namely, the money he leaves with the merchant;) and the prophet has prohibited us from taking interest on loans. He must therefore first deposit the *dirms* with

with the merchant, and then take from him whatever he may want; as the money is in this caſe a *truſt*, and not a *loan*, inſomuch that the merchant is not ſubject to pay a compenſation in caſe of the loſs of it.

SECT. VII.

MISCELLANEOUS CASES.

The KORAN ought to be written without *marks* or *points*.

IT is abominable to diſtinguiſh the ſentences of the KORAN with marks, or to inſert in it the points or ſhort vowels. Nevertheleſs the learned amongſt the moderns have ſaid that theſe diſtinctions are proper when made for the uſe of a foreigner.

Infidels may enter the ſacred moſque.

THERE is no impropriety in a *Polytheiſt** entering the ſacred moſque †. *Shafeï* held this to be abominable; and *Mâlik* has ſaid, that it is improper for ſuch to enter into any moſque.—The argument of *Shafeï* in ſupport of his opinion is, that GOD has ſaid in the KORAN, "ASSOCIATORS ARE IMPURE, AND THEREFORE MUST NOT "BE PERMITTED TO ENTER THE SACRED MOSQUE." Another argument is, that an infidel is never free from impurity, as he does not perform ablution in ſuch a manner as to work a purification; and an impure man is not allowed to enter into a moſque. The ſame arguments have been urged by *Mâlik*; but he extends them to any moſque. The argument of our doctors on this point is drawn from a tradition that the prophet lodged ſeveral of the tribe of *Sakeef*, who

* Arab. *Moſhirrak*, i. e. an *aſſociator*, including all who deny the unity of the Godhead, and therefore applying to [trinitarian] *Chriſtians* as well as to *Idolaters*.

† This is a moſque in *Mecca*, ſo called becauſe the prophet moſt frequently offered up prayers in it.

were

were infidels, in his own mosque. Besides, as the impurity of an infidel lies in his unbelief, he does not thereby defile a mosque. With respect, moreover, to the text above quoted, it merely alludes to infidels entering a mosque in a haughty and forcible manner, and to a custom which was practiced in the days of ignorance of walking about the mosque naked.

It is abominable to keep eunuchs.

IT is abominable for a *Mussulman* to keep *eunuchs* in his service, as the employment of them is a motive with men for reducing others to a like state, a practice which is proscribed in the sacred writings *.

It is allowed to castrate cattle.

IT is not abominable to castrate cattle, or to make a horse copulate with an ass, as these tend to the benefit of mankind. Besides, it is related, in the *Nakl Saheeh*, that the prophet rode upon a mule, which, if such promiscuous procreation of animals had been prohibited, he would never have done, as thereby a door would have been opened to sin.

A *Jew* or *Christian* may be visited during sickness.

THERE is no impropriety in visiting a *Jew* or *Christian* during their sickness, as this affords them a kind of consolation; and the LAW does not prohibit us from thus consoling them. Nay, we are told, in the *Nakl Saheeh*, that the prophet visited a *Jew* who lay sick in his neighbourhood.

Vain invocations in prayer not allowed.

IT is abominable that a person, in offering up prayers to GOD, should say, "I beseech thee, *by the glory of thy heavens!*" or "*by* "*the splendor of thy throne!*" for a stile of this nature would lead to suspect that the Almighty derived glory from the heavens; whereas

* That is, in the KORAN, which is termed, by way of pre-eminence, the *Sharra*, or LAW.

the heavens are created, but God, with all his attributes, is eternal and immutable. It is, however, recorded by *Aboo Yoosaf*, that there is no impropriety in this, (an opinion which has been likewise adopted by *Aboo Lais*,) because it is related of the prophet that he offered up a similar prayer to God. Our doctors, on the other hand, have urged that this tradition is uncertain; and that to abstain from whatsoever is *suspected* of being wrong is most prudent and adviseable.

It is abominable to say, in a prayer, "I beseech thee, O God, "*by the* RIGHT *of*" (any particular person,) or "*by the* RIGHT *of*" (any of the prophets;) because none of his creatures is possessed of any right with respect to the Creator.

Gaming is disallowed.

It is an abomination to play at chess, dice, or any other game; for if any thing be staked it is *gambling*, which is expressly prohibited in the Koran; or if, on the other hand, nothing be hazarded, it is useless and vain. Besides, the prophet has declared all the entertainments of a *Mussulman* to be vain excepting three; the breaking in of his horse; the drawing of his bow; and the playing and amusing himself with his wives. Several of the learned, however, deem the game of chess to be allowed, as having a tendency to quicken the understanding; which opinion has also been ascribed to *Shafeï*.—Our doctors have founded their judgment in this particular on a saying of the prophet, "*Whosoever plays at chess or dice does, as it were, plunge* "*his hand into the blood of a hog.*" Moreover, plays of this nature are apt to withhold men from the adoration and worship of God at the set periods; and the prophet has said, "*Whatsoever tends to relax men* "*in their duty to* God *is considered in the same light with the practice* "*of gaming.*"—It is also proper to remark, that if a man play at chess for a stake, it destroys the *integrity* of his character, and renders him a *Fásik*, or *reprobate*; but if he do not play at it *for a stake*, the integrity of his character is not affected. *Aboo Yoosaf* and *Mohammed* hold

it

it abominable to ſalute any perſon that is engaged in play; ſince, in thus refraining, our abhorrence of gaming may be expreſſed. *Haneefa*, on the contrary, holds it proper, as being the means of diverting the parties from their game.

Preſents (except of *cloth* or *money*) and entertainments may be accepted from a mercantile ſlave.

THERE is no impropriety in a perſon receiving a preſent from a ſlave who is a merchant; or in accepting from him an invitation to an entertainment; or in borrowing his carriage: but it is abominable to receive from him a preſent either of cloth or money.—What is here advanced proceeds upon a favourable conſtruction of the law. Analogy would ſuggeſt that there is no difference whatever between his invitations and his preſents conſiſting of cloth or money;—in other words, they are all equally abominable in the acceptance, as being all *gratuitous* acts, to which a ſlave is not competent.—The reaſon, however, for a more favourable conſtruction of the law, in this particular, is that the prophet accepted a preſent from *Soliman* when he was a ſlave, and from *Bareerá* when ſhe was a *Mokátibá*. A number of the companions, alſo, accepted an invitation from the freedman of *Aboo Ruſſaid* whilſt he was yet a ſlave. There is, moreover, a ſort of neceſſity which operates upon a mercantile ſlave, and obliges him to give into theſe ſeveral cuſtoms. Thus, for inſtance, if a perſon, having gone to his ſhop with a view to purchaſe wares, and having requeſted of him ſomething to drink, ſhould be refuſed by him, in that caſe he would conſequently incur the imputation of covetouſneſs, few people would frequent his ſhop, and his trade would thereby be ruined. Beſides, when a ſlave is permitted to trade, he implicitly poſſeſſes all the power of a merchant in its full extent. But he is under no neceſſity of *clothing* people, or of diſtributing *money* to them; and hence it is not allowed to him to perform ſuch acts, in conformity with what analogy ſuggeſts upon this ſubject.

Generalrules with respect to infant orphans or foundlings.

If a person bestow any thing in gift or alms upon an orphan * under the protection of a particular person, it is lawful for that person to take possession of such gift or alms on his behalf.—It is here proper to remark, that acts in regard to infant orphans are of three descriptions.—I. Acts of *guardianship*, such as contracting an infant in marriage, or selling or buying goods for him; a power which belongs solely to the *Walee*, or natural guardian, whom the LAW has constituted the infant's substitute in those points.—II. Acts arising from the *wants* of an infant; such as buying or selling for him on occasions of need; or hiring a nurse for him, or the like; which power belongs to the maintainer of the infant, whether he be the brother, uncle, or (in the case of a *foundling*,) the *Mooltakit*, or *taker-up*, or the *mother*, provided she be maintainer of the infant; and as *these* are empowered with respect to such acts, the *Walee*, or natural guardian, is also empowered with respect to them in a still superior degree;—nor is it requisite, with respect to the *guardian*, that the infant be in his immediate protection.—III. Acts which are purely *advantageous* to the infant, such as accepting presents or gifts, and keeping them for him; a power which may be exercised either by a *Mooltakit*, a brother, or an uncle, and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infant's receiving benefactions of an advantageous nature.—The infant, therefore, is empowered in regard to those acts, (provided he be discreet,) or any person under whose protection he may happen to be.

It is not lawful for the *Mooltakit* [taker-up] of a foundling to hire him out in service; nor is it lawful for an uncle to do so by his infant nephew, although he be under his immediate care. It is otherwise with a *mother*; for she may lawfully let her infant child to hire, provided she have immediate charge of him; because a mother is em-

* Arab. *Lakeet.* Properly, a *foundling*. (See Vol. II, p. 257.)

powered

powered to use the services of her infant child by employing him, without tendering him any return,—whereas a *Mooltakit* or an uncle have not this power.—If the child should of himself enter into an engagement of service, it is not valid, as there is a possibility of its tending to his prejudice.—Still, however, if after having hired himself out he should fulfil his engagement, it is then valid; because in thus confirming it his advantage only is consulted; and he is consequently entitled to the hire agreed for.

A master must not fix an iron collar on the neck of his slave;

It is abominable for a person to fix an iron collar on the neck of his slave in such a manner as to deprive him of the power of moving his head, according to the custom of tyrants; because a punishment of this nature is like the torments of the damned, and is consequently unlawful, in the same manner as scorching with fire.

but he may imprison him.

A Mussulman may imprison his slave; for as a custom prevails amongst the *Mussulmans* of confining people who are mad or seditious, so in a similar manner it is lawful for a person to confine a slave, that he may prevent his absconding, and thus secure his property.

Glysters are allowed in cases of necessity.

It is not abominable to apply a glyster in a case of need; because medical practices are approved, in the united opinion of all our doctors, as well as by the traditions of the prophet. An application of this kind is, moreover, equally proper, whether it be administered to a man or woman. It is not allowable, however, to have recourse to any forbidden thing, such as *wine*, or the like; for it is unlawful to seek health by unlawful means.

The allowances of a *Kâzee* are to

It is not improper to defray the allowances of a *Kâzee* from the public treasury, because the prophet nominated *Atàb Bin Osaid*

 Kâzee

be defrayed from the public treasury.

Kázee of *Mecca*, appointing him his allowance from the public treasury there; and he also nominated *Alee* to be *Kázee* of *Yemn*, appointing him his allowance from the treasury there.—Besides, as a *Kázee* is, by the nature of his office, confined to the business of guarding the rights of *Mussulmans*, his maintenance is therefore drawn from their property, (and the public treasury is the property of the *Mussulman* community;) for a confinement to any particular office or duty entitles to maintenance; as holds in the case of an *executor*, or a *Mozáribat* factor who travels with the stock.—It is to be observed, however, that the propriety of the *Kázee* receiving his allowance from the public treasury is only where he takes it in a satisfactory manner, without any condition; for if he should refuse to undertake the office, unless the sovereign allow him a certain salary, it is unlawful; because he in such case demands a reward for the discharge of an act of piety; for such the office of a *Kázee* is; nay, the exercise of jurisdiction is the noblest species of devotion.—It is also proper to remark, that if a *Kázee* be *poor*, it is most eligible, or rather *incumbent* on him to receive his maintenance from the public treasury; for otherwise he would be unable to support the dignity of his office, from a necessary attention towards the concerns of his subsistence. If, on the contrary, he be *rich*, some deem it most eligible that he should *not* receive his allowance from the public treasury; whilst others maintain that it is incumbent on him so to do. The latter is the better opinion; because otherwise the office might be rendered low and contemptible; and also because, if an indigent person should succeed a rich *Kázee*, it would then be difficult for him to procure a salary, as that had been, perhaps, for a long time relinquished.

Case of a *Kázee* dismissed after having received his allowance.

If a *Kázee*, having possessed himself of one year's allowance, should be dismissed from his office before the expiration of that year, there is in this case a disagreement amongst our doctors, in the same

manner as they have differed in opinion where a wife dies in a ſimilar predicament *. The better opinion, however, is that he ſhould reſtore the exceſs.

Female ſlaves may travel without being attended by a kinſman.

THERE is no impropriety in a female ſlave or an *Am-Walid* travelling without being attended by a kinſman; becauſe a ſtranger (as has been already explained) is conſidered the ſame as a kinſman with reſpect to looking at or touching a female ſlave; and an *Am-Walid* is alſo a ſlave, as being *property*, although ſhe cannot be ſold.

* See Vol. I. p. 399.

HEDAYA.

HEDAYA.

BOOK XLV.

Of the CULTIVATON of WASTE LANDS*.

Definition of *Mawàt*,

MAWÀT (which is here rendered *waste land*) signifies any piece of ground incapable of yielding advantage, either from a want of water, an inundation, or any other cause, such as prevents tillage; and it is termed *Mawàt*, or *dead*, because, like the dead, it is of no use.

and description of the land so termed.

ANY piece of ground which, from a long time, has lain waste without belonging to any person, or which has been formerly the

* Arab. *Ahya-al-Mawàt*, meaning, literally, *the revival of the dead*.

property

property of a *Muſſulman*, who is not then known, and is likewiſe ſo far removed from a village that, if a perſon call out from thence, his voice cannot there be heard, is termed *Mawàt*. The compiler of the *Hedàya* remarks that this is the explanation of it as delivered by *Kadooree*. It is reported from *Mohammed* that it is requiſite the ground be neither the property of a *Muſſulman* nor a *Zimmee*; and likewiſe, that it be of no uſe; in which caſe it becomes abſolutely *Mawàt*: but that ground which is the property either of a *Muſſulman* or a *Zimmee* is not *Mawàt*.—If the proprietor be unknown, the ground in the mean time belongs to the *Muſſulman* community;—but if he afterwards appear, it muſt be reſtored to him, and the cultivator is reſponſible for whatever damage he may have occaſioned.—With reſpect to the ground being diſtant from a village, as mentioned by *Kadooree*, *Aboo Yooſaf* is of opinion that this is a condition, for this reaſon, that where the ground is contiguous to a village it cannot be ſaid to be entirely uſeleſs to the inhabitants of it. *Mohammed* holds it ſufficient that the villagers do not in reality make uſe of the ground, whether it be contiguous or not. The ſame opinion has been delivered by the *Imâm* ſtiled *Khabir Zàdà*: but *Shims al Aymà*, the *Siruckſhian*, has adopted the opinion of *Aboo Yooſaf*.

The cultivation of waſte lands inveſts the cultivator with a property in them.

WHOSOEVER cultivates waſte lands, with the permiſſion of the chief, obtains a property in them; whereas, if a perſon cultivate them *without* ſuch permiſſion, he does not in that caſe become proprietor, according to *Haneefa*. The two diſciples maintain that, in this caſe alſo, the cultivator becomes proprietor; becauſe of a ſaying of the prophet, "*Whoſoever cultivates waſte lands does thereby acquire* "*the property of them*;" and alſo becauſe they are a ſort of common goods, and become the property of the cultivator in virtue of his being the firſt poſſeſſor; in the ſame manner as in the caſe of ſeizing game, or gathering firewood. One argument of *Haneefa* on this point is a ſaying of the prophet, "*Nothing is lawful to any perſon but what is* "*permitted by the* IMÂM:"—and with reſpect to the ſaying quoted by

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the two disciples, it is to be construed merely into a *judicial permission*, (for the prophet was himself an *Imâm*,)—in the same manner as where he said, "*Whoever kills an infidel is entitled to his armour.*"—Besides, all waste lands are plunder, seeing that the *Mussulmans* acquired the possession of them by conquest: and hence no person can assume a property in them without the consent of the *Imâm*, as holds in all cases of plunder.

Tithe only is due from land so cultivated, unless it be moistened with tribute water.

If a person cultivate waste land, a *tithe* only is due from it, for it is unlawful to charge a *Mussulman* with tribute in the beginning: but if the land be moistened with tribute water, tribute may lawfully be imposed, as it then becomes due on account of the water.—If, also, a person cultivate waste lands, and afterwards relinquish them, and another then cultivate them, some have said that the second cultivator is best entitled to the property; for the first was owner of the *profits* merely, and not of the land itself; and therefore, upon his relinquishing it, the second obtains a superior claim. It is certain, however, that the first cultivator may resume the lands from the second, because he is proprietor of them in virtue of having brought them to a state of cultivation, (as appears from the saying of the prophet quoted in the preceding case,) and does not forfeit his property by the relinquishment.

In the cultivation of the circumjacent grounds, a road must be left to it.

If a person cultivate a piece of waste land, and four others afterwards so cultivate the circumjacent ground as to obstruct the passage into his property, it is reported, from *Mohammed*, that his road is to lead through the ground of him who cultivated last; for, after three of the sides bordering upon his property had been cultivated, the other of consequence remains for his ingress and egress; and therefore the person who cultivates it wilfully aims at the destruction of his right.

If

A *Zimmee* acquires a property in the land he cultivates, as well as a *Mussulman*.

If a *Zimmee* cultivate waste lands, he becomes proprietor of them, in the same manner as a *Mussulman*; because cultivation endows with a right of property. (*Haneefa*, however, holds that the consent of the *Imám* is requisite.)—A *Zimmee* and a *Mussulman*, therefore, are alike in this respect, in the same manner as in all other points of property.

If the land be not cultivated for three years after it is marked off, it may be transferred by the *Imám*.

If a person circumscribe a piece of ground, and set marks upon it with stones or such like, and keep it in that state for the space of three years without cultivating it, the *Imám* may in that case lawfully resume it, and assign it to another; because the ground was given to the first with a view to his cultivating it, so that a benefit might ensue to the *Mussulmans* from the collection of the tithe and tribute; and as he neglected this, it is therefore incumbent on the *Imám* to deliver it over to another, that the end for which it was given to the first may be answered.—Moreover, the encompassing of the ground with stones, &c. does not, like cultivation, create a right of property, since by *cultivating* the land is understood rendering it productive, whereas the encompassing it with stones serves merely to designate the boundaries: the land, therefore, still remains unappropriated as before.—With respect to the specification of three years, as here mentioned, it is founded on a saying of *Omar*, "*The marker has no right after three* "*years have elapsed.*"—It also proceeds on this principle, that three periods of time are requisite for a person who marks lands; one, that he may go to his place of abode after having set the marks; another, that he may there settle his affairs; and a third, that he may return to his land; and each of these several periods is determined at a year, as it is probable any less division of time, such as an hour, a day, or a month, might not suffice to answer the purpose. If, therefore, after the elapse of three years the marker return not to his lands, it is presumed that he has relinquished them.—Lawyers remark that what is here advanced proceeds upon a principle of equity; but that, in strictness of law, if a person cultivate the lands which another has marked

 before

before the elapſe of the period above mentioned, he becomes the proprietor of them, as in this caſe he is the cultivator, and not the other.

Manner of marking off waſte land.

It is here proper to obſerve that waſte lands may be marked by other modes beſides ſetting ſtones, ſuch as by ſurrounding them with the branches of trees; by burning the underwood and thorns which may be growing upon the lands; or by collecting them together and ſcattering them, mixed with a little earth, about the borders, without carrying them ſo uniformly round as to form a continued boundary; or, laſtly, by digging a trench one or two yards in width.

Cultivation is eſtabliſhed by digging and watering the ground,

It is related, as an opinion of *Mohammed*, that if a perſon dig up and water a piece of waſte land, he is then the *cultivator* of it; whereas, if he dig it up or water it ſingly, he is only held to have ſet a mark upon it.—In the ſame manner, if he dig a trench or ditch without watering the land, it is conſidered only as marking; whereas, if he moiſten it with water, after digging a trench, it is cultivation.

encloſing it, or ſowing it with ſeed.

If, moreover, a perſon raiſe an encloſure round the land ſo high as to be a dam to the water, he is held to have cultivated it; and ſo likewiſe if he ſow ſeed in it.

It muſt not be practiſed on the *borders* of land already cultivated.

It is not permitted to cultivate a piece of waſte land immediately bordering upon lands that are in a flouriſhing ſtate; as it is requiſite that a ſpace be left for the uſe of the cattle of the other proprietor, and alſo for piling up his ſtacks, whence ſuch land does not come under the deſcription of *waſte* any more than a river or a highway;—and accordingly, our doctors have ſaid, that it is not lawful for the *Imám* to beſtow on a perſon any article of indiſpenſable uſe to the *Muſſulmans*, ſuch as a ſalt-pit, or a well from which the people draw water to drink.

A *ſpace* is appropriated to wells dug

Whoever digs a well in waſte land is entitled to a ſpace or piece of land * round it. If, therefore, the well be dug for the uſe of camels,

* Arab. *Hareem*; meaning, literally, *prohibited to others*.

camels, a ſpace of forty yards is annexed to it.—This is related in the traditions. Several of our doctors have conſtrued the forty yards to mean the *aggregate* ſpace. The better opinion, however, is that forty yards are annexed to each ſide of the well; for as many lands are of a ſoft and humid ſoil, it might happen that if another perſon ſhould dig a well at a leſs diſtance from the firſt than forty yards, the water of the one might ooze through the earth and communicate with the other. If the well be dug with a view to drawing water from it by means of camels or other animals *, in that caſe the ſpace of ſixty yards is annexed, according to the two diſciples. *Haneefa* holds that in this caſe likewiſe only forty yards are allowed.—The arguments of the diſciples upon this point are twofold.—FIRST, a ſaying of the prophet, " *The precincts of a fountain are five hundred yards, of a well " from which camels may drink forty, and of a well from which water " is drawn ſixty yards.*"—SECONDLY, there is a neceſſity that a conſiderable ſpace be annexed to a well of this nature, ſince the camels may be required to be led to a diſtance from it, as the rope by which the water is drawn up is often of long extent; but where wells are ſo made that the water may be taken out by the hand, it is not neceſſary that any great ſpace be allotted on this account; and therefore a difference ſhould certainly be made between the two ſorts of wells. *Haneefa* argues from the tradition before cited, in which forty yards are mentioned, without diſtinguiſhing between the two ſpecies of wells. The objection, moreover, ſtarted by the two diſciples may be obviated by making the camels revolve round the well with the rope, inſtead of driving them directly from it.

in waſte lands;

IF the well have a fountain in it, the ſpace annexed to it is five hundred yards; becauſe of the tradition before quoted; and alſo, becauſe a large ſpace is here abſolutely requiſite; for as the fountain is brought out to water the ground, one ſpace is required through which

* See note in Vol. II. p. 327.

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the water may be conducted from the fountain; another for a reservoir wherein the water may be collected; and a third for conveying the water from the reservoir to moisten the lands for cultivation. A considerable space is therefore required; which is determined at five hundred yards, by the tradition; and this, according to the most authentic opinions, means five hundred yards on each side of the fountain; the yard measuring six spans.—(Some have said that the annexation of five hundred yards to a fountain is only in the country of *Arabia*, where the soil is hard; but that in our country, where it is soft, a larger extent is required, as otherwise the water of one fountain might transude through the earth and communicate with that of another.)

within the limits of which no other person is entitled to dig;

If a person attempt to dig a well within the limits of the proprietor of another well, in that case the other may prohibit him; because the limits of his well are his property, (as has been explained,) and therefore none has a right to encroach upon them. If, also, a person should actually dig a well within the limits of another, the first proprietor has in that case the option either of filling it up himself gratuitously, or of forcing the other so to do.—Some have said that, in this case, the first proprietor is to take a compensation for the damage from the other, and then to fill up the well himself;—in the same manner as where a person destroys a wall the property of another, in which case he must make reparation to the proprietor, who must rebuild it himself. This is approved. It is related in *Khassaf*'s treatise upon the duties of a *Kázee*, that the damage, in this instance, must be computed by a comparison of the value the first well bore before the other was dug, with what it bears afterwards; the difference shewing the loss sustained.

or, if any do so, he is responsible for such acci-

There is no responsibility for any thing which may happen to be destroyed by falling into the first of the two wells, as the proprietor, in digging it, was not guilty of any trespass.—This is evident, in the

 opinion

opinion of *Haneefa*, if he dug it with the conſent of the *Imâm*; and alſo in the opinion of the two diſciples, whether it was done with the conſent of the *Imâm* or not;—according to *Haneefa*, becauſe the digging of a well, in this inſtance, was the ſame as the ſetting of marks, which may be done without the conſent of the *Imâm*, although the property cannot be acquired without his permiſſion.—If, on the contrary, any thing be deſtroyed by falling into the *ſecond* well, it muſt be atoned for, as the proprietor of this well has been guilty of a treſpaſs in having dug upon the property of another. If, on the other hand, a perſon dig a well bordering on the precincts of another, without however encroaching upon it, and the water of that other ſhould then decreaſe, he is not liable to make any compenſation, as he is not here guilty of any tranſgreſſion.—In this laſt caſe, moreover, the ſecond digger is entitled only to the ground on three ſides of his well, as the ground on the ſide of the firſt well is the property of the firſt digger.

dents as it may occaſion.

WHOEVER digs a channel * for conducting water to any place, has a ſpace annexed to it, according to his want. It is related by *Mohammed* that an aqueduct is the ſame as a well, ſo far as regards the annexing of land to it.—Some ſay that this is the doctrine of the two diſciples; but that, according to *Haneefa*, no ſpace is allowed, except when the water appears above ground; for as an aqueduct is in fact merely a *rivulet*, it is therefore ſubject to the ſame rules. Several doctors have, however, maintained that when an aqueduct appears above ground, it is then conſidered in the ſame light as a ſpring or fountain; and that conſequently the ſame quantity of land is annexed to it, namely, five hundred yards.

A ſpace is alſo appropriated to a *water-courſe*;

IF a perſon plant a tree in a waſte ſpot of land, he is entitled to a ſmall

or to a *tree*

* Arab. *Kanât*. Perſ. *Kareez*. It is generally underſtood to mean a *ſubterranious aqueduct* or *drain*.

planted in waste land.

a small space as an appendage to it; wherefore no other person is allowed to plant a tree on the ground within his precincts, as this space is useful to him for collecting his fruits, and heaping them upon it. The space allotted to a tree is the measure of five yards, agreeably to what occurs in the traditions upon that subject.

The deserted beds of rivers must not be cultivated.

LANDS through which the *Euphrates*, the *Tigris*, or any similar river formerly ran, must not be cultivated, if it be possible that the river may again run over them; as the people whose lands lie adjacent to the river in its former course have an interest in desiring that the river may not be prevented from returning to it. If, however, the lands be not likely to be again overflowed, they are then held to be waste, provided they do not adjoin to any cultivated spot;—because such lands are not the property of any one; for the superiority of water repels all other superiority; but as soon as the land appears above the water it becomes subject to the *Imâm*.

A space is not allowed to an aqueduct running through another's land. without proof of prior right.

WHOEVER has the property of an aqueduct, which runs through land belonging to another, is not (according to *Haneefa*) entitled to any adjacent space, unless he produce evidence to prove his right.—The two disciples, on the contrary, maintain that he is, in virtue of his property in the aqueduct, entitled to the banks on which people pass, and which the earth thrown up by the excavation of it occupies. Some have said that the difference of opinion in this case is founded on that which obtains where a person digs a canal in waste lands by permission of the *Imâm*; for in this case, according to *Haneefa*, he is not entitled to any space; whereas the two disciples maintain that he is so entitled, since he can derive no advantage from the canal unless he possess a space annexed to it, as he must often be obliged to walk along the banks of it to clear away any incumbrances that may stop the course of the water, it being impracticable for a person, in the common course of things, to walk in the *middle* of it.—As, moreover, he is often necessitated to dam it with earth and clay, and it is impossible

possible for him to bring these from any distance without incurring an extraordinary expence; he is therefore entitled to a space of ground, in the same manner as a person who digs a well.—The argument of *Haneefa* is, that the claim to any space is repugnant to analogy, the right to it being established, in the case of a well, solely on the ground of the precept before quoted. Besides, the necessity for a space, in the case of a well, is more urgent than in the case of a canal or aqueduct; for, in the latter, the use of the water may be enjoyed without any space,—whereas, in the former, this is impossible, as the water must be pulled up by a rope, to effect which a space is requisite, as has been before explained. Hence there is an obvious difference between a well and a canal; and consequently they can bear no analogy to each other. The reason for founding the case in question on this is, that if the proprietor of the aqueduct be entitled to a space of land, he is held to be seized of the said space as a dependancy of the aqueduct; and the evidence of the possessor is valid in case of a contest; whereas if, on the contrary, he be not entitled to any space, he is not held to be seized of it, and circumstances therefore testify for the proprietor of the land; as shall shortly be explained.—If, however, the case in question be considered separately, and not as founded on the above, then the two disciples argue that the space is in the hands of the proprietor of the aqueduct, as he preserves the water by means of it,—whence it is that the proprietor of the land is not entitled to break it down.—*Haneefa*, on the other hand, argues that the dependant land resembles the other land of the proprietor, with respect both to appearance and substance:—with respect to appearance, because it is on a level with, and joins to it; and with respect to substance also, because it is of the same soil, and is equally capable of nourishing trees and vegetables; and circumstances testify for him who is in possession of what bears the greatest resemblance to the dependant ground, namely, the land adjacent to it;—in the same manner as where two people contend for a door-plank in the possession of some other person, and which exactly quadrates with another that is

possessed

poſſeſſed by one of the litigants; for in that caſe the *Kâzee* muſt adjudge ſuch plank to be the property of him who poſſeſſes the correſpondent one.—In reply to what the two diſciples further urge, it may be obſerved that the conteſt here does not hinge upon what was placed for the conſervation of the water [the banks,] but upon what is independant of it, and fit for producing trees, &c. Beſides, ſuppoſing that the proprietor of the aqueduct preſerves the water only on account of the dependant ſpace of land, it may be anſwered that the proprietor of the ground preſerves it only on account of the dependant ſpace of land likewiſe.—With reſpect, moreover, to what they urge, that "the proprietor of the land is not entitled to break down the "banks of the aqueduct," it is to be obſerved that this is not becauſe they are the *property* of the proprietor of the aqueduct, but merely becauſe he has an *intereſt* in them;—in the ſame manner as where a perſon is poſſeſſed of a wall, and another, having the property of a wall near it, lays beams acroſs both with the aſſent of the other; for in ſuch caſe the other has not afterwards the power of pulling down his own wall, ſince he muſt thereby injure the right of this perſon.

Differences of opinion concerning aqueducts.

It is related, in the *Jama Sagheer*, that if a perſon poſſeſs an aqueduct, having banks on each ſide, and adjacent to them a piece of land belonging to ſome other perſon, and the banks be not in the hands of any one, that is to ſay, be deſtitute of marks, ſuch as trees, ſtones, or the like, to determine the property, thoſe banks belong to the proprietor of the land, according to *Haneefa*;—whereas the two diſciples hold that they appertain to the proprietor of the river.—If, on the contrary, the mark of any perſon be left upon them, they are then unanimouſly of opinion that the marker has the better claim.—Still, however, they differ in opinion where there is a tree upon the banks, and it is not known who planted it; for *Haneefa* is of opinion that to plant a tree is the right of the proprietor of the ground, whilſt the two diſciples hold this to be the right of the proprietor of the aqueduct.

duct.—With respect, also, to throwing up earth, many have said that there is a disagreement; whilst others have said that this belongs to the proprietor of the aqeduct, provided he do not exceed the prescribed bounds. With regard to walking upon the banks, some have said that it is not permitted, in the opinion of *Haneefa*; whilst others have said that it is not prohibited, because of there being a necessity for it. The learned *Aboo Jáfir* has said that he would decree according to the opinion of *Haneefa* in the case of planting a tree,—and according to that of the two disciples, in the case of throwing up earth. It is reported, from *Aboo Yoosaf*, that the width of the dependant space of an aqueduct is half the breadth of the aqueduct; but according to *Mohammed* it is the whole breadth: and this opinion is the most favourable to mankind.—It is here proper to observe, that the subject resolves itself into several sections, treating of the cases of *Shirbá*, or a right to water, whether derived from the possession of land, or from other causes.

SECT. I.

Of Waters.

All people have a right to drink from a well, canal, or reservoir; and also cattle;

If a person have the property of a canal, a well, or a reservoir, he cannot prohibit either man or beast from drinking of it.—Here it is necessary to premise that water is of four kinds. I. The water of the ocean, which every person has a right to drink, or to carry away for the purpose of moistening his lands.—If, therefore, a person incline to dig a canal, and convey the water in it from the ocean to his land, no person has power to prevent him from so doing; for the enjoyment of the water of the ocean is common to every one, in the same man-

 ner

ner as the light of the ſun or moon, or the uſe of the air.—II. The water of large rivers, ſuch as the *Oxus*, the *Euphrates*, or the *Tigris*, in which every perſon has an abſolute right to drink, and alſo a conditional right to uſe it towards moiſtening his lands;—that is to ſay, a perſon, if he cultivate waſte land, may dig a channel for the purpoſe of conveying water to it from the river, provided his doing ſo be not detrimental to the people: but if there be a probability of its being hurtful in its conſequences, (as if, by opening the banks, the water ſhould overflow the country and villages around,) in that caſe he is not permitted to dig a channel for the watering of his land, as the prevention of a public evil is a conſideration of greater moment.—Analogous to this, alſo, is the erection of a mill on the banks of a river; for the demolition of the banks by the mill is the ſame as by watering land.—III. Water in which ſeveral have a ſhare;—and in which, likewiſe, the right of drinking is allowed to every one; for it is recorded in the traditions that three things are common to all, namely, *water*, *graſs*, and *fire*. Beſides, wells, and the like, are not dug for the purpoſe of *preſerving* water; and hence the water of them is not the property of any one; for it is common, and as ſuch cannot be made a particular property until it be ſeparately kept and preſerved;—as holds with reſpect to a deer that only ſleeps upon a perſon's ground. There is, moreover, a neceſſity for eſtabliſhing this common right with regard to water, ſince it is impoſſible for every perſon to carry it along with him; and as a perſon may be in want of it for himſelf and his horſe, mankind would therefore be too much cramped if an unlimited uſe of it were not granted them. If, however, a perſon incline to bring water to moiſten the land he had cultivated from a river or canal which belongs to others, the proprietors may prevent him, as otherwiſe their right of watering * would be entirely deſtroyed.—IV. Water which is preſerved, or, in other words, kept in veſſels. Water of this deſcription is property, becauſe of its detention; and

* Arab. *Shirbá*, a particular right to water, explained in the courſe of this book.

 the

the right of others no longer extends to it;—in the ſame manner as holds with reſpect to game, after being taken by any perſon. Nevertheleſs, it is doubtful whether this water may not alſo be participated, becauſe of the tradition before quoted. Hence, if a perſon, in a time of ſcarcity, ſteal a quantity of water equivalent to the amount which conſtitutes theft, he is not liable to amputation.

unleſs there be other water at a little diſtance.

If a perſon be poſſeſſed of a well, fountain, or rivulet, he may prevent any one from drinking the water of them, or encroaching on his property, provided there be other water at a little diſtance, and which is not the particular property of any one. If, however, this be not the caſe, the proprietor muſt then either bring him water to drink, or permit him to take it himſelf, on condition that he deſtroy not the banks. What is here advanced is reported from *Tahâvee*.— Some have ſaid that this is approved, in caſe the poſſeſſor of the well have dug it himſelf in land which is his own property: but that, if he ſhould have dug it in waſte lands, he is not, in that caſe, on any account permitted to prohibit others from entering on his premiſes to drink water; for the waſte lands are a common right; and as the well was dug towards the promoting of a common right, namely, tithe and tribute, it follows that the digging of it is not deſtructive of the liberty of drinking. If, therefore, the proprietor refuſe the other permiſſion to drink, and that other be apprehenſive either of the death of himſelf or his horſe from an exceſs of thirſt, he may then lawfully oppoſe the proprietor with weapons, as he has already aimed at his deſtruction in withholding his right, namely, the water; for the water of a well is common, and is not property.— It is otherwiſe with reſpect to water kept in veſſels; for a perſon in want of it where it is ſo kept, is only permitted to contend with the poſſeſſor of it *without* weapons. The ſame law obtains in the caſe of a perſon oppreſſed with hunger. Many have ſaid that in the caſe of a well it is not lawful to uſe weapons; but that it is

allowable

allowable to contend with a ſtick; for the poſſeſſor is guilty of an offence in refuſing the water; and the application of a ſtick is a ſubſtitute for correction.

Water may alſo be carried away for the purpoſe of ablution,

or for watering trees or parterres.

It is lawful for men to carry away water from a rivulet to perform their ablutions, or to waſh their garments.—This is approved; becauſe, to deſire men to purify themſelves, or to waſh their garments with ſuch water, *without carrying it away*, (as mentioned by ſome,) would be attended with much inconvenience.—If, alſo, a perſon be inclined to water the trees or ſmall parterre before his houſe, he may lawfully carry away water for that purpoſe from the rivulet of another; for the law allows great liberty in the caſe of water, and conſiders the refuſal of it as truly opprobrious.—A perſon is not, however, allowed to carry away water either from the rivulet, well, or aqueduct of another, for the uſe of his orchard or fields, unleſs he be expreſsly permitted ſo to do; and the proprietor may prohibit him from it; becauſe when water is poſſeſſed in joint property, none but the proprietors have any right to the uſe of it, as otherwiſe their right would be defeated.—Still, however, the proprietor of the river may, if he chooſe, either give or lend the water of it to another, becauſe it is his property, and becauſe the gift of ſuch is cuſtomary; in the ſame manner as holds with reſpect to water preſerved in veſſels.

SECT.

SECT. II.

Of digging or clearing Rivers*.

Rivers are of three kinds.—I. Such as are not the property of any; and of which the waters have not been divided, like the *Tigris*, *Euphrates*, &c.—II. Such as, being appropriated and divided, are at the ſame time public rivers, in which boats ſail.—III. Rivers that are held in property, and divided; and are alſo private, in which no boats ſail.—In the firſt kind of rivers, if the river fill up ſo as to require digging, the care thereof devolves upon the chief †, who is to defray the charges of it from the public treaſury; for as the work is performed for the advantage of the *Muſſulman* community, the expence attending it muſt be defrayed from the *property* of the community:—thoſe expences muſt, however, be diſburſed from the funds of *tribute* and *capitation-tax*, and not from thoſe of *tithe* and *alms*; for the latter are appropriated ſolely to the uſe of the poor, whereas the former are intended as a proviſion to anſwer contingencies.—If there be not any money in the public treaſury, the chief is in that caſe at liberty, with a view to promote the public utility, to compel the people to repair the damage in queſtion, as it is preſumed they would not of themſelves apply to the work,—whence it was that *Omar Farook* ſaid to the people, "*Were I to leave you to your own direction, without ever* "*uſing compulſion, verily, matters would come to ſuch a paſs that you* "*would even ſell your children.*"—None, however, muſt be com-

Rivers are of three deſcriptions.

Great public rivers muſt be cleared and repaired at the expence of the public treaſury;

or by a general contribution of labour;

* Arab. *Nihr.*—It is a term of very general application, ſignifying not only *rivers* properly ſo called, but alſo *canals*, or any other ſpecies of aqueduct conſtructed by art.

† Arab. *Wâlee*; meaning, generally, the governor of a province or diſtrict.

pelled but ſuch as are able to work; and ſuch as are not able to work, and are rich, muſt pay a certain ſum, according to their particular ſtation and ability.—With reſpect to the ſecond kind of river, it muſt be cleared, when requiſite, at the expence of the proprietors, without any ſupply from the public treaſury; for the right of the river particularly belongs to them, as does alſo the uſe of it.—If, therefore, any one of them ſhould refuſe to aſſiſt in digging, the chief may compel him, to the end that the others may not ſuffer any injury by his refuſal.

and *appropriated* rivers, at the expence of the proprietors.

OBJECTION.—It would appear that, in being thus forced to work, the refuſer ſuffers an injury.

REPLY.—Such injury is particular, and is not without its uſe, for in recompence thereof the party obtains his ſhare of the water; it is not, therefore, to be put in competition with the common injury that would otherwiſe be ſuffered by the reſt.

—If, alſo, ſome of the proprietors of the river be deſirous of ſtrengthening the banks, from an apprehenſion that they might give way, and it be probable that bad conſequences may enſue from their decay, (ſuch as inundating the neighbouring country, and breaking up the roads,) the chief may in that caſe uſe compulſion with any of them who refuſe to aſſiſt in the undertaking. He muſt not, however, uſe force where the decay of the banks cannot produce any bad conſequence; for the fall of the banks is an event merely *probable*. It is otherwiſe with reſpect to clearing a river in a caſe of neceſſity; for that is a matter of certainty,—whence it is that compulſion may be uſed to effect it.—With reſpect to the third kind of rivers, they are particularly appropriated, and therefore the digging of them is entirely the duty of the proprietors.—Some have alleged that the magiſtrate may employ force with any who refuſe to dig; in the ſame manner as in the caſe of the ſecond kind of rivulets. Others, again, have maintained that the magiſtrate has not a power of this kind; ſince both of the injuries, namely, that of the partner on whom compulſion is uſed, and alſo that which the other partners ſuſtain in conſequence

of

of his refusal, are private; and the injury to the other partners may be remedied by their taking from the one who refuses to work a part of the expence incurred in digging the rivulet, proportionately to his share; (provided, however, that the work be executed at the instance of the magistrate.)—It is otherwise with respect to the *second* kind of rivers, as there one of the injuries is *public*.

Objection.—Here likewise is a conjunction of two injuries; and as one of these (namely, that sustained by those who have a right to drink the water) is public, it would follow that, to prevent this public injury, compulsion may be used in the case of private rivers likewise.

Reply.—No compulsion is used in digging towards obtaining water to drink:—thus if the whole should refuse to dig, the magistrate cannot employ force *.

Rules with respect to drains, watercourses, &c.

In digging a watercourse, the expence incurred in the upper part is equally defrayed by the whole of the partners: but when the work is carried beyond the land of any one of them, he is then, according to *Haneefa*, exempt from all further charge. The two disciples maintain that the expences of digging from the head to the end of the watercourse is jointly defrayed by the several partners, according to the extent of their shares; because the partner possessing the higher share has likewise a right in the lower ones, they being needful to him, in receiving the discharge, from his part, of the superfluous water. *Haneefa*, in support of his opinion, argues that the end of digging the watercourse being to obtain water for the purpose of cultivation, the object of the higher sharer is consequently obtained when his part is finished; and he is not, therefore, under any obligation after that to assist in prosecuting the work solely for the benefit of others.—With

* When water is wanted, towards moistening lands for cultivation, the magistrate may then employ force in causing a rivulet to be dug; but not where the water is wanted only to drink.

 respect,

respect, moreover, to what the two disciples urge, it may be replied that, although the higher partner do indeed stand in need of the lower shares, for the passing away of the superfluous water from his share, yet he is not, on that account, obliged to dig these lower shares;—in the same manner as where a person has a right of passing the water from his house upon the terrace of another; in which case he is not under any obligation to unite in building or repairing such terrace.—Besides, the higher partner may at any time prevent the water from overflowing his land, by occasionally damming up the source or spring, thereby preventing the flow of any superfluity of water into his share.

When, in digging a watercourse common to several partners, the work is carried beyond the share of one of them, who is thus exempted from any further charge, some have alleged that he may then immediately open the spring-head, or inlet, in order to obtain water for cultivation, as the watercourse, with respect of him, is wholly dug. Others have said that he cannot do so until the shares of the other partners be likewise completed; in order to prevent any preference among them.

Such persons as have only a right to *drink* the water, are not subject to pay any part of the charges of digging, as those are numberless, and are, moreover, subordinate to the actual sharers.

SECT.

SECT. III.

Of Claims of SHIRB *; *and of Disputes and particular Privileges with respect to it.*

A right to water may exist independant of the ground.

A CLAIM of *Shirb*, or right to water, is valid independant of any property in the ground, upon a favourable construction of the law; for a person may become endowed with it, exclusive of the ground, either by inheritance or bequest; and it sometimes happens that when a person sells his lands he reserves to himself the right of *Shirb*. Besides, *Shirb* being a desirable object, and also capable of yielding advantage, the claim to it is therefore valid.

No person can alter or obstruct the course of water running through his ground.

IF a person be possessed of a rivulet running through lands which are the property of another, and the proprietor of these lands, being desirous that it should not run through them, attempt to prevent it, on the plea of its being his property, he must not be permitted to do so, but the rivulet must be suffered to flow in its usual channel;—for, as the rivulet is in the possession of the person who has the property of it, because of his water running in the bed of it, his word, in case of a litigation, is therefore to be credited in preference to that of the other;—whereas, if the rivulet were not in his possession, (as if it should contain no water,) in that case the word of the proprietor of the lands would be credited;—unless the other could prove by witnesses that the rivulet is his property, or that he formerly con-

* This term, which is purely technical, the translator, for the convenience of the *English* reader, has rendered, in general, *a right to water*.

veyed water through it towards his own grounds for the purpoſe of watering them,—when the *Kâzee* muſt decree it to him, as he thus ſubſtantiates his claim.—(Analogous to this is a contention concerning the property of a river-head, or a water drain, a ſpout, or a road through the court of another.)

In caſe of diſputes, a diſtribution of the right to water muſt be made.

If a rivulet be jointly held by ſeveral perſons, and they diſpute concerning their particular proportions of right to water, a diſtribution muſt be made according to the extent of land which they ſeverally poſſeſs;—for as the object of right to water is to moiſten their lands, it is conſequently fit that each receive in proportion to his territory.—It is otherwiſe in the caſe of a *road*; for the object in that being to paſs and repaſs, the ſmallneſs or largeneſs of the houſe is of no weight in the diviſion;—that is to ſay, if the partners in a road diſpute concerning their ſhares, it is decreed that they ſhall hold it equally, and that no diſtinction ſhall be made from the difference of their houſes.

A rivulet muſt not be dammed up for the convenience of one partner, without the conſent of the others.

If it happen that the perſon who poſſeſſes the higheſt part of a rivulet be not able, without ſtopping the current, to enjoy his right to water in a ſatisfactory manner, (for this reaſon, that his lands, being high, precipitate the water from them with great velocity,) ſtill he muſt not be permitted to dam the rivulet, as he would thereby deſtroy the right of the others: he muſt, therefore, take his ſhare without ſtopping the current. If, however, the others aſſent to his ſtopping the current that he may the better water his land, or enter into an agreement that each ſhall ſtop it in his turn, it is lawful, as being their right. But if it be poſſible to effect the ſtoppage with a board, they muſt not uſe clay, or any kind of plaiſter, without the conſent of the whole, as an injury would be thereby occaſioned to the other ſharers. 8

One partner in a rivulet cannot dig a trench or erect a mill upon it without the general consent;

It is not permitted to any of the sharers to dig another rivulet leading from the common one, or to erect a water mill upon it;—because, in the former instance, the bank of a common rivulet must necessarily be broken; and in the latter, an erection is made of a building upon a partnership concern;—unless, however, the mill be stationed on the builder's land, and be not injurious, either to the ground, by breaking down the banks, or to the water, by diverting it into another channel;—in which case it is lawful, as being the exercise of a power derived from property, and from which there results not any injury to others.—(The erecting of a machine for raising water by camels, or oxen, is considered in the same light as the erecting of a mill.)—It is likewise unlawful for any of the sharers either to erect a small bridge which may be occasionally withdrawn, or a large one of stone or bricks which is durable and fixed.—In short, a private rivulet is considered in the same light as a private road, in which several participate, but in which none have any particular privileges.—It is otherwise where a person possesses a *small* private rivulet brought out from a large private one jointly held by several; for in that case, if the proprietor of the little rivulet choose he may erect upon it a large solid bridge; or, if there was previously a bridge over it, he may if he please pull it down, (provided a greater quantity of water than formerly do not, by that means, flow into his rivulet,) for under these circumstances the demolition of the bridge is lawful, being in virtue a power derived from his own property, which occasions no detriment to others. He must not, however, extend the inlet of the smaller rivulet, as he would thereby destroy the banks of the large one, and likewise draw a greater quantity of water into his own than is his due.—Neither must he be suffered to enlarge the sluice through which he receives his share of water, where the distribution is made in that manner,—that is, where boards with holes are fixed on the bank of the river contiguous to the lands of each partner, that he may receive, as his share, what-

nor construct a water engine or a bridge.

ever

ever quantity of water iſſues through his board.—But any of them who chuſes may either heighten or lower his particular board, as the equality of the diviſion depends upon the largeneſs or ſmallneſs of the holes, and not upon the height or lowneſs of them, for an alteration in that reſpect occaſions no difference in the diſtribution.

One partner cannot alter the mode of partition without the other's conſent;

If, where the diſtribution is made by ſluices, in the manner above deſcribed, one of the partners chooſe that the partition be made by the meaſure of time, he is not at liberty ſo to adjuſt it, unleſs with the concurrence of the others; for whatever is the eſtabliſhed mode muſt be continued; as the right of every one is by that means more clearly diſtinguiſhed.

or increaſe the number of openings through which he receives his ſhare,

If each partner in an appropriated rivulet have a ſpecific number of holes or ſluices allotted to him, it is not permitted to any of them to increaſe that number, notwithſtanding it may occaſion no injury to the others; for here exiſts a partnerſhip in particular property, and in which the right of each is particularly ſpecified.—It is otherwiſe in the caſe of large rivers, ſuch as the *Tigris* or the *Euphrates*; for as there any perſon is at liberty to dig a ſmall rivulet, and fill it from them, he is conſequently at liberty to increaſe the holes or ſluices through which the waters paſs from them.

or convey his ſhare into lands not entitled to receive it,

or through ſuch lands into thoſe that are entitled:

It is not lawful for any of the partners in a river to convey his ſhare of water into ſuch of his lands as are not entitled to receive water from that river; for this circumſtance might, in proceſs of time, furniſh an argument of his having a right to water theſe lands from that river.—Neither is it lawful for a partner to convey his ſhare of water through ſuch of his lands as are not entitled to it, into others that are; for, in this caſe, it

it is probable he would receive a greater quantity of water than his due, as part would be abſorbed by the lands through which they firſt paſſed. (This is analogous to the caſe of a joint road, where one of the partners wiſhes to open a road to the inhabitants of a houſe, in the ſame range, whoſe road lies through another way, by permitting them to paſs through his houſe in their way to their own.)

neither can he ſhut up any of the water-vents,

If two perſons poſſeſs a rivulet jointly, and receive their ſhares by water iſſuing through ſluices, and the one whoſe ſhare lies neareſt to the ſource be inclined to ſtop ſeveral of the ſluices allotted to him, to prevent the iſſue of a ſuperfluity of water into his lands, he muſt not be allowed ſo to do, as he might thereby ſubject the lands of the other ſharer to be overflowed.—Neither is he at liberty to change the mode of participation, by taking the uſe of the whole, in rotation, inſtead of each receiving a moiety of the whole quantity; for as the diviſion has already been ſettled by the mode of vents or ſluices, he cannot afterwards require any other mode,—unleſs the other aſſent, in which caſe he may do ſo;—it ſtill, however, remaining at the option of this partner (or of his heir, after his deceaſe) to annul this, and revert to the former mode;—becauſe the eſtabliſhment of a diviſion, by giving the whole to each in rotation, in a caſe where each had formerly held a ſeparate ſhare, is, in fact, *lending* a right to water, (as an exchange of *Shirb* for *Shirb* is null;) and a right to water is inheritable, or the *uſe* of it may lawfully be left in legacy; but it can neither be ſold nor beſtowed in gift, nor left in legacy to ſell, give away, or beſtow in alms, theſe ſeveral deeds being unlawful on account of the uncertainty to which they are liable, either from ignorance or deceit, with regard to the quantity of water,—or becauſe *Shirb* is not, in itſelf, a ſubſtantial property, but rather a privilege or immunity, inſomuch that if a perſon water his lands from the *Shirb* of another, he

or adopt a partition by *rotation*.

he is not liable to make compenſation for it;—and theſe ſeveral deeds being void, a legacy for any of theſe purpoſes is alſo void.

A right to water cannot be conſigned as a dower;

A RIGHT to water is incapable of being aſſigned as a ſpecific dower in a contract of marriage; wherefore if ſuch be mentioned in a marriage contract, a *Mihr-Miſl*, or *proper* dower, is due. In the ſame manner, alſo, it cannot be given as a conſideration for *Khoola*;—whence, if a wife bargain for her divorce, in conſideration of her making over ſuch right, the huſband may reſtore it to her, and, in lieu of it, take from her the dower he had aſſigned her on their marriage. The ground on which the law in theſe caſes proceeds is, that a right to water is a matter the extent of which cannot be aſcertained with any preciſion.

or given as a conſideration for *Khoola*,—

or in compoſition for a claim;

A RIGHT to water is incapable of being given in compoſition for a claim; for as it cannot, by means of any deed whatever, be rendered property, a compoſition in conſideration of it is conſequently null.

or ſold, (without ground,) to diſcharge the debts of a defunct:—(mode to be purſued in this laſt inſtance.)

A RIGHT to water, without ground, cannot be ſold after the death of any perſon to diſcharge his debts,—in the ſame manner as it cannot be ſold during his lifetime. What, then, ſhall the *Imâm* do, in this caſe, towards ſettling the debt of the deceaſed?—This queſtion has given riſe to a diverſity of opinions; but the moſt adviſeable method of proceeding, in ſuch an inſtance, is to join the right to the lands of another perſon not poſſeſſing ſuch right, and then, with his conſent, to diſpoſe of both;—when, computing how much the value of the lands has been increaſed by the addition of the right, he may apply the difference towards paying off the debts of the deceaſed. If he be not able to procure land in this manner, he may buy a piece of land, payable from the effects of the deceaſed, and, having joined it to the right, ſell them together; when, with the

price

price so obtained, he must first discharge the purchase-money of the land, and then apply the residue to discharging the debts of the deceased.

Any accident from the use of the water, does not induce responsibility.

If a person, having moistened his lands, or filled them with water, should by that means overflow the lands of his neighbour, he is not, in such case, liable to make a compensation, as he was not guilty of any transgression.

HEDAYA.

BOOK XLVI.

Of PROHIBITED LIQUORS.

There are *four* prohibited liquors. I. *Khamr*, (the *crude* juice of the grape,)

THERE are four prohibited liquors,—the firſt of which is termed *Khamr* *, meaning (according to the expoſition of *Haneefa*) the crude juice of the grape, which, being fermented, becomes ſpirituous,—firſt gathering foam and ſettling, and then poſſeſſing an inebriating quality. According to the two diſciples, the juice be-

* The tranſlator has, in the courſe of the work, rendered every inebriating drink under the general term *wine*, which comprehends all deſcriptions of prohibited liquors.—In this book, however, he retains the original terms for the ſake of diſtinction.

comes

comes *Khamr* upon its fermenting, and being ſpirituous without the condition of its gathering foam;—for whenever the juice of grapes becomes ſpirituous, the appellation of *Khamr*, and the characteriſtic of it, namely, *illegality*, are both eſtabliſhed.—The argument adduced by *Haneefa* is, that fermentation is the commencement of the proceſs by which liquor becomes ſpirituous, and which is compleated when it foams and ſettles, as by that means the dregs are ſeparated from the finer particles;—and the ordinances of the LAW regarding *Khamr*, (which are deciſive,) ſuch as puniſhment for drinking it, the holding him an infidel who ſhall deem it lawful, and the prohibition againſt ſelling it,—have all a reference to the *completion*. Some of the learned allege that it is declared unlawful to drink after having become ſpirituous, purely from motives of caution.—Others, again, maintain that the term *Khamr* is applicable to whatever is of an inebriating quality; becauſe it is mentioned in the traditions, that "*whatever inebriates is* KHAMR;"—and (in another tradition) "KHAMR *is produced from two trees, namely, the* VINE *and the* "DATE." The term *Khamr*, moreover, is derived from *Mokhàmirà*, ſignifying, *ſtupefaction*, or *deprivation of ſenſe*, which is a conſequence of drinking *any* inebriating liquor.—In reply to this, however, *Haneefa* argues that the term *Khamr*, according to the concurrent opinion of all lexicographers, is uſed only in the ſenſe above mentioned, whence it is that to liquors of other deſcriptions other terms are applied, ſuch as *Nabeez*, *Tabeekh*, and *Moſillis* *. Another argument is that the illegality of *Khamr* is *indubitable*,—whence, if every inebriating liquor were *Khamr*, all ſuch would of courſe be likewiſe indubitably illegal,—whereas this is not the caſe, for there is a doubt regarding them. In reply, moreover, to the arguments of *ſome* of the learned as above adduced, it is to be remarked that the firſt recited tradition is not perfectly authentic, *Yehya Ibn Mayeen* having diſ-

* Theſe are different kinds of liquor, extracted from dates, which are more particularly deſcribed a little farther on.

 puted

puted it;—and with respect to the *second* quoted tradition, the intention of it was merely to explain the LAW, or, in other words, to shew that all liquors extracted from either of the two trees mentioned, being of an inebriating quality, are unlawful as well as *Khamr*.

which is unlawful in *any* quantity,

KHAMR is in itself unlawful, whether it be used in small or great quantities, the illegality not depending on drinking it to such a degree as to produce *intoxication*. Some of looser principles reject the *absolute* illegality of *Khamr*, alleging that its *effects* only are the cause of its illegality; because the evil of it is, that it creates an inattention towards the worship of GOD; and as this evil is occasioned only by *intoxication*, it follows that where this does not take place it is not unlawful.—This, however, is gross infidelity, and in direct contradiction to the KORAN, GOD having there termed such liquor *filth*, a thing which is unlawful in its own nature. Besides, the prophet has decreed *Khamr* to be unlawful, according to various traditions; and all the doctors are unanimously of this opinion. It is to be observed, however, that although *Khamr* be unlawful, even in so small a quantity as may not be sufficient to intoxicate, yet the same law does not hold with respect to other things of an inebriating quality; for a little of them, if not sufficient to intoxicate, is not forbidden. *Shafeï*, indeed, is of opinion that these are likewise unlawful, in any quantity.

is *filth* in an extreme,

KHAMR is filth in an extreme degree, in the same manner as urine; for the illegality of it is indisputably proved, as has been already shewn.

WHOSOEVER maintains *Khamr* to be lawful is an infidel *, for he thereby rejects incontestable proof.

* And consequently becomes exposed to the penalties of apostacy.

KHAMR is not a valuable commodity with respect to *Mussulmans*. If, therefore, it be *destroyed* or *usurped* by any person, there is no responsibility. The sale of it is moreover unlawful; for GOD, in terming it *filth*, manifested a detestation of it; whereas, if it had been a commodity of value, some respect would have been shewn to it.— Besides, it is recorded in the traditions, that "*he who prohibited the* "*drinking of it, did likewise prohibit both the sale of it and the use or* "*enjoyment of the price of it.*"

and cannot constitute property with a *Mussulman*.

IF a *Mussulman* be indebted to another, and wish to discharge the debt with the price of *Khamr*, in that case both the payment and receipt is unlawful, because such price is produced from an illicit sale, and is considered either as an usurpation or a trust in the *Mussulman's* hands, according to the different opinions of the doctors on this subject; in the same manner as in the case of the sale of carrion. If, on the contrary, the debtor be a *Zimmee*, it is lawful for his *Mussulman* creditor to receive such payment; as the sale of *Khamr* is legal amongst *Zimmees*.

nor be employed in the discharge of his debts,

IT is unlawful to derive any use from *Khamr*, either as a medicine, or in any other manner; because the use of *filth* is forbidden; and also, because abstinence from it is enjoined; and this injunction could not be observed in case of its use being allowed.

or used by him,

WHOEVER drinks *Khamr* incurs punishment, although he be not intoxicated; for it is said, in the traditions, "*Let him who drinks* "KHAMR *be whipped;—and if he drink it again, let him be again in the* "*same manner punished.*" The whole of the companions are agreed upon this point; and the number of stripes prescribed is eighty, as has already been shewn in treating of *punishments*.

and the drinking of which, in any quantity, induces punishment,

IF a person boil *Khamr* until two thirds of it evaporate, it is not thereby rendered lawful. If, however, a person drink of it after such

(unless it be *boiled*:)

ſuch proceſs, he is not liable to puniſhment, unleſs he be intoxicated.

but it may be converted into vinegar.

It is lawful to make vinegar of *Khamr*. *Shafeï*, however, holds a different opinion.

II. *Bàzik*, (the *boiled* juice of the grape,) termed (when boiled away to one half) *Moniſſaf*.

Thus much with reſpect to *Khamr*, the firſt in order of prohibited liquors.—The ſecond ſpecies of prohibited liquor, is the juice of grapes boiled until a quantity leſs than two thirds evaporate. This is denominated *Bàzik*. It is alſo termed *Moniſſaf*; but that is only where exactly one half of it evaporates in boiling. This kind of liquor is unlawful, according to all our doctors:—according to the two diſciples, when it only ferments and becomes ſpirituous;—and according to *Haneefa*, when it foams and ſettles. *Oozràï* has ſaid that *Moniſſaf* is lawful; (and ſeveral of the tribe of *Mutazali** have ſeconded this opinion;) becauſe it is a good liquor, or, in other words, is pleaſing to the palate; and alſo, becauſe it is not *Khamr*. The argument of our doctors is, that as *Moniſſaf* is pure, and equally delicious with *Khamr*, a number of the idle and diſſolute are conſequently tempted to drink it; and it is therefore prohibited, with a view to prevent that diſſipation which it is found to occaſion.

III. *Sikker*, (an infuſion of dates.)

The third ſpecies of unlawful liquor is termed *Sikkir*; and is made by ſteeping freſh dates in water until they take effect in ſweetening it; when it is both *unlawful* and *abominable* to drink of it. *Shareek-Ibn-Abdoola* alleges that it is lawful, as God, ſpeaking of his bounty in the Koran, ſays "Ye enjoy *Sikker* from the grape and the "date;" whence we may infer that it is allowable, as *bounty* cannot apply to any thing unlawful. The argument of our doctors is the concurrent opinion of all the companions upon this point; and with

* A particular heretical ſect of the *Muſſulmans*. (See *Sales*' Preliminary Diſcourſe, Sect. 8.)

reſpect

reſpect to the text above cited, it has a reference to a *particular period*, having been revealed in the infancy of the religion of *Iſlam*, when all ſorts of ſpirituous liquors were lawful.

IV. *Nookoo Zabeeb*, (an infuſion of raiſins.)

The fourth ſpecies of prohibited liquors is *Nookoo-Zabeeb* *, that is, water in which raiſins are ſteeped until it become ſweet, and is affected in its ſubſtance. This kind is, however, lawful when merely it poſſeſſes a *ſweet quality*;—and is prohibited only when it ferments and becomes ſpirituous. *Oozràï* is of a different opinion regarding this liquor likewiſe.

The three laſt are not ſo illegal as *Khamr*.—They may be held legal, without incurring a change of infidelity, and may be drank (ſo as not to intoxicate) without puniſhment.

It is to be obſerved that the illegality of theſe liquors, namely, *Bàzik*, *Moniſſaf*, and the *Nookoo* of dates and raiſins, is inferior to that of *Khamr*. If, therefore, any perſon hold theſe lawful, ſtill he is not deemed an infidel. It is otherwiſe in the caſe of *Khamr*; for, with reſpect to the liquors here mentioned, the illegality is a mere matter of opinion; whereas, with regard to *Khamr*, the illegality is undiſputed. Puniſhment, moreover, is not inflicted for drinking theſe liquors, except in a quantity ſufficient to produce intoxication; whereas the drinking of one drop only of *Khamr* induces puniſhment. The *filth* of theſe liquors, likewiſe, according to one tradition, is of a *ſlight* degree, and according to another, of an *extreme* degree; but the *filth* of *Khamr* is of an *extreme* degree, according to *every* tradition. The ſale of the liquors in queſtion is lawful, according to *Haneefa*, and a compenſation is due from the deſtroyer of them. The two diſciples, on the contrary, hold that the ſale of them is unlawful, and that no reparation is due from the deſtroyer of them; in the ſame manner as in the caſe of *Khamr*.—It is unlawful to derive any kind of uſe from the above mentioned liquors, as they are prohibited. It is related that *Aboo Yooſaf* holds the ſale of any of the aforeſaid liquors, excepting

They may alſo be ſold, and are a ſubject of reſponſibility; but they muſt not be *uſed*

* *Nookoo* ſignifies water in which any thing is ſteeped; and *Zabeeb* means *raiſins*.

Khamr,

Khamr, to be lawful,—if more than one half, and leſs than two thirds, ſhould have evaporated in the boiling.

Mohammed, in the *Jama Sagheer*, remarks that every ſort of liquor excepting thoſe above mentioned is lawful. This opinion, the learned ſay, is recorded only in the *Jama Sagheer*, and is not to be found in any other book. It, however, affords an argument that any kind of ſtrong liquor extracted from wheat, barley, honey, or millet, is lawful in the opinion of *Haneefa*, if not drank ſo as to occaſion intoxication; and he, in fact, maintains that puniſhment is not inflicted even in the caſe of intoxication. If, therefore, a perſon intoxicated with theſe liquors ſhould divorce his wife, it is void, in the ſame manner as divorce pronounced by a perſon in his ſleep, or by one whoſe faculties are impaired from the uſe of opium, or from having drank the milk of a mare in a medical compoſition. It is elſewhere related, as an opinion of *Mohammed*, that every ſort of ſtrong drink, excepting thoſe above ſpecified, is prohibited;—that if a perſon drink them to intoxication he is to be puniſhed;—and that a divorce pronounced by him when ſo intoxicated is valid;—in the ſame manner as holds in the caſe of liquors; and decrees paſs according to this opinion. He has alſo ſaid, in the *Jama Sagheer*, that *Aboo Yooſaf* had firſt declared every ſort of wine to be unlawful which fermented and became ſpirituous, and afterwards remained ten days without ſpoiling: but that he afterwards adopted the opinion of *Haneefa*. In other words, he firſt, according to the adjudication of *Mohammed*, deemed all inebriating liquors unlawful; but afterwards adopted the opinion of *Haneefa*. *Aboo Yooſaf* was ſingular in making it a condition that the liquor ſhould remain ten days without being ſpoiled. He, however, afterwards receded from this opinion, and gave into that of *Haneefa* and *Mohammed* on this point. In the *Abridgement* [of *Kadooree*] it is ſaid, that the ſteeping of raiſins or dried dates, when boiled a little, even ſo as to become ſpirituous, may lawfully be drank in ſuch a quantity as not to inebriate, provided it be done without wantonneſs

or

or joy.—This is according only to the two *Elders*; for *Mohammed* and *Shafeï* deem it unlawful.

Khoolteen (a mixture of the infufion of dates and raifins) may be drank.

There is no impropriety in drinking *Khoolteen*; that is, water in which dates have been fteeped, mixed with that of raifins, and boiled together until they ferment and become fpirituous. This is grounded on a circumftance relative to *Ibn Zeeyád*, which is thus related by himfelf:—"*Abdoolla*, the fon of *Omar*, having given me fome *Sherbet* to drink, I became intoxicated to fuch a degree that I knew "not my own houfe. I went to him next morning, and having informed him of the circumftance, he acquainted me that he had "given me nothing but a drink compofed of dates and raifins."—Now this was certainly *Khoolteen*, which had undergone the operation of boiling; becaufe it is elfewhere related by *Omar* that it is unlawful in its crude ftate.

Liquors produced by means of *honey* or *grain* are lawful;

Liquor produced by means of honey, wheat, barley, or millet, is lawful, according to *Haneefa* and *Aboo Yoofaf*, although it be not boiled,—provided, however, that it be not drank in a wanton or joyful manner. The argument they adduce is the faying of the prophet "Khamr *is the product of thefe two trees*;" (meaning the *vine* and the *date*;)—that is to fay, he confined the prohibition to thefe two trees, as his intention was to explain the law.—It is to be obferved that feveral of the learned have made the boiling of thefe liquors a requifite towards their legality. Others, on the contrary, hold it to be no way neceffary; (and fuch is the opinion recorded in the *Mabfoot*;) becaufe thefe liquors are not of fuch a nature that a little induces a wifh for more, whether they be boiled or crude. It has likewife been difputed whether a perfon who gets drunk with any of thefe liquors is to be punifhed. Some have faid that he is not. The learned in the law, however, have determined otherwife; for it is related by *Mohammed* that punifhment is to be inflicted on whoever is intoxicated with any of the aforefaid ftrong liquors; for this reafon,

but any perfon drinking them to intoxication incurs punifhment.

that

that in the present age they are as much sought for by the dissolute as other liquors were formerly; nay even more so.—The same law holds with regard to strong drinks extracted from milk. Many have said that any drink made from the milk of a mare is unlawful, in the opinion of *Haneefa*, because it is derived from the flesh, which (according to him) is unlawful. Lawyers, however, remark it as the better opinion that the milk is not unlawful according to *Haneefa*; for although he have pronounced the flesh to be abominable, yet the reason is either because, if it were otherwise, the means of conquest would thereby be destroyed; or because the horse is a noble animal; neither of which reasons hold with regard to the *milk*.

Mosillis (grape juice boiled down to a third) is lawful.

If the juice of grapes be boiled until two thirds of it evaporate, (being then termed *Mosillis*,) it becomes lawful, according to the two *Elders*, notwithstanding it be spirituous. *Mohammed*, *Shafeï*, and *Málik*, say otherwise. (This difference of opinion, however, exists only on the supposition that it is used with a view to strengthen the constitution; for if it be drank from pleasure or joy they are unanimous in judging it unlawful.) *Mohammed*, *Shafeï*, and *Málik*, in support of their opinion, have cited a saying of the prophet, "*Every* "*inebriating drink is* KHAMR; *and whatever in excess produces intoxi-* "*cation is prohibited, even in moderation*;" and in another place, "*Any drink of which one cupful occasions intoxication, is unlawful in a* "*single drop.*"—Another argument is, that every inebriating liquor tends to stupify the senses, and is consequently prohibited either in a small or large quantity, in the same manner as *Khamr*. The two *Elders*, in support of their opinion, have quoted the saying of the prophet, "KHAMR *is unlawful in its very nature*;" and in another place, "*Little or much of it is alike unlawful*; *and inebriation from* "*every other strong drink* (that is to say, every kind besides *Khamr*) "*is forbidden.*" Now since the prophet has specified *intoxication* as a condition with respect to other drinks than *Khamr*, we may conclude that on that circumstance only their illegality depends. Besides, a stupefaction

ſtupefaction of the ſenſes takes place only when liquors are uſed in ſuch exceſs as to inebriate, which is allowed to be illegal. A little, therefore, of any ſtrong drink other than *Khamr* is never illegal, except when, on account of its fineneſs or purity, a little of it invites to more,—in which caſe the law regards every quantity of it in the ſame light. This, however, is not the caſe with *Moſillis*, a *little* of which, becauſe of its thickneſs, does not induce a wiſh for more; and which, in its ſubſtance, is food,—wherefore when uſed in a moderate quantity it retains its original legality *.

General rule with reſpect to it.

If a little water be poured into *Moſillis* to render it fine, and it be afterwards boiled for a ſhort time, it is ſtill *Moſillis*, the addition of water tending only to weaken it.—It is otherwiſe where water is mixed with crude juice, and this mixture is then boiled until two thirds of it evaporate; for here, either the water purely evaporates altogether, or it evaporates jointly with the juice; and in either caſe it is plain that two thirds of the pure juice of the grapes or dates does not evaporate, which is requiſite to render it a legal drink.

Rule in the boiling of *unpreſſed* grapes;

If grapes be firſt boiled, and afterwards preſſed until their juice be extracted, in that caſe a very little more boiling is ſufficient to render the drinking of the liquor lawful, according to one tradition of *Haneefa*. According to another tradition it does not become lawful until two thirds of it evaporate in boiling; and this is the better opinion; becauſe the juice remaining within the film, and not being in any manner affected by the boiling, it is conſequently ſimilar to juice which is not boiled.

* By *original* legality *Haneefa* alludes to an opinion he maintained in oppoſition to *Mâlik*, that every thing is *originally* lawful in its nature, being rendered otherwiſe only by the prohibition of the ſacred writings;—whereas *Mâlik* holds every thing to have been originally unlawful, until ſanctified by the KORAN.

or grapes mixed with dates.

If fresh or dried grapes, being mixed with dates, be then boiled, two thirds of the mixture must evaporate before it becomes lawful; for although, with respect to dates, a *small* boiling be often sufficient, yet with respect to the juice of grapes two thirds are always required to have evaporated in boiling. The same rule also holds where the juice of grapes is mixed with the water in which dates have been steeped. If, however, dried grapes, being mixed with the water of dates, should be boiled for a little, and afterwards some dates or dried grapes be thrown into it, in that case, provided the quantity thrown in be small, and not so much as is generally used to make *Nabeez*, it is lawful. It is otherwise, indeed, if the quantity be not small;—in the same manner as where a pot of the water of dates or raisins is mixed with the boiled juice. Still, however, the person who drinks it is not subject to punishment, because its illegality is adjudged merely on principles of *caution*; and endeavours must always be used to avoid the infliction of *punishment*.

Liquor, having once acquired a spirit, is not rendered lawful by boiling.

If *Khamr*, or any other spirituous liquor, be boiled until two thirds of it evaporate, still it is not lawful; for the illegality of it, which was previously established, is not removed by boiling.

Rule with respect to the use of *vessels*.

There is no impropriety in squeezing juice into pots or vessels of a green colour, or of which the interior part has been varnished with oil. The reason of this is, that formerly, in the infancy of the *Mussulman* religion, it was customary to keep *Khamr* in such vessels; and, on this account, when *Khamr* was rendered illegal, the prophet prohibited the use of them likewise, that the greater caution might be observed. He afterwards, however, permitted the use of them, seeing that the vessels of themselves did not render any thing unlawful. If, therefore, *Khamr* have been kept in these vessels, it is necessary they be washed before they are applied to use.

If

If a veſſel be old, it becomes clean by three waſhings: but if it be new it can never be cleanſed, in the opinion of *Mohammed*; for then the wine penetrates, and makes a deep impreſſion in it; contrary to the caſe of an old one. *Aboo Yooſaf* holds that it may be cleanſed by waſhing it thrice, and drying it after each waſhing.—Several have ſaid that, in the opinion of *Aboo Yooſaf*, the mode of cleanſing it is by filling it with water, and letting it remain for a ſhort time; and then emptying it and filling it again; and ſo repeating this proceſs until the water poured out be perfectly pure; when the veſſel is clean.

Vinegar may be made from *Khamr*,

When *Khamr* is converted into vinegar, it is then lawful, whether it have been made ſo by throwing any thing into it, (ſuch as ſalt or vinegar,) or have become ſo of itſelf.

Vinegar made of *Khamr* is not abominable. *Shafei* maintains that it is abominable; and that all vinegar obtained from *Khamr* by means of ſome mixture is unlawful.—With reſpect, however, to ſuch as turn ſo from *Khamr* of itſelf, he has given two different opinions.

and the veſſel in which it is ſo made becomes pure.

When *Khamr* is changed into vinegar, the veſſel in which it is contained becomes clean according to the quantity of the *Khamr*. With regard to that part of the veſſel that was empty, ſeveral have ſaid that it alſo becomes clean, as being dependant on the other: but others have ſaid that, as it is battered over with dried *Khamr*, it does not become clean until it be waſhed with vinegar, when it is immediately purified. In the ſame manner alſo, if *Khamr* be poured out of a veſſel, and the veſſel be then waſhed with vinegar, it becomes (as lawyers have ſaid) inſtantaneouſly clean.

Rules with respect to the *dregs* of *Khamr*.

It is abominable to drink the *dregs* of *Khamr*, or to uſe it in combing the hair, as ſome women do; for the dregs are not entirely void of the particles of *Khamr*, and it is unlawful to apply any unlawful thing to uſe;—whence the illegality of uſing it in healing a wound, or applying it to a ſore on the back of a quadruped.—It is alſo unlawful to adminiſter it to an infidel or an infant; and whoſoever does ſo is chargeable with the crime of it. In the ſame manner, it is unlawful to give it to a quadruped to drink.—Concerning this point, however, ſeveral have ſaid that although it be unlawful to carry *Khamr* to a quadruped, yet if the animal, being brought to it, ſhould drink of it, there is no impropriety;—in the ſame manner as in the caſe of a dog and carrion; that is to ſay, carrion muſt not be thrown to a dog; but if a dog be carried to where carrion is, he may, without any impropriety, be ſuffered to eat it.

It is allowable to mix the dregs of *Khamr* with vinegar. In this caſe, however, it is required, that the vinegar be carried to the place where the dregs are, and be there mixed, for otherwiſe it is unlawful.

A person who drinks the dregs of *Khamr* without being intoxicated is not liable to puniſhment. *Shafeï* is of a different opinion; for in this caſe ſeveral of the particles of *Khamr* muſt neceſſarily be drank likewiſe. Our doctors, on the contrary, argue that as the dregs of *Khamr* are diſagreeable to the palate, a little of it does not, by conſequence, beget an inclination for more; and thus, being like other ſtrong drinks, the drinking of a little, unleſs it be attended with intoxication, is not puniſhable.

An *injection* of *Khamr* is unlawful, but

An injection of *Khamr* into the *anus* or *penis* is unlawful, as being a benefit derived from an unlawful article. It is not, however,

ever, *punishable*, as punishment is inflicted only in the case of *drinking* it.

not *punishable*;

If a person throw *Khamr* into soup, it is not then lawful for him to eat the soup, because of its being rendered impure. Nevertheless, if he eat it he is not liable to punishment, for in this case the *Khamr* is as it were *boiled*.

and so likewise a mixture of it in viands.

If a person knead flour with *Khamr*, in that case it is unlawful to eat the bread or paste so made, as many of the particles of the *Khamr* still remain in it.

SECTION.

Of boiling the Juice of Grapes.

In boiling the juice of grapes there are three principles.—The first principle is, that whatever quantity may run over the pot from the agitation in boiling, or from the foaming of the juice, is not taken into account, but is considered as not having belonged to it; and the residue is to be boiled until two thirds of it evaporate, in order that the remaining third may be rendered lawful. To illustrate this:—suppose a person inclined to boil ten cups of juice; in that case, if one cup be lost from its boiling over the pot, he must boil the remainder until six cups have evaporated and three remain in the pot, when it becomes lawful.

There are three general principles to be observed upon this subject.

The second principle is, that if water be first poured into the juice, and the whole be then boiled, and the water, on account of its subtlety, be soon wasted, it is requisite that whatever remains after the evaporation [of the water] be boiled until two thirds of it be wasted. If, on the contrary, the water and juice evaporate together, it is in that case requisite that the mixture be boiled until two thirds of the whole evaporate, that the remaining third may be rendered lawful; for here the third of the mixture of water and juice which remains becomes the same as if, a third of the pure juice having remained, water had then been poured into it. To exemplify this:—suppose a person should mix ten cups of juice with twenty cups of water;—in that case, if the water purely evaporate, the mixture must be boiled until a ninth of it remain, which is equivalent to one third of the pure juice;—whereas, if the juice and water evaporate conjunctly, the whole must then be boiled until two thirds of it evaporate.

If juice be boiled with fire*, at one or several different times, before it be inebriating or prohibited, it is lawful. If, also, the juice, being taken from the fire, should continue to boil until two thirds of it evaporate, it is lawful, as in this case the evaporation is the effect of the fire.

The third principle is, in boiling juice, after part of it has evaporated, and part has likewise been poured out,—to know how much more must evaporate, that the remaining part may be rendered lawful;—and, in order to this, the following rule must be observed.—The quantity which remains after part has been poured out must be multiplied by the third of the whole; and this sum being divided by the quantity which remains after part of it only has evaporated,

* The common method of making strong drink, among the *Asiatics*, is by fermenting the juice in the sun.

the quotient is the quantity that is lawful. Thus, if a perſon boil ten cups of juice, and after one cup had evaporated, three cups more ſhould be poured out; then three cups and one third (the third of the whole) being multiplied into ſix, the number which remains after the loſs of evaporation and pouring out amounts to twenty, and this ſum being divided by nine, there remains two cups and two ninths; the quantity which is lawful, when the reſt has evaporated.

H E D A Y A.

BOOK XLVII.

Of *H U N T I N G.*

SECT. I.

Of catching Game with Animals of the HUNTING TRIBE, *such as* DOGS, HAWKS, *&c.*

It is lawful to hunt with all animals of the hunter

IT is lawful to hunt with a trained dog, a panther*, a hawk, a falcon, and in short with every animal of the hunter tribe that is *trained.* It is related in the *Jama Sagheer* that game caught with a

* *Yûz.*—It is an animal of the *leopard* or *lynx* species, hooded and trained to catching game, nearly on the same principle as the hawk.

trained animal of the hunter tribe, whether bird or beaſt, is lawful; but that, caught with any other animal it is not lawful, unleſs when taken alive, and ſlain by *Zabbah*. This doctrine is eſtabliſhed by a text of the KORAN, in which mention is made of trained dogs. The term *Kalb* [dog] comprehends, in its general acceptation, every carniverous animal, even to a tiger *. It is, however, related as an opinion of *Aboo Yoosaf*, that tigers and bears are excepted, as neither of them hunt for others,—the tiger becauſe of his ferocity, and the bear becauſe of his voraciouſneſs. Some of the *kite* tribe have likewiſe been excepted becauſe of their voraciouſneſs; and the hog has been excepted becauſe it is eſſential filth, and becauſe it is unlawful to derive any advantage from it. It is to be obſerved that it is a condition of the lawfulneſs of game that the animal which takes it be of the hunter tribe, and trained; and alſo that the maſter let ſlip † the animal in the name of GOD; for it is ſo related in a tradition of *Audee*, the ſon of *Hàtim Tài*.

tribe that are duly *trained*

THE ſign of a dog being trained is, his catching game three times without eating it; whereas the ſign of a hawk being trained is, merely, her returning to her maſter, and attending to his call. Theſe ſigns are adopted from *Abdoolla Ibn Abaſs*. The body of a hawk, moreover, is not capable of enduring blows; but as, on the contrary, the body of a dog has this capability, a dog is therefore to be beaten until he deſiſt from eating the game. Beſides, one ſign of being trained is, to deſiſt from that which cuſtom and habit have made agreeable; and as it is the cuſtom of a hawk to be wild and to fly from man, it follows that its paying attention to its maſter's call, and ſhewing no wildneſs, is a ſign of its being trained. With reſpect to a *dog*, on the contrary,

Rules for aſcertaining whether a dog, &c. be duly trained.

* Arab. *Aſſid*; including *lions*, and every other creature of the feline tribe, except the *panther* before mentioned.

† The expreſſion, in the original, ſignifies *to ſend off*.—It here means the act of *caſting off* the hound or hawk, and hunting them at the game.

he is attached to man; but his custom is to tear and eat; and consequently, when he preserves game and does not eat it, it is a sign of his being trained.—It is to be observed that the condition here recited, of a dog desisting, and not eating three times, is the doctrine of the two disciples; (and there is also one tradition from *Haneefa* to the same effect;)—and the reason of it is that, in less than three times there is a probability of the dog's forbearance having proceeded from satiety or some such cause; but that when he desists from eating for three different times, it is a proof that such forbearance has become a custom; for this particular number of *three* is the established standard for experiments, and for the discovery of an evasion,—in the same manner as it is used in determining the period of an option. It is also recorded to have been adopted in the story of *Moses* and *Khizzir* *; for *Khizzir*, upon the third instance, said, "Now there is a separation between "you and me." Another reason is that plurality is a sign of knowledge; and as *three* is the smallest number of plurality †, it has therefore been adopted as the standard. In the opinion of *Haneefa*, however, as recorded in the *Mabsoot*, a training does not take place, so long as the hunter does not conceive the animal to be trained;—and he holds it improper to fix on the number *three*; because the fixing on a particular number cannot be done by the forethought of man, but must be regulated by the precepts of the sacred writings; and as no precept has been issued on this head, it is proper to consign it to the judgment of him who is best acquainted with the matter, namely, the hunter. According to a former tradition, *Haneefa* holds the game of the third time to be lawful;—whilst the two disciples maintain that it is not lawful, as the animal does not become trained until after the third time; and consequently the game of the third time is the game

* This story (of which an explanation was given to the translator) is probably the original of *Parnell's Hermit*.

† The *Arabs*, having a *dual* number, do not of course admit two to constitute a plurality.

of

of an untrained animal, and, as ſuch, is unlawful; this being like the act of a ſlave in the preſence of his maſter; in other words, if a ſlave perform any acts in the preſence of his maſter, ſuch as purchaſe or ſale, and the maſter, ſeeing and knowing the ſame, remain ſilent, the ſlave in that caſe becomes *licenced*,—not only with reſpect to the act in queſtion, but alſo with reſpect to every act which he may afterwards perform;—and ſo likewiſe in the caſe in queſtion. The reaſoning of *Haneefa* is, that when the animal takes the game the third time, and inſtead of eating preſerves it, this argues it to have been trained at the time of taking the game, and conſequently the game of the third time is the game of a *trained animal*.—It is otherwiſe in the caſe above cited, becauſe *licence* is a notification, and cannot take place without the knowledge of the ſlave; and the ſlave cannot acquire this knowledge until *after* he has performed the act, and his maſter remained ſilent.

The *invocation* muſt be repeated (or, at leaſt, muſt not be *wilfully* omitted) at the time of letting ſlip the hound, &c.

If a perſon let ſlip his trained dog, or his trained hawk, and at the time of letting them ſlip repeat the name of God, or omit it from forgetfulneſs, and the dog or hawk catch the game, and wound it ſo that it dies, the game may in that caſe lawfully be eaten.—If, however, he ſhould *wilfully*, and not from *forgetfulneſs*, omit the name of God, it is not then lawful to eat the game ſo taken. It is mentioned in the *Zâhir Rawâyet* that the wounding of the game is a condition of its lawfulneſs, as it furniſhes the means of a *Zabbah Iztirâree*. (The meaning of *Zabbah Iztirâree* has already been explained in treating of *Zabbah*.)

A hunting *quadruped* eating any part of the game renders it unlawful.

If a dog or panther eat any part of the game, it is unlawful to eat of ſuch; but if a hawk eat part of it, it may lawfully be eaten.—The diſtinction between theſe two caſes has already been explained.

If

If a dog (for inſtance) catch game ſeveral times without eating it, and afterwards catching game eat part of it, ſuch game cannot lawfully be eaten, as the circumſtance of the dog eating it is a proof that he has not been properly trained. In the ſame manner alſo, the game which he may afterwards take is not lawful until he ſhall have been trained anew, concerning which the ſame difference of opinion obtains as that already ſet forth concerning a training in the *beginning*. With reſpect to the game previouſly taken by him, illegality does not attach to ſuch parts of it as have been eaten, ſince there the *ſubject* no longer remains; but with reſpect to ſuch parts as have not been preſerved, (that is, have been left upon the plain,) they are unlawful according to all our doctors. As to what may have been preſerved, (that is, what the hunter may have carried to his own houſe,) it is unlawful, according to *Haneefa*. The two diſciples maintain it to be lawful; for they contend that the circumſtance of the dog eating at that time is no argument of his not having been previouſly trained, as an art may be acquired and afterwards forgotten. The argument of *Haneefa*, on the contrary, is that the dog's eating of the game at that period is a proof of his never having been properly trained from the firſt.

Game caught by a hawk, after it has returned to its wild ſtate, is not lawful.

If a hawk fly from its maſter, and remain for a while in a ſtate of wildneſs and flight, and afterwards catch game, ſuch game is not lawful, as the hawk in that ſtate is not *trained*; for the ſign of being trained is to return to its maſter; and as it did not ſo return, the ſign no longer remains; whence it is conſidered in the ſame light as a dog which eats his game.

A dog does not render his game unlawful by taking its *blood*;

If a dog eat the *blood* of his game, and not the *fleſh*, the game is lawful, and capable of being eaten, as the dog has preſerved it for his maſter, which argues him to have been well trained, ſince he eat merely what was unfit for his maſter, and preſerved what was fit for him.

If a hunter, having taken the game from his trained dog, cut off a piece of it, and throw it to the dog, and the dog eat the ſame, ſtill the remaining part of it is lawful, as it is not then game; the caſe being, in fact, the ſame as if a perſon were to throw to a dog any other kind of food. The law is the ſame where a dog leaps upon his maſter, and takes from him part of the dead game in his hands and eats it; this being ſimilar to where a dog attacks his maſter's goat, and kills it, which is no proof of the dog's not being *trained.*

or by eating a piece of the *fleſh* cut off and thrown to him by the hunter.

If a dog lay hold of game with his teeth, and having bitten off the part eat it, and afterwards catch the game and kill it, without eating any other part of it, the game is unlawful; becauſe upon the dog eating part of his game it becomes evident that he is not *trained.* If, on the contrary, he drop the part bitten off, and having purſued the game kill it and deliver it up to his maſter without eating any part of it, and having afterwards paſſed by the part bitten off eat the ſame, the game is lawful; for as, if the dog, under theſe circumſtances, had eaten part of the body of the game in the hands of his maſter it would have been of no conſequence, it follows that it is, *a fortiori*, of no conſequence where he eats what was ſeparated from it, and unlawful to the maſter to eat. It is otherwiſe in the former caſe; becauſe there the dog eat in the very act of hunting; and alſo, becauſe the tearing off a piece of fleſh with the teeth admits of two explanations; for firſt, this may be done with a view to devouring,—and ſecondly, it may be done with a view merely to weaken the animal, in order the more eaſily to catch it;—and the eating of the piece before catching the animal argues the *firſt* of theſe,—whereas the eating of it after catching and delivering the game to the hunter argues the *ſecond,* whence no inference can be drawn that the dog is not *trained.*

Caſe of a dog biting off a piece in the purſuit of his game.

If a hunter take game alive which his dog had wounded, it is incumbent upon him to ſlay it according to the preſcribed form [of *Zabbah,*]

Game taken *alive* muſt be ſlain by *Zabbah,*

Zabbah,] and if he delay ſo doing until it die, it is then carrion and incapable of being eaten. The law is the ſame with reſpect to game taken by a hawk, or the like; and alſo with reſpect to game ſhot by an arrow. The reaſon of it is, that in this caſe the hunter is capable of the *original* obſervance, namely, *Zabbah Ikhtiàree*, before the occurrence of the neceſſity for the *ſubſtitute*, namely, *Zabbah Iztiràree*; and therefore the validity of the ſubſtitute is annulled. This law, however, ſuppoſes a capability in the hunter to perform the *Zabbah*; for where he takes the game alive, and is incapable of performing the *Zabbah*, and there exiſts in the animal more life than in one whoſe throat has been juſt cut, ſuch game (according to the *Zâhir Rawâyet*) is not lawful. It is related, as an opinion of *Haneefa* and *Aboo Yoosaf*, that it is lawful; (and this opinion has been adopted by *Shafeï*;) becauſe the hunter is not in this caſe capable of the *original* obſervance, and is therefore in the ſame ſituation as a perſon neceſſitated to uſe ſand inſtead of water, notwithſtanding he be in ſight of water. The reaſon alleged in the *Zâhir Rawâyet* is, that the hunter's finding the animal alive is equivalent to his capability of performing the *Zabbah*, ſince it enables him to reach the throat of the animal with his hand. Hence he has, in a manner, the power of performing the *Zabbah*, which he neglects. It is otherwiſe where only as much life exiſts in the animal as in one whoſe throat has been cut; becauſe it is then, in effect, dead,—whence it is that if, in that ſtate, it ſhould fall into water, it is not unlawful, any more than if it had fallen into water when actually dead, the dead not being a fit ſubject for *Zabbah*. Some of the learned have entered more particularly into this caſe, alleging that if the inability to perform the *Zabbah* ariſe from the want of an inſtrument, it is not then permitted to eat it; and that if the inability ariſe from the want of time, in that caſe likewiſe it is not permitted to eat it, according to our doctors,—in oppoſition to the opinion of *Shafeï*. The argument of our doctors is, that when the animal is taken alive it is no longer game, becauſe the term *game* is applicable only to what is *wild* and *free*; and that therefore the *Zabbah Iztiràree*

is

is then of no effect. What is here recited proceeds on the ſuppoſition of the animal being taken alive, and of there being a poſſibility of its continuing to live; for if there be no poſſibility of its continuing to live, (as where its belly has been torn, and part of its entrails have come out,) it may lawfully be eaten without the performance of *Zabbah*, becauſe the life that remains in it is equivalent only to the ſtruggling of an animal whoſe throat had been cut, and is conſequently of no effect;—in the ſame manner as where a goat falls into water, after having had its throat cut.

provided it live long enough to admit of performing this ceremony.

If the hunter find the game alive, and do not take it from his dog till it be dead, and there have been ſufficient time, after he found it alive, to perform the *Zabbah*, it is not in that caſe lawful to eat it; becauſe this is equivalent to an omiſſion of the *Zabbah*, notwithſtanding an ability to perform it. If, on the contrary, he had found it alive at a period when, if he had taken it, there was not ſufficient time to perform the *Zabbah*, it is lawful.

The game taken is lawful although it be not the ſame that was intended by the hunter.

If a hunter let ſlip his dog at game, and the dog take ſome other game, the game ſo taken is lawful. *Málik* has ſaid that it is not lawful, ſince the dog took this game without having been let ſlip at it, as it was at *another* ſpecific animal that the hunter let him ſlip. Our doctors, on the other hand, argue that the object of the hunter is merely *the acquiſition of game*; and all game is the ſame to him. Beſides, the ſpecification of the particular animal is of no advantage, as it is impracticable to teach a dog to take that particular animal.

Rule in caſting off a *panther* at game.

If a perſon let ſlip a panther at game *, and the panther lie for a while in ambuſh, and then catch and kill the game, it is lawful to

* The *lynx* or *panther* uſed in hunting is generally kept *hooded*, and is conveyed from place to place upon a ſort of litter. When the hunters have approached within ſight of their game, they unhood the panther and caſt off his chains, and he inſtantly ſprings at his prey, if within his reach, or if otherwiſe, practiſes a variety of ſtratagems to get near to it.

eat it; becauſe the lying in ambuſh being with a view to catch the game, and not to take reſt, does not of conſequence terminate the act of letting it ſlip. The ſame rule alſo holds with reſpect to a dog, when trained in the manner of a panther.

All the game caught by the dog, &c. under one invocation, is lawful. Rule for determining this with reſpect to dogs,

If a dog be let ſlip at game, and take and kill it, and afterwards take and kill other game, both are lawful; becauſe the act of letting him ſlip continues to operate, and is not terminated until after the taking of the ſecond game; this caſe being ſimilar to that of a perſon ſhooting at an animal with an arrow, which not only hits and kills it, but alſo hits and kills another. If, on the contrary, the dog, after killing the firſt game, lie down upon the ground and reſt for a long time, and then, ſome other game paſſing by, he riſe up and kill it, it is not lawful to eat that other game; becauſe when the dog lay down and took reſt, he thereby determined the act of letting him ſlip, ſince his ſitting down was with a view to take reſt, and not to deceive the game; in oppoſition to what was before recited.

and hawks.

If a hawk, being let ſlip [caſt off] at game, firſt perch upon ſomething, and afterwards, going in queſt of the game, take it and kill it, it is lawful to eat it. This, however, proceeds on the ſuppoſition of the hawk neither tarrying long, nor with a view to reſt, but merely a ſhort time, and with a view to *ſurprize* her prey.

Game is not lawful when caught (by a hawk, &c.) independant of the act of the hunter.

If a trained hawk catch game and kill it, and it be not known whether any perſon let her ſlip at ſuch game, it is then unlawful to eat it; becauſe in this caſe a doubt exiſts with reſpect to the *letting ſlip*; and game is not lawful unleſs the animal which takes it be let ſlip at it.

It is requiſite to its legality (when caught dead) that

If game be *ſtrangled* by a dog, and not *wounded*, it is not lawful to eat it; becauſe the *wounding* of it is a condition of its legality, according to the *Zâhir Rawâyet*, (as has been before mentioned;) and this

this condition implies that where merely particular members of the game are broken by the dog it is not lawful to eat it.

blood have been drawn from it.

Game is rendered unlawful by the conjunction of any *cause* of illegality in the catching of it.

If a trained dog be assisted in killing the game by a dog that is not trained, or by a dog belonging to a *Magian*, or by one upon which the invocation had been wilfully omitted, in that case the game is unlawful; because two causes are here united, namely, a cause of legality, and a cause of illegality, and caution dictates a preference to the cause of illegality.

Game hunted down by any person not qualified to perform *Zabbah* is unlawful.

Any person not permitted to perform *Zabbah* (such as an apostate, a *Mohrim*, or a person who wilfully omits the invocation) is the same as a *Magian* with respect to letting loose an animal of the hunter tribe.

If a dog, without being let slip, should of himself pursue game, and a *Mussulman* repeat the invocation, and then make a noise and incite the dog to run faster, and the dog catch the game, it is in that case lawful to eat it.

Game killed at a *second* catching of it (either by the same or a *second* dog) is lawful.

If a *Mussulman*, having repeated the invocation, let slip his dog at game, and the dog having pursued and caught the game, and thereby rendered it weak, let it go, and afterwards catch it a second time and kill it, it is in that case lawful to eat it;—and so likewise where a *Mussulman* lets slip *two* dogs, and one of them renders the game weak, and the other kills it;—and also, where two men let slip their dogs, (that is, each of them one dog,) and one of the dogs renders the game weak, and the other kills it. In this last case, however, the game is the property of him whose dog rendered it weak; because he deprived it of the quality of game, as he disabled it from running.

SECT. II.

*Of ſhooting Game with an Arrow**.

Game ſlain by a hunter ſhooting, &c. *at random*, on hearing a noiſe, is lawful, provided the noiſe proceed from game.

If a perſon hear a noiſe, and, imagining it to be that of game, ſhoot an arrow, or let ſlip his dog or hawk, and in either caſe game be killed, and it be afterwards diſcovered that the noiſe did actually proceed from game, it is then lawful to eat the game ſo killed by the arrow, dog, or hawk, whether it were the game of which the noiſe was heard, or not; becauſe the object of the hunter was merely *to get game*, of whatever kind. This is according to the *Záhir Rawáyet*.—It is related as an opinion of *Aboo Yooſaf*, that a hog is in this caſe an exception;—in other words, if it be afterwards known that the noiſe proceeded from a *hog*, the game killed by the arrow, hawk, or dog, is not lawful; becauſe a hog is in an exceſſive degree impure;—whence it is that no part of it is rendered allowable by hunting:—contrary to other quadrupeds, for of thoſe the ſkin, by their being hunted, is rendered lawful. *Ziffer* has likewiſe excepted all thoſe animals of which the fleſh is not fit for eating, inaſmuch as the hunting of theſe is not with a view to render them lawful.

Game ſhot by an arrow aimed at another animal is lawful.

If an arrow be ſhot at a bird and hit other game, and the bird ſhot at fly away, without its being known whether it was wild or tame, the game is in that caſe lawful, becauſe the probability is that the bird was a *wild* one. If, on the contrary, an arrow be ſhot at a camel, and hit game, and the camel having eſcaped, it be not known whether it was a wild one or otherwiſe, the game in that caſe is not lawful,

* The title of this ſection, in the *Arabic* verſion, is ſimply *Râma*, ſignifying the uſe of any miſſile weapon whatever.

becauſe

because the natural condition of a camel is that of tameneſs and attachment to man.—If, on the other hand, an arrow be ſhot at fiſh or locuſts, and hit game, ſuch game is lawful, in the opinion of *Aboo Yooſaf*, according to one tradition, inaſmuch as it is *game:* but according to another tradition it is unlawful; becauſe hunting is equivalent to the performance of *Zabbah*, which is not requiſite with reſpect to fiſhes and locuſts.

If a perſon, hearing a noiſe, and imagining it to be that of a man, ſhould in conſequence ſhoot an arrow, and kill game, and it be afterwards diſcovered that the noiſe proceeded from the game, in that caſe the game ſo killed is lawful; becauſe, when it actually proves to be *game*, the imagination of the perſon who ſhoots is of no conſequence.

Invocation muſt be made on the inſtant of ſhooting; but if the animal be taken alive, it muſt ſtill be ſlain by *Zabbah*.

If a hunter, upon ſhooting his arrow, repeat the invocation, and the arrow wound and kill the game, it is lawful to eat it; becauſe the ſhooting of an arrow along with the invocation, and the wounding of the animal, is equivalent to the performance of *Zabbah*. Nevertheleſs, if the animal be taken alive, it is incumbent to ſlay it by *Zabbah*, as has been already ſet forth in the firſt ſection.

Game wounded, and afterwards found dead by the perſon who ſhot, is lawful,

If an arrow hit game, and the game fly away with the arrow until it diſappear, and the hunter go in ſearch of it, and find it dead, it is in that caſe lawful to eat it. If, on the contrary, he ſhould *not* follow or go in ſearch of it, and afterwards happen to find it dead, it is not in that caſe lawful; becauſe it is related that the prophet held it abominable to eat that game which diſappeared from the ſight of the bowman; and alſo, becauſe there is a poſſibility that it may have died from ſome other cauſe.

unleſs he then diſcover *another* wound upon it.

If the hunter above mentioned find another wound in the game beſides that of his arrow, it is not lawful to eat it, notwithſtanding he may

may have continued in the ſearch of it until he found it; becauſe in this caſe two cauſes are conjoined,—one of illegality, namely, the other wound,—and one of legality, namely, the wound of his arrow; and it is the eſtabliſhed cuſtom to give the preference to the cauſe of illegality. Moreover, caution is eaſily obſerved in this caſe, as it is an uncommon one. All that has been above recited relates to the ſhooting of an arrow; but it is equally applicable throughout to the letting ſlip of a *dog*, or ſo forth.

Game which, being ſhot, falls into water, or upon any building, &c. before it reaches the ground, is unlawful.

IF a perſon ſhoot at game with an arrow, and hit it, and it fall into water, or upon the roof of a houſe, or ſome other eminence, and afterwards upon the ground, it is not lawful to eat it; becauſe the animal is in this caſe a *Mootradeea*, the eating of which is prohibited in the KORAN; and alſo, becauſe there is a ſuſpicion that the death may have been occaſioned by the water, or by the fall from the eminence, and not by the wound *.

Rule with reſpect to *water*-fowl.

IF a water-fowl be wounded, and the member wounded be not a part under water, it is lawful,—whereas, if it be a part under water, it is not lawful, in the ſame manner as a *land* bird, which being wounded falls into water.

Game ſlain by a *bruiſe*, without a *wound*, is not lawful.

GAME hit [ſtunned] by an arrow without a ſharp point is unlawful, as it is ſo recorded in the traditions. It is to be obſerved, moreover, that the *wounding* of game is a condition of its legality; becauſe a *Zabbah Iztirâree* cannot otherwiſe be eſtabliſhed,—as has been already mentioned †.

* Amidſt ſuch a maſs of frivolous abſurdity, the tranſlator thinks it unneceſſary to offer any apology for the omiſſion, in this place, of a long diſcuſſion ſtill more futile than any thing which has gone before.

† From this, and various preceding paſſages, it appears that it is requiſite to *draw blood* in order to the rendering game lawful.

Game killed by a bullet from a croſs-bow is not lawful, as this miſſile does not wound, and is therefore like a blunt arrow. A *ſtone*, alſo, is ſubject to the ſame rule, as it does not wound;—and game is alſo unlawful when killed by a great heavy ſtone, notwithſtanding it be ſharp; becauſe there is a probability that the game may have died from the weight of the ſtone, and not from the ſharpneſs of it. If, however, the ſtone be ſharp, and not weighty, the game killed by it is lawful, as it is then certain that it muſt have died in conſequence of a *wound* from it.

Game killed by a ſmall pebble ſtone, and of which no part has been cut by the ſtone, is not lawful, becauſe in this caſe the game is *bruiſed* and not *wounded.* If, alſo, game be beaten by a ſtick or piece of wood until it die, it is not lawful, as the death is then occaſioned by the *weight* of the ſtick or piece of wood, and not by any *wound:* yet if, in this caſe, the ſtick or piece of wood, becauſe of their ſharpneſs, occaſion a wound, there is no impropriety in eating the game, as the ſtick and piece of wood are then equivalent to a ſword and ſpear. The general rule, in ſhort, in theſe caſes, is that when it is known with certainty that the death of the game was occaſioned by a *wound*, it is lawful food; but unlawful where the death is known with certainty to have been occaſioned by a *bruiſe*, and not a *wound*; and that, in caſe of the exiſtence of a doubt, (that is, where it is not certainly known whether the death was occaſioned by a bruiſe or by a wound,) it is then alſo unlawful, from a principle of caution.

If a perſon throw a ſword or a knife at game, and the game be ſtruck by the *handle* of the ſword, or the *back* of the knife, it is not lawful; whereas if ſtruck by the *edge*, and wounded, it is lawful.

Case of cutting off the *head* of an animal.

If a person cut off the head of a goat, it is lawful to eat it, as the jugular veins have been cut through; but it is nevertheless abominable. If, however, a person perform this action by beginning with the spine, so as to occasion the death of the animal before the jugular veins be cut, it is not lawful: but it is lawful if the animal do not die until after the jugular veins are cut.

A *Magian*, an *apostate*, or an *idolator* are not qualified to kill game.

Game killed by a *Magian*, an apostate, or a worshipper of images, is not lawful, because they are not allowed to perform *Zabbah*, (as has been already explained in treating of that subject,) and *Zabbah* is a condition of the legality of game. It is otherwise with respect to a *Christian* or a *Jew*, because, as their performance of a *Zabbah Ikhtiàree* is lawful, it follows that their performance of a *Zabbah Iztiràree* must also be lawful.

Case of game wounded by *one* person, and then slain by *another*.

If a person shoot an arrow at game, and hit it, without rendering it so weak as to prevent it from running, and in that state another person shoot at it, and kill it, the game is the property of the second hunter, because he was the person who took it, and the prophet has said, "*Game belongs to him who takes it.*" If, on the contrary, the first hunter render it too weak to run, and another person then kill it, it is in that case the property of the first hunter. Nevertheless, he must abstain from eating it, as there is a probability that it may have died in consequence of the second wound; and as it had not the power of running after the first wound, it ought to have been slain by a *Zabbah Ikhtiàree*, no regard being, in such an instance, paid to the *Zabbah Iztiràree*, in opposition to the former case.—This prohibition, however, against eating the game, proceeds on the supposition of its being in such a condition as to induce us to believe the continuance of its existence possible; since under these circumstances its death is referred to the second shot: but if the first wound be such as to render the continuance of its existence impossible, (as if it have as little

little life in it as an animal with its throat cut, having, for instance, had its *head* cut off,) in that cafe it is lawful to eat it, as its death is not then referred to the fecond fhot, it being at that period in a ftate equivalent to annihilation. If, however, the firft wound be fuch as to render the furvival of the game impoffible, and there neverthelefs be more life in it than in an animal with its throat cut, (as if, for inftance, it be capable of living *one day*,) in that cafe, according to *Aboo Yoofaf*, it is not rendered unlawful by the fecond fhot, becaufe fuch a degree of life (in his opinion) is of no effect; but according to *Mohammed* it is unlawful, as fuch a degree of life (in his opinion) is of effect.

In the foregoing cafe, the fecond hunter is refponfible to the firft for the value which the game bears after receiving the firft wound; becaufe he [the fecond hunter] has deftroyed game the property of the firft hunter, (who became the proprietor of it in confequence of his wounding it, and thereby incapacitating it from running;) and the game is, by fuch wound, rendered *defective*; and in all cafes of refponfibility for deftruction of property a regard is paid to the *time* of the deftruction. The compiler of the *Hedâya* remarks that in this cafe there is a diftinction;—in other words, refponfibility takes place where it is known that the game in queftion died in confequence of the fecond wound; (that is, where the wound of the firft hunter was fuch that the animal lived after it,—and the wound of the fecond hunter fuch as to deftroy the exiftence;) and the fecond hunter is accordingly refponfible for the value of the game, in its *wounded* and *defective*, not in its *unwounded* and *perfect* ftate; in the fame manner as where a perfon kills the fick flave of another. If, however, it be known that the game died in confequence of the *firft* wound, or if it be uncertain of which wound it died, *Mohammed* has faid, in the *Zeeadât*, that it is incumbent upon the fecond hunter, firft to pay a compenfation for the damage he may have occafioned to the game by

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the wound; and, ſecondly, to pay a compenſation for half the value which the game bore after receiving both wounds; and, thirdly, to pay a compenſation of half the value of the fleſh. The reaſon for the firſt compenſation is that the ſecond hunter, having occaſioned a damage to an animal which was the property of another, is bound, in the firſt inſtance, to make good the amount of that damage. The reaſon for the ſecond compenſation is that, as the animal died of *both* wounds, the ſecond wound muſt have been the immediate cauſe of its deſtruction; and as it was at that time the property of another perſon, it is incumbent upon him to make a compenſation for *half* the value which it bore after receiving both wounds, as the firſt wound did not proceed from him. (With reſpect to the damage occaſioned by the ſecond wound, having paid it before, he is not required to pay it again.) The reaſon for the third compenſation is that, as the game, after receiving the firſt wound, was in ſuch a ſtate as to have rendered it lawful by a *Zabbah Ikhtiâree*, if it had not received the ſecond wound, it follows that the ſecond hunter, in conſequence of the ſecond wound, did render unlawful half of the fleſh with reſpect to the firſt hunter. He is only required, however, to pay a compenſation for one *half* of the fleſh, as he paid the other half before, inaſmuch as he paid half the *value*, which included the fleſh.

Caſe of game firſt *wounded*, and then *killed* by the ſame perſon.

If, inſtead of *two* perſons ſhooting the game, *one* perſon ſhoot the ſame game *twice*, the law is then the ſame with reſpect to the illegality of the game as when it receives two wounds from two different perſons;—this being ſimilar to where a perſon, having ſhot game upon any eminence, and rendered it weak and feeble, afterwards ſhoots it a ſecond time, and brings it to the ground,—in which caſe the game ſo killed is unlawful, inaſmuch as the ſecond wound is the cauſe of illegality; and ſo alſo in the caſe in queſtion.

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All animals may be hunted.

The hunting of every ſpecies of animal is lawful, whether they be fit for eating or otherwiſe; becauſe the legality of *hunting* has been abſolutely declared in the Koran without reſtricting it to animals fit to eat. Another reaſon is, that the hunting of animals not fit for eating may proceed either from a deſire to obtain their ſkin, their wool, or their feathers, or from a wiſh to exterminate them on account of their being miſchievous or hurtful; and all theſe motives are laudable.

HEDAYA.

BOOK XLVIII.

Of *RAHN*, or *PAWNS*.

Chap. I. Introductory.

Chap. II. Of Things capable of being pawned; and of Things for which Pledges may be taken.

Chap. III. Of Pledges placed in the Hands of a *Trustee*.

Chap. IV. Of the Power over Pawns; and of Offences committed *by* or *upon* them.

CHAP.

CHAP. I.

Definition of *Rahn*.

RAHN literally ſignifies to detain a thing on any account whatever. In the language of the LAW it means the detention of a thing on account of a claim which may be anſwered by means of that thing; as in the caſe of debt.—This practice is lawful, and ordained; for the word of GOD, in the KORAN, ſays, "GIVE AND RECEIVE "PLEDGES;"—and it is alſo related, that the prophet, in a bargain made with a *Jew* for grain, gave his coat of mail in pledge for the payment.—Beſides, all the doctors have concurred in deeming pawn legal; and it is, moreover, an *obligatory* engagement, and conſequently lawful, in the ſame manner as *bail.*

Pawn is eſtabliſhed by declaration and acceptance; and confirmed by the receipt of the pledge.

CONTRACTS of pawn are eſtabliſhed by declaration and acceptance, and are rendered perfect and complete by taking poſſeſſion of the pledge.—Several of the learned have ſaid that the contract is complete immediately upon the declaration; for as it is a deed purely *voluntary*, it therefore obtains its completion from the voluntary agent alone; as in caſes of gift and alms. The ſeizin of the pledge is, nevertheleſs, abſolutely requiſite to the obligation of the deed, as ſhall be ſhewn in its proper place. *Mâlik* has ſaid that a contract of pawn become valid and binding immediately upon the concurrence of the parties; becauſe they relate to the property of both, and are conſequently ſimilar to ſale.—One of the arguments advanced by our doctors is, the text of the KORAN, as above quoted; and another argument is, that as the act of pledging is purely *voluntary*, (whence it

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is that there is no *compulsion* on the pawner towards the act,) it must therefore be *effectually* concluded, in the same manner as in the case of legacies;—and a contract of pawn can only be effectually concluded by the seizin, in the same manner as a legacy is effectually concluded by the testator dying without having receded from his bequest. It is to be observed, that if the depositor *relinquish* the pledge to the pawnee, his so doing is equivalent to an acceptance; in other words, his not obstructing the pawnee from taking possession of the pledge is equivalent to his actually investing him with the possession, and is a sufficient proof of his having so done. This is recorded in the *Zahir Rawayet*; and the reason of it is, that as the seizin of the pledge is sanctioned in virtue of the agreement, it therefore resembles the seizin of a thing sold. It is recorded from *Aboo Yoosaf*, that the seizin of a *moveable* pledge can only be accomplished by the laying hold of, and removing it, not by the pawner's merely relinquishing it, as above mentioned; for the seizin of a pledge is an occasion of responsibility *from the first*, in the same manner as usurpation. The former is, however, the better opinion.

Upon the pawnee taking possession of the pledge, the contract becomes binding;

UPON a person receiving a pledge which is distinguished and defined, (that is, unmixed and disjoined from the property of the depositor,) the acceptance being then ascertained, the contract is completed, and consequently binding. (Until, however, the seizin actually take place, the pawner is at full liberty either to adhere to, or recede from the agreement, as the validity of it rests entirely upon the seizin, without which the end and intention of a pledge cannot be answered.) Upon the pledge, therefore, being delivered to the pawnee, and his taking possession of the same, he becomes answerable in case of its being destroyed in his hands. *Shafei* maintains that a pledge being a *trust* in the hands of the pawnee, if it be destroyed in his possession still he does not on that account forfeit his due; because it is recorded in the traditions, that "*no pledge shall be distrained* "*for debt, and the pawner shall be liable for all risks*," meaning,

and he [the pawnee] is responsible for the pledge,

(according to *Shafeï*,) that if the pledge be deſtroyed, ſtill the debt is not annulled on account of any reſponſibility ariſing therefrom;—and further, becauſe a pledge being merely a *teſtimony*, the loſs of it does not annul the debt, ſeeing that a debt ſtill exiſts after the loſs even of a *written bond*; the reaſon of which is, that the uſe of taking ſuch a teſtimony is to add greater ſecurity to the pawnee's debt; and therefore if, from the decay or deſtruction of the pawn or teſtimony, the debt of the pawnee were cancelled, it would be oppoſite to the ſpirit of the agreement, ſince it would admit a poſſibility of the pawnee's right becoming extinguiſhed, a thing *repugnant* to *conſervation and ſecurity*. The arguments of our doctors upon this point are twofold.—FIRST, a tradition of the prophet, who once decreed the claim of a pawnee to be annulled, on account of the death of a horſe which he had in a pledge; (although, indeed, ſeveral of the learned, in their comments on this tradition, have remarked, that it was made at a time when the value of the horſe could not be aſcertained.)—SECONDLY, all the companions of the prophet, and their followers, have declared a pledge to be a ſubject of reſponſibility; that is to ſay, that if it decay in the hands of the pawnee, he ſuſtains the loſs.—With reſpect, moreover, to the aſſertion of *Shafeï*, that "a pledge "is a truſt," it is inadmiſſible, as being in direct contradiction to the concurrent opinion of the companions above-mentioned. With reſpect, alſo, to the tradition adduced by him as an argument, the real meaning of it is, "that a pledge cannot be completely ſeized, ſo as to "render it the abſolute property of the pawnee, in the room of his other "claim," an explication which *Koorokhee* has tranſmitted to us, as delivered by former ſages.—As, moreover, the pawnee is *entitled* to take poſſeſſion of the pledge as a ſecurity for his claim, and to detain it, (for *Rahn*, in its literal ſenſe, ſignifies detention,) it neceſſarily follows that a pledge is not a truſt.—In ſhort, in the opinion of our doctors, a contract of pawn requires that the pledge be continually detained in the hands of the pawnee in lieu of his debt, in this way,

which he is entitled to detain until he receive

payment of his debt,

way, that it remain in his possession as a security for the fulfilment of his claim;—whereas, in the opinion of *Shafeï*, the claim of the pawnee is connected with the *substance* of the pledge, as a *satisfaction* for his claim,—in this way, that he may sell it, and thereby obtain a discharge,—it being until such sale a trust reposed in him, and the property of the depositor;—and agreeably to these different tenets several cases occur concerning which there is a disagreement between our doctors and *Shafeï*:—for instance,—if the pawner be desirous of resuming his pledge for a short time, that he may enjoy the use of it, (as in the case of taking milk from a cow, or so forth,) he is not so allowed, according to our doctors, unless by the consent of the pawnee, as the object of the agreement of pawn (namely, a *constant possession*) would by that means be entirely defeated,—whereas, according to *Shafeï*, a pawner may even *forcibly* take back his pledge for a temporary enjoyment of the use, nor can he be prevented from this; because (in his opinion) a pledge may be sold conformably to the nature of the agreement; and the resumption of it towards an enjoyment of the usufruct cannot be considered as a subversion thereof.—(More cases of this kind shall be exhibited in the sequel.)

without admitting the pawner to any use of it.

The debt to which the pawn is opposed must be actually due.

A CONTRACT of pawn is not valid unless opposed to a debt due at that time; for the end of such contract is to establish possession in order to the *obtaining of payment*; and the *obtaining of payment* presupposes an obligation of debt.

The responsibility for the pledge extends to the amount of the

A PLEDGE is insured in the possession of the pawnee* to whatever is the smallest amount,—the debt of the pawnee, or the value the pledge bore at the time of its being deposited. Thus if a pledge equivalent to the amount of the debt perish in the pawnee's hands, his

* In other words, "*The pawnee is responsible for it.*"

claim

claim is rendered void, and he thereby, as it were, obtains a complete payment. If, on the contrary, the value of the pledge exceed the amount of the debt, the excefs is in that cafe confidered as a *truft*, and the whole of the pawnee's claim is annulled, on account of the decay of that part of the pledge which is equivalent to the amount thereof; and the remainder [the excefs,] as being held in truft, is not liable to be compenfated for, and confequently the pawner fuftains the lofs of it. If, on the other hand, the value of the pledge be *lefs* than the debt, the pawnee forfeits that part of his claim only which is equal to the value of the pledge, and the balance, or excefs, muft be paid to him by the pawner. *Ziffer* maintains that a pledge is liable to be compenfated for according to its value;—whence if a pledge of the value of one thoufand five hundred *dirms* at the time of delivery be deftroyed, and the debt of the pawnee be one thoufand *dirms*, the pawner has a claim upon the pawnee for the difference, namely, five hundred *dirms*.—His arguments upon this point are twofold.—FIRST, a faying of *Alee*, "*The pawner and pawnee fhall mutually reftore to each other the excefs, whether the pledge exceed in value the debt, or the debt the pledge.*"—SECONDLY, the amount in which the pledge exceeds the debt being (as well as the fum equivalent to the debt) given in pledge, the excefs is of confequence a fubject of refponfibility as much as that part which is equivalent to the debt. Hence, when the debt is annulled, a reftitution muft be made of the furplus. The opinion of our doctors upon this fubject is adopted from *Omar Farook*, and *Abdoolla-Ibn Mafdood.* They, moreover, argue, that as the pledge was taken poffeffion of purely for the purpofe of obtaining payment it is therefore a fubject of refponfibility only in that degree of value from which the payment of the debt might have been made, as in the cafe of a *real* payment, the furplus being pawned merely from neceffity, (as it was impoffible to have pawned the *exact value* of the debt,) and therefore not demanding reftitution.—With refpect, alfo, to the faying of *Alee*, (as quoted by *Ziffer*,) the meaning of it is, that the

debt owing to the pawnee.

the parties ſhall mutually return the exceſs, in caſe of *ſale*, (that is to ſay, if the pawner *ſell* the pledge,) not in caſe of *deſtruction*, for he has elſewhere declared the ſurplus to be held by the pawnee in *truſt*.

The pawnee may demand payment of his debt, and impriſon the pawner in caſe of contumacy.

It is lawful for the receiver of a pledge to make a demand of his debt, and even to impriſon the pawner in caſe of refuſal; becauſe the claim ſtill exiſts after the receipt of the pledge, which is not conſidered as a *fulfilment*, but merely as a *preſervative* of it. The pawnee, therefore, is not prohibited from making the demand; and if the circumſtance of the evaſions and delays of the pawner be made known to the *Kâzee*, he muſt impriſon him, as has been formerly explained *.

It is required of the pawnee, before payment, to produce the pledge;

Whenever a pawnee demands payment of his debt, it is requiſite that the *Kâzee* order him firſt to produce the pledge; becauſe as he poſſeſſes that for the purpoſe of obtaining payment, it is not lawful for him to take his due at the ſame time that he retains poſſeſſion of the pledge, which he holds as a ſecurity; ſince if, in ſuch caſe, the pledge were to periſh in his hands, a *double* payment would be induced, which is inadmiſſible. And when the pawnee ſhall have produced the pledge, the *Kâzee* muſt order the depoſitor firſt to diſcharge the debt, in order to aſcertain the *pawnee*'s right, in the ſame manner as the right of the *pawner* is aſcertained, to the end that both may be placed upon an equal footing; as in the caſe of bargains, where the ſeller having produced the goods, the buyer then lays down the purchaſe-money.

but if he demand payment in a

If the pawnee demand payment in a city different from that wherein the contract of pawn was concluded, and the pledge be of ſuch a

* In treating of *the duties of the* Kazee. (See Vol. II. p. 624.)

nature

nature as neither to require charge of carriage or expence, the ſame rules which have been laid down in other caſes hold good in this; as the place for the ſurrender of a pledge of this kind being entirely immaterial and indifferent, the doctors have therefore aſſigned no particular rules or conditions regarding it. If, on the contrary, the pledge be of ſuch a nature as to require carriage and charges of removal, the pawnee is not deſired to produce it; for ſuch a requiſition would neceſſarily oblige him to have it carried from place to place. It is, moreover, incumbent on him to relinquiſh the pledge to the pawner, and to allow him to reſume it; but he is not required to remove it from one place to another, as that would be a loſs to him which he had not ſtipulated.

diſtant place, he is not required to produce it unleſs this can be done without expence.

IF the pawner empower the truſtee* to ſell his pledge, and he ſell it accordingly, either for ready money or on credit, it is lawful, the power of the pawner to ſell it being indiſputable. If, therefore, the pawnee afterwards demand payment, he is not deſired to produce the pledge, as that, in ſuch caſe, is not in his power.—The ſame rule alſo holds where the pawnee, at the inſtance of the pawner, having ſold the pledge, does not poſſeſs himſelf of the purchaſe-money; for then the *Kâzee* may compel the pawner to diſcharge his debt, without requiring the pawnee to produce the pledge, which, becauſe of its having been ſold at the deſire of the pawner, has become converted into a *debt*,—wherefore the pawner himſelf did, as it were, pawn the purchaſe-money, (that is, the debt.)—If, on the contrary, the pawnee poſſeſs himſelf of the purchaſe-money, he muſt in that caſe

The pledge may be ſold, at the deſire of the pawner; and the pawnee cannot afterwards be required to produce it.

* Arab. *Adil*; meaning (literally) an *upright* perſon,—one in whoſe hands the parties mutually agree that the pledge ſhall remain until it be redeemed. The tranſlator ſubſtitutes the term *truſtee* throughout this book, becauſe (although not the literal meaning of *Adil*) it beſt expreſſes the ſenſe of the author.

be required to produce it upon demanding his debt; for as the money is a commutation for the pledge, it is therefore a substitute for it. It is to be observed, however, that in the above case the pawnee has a right to the possession of the purchase-money; for as he himself made the sale, the rights of the contract consequently appertain to him.

He must produce it on receiving a *partial* payment, as well as in case of a complete discharge.

In the same manner as the pawnee is required to produce the pledge when he is about to receive payment of his debt in full, he is also required to produce it when he receives part payment, provided the term stipulated be expired; because his thus producing it can be of no prejudice to him, whilst at the same time it serves to dissipate any apprehension of the loss of the pledge which may have arisen in the mind of the pawner. The pledge, however, is not to be restored until a complete discharge be made. If, also, the pledge should have been *sold* by the pawnee, and the purchase-money taken possession of by him, he is required to produce such purchase-money upon demanding payment of his debt, or of *part* of it, in the same manner as he is required to produce the pledge itself, in case of its being extant, as the purchase-money is a substitute for the pledge.

If a person should, by misadventure, kill a pawned slave, and the magistrate decree the value of such slave to be made good by the *Akilas* of the slayer within the term of three years, the pawner must not be compelled to discharge the pawnee's debt until he [the pawnee] shall have produced the full value of the slave; for, in this case, the value is a substitute for the slave who was in pawn; and it is consequently incumbent on the pawnee to produce the whole of his value, in the same manner as he is required to produce the whole pledge where it is extant. Here, moreover, the pledge has not become converted into value by any act of the pawner;—whereas, in the case formerly stated, (namely, where the pawnee sold the pledge at the desire of the pawner

pawner without possessing himself of the purchase money,) the pledge was converted into debt by the act of the pawner, since he invested the pawnee with a power of disposal. There is consequently an essential difference between these two cases;—whence it is that, in the present instance, it is incumbent on the pawnee to produce the value received for the slave, whereas, in the former case, he is not required to produce the pledge, nor yet its price, as of that he had never received possession.

Cases in which he is not required to produce it.

IF the pawner deliver the pledge into the hands of a *trustee*, ordering him, at the same time, to resign it in charge to some one else than the pawnee, and he accordingly do so, in that case the pawnee is not required to produce the pledge upon demanding payment of his debt, for this is rendered impossible, from its not having been intrusted to his care, but to that of another.—If, also, the trustee, having committed the pledge into the hands of one of his relations, should then abscond, and the person to whom it was given acknowledge, upon its being demanded from him, that "he had indeed received it in trust, but was ignorant of the real proprietor," the pawner may be compelled to discharge his debt, without the pawnee being required to produce the pledge, as he had never received it;—(and the same rule also holds, where the trustee absconds, carrying the pledge along with him, without its being known whither he is gone.)—If, on the other hand, the trustee deny the goods entrusted to him to be a pledge, asserting that "they are his own property," the pawnee cannot take any thing from the pawner until the contrary be proved; because the denial of the trustee is tantamount to a destruction of the pledge; and when a pledge is destroyed, the pawnee is considered as having received payment of his debt, after which he is no longer at liberty to claim it.

IF

The pawner cannot reclaim the pledge on the plea of *selling* it for the discharge of his debt.

If the pawner demand a restitution of the pledge with a view to sell it, and thereby pay off his debt; still it is not incumbent on the pawnee so to do, as the contract of pawn requires that the pledge be continually detained in the hands of the pawnee until such time as his debt be paid.—If, also, the pawner discharge the debt in *part*, still it remains with the pawnee to keep possession until he shall have received payment of the balance: but whenever a complete payment is made, the pawnee must be directed to restore the pledge to the pawner, as the obstacle to his so doing no longer exists, the claimant having obtained his due.

The pawnee must restore what he has received in payment, if the pledge perish in his hands.

If, after the discharge of the debt, the pledge should be destroyed with the pawnee, he must return the money he received in payment; for as, upon the pledge perishing in the hands of the pawnee, he appears to have received payment in virtue of his previous possession of it, he therefore appears to have taken payment *twice*, and consequently must return what he has received. In the same manner, if the pawner and pawnee should, by mutual consent, dissolve the contract of pawn, the pawnee may, nevertheless, keep possession of the pledge until such time as he receive payment of his debt, or exempt the pawner therefrom.

The contract is not dissolved until the pledge be restored.

A contract of pawn is not rendered void until the pawnee restore the pledge to the pawner, according to the prescribed mode of annulment.

The debt is discharged by the loss of the pledge.

If the pledge perish in the hands of the pawnee, after the parties have in concert dissolved the contract, his debt is in that case considered as discharged, provided the value of the pledge be adequate to it, the agreement being still held in force.

It

The pawnee is not entitled to *uſe* the pledge;

IT is not lawful for the pawnee to enjoy, in any ſhape, the uſufruct of the pledge.—If, therefore, a ſlave be pawned, the pawnee muſt not employ him in ſervice; if a houſe, he muſt not dwell in it; and if clothes, he muſt not wear them;—for the right of the pawnee is in the *poſſeſſion*, not in the *uſe*.—Neither is a pawnee authorized to ſell the pledge, unleſs at the deſire of the pawner.

or to *lend* or let it to *hire*.

A PAWNEE is not permitted to let out, or give the pledge in loan; for as he is himſelf prohibited from enjoying any uſe of it, he conſequently is not authorized to confer the power of enjoyment upon another. If, therefore, he do ſo, it eſtabliſhes a tranſgreſſion: but a tranſgreſſion does not occaſion a diſſolution of the contract.

He may conſign it in charge to any of his family.

A PAWNEE may either watch over the pledge himſelf, or he may devolve the care of its preſervation upon his wife, child, or ſervant, provided they be of his family. If, on the contrary, he commit the care of it, or reſign it in truſt, to one who is not of his family, he becomes the ſecurity, and the perſon to whom he gave it the ſecondary ſecurity. Concerning this, however, there is a difference of opinion between *Haneefa* and his two diſciples; for he does not conſider the other perſon to be a ſecondary ſecurity; whereas they have declared it to be in the option of the pawner to make whomſoever he may pleaſe the ſecondary ſecurity.

If he *tranſgreſs* with reſpect to it, he is reſponſible for the whole value.

IF a pawnee commit any tranſgreſſion * with reſpect to the pledge, he muſt make reparation to the whole amount of the value; in the ſame manner as in a caſe of uſurpation; for the amount in which the value of the pledge exceeds the debt is a truſt; and a tranſgreſſion with reſpect to a truſt, renders the perſon who commits it liable to make complete reparation.

* Such as converting it to his own uſe, &c. (as prohibited above.)

IF

The *use* of the pledge is determined by the pawner's mode of keeping or wearing it.

If a perſon pledge a ring, and the receiver put it on his little finger, and it be afterwards loſt or deſtroyed, he is reſponſible, as he has tranſgreſſed in making uſe of the pledge inſtead of uſing means for its preſervation;—and, in this caſe, the right or left hand is indifferent, there being no uniform cuſtom of wearing a ring invariably upon either.—If, on the contrary, the pawnee wear the ring upon any other than his *little* finger, this is not conſidered as an enjoyment of uſe, but as a means of preſervation, as it is contrary to the cuſtomary mode of wearing a ring.—So likewiſe, if the pawnee wear a ſheet (which he has received in pledge) after the cuſtomary mode, he is reſponſible for it; whereas, if he ſpread it over his ſhoulders, he is not reſponſible.

If a perſon pawn two or three ſwords, and the pawnee fling them over his ſhoulder, then, provided there be only *two*, he becomes reſponſible for their value in caſe of their loſs, but not if there be *three*; the reaſon of which is, that amongſt warriors it is a frequent cuſtom to fling *two* ſwords on their ſhoulders in battle, but never to fling *three*.

If a perſon pawn two rings, and the pawnee put them both on his little finger, and it appear that he was accuſtomed to adorn himſelf in this manner, he is liable to make compenſation in caſe they be by any means deſtroyed; but if the contrary be proved, he is exempt from any reſponſibility.

The expences of *conſervation* [of the pledge] reſt upon the *pawnee*; and thoſe of *ſubſiſtence* upon the *pawner*;

The rent of the houſe wherein the pledge is kept, as well as the wages of the keeper, reſt upon the pawnee:—but if the pledge be a living animal, and require a keeper and maintenance, the expence of theſe muſt be defrayed by the pawner.—It is to be obſerved that the wants of a pledge are of two kinds; I. ſuch as are requiſite towards the ſupport of the pledge and the continuance of its exiſtence;—II. ſuch as may be neceſſary towards its preſervation or ſafety, whether

whether wholly or partly. Now, as the absolute property of the pledge appertains to the pawner, the expences of the first class must therefore be defrayed by him; and as he has, moreover, a property in the *usufruct* of the pledge, its support and the continuance of its existence for this reason also rest upon him, being an expence attendant upon his property;—in the same manner as holds in the case of a *trust*. (Of this class are the maintenance of a pledge in meat and drink, including wages to *shepherds*, and so forth; and the clothing of a slave, the wages of a nurse for the child of a pledge, the watering of a garden, the grafting of fig-trees, the collecting of fruits, &c.) The expences of the *second* class, on the contrary, are incumbent on the pawnee; because it is his part to *detain* the pledge; and as the preservation of it therefore rests upon him, he is consequently to defray the expence of such preservation. (Of the second class is the hire of the keeper of the pledge; and so likewise the rent of the house wherein the pledge is deposited, whether the debt exceed or fall short of the value of the pledge.)—All that is here advanced is according to the *Zâhir Rawâyet*. It is recorded, from *Aboo Yoosaf*, that the rent of the house is defrayed by the pawner, in the same manner as maintenance, it being his duty to use every possible means towards securing the existence of the pledge: but that a *Juál*, or reward for restoring a fugitive slave, is of the *second* class; for as the pawnee is necessitated to use every possible expedient to recover the possession of the slave, the reward, as being connected with preservation, must be defrayed by him. This, however, holds only with respect to such pledges as do not exceed the amount of the debt; for where the value of the pledge exceeds the amount of the debt, the pawnee must not be taxed with the payment of the *whole*, but with such share of it only as is proportionate to the value of the pledge; whilst the remaining part, in proportion to the surplus, falls on the pawner; for the excess not being held by the pawnee in *pledge*, but in *trust*; the restitution of the slave, in regard to the excess, is, as it were, made to the absolute owner, to whom, therefore, the surplus must be charged.

THE

but those incurred by *sickness* or by *offences* must be defrayed by *both*.

The expence of healing the wounds, of curing the disorders, and of pecuniary expiations for the crimes of pledges, are defrayed by the pawnee and pawner proportionably to the amount of the debt, and the excess of the value of the pledge over the debt.

Taxes are defrayed by the pawner.

The taxes on pledges are levied from the pawner, as they are necessary towards the subsistence of his property.

Tithes (upon pawned land) have preference to the right of the pawnee.

The tithe from the revenue of tithe-lands held in pawn, precedes the right of the pawnee; because it is connected with both the *substance* and the *property* of the pledge, whereas the right of the pawnee is connected with the *property* of it only, not with the *substance*.—Still, however, the contract of pawn is not invalidated in regard to the sum remaining after the payment of the tithe, as the obligation of tithe in no respect impugns the pawner's right of property. It is otherwise where an undefined part of a pledge proves the right of another; for in that case the contract becomes null with respect to the remainder, because this shews that the pledge was not wholly the pawner's property.

If either party voluntarily defray what is incumbent on the other, he has no claim upon him on that account.

If either party defray any of the expences incumbent on the other, it is deemed a voluntary and gratuitous act. If, on the contrary, one of them should, by order of the *Kázee*, fulfil a duty incumbent on the other, he has in that case a claim on the other for so doing, in the same manner as if he had done it at his instigation; for the *Kázee*'s jurisdiction is *general*. It is recorded, from *Haneefa*, that no claim can be made on the other, notwithstanding the expence be defrayed by order of the *Kázee*, unless he were then absent. *Aboo Yoosaf*, on the contrary, has said that a claim is valid in both cases; that is, whether the other were present or absent.

CHAP.

CHAP. II.

Of Things capable of being pawned; and of Things for which Pledges may be taken.

An *indefinite part* of an article cannot be pawned.

IT is unlawful to pawn an indefinite part of any thing. *Shafeï* maintains that it is lawful.—On behalf of our doctors two reasons are urged. FIRST, this disagreement arises from the difference of opinions regarding the object of pledges; for according to us, pledges are taken to be detained with a view to obtain payment of a debt, which cannot be effected in case the pledge be an undefined part of property; because a seizin of things of that nature cannot be made, a real seizin being only practicable with respect to things which are defined and distinguished;—whereas, according to *Shafeï*, the object of pledges is that the pawnee may sell them to effect a discharge of his debt; and with this object pledges of the nature above mentioned are not in any shape inconsistent.—SECONDLY, it is an essential part of the contract of pawn, that the pledge be constantly detained in the hands of the pawnee until the redemption of it by the pawner; a condition which cannot be fulfilled with respect to pledges of the above nature; for in such cases it would be necessary that the pawner and the pawnee have possession of the article alternately, whence it would be the same as if the pawner were to say to the pawnee, "I pawn it to you every "other day."—As, therefore, a constant detention is in such case impossible, it follows that the pledge of an undefined part of any thing, whether capable of division or incapable, is illegal.

even to a partner in the article.

It is not lawful to pledge any undefined part of joint property, even to a copartner; for, besides that the detention of such pledges cannot be made, the receiver would in such case retain possession of it, one day in virtue of property, and another in virtue of the contract of pawn; and thus he would hold it one day in pledge, and another not.

If the pledge be rendered indefinite by any supervenient act or circumstance, the contract of pawn is annulled.

A SUPERVENIENT indefiniteness is repugnant to the continuance of a contract of pawn, according to the *Mabsoot*;—in other words, if a person pledge a piece of ground, for instance, and afterwards desire a trustee * to sell the half thereof, and the trustee accordingly do so, the contract of pawn no longer exists.—It is recorded from *Aboo Yoosaf*, on the contrary, that a supervenient indefiniteness does not dissolve a contract of pawn,—in the same manner as it has no effect in the case of donations;—in other words, if a person bestow any thing in gift upon another, and afterwards retract the half, the gift still remains valid with respect to the other half.—The reason for what is quoted from the *Mabsoot*, as above, is that, in the case there stated, the subject of the contract does not exist as before; and a subsequent circumstance, as far as it has a tendency to annihilate the subject of the contract, operates equally as if it had existed from the beginning;—in the same manner as where a person (whether knowingly or unknowingly) marries within the prohibited degree.—It is otherwise with gifts; for the effect of gift is investiture with right of property; and an undefined part of a thing is capable of being *property*. The reason, moreover, why seizin, in the case of a gift, is requisite before the right of property can be acquired, is to prevent the possibility of compulsion; for if the grantee should become proprietor of the gift immediately upon its being offered, and without taking possession, the giver (who ought to act of his own accord) would then be constrained to do

* Arab, *Adil.* (See note, p. 195.)

that

that to which he has not yet assented; namely, to deliver up the gift.

It is not lawful to pledge fruit without the trees which bear it, crops without the land on which they are produced, or trees without the ground on which they stand; for as the pledge, in all these cases, has a natural connexion with an article which is unpledged, it is therefore, in effect, indefinite, until such time as it be separated from that article.—In the same manner also, it is unlawful either to pawn a piece of ground without the trees which are produced upon it, a field without its produce, or a tree without its fruit; because, in these cases, a mortgage is induced of an article naturally conjoined with another which is not pledged. In short, it is a rule that when a pledge is joined to something not in pawn, the contract is not valid, since in such case possession cannot be taken of it. *Haneefa* has judged it lawful to pawn a piece of ground without its trees; for as the trees have no connexion with the ground, except in that part only from which they vegetate, they may therefore be excepted, together with the particular spot on which they stand. It is otherwise when a person pawns the court-yard of a house without the building itself; for then the part of the ground on which the building stands remains unpledged, whereas it is requisite that the *whole* of the ground be pledged.

An article naturally conjoined to another cannot be pawned separately.

It is lawful to pawn trees, together with the particular spots of ground on which they grow; for here subsists a *vicinity* only with the pawner's property, which is not repugnant to a contract of pawn.—If, in this case, there be fruit upon the trees, it is included in the contract; for as the fruit is an appendage of the tree, because of the connexion between them, it is therefore included in the contract, in order that the same may be valid.—It is otherwise in the case of *sale*, for as trees may be sold without their fruit, unless that be expressly stipulated, it is not included in the sale. It is also otherwise with respect

Trees, however, may be pawned with the immediate spots on which they grow, without including the rest of the land.

respect to valuables deposited in a house; for these not being appendages to the house are not included in the pledge, unless they be expressly stipulated. Grain, however, and herbs are considered as included, in case of their ground being pawned; but not in case of the *sale* of it. Buildings, also, and trees, are included in the contract of pawn, when the ground or villages to which they belong are pledged.—A person may also lawfully pawn a house, together with whatever it contains.

A claim of right established in a separable part of a pledge does not annul the contract with respect to the *remainder*.

If another person prove his right to part of a pledge, and the remaining part be of such a nature that it might with propriety be distinctly pawned, (as where another proves his right to the *court-yard* only of a pledged house, without the *building*,) the contract still subsists with respect to the remaining part; in other words, if the residue be destroyed in the hands of the pawnee, his debt is divided between such residue and the value of what had proved the right of another; and the proportion which the residue bears to the whole is struck off from the debt, and that which the other part bears to the whole remains due from the pawner *. If, on the contrary, the residue be of such a nature that it cannot be separately pawned, (as where another proves a right to a pledged house without its court-yard,) the contract of pawn becomes absolutely void; for it cannot operate upon any thing except what remains after deducting what has proved the right of another; and such residue is incapable of being pawned.—It is to be observed that the continuance of the pawner, or of his goods, in the house which he has pledged are obstructive of a regular delivery of the house;—in other words, if a person pledge or mortgage his house, and remain himself, or keep his goods therein, a delivery to the pawnee is not established until he evacuate it, or withdraw his goods therefrom; whence, if it be destroyed in the interim, the pawnee is

Occupancy, so as to obstruct a delivery of the pledge to the pawnee, prevents his becoming responsible for it.

* The mode of calculation, in this case, will be exhibited in a note in the last section of this book.

not

not anſwerable.—In the ſame manner, the continuance of any thing within a pledged veſſel is repugnant to the delivery of it; and ſo likewiſe the continuance of a burden on a pawned quadruped,—whence the contract is not complete until the burden be taken off, as the animal otherwiſe continues occupied. It is different where the *burden* is pawned and not the *animal*; for in this caſe the contract is valid, and the burden is pledged immediately upon the pawner delivering over the animal, it being occupied by the burden, not the burden by it; in the ſame manner as where things contained in a houſe or veſſel are pledged without that houſe or veſſel.—It is otherwiſe, however, where a perſon pawns a ſaddle or bridle upon a camel, and delivers the camel to the pawnee; for in that caſe the contract is not valid until the ſaddle or bridle be taken off the camel and delivered ſeparately to the pawnee; theſe being dependants of the camel, in the ſame manner as fruit is a dependant of the tree;—whence it is that (as lawyers have remarked) whenever a camel is pawned with a ſaddle or bridle on it, theſe are likewiſe included in the contract, although not particularly ſpecified.

Pledges cannot be taken for *truſts*;

IT is not lawful to take pledges for *truſts*, ſuch as depoſits, loans, or *Mozâribat*, or partnerſhip ſtock;—in other words, if a perſon commit his goods in truſt to another, taking a pledge for the ſame, it is invalid; as the receipt of the pledge would ſubject the receiver to reſponſibility; for if the pledge were deſtroyed in his hands, his claim would be extinguiſhed in a degree proportionate to the value.—In ſhort, it is requiſite that ſomething lie againſt the pawner of a nature to ſubject him to reſponſibility, in order that, oppoſed to it, the poſſeſſion of the pledge, in the event of its deſtruction, may ſubject the pawnee to reſponſibility, and operate as a diſcharge of his claim; but there is no reſponſibility with reſpect to *truſts*.

nor for any thing not inſured with

IT is not valid to take a pledge for articles which do not ſubject the holder to reſponſibility,—ſuch, for inſtance, as an article ſold, and

the *holder* of it;

and which still remains in the hands of the seller; for if the purchaser be desirous of taking a pledge from the seller to answer the delivery, it is invalid, an article sold not being insured in the hands of the *seller*. (Still, however, if the article sold perish in the seller's hands, his claim on the buyer for the price ceases; or, if he should have previously received the price from the buyer, he must restore it.)—With respect, on the contrary, to articles which subject the holder to responsibility, (that is, those for which, when destroyed, the holder is responsible,—for a *similar*, if of the class of similars;—or for the *value*, if of a different description,—such as *usurped* property, the consideration for *Khoola*, the dower to a wife, and the composition for wilful murder,) it is lawful to take pledges for them, as responsibility attaches to all such matters, since if the article be extant the delivery of it is incumbent, or the value if it be destroyed. Opposing a pledge to such articles, therefore, is taking a pawn in security for that which is itself a subject of responsibility, and is consequently valid.

nor as a security against *contingencies*.

It is not lawful to take a pledge as a security against contingencies;—in other words, if a person sell an article and receive the price, and the purchaser, from an apprehension that the property might afterwards prove the right of another, and that he might thereby be rendered liable to a loss, should on that account demand a pledge from the merchant securing him against such a circumstance, it is invalid; for it is an established maxim that a pledge is to be taken as a security for the discharge of a claim *then extant*; and in the above case the claim does not exist, but is only what may possibly happen. If, therefore, a pledge be in such a case taken, it is considered as taken in *trust*, and not in *pawn*, and is in no respect subject to the laws of pledges. In a similar manner, if a person deposit any thing in pledge with another, in security for any thing which may *in future* be due from him, it is invalid.—It is, indeed, otherwise in the case of a *promised* debt;—as where a person gives a pledge to another on the strength of his promising to lend him one thousand *dirms*, and the other takes the

pledge

pledge and promises to lend the money, and the pledge perishes in his hands; for in this case he is responsible in proportion to the sum promised, in the same manner as if it had been actually paid, the promise of debt being considered as an actual existence of it, for this reason, that it was made at the earnest desire of the borrower.

Case of pawns in bargains of *Sillim* or *Sirf*.

IF a person, having bespoke goods of a merchant, pawn something in security for the payment of the purchase-money, or having sold silver to a banker, receive a pledge in security for the price, or if a merchant give a pledge to a person who has bespoke goods from him, as a security for his delivery of them,—the contract is valid. *Ziffer* has said that the contract, in these instances, is not valid, inasmuch as the object of the pawn in such cases is that it may be a security for the discharge of the several claims, namely, the purchase-money of the goods bespoken, the value of the silver sold to the banker, or the goods bespoken,—which is not allowable, because an exchange is here induced of things not delivered for things of a different species; and an exchange of such things, previous to seizin being obtained of them, is unlawful. The argument of our doctors is, that as a parity of species betwixt the things which were to be delivered, and the pledge, holds good with respect to their *worth*, by means of their worth the engagement may be fulfilled;—and the possession of a pledge induces a responsibility in regard to its worth, although with respect to its substance it be considered merely as a *trust*.—If, also, the pledge opposed to the price of the article bespoke, or the value of the silver sold, be destroyed at the time of making the contract, (that is, before the company in whose presence it was made breaks up,) the bargain is accomplished, and the pawnee or seller is reckoned to have received his right; because by the destruction of the pawn he is virtually considered to have received the price of his silver, or the amount of money which was to have been advanced.—If, on the contrary, the buyer and seller should have separated previous to the destruction of the pledge, the bargain becomes invalid; because the receipt of the

price of the silver, or the advance of money for the goods at the time of making the bargain, (which is a condition,) is not here established either in reality or in the construction of law.—If, moreover, a pledge taken in security for the delivery of the goods bespoken be destroyed, the bargain is completed, and the pawnee (who advanced the money) is held to have received the goods which he bespoke.

In the dissolution of a contract of *Sillim*, the pledge remains as a security for the advanced capital;

If the parties to a contract of *Sillim* dissolve the bargain in a case where a pledge has been given for the delivery of the goods, it still remains as a security for the refunding of the money which had been advanced, as *that* then stands in lieu of the *goods*;—in the same manner as where goods are usurped, and, the *Kazee* having ordered their restoration, a pledge is given for that purpose, and afterwards the goods are destroyed,—in which case the pledge remains a security for the *value* of the goods.

and if it be lost in the advancer's hands, his claim of restitution is annulled.

If, in the above instance, the pledge be lost after the parties had agreed to annul the bargain of *Sillim*, the bespoken article is in that case considered as *delivered*, and the purchaser [the advancer] has no further claim.—It is, however, incumbent on him to give to the seller as much grain as he should have received from him, in order to his recovering the money he had advanced,—in the same manner as where a person, having sold a slave and delivered him to the purchaser, takes a pledge in surety for the price,—and they afterwards mutually consent to annul the bargain,—in which case the seller is entitled to retain possession of the pledge as a security for the restoration of the slave; and if the pledge be destroyed in his hands, he is considered to have received the purchase-money; and it is incumbent on him to pay the sum of the purchase-money to the buyer, and thereby recover his slave.

It

IT is not lawful to pawn either a freedman, a *Modabbir*, a *Mokâtib*, or an *Am-Walid*; becauſe the end of a contract of pawn is to eſtabliſh the pawnee's poſſeſſion of the pledge, with a view to obtaining payment of his claim; a view which cannot be accompliſhed in any of the above-mentioned inſtances, as a freedman is not property, and the ſale of the others is contrary to law.

A freedman, a *Modabbir*, a *Mokâtib*, or an *Am-Walid*, cannot be pawned.

IF a perſon agree to be bail for the appearance of another, it is not allowable to demand a pledge from him on this account.—In the ſame manner alſo, it is not lawful to take a pledge as a ſecurity for a criminal condemned to ſuffer retaliation either in life or limb, as in ſuch caſe the right could not be obtained by means of the pledge. It is otherwiſe in the caſe of offences by *miſadventure*; for there the fine may be diſcharged by means of the pledge.

Pledges cannot be taken to ſecure the appearance of a *ſurety*; or of a criminal liable to *retaliation*;

IT is not lawful to take a pledge oppoſed to a right of *Shaffa*:—in other words, if a perſon appeal to the *Kâzee*, (for inſtance,) and claim his privilege of *Shaffa*, and obtain from him a decree to that effect, and demand of the purchaſer a pledge for the houſe over which his privilege of *Shuffa* extends, the pawn is not valid; for here the article is not inſured in the hands of the purchaſer; (that is to ſay, if the houſe ſuffer any damage in the poſſeſſion of the purchaſer, he is not reſponſible for it;) and a pledge cannot be taken but for matters that induce reſponſibility.

or in ſecurity for a right of *Shaffa*;

IT is not permitted to take a pledge oppoſed either to a ſlave guilty of a crime, or to the *debt* of a ſlave; becauſe the maſter is not in either inſtance reſponſible, ſince, in caſe of the death of the ſlave, he is not obliged to diſcharge his debts.

or for a criminal *ſlave*, or the *debts* of a ſlave;

or for the wages of a public *finger* or *mourner*.

It is not lawful to give a pledge for the wages either of a mourner* or of a finger. If, therefore, a pawn be given in fuch cafe, and be afterwards deftroyed in the hands of the pawnee, he is not refponfible for it, as the thing in fecurity for which it was pledged is not a fubject of refponfibility.

A *Muffulman* cannot give or take *wine* in pawn: but if he fo receive wine from a *Zimmee*, and it be deftroyed, he is refponfible.

It is unlawful for a *Muffulman* either to give or take wine in pawn, whether from a *Muffulman* or a *Zimmee*. Notwithftanding this, however, if the *Zimmee* be the pawner and the *Muffulman* the pawnee, and the wine be loft or fpoiled, the *Muffulman* is accountable for it, in the fame manner as in the cafe of his having *ufurped* it: whereas, if the *Muffulman* were the pawner and the *Zimmee* the pawnee, and the wine be loft in the hands of the latter, he would not owe any compenfation to the *Muffulman*, any more than a perfon who had *ufurped* wine from a *Muffulman*. It is otherwife where the pawner and pawnee are both *Zimmees*; for wine is property with them. Carrion, on the contrary, is not property with them any more than with *Muffulmans*; and accordingly a pawn of carrion is not valid among them any more than with us.

A pawnee is ftill refponfible for the pledge, although it appear that the debt to which it was oppofed is not due.

If a perfon purchafe vinegar, a flave, or a flaughtered goat, and, having given a pledge for the purchafe-money, afterwards difcover the vinegar to be wine, the flave to be a freeman, or the goat to be carrion†, ftill the feller is refponfible for the pawn in cafe of its being loft or deftroyed; for it was depofited in oppofition to a debt to all appearance due. The fame rule alfo holds in a cafe where a perfon, having killed a [fuppofed] flave and given a pledge for the payment of his value, after-

* Meaning, a perfon employed, on occafions of grief, in making lamentations.—It is a cuftom amongft the *Muffulmans* to employ fuch perfons, although prohibited by the LAW, —whence it is that they cannot legally fue for their hire.

† As having died a natural death.—The term *carrion* is applied to the flefh of all animals not flain according to the prefcribed form.

8 wards

wards discovers that he was a freeman. So, likewise, where the parties in a suit compromise the business for a part of the plaintiff's demand, and the defendant deposits a pledge to answer the same, and they afterwards agree that nothing was owing from the defendant, the pledge is insured in the hands of the holder of it.

A father or guardian may pledge the slave of his infant ward for a debt owing by himself;

IT is lawful for a father to pledge, in security of his own debt, the slave of his infant child; for a father has the privilege of depositing the goods of his infant child in trust; and to pledge them is still more conducive to the interest of the proprietor than to place them in trust, since if a pledge be lost it must be accounted for, whereas a trustee is not responsible for the deposit in his hands. A guardian also is the same as a father in this particular, because such an authority vested in him is beneficial to the child. *Aboo Yoosaf* and *Ziffer* maintain that this is not lawful either to the father or guardian; (and such is what analogy would suggest;) for a pledge is, in effect, equivalent to a *payment*; and as a father is not privileged to pay off his debts with the goods of his child, it follows that he has no power of giving them in pledge.—To this, however, it may be replied, that there is an obvious difference between the act of *pledging* and that of *payment*; for discharging the debts by means of the child's property is a destruction of his right without any equivalent; whereas, placing his property in pledge is providing it a guardian, for the interim, without in any degree affecting his right. As, therefore, the contract of pawn is valid in this instance, it follows that in case of the pledge being destroyed in the pawnee's hands, he is considered to have received payment of his debt, and that the father or guardian are responsible to the infant, as having discharged their debt by means of his property.—In like manner it is lawful for a father or guardian to order the pawnee to sell the pledge; for both of these have the privilege of selling the goods of their infant ward. The learned have said, that this is founded on the law in a case of *sale*; for where a father or guardian gives the goods of his ward to his own creditors, in payment of his debt, it is lawful;

(but they are accountable in case of loss;)

and they may also authorize the pawnee to *sell* the slave.

and

and a commutation being thus made of the debt for the price, the father or guardian, in the opinion of *Haneefa* and *Mohammed*, become anſwerable to the ward for the value.—According to *Aboo Yoosaf*, on the contrary, a commutation does not take place;—and the ſame difference of opinion obtains where an agent for ſale diſpoſes of the goods of his conſtituent to a perſon to whom he is indebted. The contract of pawn, however, is in theſe inſtances ſimilar to that of ſale with reſpect to its effects; for in both the object is to diſcharge the debts of the father or guardian with the goods of the infant, and to become anſwerable for them.

A father may retain the goods of his infant child in pledge for a debt owing from the infant to himſelf, or to *another* infant child, or to his own mercantile ſlave:

IF a father pawn the goods of his infant child into his own hands for a debt due from the child, or into the hands of another of his children being an infant, or of his ſlave, being a merchant and not in debt, it is lawful; becauſe a father, on account of the tender affection which he is naturally ſuppoſed to have for his child, is conſidered in a double capacity, and his bare inclination as equivalent to the aſſent of both parties; in the ſame manner as where a father ſells the property of his infant child to himſelf.

but a *guardian* has not this privilege;

IT is not lawful for a guardian to pledge into his own hands goods belonging to his ward on account of a debt due to him, or into the hands of his child being an infant, or into the hands of his ſlave being a merchant and free from debt; (nor is it permitted to him to give any thing of his own in pawn into the hands of an orphan for a debt owing to the orphan from himſelf;) for a guardian, being merely an agent, cannot of courſe have a double capacity in contracts. A guardian, moreover, is more deficient in tenderneſs than a father, and therefore cannot, like a father, ſtand in a double capacity in making contracts. Beſides, a guardian pawning the property of his ward into the hands of his infant child, or his ſlave, being a merchant and free from debt, is in effect the ſame as pawning it to *himſelf*.—It is otherwiſe where a guardian pawns the property of his ward to his *adult* ſon,

to

to his father, or to his indebted ſlave, ſince over theſe he has no authority.)

IF a guardian purchaſe victuals or apparel for the uſe of his ward, and, having debited him for the price, take in pawn part of his goods as a ſecurity for the debt, it is valid; for, as he is permitted to borrow for the uſe of the orphan, and as taking a pawn is like the diſcharge of a claim, it is of conſequence legal. Beſides, as it is lawful for a guardian to trade on account of his ward, it follows that it is alſo lawful for him to give and receive pawns, they being ſimilar to receipts and payments.

yet he alſo may retain the goods in pawn for *neceſſaries* furniſhed by him.

IF a father pawn the goods of his infant ſon, and the infant attain maturity, ſtill he is not at liberty to annul the contract of pawn and take back the pledge until he ſhall have diſcharged the debt; for the contract is binding upon him; as the act of a father on behalf of his infant child is binding upon the child after he ſhall have attained maturity, a father being his infant child's ſubſtitute.

A child cannot recover property which had been pawned by his deceaſed father, but by *redeeming* it.

IF a father pawn the goods of his ſon on account of his own debt, and the ſon, by a diſcharge of the debt, redeem the ſame, he has a claim on the father for the ſum; for it was neceſſary that the ſon ſhould diſcharge the debt, having occaſion to releaſe his goods out of the hands of the pawnee;—in the ſame manner as holds with reſpect to the lender of a pledge; in other words, if a perſon lend any thing to another with a view to that other's pawning it, it is lawful to him to redeem the article from the pawnee by a diſcharge of the borrower's debt, and then to prefer a claim of debt againſt the borrower; and ſo here likewiſe.—If, alſo, in this caſe, the pawn be loſt or deſtroyed before the ſon's releaſe of it by diſcharging his father's debt, it is lawful for him to prefer a claim upon the father, as he has in effect diſcharged his debt by means of his [the ſon's] property.

If he redeem it during the father's lifetime, he has a claim on him for what he pays;

and the father is reſponſible in caſe of the pledge being loſt.

It is lawful for a father to pawn the goods of his ſon for a debt jointly due by both. If, therefore, the pledge be deſtroyed, the father muſt compenſate to the ſon by the payment of a ſum equivalent to his [the father's] ſhare of the debt; becauſe he has paid off ſo much by means of the ſon's property.—The ſame rule alſo holds with a grandfather, or a guardian, in caſe of the non-exiſtence of the father.

Caſe of a guardian pawning the goods of his orphan ward, and then borrowing and loſing the pledge.

If a guardian purchaſe victuals for an orphan, ſo as that the price is a debt upon the orphan, and pawn an article belonging to the orphan as a ſecurity for the debt, and the pawnee take poſſeſſion of the ſame, and the guardian then borrow it from the pawnee for the uſe of the orphan, and it be deſtroyed in his [the guardian's] hands, it is no longer included in the contract of pawn, nor is any perſon reſponſible for it; for the act of the guardian in this inſtance is the ſame as that of the orphan when he has attained maturity, he having borrowed the article for his uſe,—in which caſe ſuch is the rule. The debt of the orphan, in this caſe, ſtill remains due; and the creditor is to receive payment from the guardian, who is reimburſed by the orphan; becauſe the guardian, in borrowing the pledge, was not guilty of any tranſgreſſion, as it was borrowed for the orphan's uſe. If, on the contrary, it have been borrowed on his own account, he is reſponſible for it to the orphan; becauſe in borrowing it for his own uſe he is guilty of a tranſgreſſion, as having uſurped a privilege which does not belong to him. If, alſo, he were to uſurp it from the pawnee and apply it to his own uſe, he is reſponſible for the value, as having been guilty of a tranſgreſſion,—with reſpect to the pawnee, by the uſurpation,—and with reſpect to the orphan, in having applied the article to his own uſe. He is, moreover, in this inſtance bound to diſcharge the debt of the pawnee, if the term ſtipulated ſhould have expired. If, therefore, the value of the pawn be equivalent to the debt, he muſt diſcharge it in full, without any reimburſement from the property of the orphan; for the ſame that was before due from the orphan to him becomes now ſo from him to the orphan, and hence a

commutation

commutation takes place. If, on the other hand, the value of the pledge be *ſhort* of the debt, he muſt diſcharge from his own property a ſum equivalent to the pledge, and the reſidue from that of the orphan; for he is only liable for the amount of the value of the pledge. If, on the contrary, the value of the pledge *exceed* the debt, he muſt pay the amount of the debt to the pawnee in diſcharge of his claim, and the remainder is the right of the orphan. If the ſtipulated term of payment ſhould not have expired, the value of the pledge muſt be depoſited in pawn with the pawnee; for the guardian having deſtroyed one of the eſtabliſhed rights of the pawnee, the value of it therefore muſt be given in pledge into his hands;—and upon the term of payment arriving, the ſame rules are to be obſerved as are above fully ſet forth.—It is to be obſerved, however, that the guardian, in caſe of having extorted the pawn and applied it to the uſe of the orphan, becomes (if under theſe circumſtances it ſhould be deſtroyed) liable only to make reparation for violating the rights of the pawnee, as in applying it to the uſe of the orphan he does not violate his right; neither is his taking it from the pawnee any tranſgreſſion with reſpect to the orphan, as a guardian is authorized to take the goods of his ward;—whence it is that *Mohammed*, in the *Zeeadât*, (under the head of *Acknowledgments*,) has ſaid, "Where a father or guardian acknowledges "having uſurped the goods of his infant ward, nothing is chargeable "to them in caſe of loſs or decay; becauſe this is not an uſurpation, "they having an unlimited power to take the goods of their ward." In the above caſe, therefore, the guardian is anſwerable to the pawnee; and at the expiration of the ſtipulated term he muſt diſcharge his debt and charge it to the account of the orphan; for he has in no reſpect prejudiced him, but has on the contrary applied the pawn to his uſe. If, however, the term of payment be not arrived, the thing given in reparation muſt, until then, remain as a pledge in the hands of the pawnee, when he is to obtain payment of his debt, and the guardian to recover the amount from the orphan's property.

Money, and all *weighable* and *measureable* articles may be pawned,—Rules to be observed in those instances.

It is lawful to pawn *dirms*, *deenars*, or any article of weight or measurement of capacity; for as a debt may be discharged by means of such articles, they are consequently fit to be pawned. If, therefore, any such articles be pawned in security for an article of the same kind or species, and be lost in the pawnee's hands, the debt becomes cleared in a degree proportionate to the value of the pledge, if that be either equal to, or less than the amount of the debt. If, on the contrary, the value of the pledge exceed the amount of the debt, the whole of the debt is in that case held to be discharged, notwithstanding the one be base and the other pure; for where the pawn and debt are of the same kind, the quality is not to be considered. This is the opinion of *Haneefa*; for (according to him) the pawnee in the above case is to receive payment of his debt by weight, and not by value.—The two disciples, on the contrary, hold that the pawnee, on the loss of the pledge, becomes responsible for its value in some thing of a different species, which value he holds (as it were) in pawn in lieu of the original pledge *. The argument of *Haneefa* is, that any regard to quality drops in the case of usurious property † when opposed to its own species.—A discharge in a *pure* article of this nature, moreover, in return for a *base* article, is lawful,—as where, for instance, a debtor, through inattention, repays a debt of base money in pure money.

Case of a silver vessel pawned,—and afterwards lost,

If a silver vessel equiponderant to ten *dirms* be pawned for a debt of ten *dirms*, and afterwards lost in the hands of the *pawnee*, the whole amount of the debt stands discharged. The compiler of the *Hedâya* remarks that this rule universally obtains with our doctors where the

* Here follows a case in point, quoted from the *Jama Sagheer*, with the author's remarks, and the difference of opinion among the *Mussulman* doctors concerning it, which is omitted by the translator, as it interrupts the discussion of the point in question, and the arguments adduced have been before fully detailed under the head of *Usury*.

† Arab. *Imwâl Rabwee*; meaning any sort of grain,—and also gold or silver;—in short, every thing with respect to which usury can be conceived possible.

value

value of the vessel is either equal to, or greater than the *weight* of it: but that where the *value*, by being short of the *weight*, is short of the debt, there is a difference of opinion; for, according to *Haneefa*, the *whole debt*, in that case, stands discharged, (he holding that the pawnee to have received payment by the *weight* of the vessel;)—whereas the two disciples teach that the pawnee remains responsible for the value, which continues with him (as it were) in pawn, his claim still existing as before. If, on the contrary, the vessel be not *lost*, but *broken*, then, on the first supposition, (that is, supposing the weight and value to be the same,) according to *Haneefa* and *Aboo Yoosaf* the pawner is not compellable to redeem it; for if he were to redeem it by paying the greatest part of his debt, and deducting some small part of it in consideration of the loss arising from the breakage, it would in that case appear that he consider the quality separately, and on this account paid only *part* of his debt, which is illegal; or if, on the other hand, he were to redeem it by paying the *whole* of his debt, and thus taking the broken vessel, it would be a loss to him.—The pawner, therefore, (according to the two *Elders*,) is at his own option, either to redeem the broken vessel by paying the whole of his debt, or to relinquish it and compound with the pawnee for its value, which may either be of the same or of a different species from the vessel; and this value remaining (as it were) in pawn, the pawnee becomes proprietor of the vessel, because of his having thus made compensation for it. In the opinion of *Mohammed*, on the contrary, the pawner may either redeem the broken vessel by a payment of the whole of the debt, or he may give it to the pawnee as a discharge of it, in the same manner as in the case of the *loss* of the pawn. Hence *Mohammed* conceives an analogy between a pawn *damaged* and a pawn *lost*, for this reason, that when a redemption cannot be made without a compensation, it is then the same as if the pawn were lost; and as, when the pawn is actually lost, the debt becomes (in the opinion of all our doctors) annulled, it is so likewise in the present instance, which is a case of loss *in effect*.—*Haneefa* and *Aboo Yoosaf* have said, that

or broken.

that when a pawn is loſt the pawnee is held to be paid in reſpect of the *worth*,—in this manner, that he becomes immediately anſwerable for the value of the pawn to compenſate for its loſs, and that a commutation for the debt takes place.—But when a debt is annulled for a pawn then extant, though ſomewhat damaged, an abſolute appropriation of it takes place; that is to ſay, it muſt be ſo detained as to render the ſubſtance of it the property of the pawnee. This is, however, a miſtaken determination, and is rejected in law; wherefore it is moſt proper that a ſubſtitute be made of the *value* *.

A pledge may be ſtipulated, in ſale, for the price of the article ſold:

If a perſon ſell a ſlave on condition that the purchaſer ſhall deliver to him in pawn ſome ſpecified thing, it is lawful on a favourable conſtruction, whereas analogy would ſuggeſt that it is unlawful. So alſo, it is lawful for a perſon to ſell a ſlave, on condition that the purchaſer give, as his ſecurity, a third perſon who is preſent at the concluſion of the bargain, and who conſents to be ſecurity. The objection ſuggeſted by analogy, in this inſtance, is that the agreement entered into forms a double compact, or one compact within another, which is prohibited in the LAW.—Beſides, it contains a condition which is not conformable to the object of the agreement, and from which there reſults an advantage to the ſeller, who is a party in both the compacts; and ſuch a condition renders a contract of ſale void. The reaſon, however, for a more favourable conſtruction of the law, in this particular, is that ſuch a condition in the agreement is no way repugnant to the contract, ſince bail or pawn tend to enſure and ſtrengthen the agreement, and are in ſtrict conformity with the obligation of the price. If, therefore, the propoſed ſurety be preſent at the concluſion of the agreement, or the pledge be ſpecified, attention is paid to the condition of bail or pawn; for, as being proper to the agreement,

* A long diſcuſſion which follows upon this ſubject is omitted by the tranſlator, as containing merely a train of ſubtle and frivolous diſtinctions relative to *uſury*, of no practical utility.

they

they are consequently legal. If, on the other hand, the surety be not present, nor the pledge specified, the agreement is invalid; for the intention of giving bail or pawn do not in that case exist, inasmuch as the pledge or surety are unknown; and as there remains only a nugatory condition, the agreement is therefore invalid. Still, however, if the proposed surety appear before the parties have separated, and acquiesce in the bail, the agreement then becomes valid.—If the purchaser, after the pawn had been agreed upon, should refuse to deliver the pledge specified, the *Kâzee* must not compel him thereunto, as it is the delivery alone that determines the agreement.—*Ziffer* has said, that when the condition of pawn is included in the sale, a fulfilment of it is absolutely necessary; and that therefore the *Kâzee* may enforce it; for the condition having been stipulated as an article of the sale, becomes one of the rights thereof, and is equally binding, although it be not in itself of any force;—in the same manner as a power of agency included in a contract of pawn, which is binding because of the *contract* being so; in other words, if the pawner of a thing were to stipulate that the pawnee shall undertake the sale of it, such agency would be binding;—whence it would not afterwards be in the power of the pawner to retract it. In reply to this, however, it is to be observed, that the agreement of pawn is *voluntary* on the part of the pawner; and there is no compulsion to the execution of a voluntary deed. The seller, however, may, at his discretion, either relinquish the agreement of pawn, or he may invalidate the sale; for as he had earnestly desired the detention of the pawn, and as it was on the strength of that condition only that he had agreed to the sale, he is not, consequently, in default of it, obliged to adhere to his agreement, unless the buyer should in the mean time either have paid the price, or pawned, in place of the thing specified, the worth of it in *dirms* or *deenars*, in which case the sale becomes complete and binding, since, in the first instance, the seller obtains his object, and in the second he obtains the fulfilment of a condition with which he was satisfied, the pawn of the *value* being the same as that of the *substance*, for the end of

but the agreement is not valid unless the pledge be particularly specified;

nor can the purchaser be compelled to deliver it.

of the agreement is *to obtain payment*, and that can only be obtained by means of the product of the pledge, namely, the *value*.

An article tendered by a purchaser in security for the price of the merchandize is considered as a pledge, although the term *pawn* be not expressly mentioned by him.

If a person purchase any thing for a particular sum, and request of the seller "to keep his robe until such time as he pays him the "purchase-money," the robe is considered as a pledge; for the buyer, in saying that the seller should detain the robe until he render him the purchase-money, spoke in a manner which implied an intention of pawn, although he did not expressly mention the word *pawn*: and in every agreement regard is to be had to the *spirit*, not to the *letter*. *Ziffer* maintains that, in this case, the robe is not pawned; in which opinion *Aboo Yoosaf* likewise concurs; and the reason they allege is, that the expression used by the buyer does not only imply an intention to *pawn*, but may likewise signify a *deposit*, which construction, as being the most favourable, ought to be adopted.—It is otherwise where a person expresses himself, "keep this robe in security of your debt (or goods,)" for then, in mentioning *security*, it becomes obvious that his object was to *pawn* it.—In answer to this, however, it is to be observed, that in either case his intention was to *pawn* the robe; for although the expression, "*keep* this robe," may admit of the interpretation either of *pawn* or *deposit*, yet when the speaker subjoins, "until such time as I pay you the purchase-money," it is no longer doubtful that he means to *pawn*, and not to *deposit* it.

SECTION.

SECTION.

IF a perſon pawn two ſlaves for a debt of one thouſand *dirms*, and afterwards pay the proportion of *one* of theſe ſlaves, ſtill he is not permitted to take back that ſlave until ſuch time as he render to the pawnee the reſidue of the debt. (By the *proportion* of the ſlaves is to be underſtood the particular ſum for which each is pawned, when they are both oppoſed to the amount of the debt.) The argument in ſupport of this determination is, that as a pawn is detained in behalf of the whole debt, it is therefore detained in behalf of every part of it, in order the more ſtrongly to bind the pawner to the payment of his debt; in the ſame manner as holds with reſpect to an article ſold, where, if the ſeller, having paid part of the purchaſe-money, be deſirous of taking in lieu thereof a proportionate part of the article, it is not allowed: on the contrary, he muſt wait until the payment of the whole price be made, when he may take the whole of the goods purchaſed. The ſame rule alſo holds, according to the *Mabſoot*, when the depoſitor previouſly ſpecifies the particular value of each of the component parts of his pledge; as, for inſtance, when a perſon, having pledged two ſlaves againſt a debt of one thouſand *dirms*, declares the value of each to be five hundred *dirms*. It is related in the *Zeeadât*, on the contrary, that in this caſe the pawner is permitted to take back the ſlave upon paying to the pawnee the ſum which he had before ſpecified to be his value. The argument of the *Mabſoot* is that, in the caſe in queſtion, there is only one agreement; and that no ſeparation takes place in it on account of the diſtinct ſpecification;—in the ſame manner as in *ſale*; in other words, if a perſon ſell two ſlaves for one thouſand *dirms*, and particularly mention the price of each to

Where two (or more) articles are oppoſed in pledge to one debt, they cannot be redeemed ſeparately,

notwithſtanding each article be oppoſed to a particular part of the debt.

be five hundred *dirms*, ſtill there are not two diſtinct bargains; and ſo likewiſe in the preſent inſtance. The argument of the *Zeeadât* is that in the above caſe there ſubſiſts two agreements; and that it is unneceſſary to conſider them as one; for, if they be conſidered as two, it amounts merely to this, that it would follow that the one is a condition of the other, a concluſion which does not invalidate the agreement, but rather the condition itſelf is invalid,—(whence it is that if the pawnee acquieſce in the agreement reſpecting only *one* of the two ſlaves, it is lawful.) It is otherwiſe in the caſe of *ſale*; for if there be *two* contracts of ſale, it leads to this, that the one is a condition of the other; a concluſion which would invalidate the ſale altogether.

An article pawned to two perſons (in ſecurity of a debt jointly owing to both) is pledged *in toto* to each;

If a perſon pawn any ſpecific article into the hands of two people, in ſecurity of a debt which he jointly owes to both, it is lawful;—and in this caſe the article is held to be completely pledged into the hands of each of the creditors; becauſe the ſpirit of the agreement is, that the article is held entire and in one pledge:—nor does it hence follow that the pledge is *undefined*, becauſe of the ſeparateneſs of rights; for each has a claim to the whole,—the object of the agreement being *a detention in ſecurity of debt*; and as that is a thing incapable of ſeveralty, the pawn is therefore detained wholly in ſecurity of the debt of each. It is otherwiſe where a perſon beſtows any thing in gift to two people; for this is not lawful, according to *Haneefa*, as the object of a gift is *an endowment with right of property*, and two men cannot lawfully have each the complete property of one thing, ſince this would induce the conſequence of a moiety being appropriated to each indefinitely, which in gifts is not admiſſible.—If, in this caſe, the parties agree to a *Mahâyat*, or alternate poſſeſſion of the pledge, each is, during his term of poſſeſſion, a truſtee on behalf of the other;—and if it be deſtroyed, each is reſponſible according to his reſpective ſhare,—for upon this happening each is held to have received a diſcharge

and if they agree to hold it alternately, each is in his turn *truſtee* on behalf of the other.

a discharge of his claim, a discharge being capable of partition. If, also, the pawner pay off the debt of either, the article in that case remains wholly in pledge with the other, since it was before completely so in the hands of each without any separation. Analogous to this is the detention of things which have been sold to two or more jointly; for one of the buyers, after paying his proportion of the price, is not entitled to take from the merchant his share of the goods purchased: on the contrary, the merchant may detain the whole until such time as he shall have received the remaining part of the price from the other purchaser.

IF two people, by one agreement, pawn a certain thing into the hands of one person in security of a debt which they jointly owe to him, it is lawful, and the thing so pledged is detained in security of the whole of the debt. The pawnee is, moreover, at liberty to detain the pledge until he receive a complete discharge; for the two having pawned the article *together*, the pawnee is therefore held to have received a complete and undivided seizin of it.

If two persons, respectively, claim an article from a third, in virtue of an alleged pawn, and both produce evidence, the claim of both is null.

IF two persons prefer a claim to a slave in the possession of a third, each separately asserting "that the possessor had formerly completely "pawned the slave into his hands, and had afterwards borrowed or "usurped him," and each produce an evidence in support of his declaration, the claims and evidences are null and inadmissible; for each of the claimants having maintained and supported by evidence that the possessor had pawned the slave completely into his hands alone, it is not, therefore, in the power of the *Kázee* to decree him to either, as it is impossible that the same slave should be pawned wholly into the hands of one person, and at the same time wholly into the hands of another:—neither could he decree wholly the *substance* of the pawn to any one of them; since he has no reason to prefer one to the other; nor could he decree each of them an half, as a pawn is indivisible. As,

 therefore,

therefore, it is impoſſible to decide according to the evidences of either, they are both ſet aſide.

Objection.—It would appear that the *Kázee* ought to decree the ſlave to be the pledge of both, ſince they have both, as it were, received him at the ſame time, the period when he was pledged not being aſcertained.

Reply.—The *Kázee* has no power to paſs a decree of that nature, as he would thereby depart from the evidence adduced by the parties, each having expreſsly declared, that the ſlave was wholly pawned into his hands towards obtaining a ſatisfaction for the whole of his particular claim. If, on the other hand, he were to decree an *half* to each, he would act in oppoſition to the evidence, which a *Kázee* is not at liberty to do.

If a pawner die, leaving an article in pledge with two pawnees, it is ſold for the diſcharge of their claims.

If a pawner die, leaving a pledged ſlave (for inſtance) in the hands of two pawnees, and each of them produce evidence to prove that the ſlave had been pledged wholly to *him*, a moiety of the ſlave is in that caſe awarded in pledge to each, and may reſpectively be ſold by them in ſatisfaction of their claims, upon a favourable conſtruction; and ſuch is the opinion of *Haneefa* and *Mohammed*.—Analogy would ſuggeſt that the pawn is in this inſtance null; (and ſuch is the opinion of *Aboo Yooſaf*;) for as the intendment of a contract of pawn is that the pledge ſhall be detained towards obtaining payment of a claim, it follows that the decree of the *Kázee*, awarding a moiety of the ſlave to each, proves the pawn to have been indefinitely held in ſeveralty, which is unlawful now, in the ſame manner as in the lifetime of the pawner.—The reaſon, however, for a more favourable conſtruction of the law in this particular is, that the object is not the mere *contract itſelf*, but its *utility*. Now the utility of the agreement in the lifetime of the pawner conſiſts in a detention of the pledge, which cannot be accompliſhed in the caſe of an indefinite ſeveralty of claim; but the utility of it after his death is, that the pawnee may ſell it in order to

difcharge his debt, which a feveralty of claims does not prevent,— the cafe being the fame as where two men contend that they are married to the fame woman,—or where two fifters contend that they are married to the fame man, and evidences are produced to prove it by both;—for in this cafe the evidence adduced is difregarded during the lifetime of the man; but after his death a decree is paffed affigning them their refpective fhares of inheritance, as that is capable of divifion.

CHAP. III.

Of Pledges placed in the Hands of a Truftee *.

The parties may, by agreement, entruft the pledge to the cuftody of any upright perfon;

If the pawner and pawnee agree to place the pledge in the hands of any upright perfon, (to act as truftee for both,) it is lawful. *Málik* is of opinion that this is not lawful; becaufe the feizin of the truftee is the fame as that of the pawner; (whence it is that the truftee has recourfe to him for indemnification where the pawn is loft in his poffeffion, and another, having proved a right to it, takes a compenfation from him for its lofs;) and fuch being the cafe, no account is made of the feizin of the pawnee; wherefore the contract of pawn is incomplete, becaufe of the failure of one of its conditions, namely, the feizin of the *pawnee*. The argument of our doctors is that the feizin of the truftee is apparently the fame as that of the *pawner*, with re-

* Arab. *Adil*, an *upright* perfon. (See note in p. 195.)

 fpect

ſpect to *preſervation*, (the *ſubſtance* of the pawn being a *truſt*,) and with reſpect to *worth* it is the ſame as that of the pawnee, as it ſubjects him to reſponſibility in caſe of its loſs, a pawn being inſured with regard to its worth; wherefore the truſtee ſtands in the place of two parties, the pawner and the pawnee, to ſtrengthen the object of both, namely, the contract of pawn. (With reſpect to the truſtee's right of having recourſe to the pawner, in caſe of the *loſs*, and ſo forth, as mentioned above, it is admitted ſolely in conſideration of his being the pawner's deputy for the conſervation of the ſubſtance of the pledge, in the manner of any ordinary truſtee.)

after which neither of them is at liberty to take it out of the truſtee's hands:

The pawnee is not at liberty to take the pledge from the truſtee, inaſmuch as the right of the pawner is ſtill connected with it, in this way, that the pledge is a depoſit in the truſtee's hands. Neither is the pawner at liberty to take it, becauſe of the pawnee's right being connected with it for the purpoſe of obtaining payment of his debt. Neither party, therefore, is at liberty to invalidate the right of the other.

but the pawnee is reſponſible in caſe of loſs,

unleſs the truſtee have tranſgreſſed, in which caſe *he* is reſponſible.

If the pledge be deſtroyed in the poſſeſſion of the truſtee, the pawnee is reſponſible; for the ſeizin of the truſtee is the ſame as that of the pawnee in regard to the worth of the pledge; and reſponſibility attaches only on account of worth. If, on the contrary, the truſtee deliver the pawn either to the pawner or pawnee, he is reſponſible; for this reaſon, that he is the *pawner*'s truſtee with reſpect to the *ſubſtance* of the pledge, and the *pawnee*'s truſtee with reſpect to its *worth*; and each of theſe parties ſtands as a *ſtranger* towards the other; and a truſtee is rendered reſponſible by delivering the object of his truſt into the hands of a ſtranger. The truſtee, therefore, being in this caſe reſponſible, cannot retain the value by way of the pawn in his own poſſeſſion; for as he has become indebted for the value, it follows that, if he were to retain it by way of the pawn, he becomes at once the claimant and claimee, and the payer and receiver; in which

which is implied an obvious inconſiſtency. The pawner and pawnee muſt therefore, in this caſe, concur to take the value from the truſtee, and deliver it again to him, or to any other perſon, in place of the original pawn. If, however, they ſhould not concur in ſo doing, either of them may in that caſe refer the matter to the *Kázee*, who may take the value from the truſtee, and again deliver it to him, or to any other, in the place of the original pawn. If the *Kázee* do ſo, and the pawner afterwards diſcharge his debt, then, ſuppoſing that the reſponſibility for the value had attached to the truſtee in conſequence of his having reſtored the pledge to the *pawner*, the value in queſtion remains ſecure to the truſtee, as the pawner here appears to have recovered his pledge, and the pawnee his debt. If, on the contrary, the reſponſibility had attached to the truſtee in conſequence of his having ſurrendered the pledge to the pawnee, the pawner, upon diſcharging the debt, is entitled to take from him the value in queſtion; for as, in caſe of the exiſtence of the pawn, he would immediately on payment of the debt reſume it, he is by conſequence at liberty to take the ſubſtitute. It is to be obſerved, in this caſe, that if the truſtee have given the pledge to the pawnee in *loan* or *truſt*, and it have been deſtroyed without any tranſgreſſion on his part, he [the truſtee] is not entitled to take the value from him [the pawnee;]—whereas, if the pawnee have occaſioned the loſs, he is ſo entitled; for as the property of the thing has before veſted in him in virtue of his having compenſated for its loſs, it was of courſe his own property that he lent; and the borrower is therefore liable for its loſs *when occaſioned by himſelf*, but not otherwiſe. If, alſo, the truſtee give the pledge to the pawnee, "in order that he may preſerve it himſelf as a "ſecurity for his debt," and it be afterwards deſtroyed, he is entitled to take the value from the pawnee, whether he [the pawnee] were the occaſion of its loſs or not; for it was not given to him in the nature of *truſt* or *loan*, but on terms which implied a liability to make compenſation.

Rules to be obſerved in this inſtance.

The pawner may commiſſion the pawnee, or any other perſon, to ſell the pledge, and diſcharge the debt; but he cannot reverſe the commiſſion, if it be included in the contract.

If the pawner conſtitute the pawnee, or any other perſon of character, an agent for the ſale of the pledge, towards effecting a diſcharge of his debt at the expiration of the ſtipulated term, ſuch agency is valid; becauſe here the pawner has merely created an agent for the ſale of his own property. If, alſo, ſuch agency be expreſſed as an article in the contract of pawn, the pawner has not afterwards the power of reverſing it; becauſe where the agency is thus ſtipulated, it is one of the *rights* of the contract, and is therefore binding, in conſequence of the contract being ſo;—and alſo, becauſe, as the right of the pawnee is connected with it, the annulment of it would be a deſtruction of his right;—the caſe here being ſimilar to that of an agent for a defendant, who has been ſo created at the inſtance of the plaintiff; for ſuch agent cannot be diſmiſſed from his employ but in the preſence of the plaintiff.

Rules with reſpect to an agent appointed to ſell a pledge.

If the pawner conſtitute any perſon his agent to ſell the pledge, without reſtricting him to ready-money or credit, ſo as to leave him entirely at his own option in thoſe points, and afterwards prohibit him from ſelling it on credit, ſuch prohibition is of no effect; for the agency (as was before mentioned) being at firſt abſolute, is not afterwards ſubject to the reſtriction of the pawner. In the ſame manner, the agent cannot be diſmiſſed by the pawnee, as on him he is no way dependant, having been created agent by the pawner. If, alſo, the pawner die, the agency nevertheleſs continues in force; for as the contract of pawn becomes not void upon the death of the pawner, ſo neither does the agency, that being expreſsly included therein. Beſides, if the contract were by this event rendered void, it would be ſo only with reſpect to the rights of the heirs of the pawner, to which the rights of the pawnee are ſuperior. The agent, moreover, is empowered to ſell the pawn without the conſent of the heirs, in the ſame manner as he would have done in the lifetime of the pawner without his conſent.—So likewiſe, if the pawnee ſhould die the agency does not determine; for a contract of pawn is not rendered void, either by the

the death of both the parties, or of one; but continues, as before, with all its rights and privileges; ſuch as poſſeſſion, diſcharge, and the agency in queſtion. The power of agency, however, ceaſes on the death of the agent; and his heir or executor cannot ſtand in his place; becauſe agency is not an inheritance, the conſtituent being ſuppoſed to have confided in his agent alone, and not in any other perſon. It is recorded from *Aboo Yooſaf*, that the agent's executor may ſell the pledge; for as the agency is binding, the executor has a power of ſelling it;—in the ſame manner as where a *Mozàrib*, after having exchanged the capital ſtock for any ſpecies of merchandize, dies,—in which caſe his executor is permitted to diſpoſe of the merchandize, the compact being ſtill binding. To this, however, it may be replied, that agency is the right of a principal over his factor; and the heirs of an agent can inherit only *his own* rights. It is otherwiſe with reſpect to *Mozàribat*, as the rights of that appertain to the *Mozàrib*, or manager.

The pawnee cannot ſell it without the pawner's conſent.

A PAWNEE has not a power of ſelling the pledge without the conſent of the pawner, as the property of it belongs abſolutely to him. Neither can the pawner ſell it without the conſent of the pawnee; for, as the thing pledged is, with reſpect to its worth, the right of the pawnee, it follows that the pawner, if he were to ſell it without the concurrence of the pawnee, would not have it in his power to ſurrender it to the purchaſer.

The agent, at the expiration of the term of credit, may be compelled to ſell the pledge.

IF, at the expiration of the ſtipulated term of credit, the agent refuſe to ſell the pledge depoſited for that purpoſe with him, and the pawner have abſconded, the *Kâzee* muſt compel him to execute the ſale, by impriſonment, or other compulſatory means, the agency being binding for two reaſons;—FIRST, becauſe, when expreſsly included in the contract of pawn, it becomes one of the rights thereof; and, SECONDLY, becauſe the right of the pawnee is connected with it; and the diſmiſſion of the agent annihilates that right. The ſame rules,

in

in ſhort, hold in this inſtance, as in the caſe of an agent for the adjuſtment of a cauſe of diſpute created by the defendant at the inſtance of the plaintiff; for if the defendant abſcond, and the agent refuſe to ſettle the cauſe, he is compellable thereunto by the *Kâzee*, for the ſecond reaſon above-mentioned, that the right of the plaintiff would elſe be deſtroyed. (It is otherwiſe with reſpect to a mere *agent for ſale*; for if he refuſe to execute the ſale, he cannot be compelled thereto; as his *conſtituent* may ſtill ſell the article, whence his right is not deſtroyed.) What is here advanced proceeds on the ſuppoſition of the agency being included in the contract of pawn; for if it have not been ſtipulated until after the execution of the contract, there is in that caſe a difference of opinion; ſome aſſerting that the agent cannot be compelled to execute the ſale, whilſt others maintain that he may be compelled. Of theſe the compiler of the *Hedâya* remarks that the laſt is the better opinion. *Aboo Yooſaf* has ſaid that the agency is equally binding in both caſes, (that is, when included in the contract, and alſo when made poſterior thereto.) And the *Jama Sagheer* and *Mabſoot* tend greatly to corroborate this opinion; for in treating of this ſpecies of agency they have ſuppoſed it *abſolute*, and not diſcriminated between that included in the contract of pawn and that agreed upon poſterior thereto.

If the pledge be ſold by commiſſion from the truſtee, the purchaſe-money is ſubſtituted in place of it.

WHEN the agent of a truſtee in whoſe hands a pledge has been depoſited ſells it, it is no longer in pawn, and the purchaſe-money ſtands in its place, (that is to ſay, is, as it were, in *pawn*,) although the agent may not yet have received it, as being the ſubſtitute for a thing which was before in his poſſeſſion. Hence, if the purchaſe-money ſhould be loſt, by the purchaſer (for inſtance) dying inſolvent without having diſcharged it, the loſs falls upon the pawnee; becauſe the contract of pawn ſtill continues in force with reſpect to the purchaſe-money, ſince that ſtands in the place of the thing ſold, namely, the pledge. In the ſame manner, where a pawned ſlave is ſlain, and the murderer accounts for his value, the contract ſtill continues in force,

force, as the owner of the slave is entitled to the value in virtue of his property, notwithstanding such value be paid *in atonement for blood.* The same rule also holds where a slave, having killed another pawned slave, is commuted for the one so killed,—the murderer being in that case substituted for the murdered.

If the trustee, having sold the pledge and paid off the pawnee, be exposed to any subsequent loss, he may reimburse himself from either party:

IF a trustee, having been appointed agent for the sale of the pledge, should sell it, and deliver the price to the pawnee by way of payment, and another afterwards prove a property in the pledge, and he accordingly pay that other a compensation for its value, it then remains in his option, either to take the value from the pawner, or the amount of the purchase-money from the pawnee: but he is not permitted to take more from the pawnee than the purchase-money.—The compiler of the *Hedáya* remarks that this case may occur under two different circumstances or predicaments:—I. where the pledge is destroyed after the sale; and II. where it remains whole and complete.—In the former of these, the owner of the pledge is at liberty either to take a compensation for the value from the pawner, who is an usurper of his right, or from the trustee, who has invaded it, in having sold his property and delivered it to another. Should he, therefore, take it from the pawner, the sale of the trustee becomes valid, as does also the pawnee's seizin of the price in satisfaction for his debt; because, as the pawner, by making compensation, becomes proprietor of the pledge and effaces the usurpation, it then appears that he had authorized the trustee to sell that which was *his own.*—If, on the contrary, he take the compensation from the *trustee,* he [the trustee] may, if he chuse, have recourse to the pawner; that is to say, he may take from him the value of the pledge; for, as being his agent, and the manager of his affairs, he is consequently entitled to an indemnification for whatever loss he may have unavoidably sustained in the execution of his commission. And in this case, also, the sale of the pledge is valid, as well as the pawnee's seizin of the purchase-money in satisfaction for his debt,—whence, in this case, he [the pawnee]

pawnee] cannot urge any future claim againſt the pawner on the ſcore of his debt.—Or, if the truſtee chuſe, he may have recourſe to the pawnee; that is to ſay, he may reſume from him the purchaſe-money which he had unjuſtly received from him; *unjuſtly*, becauſe it proved in the end to be the truſtee's property, by his having afterwards made good the loſs to the proprietor. For when he gave it to the pawnee, he ſuppoſed it to have been the property of the pawner; but he may not, perhaps, when it proves his own property, be inclined to confirm the transfer, and he is therefore allowed to reſume it. As, however, the reſumption of the purchaſe-money from the pawnee deprives him of a diſcharge of his claim, which the ſeizin of it was intended to effect, he therefore remains at liberty to demand payment from the pawner in this inſtance. In the *latter* of the above circumſtances, on the contrary, (where the pledge remains whole and complete after the ſale,) it is incumbent on the owner of the pledge to reſume it from the *purchaſer*, as he poſſeſſes the ſubſtance of his property; and the purchaſer is entitled to a reſtitution of the purchaſe-money from the truſtee, becauſe of his being the *ſeller*; after which the truſtee may, at his option, receive an indemnification either from the pawner or pawnee,—from the *former*, becauſe he occaſioned him to enter into the agreement, from which he is conſequently bound to releaſe him,—and from the *latter*, becauſe, when the thing ſold was proved to belong to another, the money obtained in lieu thereof is no longer termed *purchaſe-money*, and the pawnee having received it only as ſuch, his ſeizin is no longer of effect. If, therefore, he take the value from the pawner, the pawnee's ſeizin of the price is rendered valid:—whereas, if he reſume the purchaſe-money from the pawnee, his ſeizin being thereby deſtroyed, his former right (namely, the claim againſt the pawnee) exiſts as before.

but if he was commiſſioned by the pawner after the contract, he muſt recur to him

—All that is here advanced proceeds on the ſuppoſition of the agency having been included as an article in the contract of pawn; for if the pawner appoint the truſtee his agent for the ſale of the pledge *after* the contract, he [the agent] is in this caſe to indemnify himſelf for any loſs

loſs he may ſuſtain, in conſequence of ſelling the pledge, from the *pawner*, not from the *pawnee*, notwithſtanding he may have made over to the pawnee the price he had received for the pledge, ſince with *this* agency the pawnee has no concern, inſomuch that the pawner may reſcind the agency without conſulting him.

alone for indemnification.

IF a pledged ſlave die in the poſſeſſion of the pawnee, and it be afterwards diſcovered that he was the property of another, not of the pawner, it remains with the proprietor to demand a compenſation from either the pawner or pawnee; for both are violators of his right, —the one in having delivered the pledge to another, and the other in having received it. If, therefore, he take a compenſation from the pawner, the pawnee, becauſe of the ſlave having died in his poſſeſſion, is held to have received payment of his debt; for as the pawner has obtained a property in the ſlave by indemnifying his owner, the payment of his debt is therefore effected by the ſlave dying in the pawnee's hands. If, on the contrary, he take a compenſation from the *pawnee*, he [the pawnee] is not only entitled to an indemnificatory ſatisfaction from the pawner, but his claim upon him ſtill exiſts as before:—he is entitled to an indemnification from the pawner, becauſe of his having deceived him; and his claim of debt exiſts as formerly, becauſe the diſcharge effected by the pledge having died in his poſſeſſion ceaſes to be of force upon his making good the value, whence his right reverts.

A ſtranger proving his right in a pledged ſlave, who had died with the pawnee, may ſeek his compenſation from either party.

OBJECTION, (by the *Kâzee Aboo Khâzim.*)—It would appear that in this caſe the pawnee's claim does not exiſt as before, but that the death of the ſlave in his hands eſtabliſhes a ſatisfaction for it; becauſe, upon the pawner compenſating for the ſlave's value, (by the pawnee *recovering* ſuch value from his as above,) he becomes, in virtue of ſuch compenſation, *proprietor* of the ſlave, whence it appears that he, in fact, pledged that which was *his own*, and that the caſe is the ſame as if the proprietor had taken the compenſation from the

pawner, which would exempt him from all further obligation to the pawnee.

Reply.—As the pawnee firſt pays the compenſation, he firſt becomes proprietor of the ſlave from the time of poſſeſſion; and when, afterwards, he retakes that ſum from the pawner, his property in the ſlave is annulled, and the *pawner* becomes proprietor of him. The *pawner*'s property in the ſlave, therefore, takes place, in this inſtance, *poſterior* to the contract of pawn, (the pawnee having, as it were, *ſold* the ſlave to the pawner, and received the price for him;)—and this debt to the pawnee remains againſt him as before,—whence the pawnee is entitled to take it from him. It is otherwiſe in the *former* alternative, (where the owner takes the compenſation from the *pawner*;) for in this caſe the pawner becomes proprietor from the time of the ſlave being in his poſſeſſion, (which was *prior* to the contract of pawn,) whence it may be ſaid that he merely pawned what was *his own*;—and upon the ſlave dying in the pawnee's hands, he ſtands acquitted of his debt, which the pawnee, therefore, cannot afterwards claim from him.

CHAP.

CHAP. IV.

Of the Power over Pawns; and of Offences committed *by* or *upon* them.

A pledge cannot be fold without the pawnee's confent;

If the pawner fell the pledge without the confent of the pawnee, the fale remains fufpended upon his will, becaufe of his right being involved in the pledge, notwithftanding fuch fale be an act of the pawner with refpect to what is his own property; in the fame manner as where a perfon bequeaths the whole of his eftate, in which cafe the legacy is fufpended in its effect, with refpect to the excefs, above one third, upon the confent of his heirs, becaufe of their right being connected therewith. If, therefore, the pawnee affent to the fale, it is valid; for it was before fufpended only on account of his right, which he here confents to forego;—and it is alfo valid if the pawner difcharge his debt; for the fale is an act of the proprietor upon his property, being fufpended in its effect only becaufe of an obftacle*, which obftacle is here removed †.—In the former cafe, upon the pawnee having given his confent, and the fale having been thereby rendered valid, the right of the pawnee is transferred from the pledge to the thing given in exchange, namely, the price,—which, in the cafe here confidered, then becomes a fubftitute for the original pledge. This is approved; becaufe the right of the pawnee is connected with the *worth* of the pledge; and the *return* is in effect the fame as the

* Namely, the pawnee's right connected with the pledge.

† By the difcharge of the debt, which of courfe difengages the pledge from any claim the pawnee might otherwife have upon it.

 confideration;

consideration;—this being analogous to where an indebted ſlave is ſold by the conſent of his creditors; in which caſe their right is tranſferred from the ſlave to the value received for him, as they are ſuppoſed, in aſſenting to the ſale, to have agreed to the transfer of their right from the ſlave to the value, but not to the total abolition of it. If the pawnee refuſe his aſſent, and annul the contract of ſale, it is null of courſe, (according to one tradition,) whence, if the pawner redeem the pledge, ſtill the purchaſer is not at liberty to take it; for as the right of the pawnee is equivalent to his actual property, he therefore ſtands the ſame as the proprietor of the pledge;—(whence his power of acceding to, or annulling the contract of ſale.) According, however, to a more authentic tradition, the pawnee has not the power of annulling the ſale; for his right can ſuſtain no detriment, as the ſale cannot, at all events, be carried into execution until he aſſent to it. The execution of the ſale, therefore, being in this manner ſuſpended, the purchaſer has the option of waiting until the pawner may redeem the pawn, and reſign it to him conformable to the contract, or of carrying the matter before the *Kázee*; for the ſeller has it not in his power to deliver the goods, and the power of diſſolving the contract reſts with the *Kázee* alone; this being ſimilar to where a ſlave, having been ſold by his maſter, elopes before the purchaſer has received poſſeſſion of him, in which caſe the purchaſer may either wait until the ſlave return, or he may prefer a complaint to the *Kázee*, in order (as the ſeller is incapable of delivering the goods) to obtain an annulment of the contract.

who, if the pawner ſell it more than *once*, may ratify either ſale.

If the pawner ſell * the pledge without the conſent of the pawnee, and again, before the pawnee has ſignified his aſſent, ſell it to another perſon, in that caſe whichever of theſe two contracts the pawnee may confirm is valid; for as the firſt ſale is dependant on the conſent

* The ſale here mentioned does not ſignify an *abſolute*, but a *conditional* ſale, depending, for its ratification, upon the pawnee's concurrence, as before mentioned.

of

of the pawnee, it cannot prevent the ſecond from being ſo likewiſe. If, therefore, the pawnee chuſe, he may ratify the ſecond ſale. If, on the contrary, the pawner, after having firſt ſold the pawn as above, ſhould let, give, or pawn it to another perſon, and the pawnee give his conſent to ſuch leaſe, gift, or pawn, the ſale which preceded either of theſe deeds is valid. The difference between theſe two caſes is, that in the firſt (where one ſale is made after another) the pawnee may derive an advantage from confirming either of them, (as his right lies in the price,) and whichever, therefore, he approves is valid. In the caſe of a leaſe or gift, on the contrary, no advantage can accrue to the pawnee, as his right lies in the *return* for the article, not in the *uſufruct*. If, therefore, the pawnee approve of either of theſe, he by conſequence impliedly aſſents to the abolition of his own right; and the previous ſale (which was ſuſpended on his conſent only becauſe of his right) becomes valid of courſe.

A pawned ſlave may be emancipated by the pawner,

IT is permitted to a pawner to emancipate the ſlave whom he has depoſited in pawn; for as he is ſane and adult, he may of courſe render free his own property, which the pawn indiſputably is. As, moreover, the contract of pawn does not induce any deſtruction of the pawner's property in the pledge, his act with reſpect to it is not rendered void by the pawnee withholding his aſſent to it, notwithſtanding the pawnee's right (of detention in regard to the worth) be thereby defeated;—in the ſame manner as where the purchaſer of a ſlave emancipates him without having taken poſſeſſion; in which caſe the ſlave is free, notwithſtanding the ſeller's right (of detention of the article in ſatisfaction for the price) be thereby rendered null.

OBJECTION.—If a perſon bequeath a ſlave to another upon his deathbed, and leave no other effects except that ſlave, and the heirs of the teſtator afterwards emancipate the ſlave, ſuch manumiſſion is not valid, becauſe of the right of the legatee; and hence it would follow that

that a pawned ſlave cannot be emancipated, becauſe of the right of the pawnee.

REPLY.—The manumiſſion of the ſlave by the heirs of the teſtator is not (in the opinion of *Haneefa*) void, but is merely *ſuſpended* until ſuch time as he [the ſlave] ſhall have performed emancipatory labour.

—The *ſale*, moreover, or *gift* of a pawn is null, for this reaſon, that the pawner is unable to ſurrender it to the purchaſer or donee,—an objection which does not obtain in the caſe of manumiſſion, ſince in that inſtance a delivery is not required. The manumiſſion is therefore valid, and takes immediate effect,—whence the contract of pawn is null, as the ſubject of it no longer remains. Conſequently, if the pawner be rich, and the debt to the pawnee be then due, he [the pawnee] may require payment of it immediately;—or, if it be not due until after the expiration of a term, he may take from the pawner the value of the ſlave, and return it as a ſubſtitute until his debt become payable, when he may take it in ſatisfaction of his right, reſtoring any ſurplus which may remain from it to the pawner. This is ſuppoſing the pawner to be *rich*; for, if he be *poor*, the ſlave in queſtion muſt perform emancipatory labour to an amount adequate to his value; and with this (which, if it be of a different ſpecies from the debt, muſt firſt be converted into the ſame) the debt of the pawnee is to be diſcharged; for a diſcharge from the pawner being here impoſſible, it is conſequently made from him who enjoys the advantage of the manumiſſion, namely, the ſlave. The ſlave however, when his emancipator afterwards becomes rich, is entitled to take from him the ſum he earned; becauſe he has, in fact, paid his debt, not voluntarily or gratuitouſly, but in conformity with the ordinance of the LAW in this particular *.

who, if he be rich, muſt ſubſtitute the *value* in pawn for the ſlave;

but if he be poor, the ſlave muſt perform emancipatory labour to the amount of his value for the diſcharge of the pawnee's claim,

* The remainder of this diſcuſſion is omitted by the tranſlator, as being merely a repetition of what has been already ſet forth at large under the head of *Manumiſſion*.

IF a perſon make a declaration of having pawned his ſlave, by ſaying to him, "I have depoſited you in pledge with ſuch a perſon," and the ſlave deny it, and the maſter afterwards emancipate him, at a time when he is poor, it is incumbent upon the ſlave to perform emancipatory labour, according to our doctors. *Ziffer* is of a contrary opinion; for he holds this caſe to be analogous to where a maſter firſt liberates his ſlave, and then declares his having pawned him;—in which caſe, if the maſter be poor, and the ſlave deny it, (as above,) emancipatory labour is not incumbent on the ſlave; and ſo here likewiſe. Our doctors, on the other hand, argue that, in the caſe in queſtion, the maſter declares the pawn at a time when he is undoubtedly competent to it, as he ſtill poſſeſſes a property in the ſlave, not having yet emancipated him; and conſequently his declaration is valid.—It is otherwiſe where the declaration of pawn is made ſubſequently to the emancipation, as the maſter's power of pawning is then terminated;—whence there is no analogy between the caſes.

although he ſhould have *denied* his being in pawn previous to ſuch manumiſſion.

IF a pawner create the ſlave whom he has pawned a *Modabbir*, it is valid, according to all authorities:—according to our doctors, becauſe, as the *complete* emancipation would be lawful, it follows that this qualified emancipation is lawful, *a fortiori*; and according to *Shafei*, becauſe the granting *Tadbeer* to a ſlave does not (as he holds) prevent the ſale of him. In a ſimilar manner, it is in the power of a pawner to conſtitute his pawned female ſlave an *Am-Walid*; for as a father has this privilege with reſpect to the female ſlave of his child, becauſe of the right which he has in his property, notwithſtanding ſuch right be inferior to that of the child himſelf, it follows that the exertion of the ſame privilege by a pawner, in virtue of his right in the pledge, is valid *a fortiori*, the right of the pawner being ſuperior to that of any other perſon, as he is the proprietor.—When, therefore, a pawned ſlave is conſtituted either *Modabbir* or *Am-Walid*, ſuch ſlave is excluded from the contract of pawn, as the intention is defeated, ſince a debt cannot be diſcharged by means of a *Modabbir* or

A pawner may create his pawned ſlave a *Modabbir* or *Am-Walid*;

and if he be *rich*, he muſt ſubſtitute the value in pawn; but if he be poor,

the slave must perform emancipatory labour to the full amount of the debt.

or *Am-Walid* *;—whence, if the pawner be *rich*, he is responsible for the value, after the manner before shewn in the case of pawned slaves emancipated;—but if, on the contrary, he be in *indigent* circumstances, the pawnee may require from the *Modabbir* or *Am-Walid* emancipatory labour to the amount of the debt, as the fruit of their labour is the property of their master. It is otherwise in the case of a pledged slave emancipated by an indigent pawner; for the fruits of his labour being *his own* property, he is obliged to labour to the amount of his *value* only, or that of the debt of the pawner, in case of its being less than his value.

The pawner, on becoming *rich*, is responsible for the emancipatory labour in the *former* instance, but not in the *latter*.

It is not permitted either to a *Modabbir* or *Am-Walid* to resume from their master when he becomes rich what they paid on his account when poor, because they in fact paid this from *his property* †: but when a poor pawner emancipates the slave whom he had pledged, he [the slave] is entitled to take whatever he may have paid on account of his emancipator; because he has paid it from his *own property* ‡,—and this from necessity, in conformity with the precepts of the LAW, (as before observed,) whence such payment cannot be considered as *gratuitous* §. Some have said, that if the debt be not due at that time, the *Modabbir* or *Am-Walid* are compellable to earn their value; which, as being a substitute for the pawn, must be detained as such in lieu of the original: but that if, on the contrary, the debt be then due, it is in that case necessary to discharge it from the stock of the pawner; and as the earnings of the *Modabbir* or *Am-Walid* are considered as the property of the master, they must therefore labour towards obtaining a sum adequate to the whole of the debt.

* Because *Modabbirs* and *Am-Walids* cannot be sold.

† The earnings of their labour being his right.

‡ The labour and earnings of a *freedman* being considered as *his own property*.

§ A person is not entitled to recover, who pays the debts of another in a *gratuitous* manner.

IF a pawner emancipate the ſlave whom he had created a *Modabbir*, as above, it is not then incumbent on the freedman to earn a greater ſum than his value, although he ſhould be thereunto commanded by the *Kázee*; for, after emancipation, the fruits of his labour are his own property. Still, however, he cannot recover from his maſter what he had paid on his account prior to his freedom, as that was, in fact, the property of the maſter.

An emancipated *Modabbir* does not owe the pawnee labour beyond his value.

IF a pawner *deſtroy* the thing he had pledged, the ſame rules hold as are eſtabliſhed in the caſe of *emancipating* the pledge.

Deſtruction of the pledge by the *pawner*;

If a ſtranger (that is, a perſon unconcerned in the contract) deſtroy the pledge, the pawnee (not the pawner) is litigant againſt him, and may take from him a compenſation for the value, which he muſt retain in pawn in place of the original pledge; for the pawnee, as being the moſt entitled to the *ſubſtance* of the pledge, is alſo moſt entitled to its ſubſtitute, namely, the *value*. It is here to be obſerved, that the ſtranger muſt compenſate for the pledge according to the value which it bore at the time of its being deſtroyed. If, therefore, it be valued at five hundred *dirms* at the period of its deſtruction, and at one thouſand *dirms* on the date of the contract, the ſtranger muſt account for five hundred *dirms* to the pawnee, who muſt retain the ſame in pawn;—and five hundred *dirms* are remitted from the debt; for the deficiency to that amount is a deſtruction which has occurred in the hands of the pawnee, occaſioned (as it were) by the viſitation of heaven; and as the property has thus periſhed in his hands, a proportionable amount is therefore deducted from his claim.

by a *ſtranger*;

IF the pawnee deſtroy the pledge before the expiration of the ſtipulated term of payment, he is reſponſible for the value, becauſe of his having deſtroyed the property of another;—and this value he is to retain in pawn until the term of payment arrive; for as it is a ſubſti-

or by the *pawnee*.

tute for the ſubſtance of the pledge, it is conſequently ſubject to the ſame rule. As ſoon, therefore, as the debt becomes due, the pawnee may take it from the value; and if then a balance remain, it muſt be reſtored to the pawner, as being a return for his property, with which the pawnee has no concern.

A depreciation in the value of the pledge occaſions a proportionable deduction from the pawnee's claim.

If a perſon pawn any article eſtimated at one thouſand *dirms*, in ſecurity of a debt of the ſame amount payable at ſome future period, and the article, in conſequence of a fall on the price, bear afterwards a value of five hundred *dirms*, and be then deſtroyed in the pawnee's hands, he [the pawnee] is reſponſible for five hundred *dirms*, and five hundred are alſo remitted from his debt; for the deficiency of five hundred *dirms* ariſing from the fall in the price being (as it were) a decay of part of the pawn whilſt in the hands of the pawnee, an adequate ſum is therefore retrenched from his claim; and the remaining five hundred *dirms* are likewiſe due from him in conſequence of the decay, and remain with him in pawn, as before ſtated.

The pawnee lending the pledge to the pawner, is freed from reſponſibility during the loan;

If a perſon, having received a ſlave in pawn, lend him to the pawner, in order that he may enjoy the uſe of his ſervice, or for any other purpoſe, and the pawner take poſſeſſion, the ſlave is no longer a ſubject of reſponſibility with the pawnee; (in other words, if he be killed or loſt in the hands of the pawner, the pawnee is not thence held to have received payment of his debt;) becauſe he has paſſed out of the poſſeſſion of the pawnee; and the ſeizin of the pawner in virtue of a loan does not ſtand as the ſeizin of the pawnee, as the tenure of a loan is repugnant to that of a pawn, ſince the latter induces reſponſibility, whereas the former does not. The pawnee, however, is at liberty at any time to reſume the pledge from the pawner; becauſe he holds it by the tenure of a *loan*, which is not binding; and alſo, becauſe the contract of pawn ſtill ſubſiſts;—whence it is that if the pawner were to die without having returned the pledge, the pawnee

but he may reſume it at pleaſure, and then his reſponſibility reverts.

pawnee would in that case have a claim upon it in preference to the other creditors; (that is to say, he would be entitled first to take a satisfaction for his claim from the pledge; which done, if any part should remain it would be distributed among the other creditors.)

OBJECTION.—If a pawnee be not held liable for a pledged slave after he is lent, how is the contract of pawn supposed then to exist?

REPLY.—Responsibility is not, in every instance, one of the requisites of a contract of pawn;—whence it is that the effect of the contract reaches to the child of a pawned female slave, although such child be not a subject of responsibility from loss or destruction.
—As, therefore, the contract still subsists, if the pawnee resume the pledge from the pawner, he again becomes liable for it, in the same manner as formerly, having again taken possession of it in virtue of the contract of pawn.

The pledge, being lent to a stranger by either party, is no longer a subject of responsibility.

IF either of the parties to a contract of pawn lend the pledge with the concurrence of the other to a stranger, it is not in this case a subject of responsibility to the pawnee, any more than in the former instance: but the contract of pawn still continues in force, and either party is entitled to resume the pledge from the borrower, and to place it in pawn as before, from the interest each has in it.

The pledge, on being disposed of by either party, with the consent of the other, is excluded from the contract.

IF either party, with the consent of the other, let, sell, or bestow the pawn in gift to a stranger, it is excluded from the contract, and cannot again be subject to it, unless the parties conclude a fresh agreement. It is to be observed that if, in any of these cases, the pawner die before a restitution of the pledge be made to the pawnee, he [the pawnee] is upon the same footing with the other creditors; because as, in consequence of these acts, a binding right of others is connected with the pledge, the effect of the contract no longer remains;—whereas no *binding* right is connected with a pledge in consequence of the

the loan of it;—for which reaſon there is an eſſential difference between the caſes here conſidered and that of loan.

If the pawnee borrow the pledge from the pawner for any particular purpoſe, and it be deſtroyed previous to his having applied it to that purpoſe, he is reſponſible for it,—that is to ſay, a ſum proportionate to its value is retrenched from his claim; for until he apply it to that uſe for which he has borrowed it, the ſeizin which he had made in virtue of the contract of pawn ſtill ſubſiſts. The law is ſimilar where the pawn is deſtroyed after the pawnee has accompliſhed the ſervice for which he had borrowed it; for then his ſeizin of *loan* exiſts no longer. If, on the contrary, it be deſtroyed during the period in which he enjoys the uſe of it, he is not reſponſible, as at that time he holds it in *loan*, not in *pawn*. (The ſame rule alſo holds where the pawner conſents to the pawnee's making uſe of the pledge *.)

A perſon *borrowing* an article, with intention to pawn it, is reſtricted in the pawn according as he ſpecifies the particulars of the debt, &c. or otherwiſe;

If a perſon borrow a robe from another, with an intent *generally* declared "to pawn it," he may accordingly pawn it in ſecurity for any debt whether great or ſmall;—whereas, if the lender particularly ſpecify the ſum in ſecurity for which the borrower may pawn the robe, he is not, in that caſe, permitted to pawn it for a ſum either larger or ſmaller than what is ſo ſpecified;—not for a *larger* ſum, becauſe the intention of the lender is, that the robe ſhall be pawned for a debt which may be eaſily diſcharged, an intention which is obviouſly defeated in the caſe of pawning it for a *large* ſum;—nor for a *ſmaller* ſum, becauſe the view of the lender here is, in caſe of its loſs, the

* That is,—where the pawnee, being already poſſeſſed of the pledge, obtains the owner's conſent to make uſe of it.—For the elucidation of what is here advanced it is proper to remark, that a pledge may either be delivered to the pawnee, given in truſt to an *Adil*, or retained in the hands of the owner [the pawner] under a reſponſibility to account for it if neceſſary.

obtaining from the pawner that ſum which he would receive from the pawnee in conſideration of the extra value of the pledge. The ſame rule alſo holds where the lender ſpecifies either the particular ſpecies of debt, the perſon who is to receive the pawn, or the city in which the contract is to be concluded;—ſuch reſtrictions being ſeverally attended with particular advantage; for the payment of ſome debts is more eaſily effected than of others,—and it is alſo more convenient to make payment in ſome cities than in others, and ſo likewiſe it is of advantage to particularize the perſons, as ſome men are juſt and careful, whilſt others are not ſo. If, therefore, in any of theſe caſes, the borrower act contrary to the directions of the lender, he becomes reſponſible for the value of the article in caſe of loſs;—and when this happens, the lender has it in his option either to take a compenſation from the borrower, (in which caſe the contract of pawn ſubſiſts entirely between the borrower and the pawnee, ſince the former, by paying a compenſation for the pledge, becomes ſole proprietor of it,) or from the pawnee, who will take an indemnification from the pawner, and likewiſe receive payment of his debt, as has been before explained in the caſes of claims laid to pledges. If, on the contrary, the borrower conform to the directions of the lender, by pawning the robe for the exact ſum to which he was reſtricted, and the value of the robe be equal to, or greater than the amount of the debt, the pawnee is held, in caſe of its loſs, to have received payment of his debt, and the proprietor of the robe receives from the pawner the amount of the debt, being the ſum which the borrower had cleared by means of his property;—(and it is on this account that the borrower muſt pay the amount of the debt,—*not* becauſe he was ſeized of the robe, as that was in virtue of a free loan from the proprietor.)—In the ſame manner if, when the pawner had conformed to the direction of the lender, the robe be in any degree depreciated, the pawnee forfeits a proportionate part of his claim, and a like ſum is due from the borrower to the lender, becauſe of ſo much having been retrenched from his debt. If the value of the robe be ſhort of the amount of the debt, and it be loſt

and if he tranſgreſs, is reſponſible for the value in caſe of loſs:

loſt in pawn, a ſum equivalent to its value is retrenched from the claim, and the remainder of the debt is due from the pawner, as no diſcharge of debt is effected beyond the amount of the value of the robe; and the pawner is, moreover, indebted to the lender for the value of the robe, having by means of it made payment of as much of his debt.—If, alſo, the value of the robe be adequate to the amount of the debt, and the proprietor be deſirous of redeeming his property, on the part of the pawner, by paying the amount, the pawnee is not in that caſe allowed to object to the reſtoring of it; becauſe the robe being the property of the lender, he does not, conſequently, by redeeming it, officiouſly intermeddle in an affair which does not concern him; (whence he is entitled to take from the pawner [the borrower] the ſum which he pays towards the redemption of the pawn;) and the *Kâzee* muſt therefore compel the pawnee to ſurrender the robe. It is otherwiſe where an unconcerned perſon pays the debt of the pawner; for as, by endeavouring to redeem a thing which is not his own property, he interferes in a buſineſs which does not relate to him, the pawnee is not therefore compellable to ſurrender the pledge to him.

but not if it be loſt before pawn, or after redemption.

If the borrowed article be loſt in the hands of the borrower, either prior to his having pawned it, or poſterior to his having redeemed it, he is not reſponſible; for here he has not accompliſhed any diſcharge by means of the value, which (as we have ſhewn in the above caſe) is the ſole cauſe of reſponſibility.

On diſputes concerning the loſs of the pledge, the depoſition of the borrower is credited with reſpect to the perſon

If a diſpute ariſe between the lender and borrower after the loſs of the pledge, the lender aſſerting that it had been loſt whilſt in the hands of the pawnee, and the borrower on the other hand maintaining that it was loſt in his *own* poſſeſſion, either before he had pawned it or after he had redeemed it, the declaration of the borrower, upon oath, muſt be credited, becauſe he is, in this caſe, the defendant, as he

he denies having paid the debt by means of the others property.—If, on the contrary, they disagree concerning the amount of the debt to which the lender had restricted the pawning of the robe, the declaration of the *lender* is credited; for as his deposition would be credited if he were to deny the loan itself, it follows that where he merely denies a *quality* of the loan it is credited *a fortiori*.

in whose hands it was lost, and that of the *lender* with respect to the restrictions of the loan.

If the borrower of the robe pawn it on the faith of a promise,—that is, on a person promising to lend him a certain sum of money, and that person accept the pledge, and make the promise accordingly, and the pledge (which is supposed to be equal to the amount of the debt) be lost before the pawnee had fulfilled his engagement, he [the pawnee] is in that case responsible for the sum so promised, as a promise is held to be the same as a real debt;—and the lender is entitled to receive from the pawner the sum which he takes from the pawnee.

A person receiving a borrowed article in pledge on the faith of a promise, must pay the sum promised to the pawner, who again pays the same to the lender.

If a person lend his slave to another, that he may pawn him, and the borrower pawn him accordingly, and the lender afterwards emancipate him, he is accordingly free; for the owner's property in him is not destroyed by the circumstance of his being pawned. And in this case the pawnee may either receive payment of his debt from the pawner, (who is still indebted to him,) or he may take from the lender the value of the slave by way of compensation, as the right which he had in the worth of the slave was destroyed by the lender emancipating him;—and having thus received the value, he may retain it in pawn until such time as he obtain payment of his debt, upon which he must restore the said value to the owner.

The lender of a *slave* to pawn may emancipate him, lodging the *value* with the pawnee, in substitute for the pledge.

If a person borrow a slave or a camel with intent to pawn it, and having first employed the slave in service, or rode upon the camel, he then pawn it in security of a debt adequate to its value, and having

The borrower transgressing upon the article (before pawn or after

 afterwards

redemption) and then ceasing from such transgression, is not responsible in case of loss.

afterwards discharged the debt, the pledge be completely destroyed in the hands of the pawnee before restoration, in that case the pawner is not responsible; for when he concluded the pawn he became exempt from responsibility, notwithstanding he had previously enjoyed the usufruct; since although he at first transgressed, yet he afterwards retracted, and acted in conformity with the intention of the lender. In the same manner, if the pawner, after having redeemed the pledge, employ it in service, without occasioning any detriment to it, and it be afterwards destroyed by some unforseen contingency, he is not responsible; because the term of the loan having expired upon the redemption of the pawn, he is no longer a *borrower*, but becomes from that period a *trustee*; and although, in taking the service of the pawn, he was guilty of a transgression, yet as he afterwards retracted and conformed to the intention of the lender, he becomes thenceforth free from all responsibility. It is otherwise in the case of a person who has borrowed any thing not with an intent to pawn it; for his seizin, being derived merely from the loan, is not therefore the same as that of the proprietor, to whom he is consequently bound to restore the thing which he borrowed. In the case, on the contrary, of a loan with intent to *pawn*, when the thing is pawned the object of the lender is obtained; for his view is to have recourse to the borrower; that is to say, that when the pawn is destroyed in the possession of the pawnee, and a discharge of debt thereby proved, he may take from the borrower a sum adequate to what he is held to have discharged by the loss of the pawn: wherefore if it be destroyed in the hands of the borrower, without a transgression on his part, he is not responsible.

A pawner destroying the pledge, is responsible to the pawnee for the value;

If the pawner kill the slave whom he had pledged, he is responsible for the value; because by the murder of the slave he destroys the right of the pawnee, which is sacred and inviolable; and a right of this nature, attaching to the property of any person, renders him [the proprietor] the same as a stranger with respect to responsibility; like the connexion

connexion of the right of the heirs with the property of a dying person, which prevents the effect of his gratuitous acts in any thing beyond the third of his estate; or like the connexion of the right of a legatee with the legacy bequeathed to him, which, if the testator's heirs should destroy the article [bequeathed to him in legacy,] renders them responsible for the value as a substitute.

and so in proportion for any injury he may do to it.

IF the pawnee commit any offence upon the pledge *, a sum is remitted from his debt equivalent to the atonement for such offence; because the *substance* of the pledge belongs to the proprietor [the pawner;] and as the pawnee has transgressed upon it in this instance, he is consequently responsible to the proprietor for having so done.

Any finable offence committed by a pledged slave upon either the *person* or *property* of his pawner is of no account;

IF a pledged slave be guilty of an offence against the pawner, either in person or property, such offence is of no account,—that is to say, is not attended with any effect;—and in this our doctors have been unanimous; for as the offence is here committed by the *property* on the *proprietor*, the cognizance of it would tend to no advantage. (By the *offences* here alluded to is to be understood merely such as induce *fine*, not such as occasion *retaliation*.)

nor such offence committed by him upon the *person* of the *pawnee*.

IF a pledged slave be guilty of an offence against the person of the pawnee, this likewise (in the opinion of *Haneefa*) is of no account.—The two disciples have judged otherwise.—The argument adduced by them is that as, in this case, the offence does not affect the proprietor, an advantage may be derived from a cognizance of it, since the slave may be made over [to the pawnee] in reparation of the injury.—The offence is therefore of account in this instance; and such (according to them) being the case, it follows that if the pawner and pawnee

* Such as by *maiming*, or otherwise.

concur in diſſolving the contract of pawn, and the pawner either deliver the ſlave, or pay a ſum to the pawnee in atonement for the offence, the obligation of debt is void *:—but if the pawnee ſhould ſignify that "he does not deſire *any* compenſation for the offence," the ſlave remains in pawn as before. The argument of *Haneefa* is, that no advantage can poſſibly reſult from taking cognizance of the offence in queſtion; for if cognizance of it be taken on account of the pawnee, it is then incumbent on him to extricate the ſlave from the guilt in which he is involved †; wherefore he muſt firſt *pay* the expiatory ſum, and then again *receive* it, in which there is evidently no advantage.

nor upon his *property*, provided his value do not exceed the debt for which he ſtands pledged:

If a pledged ſlave commit an offence upon the property of the pawnee, ſuch offence is of no account, according to all our doctors, provided the value of the ſlave be adequate to the amount of the debt; for here no advantage can reſult from taking cognizance of the offence; as the remedy applicable in this caſe is an appropriation of the ſlave to the pawnee, in compenſation for the injury he had ſuſtained,—a remedy which cannot here be effected, as the ſlave is not *made over* in atonement for the offence, but is *ſold*, and a compenſation for the injury he has done to the property of the pawnee diſcharged from the purchaſe money;—and as the ſum appropriated to the diſcharge of the compenſation is deducted from the debt, there is finally no advantage in taking account of the offence in this inſtance. If, on the contrary, the value of the ſlave exceed the amount of the debt, there are two opinions recorded from *Haneefa* upon the caſe.—One is, that the offence may be redreſſed in the proportion in which the value [of the ſlave] exceeds the debt, a pledge being a truſt with reſpect to any

* Becauſe the ſlave here appears to have been "*loſt in the hands of the pawnee*," a circumſtance which liquidates his debt.

† Becauſe he is poſſeſſed of the ſlave in a way which induces reſponſibility.

exceſs,

excefs, and the injury in this cafe being fimilar to that committed by a flave in depofit on the property of the truftee. The other is, that the offence cannot be redreffed at all; for as the effect of the contract of pawn (namely, the detention of the flave on account of debt) applies to the excefs as well as to any other part of the pledge, it may therefore be faid that he is a fubject of refponfibility *in toto*.

but his offence againft the fon of the pawnee is cognizable.

If an offence be committed by a pledged flave on the fon of the pawner or pawnee, it is cognizable; for, as the right of property of a father is, in reality, diftinct and feparate from that of his fon, the crime is therefore the fame as if committed upon a ftranger.

If the pledge be deftroyed after depreciation, the pawnee muft remain fatisfied with the compenfation he recovers from the deftroyer;

If a perfon pawn a flave eftimated at one thoufand *dirms*, in fecurity for a debt of the fame amount, payable at fome future period, and the value of the flave be afterwards lowered to one hundred *dirms* from a fall in the price*, and a perfon then kill the flave, and pay a compenfation of one hundred *dirms*, (being the value he at that time bears,) and the time of payment arrive, the pawnee muft in this cafe keep poffeffion of the hundred *dirms* aforefaid in lieu of his debt, and has no further claim whatever upon the pawner.—This is founded upon an eftablifhed rule, that no regard is paid to any depreciation of a pledge from a fall in the price, regard being had folely to the value it bore at the time of the contract of pawn;—whence it is that (as is here mentioned) a diminution of the value of a pledge from a fall in the price does not occafion a remiffion of the debt, according to our doctors:—contrary to the opinion of *Ziffer*, who contends that, upon the pledge fuftaining any lofs with refpect to its *worth*, it may be faid to fuftain a lofs with refpect to the *fubftance* alfo. The argument of our doctors is, that a fall in the *price* arifes merely from a decreafe of defire in men towards the article,—a circumftance to which no regard

* That is, from a fall (for inftance) in the *current* or *market* price of *flaves*.

is paid in the case of *sale*, (whence the purchaser has no option in consequence of any casual fall in the market, but owes the whole price agreed for,) nor in the case of *usurpation*, (whence an usurper, upon restoring the article he has usurped, is not responsible for any depreciation it may have sustained in the interim of usurpation from a fall in the price.) As, therefore, no part of the debt is remitted in consequence of a fall in the price, the slave continues in pledge opposed to the whole of the debt;—and upon any person killing him, he pays the value which he [the slave] then bears, namely, one hundred *dirms*; (for, in exacting compensation, regard must be paid to the value at the time of the destruction taking place;)—and the pawnee takes the hundred *dirms*, as being a compensation for the worth of the pledge with respect to the owner of it. But, after this, the pawnee has no further claim on the pawner; because the seizin of the pawnee stands as a seizin of payment from the time of his obtaining possession of the pledge, which payment is confirmed in the event of the loss of the pledge whilst in his possession. The value of the slave, moreover, at the beginning was one thousand *dirms*, and upon his being destroyed in the hands of the *pawnee*, he [the pawnee] is accounted to have received payment of his *whole debt* in virtue of his original seizin. But since, in consequence of his having received one hundred *dirms*, it is impossible that he can also be thus accounted to obtain payment of one thousand *dirms* (the original value of the slave) without inducing usury, the matter is therefore settled thus,—that he received these hundred *dirms* as part payment of his debt of one thousand *dirms*, and that there still remain nine hundred *dirms* annexed to the substance of the pledge; and that, upon the pledge being destroyed in his possession, he is in consequence of such destruction accounted to receive payment of nine hundred *dirms*. It is otherwise where the slave dies a natural death in the hands of the pawnee; for as, in that case, there can be no imputation of usury, he is therefore held to have received payment of the *whole* of the debt in that instance.

IF a perſon pawn a ſlave eſtimated at one thouſand *dirms* in ſecurity of a debt of the ſame amount, and the value of the ſlave be afterwards lowered to one hundred *dirms* by a fall in the price, and the pawnee be authorized by the pawner to ſell the ſlave, and accordingly ſell him for one hundred *dirms*, and take poſſeſſion of the price towards the diſcharge of his debt,—he is ſtill entitled to receive from the pawnee the remaining nine hundred *dirms*; for as the pawnee ſold the pledge at the inſtance of the pawner, it is in effect the ſame as if the pawner had taken it back and ſold it himſelf,—in which caſe the agreement would be diſſolved, and the debt would continue in force, except in regard to that ſum which the pawnee had received,—and ſo here likewiſe.

but if (after ſuch depreciation) he *ſell* it by deſire of the pawnee for payment of his claim, he is ſtill entitled to any deficiency.

IF a perſon pawn a ſlave valued at one thouſand *dirms* againſt a debt of the ſame amount, and afterwards a ſlave valued at one hundred *dirms* kill the ſlave in pawn, and having been given in compenſation for his blood, be detained in pawn in lieu of him, the pawner is in that caſe compellable to redeem him by the payment of the whole of the debt, namely, one thouſand *dirms*. This is the opinion of *Haneefa* and *Aboo Yooſaf*. *Mohammed* maintains that the pawner is in this caſe at liberty either to redeem the pledge by diſcharging the whole of the debt, or to transfer the property of it to the pawnee as a commutation. *Ziffer*, on the other hand, contends that the ſlave who perpetrated the murder is to remain in pawn in ſecurity of one hundred *dirms*; and that the remaining ſum of nine hundred *dirms* is accounted to be diſcharged; becauſe (as he argues) the ſeizin of the pawnee in virtue of the contract is a ſeizin of payment, which is fulfilled in this caſe by the deſtruction of the pledge: but as the pledge has left behind it a return or conſideration, equivalent to the tenth part of the debt, ſuch part is therefore ſtill due, and the ſlave is detained in pawn in ſecurity thereof. The argument of our doctors is, that in this caſe no part of the debt is remitted; becauſe the ſecond ſlave is a ſubſtitute for the firſt, in regard merely to *fleſh* and *blood*, (that is, in regard to *appearance*;)

The pawner muſt redeem a ſlave of *leſs* value (received by the pawnee in compenſation for having ſlain the ſlave in pledge) by payment of his *whole debt*.

appearance;) and as, in case of the existence of the *first* slave, if the value were to be diminished by a fall in the price, still no part of the debt (as we have before shewn) would be on that account annulled,—so neither is any part annulled when another slave is substituted for the one originally pledged. *Mohammed* has indeed said that the pawner may nevertheless refuse to redeem the pledge; for when a change and diminution of value took place in the pawn whilst in the possession of the pawnee, (which is a cause of responsibility,) the pawner became empowered to object to the redemption of it;—in the same manner as where a slave kills a purchased slave antecedent to the delivery of him,—in which case the purchaser has it at his option either to accept the slave who committed the murder in lieu of the one he purchased, or to annul the contract [of sale.] To this, however, the two *Elders* reply, that upon the second slave being, with regard to appearance, substituted for the first, it may be said that no change takes place in the identity of the slave; and as the substance of a pawn is a *trust* in the hands of the pawnee, it follows that the pawner cannot render it the property of the pawnee unless he should consent thereunto.—Moreover, the transfer of a pledge in commutation of the debt to which it stood opposed was a common practice in times of ignorance, but has since been proscribed by the LAW. It is otherwise with respect to the case of sale adduced as a parallel by *Mohammed*; for there the buyer has the option of annulling the contract of sale; and the annulment of sale is permitted by the LAW.

The fines incurred by a pledged slave must be defrayed by the pawnee;

IF a pledged slave slay a person by misadventure, the fine of blood is in that case chargeable to the pawnee, who must defray it accordingly:—nor is he at liberty to commute the slave for it, as he has not the power of transferring the property of him to any person. If, therefore, the pawnee discharge the whole fine, the slave is thereby rendered pure; and the stains of guilt being thus effaced, his [the pawnee's] claim of debt subsists as before: but he is not entitled to make any demand on the pawner on account of the sum which he paid

paid in expiation of the crime of the slave; for as it was committed whilst in his possession, (a circumstance which occasions responsibility*,) the atonement for it therefore rests upon him. If, however, the pawnee object to the payment of the penalty, the pawner must in that case be ordered either to pay the fine, or to make over the slave in lieu of it; for the pawner is the *proprietor* of the slave; and the fine was chargeable to the pawnee merely for this reason, that his right is connected with the slave [in virtue of *pawn*,] and not because of his being in any respect the *proprietor*. Upon his refusal, therefore, the claim of atonement for the offence lies against the pawner, as being proprietor of the slave; and the atonement, in the present instance, is either paying the fine of blood, or making over the slave in lieu of it. If the pawner adopt the *latter* alternative, his debt to the pawnee is held to be completely discharged; for the transfer having been incurred by an offence committed by the slave whilst *in the pawnee's possession*, he therefore, as it were, *perishes in his hands*. If, also, he adopt the former alternative, (that of paying the *fine*,) his debt is extinguished; for as the slave was (as it were) *lost* by the offence, the recovery of him was incumbent on the pawnee, by the payment of the atonement. Upon the pawner, therefore, discharging such atonement, he, as it were, retrieves the slave, and is consequently entitled to payment from the pawnee; for which reason the debt is held to be annulled. It is otherwise where a person pawns a slave girl who bears a child whilst in the possession of the pawnee; for if that child should either kill a man, or trespass upon any person's property, it is incumbent on the pawner in the first instance to make over the child in expiation for the murder, or in compensation for the damage he may have occasioned; as the child is not a subject of responsibility with the pawnee. If, therefore, the child be given in lieu of the blood or property, it is excluded from the contract of pawn,

but if he refuse, they are defrayed by the pawner, who charges the pawnee accordingly, in liquidation of his debt.

* The *immediate possessor* of a slave is in a certain degree responsible for his conduct.

but is not deducted from the pawnee's debt,—in the ſame manner as where it dies a natural death:—or if, on the other hand, he pay the atonement, the child in that caſe remains in pawn with its mother as before.

Rule with reſpect to the debts incurred by a pledged ſlave deſtroying the property of a *ſtranger*.

If a pledged ſlave deſtroy the property of any perſon to an *equal* or *greater* amount than his value, and the pawnee diſcharge the debt thus incurred by the ſlave, his claim upon the pawner holds good as before, in the ſame manner as where he pays a pecuniary atonement for any *offence* committed by the ſlave. In caſe, however, of his objecting to ſuch payment, the pawner is then required either to ſell the ſlave towards diſcharging of the debt, or to pay it himſelf. If he adopt the *latter* alternative, the claim of the pawnee is cancelled, in the ſame manner as explained in the example of *atonements*. If, on the contrary, he prefer the *former* alternative, and (declining to pay the debt himſelf) ſell the ſlave towards the diſcharge of it, in that caſe the perſon who ſuſtained the injury muſt firſt take what is due to him from the price, (his claim having preference to that of the pawnee,) and then, if any thing remain, enquiry muſt be made whether the claim of the proprietor of the goods was *greater*, *equal* to, or *leſs* than that of the pawnee?—If it be either *equal* to, or *greater* than the claim of the pawnee, the reſidue of the price is appropriated to the pawner, and the debt of the pawnee is held to be annulled; for upon the ſlave being ſold towards the diſcharge of a debt attaching to him in conſequence of an offence committed whilſt in the poſſeſſion of the pawnee, the caſe becomes in effect the ſame as if he had been deſtroyed in the pawnee's poſſeſſion. If, on the contrary, the claim of the proprietor be leſs than that of the pawnee, the claim of the pawnee is in that caſe annulled only in proportion to the ſum diſburſed to the proprietor; and the remainder is detained in pawn in lieu of the ſlave;—wherefore, if the pawnee's debt be at that time due, he may then take this ſum as a ſatisfaction for it; but if the term of payment ſhould not have arrived, he muſt retain it in his

hands until his debt become payable. If, on the other hand, it ſhould ſo happen that the price of the ſlave does not altogether ſuffice towards the diſcharge of the proprietor's debt, he [the proprietor] may in that caſe take the whole of the price, but without making a demand on any perſon for the remainder, until ſuch time as the ſlave may have become free; for his right relates to the ſlave; and as the ſlave has been ſold towards making ſatisfaction for it, his claim therefore to whatever part of the right may not have been thus diſcharged, is ſuſpended until the ſlave obtain his freedom, when it may be again urged;—and if the ſlave, after obtaining his freedom, ſhould thus diſcharge the remainder, he is not then entitled to claim a reimburſement from any perſon, as the money he diſburſed was due from him on account of his own act.

If the value of the ſlave be twice the amount of the debt, the fines incurred by him are defrayed equally by both parties.

IF a perſon pawn a ſlave valued at *two* thouſand *dirms* in ſecurity of a debt of *one* thouſand, and the ſlave commit an offence, in that caſe the pawner and pawnee muſt *both* be ordered to pay the atonement*; for a moiety only of the ſlave is inſured with the pawnee, the other moiety being with him as a *truſt*; and accordingly the atonement for the *inſured* moiety is chargeable to him, and that of the other moiety to the pawnee. If, therefore, the pawner incline to give the ſlave as a compoſition for the offence, and the pawnee aſſent thereto, his [the pawnee's] debt is extinguiſhed. If, on the contrary, the parties diſagree, (one of them inclining to give the ſlave in compoſition, and the other wiſhing to diſcharge the atonement,) the declaration is in that caſe accepted of the party who prefers paying the atonement, whether it be the pawner or pawnee; for if the *pawnee* pay the atonement, ſtill the right of the pawner is not annulled; whereas the pawner, in commuting the ſlave for the penalty, would deſtroy the

* This does not mean that *each* is to pay the atonement, (for that would be to pay it *twice*,) but that the obligation of atoning for the offence reſts upon the *one* as well as upon the *other*.

right of the pawnee. If the *pawnee* pay the atonement, a part of the payment, in proportion to the part [of the ſlave] he held in *truſt*, is conſidered as *gratuitous*, (for this reaſon, that if he had not choſen to pay it, the matter would have reſted upon the *pawner*,) and ſuch being the caſe, he has no claim upon the pawner for an indemnification.—If, on the contrary, the pawnee refuſe to pay the atonement, and the pawner diſcharge the whole, a moiety of it is in that caſe placed to the account of the pawnee;—(that is to ſay, is deducted from his claim;) for as, in all caſes where pledged ſlaves commit a crime, the debt of the pawnee is held to be extinguiſhed upon the pawner either making over the ſlave, or paying the atonement, it follows that the pawner, in paying the atonement, does not act *gratuitouſly*. As, therefore, a moiety of the atonement is due from the pawnee, if ſuch moiety be equal to, or greater than his claim, the whole of his debt is extinguiſhed; or, if it be *leſs*, a proportionate part; whilſt the ſlave is detained in pawn in ſecurity of the part remaining due.

The executor of a deceaſed pawner may ſell the pledge, and diſcharge the debt, with the pawnee's conſent.

If a pawner die, his executor is empowered to ſell the pledge, and diſcharge the debt, provided he obtain the conſent of the pawnee; for as the executor repreſents the pawner, he has conſequently the ſame power and privilege as had appertained to *him* during his life-time. But if a pawner die without leaving an executor, it then belongs to the *Kâzee* to appoint a perſon to act in that capacity; as it is his duty to conſerve the rights of thoſe who are themſelves incapable of maintaining them; which purpoſe is fulfilled in the appointment of an executor, who may diſcharge the debts of the deceaſed, and receive payment of his claims upon others.

An executor cannot pawn effects of the defunct to

If an executor pawn part of the effects of the defunct to one of his creditors, it is illegal, and the other creditors may compel him to revoke the pawn;—for an executor, not having the power of

of paying ſome of the creditors, and of excepting others, cannot therefore give pledges to ſome and not to others; as a pledge is held to be the ſame, in effect, with an actual *payment*. If, therefore, the executor ſhould, in the mean time, diſcharge the claims of the other creditors, the pawn which he before made is valid, ſince in ſatisfying them he removes the bar to its legality. But if the defunct ſhould leave only one debt againſt him, in that caſe the executor is juſtified in pawning part of the effects in ſecurity of it; for, ſince he has a power of giving part of the effects in payment of the debts of the deceaſed, he may conſequently depoſit part of them in pledge; and if, afterwards, he ſell the pledge as a means of diſcharging the debt, it is lawful, becauſe the ſale of the effects of the defunct with a purpoſe to pay off his debts being lawful when they are *not* pawned, it is conſequently ſo likewiſe when they *are* pawned.

any particular creditor.

unleſs there be only *one*.

IF an executor take a pawn in ſecurity of a debt due to the defunct, it is lawful; becauſe the ſeizin of a pawn is the ſame as a receipt of payment; and it is the duty of an executor to receive payment of the debts of the deceaſed. (A more particular explanation of the powers of an executor, with reſpect to pawns, ſhall be given in treating of *Executorſhips*.)

He may receive pledges in ſecurity for debts owing to the defunct.

SECTION.

SECTION.

Grape-juice still remains in pawn after having become wine, and then vinegar.

If a person pawn, in security of a debt of ten *dirms*, a quantity of the juice of grapes of the same value, which afterwards becomes wine *, and then vinegar, and the value of the vinegar be also ten *dirms*, it in that case remains in pawn for the debt of ten *dirms*; because whatever is fit to be *sold* is likewise fit to be *pawned*, since *worth* is requisite to the fitness in the *one* instance as well as in the *other*; and wine, although not at *first* qualified for sale, does yet possess that fitness ultimately;—whence it is that if a person purchase the juice of grapes, and it become wine prior to his taking possession, still the compact of the sale is not dissolved; but the purchaser has, in such case, the option of either adhering to, or receding from the bargain; as the goods which he purchased, having been *changed*, are thereby as it were *damaged*.

A pledge destroyed *in part* is still retained in pawn with respect to the *remainder*.

If a goat, estimated at ten *dirms*, having been pawned for a debt of the same amount, should afterwards die, and its skin be preserved so as to bear a value of one *dirm*, it is detained in pawn in security of a like part of the debt; for as a contract of pawn is completed and perfected by the destruction of the pledge, (since the object of it, namely, a payment of debt, is then obtained,) it follows that where a part of the pawn remains, the contract continues in force in proportion to that part. It is otherwise where a goat, having been sold, dies before the purchaser takes possession, and the skin is preserved;

* By fermentation. (For an explanation of this, see *Prohibited Liquors*.)

for

for in that caſe the contract is completely void,—(that is to ſay, it does not ſubſiſt even in regard to the *ſkin*;)—becauſe ſale is rendered void, and entirely done away, by a deſtruction of the goods before the delivery of them to the purchaſer; and ſuch being the caſe, it cannot (in this inſtance) revert with reſpect to the ſkin.

Any increaſe accruing from the pledge is detained in pawn along with it.

EVERY ſpecies of increaſe accruing from a pledge after the execution of the contract, (ſuch as *milk*, *fruits*, *wool*, or *progeny*,) belong to the pawner, as being the offspring of his property:—but they are, nevertheleſs, detained with the original in pawn; for branches are dependant on the ſtock; and the contract of pawn, being of a binding nature, extends over all its branches. If, however, this offspring be deſtroyed in the pawnee's hands, he is not reſponſible for it; becauſe no part of the ſum oppoſed to the original is oppoſed to the *offspring*, as *that* was not originally included in the contract, ſince the propoſal and acceptance which form the contract did not relate to, or comprehend it. If, on the contrary, the *original* be deſtroyed, and the offſpring remain whole, it is incumbent on the pawner to redeem the ſame, by paying its proportionate value; that is to ſay, the debt muſt be divided proportionably to the value which the original bore at the time of concluding the bargain, and that which the offspring bears at the time of redeeming it; and the proportion given to the original is, upon the loſs of it, held to be annulled; but that of the offspring remains due, and muſt be paid by the pawnee towards the redemption of it *. (A variety of caſes are determined by this rule, ſeveral of which

* As this is ſomewhat obſcure, it may be proper to render it more clear, by a ſtatement of the caſe according to the rules of proportion. Suppoſe, therefore, the debt to be one hundred *dirms*, the original pledge valued at one hundred, and its offspring at fifty,—in that caſe the original and offspring, amounting to one hundred and fifty *dirms*, are pawned in ſecurity of one hundred *dirms*.—Now, in order to know the proportions of pawn which the original and the offspring reſpectively bear to the whole debt, the latter muſt firſt be multiplied by the original; and the multiple divided by the whole value of both

which are set forth in the *Kafáyat-al-Moontihee*; and the whole are enumerated in the *Jama Sagheer* and *Zeeadát*)

The pawnee, using the product from the pledge by permission of the pawner, is not liable for any thing on that account.

If a person, having pawned a goat, desire the pawnee to milk it, giving him, at the same time, permission to enjoy whatever quantity he might milk, and the pawnee act accordingly, he is not liable to compensate for the milk he may have thus consumed, nor is his claim, on that account, in any measure diminished, since he used the milk at the instance of the pawner. If, therefore, the goat die unredeemed in the hands of the pawnee, the debt owing to him must be divided into two parts, proportionate to the value of the goat and of the milk; and that part opposed to the goat is cancelled; whilst the other part, opposed to the milk, remains due from the pawner; because, although the milk be the property of the pawner, yet as the pawnee consumed it by his desire, the case is the same as if the pawner had himself taken and destroyed it. The pawnee, therefore, is not answerable for the milk: but [if the goat die] his claim still exists with respect to that proportion which corresponds with it. The same rule also obtains with regard to the offspring of a goat, which a pawnee eats at the desire of the pawner; and, in fine, with respect to every increase accruing from pledges posterior to the contract.

The pledge may be augmented, but not the debt.

The augmentation of a pledge is lawful, in the opinion of all our doctors;—as where, for instance, a person, having pawned a slave for a debt of one thousand *dirms*, afterwards gives the slave a garment to be detained likewise in pawn in security of the same debt;—in which

both [original and offspring] and the product gives the proportion of the original; after which the same process must be observed with respect to the offspring;—when the calculation will stand thus:

150 : 100 :: 100—$66\frac{2}{3}$ the proportion of the original pledge.
150 : 100 :: 50—$33\frac{1}{3}$ the proportion of the offspring.

case

case the addition so made to the original pledge is lawful, and the garment is included in the agreement; the case being, in short, the same as if the slave and garment had been originally pawned together. On the other hand, the increase of a debt in security of which a pawn has been taken is not lawful, (according to *Haneefa* and *Mohammed*;) that is to say, the pledge opposed to a particular debt does not also stand opposed to any *increase* upon it. *Aboo Yoosaf* holds that *both* debts are liquidated.—The addition to a pledge, as here stated, is termed *Zeeàdit Koosdee*, or *intentional* increase*; and the debt is to be between the value the *original* pledge bore at the time of pawning it, and that which the *addition* bears on the day of its delivery.—Hence if the value of the latter was then five hundred *dirms*, and that of the original pledge at the time of concluding the agreement one thousand, and the amount of the debt likewise one thousand, the debt is in that case divided into three shares, two of which are opposed to the original pledge, and the remaining one to the increase; and according to this proportion they are respectively charged for, if lost or destroyed in the hands of the pawnee.

Case of increase to a pledged female slave.

IF a person, in security of a debt of one thousand *dirms*, pawn a female slave of the same value, who afterwards brings forth a child likewise estimated at one thousand *dirms*, and the pawner then increase the pledge by the addition of a slave also valued at one thousand *dirms*, (saying to the pawnee, "I have added this slave to the child "of the pledge,") the slave is in that case pawned with the *child* only. If, therefore, the child afterwards die, the slave is no longer in pawn, insomuch that the pawner may resume him from the pawnee without making him any return. If, also, the *slave* should die, or be lost, nothing is chargeable on that account to the pawnee.—If, on the other hand, the *mother* should die, the debt must in that case be divided between the value she bore at the time of concluding the contract,

* To distinguish it from *accidental* increase by *breeding*, *vegetation*, &c.

and that which the child bears on the day of redemption;—and ſince the ſlave was attached ſolely to the child, the ſhare of the child muſt therefore be proportionably divided between it and the ſlave, agreeably to their reſpective values, in order that if either of them ſhould die he may be charged for accordingly. If, on the contrary, the pawner attach the ſlave to the *mother*, (ſaying to the pawnee, "I "have placed him with *her* in addition to the pledge,") the debt muſt in that caſe be proportionably oppoſed to the mother and the ſlave, according to the value which they ſeverally bore at the time of ſeizin; and from the ſum oppoſed to the mother a proportionate part muſt be allotted to the child; for the pawner, in having placed the ſlave with the *mother*, joined him (as it were) to the original matter of the agreement; whence the child is included in the proportion of the *mother* only.

Caſe of a pawner committing *one* ſlave in pawn for *another*.

If a perſon pawn a ſlave valued at one thouſand *dirms* in ſecurity of a debt of the ſame amount, and afterwards give the pawnee another ſlave, likewiſe of the ſame value, to be detained in place of the former, in that caſe the firſt ſlave is conſidered as being in pawn until ſuch time as the pawnee reſtore him to the pawner in the way of annulment, the ſecond ſlave being merely a *depoſit* in his hands until he be regularly rendered a ſubſtitute for the other; for the firſt ſlave was included in the reſponſibility of the pawnee only becauſe of his being poſſeſſed *in ſecurity of debt*; and as both the ſeizin and the debt ſtill exiſt, the ſlave therefore continues a ſubject of reſponſibility until the ſeizin be formally voided; and ſuch being the caſe, the pawnee is not liable for the *ſecond* ſlave, as the parties intend *one* of them only to be included in the pawnee's reſponſibility:—but upon the pawnee reſtoring the firſt ſlave to the pawner, he becomes reſponſible for the ſecond.

The pawnee is not reſponſible for the pledge after

If the pawnee acquit the pawner of the debt, or beſtow it on him in gift, and the pledge be afterwards deſtroyed in his [the pawnee's] poſſeſſion, he is not reſponſible for it, according to our doctors, pro-

5 ceeding

ceeding upon a favourable conſtruction of the LAW:—contrary to the opinion of *Ziffer*. The reaſons for a favourable conſtruction of the LAW in this particular are twofold.—FIRST, a pledge is inſured on two conditions;—*one*, that it be actually poſſeſſed by the pawnee; and *another*, that it be oppoſed to a debt either *due* or *promiſed*. Now compenſation for a pledge in the caſe of a debt then due, is made in this manner,—that if the pawn be loſt in the hands of the pawnee, his debt is extinguiſhed, provided the value of the pledge be adequate to the amount of the debt; whereas compenſation in the caſe of a *promiſed* debt is made by conſtraining the pawnee, in caſe of the decay of the pledge in his hands, to make good to the pawner the ſum he had promiſed;—and in a caſe where the pawnee acquits the pawner of the debt, or beſtows it on him in gift, the *ſecond* condition is wanting, as no debt exiſts in that inſtance either *due* or *promiſed*. SECONDLY, one object of a pawner in delivering the pledge to the pawnee is that, in caſe of its loſs, he may be abſolved from any further obligation: but where the pawnee acquits the pawner of the debt, and the pawn is afterwards loſt in his hands, the deſire of the pawner being accompliſhed, the pawnee is not therefore liable for it; (unleſs, however, the pawnee, having remitted the debt, refuſe to reſtore the pawn, and prevent the pawner from reſuming it; for in that caſe, if the pledge be loſt, he is reſponſible for the value, ſince by ſuch obſtruction he becomes an *uſurper*, as he no longer poſſeſſes a power of obſtruction.)—In the ſame manner, if a woman take a pledge from her huſband in ſecurity of her ſtipulated dower, and afterwards exempt him from the payment of it, or apoſtatize from the faith before conſummation, and the pledge be then deſtroyed in her hands, ſhe is not reſponſible for it, as the dower (like the debt) was remitted.

having acquitted the pawner of his debt.

IF a pawnee receive payment of his debt, either from the pawner or from an unconcerned perſon, in a gratuitous manner, and the pledge be afterwards deſtroyed in his poſſeſſion, his debt is in conſe-

If the pledge be deſtroyed with him after he has received pay-

 quence

ment of his debt, he must return what he has received, and the debt stands liquidated;

quence extinguished, and it is incumbent on him to restore what he had received to the person from whom he received it, whether the pawner or any other; for the seizin of the pawnee is equivalent to a receipt of payment in case of the loss of the pledge; and in the present instance, upon the pledge being destroyed, the pawnee is accounted to have received payment from the time he was first seized of it; and as he is not entitled, after that, to a *second* discharge, and the payment he had received as above then becomes such in effect, it must therefore be refunded.—In short, the discharge of the pawnee's claim, whilst he remains seized of the pawn, does not take place, but continues *suspended* until he deliver it to the pawner; and such being the case, the pawner is not therefore, during that time, held to be acquitted of the debt;—and upon the pledge being afterwards destroyed in the hands of the pawnee, his possession of it under such a circumstance is, in effect, *a receipt of payment*, and the other payment received whilst he was in possession of the pledge is annulled and done away, for otherwise a *repetition* of discharge would be induced;—for which reason he must refund the money he received in payment,—and also for *this* reason, that if he were not to refund it the intent of the pawner would be defeated.

and so likewise, if he *compound* the debt;

If a pawnee purchase some specific article from the pawner in lieu of his debt, or *compound* the debt with him for some specific article; and the pawn be afterwards lost in his possession, he is still responsible, and may therefore be compelled to restore the article which he had either received in purchase or composition; for the seizin of that article, in either case, is equivalent to an acceptance of payment; and consequently, if he do not refund it, a double receipt of payment is induced, as mentioned in the preceding example.

or if the pawner (with his concurrence) transf-

If a pawner transfer the debt which he owes the pawnee upon another person, (such as *Zeyd*, for instance,) who agrees to pay the same, and the pawnee, having assented to such transfer, acquit the pawner

pawner of the debt, and the pledge be afterwards deſtroyed in the pawnee's hands, the transfer is thereby rendered ineffectual, and the claim of the pawnee is annihilated; for although, in conſequence of the transfer, the transferrer [the pawner] be acquitted of any further concern in the matter, yet this acquittance is the ſame as an actual payment, inaſmuch as the ſum, the payment of which he had tranſferred upon the other perſon, is ultimately diſburſed by him, he having ſo transferred it in conſequence of his having a claim upon the transferee for a like ſum, whence the payment is made from him *in effect*;—or, if that perſon was *not* indebted to him, ſtill the pawner muſt afterwards repay whatever ſum he may have diſburſed in conſequence of the transfer, as in that caſe he acted in the capacity of an agent on his behalf.

fer the debt upon another perſon.

IF a perſon pawn any thing into the hands of another, and both parties afterwards concur in ſaying that no debt had ever ſubſiſted between them, and the pledge be then deſtroyed in the hands of the pawnee, it is anſwered by the debt; in other words, the debt in ſecurity of which the thing had been pawned is extinguiſhed;—for there is ſtill a probability of the debt being eſtabliſhed by the parties at ſome future period concurring and agreeing that it *did* exiſt; whence it is poſſible that the debt may be claimed,—a circumſtance which cannot happen in a caſe of *acquittal* of debt.

If the pledge be loſt after the parties agreeing that *no debt had exiſted*, it ſtands as a diſcharge of the ſuppoſed debt.

HEDAYA.

HEDAYA.

BOOK XLIX.

Of *JANAYAT*, or OFFENCES against the PERSON.

Definition of *Janayat*.

JANAYAT, in the language of the LAW, is a term expressive of any prohibited act committed either upon the *person* or *property*: —in the practice of lawyers it signifies that prohibited act committed upon the *person* *, which is called *murder*, or upon a part of the body, which is termed *wounding* or *maiming*.

* Arab. *Zât*, signifying the body connected with the soul; in opposition to *Badn*, which means simply the *material* body. The translator renders it *person* or *life*, as best suits the context.

Chap.

Chap. I. Introductory.
Chap. II. Of what occasions Retaliation.
Chap. III. Of Retaliation in Matters short of *Life*.
Chap. IV. Of Evidence in Cases of *Murder*.
Chap. V. Of the Circumstances under which *Murder* takes place.

CHAP. I.

THE homicide of which the LAW takes cognizance is of five kinds; I. *Katl-amd*, or wilful murder; II. *Shàbbáh-amd* *, or manslaughter; III. *Katl-khotá*, or homicide by misadventure; IV. *Katl-kàyem-mokàm-bá-Khotá*, or homicide of the same nature as that by misadventure; and V. *Katl-ba-Sibbab*, or homicide by an intermediate cause.

Homicide is of five descriptions.

KATL-AMD, or wilful murder, is where the perpetrator maliciously kills a man with a weapon, or something that serves for a weapon, such as a club, a sharp stone, or fire; because *amd* means *intentionally*, or *wilfully*; and as the intention is a thing concealed, which we cannot discover but by inference from something affording an argument of it, and the use of an *instrument* of murder does afford such argument,

I. *Wilful murder*;

* This is a technical phrase signifying, literally, "*the semblance of wilful:*"—the translator expresses it by the term *manslaughter*, on the authority of SALE, (see his Introductory Discourse, sect. VI.) and also, as being the most analogous term in our language.

argument, it may be concluded, where ſuch an inſtrument is uſed by the ſlayer, that murder was his intention.

which is *criminal*, and ſubjects the offender to retaliation.

If a perſon commit wilful murder, two points are eſtabliſhed. I. that the murderer is a *criminal*; becauſe it is ſaid in the KORAN, "WHOEVER SLAYETH A BELIEVER, HIS REWARD IS HELL;" and the ſame is repeatedly mentioned in the traditions; and all authorities, moreover, concur in this point. II. that the murderer is liable to retaliation; becauſe the KORAN ſays, "IT IS INCUMBENT "ON YOU TO EXECUTE RETALIATION UPON MURDERERS,"—by whom is to be underſtood perſons guilty of *wilful murder*, as it is ſaid in the traditions, "*Wilful murder requires retaliation.*"—An offence is, moreover, rendered complete by the *intention*, and complete puniſhment (underſtood by retaliation) is incurred where that exiſts, but otherwiſe not. In ſhort, retaliation is incurred in a caſe of wilful murder, except where the heirs * of the murdered perſon either forgive or compound the offence, retaliation being their right. It is proper, alſo, to obſerve, that retaliation is the appointed penalty in this inſtance; and the heir is not at liberty to commute it for a fine, but with the conſent of the murderer. This is likewiſe one opinion of *Shafei*. He however ſays, that the heir is at liberty to remit the retaliation, and exact a ſum in lieu of it, without the murderer's conſent; for as this occaſions his releaſe from deſtruction, it is conſequently lawful independant of his will. Another opinion of his is, that one of two things is incurred, without any particular appointment or ſpecification of either,—namely, retaliation, or fine; and that this determination reſts with the heir,—(that is, one or other

* Arab. *Awleya*, plural of *Wallee*. This term has a multitude of meanings, as has been already repeatedly obſerved. In the preſent inſtance it ſignifies the *next of kin*, or other perſons entitled to exact retaliation, as is more fully explained in treating of the *levying of fines*. The term *heir*, although not ſtrictly literal, is adopted as being the moſt analogous for the convenience of the Engliſh reader.—*Wallee-ad-dam* is for the ſame reaſon rendered *avenger of blood*.

becomes

becomes determined, according to his choice;) becauſe the LAW endows the individual with a right for the reparation of his injuries; and the injury, in the preſent inſtance, is repaired either way. The arguments of our doctors in ſupport of the former opinion are twofold. FIRST, what has been already quoted from the KORAN and the traditions.—SECONDLY, property is incapable of being a recompence for murder, ſince between *property* and a *man* there is no equality or compariſon,—whereas retaliation poſſeſſes this capacity, becauſe of the equality between the perſons of the murdered and the murderer;—and it is, moreover, advantageous to the living, ſince by the execution of a murderer men are deterred from committing this offence.

THERE is no *expiation*, in a caſe of wilful murder, according to our doctors. *Shafeï* maintains that expiation alſo is incumbent*; for as the neceſſity for expiation is ſtill more urgent in a caſe of *wilful* murder than in a caſe of homicide by miſadventure, it follows that in the former inſtance it is incumbent *a fortiori*. The argument of our doctors is that wilful murder is a peculiarly heinous offence; and as expiation bears the property of an act of piety, the performance of it is not to be annexed to an offence of that deſcription. Expiation, moreover, is appointed by the LAW in attonement for the *ſmaller* offence, namely, homicide by miſadventure; and it does not hence follow that it is appointed in atonement for the *greater* offence alſo, namely, *wilful murder*.

and excludes him from inheritance.

ONE effect of wilful murder is that the murderer is excluded from being heir to the murdered perſon; for, in the traditions, it is ſaid, "*There is no inheritance to the murderer.*"

* That is, beſides the *fine*,—ſuppoſing retaliation to be rémitted in lieu of a fine; for where retaliation is executed, expiation is out of the queſtion.

II. Manslaughter;

SHABBAH-AMD, or manſlaughter, according to *Haneefa*, is where the perpetrator ſtrikes a man with ſomething which is neither a weapon nor ſerves as ſuch. The two diſciples and *Shafei* maintain that if the ſtroke be given with a large ſtone, or a club, the act amounts to wilful murder. *Shabbah-amd*, or manſlaughter, on the contrary, (according to the two diſciples,) is where a perſon ſtrikes another with ſomething of a nature not likely to produce death, ſuch as a *ſmall ſtick*. For as, in this caſe, the property of *wilful**, in the act, is defective, (inaſmuch as the perpetrator here uſes an inſtrument not of a mortal kind, the intention being ſomething elſe than death, namely, *inſtruction*, or ſo forth,) it follows that killing a perſon with ſuch an inſtrument is merely a *ſemblance* of wilful murder;—whereas the property of *wilful* is not defective in caſe of a man ſtriking another with an inſtrument of a nature to produce inſtant death, ſuch as a *great ſtone*,—for here the intention can only be to kill, as well as with a ſcimitar;—this, therefore, is wilful murder, and occaſions retaliation. The argument adduced by *Haneefa* is a ſaying of the prophet, "*Killing with a rod or ſtick is not* MURDER, *but only* MANSLAUGHTER†, "*and the fine for it is one hundred camels.*" Another argument is, that as the inſtruments in queſtion are not commonly uſed with a view to *kill*, (whence it is that the property of *wilful* is defective therein, conſidering the inſtrument uſed,) killing, therefore, with ſuch inſtruments amounts only to manſlaughter, in the ſame manner as killing with a rod or a ſmall ſtick.

which is alſo criminal; requires expia-

MANSLAUGHTER is ſinful, the perpetrator having ſtruck intentionally, and killed, although without deſign; and it requires expia-

* The term *amd* [wilful] is uſed, in the *Muſſulman* law, in a ſenſe analogous to the *malicium* of the *Roman* law.

† Literally, "*is merely* SHABBAH-AMD;" in other words, "*is merely a* SEMBLANCE "*of* WILFUL [*murder.*] Where technical terms, of a nature not to bear tranſlation, occur ſo frequently, ſome liberties muſt neceſſarily be taken with the text.

tion,

tion, because of the semblance it bears to homicide by misadventure. An heavy fine is also due from the *Akilas* of the slayer, because of the analogy this offence bears to homicide by misadventure; for it is a rule that in all cases where the fine * is due for bloodshed at the first, and not on account of any supervenient or involved matter, it falls upon the *Akilas*, as being connected with homicide by misadventure. The restriction, in this particular, to "*at the first*," is in order to distinguish this from the fine incurred on account of some other matter, and not on account purely of the *bloodshed*;—as where, for instance, a father wilfully kills his son, in which case the fine falls immediately upon the murderer, and not upon his *Akilas*,—for here retaliation is incurred at the first, prior to fine, but is commuted for a fine out of reverence to the parent;—or where one of the heirs of a person wilfully murdered forgives the offence, in which case the other heirs are entitled to the fine;—or where the heirs of a person wilfully murdered enter into a composition for the fine;—for in all these instances the fine is due from the property of the murderer, and does not fall upon his *Akilas*, as not having been due *at the first*.

tion; subjects the *Akilas* of the murderer to the payment of a heavy fine,

IN consequence of manslaughter an heavy fine is due from the *Akilas* [of the perpetrator,] payable within three years; because it is recorded of *Omar* that he thus ordained in such cases. (The meaning of an *heavy* fine shall be presently made appear.)

(payable within three years;)

ONE effect of manslaughter is that it excludes the slayer from inheriting to the slain, this being the proper recompence of bloodshed. The *doubt*, moreover, which obtains in this species of bloodshed occasions a remission of retaliation, but does not prevent an exclusion from inheritance.

and excludes the manslayer from inheritance.

* Always meaning (throughout this book) the *Deyit*, or *fine of blood*.

III. *Homicide by misadventure;*

The error which occasions *Katl Khota*, or *homicide by misadventure*, is of two kinds; I. error in the *intention*; II. error in the *act*.—Error in the *act* is where a person intends a particular act, and another act is thereby occasioned;—as where, for instance, a person shoots an arrow at a *mark*, and it hits a *man*.—Error in the *intention*, on the other hand, is where the mistake exists, not in the *act*, but with respect to the *subject*;—as where, for instance, a person shoots an arrow at a *man*, supposing him to be *game*; or at a *Mussulman*, under the supposition of his being a *hostile infidel*;—for here the person who shoots intends to hit the object, but errs in his intention, as not knowing what that object is.

which requires expiation; subjects the *Akilas* to a fine (payable in three years;)

Homicide by misadventure requires two things; expiation, (performed by emancipating a *Mussulman* slave, or else fasting for two months successively,) and the payment of a fine from the *Akilas* [of the slayer] within three years; because God has said, in the Koran, "Whoso killeth a believer by mistake, *(the penalty of it* "*is)* the freeing of a believer, and a fine to the fa-"mily *(of the slain;")*—and the fine is payable within *three years*, because of the determination of *Omar*, as before mentioned.

Is criminal *in a certain degree;*

Homicide by misadventure does not bear the criminality of wilful bloodshed. Still, however, it is not altogether exempt from criminality; for as the slayer neglected caution, and acted hastily in shooting his arrow, he is criminal so far as *having neglected caution*.—Besides, if the act were not criminal, expiation for it would not have been ordained, as expiation is ordained in atonement for crimes.

and excludes the offender from inheritance.

Homicide by misadventure occasions the slayer's exclusion from inheriting to the slain; because it is an offence for which exclusion from inheritance is the due recompence.

(A blow with an intention

If a person strike at any part of another, with intention to *wound* him,

him, and hit another part, and the perſon ſtruck die in conſequence of the wound, retaliation is incurred; becauſe this is not *homicide by miſadventure*; for here the bloodſhed is a conſequence of an intention againſt a certain part; and all the parts of the body are as a ſingle ſubject.

to wound only, if it produce death, ſubjects to the penalties of *wilful murder.)*

HOMICIDE of the *fourth* deſcription (namely, that which is of the *ſame nature* as homicide by miſadventure*) is where, for inſtance, a perſon walking in his ſleep falls upon another ſo as to kill him by ſuch fall; and it is ſubject to the ſame rules with homicide by miſadventure.

IV. *Homicide of the* SAME NATURE *as by miſadventure.*

HOMICIDE BY AN INTERMEDIATE CAUSE is where, for inſtance, a perſon digs a well, or ſets up a ſtone, in ground which does not belong to him, and another falls into the well, or over the ſtone, and dies;—in conſequence of which a fine is due from the *Akilas*; becauſe the digging of the well, or placing the ſtone, was the occaſion of the deceaſed's deſtruction; and as the perſon who dug the one or ſet up the other was guilty of a tranſgreſſion in ſo doing, the caſe is in fact the ſame as if he had himſelf thrown the deceaſed into the well or againſt the ſtone. A fine is therefore incumbent in this inſtance.

V. *Homicide by an intermediate cauſe;*

which ſubjects the offender's *Akilas* to a fine,

EXPIATION is not incumbent in this ſpecies of *homicide*, nor is the guilty perſon excluded from inheriting [to the perſon killed.] *Shafeï* alleges that *homicide by an intermediate cauſe* is connected with *homicide by miſadventure*, with reſpect to all its effects, the lawgiver having accounted the guilty perſon, in this inſtance, to be equally a *ſhedder of blood*. The argument of our doctors is that as, in this caſe, the bloodſhed has not *actually* proceeded from the offender, the fact is therefore connected with homicide merely with reſpect to a *compenſation*, continuing, ſo far as concerns other matters, ſubject to its own rules.

but does not require expiation, nor exclude from inheritance,

* This diſtinction might perhaps be with propriety rendered *accidental* homicide.

THE

although the person from whom it originates be an offender.

THE digger of the well, or fetter-up of the ftone*, is an offender becaufe of thefe acts,—that is, becaufe of digging the well, or fo forth, *in land not his own property*, and not becaufe of the death thereby occafioned,—according to the opinions of the learned. Homicide by an intermediate caufe, therefore, does not require expiation; nor does it exclude from inheritance, (as has been already mentioned,) becaufe fuch exclufion is a penalty annexed to the actual *offence of bloodfhed*, which does not here exift.

General rule in offences fhort of life.

WHATEVER has the *femblance* merely of a wilful act, where life is affected, amounts to *wilful* in any thing *fhort* of life; becaufe the deftruction of life bears a different conftruction according to the inftrument by means of which fuch deftruction is produced;—whereas the deftruction of a *limb* or *member* does not bear any difference of conftruction from that circumftance; for by *bloodfhed* is underftood an act by which the vital principle is extinguifhed; and the vital principle is not a matter of a palpable nature,—nor can the intention of deftroying it be difcovered but from the ufe of fome mortal weapon; whereas a *limb* or *member* being a palpable thing, the inftrument ufed in deftroying it does not occafion any difference in the conftruction of the act by which it is deftroyed. Befides, if an inftrument of manflaughter (fuch as a *rod)* be ufed with an intention to kill, the act is *murder*,—whereas if it be ufed merely with a view to *correction*, and produce death, it is only *manflaughter*; but thefe diftinctions do not exift in any matter fhort of life, fince in the fame manner as the deftruction of a member may be intended by the ufe of a weapon, fo may it likewife by the ufe of any thing elfe; for as an eye (for inftance) may be put out by a weapon, fo likewife may it by a fmall rod; and confequently the act is equally *wilful* in either inftance.

* In the public highway, which may be an intermediate caufe of homicide, by occafioning the death of a paffenger. (This fubject will be difcuffed at large in the next book, under the head of *Nuifances.)*

CHAP.

CHAP. II.

Of what occaſions Retaliation.

Retaliation is incurred by the wilful murder of any perſon of protected blood.

RETALIATION is incurred by the killing of a perſon whoſe blood is under continual protection *, where the perpetrator ſlays him *wilfully*. The reaſon for ſtipulating that the act be *wilful* has been already explained; and it is alſo a condition that the perſon ſlain be one whoſe blood is under *continual* protection, in order that the doubt with reſpect to the neutrality of his blood may be removed, and an equality certified [between the ſlayer and the ſlain,] as equality is the point upon which retaliation turns.

A freeman is ſlain for a ſlave the property of another;

A FREEMAN is ſlain for a freeman;—and alſo for a ſlave the property of another, the argument for retaliation being univerſal, as was before explained. *Shafeï* maintains that a freeman is not to be ſlain for a ſlave; becauſe GOD has ſaid, in the KORAN, "THE FREE "SHALL DIE FOR THE FREE, AND THE SERVANT FOR THE SER"VANT;" and alſo, becauſe retaliation reſts upon equality, which does not exiſt between a freeman and a ſlave,—whence it is that the limb of a freeman is not ſtruck off for the limb of a ſlave:—in oppoſition to a *ſlave for a ſlave*, as theſe are on a perfect equality; and contrary, alſo, to the caſe of ſlaying a ſlave for a freeman, for here the defect is on the part of the ſlayer, which is no obſtacle to retaliation; as where, for inſtance, a paralytic perſon murders one in perfect health,

† Such as a *Muſſulman* or a *Zimmee*: in oppoſition to aliens, who have only an *occaſional* and *temporary* protection.

health, in which case he is slain in return. The argument of our doctors is, that retaliation rests merely upon equality in point of protection to the blood; (in other words, it depends upon the blood of *both* parties being in perpetual protection, and never in a neutral state;) and accordingly a person in health is put to death for a valetudinarian, an adult for an infant, and a maniac for one in his perfect senses;—because both parties are upon a footing in point of protection. Now this protection is a consequence either of religion or country; and as a slave and a freeman are both equally in these respects entitled to it, a freeman may therefore be put to death for a slave.

and a *Mussulman* for a *Zimmee*.

A Mussulman is put to death for a *Zimmee*. *Shafeï* maintains that a *Mussulman* is not to be put to death for a *Zimmee*; because the prophet has said, "*A* Mussulman *is not to suffer death for an infidel*;" and also, because there is not a perfect equality between the parties at the time of the offence, God having said, "*Infidels are not the equals of believers*;" and also, because as infidelity puts the blood out of protection, there is in this instance a doubt concerning its neutrality, preventive of retaliation. The arguments of our doctors upon this point are twofold.—First, it is recorded of the prophet, that he once slew a *Mussulman* for a *Zimmee*.—Secondly, an equality must necessarily be established on the part of the *Zimmee* with respect to protection of blood, when we consider the circumstance of country, and the duties of life; for if his blood were not protected, it would be impossible for him to discharge the various duties required of him as a member of the community. With respect, moreover, to what is advanced by *Shafeï*, it may be replied, that by the infidelity which puts the blood out of protection is to be understood the infidelity of an *hostile* unbeliever, as *those* are the infidels who hold enmity with *Mussulmans*, and not *Zimmee* infidels. The rule, moreover, of retaliating upon a *Zimmee* for a *Zimmee* affords an argument that the infidelity of a *Zimmee* does not occasion any doubt with regard to the protection of his blood, since if this were a matter of doubt, a

 Zimmee

Zimmee would not be ſlain for a *Zimmee*. Beſides, by the term *infidels* (in the ſaying of the prophet adduced by *Shafeï*) muſt be underſtood *Mooſtâmins*, or *protected* infidels, as appears from what the prophet further ſaid, (in the ſame tradition,) "*A* ZIMMEE *is not to be* "*ſlain for an* INFIDEL," (meaning a *Mooſtâmin*.)

A Mussulman is not to be ſlain for a *Mooſtâmin*;

A MUSSULMAN is not to be ſlain for a *Mooſtâmin*, as the blood of a *Mooſtâmin* is not in a continual ſtate of protection,—and his infidelity is, moreover, an occaſion of hoſtility, ſince a *Mooſtâmin* ſtill entertains an intention of returning to his own [an hoſtile] country. Neither is a *Zimmee* to be ſlain for a *Mooſtâmin*, becauſe of the tradition of the prophet before noticed.

nor one *Mooſtâmin* for another.

ANALOGY ſuggeſts that a *Mooſtâmin* is to be ſlain for a *Mooſtâmin*, both being upon a footing. The benevolence of the law, however, determines that one *Mooſtâmin* is not to be ſlain for another; becauſe here the infidelity which occaſions *enmity* exiſts with reſpect to the parties; and as that puts the blood out of protection, there is therefore a doubt with reſpect to its being protected ſufficiently to prevent retaliation.

A *man* is ſlain for a *woman*; and the *ſound* for the *unſound*.

A MAN is ſlain for a woman, an adult for an infant, and a ſound perſon for one who is blind, infirm, diſmembered, (that is, deprived of an *eye* or a *limb*,) lame, or inſane; becauſe the argument of retaliation is univerſal; and if regard were paid to a diſparity in thoſe particulars, as well as in point of protection to the blood, retaliation would be in a great meaſure prevented, and contention and bloodſhed would conſequently prevail among mankind.

The parent is not ſlain for the child,

A FATHER is not to be ſlain for his child; becauſe the prophet has ſaid, "*Retaliation muſt not be executed upon the parent for his off-*" *ſpring*;" and alſo, becauſe, as the parent is the efficient cauſe of his

his child's exiſtence, it is not proper that the child ſhould require or be the occaſion of his death;—whence it is that a ſon is forbidden to ſhoot at his father when in the army of an enemy, or to throw a ſtone at him when ſuffering lapidation for whoredom. All the anceſtors, whatever be their character or degree, are included in this rule; and ſo likewiſe the mother, grandmothers maternal or paternal, and all other *female* anceſtors, however remote; becauſe of the argument for retaliation being univerſal, as was above obſerved.

but the child is ſlain for the parent.

A CHILD is ſlain for the parent, as the reaſon for retaliation here exiſts, and there is no reaſon why it ſhould be remitted.

A maſter is not ſlain for his own or his child's ſlave,

A MASTER is not ſlain for his ſlave, nor for his *Modabbir* or *Mokâtib*, nor for the ſlave of his child;—becauſe, if retaliation were due in thoſe inſtances, it muſt be ſo at the requiſition either of the maſter himſelf, or of his child *, the one of which is abſurd, and the other inadmiſſible.

nor for a ſlave in which he has a ſhare.

IF one of two partners in a ſlave kill ſuch ſlave, retaliation is not incurred; becauſe it fails in the proportion of this partner's right in the ſlave, the avenger of the blood being, with reſpect to that part, the murderer himſelf; and as it thus fails *in part*, it muſt neceſſarily fail *in toto*, ſince retaliation does not admit of being inflicted in *part* only.

Retaliation inherited againſt a *parent* drops.

IF a perſon inherit the right of retaliating upon his parent, the retaliation fails, and is remitted, becauſe of the reverence due to paternity.

* The maſter of a ſlave, being his *Mawla*, is the only perſon entitled to demand ſatisfaction for his blood.

RETALIATION

It muſt be executed with a mortal weapon.

RETALIATION is not to be executed but with ſome mortal weapon *. *Shafeï* maintains that we muſt execute upon the murderer the very act he committed upon the murdered, provided it be ſuch as is ſanctioned by the LAW: if, therefore, this be done, and the murderer in conſequence die, it is well; but if not, his throat muſt then be cut with a ſcymitar. For inſtance;—if a perſon wilfully ſtrike off the hand of another, and the diſmembered perſon die in conſequence of the wound, the hand of the murderer muſt firſt be cut off in retaliation, and if he die within the ſame time after as the deceaſed, it is well; but if not, he muſt then be put to death. If, on the contrary, a perſon produce the death of another by ſome act not ſanctioned in the LAW, (ſuch as by laying hold of the hands, and pouring poiſon down the throat,—or by coition with an immature infant,) retaliation is to be executed by putting to death; and this according to all authorities.—The argument advanced by *Shafeï*, in ſupport of his opinion as above, is that retaliation reſts upon a perfect equality in all particulars, which requires that there be inflicted on the murderer the very ſame act that he committed upon the deceaſed. The arguments adduced by our doctors in ſupport of the contrary opinion are twofold;—FIRST, a ſaying of the prophet, "*There is no retaliation but* "*with a ſcymitar*,"—(meaning a *ſword*, as is underſtood by all the companions.) SECONDLY, according to what *Shafeï* advances, it follows that, where the exacter of retaliation executes upon the murderer the ſame act that he had committed on the deceaſed, and the end is not thereby anſwered, and he then puts him to death, he takes more than he is entitled to, a thing which muſt be carefully avoided; as where, for inſtance, a perſon wilfully breaks a bone of another, in which caſe retaliation in any ſhape does not follow, becauſe of the apprehenſion of the exacter taking more than his right; an apprehenſion which applies equally in the preſent inſtance.

* That is, with a *ſharp* inſtrument, ſuch as is proper to inflict a wound.

Cases of retaliation for the murder of a *Mokâtib*.

If a person wilfully murder a *Mokâtib*, who has no heir but his master, and leaves effects sufficient to discharge his ransom, the master is entitled to exact retaliation, according to the two *Elders*. —*Mohammed* says there is no retaliation in this instance; because here the existence of the ground or cause for taking retaliation is dubious, and unascertained; for the cause thereof is *Willa*, supposing the *Mokâtib* to have died *free*, or, right of property in his person, supposing him to have died a *slave*,—(as the companions have differed concerning the point whether a *Mokâtib*, under the circumstances above described, died a *slave* or *free*, some deciding one way, and some another;)—and the cause for taking retaliation being thus doubtful, and unknown, it cannot be exacted.—The argument of the two *Elders* is that the right of taking retaliation undoubtedly appertains to the master, for two reasons, namely, *Willa*, and right of property in the person; and as the effect of each is the same, (namely, the taking of retaliation,) the difference in the causes cannot occasion either a dispute, or a difference in the effect; neither is any regard paid to such a difference.—The difference above urged, therefore, does not prevent retaliation.

If a person wilfully murder a *Mokâtib*, who leaves effects sufficient to discharge his ransom, and has other heirs besides the master, retaliation is not incurred on behalf either of the master or his heirs, although both should unite in demanding it; because here the person entitled [to retaliation] is dubious and unascertained, the *master* being the entitled person, if the *Mokâtib* died a *slave*, and the *heirs*, if he died *free*, as before mentioned.—It is different in the preceding case, for there the person entitled is specific and determinate, namely the *master*.

If a person murder a *Mokâtib*, who does not leave effects sufficient to discharge his ransom, retaliation is incurred on behalf of the master,

master, according to all; because here the *Mokátib* undoubtedly dies a *slave*, as the contract of *Kitábat* is broken from his inability to discharge the ransom. It is otherwise with respect to a slave emancipated in part:—in other words,—if one of two partners in a slave emancipate his share, and emancipatory labour be, consequently, due from the slave for half his value, and a person kill him before he has discharged it; he leaving no effects wherewith to make satisfaction for such labour,—still retaliation is not incurred on behalf of the emancipating partner; because, as the partial manumission is not dissolved or broken by the slave's inability to perform the labour, a right in the whole of him does not appertain to the master.

or of a *pawned* slave.

IF a pawned slave be murdered whilst in the possession of the pawnholder, retaliation is not to be executed until the pawner and pawnholder unite in demanding it;—because, as the pawnholder is not the slave's *master*, he is consequently not entitled to the retaliation; and if the pawner alone exact the retaliation, the right of the pawnholder, in the debt due to him, is destroyed.—It is therefore determined that both must unite in taking the retaliation, as in such case the pawnholder's right is done away by his own consent.

Retaliation appertaining to an infant or ideot may be executed by the *father*.

IF a person be slain whose heir [*Wallee*] is an infant or an ideot, it belongs to the father of the infant or ideot to execute retaliation upon the murderer; because the taking of retaliation is the right of him who is endowed with the guardianship of the person entitled to it, retaliation having been ordained on account of a matter in which guardianship is interested, namely, *satisfaction to the mind*;—and hence the infant's or ideot's right to retaliation appertains to the father, in the same manner as the right of contracting them in marriage.—It is otherwise, however, with respect to a *brother* or *uncle*, although they also be endowed with the right of contracting the infant or ideot in marriage; for as the father's tenderness is *complete*, insomuch that he regards the interest of his child in preference even to *his own*, his exacting

acting the retaliation on account of his child is the same as the child himself exacting it; which is not the case with a brother or uncle, whose tenderness is of a defective nature, they preferring their own interest to that of their brother or nephew,—whence in committing the right to them, the interest of the infant or ideot is not to a certainty pursued.—Besides, the executing of retaliation is an act which cannot be afterwards undone; in opposition to marriage, which may be undone.—They, therefore, are not empowered to take retaliation.

who is also at liberty to commute it for a fine.

The father of an infant or ideot is empowered to compound retaliation for a fine, on their behalf, this being advantageous to them:—but he is not empowered to remit the retaliation gratuitously, as this would be destructive of their right.

If a person wilfully strike off the hand of an infant or ideot, the father of such infant or ideot may either strike off the hand of the offender, in retaliation, or compound the matter for a fine,—for the reasons already mentioned.

The power, in this particular, of guardians appointed by will.

A guardian appointed by will* is the same as a father, with respect to all the points above mentioned,—except retaliation by slaying; for he is not entitled to put the murderer to death, as he has no power over his life, and the taking of retaliation is an effect of power over life.—From this (it is to be observed) we may infer that the guardian in question is at liberty to enter into compositions for a fine in lieu of life, and also to take retaliation in all matters *short* of life, nothing being excepted beyond actual *slaying*.—It is indeed asserted, in the treatise on *Compositions*, that an appointed guardian is not at liberty to compound life for property; for as this is an act with respect to life, being an acceptance of a return for life, such

* Arab. *Wasee*.—It also signifies (more literally) an *executor*.—It is here used in opposition to a *natural* guardian.

composition is equivalent to taking retaliation;—and as the one is not allowed to an appointed guardian, so neither is the other.—The reason, however, for what we have mentioned above, is that the end, in composition, is *property*, which is rendered obligatory by an engagement with an appointed guardian, in the same manner as with a father. It is otherwise in retaliation; for the end, in that, is purely revenge, and satisfaction to the mind, which are restricted also to the father, as he, because of his near relation, and tender affection, is the substitute of his child with respect to them.—Lawyers have observed that, according to analogy, an appointed guardian is not empowered to exact a retaliation *short* of life, any more than a retaliation which extends to life; because the end, in both, is the revenge and satisfaction already mentioned:—but that, according to a more favourable construction of the law, he is so empowered; because the parts of the body are equivalent to *property*, as having been, like property, created for the support and preservation of life; and hence the exacting of a retaliation short of life is merely equivalent to an act with respect to property.

Case of a murdered person leaving several heirs, some infants, and some adults.

IF a person murdered leave heirs, some infants, and some adults, according to *Haneefa*, the adult heirs are entitled to put the murderer to death.—The two disciples, on the contrary, maintain that they are not entitled to slay the murderer until such time as the infant heirs attain maturity; because retaliation is a right equally participated in by all the heirs; and it is impossible for the adult heirs to take their right, (namely, *part* of the retaliation) as retaliation is indivisible; and if they take it *in toto*, the right of the infant heirs is destroyed.—A delay is therefore indispensable until the infant heirs become of age;—in the same manner as where a right of retaliation is possessed by two men, and one of them is absent,—in which case the one who is present cannot exact the retaliation until the absentee be also present;—or, as where a slave held in partnership between an infant and an adult is murdered,—in which case the adult cannot take retaliation

retaliation until the infant have attained maturity.—The argument of *Haneefa* is that retaliation is not divided; for retaliation is established on behalf of relationship, which is not of a divisible nature, since if a man have two brothers (for instance,) a complete relationship belongs to each,—not one half to one and one half to the other; and there is, moreover, no room, for the present, to apprehend that the infant might grant the murderer a pardon, since to that he is incompetent during his minority.—The right of taking retaliation is therefore established to each *in toto*, in this way, that each is (as it were) distinct and separate,—in the same manner as guardians in marriage, each of whom possesses a power to contract the ward in marriage independent of the others, and as if no other existed.—It is otherwise where retaliation is divided between two adults, one of whom is absent;—for here exists the apprehension of a present pardon from the absentee.—With respect to the case of two partners in a slave, adduced by the two disciples, *Haneefa* does not admit it as any objection, since (according to him) in this case also the adult master is entitled to exact the retaliation.

Retaliation is incurred from killing by a blow with the *iron* of a spade, &c. but not with the *shaft*.

If a person strike another with a *spade*, or *shovel*, and the person struck die in consequence, and the blow have been given with the *iron* part of such spade or shovel, the murderer is liable to be put to death.—If, on the contrary, the blow have been given with the *wooden* part [the handle or shaft], he is responsible for a fine; because he has slain a person of protected blood; and as retaliation is in such case forbidden, the fine is due, in order that the blood may not be shed without penalty.—Our author here remarks that the murderer, in the former instance, is liable to be put to death only when he struck with the *edge* of the iron part, as by this alone a *wound* (which demands retaliation) can be inflicted; and that if he have struck with the *back* of the instrument, not with the *edge*, there is a difference of opinion among our doctors,—the two disciples holding that in this instance also he is liable to suffer death, as regard is paid solely to the

use

uſe of an inſtrument of murder, which here exiſts,—and *Haneefa*, on the contrary, maintaining that he is not liable to death, as retaliation is not incurred unleſs a *wound* be inflicted.—This laſt is the better opinion, as ſhall be preſently made appear.

It is not incurred by *drowning* any perſon.

IF a perſon immerſe another, whether an infant or an adult, into a water whence it is impoſſible for him to eſcape by ſwimming, (as the *ſea*, for inſtance,) retaliation is not incurred, according to *Haneefa*.—The two diſciples, on the contrary, maintain that retaliation is incurred; and ſuch alſo is the opinion of *Shafeï*; with this difference, however, that according to the two diſciples it is inflicted with a weapon, whereas according to *Shafeï* the murderer is to be drowned.—The arguments of thoſe doctors, in ſupport of their opinion upon this point, are twofold.—FIRST, a ſaying of the Prophet, "*If any perſon drown another, I ſhall drown him in return.*" SECONDLY, *water* is an inſtrument of murder, the ſame as *fire*, wherefore the uſe of it is an argument of *wilfulneſs* in the act; and as there is no doubt with reſpect to the protection of blood of the ſlain, retaliation is conſequently incurred by him.—The arguments of *Haneefa* are alſo twofold.—FIRST, water is analogous to a ſmall ſtick or rod, as it is ſeldom or never uſed in murder. Now it is ſaid, in the traditions, that death produced by a *rod* is merely *manſlaughter*; and as, in that, a fine merely is incurred, ſo here likewiſe. SECONDLY, retaliation requires the obſervance of a perfect equality: but between *drowning* and *wounding* there is no equality, the former being ſhort of the latter with regard to damaging the body.—As, therefore, the infliction of retaliation is in this cauſe impoſſible, a fine is conſequently due from the *Akilas* of the ſlayer.—With reſpect, moreover, to the ſaying of the prophet, adduced by the two diſciples, the drowning there treated of is to be regarded merely in the light of a *puniſhment*, and not as *retaliation*; for if the prophet had meant retaliation, he would have referred the execution of it to the relations of the drowned perſon, and not to [himſelf] the magiſtrate.

It is incurred by [maliciously] *wounding* a person, who dies in consequence.

If a person wound another, so as to disable and render him perpetually bedridden until death, retaliation is incurred by the person who inflicted the wound; for as a cause of murder here exists, and nothing occurs to do it away, the death must be referred to such cause, and retaliation is incurred in consequence.

It is not incurred by mistakenly slaying a *Mussulman* in battle.

If an army of *Mussulmans* engage an army of infidels, and they mingle together, and a *Mussulman* kill another *Mussulman*, on the supposition of his being an infidel, he is not liable to retaliation, but must perform an expiation, and pay a fine; because this is *homicide by misadventure*; in which expiation and fine are due, but not retaliation,—as has been already explained.

Case of death produced by a combination of various causes.

If a person hit himself upon the *head*, and *another* person also hit him upon the same part, and a wild beast tear him, and a snake bite him, and he die in consequence of all these, the person who struck him is liable for one third of the fine of blood; because the acts of the wild beast and snake are of the same nature, and incur no penalty either in this world or the next; and as the act committed by the deceased upon himself is also of no account in this world, (notwithstanding it be of account in the world to come, as the person in question is therein universally admitted to be an offender,) this constitutes another species; and as, again, the act of the other person is of account both in this world and in the world to come, it therefore constitutes a *third* species.—Now, the deceased having perished in consequence of these three different species of acts, he may be said to have perished by *three several acts*; and as the act of the other person was one of these three, he is consequently responsible for one third of the fine.

SECTION.

SECTION.

A man may kill another in *self-defence*.

IF any person draw a sword upon a *Mussulman*, he [the *Mussulman*] is at liberty to kill him in self-defence; because the prophet has said, "*He who draws a sword upon a* MUSSULMAN *renders his blood* "*liable to be shed with impunity*;" and also, because a person who thus draws a sword is a rebel, and guilty of sedition; and it is lawful to slay such, GOD having said, in the KORAN, "SLAY THOSE WHO "ARE GUILTY OF SEDITION, TO THE END THAT IT MAY BE PRE- "VENTED."—Besides, it is indispensably requisite that a man repel murder from himself; and as, in the present instance, there is no method of effecting this but by slaying the person, it is consequently lawful so to do. If, however, it be possible to effect the self-defence without slaying the person, it is not lawful to slay him.

Distinctions in this particular.

IT is written in the *Jama Sagheer*, that if a person strike at another with a sword, during either night or day, or lift a club against another in the night in a city, or in the day-time in the highway out of the city; and the person so threatened kill him who thus strikes with the sword, or lifts the club, nothing is incurred; because, as striking with a sword affords no room for delay or deliberation, it is in this case necessary to kill the person in order to repel him; and although, in the case of a *club*, there be more room for deliberation, yet in the night-time assistance cannot be obtained, and hence the person threatened is in a manner *forced*, in repelling the other's attack, to kill him; (and so likewise where the attack is made during the day-time in the highway, as there assistance cannot readily be obtained.) Where, therefore, a person thus slays another, the blood of the slain is of no account.

IF

A fine is due for slaying an *infant* or *lunatic* in self-defence.

If a lunatic draw a sword upon a person, and the person slay him, the fine of blood is due from his property, and does not fall upon his *Akilas*. *Shafeï* maintains that nothing whatever is incurred in this instance.—In the same manner also, if an *infant* draw a sword and make an attack upon a person,—or if an *animal* attack any one, and the person so attacked slay the infant, or the animal, a *fine* is due on account of the infant, or the *value* on account of the animal, according to *Haneefa*, but not according to *Shafeï*. The arguments of *Shafeï* upon this point are twofold. First, as the person attacked slew the infant or lunatic in *self-defence*, they are therefore accounted the same as a sane person or an adult. Secondly, the person attacked slew the infant or lunatic because of their act furnishing him with a reason for so doing. He is therefore in the same predicament with a person acting under compulsion:—in other words, if a person threaten another, by saying to him, "kill me, or I will kill you;" and the person thus threatened perceive that if he do not kill the other he will himself be slain, and accordingly kill him [the compeller,] nothing whatever is incurred;—and so here likewise. The argument of *Haneefa* is, that the slayer has in this instance killed a person of perpetually protected blood, or has destroyed a property [the animal] protected in right of the proprietor. Now the act of an animal is not of of a nature to do away its protection; neither can an infant, by any act, forfeit the protection of his blood, notwithstanding it be purely on behalf of his own right, infants not being capable of distinguishing between right and wrong;—(whence it is that an infant guilty of wilful murder is not liable to be put to death;)—in opposition to an adult, or one of sound understanding, as those are capable of so distinguishing. Still, however, retaliation is not incurred by the slaying of the infant or lunatic; because, in the case in question, a reason exists for their blood being out of protection,—namely, the repulsion of evil. A person attacked by them, therefore, is allowed to slay them, under a condition of responsibility, in the same manner as a

person

person who eats the provisions of another in a time of famine is responsible for the value;—and the fine of blood is accordingly due.

Retaliation is incurred by killing a person whilst going off, after having made an attack upon another.

If a person draw a sword upon another, and strike him, and then go away, and the person struck, or any other, afterwards kill this person, he is liable to retaliation. This is where the striker retires in such a way as indicates that he will not strike again; for as, upon his so retiring, he no longer continues an assailant, and the protection of his blood (which had been forfeited by the assault) reverts, retaliation is consequently incurred by killing him.

A thief may be slain, *whilst in the act of theft*, without penalty.

If a person come in the night to a stranger, and carry off his goods by theft, and the owner of the goods follow and slay him, nothing whatever is incurred, the prophet having said, "*Ye may kill in preservation of your property.*" It is to be observed, however, that this is only where the owner cannot recover his property but by killing the thief; for if he know that upon his calling out the thief would relinquish the goods, and he notwithstanding neglect calling out, and slay him, retaliation is incurred upon him, since he in this case slays the person unrighteously.

CHAP.

CHAP. III.

Of Retaliation in Matters short of Life.

Retaliation is inflicted for a hand

If a person wilfully strike off the hand of another at the wrist, his hand is to be struck off in return, notwithstanding it be larger than the hand of the other; because the word of GOD (in the KORAN) "says, "THERE IS RETALIATION IN CASE OF WOUNDS;"—and also, because, as the point upon which retaliation turns is *a perfect equality*, it is therefore to be inflicted in every case where an attention to such equality is possible; and as this is possible in the case of striking off the hand at the wrist, it is therefore incurred in that instance. No regard, moreover, is paid to the size of the hand; because there is no difference in the use or advantage of a hand according as it may be large or small.

or foot (struck off at the joint,) an ear, a nose,

If a person strike off the foot of another at the ankle, or cut off the *nose* or *ear* of another, retaliation is to be inflicted upon him in return, since in such cases it is possible to attend to equality, as those are all distinct members.

or an eye (if not forced out of the socket;)

If a person strike another on the eye, so as to force the member, with its vessels, out of the socket, there is no retaliation in this case, it being impossible to preserve a perfect equality in extracting an eye. If, on the contrary, the eye remain in its place, but the faculty of seeing be destroyed, retaliation is to be inflicted, as in this case equality may be attended to by extinguishing the sight of the offender's corresponding eye with a hot iron.

If

IF a person strike out the *teeth* of another, he [the striker] incurs retaliation, although his teeth should be larger; because the *size* of the teeth occasions no difference of advantage in the use of them; and the necessity of retaliation, in such a case, is moreover supported by a text of the KORAN, where GOD has said, "EXACT A TOOTH FOR A "TOOTH."

and also for the *teeth*:

RETALIATION is not to be inflicted in the case of breaking any bones except the teeth; because it is impossible to observe an *equality* in other fractures, since, if retaliation were exacted in such cases, it is to be apprehended that it might be inflicted to a degree greater or less than the offence.—It is otherwise in the case of *teeth*; for if those be *broken*, retaliation may be inflicted by *filing*, or if they be *struck out*, by extracting with an instrument.

but not for *fractures*.

OFFENCES which do not affect life are of two descriptions; *Amd*, or *wilful*; and *Khota*, or *by misadventure*;—and the SEMBLANCE *of wilful* (which, in offences affecting life, we term *manslaughter*) does not here find any place; because the instrument used in taking life is the criterion by which the offence is determined to amount to *manslaughter*, death being different according to the instrument used in producing it; but a destruction of any thing short of life (that is, of member) is not different with relation to the difference in the instrument, as has been already observed.

Offences short of life are either *wilful*, or *by misadventure*;

THERE is no retaliation, in offences short of life, between a man and a woman, a free person and a slave, or one slave and another slave. *Shafei* maintains that retaliation holds in all these cases,—except where a freeman strikes off the limb of a slave, in which instance the limb of the freeman is not struck off;—for as (according to him) retaliation for parts of the body is a dependant of retaliation for the *person*, (the parts of the body being dependants of the whole man,)

and do not induce retaliation between a *man* and a *woman*, a *free* person and a *slave*, or *one* slave and *another*:

it follows that where (agreeably to his tenets) retaliation holds for the *person*, it also holds for the parts of the body, and *vice versa*. The argument of our doctors is, that the *parts* of the body are a species of property: now, in all matters of *property*, equality is destroyed by any difference in the value; and this difference is perfectly evident in the present case, as the LAW estimates the value of the same members, in different persons, at a different rate, stating the fine for striking off the hand of a *woman* (for instance) at only one half the fine for the same offence committed upon a man; (and in the same manner there is a difference in the value of slaves.) As, therefore, the observance of that equality, indispensable in retaliation, is here impracticable, it follows that it cannot be inflicted. It is to be observed, however, that the inequality now mentioned, (between a man and a woman, &c.) is no objection to retaliation for the person, with respect to them, because the *person*, where it involves the *life*, is not held in the same light with *property*.

but they do so between a *Mussulman* and an *infidel*.

RETALIATION for parts of the body holds between a *Mussulman* and an *infidel*, both being upon an equality with respect to *fines* for the offences in question.

Retaliation is not inflicted where a *bone* is cut through; nor for a *stab*.

IF a person strike off the hand of another above the wrist-joint,—or give him a *stab* in any part, which afterwards heals, there is no retaliation; because here it is impossible to observe equality, since in the former case bones are broken, and in the latter it is likely that if retaliation were inflicted the offender might die, a stab being frequently incurable.

If the corresponding member of

IF a person paralytic *, or having withered hands, strike off the hand of a *sound* person, he who is thus dismembered has it at his

* Arab. *Shill*, meaning a person afflicted with a palsy *in the hands*.

option

option either to cut off the defective hand (and nothing more,) or to take the complete fine for his own hand; for as, in this instance, he cannot possibly obtain his *precise* right, he must therefore be necessarily content to take something less, or to accept of a substitute, namely, the fine;—in the same manner as where a person destroys the property of another, of the class of similars, but the species of which is no longer to be found, except what is decayed *,—in which case the proprietor of the destroyed article has it in his option either to take the *decayed* similar, or the value of what he has lost. Thus, in the case in question, the dismembered person may either take the defective hand of the offender, or a fine for his own hand;—and as, upon his striking off the defective hand, it is evident that he is content therewith, his right to any thing else then fails, in the same manner as where a decayed similar is accepted in lieu of an *un*decayed similar.

the maimer be defective, still nothing more is due than *that*, or a *fine*.

If, in this case, the hand of the offender mortify and drop off, or be unlawfully struck off, before the person whom he had dismembered has made his choice of fine or dismemberment as above, he is not then entitled to any thing, according to our doctors;—because his appointed right was retaliation, which cannot now be obtained, from the circumstance of its subject no longer existing; and as the *property* [fine] could not be due, or obligatory, but from being chosen in preference before the cutting or dropping off of the hand, and the choice has not been made, his right consequently fails, and entirely drops. It is otherwise where a person, having defective hands, strikes off the hand of another, and then has his own defective hand struck off for theft, or in retaliation; for in this case he must pay the fine for a perfect hand, since here, as his hand has been lost in satisfaction of a *right*, it still (as it were) remains, and he opposes the retaliation.

and if such member be (in the mean time) lost, nothing whatever is due.

* As in the case of a person destroying any kind of *fruit* towards the close of the season.

There is no retaliation for the *tongue*, or the *penis*;

THERE is no retaliation for the tongue, or the virile member.—It is recorded, from *Aboo Yoosaf*, that if either have been cut from the root, retaliation is due, as an obſervance of equality is then practicable. The argument of our doctors is that, as the yard of a man is ſometimes in a *flaccid* and ſometimes in a *turgid* ſtate, it is impoſſible to pay a ſtrict regard to equality in cutting it off;—except where the *nut* only is to be ſeparated at the *glans*, in which caſe the ſpot for cutting is preciſely aſcertained.

or for any privation, the extent of which cannot be preciſely aſcertained.

IF a *part* of the nut of a man's yard be ſtruck off, there is no retaliation, as it is impoſſible to take off that preciſe quantity.—It is otherwiſe with reſpect to the *ear*;—for where either the *whole* ear, or a part, is ſtruck off, retaliation is incurred, as the ear is not occaſionally flaccid and turgid, but of certain aſcertainable dimenſions,—whence it is poſſible to obſerve equality in this inſtance.

IF a man cut off the whole of another's lip, retaliation is inflicted upon him, becauſe here an obſervance of equality is practicable. It is otherwiſe where a *part* only of the lip is cut off, as in that inſtance equality cannot well be obſerved.

SECTION.

SECTION.

WHEN the heirs of a murdered perſon enter into a compoſition with the murderer for a certain ſum, retaliation is remitted, and the ſum agreed for is due, to whatever amount; becauſe GOD has ſaid, in the KORAN, "WHERE THE HEIR OF THE MURDERED PERSON "IS OFFERED ANY THING, BY WAY OF COMPOSITION, OUT OF "THE PROPERTY OF THE MURDERER, LET HIM TAKE IT;"— and alſo becauſe the prophet has ſaid, "*The heir of the murdered per-* "*ſon is at liberty either to take retaliation, or a fine with the murderer's* "*conſent.*" As, moreover, retaliation is a right of the heirs, which they are at liberty to remit entirely by a free pardon, it follows that they may alſo remit it for a return, ſince their ſo doing is advantageous to them, and life to the murderer. It is therefore lawful, with the conſent of the avenger of blood and the murderer;—and it is the ſame whether the ſum be great or ſmall; for as the LAW does not ſpecify any particular amount, it is conſequently left to the parties, in the ſame manner as the conſiderations for *Khoola* or *Kitábat*.

Retaliation may be commuted for a ſum of money,

IF the murderer enter into a compoſition with the heirs of the perſon murdered, without any mention being made of a prompt or diſtant payment, the ſum agreed upon muſt be paid down; becauſe this ſum is made obligatory by a contract; and the original rule, in ſuch contracts, is a *prompt*, not a *diſtant* payment;—in the ſame manner as holds in the caſes of *dower*, and the *price* of property. It is otherwiſe with reſpect to the *Deyit*, or fine of blood, that not being impoſed by a *contract*, but particularly appointed, and its rate ſtated, by an inſtitute of the LAW.

payable on the ſpot, if a term of credit be not ſtipulated.

In a composition for murder, where a *slave* is concerned, his proportion is the same as that of a *freeman*.

If a freeman and a slave together murder any person, and the freeman and the slave's master afterwards desire some man to compound the matter [with the deceased's heirs,] on behalf of both the murderers, for one thousand *dirms*, and he compound it accordingly, the whole is due from them (the master and the other) in equal proportions; because they are co-parties in the contract of composition; and the thousand in question is due as a substitute for retaliation; and as both are equally liable to retaliation, the substitute for it must therefore be paid by them in equal shares.

One of several heirs compounding a murder, defeats the right of the rest to retaliation,—and they get their shares of the fine of blood,

If one of the heirs of a murdered person pardon the offence, or enter into a composition with the murderer for a sum of money opposed to his share of retaliation, the right of all the heirs to retaliation ceases, and they get, in either case, their respective proportions of the fine of blood.—It is here to be observed, as a rule, that as retaliation is the right of *all* the heirs, so likewise is the fine of blood. According to *Shafeï* and *Málik* the fine of blood is the right of all the heirs except a husband or wife; because an heir is the successor (or, in other words, the substitute) of the deceased in virtue of *affinity*, and not of any secondary cause, such as marriage, which at death ceases to exist.

Objection.—It would hence appear that a husband and wife do not inherit of each other with respect to *other* property likewise, since the *cause* is terminated by the decease of either.

Reply.—According to *Málik* and *Shafeï*, the fine of blood is not due until *after* death: contrary to all other property, the right of the heirs being connected with the estate of the deceased in the commencement of his sickness, (whence it is that the acts of a sick person do not hold good with respect to any thing beyond a *third* of his property,) and confirmed by his demise; and accordingly, his estate goes among the *whole* of his heirs, without any exception. It is otherwise with a *fine of blood*; for as that is not due until after death, and the cause

cause * is terminated by the decease of the party, it follows that it cannot be inherited by the *wife* or *husband*.

—The arguments of our doctors upon this point are twofold.—FIRST, the prophet decreed to the wife of *Asheem Zeeàbee* an inheritance in the fine imposed for the blood of her husband.—SECONDLY, the fine is a right to which inheritance appertains, insomuch that if a person be slain, having two sons, and one of those sons afterwards die, leaving a son, his heir, the fine is shared between the son and the son's son. It is therefore established on behalf of *all* the heirs indiscriminately; and the effect of marriage continues with respect to inheritance, after the demise of either of the parties. It is here proper to remark, that where one of the heirs grants a pardon, as above, the shares due to the others are payable within three years. *Ziffer* maintains that payment must be made within *two* years, in a case where the right of retaliation lies between two persons, and one of them grants a pardon; for here an *half* fine is due, whence this is the same as where a person strikes off the hand of another by mistake, in which case an half fine is due, payable within two years. The argument of our doctors is that the half here due is a proportion of the fine of blood; and as the whole of a fine of blood is payable in three years, so likewise is any part of it. The proportion due on account of a *hand*, on the contrary, is the *whole* of the recompence for a *hand*, which is payable in two years; and therefore the analogy urged by *Ziffer* in this particular is not admitted.—It is likewise proper to observe that the proportions owing to the remaining heirs, (as here mentioned,) is due from the property of the murderer, the act being in this case *wilful*.

payable within three years:

* Meaning, the ground of inheritance between husband and wife, namely, *marriage*.

Composition by the heirs of *one* murdered person does not prevent retaliation with respect to a *second* murder.

If a man murder two persons, and the heirs of one of the murdered persons grant a pardon, still the right of retaliation remains on behalf of the heirs of the *other* murdered person; because in this case there are *two* retaliations, each murder being a distinct and separate act.—It is otherwise in the preceding example, for there *one* retaliation only is incurred, one murder only having been committed.

All the persons concerned in a murder are alike liable to retaliation.

If a number of persons unite in murdering a man, analogy suggests that *one* of them only is to be put to death in retaliation, as equality is indispensable in the infliction of retaliation, and between *ten* persons (for instance) and *one* person there is no equality.—The whole are, however, liable to suffer death, analogy being in this instance abandoned for a more liberal construction of the law;—because it is related that when, on a certain occasion, seven of the inhabitants of *Lena** murdered a man, *Omar* decreed retaliation upon all the seven, saying, "If the *whole people* of *Lena* had assisted in the "murder, I should certainly have slain them *all*;"—and also, because murder is still more likely to be committed by *several* than by *one*; and retaliation has been ordained for the purpose of determent, and a warning to the vicious.—Each individual concerned is therefore as if he alone had committed the act; and consequently equality is certified, and retaliation incurred, in order that the lives of mankind may be in security.

Case of a person guilty of *several* murders.

If one man murder several persons, and the heirs of all the murdered persons appear together, the murderer is put to death on behalf of the whole, nor are the heirs entitled to any thing further.—If, also, *one* of the heirs only appear, the murderer is slain on behalf of him, and the right of the others is consequently annulled.—*Shafeï*

* Pronounced, also, *Laneh*, or *Lanaa*. It is a city pleasantly situated in the southern part of *Arabia Felix*, and about one hundred miles east of *Mokha*.

maintains

maintains that the murderer is put to death on behalf of the heir of the person first murdered, and a fine of blood is due to the others; and that, if all the heirs appear together, and it be not known which of the persons was first murdered, the murderer is slain on behalf of the whole, and a fine of blood divided among all.—The reason he alledges is that, in the example here supposed, several murders are committed by one man; but one murder only is proved against him *; and as between *one* murder and *several* murders there is no equality, he is therefore put to death on behalf of one person only, and a fine is due to the others.—The arguments of our doctors upon this point are threefold. FIRST, Each of the heirs of the several persons murdered is here supposed, in fact, to execute retaliation upon the murderer completely and individually; as in the preceding example of several persons murdering one,—where each of the several murderers is as if he had alone committed the murder, otherwise retaliation could not be inflicted because of inequality; and so likewise, in the case in question, as each of the heirs is as if he himself executed the retaliation, equality is in this way established. SECONDLY, There proceeds, from each heir, in this instance, a wound, sufficient to dispatch the soul [of the murderer]; and consequently the death [of the murderer] is referred to each of them individually:—for it is a rule that whenever an effect springs from a variety of causes, it must necessarily be referred to those causes collectively; and it then must follow, either that a *part* or the *whole* of the effect is referred to each particular cause; and as the former is here impossible (since the dispatching of the soul from the body is a thing incapable of division, so as to have any part of it in particular referred to any particular cause) it is therefore determined that the whole effect is referred to each cause individually.—THIRDLY, retaliation has been instituted with a view to the security of mankind, under a precept which militates against

* Because *one* murder alone being sufficient to convict the criminal, none of the others are adduced in judgment against him.

it, the prophet having said, "*Man is the chosen vessel of* God;—*ac-*
"*cursed is he who destroyeth the same*;—and as this security is obtained by putting the murderer to death, retaliation alone is therefore sufficient, and consequently no fine is required.

Retaliation is done away by the death of the murderer.

When a person who had incurred retaliation dies, the right to retaliation necessarily ceases*, as the subject of it no longer remains.

Two men uniting to maim a third are not liable to retaliation.

If two men cut off the hand of one man, by both seizing a knife and applying it to the joint, until the hand be separated, retaliation is not to be inflicted on either of them, but they are responsible for one half of the fine of blood; because the mulct for a hand is half the fine for the person; and as they united in depriving the man of his hand, the half of the fine of blood therefore falls upon each.—*Shafei* maintains that the offenders are each to be deprived of a hand; because the hand is a dependant of the person; and as, if two men kill one, retaliation is executed upon both, so in the same manner, in the case of a hand, as it is a dependant of the person, retaliation is executed upon both the offenders.—Besides, retaliation, whether for the person, or for parts of the body, has been ordained for the purpose of determent.—Hence, whatever is established with respect to the *person* for the purpose of determent, is likewise established with respect to the parts of the body for the same purpose; and as, in cases concerning the person [life,] retaliation is inflicted upon both the murderers where two men murder a third, so likewise, in a case of dismemberment, retaliation is inflicted upon both.—The arguments of our doctors upon this point are twofold. First, each of the offenders, respectively, has cut off a part of the hand, inasmuch as the amputation has been effected by both, and the subject is capable of par-

* Consequently, no fine is due, either from the murderer's estate, or from his *Akilas*.

tition.

tition.—A part of the amputation is therefore referred to one of the offenders, and a part to the other; and as there is no equality between the amputation of a *part* of the hand, and the amputation of the *whole*, there cannot, consequently, be any retaliation. It is otherwise in cases affecting the person [life,] as the act of dispatching the soul from the body is incapable of partition. SECONDLY, in a murder committed by several persons, (that is, where a number unite in murdering one,) it is most probable that no one will come to the assistance of the murdered; whereas, in the case of two persons uniting to cut off the hand of a third, as there is necessarily a considerable delay in the execution, it is most probable that the person they design to injure may obtain assistance before they effect their purpose.—Hence between the case in question and a case affecting the person there is no analogy.

A person maiming *two* others is liable both to retaliation and fine,—

IF a man strike off the right hands of two others, or the *left* hands of two, and both appear against him, the right hand of the offender is cut off in the former instance, or his left hand in the latter,—and a moiety of the fine of blood is moreover exacted from him, and divided equally between the parties;—and this whether the hands were struck off, both at the same time, or one after the other. —*Shafei* maintains that in the latter instance, the hand of the offender is struck off solely on behalf of him who was first deprived of his hand; and that where both hands were struck off together, the parties draw lots, and the retaliation is then executed on behalf of him to whose lot it falls.—The argument of our doctors is that, as the dismembered parties are upon an equality with respect to the ground of their claim, (each having lost a hand,) they are therefore upon an equal footing with respect to the *effect* also, namely, the retaliation, —in the same manner as two creditors are upon an equal footing in their claims upon the estate of a deceased person, notwithstand-

ing the debt owing to one be of prior date to that owing to the other*.

and, if only *one* of the two appear, retaliation is executed on his behalf, and the other gets the fine.

If a man ſtrike off the right hands of two others, or the *left* hands of two, and only *one* of the parties appear, retaliation is executed on behalf of this one, and a moiety of the fine of blood is due to the other; becauſe the party preſent is entitled to take his right; and the right of the abſent party is dubious, ſince it is poſſible that, if preſent, he might either pardon the offence or decline proſecuting; and it is not allowable to make any delay in rendering a *certain* right on account of one which is merely *conjectural*;—and as, upon the party preſent taking the retaliation, the ſubject on which the other party might execute it no longer remains, the fine is the appointed right of the other, ſince here the offender has loſt his hand on account of a right which lay againſt him, and may therefore be ſaid to have *obſtructed* the right of this one.

A ſlave may be put to death on confeſſing a murder.

If a ſlave confeſs a murder, he incurs retaliation. *Ziffer* maintains that the acknowledgment of a ſlave is not valid in this inſtance; for as he, by ſuch acknowledgment, ſets at nought the right of his maſter, it therefore cannot be admitted, any more than the acknowledgment of a ſlave concerning property †.—The arguments of our doctors upon this point are twofold. First, a ſlave, in confeſſing a murder, is not liable to any ſuſpicion, ſince ſuch confeſſion is eſſentially prejudicial to himſelf, as being productive of his death.—Secondly, a ſlave, with reſpect to his *blood*, continues in his original

* The tranſlator apprehends that little apology is neceſſary for his here omitting the arguments advanced by *Shafei* in ſupport of his doctrine, and the reaſonings adduced by the *Haneefite* doctors in reply to them, as they are much of the ſame complexion with thoſe which have been already recited.

† A ſlave's acknowledgment concerning property is not of any weight. See Vol. III. p. 138.

ſtate

ſtate of liberty, freedom being the original ſtate of MAN,—whence it is that the acknowledgment of a maſter, inducing puniſhment or retaliation upon his ſlave, is not admitted.—With reſpect to the argument of *Ziffer*, we obſerve that the acknowledgment of murder, by a ſlave, is prejudicial to himſelf *poſitively*; but it is ſo to his maſter only by *implication*, which is of no weight.

Caſe of murder and erroneous homicide united.

IF a man wilfully ſhoot an arrow at any perſon, and the arrow paſs through that perſon, and then hit another, and they both die, retaliation is incurred on behalf of the former perſon, and a fine of blood on behalf of the latter, to be paid by the *Akilas* of the murderer;—becauſe the *firſt* killing is *murder*; whereas the *ſecond* is only *homicide by miſadventure*,—in the ſame manner as where a perſon ſhoots at a deer, and his arrow hits a man.—An act, moreover, is eſtimated according to the number of its effects; and hence it is poſſible that the act of the murderer, in ſhooting the arrow, was wilful with reſpect to the one perſon, and inadvertent with reſpect to the other.

SECTION.

Caſes of *maiming* united with *homicide*.

IF a man ſtrike off the hand of another by miſtake, and then ſlay him wilfully before he has recovered from the wound,—or, ſtrike off his hand wilfully, and then ſlay him by miſtake before he has recovered,—or, ſtrike off his hand by miſtake, and after the wound is healed ſlay him by miſtake,—or, ſtrike off his hand wilfully, and after the wound is healed ſlay him wilfully,—he is proſecuted on

both counts in all these cases*.—The ground of this is that both the wounds must be considered under one head, if it be possible that the *second* wound was merely a completion of the *first*, as slaying is most frequently effected by several successive wounds; for if each wound were considered separately, one being regarded as mortal, and the other not, it would create a difficulty in the determination.—The second wound is therefore to be regarded merely as a completion of the first, and both included under one sentence,—except where this conjunction is impossible, when each wound must be considered under a separate head.—Now, in the four cases here stated, this conjunction cannot be made; for, in the two *first* cases, the two acts are subject to two different sentences,—and in the two *others*, the second wound is not inflicted until after the party has recovered from the *first*, a circumstance which prevents the one from having any connexion with the other.—If the second wound be inflicted before the first is healed, and the acts be both of the same species, both being by *mistake*, they are resolved under one head, undisputedly, since a conjunction is in this instance possible;—and therefore one fine suffices.—If, on the contrary, the offender first strike off the hand wilfully, and then, before the wound is healed, kill the person wilfully, the magistrate may desire the heirs either first to strike off the offender's hand, and then to put him to death,—or to put him to death at once, without striking off his hand;—in other words, the heirs have either of these modes in their choice, and the magistrate also is at liberty to determine either way.—This is according to *Haneefa.*—The two disciples maintain that the offender, in this instance, can only be put to death, and is not to have his hand struck off besides; for here it is possible to resolve both the wounds under one head, both

* In the *first* of these cases, therefore, the offender's property is subject to a fine for the hand, and he also suffers retaliation for the murder; in the *second*, he is subject to retaliation for the hand, and also to a fine for the homicide; in the *third*, he is subject to a fine for the hand, and also to a fine for the homicide; and in the *fourth* he suffers retaliation, first for the *hand*, and then for the *murder*.

the

the acts being of one species, namely *wilful.* The argument of *Haneefa* is that in this case a conjunction of both wounds under one head is impossible; because the two acts are essentially different, one being merely the dismemberment of a part of the body, whereas the other is a deprival of life.—Both, moreover, as being *wilful*, are subject to the same rule, namely, retaliation; and retaliation requires an equality with respect to the act, which, in the case in question, cannot be observed but by taking life for life, and a hand for a hand: but if both wounds be resolved under one head it is impossible to preserve equality, because in that case the offender is only slain, without any retribution for the dismemberment.—Besides, the murder prevents any reference of the consequence to the dismemberment, insomuch that if the two acts were to proceed from two different persons, retaliation would be due upon the murderer.—These two offences are therefore subject to the same rule as the two between which a recovery intervenes *.

Case of a person dying in consequence of *stripes* unjustly inflicted;

IF a person give another one hundred stripes [with a stick or rod,] and the person so struck recover from *ninety* of the stripes, so as that no mark of them remains, and then die in consequence of the ten last stripes, one fine of blood is due;—because, upon his recovering from ninety of the stripes, they are no longer of any consideration with respect to the *fine*, notwithstanding they still be so with respect to correction; and hence, with respect to the fine, no more than ten stripes remain to be considered.—The same rule obtains with respect to every wound which heals and leaves no mark, according to *Haneefa.*—*Aboo Yoosaf* alledges that in such cases a fine is due in proportion to the pain or trouble sustained;—in other words, an estimate must be made of what is the adequate recompence for so much trouble, and the result gives the fine to be imposed.—*Mohammed*, on the

* A long train of futile reasoning is here omitted, as being of no consequence whatever to the subject, nor tending to throw any new light upon it.

 other

other hand, ſays that nothing is due in ſuch a caſe except the expences of the phyſician or ſurgeon.

or being *cut* thereby.

If a perſon give another one hundred ſtripes, and thereby cut him, and the cuts heal, but leave ſcars, an *Hakoomit Adil*, or award of equity, is due on account of ſuch ſcars.—(An explanation of *Hakoomit Adil* ſhall be given in its proper place *.)

Forgiveneſs by a maimed perſon does not exempt from a fine, in caſe of his death, unleſs it extend to any *conſequence* of the maiming.

If a perſon ſtrike off the hand of another, and the perſon ſo diſmembered pardon the diſmemberment, and afterwards die in conſequence of it, a fine of blood is due,—from the offender's property, if the offence was wilful,—or from his *Akilas*, if it was by miſadventure.—If, on the other hand, he pardon not only the diſmemberment, but alſo any conſequence which may ariſe from it, and afterwards die of the wound, his pardon comprehends both *life* and *diſmemberment* ;—and then, if the offence was committed by miſtake, the pardon is eſtimated as from one third of the deceaſed's property †; but if it was committed wilfully, the pardon is in that caſe eſtimated as from the *whole* of the property ‡. The reaſon of this is, that the decree in wilful murder is retaliation; and as retaliation is not property, the right of the heirs is not connected with it before the demiſe of the wounded perſon, wherefore the pardon and remiſſion are valid on his part, and are conſequently eſtimated as from the whole of his property. Manſlaughter, on the contrary, is ſubject to the law of property; and as the right of the heirs is connected with the dying perſon's property, the remiſſion, therefore, in ſuch caſe, is eſtimated as from the *third* of the property; becauſe it is a gift of the fine; and the gift of a dying perſon takes effect in one third; and as this is a bequeſt to the *Akilas* of the murderer, not to the murderer

* In the next following book, treating of *Fines*.

† That is to ſay, it has effect in remitting one third of the fine; but fails with reſpect to the other two thirds, which therefore ſtill remain due, notwithſtanding the pardon.

‡ In other words, it has effect in a complete remiſſion of the fine.

himſelf,

himself*, it is consequently valid.—This is according to *Haneefa*.—The two disciples maintain that pardon for the dismemberment extends also to life;—(and the same difference of opinion obtains where a person pardons another for giving him a cut, of which he afterwards dies.) Their argument is, that the pardon of the dismemberment is also a pardon of its effect, which must be one of two things, namely, the *loss of a hand* in case of a cure, or *the loss of life* in case the wound prove fatal. A pardon of dismemberment, therefore, is also a pardon of one of these effects, whichever it may happen to prove. Another argument is, that the term *dismemberment* extends both to a *mortal* wound, and also to one *not* mortal; and therefore a pardon of *dismemberment* is a pardon either way; this being the same as a pardon of an *offence*;—in other words, if the wounded person were to say, "I par-"don this *offence*," a pardon is established in both ways, the term *offence* comprehending *mortal* wounds and also wounds *not* mortal. The argument of *Haneefa* is, that here a cause of responsibility is established in the death of a person whose blood was in a continual state of value and protection; and to this the pardon does not expressly extend, because it was granted with respect to the *dismemberment*, which is different from the *death*; and in consequence of the wound proving mortal it becomes evident that the act was in reality murder; and with that also the right of the murdered person is connected; and as no pardon was granted with respect to *that*, a decree of responsibility for it issues. Analogy would suggest that retaliation is incurred for it, as being a *wilful* murder: but on a more favourable construction of the LAW a fine only is due, as in consequence of forgiving the dismemberment a demur is engendered, and retaliation is repelled by any demur. In reply, moreover, to the arguments of the

* The reason of this distinction is, that any bequest by a murdered person on behalf of his murderer is null.—The pardon is here considered in the light of a *bequest*; for as the fine for his hand virtually belongs to the dismembered person from the instant of the act, his remission of it is, in effect, a *bequest* of it to the *Akilas* of the offender.

two

two disciples it is answered, that the consequence [death] is murder from the beginning, and not merely one description of effect produced by dismemberment; and therefore a pardon of the *dismemberment* is not a pardon of the *murder*. It is otherwise in the pardon of an *offence*, as the term *offence* comprehends both *murder* and *maiming*. It is also otherwise in the pardon *of a cut, and of every consequence which may arise from it*, since in this case the pardon is expressly extended to death itself.

Case of a woman marrying a man in recompence for maiming him.

If a woman strike off the hand of a man, and marry him, as a recompence, and he afterwards die of the wound, the woman is entitled to her proper dower, and a fine of blood is due—from the *Akilas* if her offence was involuntary, and from herself if it was wilful; because, according to *Haneefa*, a forgiveness of the dismemberment is not a forgiveness of the consequence, and therefore her marrying him in recompence for the dismemberment merely implies a pardon of the dismemberment itself, but not of any effect which may result from it. Hence she is still liable to the fine of blood in case the man die. It is here to be observed that if the dismemberment have been wilful, the marriage on account of such dismemberment is a marriage in lieu of retaliation; and as retaliation, not being property, is incapable of constituting a dower, the woman is still entitled to her proper dower. A dower being therefore due *to* the woman, and a fine owing *from* her, there is a mutual liquidation in case both be of an equal amount; or if the fine be more than the dower, the woman is to pay the difference to her husband's heirs; or if it be *less*, the heirs must pay her the difference. If, on the contrary, the dismemberment have been *accidental*, the marriage is in lieu of a mulct for the hand; but as, upon the dismemberment proving fatal, it is ascertained that no fine is due for the hand, it follows that the specific sum which stood for the dower no longer exists, and consequently that a proper dower is due;—in the same manner as where a woman marries a man "*for what is in his hand*,"—and it prove that he had *nothing*

nothing in his hand,—in which caſe a proper dower is due, and ſo here likewiſe. In this laſt inſtance, moreover, there is no mutual liquidation of the dower by the fine of blood [due in conſequence of the huſband's deceaſe;] becauſe, as the offence was not *wilful*, but by *miſadventure*, the fine falls not upon the *woman*, but upon her *Akilas*, —whereas the dower is the right of the woman herſelf; and there can be no mutual liquidation unleſs each party owe ſomething to the other.

IF, in the example above ſtated, the man marry the woman "as "a ſatisfaction for *the diſmemberment, and every conſequence which* "*may reſult from it*," or "as a ſatisfaction for *the offence*," and he afterwards die of the wound, the woman is entitled to her proper dower if the diſmemberment was *wilful*; becauſe, in this caſe, ſhe married in lieu of retaliation; and retaliation, not being *property*, is incapable of conſtituting a dower;—in the ſame manner as where a woman marries for *wine* or a *hog*;—in which caſe, thoſe articles not being property, ſhe is entitled to her proper dower;—and ſo here likewiſe. In this inſtance, moreover, the retaliation is completely remitted, and nothing remains due from the woman [in lieu of it;] for upon the man conſtituting retaliation the dower, he becomes content that it ſhould be remitted on behalf of the ſame. The original retaliation, therefore, ceaſes, in the ſame manner as where a perſon remits retaliation on the condition of its being converted into property; and no fine is due (in conſequence of the deceaſe of the wounded perſon,) becauſe the offence was *wilful**. If, on the contrary, the diſmemberment was *accidental*, the fine of blood is in that caſe conſidered as the woman's dower, and a proportion of it adequate to her proper dower is *remitted* from her *Akilas*, and the remainder is re-

* In conſequence of the offence being *wilful*, the fine for it would be due from the woman herſelf, and not from her *Akilas*.

garded as a *bequest* to them *; for here the marriage in recompence of the dismemberment is a marriage in lieu of the *consequent*, namely, the *fine*; and as the fine, being itself property, is capable of constituting a dower, it is the dower accordingly;—but this only in the proportion of the woman's *proper* dower. With respect to the remainder, it is considered as a bequest to the woman's *Akilas*, which they are competent to benefit by, as not having been themselves concerned in the bloodshed. If, therefore, the amount do not exceed one third of the deceased's property, the *whole* is remitted to them; or, if it exceed, they have to pay the difference to the heirs †.

Retaliation for *maiming* does not exempt from retaliation for the *person*, in case of the death of the maimed.

If *Zeyd* wilfully strike off the hand of *Khàlid*, and suffer retaliation, and *Khàlid* afterwards die in consequence of the loss of his hand, *Zeyd* is still liable to be put to death in retaliation, as he then appears to have murdered *Khàlid*, who is consequently entitled to retaliation for the *person*. The heirs of *Khàlid*, therefore, may put *Zeyd* to death, as the right of *Khàlid* to retaliation for the person is not done away by the dismemberment of the offender;—in the same manner as where a man, being entitled to execute upon another retaliation for the person, takes a limb from that other;—in which case his right to retaliation for the *person* is not annihilated; nor is any thing due for the *limb*, as the *whole person* was forfeited, and the *limb* was only a part of it; and so likewise in the present instance. *Aboo Yoosaf*

* The reason of this distinction is that, in *accidental* offences, the fine falls upon the *Akilas*, not upon the *offender*; whereas, in the case of *wilful* offences, the fine being always considered as a compromise for retaliation, falls upon the offender alone, the *Akilas* having no concern in it.

† To understand the phraseology which runs through this and the preceding example, it is necessary to recollect that a dower, like any other consideration, may be understood either by an *actual payment* of something to the woman, or by the remission (on the part of the husband) of something owing from the woman.—When, therefore, we say, "the *fine* "constitutes the dower," or "*retaliation* constitutes the dower," nothing more is meant than that the woman marries the man in consideration of those being remitted to her.

alleges

alleges that upon cutting off the offender's hand, the right to any further retaliation ceases, as the retaliation being executed in that manner, the offender is discharged from all further consequences. To this, however, it may be replied that the hand of the offender was struck off only under the idea of that being the sole right; and that therefore the offender is not discharged from retaliation for the *blood-shed*, as the death of the wounded person had not then taken place.

An heir executing retaliation for murder, by *maiming*, without authority from the magistrate, is liable to a fine.

IF the heir of a murdered person cut off the hand of the murderer, and remit any farther retaliation, either before or after the decree of the magistrate, authorizing the same, he [the heir] owes a fine for the hand, according to *Haneefa*. The two disciples, on the contrary, maintain that nothing whatever is due; because here the heir of the murdered person has taken what was his right, and consequently is not required to make any atonement; for he is entitled to destroy the person of the murderer *in toto*; and as a *limb* is merely a dependant of the *person*, it follows that he is entitled to destroy any particular *limb*. He is therefore not required to make any atonement whatever,— whether the dismembered murderer pardon him or otherwise,—or, the wound prove fatal or otherwise,—or, he first strike off the hand and then take the life, either before or after the wound is healed;—this case being analogous to one where, retaliation for the hand being due, the person who is to exact it first strikes off the *fingers* of the offender's hand, and then remits the retaliation upon the hand,—in which case he is not responsible for the fingers. The argument of our doctors is that in this instance the heir has taken what was not his right; for *killing* was his right, not *dismemberment*. A fine is therefore due for the hand of the murderer thus unjustly struck off. Analogy, indeed, would suggest that the murderer's heir is here entitled to exact *retaliation* for the hand;—that, however, is remitted because of a doubt; for it was lawful for him to strike off the murderer's hand as a dependant of his *person*. Retaliation, therefore, being thus remitted,

 the

the fine is due:—*after*, however the murderer recovering from the wound, and not *before*; for it is possible that the wound may prove mortal, in which case the murderer's heir is entitled to take his right *.

In retaliation for *maiming*, a fine is due, if it occasion *death*.

If a person be entitled to retaliation upon another with respect to any part of the body, and strike off that part accordingly, and the person upon whom retaliation is thus executed die in consequence, the person in question is liable for a fine of blood, according to *Haneefa*. The two disciples allege that he is not in any respect responsible, since he has only taken what was his right, and it is impossible to restrict dismemberment to the condition of *safety*,—(in other words, to require that it be executed so as not to endanger the person who suffers dismemberment,) for if such were the case, retaliation would be altogether prevented, it being impossible always to avoid its proving fatal. The person in question, therefore, stands in the same predicament with an *Imâm*, a *cupper*, or a *phlebotomist*;—in other words, if an *Imâm* execute retaliation by cutting off a limb, or a cupper apply his cupping-horn, or a phlebotomist use his lancet, by desire of a patient, and the wound so occasioned prove fatal, still no fine is due; and so here likewise. The argument of *Haneefa* is that the person in question has slain another wrongfully; because his right was to *dismember*, not to *kill*, but here he has *killed*. Now, such being the case, analogy would suggest that *retaliation* is incurred by him, as having wilfully and without right slain another. Retaliation, however, is remitted in this instance, because of the doubt which here exists; for the person, in cutting off the limb, did not intend to destroy life, but merely to take his right. A fine, therefore, is due from him. It is otherwise with respect to the *Imâm*, the cupper, or the phlebotomist, for all these act upon authority,—the *Imâm*, in virtue of his office,

* The reply to the arguments of the two disciples is omitted in the translation, as being, for the most part, merely a repetition of what had gone before.

which

which requires him to perform ſuch acts for the good government of the people,—and the cupper or phlebotomiſt, in virtue of orders from and agreement with the perſon upon whom they perform their operations. It is to be obſerved, moreover, that the performance of any thing ſtrictly incumbent is not reſtricted to the deſcription of *ſafety*,—ſuch, for inſtance, as the ſhooting of an arrow at an enemy:—but in the caſe in queſtion there is nothing ſtrictly *incumbent*;—nay, forgiveneſs is rather commendable, GOD having ſaid, "IF YE REMIT RETALIATION, IT IS A KINDNESS." The taking retaliation for the *hand*, therefore, is a matter of indifference, in the ſame manner as hunting game; and conſequently is reſtricted to the condition of ſafety.

CHAP. IV.

Of *Evidence* in Caſes of *Murder* *.

IF a perſon be ſlain, and leave two ſons, one preſent †, and another abſent, and he who is preſent eſtabliſh evidence to the fact, and the other afterwards appear, it is in this caſe requiſite that *he* alſo eſtabliſh evidence to the fact, according to *Haneefa*. The two diſciples, on the contrary, maintain that there is no occaſion for this. If, how-

Evidence to *murder* muſt be eſtabliſhed by each heir ſeparately, and independant of the other.

* The term is here to be u[illegible] general ſenſe, including every ſpecies of homicide.

† In the city, or the court of the *Kâzee*.

ever,

ever, the perſon was ſlain by *miſadventure*, there is in that caſe no occaſion for a ſecond eſtabliſhment of evidence, according to all our doctors, any more than in the caſe of proving a debt due to the deceaſed. The argument of the two diſciples, in the point where they differ from *Haneefa*, is, that retaliation is eſtabliſhed to the heirs in the manner of an *inheritance*;—in other words, the right to retaliation is firſt eſtabliſhed in the anceſtor *, and then devolves to his heirs, in the ſame manner as a debt; for as retaliation is a retribution for the *perſon* †, the right to it therefore reſts with him to whom the *perſon* belongs, namely, the *murdered* perſon, in the ſame manner as the *fine*, which belongs to the murdered in virtue of his right to retaliation; whence it is that if the retaliation be converted into a *property*, by the heirs compounding it for a ſum of money, ſuch property is conſidered as belonging to the murdered, inſomuch that his debts may be diſcharged therewith, and his bequeſt alſo holds with reſpect to it; and likewiſe, that retaliation is entirely remitted by the deceaſed having forgiven the offence after he was wounded. Any one of the heirs, therefore, is proſecutor on behalf of the others. The argument of *Haneefa* is that retaliation is eſtabliſhed to the heirs merely by *ſubſtitution*, and not as an *inheritance*. Now by ſubſtitution is here to be underſtood one perſon ſtanding in the place of another in performing that other's act. Thus, in a caſe of bloodſhed, where it has been wrongfully committed, the perſon ſlain is entitled to do the ſame by the ſlayer: but as he is incapacitated from this by death, his heirs are his ſubſtitutes for the execution of it;—*not* that he has any *property* in that act, which afterwards devolves to his heirs,—for retaliation is not eſtabliſhed until *after* the deceaſe of the murdered perſon, and a defunct is incapable of having any property in retaliation, as it is an

* Arab. *Mâwris*, meaning the perſon from whom inheritance deſcends. (See note in Vol. II. p. 705.)

† Arab. *Zât*, meaning the *ſelf*,—the body as connected with the ſoul. (See note in p. 276.)

act,

act, and it is impossible that any act should proceed from the *dead*.—The deceased, therefore, has no property in the retaliation. It is otherwise with respect to debts, or the fine of blood, as these are property, and a defunct is capable of being a proprietor;—as where, for instance, a game-catcher lays his snares, and then dies, and game is found in the snares after his decease,—in which case the game-catcher is considered as proprietor of the same. Retaliation, therefore, being established by *substitution*, and not as an *inheritance*, no one of the heirs can be litigant for the others;—and as the others stand in need of again establishing their evidence, the absent heir will therefore be required, on making his appearance, to establish evidence on his part.

Retaliation is remitted by the murderer adducing evidence to prove the remission of it by an absent heir.

IF a murderer adduce evidence to prove, against the present heir, that the absent heir has remitted the retaliation, in this case the present heir is litigant, and the evidence thus adduced by the murderer being credited, the right of retaliation ceases accordingly. The murderer, moreover, is not in this case under any necessity of producing his evidence again upon the absent heir appearing; for his plea here is that "the right of the present heir to *retaliation* has been commuted "into a right to *property*,"—a plea which cannot be substantiated but by proving the remission on the part of the absentee. In fine, the plea of the defendant is here founded on the plea of the absentee's remission; and as, in all such cases, the party present is litigant for the absentee, the present heir is therefore litigant for the absent heir in this instance.

IF a slave held in partnership between two men be murdered, one of the owners being present, and the other absent, and the *present* owner adduce evidence against the murderer, in this case, upon the absentee appearing, he also is required to adduce evidence. If, also, the murderer adduce evidence to prove that the absentee has remitted the retaliation, in this case the owner present is litigant, and the

3 murderer

murderer is therefore under no neceſſity of again adducing evidence upon the abſentee appearing, for the reaſons ſtated in the preceding examples.

Rule in caſe of two *preſent* heirs bearing teſtimony to a remiſſion by an *abſent* heir.

If the heirs of the perſon murdered be *three*, and two of them give evidence againſt the third, that "he has remitted the retaliation," their evidence ſo given is null, but the retaliation is conſidered as being remitted *by theſe two*; becauſe, in bearing evidence as above, they *acknowledge* retaliation to have been remitted, and their acknowledgment, ſo far as it affects themſelves, muſt be credited.—(The nullity of the evidence, in this inſtance, is becauſe of its tending to the advantage of the witneſſes, as converting *retaliation* into *property*.)—It is to be obſerved that the caſe here conſidered may occur in four different ſhapes.—First, where the murderer confirms the evidence of the two heirs in queſtion, and the third heir denies it, in which caſe a fine of blood is due among the three, in equal ſhares; becauſe the murderer, in confirming the evidence of the two heirs, makes an acknowledgment of two thirds of the fine in their favour; and he at the ſame time claims that "the right of the *third* heir has "dropped, in conſequence of the remiſſion granted by the others," a plea which is reſiſted by the third heir, and cannot be eſtabliſhed by the teſtimony of the others, inaſmuch as their evidence is null,—whence he owes an atonement to this heir likewiſe, namely, a third of the fine.—Secondly, where both the murderer and the third heir confirm the evidence of the two heirs,—in which caſe two thirds of the fine of blood go to the two teſtifying heirs, for the reaſon already mentioned; but the third heir gets nothing whatever, as in confirming the evidence of the other two he acknowledges a remiſſion, and is therefore not entitled to any thing.—Thirdly, where the murderer and the third heir both deny the truth of the evidence,—in which caſe the third heir is entitled to one third of the fine of blood;—but the two teſtifying heirs get nothing whatever; for as they have acknowledged, againſt themſelves, that retaliation has ceaſed, they muſt be credited;

credited;—but they at the ſame time claim that the ſhares of each have been converted into property*; and a claim cannot be admitted unleſs ſupported by proof, which with reſpect to them does not appear, as their teſtimony does not ſerve for proof in their own cauſe. The ſhare of the *third* heir, on the contrary, is conſidered as being converted into property upon the force of their allegation, as that is ſufficient proof with reſpect to *him*.—FOURTHLY, where the third heir confirms the evidence of the other two, and the murderer denies it,—in which caſe the murderer owes a third of the fine to the third heir; becauſe, in denying the evidence of the two, he acknowledges that the right of retaliation had ceaſed in conſequence of the remiſſion of thoſe two *alone*, and that the ſhare of the *third* is ſtill due in *property*. It is to be obſerved, however, that this heir, on receiving ſuch third, muſt make it over to the other two; becauſe they claim two thirds of the fine of blood for themſelves, and the murderer denies their claim in point of *property*, but acknowledges a *fine* to be due to the third heir, as having acknowledged that the right of retaliation has ceaſed in conſequence of the avowal of the other two heirs, at the ſame time that the ſhare of the third became converted into *property*. Whatever, therefore, the murderer acknowledges in behalf of the third heir, he [the third heir] acknowledges in behalf of the other two, in having confirmed their teſtimony;—in the ſame manner as where a perſon makes an acknowledgment of a thing as being due to another, and that other declares the thing to belong, not to *himſelf*, but to a *third* perſon; in which caſe the article goes to that third perſon; and ſo here likewiſe. This proceeds upon a favourable conſtruction of the LAW. Analogy would ſuggeſt that nothing whatever is in this caſe incumbent on the murderer, as the two teſtifying heirs advance a claim for property, which the murderer reſiſts, at the ſame time making an acknowledgment in favour of the third heir, which he [the third heir] denies, whence it would appear that nothing

* By this phraſe is to be underſtood "*commuted for a fine.*"

is due to him. He, however, gets a third of the fine, on a favourable construction of the LAW, as above set forth,—the ground of which is, that the third heir does not *completely* deny, but passes the matter to the attesting heirs, and acknowledges the property in question to be their right.

Evidence to a person's "*dying of a* "*wound*," proves the person who inflicted it to be guilty of *murder*.

If witnesses give evidence that "a certain person had wounded "another with a weapon so as to render him bedridden until at length "he died," retaliation is in this case incurred by the person who inflicted the wound;—for whatever is established upon the testimony of witnesses is (as it were) established by *actual sight*; and as, where a murder is *actually seen*, retaliation follows, so here likewise. Evidence to wilful murder is, moreover, established after this manner; as death cannot be ascertained to have been occasioned by any particular wounds, but from the circumstance of the wounded person having been thereby rendered bedridden until he died.

Any essential disagreement in the testimony of the witnesses renders the whole evidence null.

If two witnesses to murder disagree in their testimony concerning the *time* of the fact, (one stating that the murder was committed on a particular day, and the other that it was committed on *another* day,) or the *place*, (one stating that it was committed in *such* a place, and the other that it was committed in *another* place,)—or the *instrument*, (one stating that it was committed with a *weapon*, and the other that it was committed with a *stick*,) their evidence is altogether null; because the murder to which they testify is a single act; and the murder committed in one place cannot be the murder committed in *another* place; nor is a murder committed with a *stick* the same as with a *weapon*, the former being only *manslaughter*, whereas the latter is *wilful murder*, and these two are subject to different rules:—hence the testimony of each can only be regarded as a separate evidence to a distinct fact; and the testimony of one witness cannot be admitted. In the same manner also, if one of the witnesses testify that "the murder was committed with a *stick*," and the other

that

that " it is unknown with what inftrument it was committed,"— their evidence is null; becaufe evidence to a murder committed with a *ftick* tends to prove only murder in a reftricted fenfe, (as it amounts merely to evidence of manflaughter,) whereas evidence to *pofitive murder* applies generally, that is, to murder in its moft *extenfive* (not in a *reftricted)* fenfe;—and the one being altogether different from the other, the teftimony of each is therefore feparate evidence to a diftinct fact.

Evidence to a murder, which does not afcertain the *inftrument*, proves only *manflaughter*.

IF two perfons give evidence that " a certain perfon has killed " another perfon, but it is unknown with what inftrument," a fine of blood is in this cafe due [from the alleged murderer,] on a favourable conftruction. Analogy would fuggeft that the evidence is not to be credited, as bloodfhed bears a different conftruction according to the difference of the inftrument; and therefore the matter teftified to (namely, *murder*) is here uncertain; whence the evidence cannot be credited. The reafon, however, for a more favourable conftruction is, that as the witneffes here teftify to a murder *unreftrictedly*, the leaft of the two different penalties in cafes of bloodfhed (namely, *fine)* is therefore declared due, out of caution. As, moreover, the inftrument is here dubious, no one in particular can be proved. It is to be obferved that in this cafe the fine is due from the *murderer*, (not from his *Akilas*,) becaufe all acts are fuppofed *wilful*, unlefs they be proved otherwife. Here, moreover, the evidence is given to bloodfhed *unreftrictively*, whence there is a doubt with refpect to *mifadventure*; and a dubious point cannot be eftablifhed.

Evidence to a murder in which two are concerned.

IF two perfons, refpectively, make acknowledgment of their having murdered a particular perfon, and the heir of the murdered perfon alfo affert the fame, he is at liberty to put them both to death; whereas, if two perfons bear evidence to a man's having murdered a particular perfon, and two others atteft that *another* had murdered

that

that perſon, and the heir aſſert that they had both murdered him, the evidence of both parties is null. The difference between acknowledgment and evidence, in this inſtance, is that in conſequence of both acknowledgment and teſtimony it is proved that each, reſpectively, was guilty of the murder, and each is accordingly liable to retaliation independant of the other. In the *former* inſtance, however, the heir (in whoſe favour the acknowledgment is made) falſifies the acknowledgment with reſpect to a part of what is acknowledged,—whereas, in the *ſecond* inſtance, he falſifies the teſtimony of the witneſſes with reſpect to a part of the evidence they have delivered on his behalf;—and the falſification of a *part* of an acknowledgment by the perſon in whoſe favour the acknowledgment is made does not invalidate the remainder,—whereas the falſification of any part of evidence, by the perſon in whoſe behalf it is delivered, invalidates the whole; for falſification is a reprobation*; and the circumſtance of a witneſs being *reprobate* is obſtructive to the reception of his evidence,—but the ſame circumſtance is no obſtacle to the validity of an acknowledgment.

* The literal meaning is "*falſification renders reprobate*;" that is, deſtroys a perſon's credit by calling his veracity in queſtion.—So much *technical* matter occurs here that it is difficult to render the paſſage into intelligible Engliſh.

CHAP.

CHAP. V.

Of the Circumſtances under which Murder takes place.

Case of ſhooting at a *Muſſulman*, who, in the interim, becomes an *apoſtate*.

IF a perſon ſhoot an arrow at a *Muſſulman*, and the *Muſſulman* apoſtatize, and the arrow then hit and kill him, the ſhooter is reſponſible for a fine of blood, according to *Haneefa*. The two diſciples maintain that the ſhooter is not, in this inſtance, reſponſible for the fine, as the life of the *Muſſulman* in queſtion had loſt its value by his apoſtacy. The argument of *Haneefa* is, that as reſponſibility attaches in conſequence of ſhooting the arrow, regard muſt therefore be paid to the time of ſhooting it; and as, at that time, the life of the *Muſſulman* was valuable, the atonement (that is, the fine) is conſequently due from the ſhooter, notwithſtanding the deed was wilful *, as retaliation is in this caſe remitted becauſe of doubt,—the perſon in queſtion not being of protected blood at the time the arrow reached him.

A perſon ſhooting at an *apoſtate*, who, in the interim, returns to the faith, incurs no penalty.

IF a perſon ſhoot an arrow at an apoſtate, and the apoſtate become a *Muſſulman*, and the arrow then hit and kill him, the ſhooter is not liable to any fine, according to all our doctors; (and ſo likewiſe, if a perſon ſhoot an arrow at a hoſtile infidel, and the infidel become a *Muſſulman*, and the arrow then hit and kill him;) for as the ſhooting at the perſon, whilſt an apoſtate or a hoſtile infidel, was not an occaſion of reſponſibility, becauſe of his not being then in a ſtate of protection, it follows that it does not become ſo afterwards.

* In caſes of *wilful* murder the fine is in general due (*not* from the *murderer*, but) from the murderer's *Akilas*.

IF

Shooting at a *slave*, who, in the interim, is emancipated, induces responsibility to the master.

If a person shoot an arrow at a slave, and the slave be emancipated by his master, and the arrow then hit and kill him, the shooter is responsible to the master for the value of the slave, according to *Haneefa* and *Aboo Yoosaf*. *Mohammed* says that an estimate is in this case to be made of the value the slave bore before the arrow was shot, and his value afterwards; and that the shooter is responsible to the slave's master for the difference; because the manumission precludes the consequence of the offence;—in the same manner as where a person undesignedly strikes off the hand of a slave, and his master afterwards emancipates him,—in which case the manumission precludes the consequence, insomuch that neither the fine of blood nor the value of the slave are due, nor (in short) any thing except a mulct for the hand, and the difference occasioned in the value of the slave; for here it is uncertain who the claimant of right is, as at the time of the offence it was the master, and at the time of the consequent death it was the slave, he being then free. The emancipation of the slave, therefore, operates the same as his recovering from the wound;—and the consequence being precluded, nothing remains except the shooting; and as this also is an offence, (since it tends to lessen the value of the slave shot at,) the shooter is consequently responsible for the difference of value thereby created. The argument of the two *Elders* is that the shooter is guilty of murder from the instant of his shooting; for he, in fact, does nothing more than merely shoot; but as this is a matter which was at that time purely optional and in his power, he is consequently responsible for the value of the slave. It is otherwise where a person undesignedly strikes off the hand of a slave, and the wound proves fatal after he [the slave] has been emancipated; for here the offender has destroyed a *part* of the subject, which occasions a responsibility to the master;—and if, upon the wound proving fatal, any thing remain due, it is due on behalf of the *slave*, he being then free. In this instance, therefore, the state of the case in the *beginning* is different from what it is in the *end*, being similar to where the subject undergoes a complete change; and as, where the subject is changed, the

the mortal confequence is not eftablifhed at the firft, fo here likewife. The mere fhooting of the arrow, on the contrary, is not a deftruction of any thing previous to its reaching the flave, the only effect of it upon the fubject being to leffen its value in the eyes of mankind from the danger it is thus expofed to,—a circumftance not worthy of any regard. No atonement, therefore, is due on account of the mere *fhooting*. Upon the arrow, however, reaching the fubject, the fhooting of it becomes the efficient caufe of refponfibility, which, when the arrow takes place, is referred to the act of fhooting. In this inftance, therefore, there is no difference between the *beginning* and the *end*, the fhooting being confidered as *murder* alone, and not *a wound, fatal in its confequence*; and accordingly, the value of the fubject [the flave] is due on behalf of the mafter.

Cafe of fhooting at a condemned criminal, who, in the interim, ftands acquitted.

IF the magiftrate pronounce upon any perfon a fentence of lapidation [for whoredom,] and one of the byftanders fhoot an arrow at this perfon, and one of the witneffes then retract from his teftimony, and then the arrow take place, the fhooter is not refponfible for any thing; for regard is here paid to the time of fhooting the arrow; and the blood of the perfon condemned was at that time in a neutral ftate.

H E D A Y A.

B O O K L.

Of *DEEÀYAT*, or FINES.

Definition of *Deeàyat.*

DEEÀYAT is the plural of *Deyit*, which signifies the fine exacted for any offence upon the person.

Chap. I. Introductory.
Chap. II. Of Nuisances placed in the Highway.
Chap. III. Of Offences committed *by* or *upon* Animals.

Chap. IV. Of Offences committed *by* or *upon* Slaves.

Chap. V. Of Offences committed by usurped Slaves, or Infants, during the Usurpation.

Chap. VI. Of *Kissâmit*, or the administration of Oaths.

CHAP. I.

Manslaughter requires an *heavy* fine; and the performance of an expiation by the slayer.

IN cases of manslaughter an heavy * fine is due from the *Akilas* [of the slayer;] and it is incumbent on the slayer to perform expiation.—The expiation for manslaughter (and also for homicide by misadventure) consists in the emancipation of a *Mussulman* slave, (provided, however, that he be free from all personal defects;) or, if such a slave cannot be procured, in observing a fast for two months successively.—With respect to the distribution of *alms*, it does not constitute an expiation in cases of homicide, as in cases of *Zihâr* †; because the above two modes of expiation for homicide are particularly specified in the KORAN, whereas the expiation of *Zihâr* is there mentioned to be sufficiently performed by the distribution of alms, as well as by the other two modes.) It also suffices, for an expiation, that the slayer emancipate an infant at the breast ‡ whose father or mother is a believer, since such infant is a *Mussulman* in effect §,—and its members (such as the hands, feet, eyes, &c.) are all apparently perfect:—but

* Arab. *Moghàllizá*. It is particularly defined a little further on. † See Vol. I. p. 332.

‡ Arab. *Ràzzi*; meaning an infant not yet weaned: a *suckling*.

§ Because an infant is a *Mussulman* in dependance of its parent.

it does not suffice to emancipate an embryo yet in the womb, since its existence, as well as the perfectness of its frame, are unknown and uncertain.

The fine for manslaughter consists of one hundred female camels;

The *heavy* fine for manslaughter consists, according to *Haneefa* and *Aboo Yoosaf*, of one hundred female camels, in four lots or classes, namely, twenty-five of one year, twenty-five of two years, twenty-five of three years, and twenty-five of four years. *Mohammed* maintains that it consists of one hundred female camels, in *three* lots; namely, thirty of three years, thirty of four years, and forty (pregnant ones) of five years; because the prophet has said, "*A person who dies of scourging or the bastinado is slain by* MANSLAUGHTER*, "*which requires an expiation of one hundred camels, forty of them pregnant*;"—and also, because manslaughter requires an *heavy* fine, which the number in question amounts to. The two *Elders*, in support of their opinion, argue that the prophet in general terms ordained one hundred camels to be the mulct for bloodshed;—and with respect to the saying quoted by *Mohammed*, it is of no weight; for the companions have differed concerning the amount of the fine, which would not have been the case had it been established (as it *must*) by that authority. It is to be observed, however, that this aggravation † of the fine for manslaughter holds only where it is paid in camels;—for if the magistrate decree it to be paid in money, no more than ten thousand *dirms*, or one thousand *deenars*, can be imposed in aggravation; because, when paid in this mode, the amount has been particularly specified by the lawgiver.

or (when paid in money) of ten thousand *dirms*, or one thousand *deenars*.

The fine for homicide by misadventure consists of

In cases of homicide by misadventure a fine is incumbent upon the *Akilas*, and expiation upon the slayer. The fine, in this instance, consists of one hundred camels in five lots; twenty females of one year,

* That is, supposing those to be inflicted *unjustly*, or *without authority*.

† Previous to the time of the prophet the fine for bloodshed was only *ten* camels.

twenty

twenty of two years, twenty of three years, twenty of four years, and twenty males of one year; becauſe ſuch was the fine decreed by the prophet in this inſtance; and alſo becauſe in this mode the fine is leaſt burthenſome, and an alleviation ought to be granted in a caſe of *miſadventure*, ſince the ſhedder of blood there ſtands excuſable.

eighty female camels and twenty males.

A FINE of *gold* is one thouſand *deenars*, and that of ſilver ten thouſand *dirms*, (as mentioned above.) *Shafeï* maintains that the fine of ſilver is twelve thouſand *dirms*. Our doctors, in ſupport of their opinion, quote the authority of *Omar*. In fact, this difference of opinion ariſes ſolely from a difference in the *weight* or *rate* of the *dirms* *.

Difference of opinion concerning the rate of a *pecuniary* fine.

A FINE is not paid in any other than the above three modes, namely, in camels, *deenars*, or *dirms*. The two diſciples maintain that it may be paid not only in theſe, but alſo in kine, (two hundred,) or in goats (two thouſand,) and alſo in cloaths, (two hundred ſuits.) It is alſo remarked in the *Mabſoot*, under the head of *Fines*, that "if "the avenger of blood compound the matter for *more* than two hun-"dred kine, or two hundred ſuits of clothes, it is unlawful;" and as no diſſent is there noticed on the part of *Haneefa*, it hence follows that *he* alſo admits the payment of a fine in clothes or kine, as well as the two diſciples.—This is approved.

It is not payable in any other mode than by *camels* or *current coin*.

THE fine for a woman, whether for the *perſon* or the *members*, is half the fine for a man. *Shafeï* maintains that in all caſes of offence againſt the *members* of the body, where the fine is rated at one third of the fine of blood, or leſs, a man and woman are equal; but that where it *exceeds* a third, up to the complete fine, that for a woman

The fine for a *woman* is half the fine for a *man*;

* The tranſlator omits, in this place, a long and perfectly uſeleſs diſcuſſion concerning the relative weight and value of *dirms* at different times.

is only in half the proportion. The argument of our doctors is that the prophet has said, "*The fine for a woman is half the fine for a* "*man*;" and as this precept is thus unrestrictedly expressed, it therefore comprehends all cases, and is consequently a sufficient refutation of *Shafeï*'s opinion. Besides, the *rank* of a woman is lower than that of a man, and so likewise her *faculties* and *uses*; and as an effect of this appears in the fine for a woman's person, (that being only *one half*, according to all authorities,) so in the same manner it is one half for the members, as well as for the person,—and the same in all cases where it exceeds one third of the whole.

and that for a *Zimmee* is the same as for a *Mussulman*.

THE fine for a *Zimmee* is the same as for a *Mussulman*. *Shafeï* says that the fine for a *Jew* or a *Christian* is four thousand *dirms*, and for an idolator six hundred. *Málik*, on the other hand, says that the fine for a *Jew* or a *Christian* is half the fine for a *Mussulman*. Our doctors, however, support their opinion upon a saying of the prophet, "*The fine for every* ZIMMEE *is one thousand* DEENARS," which precept, being generally expressed, places all upon an equality.

SECTION.

Of FINES *for Offences not affecting* LIFE.

A complete fine is required for the nose, the tongue, or the virile member;

THE cartilage of the nose requires a complete fine; and so likewise the tongue and the virile member; because the prophet has said, "*A fine is due for life, and for the nose, and for the tongue.*" It is, moreover, a rule, with respect to the members of the body, that

 where

where one of the faculties [bodily or mental] is deftroyed, or the beauty of the countenance effaced, a complete fine is due; becaufe this is a deftruction of the perfon, in *one* fhape, which is held tantamount to a deftruction of it in *every* fhape, out of refpect to MAN.

IF the bone of the nofe be ftruck off, together with its cartilage, ftill a *fingle* fine only is due, and no more, the whole forming only one member. In the fame manner alfo, if the whole tongue be cut out, a fingle fine is due, as a defirable faculty (namely, *fpeech*) is thereby loft. A complete fine is likewife due if a *part* only of the tongue be cut off, provided the power of fpeech be utterly deftroyed, for in this cafe the moft defirable ufe of the tongue is loft, notwithftanding the *inftrument* of fpeech ftill remain. Lawyers, however, have remarked that if the perfon continue to poffefs the power of pronouncing *fome* of the letters, the fine is levied proportionably.—(Some hold that it is in this cafe to be levied in the proportion which the *dental* letters bear to the reft.)—Lawyers alfo fay that if the perfon be ftill capable of pronouncing moft of the letters, the fine muft be determined by arbitration *; becaufe the ufe of fpeech is to communicate ideas, which end is ftill anfwered;—but yet an impediment is occafioned in the utterance, which requires an equitable recompence.—If, on the contrary, the perfon be rendered incapable of pronouncing moft of the letters, a complete fine is due, fince here it is evident that the ufe and intention of fpeech is not obtained.

and alfo, for a *part* of the tongue, if the power of fpeech be deftroyed, (or, in proportion as it may be injured;)

IF a man hit another a blow upon the head, fo as to deprive him of reafon, a complete fine is due, as the perfon is thereby deprived of the power of attending either to his temporal or eternal concerns. So likewife, if a perfon be by a blow deprived of any of the fenfes, fuch

and for a blow which, in its confequence, deprives the perfon ftruck of his reafon,

* Arab. *Yawjibo Hakoomit-al-adil*; literally, "*an award of equity is due.*" *Hakoomit-al-adil* (the award of equity) is a technical phrafe, which occurs frequently in the fequel, and is fometimes rendered, by the tranflator, *an arbitratory atonement.*

as

or of any of his senses;

as feeing, hearing, fmelling, or tafting, a complete fine is due, all thefe being defirable faculties;—and it is, moreover, related of *Omar*, that he impofed a quadruple fine for a fingle blow, in a cafe where it had deprived the perfon of reafon, and of the power of fpeech, fight, and hearing.

and for the *beard* or the hair of the fcalp

If a perfon tear out the beard of another, fo as that it never afterwards grows, a complete fine is due, becaufe the beauty of the countenance is hereby effaced; and the fame is likewife due for tearing out the hair of the head (fo as to prevent its future growth) for the fame reafon. *Shafeï* maintains, that for the hair of the beard or head an arbitrary fine only is due, becaufe thofe are not an original part of man, but fupervenient and excrementitious, infomuch that in many countries it is cuftomary to cut them off. The argument of our doctors is, that the beard is ornamental to the human countenance, and neceffary to its beauty; and as, by the deprivation of it, beauty is confequently effaced, a fine is due for it, in the fame manner as for cutting off the cartilage of the ear, and for the fame reafon;—and fo likewife of the hair of the head. With refpect to the beard of a *flave*, it is recorded from *Haneefa*, that the penalty for tearing it out is the full value of the flave. According to the *Zâhir Rawâyet*, however, nothing more is due than merely the defect occafioned in his value; becaufe the ufe of a flave is to *work* and perform *fervice*, which does not require beauty.

(Fine for the *whifkers*

If a perfon tear out the whifkers of another, fo as that they never afterwards grow, an arbitratory atonement is due. This is approved; becaufe, as the whifkers are a dependant of the beard, the tearing them out is therefore fubject to the fame rule as tearing out a *part* of the beard.

If

IF a perſon tear out the hair of another's eye-brows, a complete fine is due; and half a fine for tearing out the hair of *one* eye-brow.—According to *Málik* and *Shafeï* an arbitratory atonement is due in this inſtance. The arguments have been recited at large in treating of the beard.

or *eye-brows*.)

A COMPLETE fine is due for the two eyes, the two hands, the two feet, the two lips, the two ears, and the two teſticles;—and for *one* of either an half fine is due; becauſe the prophet wrote a letter to *Omar*, ſignifying that "*for the two eyes a complete fine is due, and an* "*half fine for one eye*;" and alſo, becauſe, as by the loſs of both the fellow members, in the inſtances above mentioned, either one of the faculties is deſtroyed, or beauty is totally effaced, a complete fine is conſequently due; and as, by the loſs of one of them, an half of the faculty is deſtroyed, or an *half* of the beauty effaced, an *half* fine is therefore due.

A complete fine is likewiſe required for any two fellow-parts or fellow-members of the body; and an *half* fine for any *one* of them;

FOR the two breaſts of a woman a complete fine is due; and an half fine for one breaſt, for the reaſon before mentioned. For the two nipples, alſo, of a woman's breaſts a complete fine is due; and for one of them a half fine; becauſe the faculty of preſerving the milk and giving ſuck is completely deſtroyed in the former inſtance; and it is alſo deſtroyed in one half in the latter inſtance.

and the ſame for the breaſts or nipples of a *woman*;

FOR the four eye-lids a complete fine is due; and for any one of them a quarter of the complete fine; becauſe by the loſs of the whole beauty is completely effaced, and a natural advantage is alſo loſt, namely, that of preſerving the eyes from external ſubſtances. As, therefore, a complete fine is due for the *whole*, being four in number, a quarter of a fine is conſequently due for one, an half for two, and three quarters for three;—and it is the ſame whether the whole eye-lid be taken off, or only the eye-laſh and edge of the lid.

and alſo for the *four* eye-lids.

FOR

A *tenth* of the fine is required for a *toe* or a *finger*;

For each of the fingers or toes a tenth of the fine is due; becaufe the prophet has faid, "*Ten camels muft be paid for a finger*;" and alfo becaufe, by the lofs of all the fingers or toes, one of the faculties (namely, walking or holding) is completely deftroyed, for which a complete fine is due; and as the fingers (or toes) are ten each, the fine is therefore divided into ten equal parts, one of which is due for each refpectively. It is to be obferved that in this refpect all the fingers (and toes) are alike, the faying above quoted being unreftrictedly expreffed. Befides, all the fingers are alike in their original purpofe, in the fame manner as the right-hand and the left.

(the fine for the *joints* of the finger or toe being in proportion to their number;)

In every finger (or toe) confifting of three joints, a third of the fine for the whole finger is due for each joint; and in every finger of two joints an half of the fine for the finger; for in the fame manner as the fine for the two hands is divided among the fingers, fo likewife is the fine for each finger divided among its joints.

and a *twentieth* for a *tooth*.

The fine for each tooth is five camels,—that is, a twentieth of the complete fine, the prophet having thus ordained. It is to be obferved, moreover, that all the teeth are in this refpect alike; becaufe the ordinance here mentioned is abfolute; and all the teeth are, moreover, alike in their original purpofe, in the fame manner as the fingers or toes.—This is where the deprivation has been effected by *mifadventure*;—for, where it is *wilful*, retaliation is due in all thofe inftances as has been already mentioned in treating of offences againft the perfon.

An half fine is incurred by the deprivation of the *ufe* of a member;

If a perfon ftrike the member of another, fo as to deftroy the ufe of it, the member itfelf ftill remaining, an half fine is due;—(as in the cafe, for inftance, of caufing a perfon's hand to wither, or blinding an eye;) becaufe the fine is incurred by deftroying the ufe of the member, as well as by a deprivation of the member itfelf.

If

IF a perſon ſtrike another on the loins, ſo as to deſtroy his power of ſecreting *ſemen*, a complete fine is due, this amounting to a complete deſtruction of one of the faculties.

and a complete fine by the deſtruction of any of the faculties,

IF a perſon ſtrike another on the back, ſo as to make him crooked, [back-broken,] a complete fine is due, as the beauty of the perſon is thus completely deſtroyed. If, however, the perſon afterwards recover his carriage, ſo as to retain no ſign of the injury, nothing whatever is incurred.

or of the beauty of the perſon.

SECTION.

Of SHADJA, *or Wounds and Cuts from the Crown of the Head to the Chin.*

(*Mâlik* maintains that the cheek bones are not included in the *face*, as they do not form a part of what is properly termed the *viſage*. Our doctors, however, include them in the face, both as they are annexed to it, and alſo becauſe they, in fact, conſtitute a part of the whole countenance.)

OF *Shàdja* wounds there are ten: I. *Hàriſá*; or a ſcratch, ſuch as does not draw blood: II. *Dàmiá*; or a ſcratch, ſuch as draws blood, but without cauſing it to flow: III. *Dameeá*; or a ſcratch, ſuch as cauſes the blood to flow: IV. *Bàziá*; or a cut through the ſkin: V. *Motàbmilá*; or a cut into the fleſh: VI. *Simhàk*; or a wound reaching to the pericranium: VII. *Màwzihá*; or a wound which lays bare the bone: VIII. *Hàſhimá*; a fracture of the ſkull: IX. *Moonàk-*

Shàdja wounds are of ten deſcriptions.

kilá; a fracture which requires a part of the ſkull to be removed: X. *Ammá*; or a wound extending to the membrane which incloſes the brain.—Next follows *Dàmighá*, or a wound which penetrates to the brain; which, however, is not included among the others, as a perſon ſo wounded cannot poſſibly continue alive.

Retaliation is inflicted only in the caſe of a cut (wilfully given) which lays bare the bone.

In the caſe of a wound of the *ſeventh* deſcription [*Màwzihá*] retaliation is due, provided the wound was wilfully given; becauſe it is recorded of the prophet that he decreed retaliation for ſuch a wound; and alſo, becauſe it is here practicable to obſerve an equality in the retaliation, ſince it is poſſible to cut the offender to the bone with a knife. Retaliation is therefore due in this inſtance;—but it is not to be inflicted in any of the other caſes above deſcribed, as in thoſe there is no determinate limit to which to cut with a knife; and beſides, in all wounds *above* the ſeventh deſcription the bone is fractured; and there is no retaliation for fractures. In wounds ſhort of the ſeventh deſcription an award of equity is due, as thoſe have no ſpecific limit, and yet cannot lawfully be ſuffered to paſs without penalty.

Rate of fines for *Shàdja* wounds when given by *miſadventure*.

In the caſe of a *Màwzihá* wound inflicted by *miſadventure*, a twentieth of the complete fine is due. For a *Hàſhimá* wound a tenth of the complete fine is due; for a *Moonàkkilá* three twentieths; and for an *Ammá* a third;—whether they be inflicted wilfully or accidentally. (A third of the fine is alſo due for a *Jàifá*, or ſtab,—that is, a wound penetrating into the cavity of the trunk, from the breaſt, the back, the belly, or the ribs, or from the neck into the gullet;—and if it penetrate quite through, from ſide to ſide, it is accounted as *two* ſtabs, and two thirds of the fine are accordingly due for it; becauſe the prophet has ſaid, "*Five camels are due for a* Mawziha *wound,* "*ten for a* Hashima, *fifteen for a* Moonakkila, *and a third of the* "*complete fine for an* Amma *and a* Jaifa;" and alſo, becauſe where the wound extends *quite through*, it ſtands, in effect, as two ſtabs,

one

one on one ſide, and one on the other; and as a third of the fine is due for each ſtab, it follows that *two* thirds are due in this inſtance.)

All other wounds are compenſated for by an arbitratory atonement.

THE ten deſcriptions of wounds here treated of are reſtricted ſolely to the *head* and *face*, as has been already mentioned. With reſpect to wounds on the other parts of the body, which are termed *Jiràbit*, and for which no ſpecific mulcts have been appointed, they require an arbitratory atonement, where the bone is either fractured or laid bare, provided a laſting ſcar or deformity be occaſioned; becauſe although ſpecific mulcts have been appointed only for wounds of the head or face, yet the offences in queſtion cannot lawfully be ſuffered to paſs without penalty; and alſo, becauſe the particular appointment of a mulct is on account of the defect occaſioned by a ſcar, which is a defect only where it occurs upon the head, or in the face. With reſpect to the arbitratory atonement to be awarded in this inſtance there is a difference of opinion. *Tahàvee* ſays that it is to be determined by the difference between the value which the wounded perſon would bear (ſuppoſing him to be a ſlave) *without* the ſcar, and that which he bears *with* the ſcar; and if the difference be equal to a twentieth of the former value, a twentieth of the fine muſt be awarded; if a tenth, a tenth of the fine; and ſo forth. (Decrees paſs according to this.) *Koorokhee*, on the contrary, ſays that the atonement muſt be adjuſted by the proportion which the wound in queſtion bears to a *Màwzihà* wound;—in other words, if it amount to an *half* of a *Màwzihà* wound, the half of a *Màwzihà* fine is due; if to a quarter, a quarter is due; and ſo forth. This, however, is rejected, as it is ſcarcely poſſible thus to meaſure the wound.

Mode of determining ſuch atonement.

SECTION.

An half fine is due for all the fingers of either hand;

For the fingers of one hand an half of the complete fine is due; becauſe, as the fine for each finger is a tenth, (as has been before mentioned,) it follows that for five of them the fine is five tenths; and alſo becauſe, as for cutting off *all* the fingers, one of the faculties being thereby deſtroyed, (namely, that of carrying,) a complete fine is due, ſo in like manner, half the faculty being deſtroyed by cutting off the fingers of one hand, an half fine is conſequently due. If, alſo, the fingers of one hand be cut off, together with a part of the *metacarpus*, ſtill an *half* fine only is due; becauſe the prophet has ſaid, "*for the two hands a fine is due, and* HALF *the fine for one hand*;" and alſo, becauſe the *metacarpus* is merely a dependant of the fingers, as it is upon the latter ſolely that the power and faculty of *carrying* or *taking hold of* any thing depends.

and no more, although a part of the hand be ſtruck off;

but if a part of the lower arm be ſtruck off, an arbitratory atonement is alſo due.

If the hand be ſtruck off, together with a part of the lower arm, an half fine is due for the hand, and an arbitratory atonement for the part of the arm, according to *Haneefa* and *Mohammed*, and alſo according to one opinion of *Aboo Yooſaf*. There is another opinion recorded from him, that any thing beyond the hand or foot, to the ſhoulder or the hip, is merely a dependant; and that nothing whatever is incurred for the leg or arm; as the LAW has appointed an half fine for a *hand*, [*Yed*,] which ſignifies the whole limb up to the ſhoulder, whence nothing more can legally be impoſed. The arguments of *Haneefa* and *Mohammed* upon this point are twofold.—First, the hand is the inſtrument of ſeizing and carrying; and as thoſe acts depend upon the hand and fingers, not upon the arm, the latter therefore

therefore is not a dependant of the former with reſpect to compenſation.—SECONDLY, the *hand* intervenes between the fingers and the arm,—whence the arm cannot be conſidered as a dependant of the fingers;—neither is it a dependant of the hand, as that is itſelf a dependant of the fingers, and a dependant cannot have a ſecondary dependant.

For a defective hand a fine is due in proportion to its defect.

IF a hand be ſtruck off having only one finger, a tenth of the fine is due; or, if it have two fingers, a fifth; and ſo forth; and nothing whatever is due for the *metacarpus* in either caſe*; becauſe the fingers are the original, and the *metacarpus* the dependant, not only in reality, but alſo in the eye of the LAW;—in *reality*, as the power of ſeizing and carrying depends upon the fingers; and alſo in the eye of the LAW, becauſe that has appointed a fine for the *fingers*, not for the *metacarpal* part of the hand.

An award of equity is due for a redundant finger;

FOR a redundant finger (that is, a *ſixth)* an award of equity is due, out of reſpect to MAN; for that alſo is a part of the perſon, although it be neither uſeful nor ornamental. The ſame rule alſo obtains with reſpect to a redundant tooth; and for the ſame reaſon.

and alſo for the eye, yard, or tongue of an infant.

AN award of equity is due for the eye, the yard, or the tongue of an infant ſo young as that the perfectneſs of theſe members in him cannot be aſcertained. *Shafeï* maintains that a complete fine is due for thoſe, in the ſame manner as for the cartilage of the noſe of an infant, or the ear, the perfectneſs of them being the moſt probable concluſion. The argument of our doctors is, that the chief end of the organs in queſtion is the *uſe* of them; and therefore, where their uſefulneſs cannot be aſcertained, the fine for them is not due, becauſe of a doubt. Beſides, mere *probability* is not a ſufficient ground on

* An objection by *Mohammed* is here omitted, as being utterly frivolous and nugatory.

 which

which to advance a claim. It is otherwise with respect to the cartilaginous part of a nose or an ear; for the chief end of that is beauty, which by the deprivation of it is completely destroyed. It is to be observed that the perfectness of the tongue is known from speaking, that of the yard by the proper ejection of urine, and that of the eye from such signs as serve to manifest that the child sees objects with it. As soon, therefore, as from these tokens the perfectness of the organs in question is ascertained, the same rules obtain with respect to them as in the case of adults.

Retaliation cannot be inflicted for any injury upon the head, of an indeterminate nature;

If a man, either wilfully or by misadventure, give another a wound upon the head, and he be in consequence deprived of his reason, or lose the whole of his hair, retaliation is not due upon the striker:—not in the case of misadventure, evidently; nor in the case of a *wilful* wound, because equality, in a case of this nature, cannot be observed in the infliction of the retaliation. A complete fine is therefore due in either instance, and the mulct for the wound is therein included:—in the instance of loss of reason,—because, as all the faculties of the body are thereby rendered null, the case is therefore, in effect, the same as where a person gives another a wound upon the head, and the wounded person dies,—in which instance the mulct for the cut is included in the fine,—and so here likewise;—and in the instance of the loss of the hair,—because the mulct for a wound upon the head is due solely on account of its occasioning a defect, by the destruction of a *part* of the hair, (insomuch that if the hair grow again, as it was before, the mulct is remitted;) and as the complete fine is here due in consequence of the loss of *all* the hair, the mulct due for the wound is therein included, as being the least of the two. The mulct is therefore included in the complete fine due on account of the hair, which is the greatest of the two; for it is a rule that where an offence is committed upon any one member, and two injuries are thereby sustained, and the mulct for the one injury is greater than for the other, the smaller is included in the greater;—as where, for instance, a person cuts off the finger of another,

another, and the whole hand is thereby rendered powerless; in which case a fine for the hand is due, including the fine for the finger.

but the mulct for the wound is due, over and above the *complete fine* where any of the senses or faculties are destroyed in consequence.

IF a person wound another upon the head, and thereby deprive him of speech, sight, or hearing, in this case the mulct for the wound is due, together with the complete fine. The reason of this is, that each of those privations is a separate offence; and as the advantage of each respective organ is restricted to that organ, each is, therefore, like a separate member, such as the hand and foot.— It is otherwise with the *reasoning* faculty, that extending to and affecting all the organs, as has been already explained. *Aboo Yoosaf* maintains that the mulct for the wound is included in the fine, in the case of a privation of *hearing* or *speech*, but not of *sight*; because, as the power of hearing or speaking is, like the *reason*, a matter of a concealed nature, it is therefore subject to the same rule; whereas the power of seeing, on the contrary, is evident, and not of a concealed nature, and therefore bears no analogy to reason in this particular. The former opinion is approved.

Case of a blow on the head, occasioning the loss of sight.

IT is recorded, in the *Jama Sagheer*, as an opinion of *Haneefa*, that if a man wilfully wound another upon the head, and thereby put out both his eyes, retaliation is not to be inflicted; and lawyers have, moreover, delivered it as his opinion, that in this instance a fine is due for the eyes, and also the mulct for the wound. The two disciples, on the contrary, hold that retaliation is due for the wound, and a fine for the eyes; for as the act took place upon two different parts or subjects, it therefore amounts to two separate offences; nor does the apprehension of misadventure with respect to the eyes occasion a remission of retaliation for the wound; in the same manner as where a person wilfully shoots an arrow at another, which passing through him hits a second person, and they both

both die; in which case retaliation is due for the firſt, and a fine for the ſecond. The arguments in ſupport of the doctrine of *Haneefa* upon this ſubject are twofold.—First, the wound has communicated an additional conſequence. Now the penalty to be inflicted for any thing muſt be the ſame as the thing itſelf: but that is here impoſſible, it not being in the power of men to inflict a wound upon the head in ſuch a way as to be attended with the ſame preciſe effect as the wound in the preſent inſtance. A fine is therefore due for both injuries reſpectively.—Secondly, the act is undoubtedly one; and the ſubjects of it are alſo one, in one ſhape, as being conjunct. The apprehenſion of miſadventure, therefore, with reſpect to the eyes, in the ſecond inſtance, is extended alſo to the *firſt* inſtance,—that is, to the wound; and conſequently occaſions a remiſſion of retaliation with reſpect to that likewiſe. It is otherwiſe in the caſe of ſhooting an arrow; for there the wound [received by the firſt perſon] cannot with propriety be ſaid to have *communicated an additional conſequence* *; and the ſubjects are, moreover, totally diſtinct and ſeparate. It is alſo otherwiſe where a perſon cuts off the finger of another, and the knife ſlips, and hitting another finger, cuts off that likewiſe; for in this caſe retaliation is due for the firſt finger, and a fine for the ſecond, as they are two different ſubjects.

If a member periſh in conſequence of a *partial* injury, *retaliation* is not incurred, but *fine*.

If a perſon ſtrike off the upper joint of another's finger, and the reſt of the finger, or the hand itſelf, wither in conſequence, retaliation is not due, nor any thing except the fine for the joint, and an arbitratory atonement for the remainder. In the ſame manner, if a perſon break off a part of another's tooth, and the reſt of the tooth

* The term by which this is expreſſed in the original [*Sirràyat*] will not bear a literal tranſlation.—In its primitive ſenſe it ſignifies to *paſs* or *penetrate*, and alſo to *communicate*, (as a contagion or peſtilence.) This expoſition will ſuffice to explain the meaning of the phraſe.—Where it occurs with a relation to *life* the tranſlator uniformly renders it "*prove* "*fatal*."

turn

turn black, retaliation is not due, but he muſt pay the fine for the tooth. If, alſo, in either of thoſe caſes, the injured perſon require retaliation, offering to be ſatisfied with ſtriking off the correſpondent upper joint of the offender's finger, or a part of his tooth, and to remit the remainder, it is not permitted, thoſe acts not being proper ſubjects of retaliation.

Caſe of an injury to one member occaſioning the loſs of another.

IF a man ſtrike off the finger of another, and the next finger become powerleſs in conſequence, retaliation is not to be inflicted for either, according to *Haneefa*. *Mohammed* and *Ziffer*, on the contrary, maintain that retaliation is due for the firſt finger, and a fine for the ſecond. The arguments on both ſides have been already recited. *Ibn Simmáia* reports, from *Mohammed*, that if a perſon give another a wound upon the head, and deprive him of ſight in conſequence, retaliation is to be inflicted for both the wound and the eye-ſight,—the offender, where his offence communicates an additional conſequence, being accounted a perpetrator with reſpect alſo to the ſecondary or occaſional effect thus produced;—in the ſame manner as where a wound is attended with loſs of life; in which caſe the wounder, being accounted a murderer, is liable to retaliation. In the caſe in queſtion, therefore, as the wound in the head is attended with loſs of ſight, the wounder is accounted the perpetrator, or immediate occaſion of ſuch privation; and as ſight is a ſubject of retaliation, retaliation by a deprival of ſight muſt therefore be inflicted. It is otherwiſe where a perſon ſtrikes off another's finger, and the next finger becomes powerleſs in conſequence; for a paralytic affection cannot occaſion retaliation. From this report of *Ibn Simmáia* it appears that, according to *Mohammed*, if a wound extend, in its effects, to any thing for which retaliation is practicable, it muſt be inflicted, in the ſame manner as where a wound, unrightfully inflicted, is attended with loſs of life. The reaſon for the more commonly received opinion above ſet forth, (that retaliation is not inflicted for the eye-ſight, when occaſioned by a wound on the head,) is that the loſs of

 ſight,

ſight, in the inſtance in queſtion, occurs merely in an *adventitious* way; in other words, the act, in the firſt inſtance, proceeded from the offender, and then occaſioned the loſs of ſight. In the caſe, moreover, of wounds communicating an additional injury, it is a rule that, if the legal effect* of the firſt injury ſtill remain, the ſecond injury is regarded merely as being *occaſional*; whereas if, on the contrary, no legal effect remain, it is conſidered as an immediate conſequence of the offender's act. As, therefore, in the caſe in queſtion, the legal effect of the wound ſtill remains, it [the wound] is conſequently regarded as the intermediate cauſe of the loſs of the eye-ſight, in the ſame manner as the digging of a well in the highway is the intermediate cauſe of homicide;—and retaliation is not inflicted in the inſtance of an intermediate cauſe. It is otherwiſe where a wound is attended with the loſs of life, for as, in that caſe, the legal effect of the firſt injury no longer remains, the ſecond injury is therefore conſidered as an immediate conſequence of the offender's act.

Retaliation is not incurred where the injury received produces any additional and unexpected defect.

If part of a tooth be broken off, and the remainder afterwards fall out, retaliation is not due;—and in the ſame manner, if a perſon give another two wounds upon the head, and the two wounds afterwards become one, retaliation is not due. *Ibn Simmàia* holds that it is due in both inſtances.

Caſes of injury to the teeth.

If a perſon ſtrike out another's tooth, and a ſecond tooth grow in its place, the fine for the firſt tooth is remitted, according to *Haneefa*; for here the offence in effect no longer remains, as the uſe and ornament both continue; and the caſe is therefore the ſame as if nothing whatever had been deſtroyed,—this being analogous to where a

* Meaning, the liability of the offender to fine or retaliation.

perſon ſtrikes out the tooth of an infant, which grows again, in which inſtance no fine whatever is incurred.

If a perſon ſtrike out another's tooth, and this perſon keep the tooth in its place until the gum grow round it, and it remain, after all, unlike to the reſt in point of uſefulneſs or beauty, a fine for the tooth is due from the ſtriker, the growing of the gum round it not being regarded, ſince it is impoſſible that the veſſels and nerve of the tooth ſhould be connected with it in the ſame manner as before.

If a perſon ſtrike out another's tooth, and this perſon draw a tooth of the ſtriker, in retaliation, and afterwards obtain, by growth, a new tooth, he in that caſe owes the ſtriker five hundred *dirms*, as it then becomes evident that he executed the retaliation unjuſtly, ſince it is the *deſtruction of the root* [the renovating power] which, in the caſe of a tooth, gives cauſe for retaliation; but here it appears that the root ſtill remains, for if it did not, the tooth could not poſſibly grow again. In the caſe in queſtion, therefore, the offence no longer remains, but is utterly done away.—(It is for the reaſon here alleged that, in executing retaliation for a tooth, a delay is obſerved of one year, according to all our doctors.)—Retaliation, however, cannot be executed upon the unjuſt exactor of it in return, becauſe of a doubt; and conſequently a pecuniary recompence is due from him.

If they be *looſened* by a blow, a delay of one year muſt be granted before paſſing judgment,

If a perſon ſtrike another upon the mouth, ſo as to looſen his teeth, a delay of a year muſt be obſerved, (as mentioned above,) in order to aſcertain the effect. If, therefore, the *Kázee* appoint a year's delay, and the perſon who was ſtruck appear before him without his teeth, previous to the expiration of the year, and the plaintiff and defendant diſagree,—the former aſſerting that his teeth fell out in conſequence of the blow he had received from him [the defendant,] and the

latter affirming that they fell out in consequence of a subsequent blow received from another,—the assertion of the plaintiff, upon oath, must be credited, in order that the advantage of fixing a term of delay may be maintained. It is otherwise where the parties differ after the expiration of the year; for in that case the oath of the striker must be credited.

which, at the expiration of that term, must be passed according to the event.

If, in the above case, the year of delay appointed by the *Kázee* expire, and the teeth do not fall out, nothing whatever is due from the striker. If, on the other hand, the teeth turn black, or decay, a fine for them is due,—from the *Akilas* in a case of misadventure, or from the striker in a *wilful* case:—but retaliation is not due, as equality cannot possibly be observed in the infliction of it, since it is not in the power of man to hit the teeth of the striker so as to produce the same precise effect upon them;—and for the same reason, if a person break off part of another's tooth, and the rest of the tooth turn black, retaliation is not to be inflicted.

There is no fine for a cut on the head which afterwards heals without leaving a scar;

If a person give another a cut upon the head, and the cut heal, and the hair grow upon the place, so that no mark of it remains, the fine is remitted, according to *Haneefa*, as the defect which would have occasioned the fine no longer exists. *Aboo Yoosaf* holds that the striker still owes a fine for the pain of the wound; because, notwithstanding the mark of the injury be effaced, yet the pain has been sustained, and that requires a recompence. *Mohammed*, on the other hand, maintains that the striker is liable merely for the expence of the surgeon; for as the wounded person has been subjected, by the act of the striker, only to the hire of the surgeon, and the price of his remedies, the case is therefore the same as if the offender had taken and destroyed so much of the wounded person's property. *Haneefa* says that the award for the pain, as mentioned above, can only be determined by considering for how much a person might undertake to bear such

ſuch a degree of pain, ſuppoſing it poſſible that a man were hired ſolely for the purpoſe of bearing pain. The award, therefore, for the pain is oppoſed to the trouble ſuſtained in bearing it. Now trouble is not valuable but under a contract of hire, either valid or invalid; and as no ſuch contract exiſts on the part of the offender, it follows that no value can be ſet upon the trouble of the wounded perſon in bearing the pain occaſioned by the offence; and conſequently, that the offender owes nothing on that account;—in the ſame manner as where a perſon ſtrikes another a blow with his fiſt, and puts him in pain; in which caſe nothing whatever is due; and ſo here likewiſe. With reſpect, moreover, to the fee of the ſurgeon, the wounded perſon has paid it at his own diſcretion, and therefore the offender is not liable for it.

nor for *ſtripes* which heal without leaving marks.

IF a perſon give another one hundred ſtripes (for inſtance) and thereby cut him, and the perſon ſo cut recover, in this caſe a fine is due for the ſtripes, provided they leave a mark; but if they do not leave a mark, the fine is remitted. *Aboo Yooſaf* maintains that a fine is due for the pain inflicted. *Mohammed*, on the other hand, alleges that the offender muſt pay the expence of a ſurgeon. The fine for ſtripes is to be determined by obſerving the proportion which the wounds they occaſion bear to thoſe for which a fine is appointed.—If, therefore, they be in the degree of one half, an half of the appointed fine for a wound is due; if, of one third, a third of the fine is due; and ſo forth.

A perſon *killing* another by miſadventure, after having *maimed* him, incurs only one fine.

IF a perſon ſtrike off the hand of another by miſadventure, and then, before he has recovered, ſlay him by miſadventure, he owes a complete fine, and the fine for the hand is remitted; becauſe both offences are of one ſpecies or deſcription, namely, *by miſadventure*; and the award for both is the ſame, namely, a fine; and as the conſideration for the perſon is alſo a conſideration for all its parts, it follows that the fine for the member is included in the fine for the whole

whole man, whence the case is the same as if he had slain him at the first.

Retaliation is not inflicted for a wound, until after the wounded person's recovery.

If a person [wilfully] wound another, retaliation must not be inflicted until the wounded person shall have recovered; because the prophet has said, "*In the case of wounds a delay must be observed for* "*one year*;" and also, because regard is paid to the *ultimate consequence* of a wound, as the award for it is at present unknown, since it is possible that it may prove fatal, and consequently that the act may prove to be murder. The award, therefore, for a wound is not fixed until it be healed.

The fine for *wilful* offences, and *compositions* for offence, are to be discharged by the offender.

In all wilful offences, where retaliation is remitted because of a doubt, a fine is due from the property of the offender; and all *compositions* for offence, also, fall upon the property of the offender;—for the prophet has said, "*The* Akilas *are not to pay the fine for a wilful* "*offence, nor the fine of a slave, nor a composition for offence, nor a fine* "*incurred by acknowledgment, nor any thing short of the fine for a* "Mawziha *wound.*"—It is to be observed, however, that in the first of the above cases (where retaliation is remitted because of a doubt) the fine is payable in three years; for as the offence, in this instance, is analogous to manslaughter or homicide by misadventure, because of the doubt, the same delay is therefore granted in the payment of the fine. In the case of composition, on the contrary, it is due upon the instant, being rendered obligatory by a particular contract, in the same manner as the price of the goods in a contract of sale.

A father murdering his son incurs a fine payable in three years.

If a father wilfully murder his son, a fine is due from his property, payable in three years. *Shafeï* maintains that it is payable upon the instant. The argument of our doctors is, that in all cases of offence the law has granted a delay in the payment of the fine; and the precepts of the law are not to be set aside, especially to countenance

tenance an aggravation, which the immediate exaction of the fine would amount to.

A fine incurred in consequence of acknowledgment must be paid by the acknowledger.

THE fine for any offence established upon the acknowledgment of the offender, is due from his property, his acknowledgment not being regarded with respect to his *Akilas*; because of the saying of the prophet before quoted, and also because the effect of an acknowledgment cannot extend beyond the acknowledger himself, (he having no authority over others,) and therefore does not affect his *Akilas*.

Wilful murder, by an infant or lunatic, requires a fine, payable by their *Akilas*.

WILFUL murder committed by an infant, a lunatic, or a person occasionally insane, [*Matooá*,] being the same as homicide by misadventure, the fine for it is due from the *Akilas*, and so likewise every other fine incurred by such persons to the amount of five hundred *dirms* and upwards. *Shafeï* says that wilful murder by those persons comes under the construction of *wilful*, insomuch that the fine for it is due from the property of the perpetrator; because the act was wilful undoubtedly, as the term *wilful* applies to any thing done by intention and with design; and retaliation is remitted in this instance solely because persons of the above description are not liable to any corporal infliction,—which argument, however, does not apply to their property, whence it is that expiation is required of them. The arguments of our doctors upon this point are twofold.—FIRST, it is recorded of *Alee* that he once decreed the fine incurred by a lunatic to be paid by his *Akilas*.—SECONDLY, an infant or lunatic is an object of compassion; and as an adult, or a sane person, is entitled to an alleviation, insomuch that his fine is paid by his *Akilas*, it follows that those are likewise entitled to an alleviation *a fortiori*. With rerespect, moreover, to what *Shafeï* says, that "their act is *wilful*," it is not admitted; for will depends upon knowledge; and knowledge depends upon reason, which in a lunatic is altogether wanting, and in

in an infant is defective. Neither are they (as he alleges) required to make expiation; because that is performed to cover a crime; and in the present instance there is no crime to be covered, as they are held incapable of committing a crime.

SECTION.

Of Embryos *in the* Womb.

A person striking a woman so as to occasion her miscarriage (of a free begotten fœtus) incurs a twentieth of the complete fine [a *Ghorra*,]

If a man strike a pregnant woman upon the belly, so as to cause her to miscarry of either a male or female fœtus, begotten free, a *Ghoorá* * being a twentieth of the complete fine for a man, namely, five hundred *dirms*, is due, upon a favourable construction. Analogy would suggest that nothing whatever is due from the striker in this instance; because the living existence of a fœtus is not a matter of certainty; and mere probability is not an admissible ground of claim. The reason, however, for a more favourable construction of the LAW in this particular is, that the prophet has said, "*A* GHORRA *is due for a fœtus*;" and by a *Ghorrá* is understood a male or female slave, of the value of five hundred *dirms*.

of which his *Akilas* are to pay their part;

The *Akilas* of the striker, in the above instance, are to pay their part of the fine [the *Ghorrá*] according to our doctors. *Málik* maintains that it is solely due from the property of the striker; because it

* This is a technical term, expressive of a fine of five hundred *dirms*,—derived from the appellation generally given in *Arabia* to an infant male or female slave of that value.

is

is paid in compenſation for a part of the body; for a fœtus is a part of the mother; and a compenſation for a part of the body, like the compenſation for a *finger* (for inſtance,) is due from the property of the offender. The arguments of our doctors are twofold.—FIRST, a precept of the prophet, who once decreed a *Ghorrá* to be paid by the *Akilas.*—SECONDLY, the *Ghorrá* is a compenſation for the perſon, (of the fœtus,) not for a part of the body;—whence it is that the prophet denominated it a *fine.*

and it is payable within a year:

THE *Ghorrá* is payable within a year. *Shafeï* ſays that it is payable in three years; becauſe it is a compenſation for the perſon, and accordingly is diſtributed among the heirs of the fœtus. The arguments of our doctors upon this point are twofold.—FIRST, It is recorded, in the traditions, that the prophet, upon a certain occaſion, decreed a *Ghorrá* to be paid by the *Akilas* within the year.—SECONDLY, the *Ghorrá* is a compenſation for the *perſon,* conſidering the embryo as a ſeparate exiſtence; but it is alſo a compenſation for a part of the body, conſidering the embryo as connected with the mother. Now we pay attention to both conſiderations; and accordingly, we adjudge the inheritance [of the fine among the embryo's heirs] on the *firſt* conſideration, and on the ſecond conſideration adjudge the term of one year for the payment,—the compenſation for a part of the body, where it falls ſhort of the complete fine, being invariably payable within a year. It is otherwiſe with reſpect to parts or diviſions of the fine; for any part thereof due from any perſon is payable in three years *.

but if ſhe produce a *living* child,

IF a perſon ſtrike a woman upon the belly, and ſhe in conſequence bring forth a living child which afterwards dies, a complete

* The *Ghorrá* is not conſidered merely as a *proportion of the fine,* but is a diſtinct and ſeparate ſpecies of fine, impoſed ſolely in the caſe of *embryos.*

which afterwards dies, he owes a complete fine.

fine is due from the ſtriker, as he, by ſtriking the mother, has produced the deſtruction of a living perſon.

If the woman ſo ſtruck miſcarry of a dead fœtus, and alſo die herſelf, the ſtriker is accountable both for a complete fine, and a *Ghorrá*.

If a perſon ſtrike a woman on the belly, and ſhe in conſequence miſcarry of a dead fœtus, and afterwards die, the ſtriker owes a fine for the murder of the mother, and a *Ghorrá* on account of the miſcarriage,—the prophet having ſo decreed in ſuch an inſtance.—If, on the contrary, the mother firſt die of the blow, producing a living child which afterwards dies likewiſe, the ſtriker owes one fine on account of the mother, and another on account of the child, as having here murdered two people. If, on the other hand, the mother die of the blow, producing a dead child, a fine is due for the mother, but nothing whatever for the child. *Shafeï* maintains that in this caſe a *Ghorrá* is due on account of the dead child; for as the death of the child has been, to all appearance, occaſioned by the blow, the caſe is therefore the ſame as if the mother had produced a dead child whilſt ſhe was yet alive. The argument of our doctors is, that it may have been the death of the mother which produced that of the child, as an embryo muſt neceſſarily periſh where the mother dies, ſince the life of the one is derived from that of the other:—hence it is doubtful whether the death of the child was occaſioned by that of the mother, or by the blow; and there is no reſponſibility in any caſe of doubt.

The ſtriker cannot inherit any part of the *Ghorrá*.

The fine or penalty incurred on account of an embryo goes as an inheritance to the embryo's heirs, as being a compenſation for his perſon. The ſtriker *, however, cannot have any ſhare in ſuch inheritance. If, therefore, a man ſtrike his wife on the belly, ſo as to cauſe her to miſcarry of a dead child, of his begetting, his [the father's] *Akilas* are reſponſible for a *Ghorrá*, of which he cannot inherit

* Meaning, the perſon who ſtruck the mother, and thereby occaſioned the miſcarriage.

any

any part; becaufe he has flain the child unrightfully, and is therefore guilty of murder; and there is no inheritance for a murderer.

Cafes of mifcarriage occafioned with refpect to *female flaves.*

If a perfon ftrike upon the belly a pregnant female flave, whofe pregnancy has proceeded from fome other than her mafter, and fhe, in confequence, mifcarry of a dead fœtus, but herfelf remain alive, the value of the fœtus muft in this cafe be eftimated at the fame rate as if it were alive. If, therefore, it be a male fœtus, a twentieth of the value is due; or, if a female, a tenth. *Shafeï* maintains that the ftriker is liable for a tenth of the value of the mother; becaufe, as the embryo is, in one view, a part of the mother, the rate of compenfation is therefore determined by the value of the mother, who is the original,—the rate of refponfibility for a part being always determined by the rate of the original. The argument of our doctors is that a *Ghorrá* is a compenfation for the perfon, not for a part or member of the body;—for a compenfation for a part or member is not due unlefs fome noticeable defect be occafioned in the original; (infomuch that if there be no defect occafioned in the original, nothing whatever is due;—as where, for inftance, a perfon ftrikes out the tooth of another, and a fecond tooth grows in its place,—in which cafe the ftriker is not liable for any thing;)—and in the cafe in queftion the defect occafioned in the original (namely, the mother) is of no account, fince a refponfibility attaches for the embryo whether a defect have been occafioned in the mother or not. As, therefore, the *Ghorrá* is evidently a confideration for the perfon, and not for any part or member, the rate of it is to be determined by the confideration for the perfon. Now, in eftimating the confideration for the *perfon*, the original thing is the *perfon of a freeman*; and the rate for the perfon of a free-begotten embryo, if it be a male, is a twentieth of the fine for a man, or, if a female, the tenth of the fine for a woman;—whence the fame rule holds with refpect to the embryo produced from a female flave. As, however, the *value*, in the cafe of a flave, is a fubftitute for the *fine*, in the cafe of a freeman, the ftriker therefore owes a twentieth of the value of the embryo, if it

be a male, or the tenth if it be a female. *Aboo Yoosaf* maintains that the ſtriker is reſponſible for any damage which the mother may have ſuſtained, in the ſame manner as holds in the caſe of animals,—the reſponſibility for a ſlave being (according to his tenets) a reſponſibility for property, as ſhall be preſently explained.

If a perſon ſtrike a pregnant female ſlave upon the belly, and her maſter afterwards emancipate "whatever may be in her womb," and ſhe then miſcarry of a living child, which ſhortly after dies, the value of it, as a living child, is due, and not the *fine*, notwithſtanding it died after manumiſſion; for the offender is accounted to have killed the child by a blow given to the mother at a time when it was ſtill a ſlave.

Expiation is not required for the deſtruction of an embryo.

Expiation is not due for an offence committed upon an embryo. *Shafeï* maintains that expiation is due in this inſtance; for an embryo is, in one view, a perſonal entity*; and as, in the caſe of a perſonal entity, life is moſt probable, an expiation muſt therefore be performed, out of caution. The argument of our doctors is that expiation is a ſort of penal infliction, as it has been ordained for the purpoſe of determent. Now determent applies ſolely to the *perfect man* †, not to any other ſubject; and an embryo is not a *perfect man*, for if it were ſo, a complete fine would be due. Our doctors, however, remark that if the ſtriker be deſirous of performing expiation, it is lawful; for as he has been guilty of a prohibited act, it is conſequently moſt laudable that he perform expiation and intreat forgiveneſs. It is to be obſerved that a fœtus not yet perfectly formed is the ſame as a perfect embryo with reſpect to all the rules concerning embryos;—becauſe the

* Arab. *Zât*.—Literally, a *ſelf*; meaning, a diſtinct and ſeparate being. The *Engliſh* language does not afford any term preciſely correſponding with it.—(For a further explanation of it, ſee the preceding book, p. 270.)

† Arab. *Zât Kâmil*; literally, a *perfect ſelf* or *perſon*.

ſaying

ſaying of the prophet, before quoted upon this ſubject, is unreſtrictively expreſſed; and alſo becauſe, as an imperfect fœtus is the ſame as a born child, with reſpect to conſtituting a female ſlave *Am-Walid*, the termination of *Edit*, and ſo forth, it is conſequently the ſame with reſpect to the law in queſtion. Beſides, from the inſtant of the firſt formation of the *fœtus* it becomes diſtinguiſhed from the body of the mother, and is therefore a diſtinct perſon.

CHAP. II.

Of Nuiſances placed in the Highway.

Buildings or timbers placed *in* or projecting *over* the highway may be removed by any perſon whatever.

If any perſon conſtruct a bath, or ſet out a water-ſpout, or erect a wall, or ſet out timbers from his wall to build upon, or ſet up a ſhop or booth,—in the public road, every other perſon is at liberty, however mean and humble his condition, to pull down the ſame, and remove it; becauſe all people are entitled to a free paſſage along ſuch a road for themſelves and their cattle; and the caſe is therefore the ſame as where a ſtranger erects a building upon a partnerſhip property; in which inſtance any one of the partners is at liberty to remove ſuch building; and ſo here likewiſe the removal is lawful to all, as all are alike partners in the rights of the road. It is lawful, however, for the perſon in queſtion, in all the above caſes, to make uſe of the bath, fountain, or ſo forth, where they are no way injurious to the community; for as he has the right (in common with others) of paſſing and

and repaſſing, it follows that, provided there be no injury ſuſtained, the obſtructing him in the enjoyment would be vexatious. But if they be injurious to the community, the uſe of them is abominable.

They cannot be erected or ſet up in a cloſed lane without the conſent of the inhabitants.

It is not lawful for an inhabitant of a lane ſhut up at one end to conſtruct in it a bath, ſet out a ſpout, or ſo forth, without the conſent of the other inhabitants, whether it be injurious to them or otherwiſe; for as the lane is, in fact, their property, (whence it is that the right of *Shaffa* with reſpect to the houſes in it appertains equally to them all,) their acquieſcence is therefore indiſpenſable. In a public road, moreover, the converſion to particular uſe is lawful to all men indiſcriminately, excepting only in inſtances where it may prove detrimental; for as it is impoſſible to obtain the acquieſcence of every individual of the community, each is therefore accounted a proprietor, leſt his right of uſe ſhould be altogether defeated:—but it is not ſo in a cloſed lane; for as it is practicable to obtain the acquieſcence of all the inhabitants of the lane, the privileges of partnerſhip therefore hold good, both actually and virtually, with reſpect to each individual of them.

A perſon erecting a building, &c. in the highway incurs a fine for any perſon

If a perſon erect a building in the public highway, as before mentioned, and it happen to fall upon and deſtroy any one, a fine is due from the *Akilas* of the perſon in queſtion; becauſe he was the occaſion of the deſtruction, and was guilty of a tranſgreſſion in having erected a building in ſuch a ſituation; and a perſon who occaſions a deſtruction is reſponſible where he has in any reſpect tranſgreſſed, as in the caſe of digging a well in the highroad. The ſame rule alſo obtains where the building falls upon and thus deſtroys a man or an animal.

(or *number* of perſons) it may occaſion

If a man ſtumble over the ruins of ſuch building, and fall upon another man, and they both die, the perſon who erected it is reſpon-

 ſible

ſible for both, and nothing is due from him who fell upon the other; for as the builder was the primary cauſe of the accident, the caſe is therefore the ſame as if he had ſtruck the perſon who fell, and ſo cauſed him to fall upon the other, and they had both died in conſequence.

the deſtruction of.

Caſe of death occaſioned by the fall of a *ſpout*.

IF a water-ſpout, ſet out from a houſe over the public road, fall upon any perſon, and kill him, an examination muſt be made to diſcover which part of the ſpout it was that hit the perſon; and if it appear that he was ſtruck by the end next the houſe from which it had projected, no atonement is due from the perſon who ſet it up, becauſe with reſpect to that part he is not a tranſgreſſor, ſince he had placed *that* in his own property; but if it appear that the deceaſed was ſtruck by the projecting end, the perſon who ſet it up is reſponſible, becauſe with reſpect to that part he is a tranſgreſſor, as having cauſed the ſpout to project over the road without any neceſſity, ſince he might to as good purpoſe have fixed it up ſo as not to project over the road at all.—(It is to be obſerved that in this inſtance expiation is not incumbent on the fixer up of the ſpout;—nor is he excluded from inheritance; for he is not the actual perpetrator, but ſtands merely guilty of *homicide by an intermediate cauſe.*)—If, on the other hand, it appear that the deceaſed was ſtruck by both ends of the ſpout, the fixer-up is reſponſible for an half of the fine, and the other half drops; in the ſame manner as where a perſon is wounded by another, and alſo by a lion or tiger, and dies,—in which caſe an *half* only of the fine is due from the wounder. If it cannot be diſcovered which part of the ſpout ſtruck the deceaſed, in this caſe alſo an half of the fine is due; for the accident may have happened in either of *two* ways, in one of which the complete fine is due, and in the other nothing whatever; and therefore, in contemplation of *both* circumſtances, an *half* is impoſed.

IF

A person having fixed up a nuisance upon his house, is responsible for any damage it may occasion even after he has sold the house.

If a person construct a balcony, projecting from his house, and then sell the house, and the balcony afterwards fall upon any person and destroy him,—or, if a person set up a piece of timber in the middle of the highway, and afterwards sell it, and deliver it to the purchaser, and he [the purchaser] declare him acquitted of all accidents which may happen from it, and leave it there until it fall and kill some person,—the seller is responsible in both instances, and nothing whatever falls upon the purchaser; because the act of the seller (in constructing the balcony, or setting up the timber) is not done away by the extinction of his property; and as such act occasions responsibility, he is responsible accordingly, and not the purchaser, who has not done any act to occasion responsibility.

A person laying fire in the highway is responsible for any thing which may be burnt in consequence.

If a person lay fire in the highway, and any thing be burnt in consequence, he, as having transgressed, is responsible for the damage. If, however, after the fire being thus laid in the highway, the wind should blow it to another place, and any thing be burnt in consequence, he is not responsible, as by the wind carrying off the fire his act is done away. Some, indeed, say that if the fire was laid in the highway at a time when the wind was high, he is responsible; because he laid the fire there, notwithstanding his knowledge of the probable consequence; and therefore the act of the wind, in carrying it off, is in effect the same as if he had himself carried it to the place which was burnt.

Workmen constructing a nuisance are responsible for any accident it may occasion before their work be finished.

If a person hire workmen for the purpose of constructing a balcony, or a penthouse, and such balcony or penthouse fall upon and kill a man before the workmen had finished it, the responsibility falls entirely upon the workmen; for the deceased was destroyed in consequence of their act; and so long as they continue engaged in the work, the balcony or penthouse is not held to be delivered to their employer. Their act is therefore construed into homicide, insomuch that

that they muſt perform an expiation for it. Beſides, as their employer did not hire them to *kill* any perſon, but to conſtruct an erection, the accident has therefore no relation to the contract of hire, but attaches to the workmen alone, whence the damage alſo attaches ſolely to them, as being a conſequence of their act. If, on the contrary, the balcony or penthouſe in queſtion fall after the work is finiſhed, the owner of the houſe is reſponſible, on a favourable conſtruction; for in this caſe the contract of hire has been completely fulfilled, inſomuch that the workmen have become entitled to their wages. Their act has therefore devolved upon their employer, who conſequently ſtands in the ſame predicament as if he had himſelf performed the work; and he is reſponſible accordingly.

A perſon is reſponſible for any accident occaſioned by his throwing water in the highway,

IF a perſon ſpill water on the highway, either purpoſely, or by performing his ablutions there, and a man or animal periſh in conſequence, a fine for the man is due from the perſon's *Akilas*, or a compenſation for the animal from the perſon himſelf; becauſe he has been guilty of a tranſgreſſion, injurious in its conſequences to the paſſengers upon the road. It is otherwiſe where water is ſpilled in a cloſed lane by one of the inhabitants, and a man or animal periſhes in conſequence; or, where an inhabitant of ſuch a lane ſets down any thing in the middle of it, and a man or animal falls over the ſame, and ſo periſhes; for in none of theſe caſes does reſponſibility attach to him, as any inhabitant of a cloſed lane is entitled, in virtue of his reſidence, to perform theſe acts in ſuch lane, in the ſame manner as in a partnerſhip houſe. Lawyers remark that what is here advanced applies only to a caſe where water is ſpilled upon the road in large quantities, ſuch as commonly renders the footing inſecure;—but that if the water be only in a ſmall quantity, and not in a degree to endanger the paſſenger, there is no reſponſibility.

unleſs the perſon who ſuſtained the

IF a perſon knowingly and wilfully paſs over a road in which water has been ſpilled, as above, and periſh in conſequence of falling

 in

damage had *wilfully* passed over such water.

in it, nothing whatever is incurred by the person who spilt the water, since here the deceased has perished from his own wilfulness or obstinacy. Some, however, remark that this rule obtains only where the water is spilled over a *part* of the road, for in that case a part remains unaffected by it;—whereas, if it extend over the whole road, the passengers have no option; and (as they further observe) the same distinction holds with respect to *timbers*, or other nuisances, set up in the highway.

The person who directs water to be sprinkled in the road is responsible for accidents.

If a shopkeeper desire a person to sprinkle water in the front of his shop, and another person fall there, and die in consequence, the responsibility rests upon him who gave the order, [the shopkeeper,] on a favourable construction;—(and so likewise, if a shopkeeper hire a workman to erect a stall or other edifice in the front of his shop, and after it is finished a person fall over it and die;)—because the order given by the shopkeeper is of a lawful nature, his right to the precincts in front of his shop being superior to that of any other person; and therefore the act of the person whom he directed must be referred to himself.—It is otherwise where a person orders another to throw water, or erect an edifice, in the middle of the highway; for in this case the responsibility rests upon him who obeyed the order, as an order to this effect is unlawful, the man who gave the order possessing no superior right in the highway.

Case of a person digging a well, or laying a stone, in the highway.

If a person dig a well, or lay a stone, in the middle of the highway, and a man perish in consequence, a fine is due from the *Akilas* of the person who placed such nuisance there. If, on the contrary, an animal were thus to perish, the compensation for the same would be due from the *property* of the person in question; because, as he has been guilty of a transgression, he is therefore responsible for any accidents it may occasion; and as the *Akilas* are not implicated except in offences against the *person*, it follows that, in cases of

of *property* merely, the reſponſibility reſts ſolely upon the offender himſelf.

The throwing dirt, or digging a hole, in the highway is the ſame as placing a ſtone there.

THE throwing of dirt or earth in the highway, or the carrying away of earth thence, ſo as to occaſion an hollow, is the ſame as placing there a ſtone or log of wood, for the reaſons already explained. It is otherwiſe where a perſon merely *ſweeps* the road; for in this caſe he is no way liable to reſponſibility, as his act of ſweeping does not occaſion any nuiſance, but rather the contrary. If, however, this perſon leave an heap of the ſweepings in the road, ſo as to occaſion accidents, he is reſponſible, ſince in acting thus he is guilty of a tranſgreſſion.

The remover of a nuiſance to another ſpot incurs reſponſibility for any accident it may afterwards occaſion.

IF a perſon lay a ſtone in the highway, and a ſecond perſon remove the ſtone to another part of the road, and a man be thereby deſtroyed, the reſponſibility reſts upon the remover of the ſtone; becauſe the act of the original depoſitor is abrogated in its effect, by the place which he had occupied with the ſtone being cleared, and another place being occupied with it by the act of the remover,—who is therefore reſponſible for the conſequence.

There is no reſponſibility for accidents occaſioned by a *ſewer* conſtructed in the highway by public authority.

IT is related in the *Jama Sagheer*, that if a perſon conſtruct a common ſewer in the public highway, by the order or compulſion of the Sultan, he is not reſponſible for conſequences; becauſe, in conſtructing the ſewer, he has not committed any tranſgreſſion, for in ſo doing he acted by order of the Sultan, who poſſeſſes a paramount authority with reſpect to all public rights. It is otherwiſe where a perſon does ſo without ſuch an order; for in that caſe he is reſponſible, as having tranſgreſſed, in preſuming to encroach upon the public rights without a ſufficient authority:—beſides, acts with reſpect to the highway are permitted under a condition of ſafety,—that is, under the condition that they be not injurious. It is to be obſerved that

 this

this diſtinction holds in all caſes of acts with reſpect to the highway, as the ſame reaſoning equally applies to every other inſtance.

A perſon digging a well in his own land is not reſponſible for any death it may occaſion.

If a perſon dig a well in his own land, and another be killed by falling into it, the digger of the well is not reſponſible, as he has not tranſgreſſed; and the ſame rule alſo holds where a perſon digs a well within the precincts of his houſe, a man being entitled ſo to do, for the purpoſes of domeſtic convenience. Some ſay that this rule with reſpect to a well dug in the precincts of a houſe holds only in caſes where the houſeholder has either a property in ſuch precincts, or poſſeſſes a right, by immunity, of digging therein;—but that where the precinct is public, or held in partnerſhip, (as in the caſe of a court or cloſed lane,) the digger is reſponſible, ſince in digging the well under ſuch circumſtances he is guilty of a tranſgreſſion.—This is approved.

A perſon falling into a well, and there dying of *hunger*, does not occaſion reſponſibility.

If a perſon dig a well or pit in the highway, and another happen to fall in, and there periſh of hunger, the digger is not reſponſible, according to *Haneefa*, becauſe the deceaſed has here died of *hunger*, and not in conſequence of the excavation, as his death cannot be attributed to the latter unleſs he be killed by the fall, which is not the caſe in this inſtance.

Workmen employed to dig a well in another'sland are not reſponſible for accidents unleſs they be aware of the treſpaſs.

If a perſon hire workmen to dig a well in the precincts of his neighbour's habitation, and they dig it accordingly, and a man be killed by falling into it, the reſponſibility reſts upon the employer, not upon the workmen, provided they dug the well under the idea of the place being within the precincts of their employer; becauſe, as a contract of hire, ignorantly engaged in, is lawful and valid in appearance, their act is therefore referred to the hirer, they themſelves having proceeded under a deception:—the caſe being, in fact, the ſame as where a perſon deſires another to ſlay "ſuch a goat," and he

he does ſo accordingly, and it afterwards appears that the goat was the property of another,—in which caſe the compenſation is paid by the perſon who gave the order. It is otherwiſe where the workmen dig the well, knowing, at the ſame time, that the place is not within the precincts of their employer; for in this caſe they are reſponſible; becauſe the contract is not here valid in appearance, as they have not been deceived.

The builder of a private bridge, &c. is not reſponſible for any life which may be loſt in paſſing over it.

IF a perſon conſtruct a bridge, or lay a plank, in the highway [over a ſtream] without authority, and another, wilfully paſſing over ſuch bridge or plank, fall off and periſh, ſtill the perſon in queſtion is not reſponſible; becauſe although he be the creator of the cauſe, and therefore a tranſgreſſor, yet as the deceaſed was a wilful agent *, and tranſgreſſed in his own act †, his deſtruction is therefore referred to himſelf; and alſo, becauſe where the act of one who has an option intervenes, it precludes the reference of the deſtruction to the firſt agent; as where (for inſtance) a perſon digs a well in the highway, and another gives a man a puſh, and thereby cauſes him to fall into the well, ſo that he dies,—in which caſe the reſponſibility reſts upon the perſon who gave the puſh, ſince his act, being the act of a wilful agent, precludes a reference of the deſtruction to the digger of the well.

A porter is reſponſible for accidents occaſioned by his load.

IF a perſon be carrying a load upon the highway, and the load fall upon any perſon ſo as to kill him, or fall in the road ſo as to cauſe a perſon to ſtumble and thereby occaſion his death, the reſponſibility reſts upon the carrier;—whereas, if a perſon be wearing a cloak upon the highway, and it fall upon any perſon, or upon the road, ſo as to occaſion death, the carrier of the cloak is not reſponſible.

* Arab. *Mobaſhir*;—literally a perpetrator.

† (Probably) as having paſſed over the bridge, &c. without leave from the builder of it.

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The difference between these two cases is, that as the business of the carrier is to take care of his parcel or load, the circumstance of restricting his liberty of carrying it to the condition of safety does not operate as a hardship upon him;—whereas, the business of the wearer is not merely the taking care of his garment, but the *wearing* of it; and therefore, as the restricting his liberty of use to the condition of *safety* would operate as a hardship, his use of it is not restricted to any particular conditions, but is allowed to him generally.

A stranger hanging up a lamp, or strewing gravel, &c. in a mosque, is responsible for any accidents which may arise therefrom;

If a person hang up a lamp, or spread a carpet, or strew gravel in a mosque appropriated to any particular tribe or people, and any person perish in consequence, nothing is incurred, provided the person who hung up the lamp, or so forth, be one of that people;—whereas, if a stranger do any of these acts, he is responsible. In the same manner, if one of the people of a mosque sit in that mosque, and any person perish in consequence, he is not responsible, provided he be, at the time, engaged in prayer: but if he be engaged in reading the KORAN, or teaching, or be waiting for the time of prayer, or sleeping (either during prayer or at any other time,) or conversing, he is responsible. The reason for the law in the former instance is, that as all the regulations of a mosque, such as the appointment of a priest or a supervisor, the opening and shutting of the doors, and so forth, appertain solely to the people to whom the mosque belongs, and not to any others, their acts are therefore of a neutral nature, and are not restricted to the condition of safety; whereas the acts of all others with respect to it are either transgressive, or permitted under the condition of safety; and a pious intention does not prevent responsibility where the person errs in the *manner* of his piety. The reason for the law in the second instance is, that a mosque is constructed particularly for the purpose of prayer, to which reading the KORAN, teaching, or so forth, are only (as it were) appendages; and as it is indispensable that a distinction be made between the original and the branch, or dependant, the act of prayer (which is the original) is therefore permitted generally,

generally, without any reſtriction to the condition of ſafety, whereas all other acts or employments are ſo reſtricted.

but he is not reſponſible for accidents occaſioned by his own perſon.

IF a ſtranger to the people of the moſque be at prayers in it, and a perſon fall over him, and die in conſequence, the ſtranger is no way reſponſible; becauſe (as has been already obſerved) a moſque is conſtructed for the purpoſe of prayer; and although the right of public prayer appertain ſolely to the people of that moſque, yet any perſon is entitled to pray there alone.

SECTION.

Of Buildings which are in danger of falling.

The owner of a ruinous wall is reſponſible for any accident occaſioned by it after having received due warning, and requiſition to pull it down.

IF a wall belonging to any perſon lean towards the public highway, and a perſon require the owner to pull it down, and call people to witneſs his requiſition, and the owner neglect taking it down, until at length it fall and deſtroy either man or property, the owner is reſponſible for the damage ſo occaſioned, on a favourable conſtruction. Analogy would ſuggeſt that he is not reſponſible; (and ſuch is the doctrine of *Shafeï*;) for he has neither perpetrated the deſtruction himſelf, nor done any thing tranſgreſſively to occaſion it, as he built the wall in his own right, and its tottering, or the wind ſhaking it, were not his acts, whence the caſe is the ſame in effect as if the wall had fallen previous to the requiſition, and calling of witneſſes, as aforeſaid. The reaſons, however, for a more favourable conſtruction of the LAW in this particular are twofold.—FIRST, upon a wall leaning

over

over towards the highway, the public communication becomes interrupted, and the way * occupied by the property of the owner of that wall. When, therefore, any person makes application to him, and requires him to clear the way, it is incumbent on him so to do; and he is consequently guilty of a transgression in neglecting it, and therefore remains responsible for any damage it may occasion;—in the same manner as where a man finds his garment upon another, and demands it of him; in which case, if that other refuse to deliver it, he is guilty of a transgression, and is consequently responsible for the garment if it should be lost whilst in his possession.—SECONDLY, if the owner of the wall were not made responsible for any damage its falling might occasion, he would neglect to remove the nuisance, and consequently passengers would sustain an injury, as they would be deterred from going by the place, for fear of the wall falling on them. The removal, moreover, of any thing injurious to the community is a duty incumbent upon the person to whom it belongs; and as the owner of the wall is the person immediately concerned in the present instance, it is therefore incumbent on him to take it down, notwithstanding his so doing may be prejudicial to himself, since private interest must yield to public benefit. It is requisite, however, that such a time be allowed as may admit of the owner taking down his wall, this being indispensable to the establishment of offence from neglect or delay. If (after the requisition for pulling it down) any person be destroyed by the wall falling, a fine is due from the *Akilas* of the owner, not from the owner himself; for as the offence, in this instance, is still short of *homicide by misadventure*, an alleviation is admitted *a fortiori*, lest the owner should suffer too severely:—but if, on the contrary, *property* (such as an animal, or household goods) be destroyed, the compensation for it must be paid by the owner of the wall, as the *Akilas* are not implicated in the responsibility for property. It is to

* Arab. *Hàwá*; literally, the *air*, or *atmosphere*; a phrase generally used where the nuisance or obstruction is not immediately upon the ground.

be obſerved that the *application* [that is, the requiſition for pulling down the wall] is a condition of reſponſibility, but not the *taking to witneſs*; for the latter is called in aid merely with a view to eſtabliſh the former, in caſe of the owner of the wall denying it, and is therefore uſed only out of caution. The *application* is made by the claimant ſaying to the owner of the wall, "Your wall has become dangerous;—you muſt therefore take it down, leſt it prove deſtructive;" and the *taking to witneſs* is effected by his ſaying to the byſtanders, "be ye witneſs that I have required this perſon to take down his "wall."—It i proper, however, to remark that the taking to witneſs before a wall has become ruinous or crooked is not valid, as tranſgreſſion cannot be eſtabliſhed previous thereto.

A perſon building a *crooked* wall is reſponſible for the damage occaſioned by its falling.

IF a perſon build a wall in the highway, leaning over from the firſt, lawyers remark that he is reſponſible for any thing which may be deſtroyed by its falling, independant of the requiſition before mentioned, as having been guilty of a tranſgreſſion in the building of it, in the ſame manner as a perſon who conſtructs a balcony or gallery projecting over the highway.

The requiſition is eſtabliſhed upon the evidence of one man and two women.

THE evidence of one man and two women ſuffices to eſtabliſh the application above deſcribed; for it is not here requiſite, as in caſes of murder, that both the witneſſes be males, the death occaſioned by the falling of a wall not amounting to murder.

A *Zimmee* may make it, as well as a *Muſſulman*;

A MUSSULMAN and a *Zimmee* are upon an equal footing with reſpect to the requiſition for pulling down the wall, as all mankind are partners in the right of paſſing along. The application is therefore valid, by whomſoever it be made,—whether a man, a woman, a freeman, a *Mokâtib*, a ſlave, (provided his maſter give him permiſſion to litigate the point,) or an infant, (with permiſſion to litigate from his guardian.)—It is alſo valid whether made by the Sultan or any other;

 for

for as the application affects a matter of right in which all are equally concerned, all are therefore equally entitled to make it.

or the inhabitants of a neighbouring house;

If a wall lean over towards a neighbouring house, the owner of the house is entitled to require it to be pulled down,—or the tenants, whether they be hirers or borrowers,—for to such persons in particular the right appertains in this instance.

and if those last grant a term of delay, it is valid.

If the owner or tenants of the house grant the owner of the wall a term of delay, or exempt him from responsibility for any damage which may be occasioned by it, it is lawful, and the owner of the wall is not responsible in case of any thing being destroyed by its fall, because the right of the owner or tenant alone is concerned. It is otherwise where a wall leans over a road, and the magistrate, or the person who made the requisition for pulling it down, grants a term of delay, or an exemption; for this is not valid; and the owner of the wall consequently still remains responsible in case of its falling and destroying any thing; because here the right of every one is concerned; and the magistrate, or the person who made the requisition, is not at liberty to annul a right of the public.

A person selling a ruinous house, after requisition, is not responsible for any accidents it may occasion.

If, after application, a person sell a house, the wall of which leans over, and the purchaser take possession of it, and any thing be then destroyed by its falling, there is no responsibility whatever upon either party.—The *seller* is not responsible, as offence cannot be established in him unless it appeared that he neglected to take down the wall, having at the same time ability so to do; and here his ability has terminated with the sale:—neither is the *purchaser* responsible, because no application has been made to him. But if application be made to the purchaser after the sale, he then becomes responsible, as in that case he possesses the ability of complying with the requisition.

THE application and requisition for pulling down a ruinous wall are valid when made to any one who possesses the power of pulling it down;—but not when made to one who is not possessed of this power, such as a pawnee, a trustee, a borrower, or a renter. The application and requisition in question are therefore valid when made to the pawner of a house, as he has it in his power to pull down the wall by redeeming his house. They are also valid with respect to a wall belonging to an infant when made to the infant's parents or guardians; and if, after the requisition, they neglect to pull down the wall, and any thing be destroyed by the fall of it, the compensation falls upon the infant's property, because their act is, in effect, the act of the infant. They are likewise valid with respect to a *Mokâtib*, as he may be authorized to pull down a wall; and also, with respect to a trading slave, whether indebted or otherwise, for the same reason;—and if, in this last instance, the slave neglect to pull down the wall, and any property be destroyed by the wall falling, the compensation for it rests upon the slave's person *;—or, if a *man* be destroyed, the fine is due from the master's *Akilas*.

The requisition (to be *valid)* must be made to a person capable of complying with it.

IF a ruinous wall be held in coparcenary by several heirs, and a person apply to one of the heirs, requiring him to pull down the wall, the application affects that heir in particular; and accordingly, if any thing be afterwards destroyed by the falling of the wall, the heir who was applied to is responsible in proportion to his share of inheritance; for it was in his power to have remedied the nuisance by referring the matter to the *Kâzee*, and representing the circumstance to him, requiring his order to his coparceners (if present) to pull down the wall, —or (if absent) his authority to do so himself.

The requisition, made to one of several coparceners, affects that coparcener in particular.

IF a ruinous wall fall upon a man, after application, and destroy

After a wall falls, it is the

* That is, he must either be made over or redeemed, as in other cases of offence.

duty of the owner to remove the ruins; and failing of this, he is responsible for subsequent accidents.

him, and another perſon fall over the corpſe, and ſo periſh, the proprietor of the wall incurs nothing for this ſecond perſon, becauſe the removal of the corpſe was incumbent upon the *heirs*, not upon *him*. If, on the contrary, another perſon, after the wall falling, be deſtroyed by ſtumbling over a fragment of the ruins, the owner of the wall is reſponſible, as it is his buſineſs to clear the road of all ſuch fragments, ſince thoſe are his property, and an application with reſpect to the wall itſelf is (as it were) an application with reſpect to the fragments, the intention of it being *to clear the highway*.

The owner of a ruinous wall is not reſponſible for accidents occaſioned by the fall of any article from it, unleſs ſuch article belong to him.

If a perſon make application concerning a wall which leans over towards the highway, and it afterwards fall, throwing down a vaſe, or urn, which had ſtood upon it, and a man be thereby deſtroyed, the owner of the wall is reſponſible, provided the vaſe or urn was his property, as the freeing the road from it reſted upon him. If, on the contrary, the vaſe or urn be the property of ſome other, the owner of the wall is not reſponſible, ſince the freeing the road from the vaſe or urn reſts upon him to whom it belongs.

CHAP.

CHAP. III.

Of Offences committed *by* or *upon* Animals.

THE rider of an animal is anſwerable for any thing which the animal may deſtroy by treading it down, or by ſtriking it with his head, his forefeet, or his body: but he is not reſponſible for any thing which the animal may deſtroy by ſtriking it with his hind-feet or his tail.—In ſhort, it is a rule that the right of paſſing on the highway is allowed to the whole community, under the condition only *of ſafety*; for it is the exerciſe of a privilege in the paſſenger, with reſpect to *himſelf* in one ſhape, and with reſpect to *others* in another ſhape, the right of paſſage being participated among the whole community,—whence it is adjudged to all, under the condition of ſafety, with a view to the intereſt of both parties.—It is moreover to be obſerved, that a reſtriction to the condition of ſafety can obtain only in matters where an attention to ſafety is practicable; for if it were impoſed where ſuch attention is impracticable, the exertion of the privilege [of travelling on animals] would be altogether precluded. Now it is poſſible for a man to guard againſt the animal he rides treading men or property under foot, and ſuch like, ſince a perſon who rides is under no neceſſity of treading down every thing that lies in his way: but he cannot guard againſt the animal ſtriking things with his hind-feet or tail, ſince an animal unavoidably uſes theſe parts, in travelling, without any immediate controul from its rider. Accordingly, he is reſtricted to the condition of ſafety in the former inſtance, but not in the latter. If, however, he ſtop the animal in the highway, he is reſponſible for any deſtruction which may be occaſioned by a kick of its

The rider of an animal is reſponſible for any damage occaſioned by it, which it was in his power to prevent;

and if he ſtop the animal in the road, he

is responsible for *all* accidents.

its hind-feet, or a stroke of its tail, since it is possible for him to avoid stopping, although it be not in his power to guard the animal from kicking, or so forth; and therefore, as he transgresses in so stopping, he is responsible for any damage which may ensue in consequence.

He is also responsible for any injury sustained from a *large* stone, thrown up by the animal's hoof:

If an animal's hoof strike upon and throw up gravel or small stones, and a person's eye be put out, or his clothes damaged thereby, the rider is not responsible; whereas, if the animal so throw up a *large* stone, he is responsible. The reason of this is that in the former case it was impossible to guard against the accident, since an animal cannot move without being liable to it; whereas, in the second instance, it is possible to guard against the accident, since animals may easily be so guided as to avoid large stones. It is to be observed that, in all these cases, a second rider (that is, one who rides behind the first) is in the same predicament as the first, with respect to responsibility.

but not for any accident occasioned by its dung or urine,

If an animal, whilst travelling, discharge its dung or urine on the highway, and any person perish in consequence, the rider is not responsible, since it was impossible to guard against this; and the same rule also holds where the animal stands still whilst discharging its dung or urine, or when the rider stops it for this purpose, since there are several animals which cannot perform these whilst in motion. If, however, the rider have stopped the animal for any other purpose, and it discharge its dung or urine, and any person perish in consequence, he [the rider] is responsible, as in so doing he was guilty of a transgression, since he stopped the animal without any absolute necessity, knowing, at the same time, that this must be injurious to the passengers.

unless he had stopped it on the road unnecessarily whilst discharging those.

THE driver of an animal is refponfible for any damage the animal may occafion with either its fore or hind-feet, whereas the *leader* of an animal is refponfible for the damage occafioned by its *fore*-feet only, not by its *hind*-feet. The compiler of the *Hedáya* remarks that this is what is faid by *Kadooree* in his compendium;—and feveral of our modern doctors coincide in the fame opinion; becaufe, as a perfon who drives an animal before him has a view of his hind-feet, it is therefore in his power to avoid accidents from them; whereas, a perfon who leads an animal after him, not feeing or having any command over its hind-feet, cannot poffibly guard againft fuch accidents. Moft of our modern doctors, however, are of opinion that as the driver of an animal has no more command over its hind-feet than a perfon who leads it, he therefore is not refponfible, any more than the other, for the damage which may be occafioned by them;—and this is approved.

Refponfibility attaching to the *driver* or *leader* of an animal.

IT is written in the *Jama Sagheer*, that the *driver* or *leader* of an animal is refponfible in all the inftances in which refponfibility lies againft the rider; for as they (as well as one who rides) occafion the damage by taking the animal to the place where it is committed, their fo doing is therefore reftricted to the condition of fafety, as far as may be practicable, in the fame manner as holds with refpect to the rider.

THE rider of an animal is required to perform expiation only where he has happened to *tread down* a perfon,—not in any other inftance;—but no expiatory act whatever is required from the *leader* or *driver* of an animal. The reafon of this is that, in the cafe of *treading down* a perfon, the rider is, in effect, the perpetrator of the homicide, as it is by *his* weight that the perfon is deftroyed,—the weight of the animal being merely a dependant upon the weight of its rider, fince to him the *motion* of it muft be referred, it being the *inftrument* of fuch motion.

Expiation is required from the *rider* of an animal,—not from the *leader* or *driver*.

motion. It is otherwiſe with the *leader* or *driver* of an animal; for thoſe are only the producers of the intermediate cauſe, and not the actual perpetrators of the homicide, as their acts did not immediately affect the ſubject; (and the ſame reaſoning holds with reſpect to the act of the rider in all caſes except that of *treading down*;)—and expiation is enjoined, in caſes of homicide, only where the offender is the *actual perpetrator* of the homicide, not where it is effected by an *intermediate cauſe*. In the ſame manner, the rider of an animal is excluded from his ſucceſſion to the deceaſed by bequeſt or inheritance, in a caſe of *treading down*, but not the *leader* or *driver*, excluſion from bequeſt or inheritance being reſtricted to the *actual perpetrator*.

If there be a *rider*, as well as a leader or driver, reſponſibility attaches to the former, not to the latter.

If one man ride upon an animal whilſt another drives or leads it along, and it tread down a man, ſome ſay that no part of the reſponſibility falls upon the driver or leader; becauſe the rider (as has been already explained) is accounted the *actual perpetrator* of the homicide, and the driver or leader the producer of the intermediate cauſe; and the accident muſt be referred to the actual perpetrator, rather than to the producer of the cauſe.—This is approved.

Caſe of two riders driving againſt and killing each other.

If two men be riding on two different animals, and ruſh with violence againſt each other, ſo that they both die, the fine for each is due from the *Akilas* of the other. *Shafeï* and *Ziffer* maintain that in this caſe the *Akilas* of each party owe an *half* fine only, on account of the other*, each having died as much in conſequence of *his own* act as of that of the *other*, whence one half of the homicide, on each part, is of no account.—The argument of our doctors is, that the death of each party muſt be referred ſolely to the act of the other, and not in any degree to *his own* act, for *his* act (namely, paſſing along

* The fines here (as in all other caſes) go to the heirs of each party reſpectively.

the highway) is purely of a neutral nature, and an act of ſuch a nature does not admit of the death being referred to it ſo as to occaſion reſponſibility. It may indeed be objected, that upon this ground the whole of the blood is of no account, and of courſe that nothing whatever is due from the *Akilas* on either ſide;—for as the act of both (namely, paſſing along the highway) is of a neutral nature, it cannot be made the occaſion of reſponſibility. In reply, however, to this it is to be obſerved, that although the act of each party, reſpectively, be of a neutral nature, ſtill it is reſtricted to the condition of ſafety; and a neutral act, reſtricted to the condition of ſafety, notwithſtanding that it be not an occaſion of reſponſibility with reſpect to the party *himſelf*, is nevertheleſs ſo with reſpect to the *other* party. It is to be obſerved, however, that a complete fine for each rider is due only where they have happened to ruſh againſt each other (as above) by *miſadventure*; for where they have done ſo *wilfully*, an *half* fine only is due on account of each. All that is here advanced proceeds on the ſuppoſition of the parties being *freemen*; for if they be both *ſlaves*, the blood of each is of no account*:—it is not of any account in a caſe of *miſadventure*; becauſe the offence of a ſlave affects only his own perſon, in this way, that his maſter makes his perſon over to the avenger of offence, or pays him an atonement in lieu thereof; but in the preſent inſtance the perſons of both ſlaves are deſtroyed, in ſuch a manner that the maſters have no concern with it; nor have they left any thing in lieu thereof; and hence the blood of each muſt needs be of no account:—and ſo likewiſe in a *wilful* caſe; becauſe each of them has periſhed at the time of his offence, without leaving any thing in lieu of his perſon, and in ſuch a manner that the maſters have no concern in it,—whence the blood of each muſt needs be of no account in this inſtance alſo. If one of the parties be a ſlave, and the other a free-

* Literally, "—*goes for nothing.*"—The tranſlator adopts the phraſe here uſed in preference, as being ſomewhat more elegant, and expreſſing the ſenſe of the author with equal correctneſs.

 man,

man, then, in a cafe of mifadventure, the freeman's *Akilas* are refponfible for the value of the flave, which muft be paid to the freeman's heirs, whofe right is extinguifhed with refpect to any thing beyond fuch value;—(as if, for inftance, the value of the flave were one thoufand *dirms*; in which cafe the freeman's heirs would be entitled to take, from his *Akilas*, one thoufand *dirms*, the remaining nine thoufand of the freeman's fine being remitted;)—becaufe, in conformity with the tenets of *Haneefa* and *Mohammed*, the value of the flave is due from the freeman's *Akilas*, as the compenfation for his [the flave's] perfon, for which the *Akilas* are refponfible;—and of this the freeman's heirs are entitled to poffefs themfelves, becaufe it is (in effect) an *equivalent* for the flave;—but their right to any thing beyond the value of the flave drops, as the flave has left nothing behind him to anfwer fuch excefs. If, on the contrary, the parties, being a flave and a freeman, rufh againft each other *wilfully*, the freeman's *Akilas* are accountable only for *half* the value of the flave, (a wilful cafe only inducing *half* of the refponfibility,) which muft be paid to the freeman's heirs; for as, in this inftance, a moiety of the fine for the freeman was due from the flave, and he left nothing except the half of his value, (as above,) they are therefore entitled to poffefs themfelves of the fame, and the remainder of the half fine, beyond half the value of the flave, is remitted.

The driver of an animal is refponfible for any accident occafioned by its faddle, &c. falling off.

IF a perfon be driving an animal along, and the animal's faddle or load, or any thing elfe which may be upon it, fall off, and kill a man, the driver is refponfible, as having been guilty of a tranfgreffion, in neglecting to fecure the load, or fo forth, properly upon the animal, for if it had been fufficiently fecured, it could not have fallen off.

Refponfibility in the cafe of a ftring of camels.

THE perfon who leads a ftring of camels is refponfible for any thing which they may tread down. If, therefore, the camels tread down a *man*, the fine for him is due from the leader's *Akilas*, or, if

they

they tread down *property*, he is to make compenſation for the ſame; becauſe it was his buſineſs to look to the camels, in the ſame manner as a driver; and as, where he neglects ſo to do, he is guilty of a tranſgreſſion, and tranſgreſſion occaſions reſponſibility, he is reſponſible accordingly: — but the reſponſibility for the *perſon* reſts with his *Akilas*, and that for the *property* with himſelf, as has been already explained. If there be a *driver* to the ſtring, as well as a *leader*, the reſponſibility reſts equally with both; becauſe, as the leader of one camel is the leader of the whole, ſo the driver of one is the driver of the whole, the halter of each being faſtened to the one immediately before him. This rule, however, obtains only where the driver is at the end of the whole ſtring; for if he be in the middle, and there lay hold of the halter of one of the camels, he alone is reſponſible with reſpect to ſuch damage as may be occaſioned by the camels which come after him; becauſe the leader at the head of the whole cannot be ſaid to lead thoſe, on account of the ſtring being thus interrupted; —but both are equally reſponſible for any damage occaſioned by the camels before him, ſince he *drives* thoſe at the ſame time that he leads the others.

IF a perſon faſten a camel to a ſtring of camels, with the leader's knowledge, and the camel ſo faſtened tread down a man, the fine for him is due from the leader's *Akilas*, becauſe it was in his power to have looked after and watched his camels, ſo as to prevent an additional one being joined to the ſtring; and in neglecting ſo to do he was guilty of a tranſgreſſion; which occaſions reſponſibility. Now the homicide, in this inſtance, is *homicide by an intermediate cauſe*; and the fine for it therefore falls upon the *Akilas*, in the ſame manner as in a caſe of homicide by miſadventure. But the leader's *Akilas* are entitled afterwards to reimburſe themſelves by taking the amount of the fine from the *Akilas* of the perſon who faſtened the additional camel to the ſtring; becauſe it was by his act that they became ſubjected to the payment of it; and the only reaſon why the reſponſibility

 did

did not fall upon them at the first is, that the act of fastening the additional camel was a sort of creation of a cause, whereas the leading of the string is, in the eye of the law, equivalent to the actual commission of the homicide, the destruction having been occasioned by the leading of the string, not by fastening the additional camel;—and as the actual perpetration of the homicide is a thing of a more forcible nature than the mere creation of the *cause* of it, the responsibility consequently first falls upon the *Akilas* of the leader. Lawyers remark that what is here advanced (of the leader's *Akilas* having recourse to the *Akilas* of the fastener) applies only to a case where the additional camel was fastened to the string at a time when it was moving forwards; for as, in this case, the fastener does, as it were, *direct* his camel to be led, he therefore impliedly assumes the responsibility for such damage as it may occasion:—but where the additional camel was fastened to the string at a time when it stood still, and the leader afterwards leads it on, and a man is trodden down by this additional camel, the responsibility rests with the leader's *Akilas*, who are not entitled, in this case, to reimburse themselves from the *Akilas* of the fastener, because here the leader appears to have led on the camel of another without that other's concurrence, as he has not signified his consent either *expressly* or by *implication*.

A person is responsible for the damage occasioned by hunting his dog at any thing;

If a person let slip * his dog, and *drive* him, (that is, *run after* him,) and the dog, without stopping, destroy any thing, the responsibility for it rests with the person who let him slip, the act of the dog being attributed to him because of his *driving* him;—whereas, if a person cast off his hawk, and drive her, (as above,) and she, without stopping, destroy any thing, the person who cast her off is not responsible.—(The reason of this distinction between a dog and a hawk is, that a quadruped is capable of being *set on* or *driven*, whereas a bird

* Literally, *give head to*. (See *Hunting*, p. 171.)

is

is not ſo,—whence a regard is paid to the driving of the *one*, but not of the *other*.)—If, on the contrary, a perſon let ſlip his dog *without* driving him, (that is, without running after him,) and he deſtroy any thing without ſtopping, the perſon who let him ſlip is not reſponſible; becauſe, as the dog, in this inſtance, acts from his own option, his act cannot be attributed to the perſon who let him ſlip.—It is related as an opinion of *Aboo Yooſaf* that, in all thoſe caſes, the perſon who caſt off the hawk or let ſlip the dog is to be held reſponſible, out of a regard to the preſervation of property. *Mohammed* alſo obſerves, in the *Mabſoot*, that where a perſon lets ſlip or caſts off any animal upon the highway, and the animal, without ſtopping, kills a man, the reſponſibility for the ſame reſts upon the perſon who caſt it off, or let it ſlip, whether he have *driven* it, or otherwiſe, the motion of the animal being referred to the perſon who let him ſlip, ſo long as it continues to move on in a ſtraight line:—but that, upon the animal turning off to the right or left, the effect of letting it ſlip terminates,—in other words, the perſon is no longer reſponſible in caſe of any damage;—and the ſame rule alſo holds where the animal ſtops, and then moves on of itſelf; for if, afterwards, any thing be deſtroyed, there is no reſponſibility.

but not unleſs he *drive* or *encourage* the dog;

IF a perſon let ſlip his dog at game, and the dog deſtroy any thing elſe, without ſtopping, yet the perſon who let him ſlip is not reſponſible, provided he did not *drive* (that is, *run after*) him; for as hunting is a thing unlimitedly lawful, and is not reſtricted to the condition of ſafety, (it not being an exertion which can affect any other than the hunter himſelf,) tranſgreſſion (which is the occaſion of reſponſibility) cannot be eſtabliſhed in this inſtance. If, on the contrary, a perſon let ſlip his dog on the highway, and the dog deſtroy any thing without ſtopping, compenſation muſt be made by the perſon who let him ſlip; becauſe, although the occupancy of the highway be a matter of a neutral nature, ſtill it is reſtricted to the condition of ſafety, as being an exertion affecting the community; and the

nor where he has let him ſlip at *game*.

 letting

letting ſlip the dog, being an endangering of the ſafety of the highway, is therefore a tranſgreſſion, and conſequently induces reſponſibility.

A man, caſting off his animal on the highway, is reſponſible for any depredations it may commit.

If a perſon caſt off or ſet looſe an animal on the highway, and the animal move ſtraight on, and then, turning to the right or left, tread down corn, or ſo forth, the perſon who caſt it looſe is reſponſible; but not if there be more roads than one. If, on the contrary, an animal *break* looſe, and then, moving on of its own accord, kill a man, or tread down property, either by night or day, the owner is not reſponſible; becauſe the prophet has ſo ordained; and alſo, becauſe the act of the animal cannot, in this caſe, be attributed to the owner, ſince he neither caſt it off nor drove it.

For the eye of a goat an adequate compenſation is due, and for the eye of a *labouring* animal a fourth of the value.

If a perſon put out one of the eyes of a goat, he muſt compenſate [not for any determinate part of the whole value, but merely] for the defect thereby occaſioned; becauſe, as the only uſe of a goat is its milk or its fleſh, not its labour, nothing more can be required than merely the diminution occaſioned in its value. For the eye, on the contrary, of an ox, a camel, a dromedary, an aſs, or a horſe, of whatever deſcription, a compenſation muſt be made of one fourth of the value; becauſe the prophet has ſaid, "*For the eye of every animal* "*except a goat ye muſt pay a fourth of the value of the animal*;"—and alſo becauſe, as the work of the animal cannot be performed but by means of *four* eyes, (two of the animal, and two of his driver,) the animal may therefore be ſaid to have *four* eyes,—whence a fourth of his value is due for the loſs of one eye.

Caſes of damage occaſioned by an animal, having a rider on its back,

If a perſon be riding upon his beaſt on the highway, and another perſon ſtrike or goad the beaſt, without the conſent of the rider, ſo as to cauſe it to kill a man by kicking, or treading him down, or running over him, the reſponſibility reſts upon the perſon who ſo ſtruck or goaded it, not upon the rider; becauſe the former was the

inſtigator of the animal's act, which muſt therefore be referred to him; and alſo, becauſe this perſon is the producer of the *cauſe* of the accident, (for an animal naturally kicks upon being ſtruck or goaded,) and, as ſuch, is guilty of a tranſgreſſion, having goaded the beaſt without the rider's conſent; and as the *rider* has not in any reſpect tranſgreſſed, he [the goader] is therefore ſolely reſponſible.—(If, however, the rider, at the time of the other perſon ſtriking or goading the beaſt, had ſtopped it in the highway, the reſponſibility reſts upon him and the goader in equal ſhares, as in this caſe he alſo has tranſgreſſed, in having ſtopped the animal upon the road.)—If, on the contrary, the beaſt ſtrike out at the perſon who goaded or ſtruck him, as above, and he die of the kick, his blood is of no account, as he may be ſaid to have ſlain himſelf. If, on the other hand, the beaſt throw his rider, and kill him, the fine for him is due from the *Akilas* of the goader or ſtriker, he having tranſgreſſed in producing the cauſe of the accident.

If a perſon be riding or ſtopping upon his beaſt on his own land, and another goad or ſtrike the beaſt without the rider's conſent, and the beaſt fly out and tread down a man, the reſponſibility reſts upon the perſon who ſo goaded or ſtruck it, and not upon the rider, for the reaſons before explained.—If, on the other hand, a perſon be riding upon his beaſt on the highway, or ſtopping upon it on his own land, and another goad or ſtrike it by his deſire, and it fly out and tread down a man, neither the rider nor the other are in any degree reſponſible:—the *latter* is not ſo; becauſe his act of ſtriking or goading the animal is in ſuch a caſe tantamount to that of the rider himſelf;—nor is the *former* [the rider] ſo, as he has here authorized an act to which he is perfectly competent, the *goading* of an animal being equivalent to *driving* it. But if the rider be *moving along the road* upon his beaſt, and another then ſtrike or goad it by his deſire, and it tread down a man, both parties are reſponſible in an equal degree, provided the man

man was trodden down without the beaſt making any ſtop, becauſe, in this caſe, its motion is referred to both alike *.

or being led in hand.

If a man be leading an animal, and another ſtrike it, and it break away from the leader, and commit any damage without ſtopping, the perſon who ſtruck it is reſponſible; (and ſo likewiſe where the animal was *driven* by any perſon, inſtead of being *led*;) becauſe, as the breaking away of the animal was owing to the act of the ſtriker, any accident that may enſue is referred to him.

A perſon wantonly ſtriking an animal, ſo as to occaſion miſchief, is reſponſible;

If the ſtriker, in the examples here recited, be a ſlave, he is reſponſible in his perſon for any damage which may enſue;—or, if he be an *infant*, the reſponſibility (for *property* deſtroyed, or for any perſonal injury ſhort of a *Màwzihà* wound) lies againſt his eſtate; becauſe ſlaves and infants are liable to be proſecuted for their acts.

and ſo likewiſe, a perſon who ſets any thing in the highway, which renders the animal miſchievous.

If a beaſt be ſtruck by any thing which a perſon may have ſet in the highway, and fly out, and kill a man, the reſponſibility reſts with the perſon who placed the thing there; for as he tranſgreſſed in ſo doing, the ſtriking is therefore referred to him, the cauſe being in effect the ſame as if he had himſelf ſtruck the animal.

* A frivolous diſcuſſion, on this point, of conſiderable length is omitted by the tranſlator.

CHAP.

CHAP. IV.

Of Offences committed *by* or *upon* Slaves.

A slave committing an offence by misadventure must be made over to the avenger, or redeemed;

UPON a slave committing any offence by *misadventure*, his master must be required either to make him over to the avenger of the offence, or to pay a redemption * for him. This is according to our doctors. *Shafeï* maintains that the slave's offence attaches solely to his person; whence he must be sold in order to make satisfaction for it, unless his master agree to pay the *fine* thereby incurred. One result of this difference of opinion is that, according to our doctors, if the master, being aware of the offence, emancipate the slave, he is immediately supposed to prefer the mode of paying a redemptionary atonement, as above; for as he had two modes of conduct in his choice, and thus incapacitates himself from adopting one of them, the other consequently remains binding;—whereas, according to *Shafeï*, the offence, after such manumission, is to be accounted for by the *slave*, not by the *emancipator*; because it was to have been accounted for by means of his person; and as the master, in emancipating him, *parted* (as it were) with his person, the matter of course rests with the slave. (It is to be observed that, concerning this case, a difference of opinion obtains among the companions; the opinion of *Ibn Abbas* coinciding with the tenets of our doctors, and that of *Omar* with the tenets of *Shafeï*.)—*Shafeï*, in support of his opinion, argues

* Arab. *Fiddeeyá*.—The redemption, or redemptionary atonement, in this instance, must not be confounded with the ransom in a contract of *Kitàbat*, *Fiddeeyá* being defined "*a redemption for what is otherwise forfeited.*"

 that,

that, in the laws concerning offences, the original principle is that the responsibility rests upon the offender himself; but that the *Akilas* are to bear their part. Now a slave has no *Akilas*, for (according to *Shafeï*) a man's *kindred* are his *Akilas*; but between the slave and his master no relationship whatever subsists;—and such being the case, the responsibility for an offence by misadventure rests upon the slave's person in the manner of a debt; and he will accordingly be sold for an offence against the *person* in the same manner as for an offence committed upon *property*.—Our doctors, on the other hand, argue that the original principle, in the case of offences by misadventure against the person, is that the responsibility must not rest entirely upon the offender, lest it should prove ruinous to him, (because he is in this instance excusable, as he did not *design* to offend,) but that his *Akilas* must bear their part of it; and the master of the slave is his *Akila*; because the ground of the relation of *Akila* is *support* and *assistance*, and a master stands as the *supporter* and *assistant* of his slave. The responsibility, therefore, for an offence by misadventure, committed by a slave, rests upon his *Akila*, namely, his master:—but not for an offence committed upon property, the *Akilas* not bearing any part of the responsibility for offences of that description.

Objection.—If the master be the *Akila*, it would follow that no option should be allowed to him between putting away the slave and paying the redemptionary atonement for him;—in the same manner as holds with respect to all other *Akilas*.

Reply.—An option has been ordained, in this instance, as an alleviation to the master, lest the matter might prove essentially injurious to him. This alleviation, in fact, is requisite in both instances; the only difference being that, in the case of other *Akilas*, it is effected by dividing the responsibility among the whole;—whereas, in the present instance, it is effected by giving the master an option of making over the slave, or paying the redemption; for he is only *one*, and the option is a kind of alleviation to him. The making over the slave is indeed what is originally required, (according to the *Rawâyet Saheeh*;) but

but the master is thus at liberty to redeem his slave by paying the redemptionary atonement;—whence it is that he stands acquitted of all claim, and that nothing whatever is required of him, in case of the slave dying before he has made his option, as above; because the slave was the subject due, which here no longer remains. It is otherwise in the case of an offender dying who is a *freeman*; for in this instance the fine is still due from his *Akilas*, as the discharge of the thing incurred [the fine] is in no respect connected with the *person* of the freeman, the subject, in this instance, not being such as to constitute a means of payment.

and whichever of these may be preferred by the master, (who must make his option without delay,) the same is binding upon him.

UPON the master of an offending slave making him over to the avengers of the offence, they become proprietors of the slave.—If, on the other hand, he prefer paying the redemption, the *fine* of the offence is therein included. Whether, moreover, he chuse to make over the slave, or to redeem him, the same becomes binding upon him on the instant:—the making over of the slave is so, because a delay in the case of an article existent and present on the spot can answer no end, delay being ordained by the LAW for the purpose of preparation, which is not required in the case of a thing already prepared;—and the payment of the ransom is likewise so, because it is a substitute for the slave, and is therefore subject to the same rule with the slave himself. Whether, also, he chuse to make over the slave, or to redeem him, the avengers of the offence are not at liberty to refuse either of these;—not the *first*, because it is their right; and therefore, upon the slave being relinquished to them, their power of claim ceases;—not the *second*, because they are only entitled to a consideration for the offence, which being paid, the slave remains with his master.

The right of the avenger is annulled by the slave dying before the

IF the slave happen to die before the master has made his option, as above, the right of the avenger of offence is annulled, as the subject with which his right was connected no longer remains. If, on the

master has declared his option.

the contrary, he die after the master had adopted the option of redeeming him, he [the master] is not acquitted by that circumstance, but it is still incumbent on him to pay the redemptionary atonement, because, upon his chusing to pay that in preference, the right of the avenger of offence is transferred from the person of the slave to *his* [the master's] person.

A second offence by the same slave, is subject to the same rules.

If a master pay a redemption for his offending slave, and the slave afterwards commit another offence, the second offence is subject to the same rules with the first; because, upon being cleared from his first offence, he stands in the same predicament as if he never had offended before.

A slave committing two different offences is made over, in adequate proportions, to the avengers.

If a slave commit two offences, the master must be desired to make him over to the two avengers of offence, in order that they may share him between them according to their respective claims from offence; because the attachment of the *first* offence to his person does not prevent the *second* offence from so attaching; for as the master's right in the slave did not prevent it in the *first* instance, that of the first avenger cannot prevent it in the *second*, *a fortiori*; (and the same rule also obtains where a slave commits *more* than two offences.)—If, therefore, a slave kill one man, and put out the eye of another, he is made over between the heir of the person slain, and the person deprived of the eye, in three portions, the fine for an eye being one half of the fine for the person. The same rule also obtains with respect to wounds;—that is, if a slave wound several persons, he is made over, and divided among them, according to the injury each may have sustained.

A slave committing a variety of offences, the master may satisfy the

Where a slave commits a number of different offences, the master is at liberty to satisfy some of the plaintiffs by paying a redemptionary atonement, and others by making over a proportionable part of the slave; for the rights of all are different, because of the difference in the

the grounds of them, namely, the *offences*, that committed upon each in particular being diſtinct and ſeparate from thoſe committed upon all the others;—whence it is lawful for the maſter to adopt a mode of ſettlement with one different from what he purſues with reſpect to another. It is otherwiſe where a ſlave kills one perſon, having two heirs;—for in this caſe it is not lawful for the maſter to pay a redemption to the one heir, and make over a proportionable part of the ſlave to the other, as the rights of both are one and the ſame in this inſtance, the offence being *one*;—whence it is not lawful to make a diſtinction in the atonements for the one offence, by giving a redemption to the one, and making over a part of the ſlave to the other.

ſeveral plaintiffs in various ways.

IF a maſter emancipate his ſlave who has committed an offence, of which he [the maſter] is at that time ignorant, he is reſponſible for whichever is the ſmalleſt of the two, the value of the ſlave, or the fine for the offence. If, on the contrary, he emancipate him, *knowing* the offence, he is reſponſible for the complete fine, to whatever amount. The reaſon of this is that, in the former inſtance, the maſter, in emancipating the ſlave, oppoſes the right of the avenger of offence, (namely, the making over of the ſlave to him,) as the ſubject to be made over no longer remains; and is therefore reſponſible: but he is ſo only for the leaſt ſum, between the value of the ſlave and the fine; becauſe, being ignorant of the offence at the time of emancipation, he cannot be accounted to act under an option, of making over the ſlave, or paying the ranſom for him, ſince he could not poſſibly make an option unleſs he were aware of the offence. In the *latter* inſtance, on the contrary, he is accounted to have adopted the option of paying the redemption; becauſe the manumiſſion of the ſlave prevents the making of him over; and upon his proceeding to emancipate him, at the ſame time that he is aware of his offence, it becomes evident that he has adopted the payment of a redemptionary atonement. What is obſerved with reſpect to theſe two inſtances applies equally to the caſes of a maſter *ſelling* his offending ſlave, or

A maſter ignorantly emancipating his offending ſlave is reſponſible to the avenger for the ſmalleſt ſum between the *fine* and the *value*: but if he emancipate him, *knowing* of the offence, he is accounted to have adopted the mode of redemption, and is accordingly reſponſible for the complete fine;

giving him away, or making him a *Modabbir*, or (if a female) an *Am-Walid*,—all these acts being preventive of making the slave over, as they annul the master's right of property. It is otherwise, indeed, in a case of acknowledgment;—(that is, where the master in whose hands the offending slave is acknowledges [declares] him to be the slave of another;)—for the acknowledgment does not invalidate the right of the avenger of the offence, since in such case the person in whose favour it is made will be required to make over the slave. This is according to the *Mubsoot*.—(*Koorokhee* maintains that acknowledgment is connected with sale; because the offending slave is the property of the acknowledger in appearance, and the person in whose favour it is made is entitled to him solely in virtue thereof, in the same manner as if the master were to declare his having *sold* the slave to this person.)—It is proper, also, to remark, that as the opinion delivered in the *Mabsoot* upon this subject is mentioned without any restriction, the rule comprehends all offences whatever, whether affecting life, or otherwise; because *fine* is equally incurred in all instances. It is also to be observed, that what has been said of *sale* (as being similar to *emancipation*, in the case in question) applies equally to sale under a condition of option on the part of the seller; as the seller's right of property is extinguished by this, as well as by an *unconditional* sale. It is otherwise where an option is reserved to the seller; or where he merely exposes the slave to sale; for in neither of these cases is his right of property extinguished.

and so, likewise, if he make delivery of him under an invalid sale, or constitute him a *Mokâtib*,

If a master sell his slave, being an offender, by an invalid sale, he is not accounted to have adopted the mode of redemption until such time as he deliver the slave to the purchaser; for, in a case of invalid sale, the seller's right of property is not extinguished until the article sold be actually delivered over to the purchaser. It is otherwise where a master constitutes his offending slave a *Mokâtib*, by an invalid contract; (as where, for instance, a *Mussulman* master does so, in consideration of *wine* or *pork*;)—because, in such case, the master is accounted

counted to have adopted the mode of redemption; for as, in a case of *Kitàbat*, a title to freedom is established before the payment of the ransom, [the consideration of *Kitàbat*,] the master is therefore accounted to have adopted the mode of redemption immediately upon concluding such contract.

or sell him, (by a valid sale,)

If a master sell his offending slave to the offended person, he is accounted to have adopted the mode of redemption *. It is otherwise where he transfers the slave *in gift* to the offended person; because this person is entitled to take the slave without any recompence; and this mode of transfer is established in a case of *gift*, although not in a case of *sale*. The master is therefore accounted to have adopted the mode of redemption in one case, but not in the other.

or another emancipate him on his behalf,

If the offended person emancipate the offending slave, on behalf of his master, by his [the master's] desire, the case is subject to the same rule as where the master emancipates the slave himself, the act of the person directed being referred to the director.

or he himself maim him,

If a master strike his offending slave, so as to occasion a defect in him †, he is accounted to have adopted the mode of redemption, provided he were aware of the offence; for as, in occasioning such defect, he prevents the making over of the slave with respect to the part thus rendered defective, his making over the whole slave is thereby rendered impossible. The same rule also obtains, where a female offending slave is a virgin, and her master has carnal connexion with her, because she thus sustains a defect. It is otherwise where he merely contracts her in marriage to another person; for this, al-

or (the offender being a virgin) deflower her;

* That is, it is taken for granted that he prefers paying the full damage (and thus redeeming the slave) to the alternative of making him over to the offended party; and consequently, he still owes the redemption-money.

† Depriving him of a hand, for instance.

though

though it occaſion a defect in law, yet does not render her perſon defective; nor does it prevent her being made over; whence the maſter is not accounted to have adopted redemption in this inſtance. It is alſo otherwiſe where a maſter has connexion with his *Siyeeba* ſlave, being an offender; for ſhe does not ſuſtain any injury from ſuch connexion. It is otherwiſe, alſo, where a maſter merely uſes the ſervices of his offending ſlave; becauſe uſufruct is not particularly reſtricted to right of property;—whence it is that a condition of option [in a caſe of ſale] is not annulled by accepting ſervices [from a ſlave ſold under ſuch condition.]

but not if he pawn the offender, or let him out to hire.

If a maſter let out his offending ſlave to hire, or pawn him, he is not accounted to have adopted the mode of redemption, according to the *Zábir Rawáyet*. In the ſame manner, he is not accounted to have adopted the mode of redemption if he permit him to trade, notwithſtanding his being in conſequence involved in debt, becauſe ſuch permiſſion does not prevent his making him over, nor does it occaſion any defect in his perſon. In this laſt caſe, however, the offended perſon may refuſe to accept the ſlave on his being tendered to him; for as he is, in this inſtance, involved in debt, by his maſter's permiſſion, *he*, therefore, is bound for his value.

A maſter, inſtigating his ſlave to commit an offence, is accounted to have adopted the mode of redemption.

If a maſter offer to emancipate his ſlave on condition of his killing, ſhooting at, or wounding a certain perſon, and the ſlave act accordingly, he [the maſter] is accounted to have adopted, from the firſt, the mode of redemption. *Ziffer* is of a different opinion; becauſe neither the offence, nor the maſter's knowledge of it, was eſtabliſhed at the time of making the offer; and nothing has appeared on the part of the maſter, after the offence was committed, to manifeſt his having adopted the mode of redemption;—the caſe being ſimilar to where a man ſuſpends the divorce of his wife, or the emancipation of his ſlave, upon a particular condition, and then ſwears "that he will "not divorce his wife, or emancipate his ſlave," and afterwards the condition

condition aforefaid takes place, and the wife becomes, in confequence, divorced, or the flave free,—in which cafe, ftill the perfon is not forfworn, fince nothing has proceeded from him, to occafion divorce or emancipation, fubfequent to his vow. The arguments of our docters upon this point are twofold. FIRST, the mafter has fufpended the manumiffion of his flave upon the condition of his committing a particular offence; and as any thing fufpended upon a condition takes place on the condition being fulfilled, the cafe is therefore in effect the fame as if he had emancipated him after the offence.—SECONDLY, the mafter has incited the flave to the commiffion of the offence, namely, the killing, fhooting, or wounding, in having caufed his freedom to depend thereupon; and as the flave is naturally defirous of freedom, it is almoft certain that he will perform the condition. Such inftigation, therefore, evinces that the mafter had adopted the mode of redemption from the firft.

A flave, made over for a wilful offence, and emancipated by the offended party, who afterwards dies in confequence of the offence, is not liable to anfwer for the death.

IF a flave wilfully cut off a perfon's hand, and his mafter make him over to the offended perfon, either by a decree of the *Kázee*, or otherwife, and the perfon emancipate him, and afterwards die of the wound,—in this cafe the making over of the flave is a compofition in full for the offence;—in other words, the offence is remitted. It would be otherwife if the offended perfon had not emancipated the flave; for in this cafe, upon his dying, the flave would be reftored to his former mafter, and the heirs of the deceafed would then be defired either to put him to death or to pardon him. The reafon of this is, that upon the wound proving fatal, without the flave being emancipated, the compofition is made void; for a compofition was accepted merely for this reafon, that the penalty was apparently to confift of property, retaliation not being inflicted upon a flave for the members of a free perfon: but upon the difmemberment proving fatal, it appears that [a fine of] *property* was not incurred, but *retaliation*. As, therefore, the compofition has taken place without any thing being oppofed to it, it is confequently null; and retaliation is incurred of courfe.

courſe.—It is otherwiſe where the offended perſon emancipates the ſlave; becauſe his emancipating him evinces his deſign to be a *confirmation of the compoſition*; and the compoſition cannot be *confirmed*, unleſs it extend, not only to the offence itſelf, but alſo to every conſequence of it;—whence it is that if the offended perſon were expreſsly to declare that he receives "this ſlave in compoſition for the "offence, and for every conſequence which may ariſe from it," and the maſter aſſent thereto, the compoſition is confirmed.—In the caſe in queſtion, moreover, the maſter is aſſenting, becauſe, where he willingly makes over the ſlave as a compenſation for the diſmemberment, which is the *ſmaller* injury, it follows that he is willing to part with him as a compenſation for the *loſs of life*, which is the *greater* injury, *a fortiori*.—Upon the offended perſon, therefore, emancipating the ſlave, the compoſition implicated in the manumiſſion is confirmed; and this being a ſecond compoſition entered into *de novo*, the compoſition accepted at the firſt is null.—Where, on the contrary, he does not emancipate the ſlave, no ſecond compoſition exiſts; but the firſt compoſition is void; and conſequently, the ſlave is reſtored to the maſter; and the avengers of the offence are left at liberty either to put him to death, or to forgive him. It is mentioned in ſome copies of the *Jama Saghcer*, that if a perſon wilfully cut off another's hand, and then compound the matter with the diſmembered perſon by making over to him his ſlave,—and the diſmembered perſon emancipate the ſlave, and then die of the wound, the making over of the ſlave is conſidered as a compoſition in full for the offence; whereas, if the diſmembered perſon had not emancipated the ſlave, the heirs of the deceaſed muſt return the ſlave to his maſter, and are then deſired either to put him [the maſter] to death, or to forgive him. It is to be obſerved, however, that a difficulty ariſes concerning the determination in this inſtance; for it has been already ſaid, that "if a "perſon wilfully cut off the hand of another, and the wounded per-"ſon forgive the diſmemberment, and afterwards die, retaliation is "not to be inflicted on the perſon who gave the wound;" whereas, in

Caſe of a maſter, who having committed a wilful offence, compounds it by a making over his ſlave to the offended party.

in the inſtance now under conſideration, retaliation is declared to be incurred.—[To reconcile this apparent inconſiſtency,] ſome ſay that the remiſſion of retaliation, in a caſe of forgiveneſs, (as here alluded to,) proceeds upon a favourable conſtruction of the LAW; and that what is mentioned in the preſent inſtance (implying that the offender is ſtill liable to retaliation) proceeds upon analogy;—whence there is, in reality, no contradiction.—Others, again, ſay that there is an eſſential difference between the caſes; for the forgiveneſs of the diſmemberment is valid and effectual in appearance, as the wounded perſon was entitled only to cut off the hand of the offender. The forgiveneſs is therefore, in appearance, complete; and although, upon the wound proving fatal, the pardon becomes void in *effect*, yet it ſtill continues in *reality*, (that is, upon the *face* of the matter;) and its exiſtence in this degree ſuffices to prevent retaliation.—In a caſe of *compoſition*, on the contrary, the compoſition does not do away the offence, but is rather a means of confirming it, the offended [wounded] perſon having agreed to a compoſition in property, and thus accepted a conſideration for the injury he has received; and as the offence is not done away, and the conſideration for it is returned, it follows that the compoſition does not prevent retaliation being inflicted. This is where the ſlave is *not* emancipated;—for where he *is* emancipated, the caſe is ſubject to the rules before ſtated.

A maſter emancipating his offending ſlave, involved in debt, is liable to pay his value twice,—to the creditors, and to the avenger.

IF a licenſed ſlave, involved in debt to the amount of one thouſand *dirms*, kill a man, and his maſter afterwards emancipate him without knowing of the murder, he is liable to pay the value of the ſlave twice, once to the creditors, and once to the heirs of the ſlain; for he has invaded two different rights,—the right of the heirs, (which is, that the ſlave be made over to them,)—and the right of the creditors, (which is, that the ſlave be ſold for payment of his debts;)—and as he would be reſponſible for the whole value, from invading either of theſe rights where they occur ſeparately, he is in the ſame manner reſponſible for each where they occur jointly.

Objection.—It would appear that the two rights cannot possibly be united, so that both should be satisfied by means of the slave's person; for if the slave were made over to the heirs [the avengers of blood,] he could not be sold on behalf of the creditors; and *vice versa*.

Reply.—The two rights *may* be united, in this way, that the slave be first made over to the heirs, and then sold on behalf of the creditors.

Objection.—If the slave is to be sold on behalf of the creditors, where is the advantage in making him over to the heirs?

Reply.—The advantage is, the establishment of the right of the heirs to release the slave upon payment of a redemptionary atonement.

—As, moreover, the slave committed the offence at a time when he was occupied by debt, he is consequently made over under the same predicament.—The master, therefore, is responsible for both the rights, as having invaded both.—It is otherwise where a stranger* kills, by misadventure, a slave of this description, (that is, *involved in debt*;) for in this case the stranger owes merely the single value of the slave, which he must pay to the master, who again delivers the same over to the creditor; because the stranger is *a priori* responsible to the master, the slave being his property; and as the creditor's right (to a *transfer* of the slave) is weak in comparison with the *master*'s right (to the *property* of him,) it consequently cannot come in competition with it, the case being, in fact, the same as if no other right were involved. But the creditor is afterwards entitled to take the value from the master, as this value is the worth of the slave, and the creditor's right in the worth precedes the right of the master, it being incumbent on him [the master] to set up the slave to sale, for the discharge of his debts. This (it is to be observed) is where the slave is merely involved in debt, without having committed any offence; for if he had com-

* Meaning, any person not concerned in the slave, as his *creditor*, or so forth.

mitted

mitted an offence, and a ſtranger ſlay him by miſadventure, the maſter muſt in that caſe pay the value of him to the avengers of the offence, and alſo to the creditors; but the ſtranger is only to pay the value to the maſter, in the manner above mentioned. In the caſe of emancipation, on the contrary, the maſter owes twice the value to the parties; becauſe he has invaded the rights of both; and as the right of one has no preference over that of the other, an equal regard is paid to the rights of both, and the maſter conſequently owes each a compenſation.

The child of a licenſed female ſlave is made over with herſelf in diſcharge of her debt, but not in ſatisfaction of her offences.

IF a licenſed *female* ſlave, involved in debt, bring forth a child, ſhe is liable to be ſold, together with her child, for the diſcharge of her debts;—whereas, if ſhe commit an offence, the maſter is not required to make over her child, as well as herſelf, to the avengers of the offence. The difference between theſe two caſes is that, in the former, as the debt, in the contemplation of the LAW, is due from the perſon of the ſlave, (in this way, that the diſcharge is to be effected by means of her perſon,) *debt* is therefore her legal deſcription; and as every legal deſcription appertaining to the perſon extends to the *offspring* of the perſon, the ſlave's debts, therefore, extend to and affect her child;—in the ſame manner as where a man pawns his female ſlave, and ſhe brings forth a child; in which caſe the child alſo is comprehended in the contract of pawn. It is otherwiſe in a caſe of offence; becauſe an offence committed by her requires that ſhe be made over in compenſation for it; but as that is a matter which reſts upon the maſter, not upon the ſlave, the *obligation of transfer* (being the legal deſcription) applies to the maſter, not to the ſlave, ſhe not encountering any thing except merely the *effect* of the transfer, which is a certain predicament, not the *legal deſcription*, or, in other words, the *obligation of transfer*;—and a *certain predicament* extends to the child, not a mere *legal deſcription*.

IF

A person having declared the freedom of a slave cannot afterwards sue the master for any offence committed by such slave.

If a person make a declaration concerning another, that "he has "emancipated his slave," and the slave should afterwards, by misadventure, kill a relation of that person, (as his *son*, for instance,) he is not entitled to any thing on that account; because, in having declared the emancipation, he throws the liability to the fine upon the slave's *Akilas*, and discharges the master from it: and his mere affirmation is not credited nor received as proof against the *Akilas*, unless it be supported by evidence:—but if he produce evidence, the *Akilas* are liable for the fine.

A freedman's allegation of his having committed an acknowledged murder "*whilst he* "*was a* "*slave*," exempts him from responsibility for it.

If a master emancipate his slave, and the slave afterwards make an acknowledgment to a man, saying, "I murdered your brother, by "misadventure, whilst I was yet a slave,"—and the man assert that he had committed the murder after having obtained his freedom, in this case the allegation of the *slave* is credited, as he is a negator of responsibility, because he refers the murder to a time and situation repugnant to responsibility, and which is notorious:—notorious, as this supposes a case in which his bondage was a matter of notoriety; and repugnant to responsibility, because, during his bondage, it would have been incumbent on his master *either* to make him over in atonement for the offence, or to release him by paying a redemption.—The case is therefore the same as where a person, being an adult, says "I divorced my "wife (or, *sold my house*, &c.) whilst I was yet an infant,"—or, being of sound mind, says "I divorced, &c." whilst I was insane, (his insanity having been notorious;)—for under such circumstances his assertion is to be credited, so far as to establish the inefficacy of the divorce, or the invalidity of the sale;—and so likewise, in the present instance, the assertion of the slave is credited, so far as to establish his exemption from responsibility.

Cases in which a master is respon-

If a person emancipate his female slave, and afterwards assert that "he had struck off her hand whilst she was yet a slave;" and

ſhe, on the contrary, affirm that "he did ſo after ſhe was free," her allegation muſt be credited. The ſame rule alſo holds with reſpect to every thing taken from a female ſlave by her maſter,—excepting only her earnings *, and the enjoyment of her perſon,—for if her maſter were to ſay, "I took your earnings," or "I enjoyed "you—*whilſt you were my ſlave*," and ſhe to reply, "nay!—you "did ſo after I was free,"—ſtill his allegation would be credited in either caſe, upon a favourable conſtruction.—This is according to the two *Elders*. *Mohammed* alleges that the aſſertion of the female ſlave is to be credited only with reſpect to ſuch things, actually exiſtent, as a maſter would be required to return or account for to her, according to all authorities; (in other words, that where the maſter acknowledges having taken any thing then extant in his hands, he is directed to return or account for the ſame, and that only;) and that, with reſpect to any other matter, the aſſertion of the maſter muſt be credited. The argument of the two *Elders* is, that the maſter has made acknowledgment of a fact which occaſions reſponſibility, (namely, the cutting off of a hand, or the taking of property,) as having referred his act to a time which was not repugnant to reſponſibility; (for a maſter cutting off the hand of his ſlave, or taking his property, is invariably reſponſible, in the ſame manner as a maſter who cuts off the hand of his *pawned* ſlave, or who takes property from his ſlave involved in debt;) and after having made ſuch acknowledgment, he pleads another circumſtance to exempt him from reſponſibility;—whence his aſſertion is not to be credited unleſs ſupported by evidence;—in the ſame manner as where a man, wanting his right eye, and having ſtruck out the right eye of another, alleges that "the other had ſtruck out his right eye in retaliation," and the other denies this, aſſerting that "he had ſtruck out his eye at a time when "he was already deprived of his own eye, and therefore owes him a

ſible to his emancipated ſlave.

* The example refers to a *female* ſlave, becauſe of the alluſion to *carnal connexion*.—The rules of it, however, equally apply to *male* ſlaves in all other particulars.

"mulct

" mulct for his eye,"—in which case his assertion is credited, and the former owes him a fine accordingly, as having acknowledged an act which induces responsibility, (namely, the striking out of an eye,) without referring it to a time repugnant thereto; and after having thus acknowledged an occasion of responsibility, he pleads an exemption therefrom, which the other denies; and the assertion of a negator must be credited;—and so likewise in the present instance, the declaration of the female slave, who is the negator, must be credited. It is otherwise with respect to the earnings of the slave, or the enjoyment of her person; because, as a master is not liable to a fine of trespass for having carnal connexion with his slave, notwithstanding she be involved in debt, nor responsible for taking her earnings under the same circumstance,—he therefore, in these two cases, refers the act to a time which was notoriously repugnant to responsibility.

Case of an infant committing an offence at the instigation of a slave or an infant.

If an inhibited slave, or an infant, instigate an infant to kill a man, and the infant so instigated kill the man accordingly, the fine for the man's blood is due from the infant's *Akilas*; because he has actually killed the man; and the malice or error of an infant is one and the same,—that is, a fine is incurred equally in either instance, as has been already explained. A fine is therefore imposed on the infant's *Akilas*; and nothing whatever is incurred by those who directed him, (the inhibited slave, or infant,) as they are not liable to be taken to account for their words, nothing being cognizable except what is noticed in the LAW, which pays no regard to the words of such persons. The *Akilas*, moreover, having paid the fine, are not at liberty to reimburse themselves from the infant, either at present, or after he shall have attained maturity;—they may, however, require reimbursement from the slave so directing, when he shall have obtained his freedom; for his words were uncognizable because of the right of his master, *not* because of any defect in his natural competency; and as, on his becoming free, the right of his master (which was the obstacle) no longer remains, they are then entitled

to take the fine from him. It is otherwise with an infant; for as his words were uncognizable because of a defect in his natural competency, he is therefore not liable to be sued for the fine, either at present, or after having attained maturity.

Case of a slave committing a murder at the instigation of another slave.

IF one inhibited slave instigate another inhibited slave to kill a man, and he kill him accordingly, it is incumbent on his master either to make him over, or to pay his fine of redemption, without, at present, demanding any recompence from the instigator: but he is at liberty, after the instigator shall have become free, to take from him the amount of whichever is the least,—the value of the slave he had made over, or the redemption he had paid for him. This proceeds upon a supposition of the slave having killed the man by misadventure,—or, having killed him wilfully, being himself an infant, as the malice and error of an infant are the same thing:—but where the slave who thus kills the man is an *adult*, and kills him wilfully, he incurs retaliation, a slave being liable to retaliation for a freeman.

One of two heirs pardoning a slave, in a case of wilful murder, the other heir receives only his just proportion.

IF a slave wilfully kill two freemen, and each of those leave two heirs, and one heir of each pardon the offence, the master has it at his option either to make over a moiety of the slave to the two heirs who have *not* pardoned it, or to pay them one thousand *dirms* as a redemption for the same; because, upon one of each two heirs granting a pardon, retaliation is remitted, and the remaining heirs are only entitled to property; and as the shares of the pardoning heirs amount to one half, that half is remitted, and the other half remains due.

A slave killing one man *wilfully*, and another *accidentally*, where one heir of the former pardons the offence, is di-

IF, on the contrary, a slave kill two freemen, one wilfully, and the other by misadventure, and each leave two heirs, and one of the heirs of the person slain wilfully pardon the offence, and the master prefer paying a redemption, he must pay fifteen thousand *dirms*,—five thousand to the heir of the person wilfully slain who had not granted

vided among the remaining heirs of both,—or redeemed, at his owner's discretion.

granted a pardon, and ten thousand to the two heirs of the person slain by misadventure;—for upon one of the heirs of the person slain wilfully pardoning the offence, retaliation is remitted, and his fellow-heir remains entitled to a fine; and therefore the two heirs of the person slain by misadventure have a right to a complete fine, namely, ten thousand *dirms*, and the heir of the person wilfully slain, who had not granted a pardon, has a right to a *moiety* of the complete fine, namely, five thousand *dirms*. If, on the other hand, the master prefer making over the slave, he is to be divided among the heirs in three portions, two going to the heirs of the person slain by misadventure, and one to the unforgiving heir of the person slain wilfully.—This is according to *Haneefa*. The two disciples, on the contrary, maintain that the slave is divided among the heirs in *four* parts, three fourths going to the heirs of the person slain by misadventure, and one fourth to the unforgiving heir of the person slain wilfully. The division, therefore, according to them, is to be determined by the litigation; in other words, in the degree in which the right of any of the parties attaches without litigation from the others, he receives a proportion; and in the degree in which the litigation obtains, the division is made equally. Now, in the case here considered, *one* moiety of the slave is reserved to the two heirs of the person slain by misadventure, without litigation on the part of any other person, and goes to them accordingly; but with respect to the *other* moiety, there is a litigation between the two heirs of the person slain by misadventure, and the unforgiving heir of the person slain wilfully; and therefore it is divided equally between the one heir on the one part, and the two heirs on the other part. The argument of the two disciples, in support of this determination, is that the right of the two heirs of the person slain wilfully is connected with the *whole* of the slave's person: but upon one of them granting a pardon, his right becomes extinct, and of course a moiety of the slave is disengaged, and the right of the two heirs of the person slain by misadventure attaches to it, without litigation, whence it goes to them; and there then remains the other moiety,

moiety, with which is connected the right of the two heirs of the person slain by misadventure, and also of the unforgiving heir of the person slain wilfully;—and as this is equally divided among them, the two former, therefore, get one half of such moiety, and the latter the other half; and thus, of the whole, three fourths go to the two heirs of the person slain by misadventure, and one fourth to the unforgiving heir of the person slain wilfully; as above stated. According to *Haneefa*, on the contrary, the slave is divided among the heirs (as above stated) in three portions, by the rule of fractional arithmetic *; because of their right being equally connected with the slave's person †;—in the same manner as where a person dies insolvent;—in which case his estate is divided among his creditors by the rule of fractions.

A slave, being held between two men in partnership, and forgiven of a murder by one of them, the bloodshed is of no account.

IF a slave held in partnership by two persons murder a man whose heirs are those two partners, and one of them pardon him, retaliation is remitted, and the blood of the slain is of no account, according to *Haneefa*.—The two disciples maintain that in this case the partner who grants the pardon must make over a portion of his share (namely, a quarter) to the other partner, or else must pay him a fourth of the complete fine of blood, as a redemptionary atonement.—The reasons they allege are, that a master is entitled to execute retaliation upon his

* Arab. *Zirb-wa-awl*; literally, "*multiplication and excess*."

† The translator here omits the *process*, which has no place in the *Arabic* version, and in fact teaches a most circuitous mode of practice for solving a very plain question. As, however, it is somewhat curious, he conceives it adviseable not entirely to omit it.—"Now, "the right of the heirs of the two persons slain by misadventure is ten thousand *dirms*, and "that of the unforgiving heir of the person slain wilfully is five thousand.—The proposition, "therefore, contains a *whole* and an *half*.—Hence we must take for the denominator "the smallest number which admits of subdivision, namely, *two*, by which the fractional "number [being multiplied] is resolved into three [integral parts;]—and the two heirs by "misadventure take in the proportion of the whole, namely, *two* parts; and the unforgiving heir takes in the proportion of the half, namely, *one* part."

ſlave; for a maſter's property in his ſlave does not oppoſe his right to retaliation, the ſlave, with reſpect to his blood, remaining in the original ſtate of MAN, namely, *freedom.*—Now, retaliation being incurred on behalf of both maſters, an half of it is therefore, in an indefinite manner, incurred on behalf of each of the two; and the moiety of the half of each, reſpectively, is of courſe involved in the other's half. But upon one of them granting a pardon, the other's right to retaliation is annihilated, and he then becomes entitled to property, indefinitely, in the ſame manner as he had been before entitled to indefinite retaliation; and one *half* of his right, therefore, (which is a fourth of the whole,) is converted into property, with reſpect to his ſhare; and then becomes extinguiſhed *in toto*, (in other words, fails even with reſpect to the exchange for retaliation, namely, property,) as a maſter cannot be a claimant of debt againſt his ſlave; and the other half of the right (which is likewiſe a fourth of the whole) is converted into property, with reſpect to the ſhare of the other partner, who granted the pardon, and conſequently does not drop, but he is deſired either to make over a moiety of his ſhare (namely, a fourth of the ſlave) to his copartner, or to pay a redemption to the amount of a fourth of the fine of blood in lieu thereof.—The argument of *Haneefa* is that, as retaliation is due on behalf of both maſters indiſcriminately, it therefore bears the conſtruction of being due on behalf of each in particular, with reſpect either to the *whole* of the ſlave, or the *half* of him,—in this way, that the right of each, (namely, an half) is connected with his own particular ſhare,—or, in this way, that the right of each is connected with the other's ſhare,—or, in this way, that a moiety of the right of each is connected with his own particular ſhare, and a moiety with the ſhare of his partner, indefinitely and without diſcrimination; and on none of theſe ſuppoſitions is there any obſtacle to retaliation, as all the parts of a ſlave are alike with reſpect to retaliation, no one of them in regard to it being leſs than another.—Upon the right, therefore, of one of the maſters being converted into property by the other granting a pardon, there

there is a poſſibility of the *whole* of his right being due to him, conſidering his whole right as connected with his partner's ſhare; and it is alſo poſſible that the whole of his right is extinct, conſidering his whole right as connected merely with his *own* ſhare; and it is likewiſe poſſible that an half of his right is due to him, conſidering one half of his right to be connected with his own ſhare, and another half with the ſhare of his partner, indefinitely;—and hence there is a doubt with reſpect to the obligation on the other partner: and any circumſtance of doubt, in a matter of property, prevents the eſtabliſhment of a claim.

SECTION.

A ſlave ſlain by miſadventure muſt be accounted for to the amount of his value, as far as nine thouſand nine hundred and ninety-nine *dirms.*

IF a perſon kill a ſlave by miſadventure, he is reſponſible for the value of ſuch ſlave, provided it do not exceed ten thouſand *dirms*; but if it amount to ten thouſand *dirms* or above, he is directed to pay ten thouſand *dirms* excepting ten, (that is, nine thouſand nine hundred and ninety;) and where, on the other hand, the value of a *female* ſlave (ſuppoſing the one killed to be ſuch) equals or exceeds the fine for her blood, the perſon who killed her is directed to pay five thouſand *dirms* excepting ten.—This is according to *Haneefa* and *Mohammed. Aboo Yooſaf* and *Shafeï* maintain, that the perſon who kills the ſlave is reſponſible for the value to whatever amount; becauſe the reſponſibility is in conſideration of the *worth* not of the *blood*; (whence it is that it holds on behalf of the ſlave's *maſter*, who is proprietor only with regard to the *worth*, not with regard to the *blood*, with reſpect to which a ſlave is in his natural ſtate of freedom;) for if it were in conſideration of the blood, it would neceſſarily follow that the ſlave

would be the proprietor of the atonement, not the *master*.—Thus, for instance, if a slave, having been sold, be killed in the hands of the seller before the purchaser obtains possession, the contract of sale still continues in force; which evinces that the responsibility is a return or compensation for the worth; for otherwise the contract would not continue, the continuance of that being because of the continuance of the value, whether the original property remain, or only the *return* for it; and notwithstanding the original property, in such instance, no longer remain, yet still the *return* for it does so, whence the sale continues, in consideration of the continuance of the return for the article sold, namely, the *value* thereof;—whereas, if the responsibility were in consideration of the blood, the contract of sale would be entirely dissolved, since on this supposition the value of the article sold does not remain in any shape whatever. The slave in question, therefore, where his value equals or exceeds the amount of the fine for his blood, is considered in the same light as one whose value falls short of the fine*;—or as an *usurped* slave, who, if he perish in the usurper's hands, must be accounted for at the rate of his full value, whatever that may be. The arguments of *Haneefa* upon this point are twofold.—First, the word of God has imposed the fine for erroneous bloodshed unrestrictively, (that is, in a way which comprehends [*Mussulman*] *slaves*, as well as *freemen*;) for the text of the Koran says, "Whosoever killeth a believer by mis-"take, *the penalty of it shall be* the freeing of a believer, "and a fine, *to be paid* to the heirs of the deceased."—A fine, therefore, is due; and as the fine is a consideration for the blood, which never exceeds ten thousand *dirms*, that sum only is due, in the same manner as holds in the case of a freeman.—Secondly, in the slave two different qualities are said to exist;—one, the quality of *humanity*, understood in a being endowed with understanding, reflection, apprehension, and memory; and another, the quality of *worth*,

* That is to say, his *value* must be paid by the murderer.

understood

underſtood in a ſubject fit for the uſe and purpoſes of the individual.—In a ſlave, therefore, there are two modes or characters, the character of humanity, and the character of worth*. Now, the former of theſe is ſuperior to the latter; and it is a rule that where two characters or modes occur together, diſagreeing in their laws, regard muſt be paid to the *ſuperior* character, not to the *inferior*. Here, moreover, it is impoſſible to pay attention to *both* characters; for the character of *humanity* requires that the reſponſibility be fixed to the amount of the fine of blood, whereas the character of *worth* requires that it extend to the whole value of the ſlave, to whatever amount;—and regard muſt be paid to the character of *humanity* in preference, as that is the ſuperior. With reſpect to the caſe of uſurpation, adduced by *Aboo Yooſaf* and *Shafeï*, it is of no weight; becauſe the reſponſibility, in that inſtance, is in conſideration of *worth* only, uſurpation holding only with reſpect to property. With reſpect, moreover, to what they ſay concerning ſale, that " the contract of ſale ſtill continues, " becauſe of the continuance of the return for the article ſold, namely, " the *value* thereof,"—it is not admitted; for as a contract of ſale endures even where the ſlave, who is the ſubject of it, is *wilfully* murdered in the hands of the ſeller, and before the purchaſer has obtained poſſeſſion of him, notwithſtanding retaliation be not a return for worth,—ſo likewiſe in a caſe of fine. With reſpect to a ſlave whoſe value is ſhort of the fine, there likewiſe the recompence for MAN is due; namely, the fine. As, however, the amount of the fine was not fixed by the LAW†, it is therefore, in this inſtance, eſtimated by

* Arab. *Maleeat*.—We have no word in our language preciſely correſponding with it. The tranſlator (to avoid a paraphraſis) generally expreſſes it by the term *worth*.—It is derived from *Mâl* [property,] and ſignifies *the quality of being* (or conſtituting) *property*; and, to underſtand this paſſage, that ſenſe muſt be annexed to it.

† The amount of fines is not fixed by the KORAN, but by the *Sonna*.—The reaſon of the diſtinction here is, that if it had been determined by the KORAN, it would be conſidered as *abſolute*, and therefore not to be ſwerved from in any inſtance.

the

the value; for here it is possible to ascertain the deficiency between the recompence for the slave and the recompence for a freeman by reverting to the value, which is short of the fine; and regard is paid to that accordingly. It is otherwise where the value of the slave *exceeds* the fine; for it is here impossible to ascertain the deficiency with regard to the value, as that exceeds the value of a freeman, namely, the fine, which fixes the value of a freeman at ten thousand *dirms*. (The fine for a slave is established at a rate *short* of the fine for a freeman, in order to evince the inferiority of his rank; and the difference is fixed at ten *dirms*, on the authority of *Abdoola Ibn Abbas*.)

The hand of a slave is accounted for at the rate of half his value, as far as four thousand nine hundred and ninety five *dirms*.

For the hand of a slave half his value is incurred, provided that do not exceed four thousand nine hundred and ninety-five *dirms*; the hand of a man being equivalent to half his person. In short, the *value*, with respect to a slave, is the same as the *fine* with respect to a freeman; and therefore, in all cases where a fine is due for a freeman, the value is due for a slave; where an half fine is due on account of the one, an half of the value is due on account of the other; and so forth;—because the value of a slave is similar to the fine for a freeman, as being (like that) a recompence for his blood.

Case of a slave who being maimed, and then emancipated, dies of the wound.

If a person wilfully strike off the hand of a slave, and the slave's master afterwards emancipate him, and he then die in consequence of the maiming, in that case, provided the freedman have other heirs besides his master, retaliation is not incurred by the offender;—whereas, if he have no other heirs, it must be inflicted. This is according to *Haneefa* and *Aboo Yoosaf*. *Mohammed* maintains that retaliation is not incurred in either case; but that a mulct for the hand is due from the maimer, together with any deficiency occasioned, by the maiming, in the value of the slave, between the time of dismemberment and emancipation,—and the rest of his value is altogether remitted. Thus, for instance, if the value of the slave, at the time of

of dismemberment be one hundred *dirms*; in this case one half of his value [fifty *dirms*] is incurred by the dismemberment, and then, if, at the time of his emancipation, his value have diminished to the amount of ten *dirms*, those ten are also incurred; and thus sixty *dirms* are due, and forty are remitted. Retaliation is not incurred on the *former* supposition, [that is, supposing the freedman to leave other heirs besides his master,] according to all the doctors; because it is in this case uncertain who is the claimant of right; (for retaliation is incurred on the occurrence of the death, that being at the same time referable to the wound; and therefore, if regard be paid only to the time of the *wound*, the *master* is the claimant; or if, on the other hand, regard be paid to the time of the *death*, the *heirs* are the claimants;) and such being the case, it is impossible to exact retaliation, which therefore utterly ceases, —insomuch that if both parties [the master and the heirs] were to unite in claiming retaliation, still it is not to be inflicted, as their coalition does not dispel the doubt, the right of the master having existed at the time of the wound, not at the time of the death, and that of the heirs (on the contrary) at the time of the death, not at the time of the wound.—The reasons alleged by *Mohammed* why retaliation is not to be inflicted in the instance in which he differs from the two *Elders*, (that is, where the slave leaves no other heirs than his master,) are twofold.—FIRST, the grounds of authority for exacting retaliation are here various; for, looking to the time of the wound, the ground is, the master's right of property in his slave; whereas, looking to the time of the death, it is, the *Willa* of manumission *; and a diversity in the grounds is the same as a difference in the claimants, in all matters where caution is necessary, such as punishment or retaliation, or as where, for instance, a man says to the owner of a female slave, "You have sold me this slave for so much," and the other replies, "No! I have contracted her to you in marriage,"—in which case it

* Which entitles the emancipator to seek satisfaction for the death of his freedman. (See Vol. III. p. 436.)

is not lawful for the man to have connection with the slave, as the grounds of her claim are different, since, looking to sale, it is *right of property*, and looking to marriage, it is the *connubial* right.—Secondly; the emancipation precludes the consequence*; and because of the consequence being thus precluded, the wound remains independent of its consequence, and the consequence occurs independent of the wound, the case being the same [on the slave's afterwards dying] as if he had perished by the visitation of heaven;—whence retaliation is prevented.—The arguments of the two *Elders* are that although the two grounds of claim be contrary, yet the master has an indisputed authority to exact retaliation, that appertaining to him in every view; and the legal effect of both grounds is moreover one and the same, namely, retaliation;—thus the claimant, (namely, the master,) the thing claimed, (namely, retaliation,) and the person upon whom the claim is made (namely, the offender) are known and ascertained; and as the exacting of retaliation is therefore possible in this instance, it must be decreed accordingly.—The difference in the grounds of claim, moreover, are not to be regarded in this instance, as it does not occasion any difference in the legal effect.—It is otherwise on the first supposition †; for there the claimant is unknown.—It is also otherwise in the case of the female slave; because there the legal effect differs according to the difference in the grounds of legality; for the right of property is different from the right of marriage in point of legal effect, the legality of connexion established by a contract of marriage being a thing essential to and involved in it, whereas the same legality established by a right of property is not an essential, but merely follows as a dependant. With respect, also, to what is advanced by *Mohammed*, that "the emancipation precludes the conse-

* Arab. *Sirrayet*.—The definition of this term has been given before. (See p. 344.) The meaning of the phrase here is, that the emancipation precludes the legal effect of the slave's death taking place upon the offender.

† That is, supposing the freedman to have other heirs besides his emancipator.

"quence," it may be replied, that the emancipation precludes the consequence only because of its rendering the claimant doubtful and unknown. Now *that* holds only in a case of *misadventure*, not in a case of *malice*. In other words, if a person cut off the hand of a slave by misadventure, and the dismemberment prove fatal after manumission, retaliation is not incurred, but a fine for the *hand* only, together with the diminution occasioned in the slave's value by the maiming between that time and his emancipation, because it is in this case uncertain who the claimant of the right is, a slave being incapable of possessing property; and therefore, looking to the time of the wound, the *master* is the claimant of the right;—whereas, if the time of the *death* be regarded, the *slave* is the claimant, as he is then free;—and regarding, also, the time of the wound, the *value* of the slave is incurred; but regarding the time of the death, the fine of blood is incurred as he is then free. The claimant, and the thing claimed, are therefore both uncertain in this case;—and as an ignorance concerning the *claimant* alone prevents the consequence, it follows that an ignorance concerning both the claimant and the thing to be claimed prevents the consequence, *a fortiori*. In a case of *malice*, on the contrary, the legal effect is retaliation; and as a slave stands, with respect to his blood, in the original state of MAN, namely, freedom, he is therefore entitled to retaliation; but this is to be exacted by his emancipator, as being the avenger of his blood; and as the freedman [in the instance here supposed] leaves no other heirs besides his master, the claimant of the right, therefore, is known and ascertained.—It is to be observed, that as, according to *Mohammed*, retaliation is prevented in both cases, a fine is due for the hand, together with the diminution occasioned in the value of the slave on account of the time elapsed between the wound and the emancipation, (as already mentioned,) because the wound was given during the master's right of property;—and nothing beyond those is allowed. According to the two *Elders*, on the contrary, in the first of those cases only a fine

 for

for the hand is due, together with the diminution occafioned in the value, as aforefaid.

Cafe of an injury inflicted on two flaves, after the mafter indefinitely declares *one* of them *free*.

If a mafter fay to two of his flaves, "one of you is free," and a perfon then ftrike and wound both the flaves upon the head, and the mafter afterwards fpecify the one whom he defigned to emancipate by the above fpeech, ftill he is entitled to the recompence for the offence committed upon both; for he emancipated an *un*fpecified flave; and the wounds have been received by *fpecific* flaves; and as what is *fpecific* is *one* thing, and what is *un*fpecified is *another*, they are *both*, therefore, his property, with refpect to the offence. If, on the other hand, a perfon were thus to *flay* the two flaves in queftion, he incurs a fine for the one emancipated*, (payable to his heirs, if he leave heirs, or otherwife to the mafter,) and the value of him who was to have remained in bondage, payable to the mafter,—provided that the murderer be one perfon, and have flain the two *together*, (not *fucceffively*,) and that the value of both be equal †. If, on the contrary, the two flaves be murdered by the one perfon *fucceffively*, (that is, one after the other,) he incurs the value of the one *firft* flain, payable to the mafter, and a fine for the other, payable to his heirs; becaufe, by one of them being flain, the emancipation is, of neceffity, determined to the other. If, on the other hand, the two be flain by the one perfon *together*, and they be of different value, the murderer incurs a moiety of the value of each, refpectively, together with a fine for a freeman; becaufe he has, to a certainty, killed a freeman and a flave; and the murder of the one fubjects to a fine, and of the other

* That is, the one to whom the mafter afterwards explains his indefinite emancipation to have applied.

† The reafons for this diftinction between a cafe of murder and of wounding are here ftated at large.—The tranflator, however, conceives himfelf juftified in omitting them, as they involve a long train of metaphyfical fubtleties of no ufe, and the fubftance of which are to be found under the head of *Indifcriminate Manumiffion*. (See Vol. I. p. 456.)

other to the value; and neither of them precedes the other. The murderer, therefore, in this instance, owes one half of the value of each, together with an half of the *fine* for each; for as, in consequence of the death of both, no subject remains for the master's explanation, the emancipation indiscriminately pronounced by him applies in an indefinite manner to each.

Case of a person putting out the eyes of another's slave.

IF a person put out both the eyes of another's slave, the owner has it in his option either to make over the slave to the offender, taking from him the value, or to retain the slave, without getting any thing for the defect thus occasioned in him. This is the doctrine of *Haneefa*. The two disciples maintain that the master has it in his option either to keep the slave, taking a compensation for the damage he has sustained, or to give him to the offender, taking the whole of his value. *Shafei*, on the contrary, holds that the master is entitled to keep the slave, taking, at the same time, his complete value; for as the responsibility is opposed to what is *destroyed*, not to what *remains*, (in the same manner as in the case of a *freeman*,) this remainder, therefore, still continues the property of the master;—as where, for instance, a man strikes off one hand of a slave, and puts out one of his eyes; in which case the offender incurs the whole value of the slave, who still remains with his master; and so here likewise. (It is proper to observe, in this place, that our doctors maintain that worth * exists in the person; but regard is also paid to it with respect to the members of the body, for otherwise any regard to it with respect to the person (so as to be confined to that alone) must be nugatory, since as the members of the body are held equivalent to property, for the security of the body †, it follows that a regard to the worth,

* *Maleeat*; it has been already explained to signify the *quality of being property*.—This whole passage is somewhat enigmatical, and (to understand it properly) requires that a strict attention be paid to the context.—It is altogether detached from the question in dispute.

† With a view to protect the body from the injuries it might otherwise be liable to, *in* *its*

worth, in the members, is of prior consideration. As, therefore, worth is regarded in the members of the body, as well as in the person, and, in the case in question, the person also is destroyed in some degree, (for one of the bodily faculties has been totally destroyed,) and the responsibility is (consequently) to the amount of the complete value, it is requisite that the offender become proprietor of the body of the slave, in order that he may not be subjected to injury, and that an equality may be established. It is otherwise where a person puts out both the eyes of a freeman; because a freeman does not possess the quality of *worth* *. It is also otherwise where a person puts out the eyes of a *Modabbir*; because a slave of that description is incapable of passing from the property of one person to that of another. It is likewise different where a person strikes off one hand of a slave, and puts out one of his eyes; for in this case no one faculty is completely destroyed.) The argument of the two disciples is, that as the quality of *worth* exists in the slave, and as the situation to which the slave is reduced admits of two different constructions,—a destruction of the person †, or a destruction of the members,—it is therefore requisite that the master have it at his option either to deliver over the slave, and take the full value, on the *former* of these constructions; or, on the *latter* construction, to keep the slave, and take a compensation for the damage he has sustained ‡; as in all other cases of property;—this being analogous to where a person tears another's robe to pieces, in which case the owner of the robe has it at his option either to make over the robe and take the value, or to retain the robe and take a compensation for the damage. The argument of *Haneefa* is that, although

its members, owing to the carelessness or incautiousness of others;—for if the members were not held equivalent to property, (in other words, if no fine were imposed for injuries to them,) the body (of which the members are a part) would not be effectually protected.

* In other words, "*does not possess the capacity of being property.*"

† Because a complete destruction of one of the faculties is accounted a destruction of the *whole man.*

‡ Literally, "*and take the difference occasioned in his value.*"

worth

worth be regarded both in the perſon and in the members of the body, ſtill the character of HUMANITY alſo exiſts in the perſon and members of a ſlave, and has not been totally extinguiſhed by his bondage. Now, it is to be obſerved that one of the rules of HUMANITY is, that the penalty incurred by an offence be *not* divided between the perſon and the member deſtroyed, but oppoſed to the latter alone; and (conſequently) that the property of the body* be not transferred, (as where, for inſtance, a perſon puts out both the eyes of a *freeman*;) and that therefore the maſter is to take the whole value in compenſation for the thing deſtroyed, the body remaining as it was;—and, on the contrary, one of the rules of *worth* is, that the compenſation for an offence be divided between the whole perſon and the particular member deſtroyed; and that therefore the maſter is to take the defect occaſioned in the value, as a ſatisfaction for the member deſtroyed, at the ſame time keeping the body [*Juſſà*] as before. We therefore (ſays *Haneefa*) pay attention to both theſe characters; and accordingly, looking to the character of HUMANITY, we determine that the compenſation is *not* divided (as above,)—for if we were to ſay that the maſter is to take the difference occaſioned in the value, and retain the body [*Juſſá*,] it would induce a total neglect of the character of HUMANITY, and would cauſe the character of *worth* alone to be regarded, (as is determined by the two diſciples;)—and looking, on the other hand, to the character of *worth*, we determine that the maſter is not at liberty to take the whole of the value, and alſo retain the perſon of the ſlave, (as is determined by *Shafeï*,) for in this caſe a regard is paid to HUMANITY alone, and the regard to worth is altogether loſt.

* Arab. *Juſſà*.—It is defined, by the *Arabian* lexicographers, "*the figure of a man*," meaning (perhaps) a man independant of his qualities or faculties; and it therefore applies to a *mutilated* as well as to a *complete* body,—whence the uſe of it in this place.

SECTION.

Of Offences *committed by* Modabbirs *and* Am-Walids *.

The master of a *Modabbir* or *Am-Walid* is accountable for their offences, to the smallest amount between the fine and the value.

If a *Modabbir* or *Am-Walid* commit any offence, the master is accountable for the least of the two, the value of the offender, or the fine for the offence.—The *master* is thus accountable; because it is recorded of *Aboo Abeeda* that he once decreed the offence of a *Modabbir* to be accounted for by his master; and also, because, as the master, by having constituted the offender a *Modabbir* or an *Am-Walid*, counteracts (as it were) the regulation of making him [or her] over, the case is therefore, in effect, the same as if he had so done after the offence, and at a time when he was not aware of it.—He is also accountable for the least of the two, the value, or the fine, (as above,) because the avenger of the offence is not entitled to any thing beyond the FINE for it; and the master, by having constituted the offender a *Modabbir* or *Am-Walid*, counteracts the regulations merely to the amount of the value, not with respect to *more* than the value.

Objection.—The avenger of the offence not being entitled to any thing more than the fine, and the master (by having constituted the offender a *Modabbir* or *Am-Walid*,) having counteracted the regulation merely to the amount of the value, it would follow that the master should have it in his choice to give either the value or the fine, in the same manner as, in the case of an absolute slave, the master has it in his choice either to make over the slave, or to pay the redemption.

Reply.—An option in this instance is attended with no manner of advantage, as the fine for an offence and the value of a slave are of

* That is, by *untransferable* slaves.

the

the ſame kind, and it is certain that the maſter will chuſe that which is the ſmalleſt.—It is otherwiſe in the caſe of an abſolute ſlave; for as a ſlave is a ſpecific article, and men frequently feel an attachment to ſuch, it is therefore poſſible that, in this inſtance, the maſter might prefer paying the redemption, although that be more than the value of the ſlave; and hence there is an advantage in leaving him an option.

The higheſt penalty, for numerous offences of a *Modabbir*, is one payment of his value;

THERE is no fine incurred for the numerous offences of a *Modabbir*, beyond one payment of his value, notwithſtanding they be committed in immediate ſucceſſion; becauſe the maſter, by having created his ſlave a *Modabbir*, has counteracted the regulation with reſpect only to one individual ſlave; and alſo, becauſe paying the value is equivalent to giving up the ſlave; and as a maſter cannot make over his ſlave more than once, ſo in the ſame manner he is not required to pay the value more than once.—When, therefore, a maſter pays the value of his *Modabbir* on account of ſeveral diſtinct offences, the avengers of the offence are to divide it among them, each taking in proportion to his reſpective ſhare.—It is to be obſerved, however, that as regard muſt be had to the value the *Modabbir* bore at the time of the offence, attention is therefore to be paid, on behalf of each claimant, to his value on the day in which the offence was committed on him, as it is on that day that the oppoſition of the maſter operates.—Hence if a *Modabbir* kill a perſon by miſadventure, at a time when his value is one thouſand *dirms*, and afterwards kill another by miſadventure, at a time when his value has increaſed to fifteen hundred *dirms*, the heir of the *firſt* ſlain perſon is not entitled to any proportion out of the exceſs five hundred, but that goes entirely to the heir of the *ſecond* ſlain perſon, and the two ſhare the remaining thouſand between them, according to their reſpective rights.—Now the right of the firſt is to ten thouſand *dirms*, and the right of the ſecond to nine thouſand five hundred *dirms*, (for he has received five hundred.) The whole right of both is therefore to be divided into thirty-nine equal lots, each lot

 correſponding

corresponding with five hundred *dirms* of the complete fine; and consequently the first heir gets twenty lots, and the second nineteen.

nor is the owner responsible for any thing on account of his *future* offences, after having made such payment;

If a *Mobabbir* commit an offence*, and his owner pay the value of him to the avenger of the offence, by order of the magistrate, and the same *Modabbir* afterwards commit another offence, the owner is not accountable for any thing, because, in before paying the value, he acted upon compulsion, in consequence of the magistrate's order. The second avenger, however, is in this case entitled to share the value with the first avenger. If, on the contrary, the owner have paid the value to the first avenger without an order from the magistrate, the second avenger has it in that case at his option either to require a fine for the offence from the master, or to have recourse to the first avenger for his proportion of the value. This is according to *Haneefa*. The two disciples maintain that, in this last instance, the second avenger has no claim whatever on the master; because he [the master] has already paid all that was incumbent on him to a proper claimant, as at that time no second offence had taken place. The argument of *Haneefa* is that as the owner of the *Modabbir* has unjustly given to the first avenger what is the right of the second avenger, and as the first avenger (on the other hand) has unjustly *taken* the same, the second avenger has therefore an option, as above. The ground of this is that the second offence is, in the eye of the LAW, associated with the first in one shape; for the second avenger is made to participate with the first;—and the second offence is also, in the eye of the LAW, a *follower* of the first, in another shape; for, with respect to the second avenger, regard is paid to the value of the *Modabbir* at the time of the second offence. The second offence, therefore, is considered as associated with the first, so far as regards taking the compensation either from the master or from the first avenger, because

* Always meaning *homicide by misadventure*, this being the only offence which involves the slave's value.

cause of each of them having disregarded the right of the second avenger, in order that a due attention may be paid to both points of view, —to the *non*-association, where the value has been given [to the first avenger] by order of the magistrate, and to the association, where it has been given without his order;—for it is not possible that the second avenger should have it in his choice to take his compensation from either party, except where the two offences had been perpetrated together.

nor for more than one value, where he emancipates him after a variety of offences.

IF a *Modabbir* commit a variety of offences, and his owner then emancipate him, he [the owner] is not accountable for more than one payment of his value; because he was subjected to this responsibility only in consequence of having constituted the offender a *Modabbir*, an act *a priori*; and his emancipating him, or otherwise, afterwards, is one and the same. (It is to be observed that an *Am-Walid* is considered in the same light as a *Modabbir*, with respect to all these rules.)

His *acknowledgment* of an offence is not cognizable.

A MODABBIR's acknowledgment of an offence by misadventure is not admitted, nor does it subject the master to any penalty, whether he have emancipated him or otherwise; because the penalty for any offence by misadventure, committed by a slave, rests upon his master; and the master is a different person from the *Modabbir*; and therefore the acknowledgment of the latter, as tending to effect another than himself, is not valid.

CHAP. V.

Of Offences committed upon usurped Slaves, or Infants, during the Usurpation.

A person usurping a maimed slave, who afterwards dies, is responsible for the value he bore when maimed;—but he is not responsible for any thing if the slave was maimed (by his master) after the usurpation.

If a master strike off the hand of his slave, and a person then usurp such slave, and he die in the usurper's possession in consequence of the dismemberment, the usurper is accountable for the value he bore after he was maimed. If, on the contrary, a person usurp a slave, and the slave's master then strike off his hand whilst in the usurper's possession, and the slave die in consequence, the usurper is not responsible for any thing. The reason of the distinction here made is that usurpation (as being in itself a cause of property, where a compensation is paid by the usurper) precludes the consequence; and therefore, upon the usurpation taking place between the offence and its consequence, the letter is put out of the question, (in the same manner as where a *sale* intervenes between the offence and its consequence;) whence the matter stands upon similar ground as if, the person having usurped the maimed slave, he [the slave] were afterwards to die by the visitation of heaven;—and accordingly, the value he bore when maimed is due. In the second instance, on the contrary, as nothing has occurred between the offence and its consequence, to preclude the latter, that is therefore immediately referred to the dismemberment committed by the master, and he is considered the immediate destroyer of the slave,—whence the case is as if he [the master] had taken back the slave from the usurper, (as having performed an act

upon him,)—and the uſurper is conſequently exempted from reſponſibility.

IF an inhibited ſlave uſurp another inhibited ſlave, and ſuch ſlave die in the uſurper's hands, he [the uſurper] is reſponſible, as an inhibited ſlave is liable to be proſecuted for his acts.

One inhibited ſlave uſurping another, who dies, is reſponſible.

IF a perſon uſurp a *Modabbir*, and the *Modabbir* commit an offence whilſt in the uſurper's hands, and be afterwards reſtored to his maſter, and then commit a ſecond offence, in the maſter's hands, the maſter is in that caſe accountable to the two avengers of offence for the *Modabbir*'s value, which is ſhared equally between them;—for it is out of the maſter's power to make over the offender, becauſe of his having conſtituted him a *Modabbir*; and he has therefore, by that act, annulled the right of the avengers: but as he has been guilty of this obſtruction with reſpect to *one* body only, he therefore is accountable for no more than one value. The value, moreover, is divided equally between the avengers, becauſe the caſe proceeds on the ſuppoſition of both the offences inducing the ſame penalty, and the *Modabbir* bearing the ſame value at the time of each reſpective offence. Upon the maſter, however, thus paying the value to the two avengers, he is to take one half of the value from the uſurper, as having paid the ſame on account of an offence perpetrated [by the *Modabbir* whilſt] in his poſſeſſion; and this he is to pay to the avenger of the firſt offence; after which he is again entitled to take the ſame, a ſecond time, from the uſurper. This is according to the two *Elders*. *Mohammed* ſays that the maſter is to reſume one half of the value from the uſurper, which he is to retain with himſelf, (that is, he is not to make it over to the firſt avenger;) becauſe what he thus takes from the uſurper is in lieu of what he has paid to the firſt avenger, and he therefore is not required to pay this alſo to him; for if ſo, it follows that the conſideration and the return unite in one perſon, which is unlawful; and it alſo follows that the claim is repeated, as what the maſter takes from

Caſe of a *Modabbir*, being uſurped, and committing an offence, and then, being reſtored to his maſter, committing another offence.

from the usurper is in lieu of what rests with the *first* avenger, not in lieu of what rests with the *second*; and therefore his paying the same to the first avenger a second time induces a reiteration of claim. The argument of the two *Elders* is, that the right of the first avenger extends to the *whole* value of the slave; for as, at the time of the first offence, no other offence had taken place, there is therefore no prevention * from the second offence, the only circumstance which could trench upon or lessen the first avenger's right. The master, therefore, being thus possessed of something in consideration of the slave, unoccupied by any other claim, the first avenger is entitled to take it, in order to the completion of his right; and upon his so doing, the master is again to reimburse himself for the same from the usurper, as the first avenger took it from him on account of an offence committed by the *Modabbir* whilst in the usurper's hands.

Case of a *Modabbir*, first committing an offence with his master, and then, being usurped, committing another with the usurper.

If, on the other hand, a *Modabbir* first commit an offence whilst in the possession of his master, and then a person usurp him, and he commit another offence whilst in the possession of the usurper, the master is accountable to the two avengers of offence for his value, which they share equally between them; and he is entitled to reimburse himself for half the value from the usurper, for the reasons explained in the preceding example. As, however, in this instance, the master takes the half, as aforesaid, on account of the *second* offence committed in the usurper's hands, not on account of the *first* offence, he is to make this over to the first avenger, but cannot reimburse himself from the usurper a second time;—and this according to all authorities. The ground of distinction between this and the preceding case (according to *Mohammed*) is that, in the former, if the master were to pay that half of the value, which he takes from the usurper, to the first avenger, it induces an union of the consideration and the return in one person, as has been already stated;—whereas,

* Arab. *Mezâhimat.* The meaning is, *preventing a thing from taking its full effect.*

in the latter, this consequence is not induced; because, as the first offence was committed in the master's hands, what he takes from the usurper is therefore on account of the *second* offence, that having been committed in the hands of the usurper; and hence, his making over this to the first avenger does not induce an union of the consideration and the return in one person.

Case of a *slave*, usurped, committing an offence with the usurper, and then, being restored, committing another with his master.

IF a person usurp the slave of another, and the slave commit an offence whilst in the usurper's possession, and the usurper afterwards restore him to his master, and the slave then commit another offence whilst in his master's hands, the master must resign him to the two avengers, and is then to take an half of his value from the usurper and make it over to the *first* avenger,—and is again entitled to reimburse himself for such half from the usurper. (This is according to the two *Elders*. *Mohammed* maintains that he is to take the half from the usurper, and retain it for his own use, without any further process.) If, on the contrary, the slave first commit an offence in the hands of his master, and a person then usurp him, and he commit an offence in that person's hands, his master must make him over to the two avengers, in equal shares; and must then take an half of his value from the usurper, and pay it to the first avenger; but is not again to reimburse himself, for this half, from the usurper. The reason of this distinction has been already assigned; for there is no other difference between this, and the case of the *Modabbir*, than that here the master is to make over the slave,—whereas, in the other instance, he is to pay the value of the *Modabbir*.

Case of a *Modabbir*, usurped offending, restored, again usurped (by the same person,) and again offending.

IF a person usurp a *Modabbir*, who commits an offence whilst in his possession, and he then restore him to his master, and again usurp him, and the *Modabbir* again commit another offence in his possession,—the master is in this case to pay his value to the two avengers, in equal shares;—for as the master, in having constituted his slave a *Modabbir*, counteracts the regulation [of resigning him] only with respect to the single

ſingle individual, he is therefore accountable only for one payment of his value. But he is then entitled at the ſame time to take ſuch value from the uſurper, as both the offences were committed in his hands;—after which he is to pay an half of ſuch value to the firſt avenger; becauſe the firſt avenger is entitled to a complete value, ſince at the time of the firſt offence no other offence had taken place, ſo as to interfere or prevent this; and his right is not leſſened by any *ſubſequent* prevention; and therefore, where he finds an half of the value of the ſlave in the maſter's hands, unoccupied by any other claim, he is entitled to poſſeſs himſelf of it;—and the maſter is again to reimburſe himſelf for this from the uſurper, (the firſt avenger having taken it from him on account of an offence committed in his [the uſurper's] hands) and to retain what he thus recovers for himſelf; for he is not required to pay it to the firſt avenger, as *he* has already received his full right,—nor to the *ſecond*, as he never was entitled to more than the *half* value, becauſe of the priority of right of the firſt avenger, and has already received all he could claim.

A perſon uſurping an infant is reſponſible if he die in his hands by any *accident*.

If any perſon uſurp a free-born infant, (that is, take him away, without the conſent of his guardian,) and the infant die, either ſuddenly, or of any diſorder (ſuch as a *fever* for inſtance,) the uſurper is not reſponſible,—whereas, if he die by a ſtroke of lightning, or the bite of a ſnake, the uſurper's *Akilas* are accountable for the complete fine. This proceeds upon a favourable conſtruction. Analogy would ſuggeſt that there is no reſponſibility in either inſtance, (and ſuch is the opinion of *Ziffer* and *Shafeï*,) becauſe uſurpation connot be eſtabliſhed with reſpect to a freeman, inſomuch that if the infant uſurped be a *Mokâtib*, ſtill the uſurper is not accountable for any thing, notwithſtanding a *Mokâtib* be free with reſpect to *poſſeſſion* only*; and as the infant in queſtion is free in point both of *poſſeſſion* and *perſon*, reſponſibility

* A *Mokâtib* differs from an abſolute ſlave, in this particular (among others,) that he is capable of holding property in his own right.

ſponſibility for him is not incurred *a fortiori*. The reaſon, however, for a more favourable conſtruction, in this inſtance, is that although the uſurper be not reſponſible on account of the *uſurpation*, yet he is ſo on account of the *deſtruction*, as that is referred to him, he having taken the infant to the place where the ſnake was, or the lightning fell; for thoſe are not to be met with in *every* place; and conſequently, in taking the infant thither he was guilty of a tranſgreſſion, and rendered fruitleſs the care of the guardian. The death of the infant is therefore, in this inſtance, referred to the uſurper, in the ſame manner as in the caſe of digging a well; and this (as in that inſtance) is *homicide by an intermediate cauſe*. It is otherwiſe where the infant dies ſuddenly, or of ſome diſeaſe; for in this there is no difference from a difference of place. If, however, the uſurper carry the infant to a particularly unhealthy ſpot, and the infant die of any diſorder contracted there, the *Akilas* are accountable for the fine, as the death, in this inſtance, bears the conſtruction of homicide.

An infant truſtee is reſponſible for the *deſtruction* of the depoſit, but not for the *conſumption* of it.

IF a perſon place his ſlave in depoſit with an infant, and the infant kill ſuch ſlave, his *Akilas* are accountable for the fine, (that is, the value of the ſlave;) whereas, if a perſon place a quantity of wheat (for inſtance) in depoſit with an infant, and the infant conſume ſuch wheat, he is no way reſponſible. This is according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* and *Shafeï* allege that the infant is equally reſponſible in either caſe. In the ſame manner, if a perſon place a quantity of wheat in depoſit with an inhibited ſlave, and the ſlave conſume the ſame, he is not then immediately reſponſible, according to *Haneefa* and *Mohammed*, but is liable to account for it after he ſhall have obtained his freedom; whereas, according to *Aboo Yooſaf* and *Shafeï*, he is then accountable. The ſame difference of opinion alſo prevails between thoſe doctors where a perſon *lends* any article, or money, to a ſlave or an infant, and the ſlave or infant deſtroy the ſame. The argument of *Aboo Yooſaf* and *Shafeï* is that the infant has deſtroyed the property of another without his conſent; and as this

property is valuable, and protected on behalf of the owner, the destroyer is therefore responsible for it,—in the same manner as where a person places his slave in deposit with an infant, or where a stranger destroys property placed in deposit with an infant. The argument of *Haneefa* and *Mohammed* is that as the infant has destroyed a property which was not in protection, he therefore is not responsible, any more than if he had destroyed it with consent of the owner;—and the property is not in protection, in the present instance; because the protection of property is established on behalf of the owner of it. As, also, the owner in question has placed his property with a person incapable of protecting it, and we are forbidden, by the LAW, to place our property in deposit with such, he [the depositor] is not entitled to look for an attention to his interest unless he depute some person as his substitute to take care of it; and in the present instance he has not done so, since his making the infant his substitute is invalid, he having no authority over the infant, nor the infant over himself. It is otherwise with an adult, or a licensed slave; for they have a power over themselves. It is also otherwise where a slave is placed in deposit with an infant, and the infant kills such slave; for the protection of a slave is founded on his natural right, a slave being in his original state of freedom with respect to his blood. It is likewise different where a stranger destroys property placed in deposit with an infant; for here the proprietor has remitted the protection of the property in reference to the *infant*, but not in reference to any *other* person.

An infant or slave is responsible for the destruction of any property not *lent* or *entrusted* to them.

If an infant or inhibited slave destroy the property of any person, the responsibility rests upon the destroyer, provided the owner have not either lent such property to them, or deposited it with them in trust; because infants and inhibited slaves are liable to persecution for their acts, although their will be of no account,—no regard being paid to this circumstance in any matter affecting the rights of the individual.

CHAP.

CHAP. VI.

Of *Kissàmit*, or the Administration of Oaths.

Upon a person being found slain, fifty exculpatory oaths are administered to the people of the district;

WHERE a person is found slain in any district *, and it is not known who was the murderer, and his heir demands a satisfaction for his blood from the inhabitants of the district, or from any number of them not specifically named, fifty of the inhabitants, selected by the heir, must be put to their oaths, and depose to this effect,—" by " GOD I did not kill him, nor do I know his murderer."—*Shafeï* maintains that if there be any stain † upon the place, the heirs of the slain must make fifty depositions, to this effect, that " the people of " such a district have slain such an one, their relation,"—after which a decree is granted against the defendants, awarding a fine to the plaintiffs, [the heirs of the slain,] whether they claim for *wilful* murder, or for homicide by misadventure.—(*Mâlik* holds that if the claim be for wilful murder, retaliation is to be decreed ‡; and there is also one opinion recorded from *Shafeï* to the same effect.)—By the " stain [*Lâwis*] upon the place," as mentioned above, is to be under-

* Arab. *Mahla*.—It signifies, in its general acceptation, any place of residence whatever.—In matters of law, revenue, &c. it is used to express a district of the smallest class, such as the ward or quarter of a city, a parish, &c.

† The meaning of this will be explained a little further on.

‡ This can only mean where the depositions of the heirs point at some particular person, (such as one upon whom any thing is found to induce suspicion,) for it is scarcely possible that he should argue for retaliation, either upon the *whole district*, or upon any individual unspecified. The arrangement of this passage is somewhat obscure both in the *Arabic* and the *Persian* version.

ſtood (according to the expoſition of *Mâlik* and *Shafeï*) any ſigns of murder being found upon a particular perſon, ſuch as a *bloody ſcymiter*, for inſtance,—or, apparent circumſtances teſtifying for the plaintiffs, ſuch as a notorious enmity having ſubſiſted between the inhabitants [or any individuals of them] and the deceaſed,—or, one juſt perſon (or a number of uncertain character) bearing teſtimony that "the "people of ſuch a place have ſlain this perſon."—If, therefore, there be neither any tokens of murder, nor any apparent circumſtances teſtifying to it, the opinion of *Mâlik* accords with that of our doctors,—with this difference only, that where the inhabitants of the place do not amount to fifty in number, according to *Mâlik* the oaths are not repeatedly adminiſtered ſo as to make them amount to fifty, but thoſe given are rejected;—whereas, according to our doctors, it is lawful to repeat the oaths until the whole fifty be complete;—and again, according to *Mâlik*, if the people of the place make oath, as required, they are not ſubject to a fine,—whereas, according to our doctors, they are ſubject. One argument adduced by *Shafeï*, in ſupport of his opinion, that "if there be any ſtain upon the place, the "oaths muſt firſt be adminiſtered to the heir of the ſlain," is a tradition of the prophet;—for it is related, that upon the body of a murdered *Muſſulman* being found in the well of *Kheebir* *, and [the relations of the deceaſed] carrying the matter before the prophet, he directed that fifty of the people of the well ſhould be ſworn, and the plaintiffs objecting to this becauſe of thoſe being infidels, he ſaid "*Fifty of ye muſt ſwear that thoſe people have murdered him*,"—to which they replied, "*How ſhall we ſwear to that which is unknown* "*to us?*"—Another argument is, that an oath is required, firſt, from the perſon in whoſe behalf apparent circumſtances bear teſti-

* *Kheebir* (alſo pronounced *Khâiabar*) is a city of *Arabia*, ſituated in the province of NAJD, about two hundred and fifty miles north-eaſt of *Medina*, inhabited (as appears from the context) chiefly by *Jews*. It is probable that *Kaletbal Kheebir* (the well of *Kheebir*) is the proper name of ſome place in the neighbourhood.

mony,

mony, (whence it is that the oath is firſt tendered to the poſſeſſor*;) and therefore, where apparent circumſtances teſtify for the plaintiffs, they are firſt ſworn. According to *Shafeï*, moreover, it is lawful to adminiſter an oath to the plaintiff, as holds in caſes where the defendant refuſes to ſwear. As, however, the teſtimony of *apparent circumſtances* merely is attended with ſome degree of doubt, and retaliation is remitted by the exiſtence of a doubt, but not property, a fine is therefore due from the defendants. The argument of our doctors is, that the prophet has ſaid, "*It is the part of the plaintiff* "*to produce evidence, and of the defendant to ſwear.*" It is, moreover, related by *Ibn Mooſeyib*, that a dead body having been found among the *Jews*, the prophet began by ſwearing them, and then decreed them to pay the fine,—which affords an argument that the oath is incumbent on the perſon liable to the fine. With reſpect to the tradition quoted by *Shafeï*, concerning the people of the well of *Kheebir*, the ſaying of the prophet, in that inſtance, is explained in an *interrogatory* ſenſe, as if he had ſaid to the plaintiffs "*Will fifty of* "*you ſwear?*"—This tradition is alſo related with ſome variation; for ſeveral authorities ſtate it that the prophet firſt aſked the plaintiffs "if they could produce evidence?"—to which they replied, "*if* "*there had been any witneſſes the murder would not have happened;*" —when the prophet ſaid to them, "*Let the* JEWS *ſwear to this* "*effect,—that they did not murder the man, nor do they know the mur-* "*derer;*"—and therefore the one account runs counter to the other. In reply, moreover, to what *Málik* has advanced, it is obſerved that ſwearing is proof ſufficient to *repel* but not to *eſtabliſh* a claim,—inſomuch that a perſon does not, by mere ſwearing, obtain a title even to *property*, although that be (comparatively) inſignificant, and conſequently cannot obtain a title to life [by retaliation] *a fortiori*. It is to be obſerved that the heirs have it in their option to appoint any

* Alluding to diſputes concerning *property*.

fifty

fifty individuals *, becauſe the oath required is their right, and it is moſt likely that they will fix upon ſuch as are ſuſpected of the murder, or upon perſons of known probity among the inhabitants, (thoſe being the moſt cautious of ſwearing falſely,) by which means the murderer may be diſcovered; for the advantage propoſed in ſwearing is the diſcovery occaſioned by a *refuſal* to ſwear; and therefore the upright among the inhabitants, admitting that they themſelves were not concerned in the murder, ſtill will not fail to diſcover the murderer if they know him. If, alſo, the heirs fix upon a *blind* perſon among the inhabitants, or perſons who have ſuffered puniſhment for ſlander, to ſwear, it is approved, becauſe the depoſitions of ſuch are inadmiſſible only where they appear as *witneſſes*; but here they are brought forward merely to *ſwear*, not as *witneſſes*.

and the fine of blood is then impoſed on them.

Upon the people of the diſtrict ſwearing, as above, a decree is paſſed awarding them to pay the fine for the ſlain; and an oath is adminiſtered to the heirs. *Shafeï* maintains that the fine is not impoſed in this inſtance; becauſe of a determination of the prophet, who exempted certain *Jews* from a fine upon their taking the oath; and alſo, becauſe the oath has been ordained by the LAW for the purpoſe of exculpating the defendant, and not with a view to ſubject him to any puniſhment. The argument of our doctors is, that the prophet uſed to impoſe the fine as well as the oath, as appears from the traditions of *Abdoola Ibn Saheel*, with which *Shafeï* was not acquainted.—*Omar* alſo did the ſame. *Kiſſamit*, moreover, was not inſtituted for the purpoſe of eſtabliſhing a fine where the parties refuſe to ſwear, but for the purpoſe merely of diſcovering whether it be not a caſe of retaliation, by compelling the murderer to an acknowledgment, from his fear of taking a falſe oath. Upon the people of the diſtrict, therefore, taking the oath, retaliation being put out of the queſtion, the fine is

* Of the diſtrict, for the purpoſe of being ſworn.

consequently

consequently due from them, either because of their having been guilty of a neglect, (as in cases of homicide by misadventure,)—or, because it is evident that they must have slain the person, his body being found among them;—not because of their *refusing to swear*.

If any one of them refuse to swear, he must be imprisoned.

IF, among the people of the place selected to swear, any one refuse to take the oaths, he is to be imprisoned until he take it*; because the oath, in *Kissámit*, is essential and indispensable, blood being a matter of weight, and not of slight consideration. It is otherwise where a person refuses to swear in a matter of *property*; for the oath, in matters of property, is a substitute in lieu of the article claimed by the plaintiff†, and accordingly, the swearing is remitted by the surrender of the article claimed; but in the case of *Kissámit* the swearing is not remitted by a payment of the fine. It is to be observed that what is here advanced applies, not only to where the heir of the slain lays his claim against the *whole* of the inhabitants of the district, but also, to where he advances it against any number of them not specifically named; for as those cannot be distinguished from the rest, the case is therefore as if the claim comprehended the whole. A claim laid on the ground of wilful murder is also the same as on homicide by misadventure. With respect to a case of claim advanced against specific individuals, it shall (GOD willing) be treated of in its proper place.

If the whole number of them be not fifty, the oath must be administered

IF the inhabitants of the place or district do not amount to fifty in number, the oath must be administered to them repeatedly, so as to make up the complete number of fifty depositions;—because it is recorded of *Omar* that (on a certain occasion) when he ordered a *Kissá-*

* That is, "until he either take it, *or acknowledge himself guilty of the murder.*"

† This is a law phrase.—The meaning of it is that, if the claimant cannot produce evidence, the oath of the defendant must be considered as all that can be expected of him, and acquits him of every demand.

repeatedly, until that number of depositions be obtained.

mit, forty-nine men only having taken the oath, he administered it to one of them a second time, so as to complete the number of fifty, and then decreed the fine;—and also, because, fifty depositions being requisite upon the authority of the tradition concerning the prophet's determination in this point, the completion of the number, in the utmost possible degree, is therefore requisite;—and it is, moreover, attended with this advantage, that it ascertains the weight and importance of blood. It is to be observed, however, that if there be fifty inhabitants of the place or district, the heir cannot insist upon any of them being repeatedly sworn; because the repetition of the oath is admitted purely from necessity, which does not here exist.

It is not required of an *infant* or *idiot*:

The oath [required in *Kissamit*] is not incumbent on an infant or an idiot; for an oath is in the nature of a *declaration*, not of an *act*; and the declarations of such are not regarded. In the same manner, it is not incumbent on a woman or a slave; because those cannot be considered as aiders and confederates of the murderer; and of such alone is it required.

nor, where a corpse is found without marks of violence upon it.

If a corpse be found without marks of violence upon it, the oath is not required, nor is any fine imposed on the district; for it is here evident that the person was not murdered; because this description is applicable only to one who dies in consequence of some act of violence sustained from another; but the person in question appears to have died naturally, and not in consequence of any violence. Fine, moreover, is incurred by the overt act of the individual; and the oath is imposed from a suspicion of murder; and hence it is indispensable that there be some marks upon the body sufficient to evince a murder,—such as a wound, a bruise, or signs of strangling,—or a hemorrhage from the eyes or ears, as that cannot be occasioned but by some violence. It is otherwise where the hemorrhage proceeds from the mouth, the anus, or the yard; as this may appear without any act of violence.

If

IF either the whole body of the ſlain be found, or the greater part of it, or the upper half of it, with or without the head, the oath is adminiſtered to the people of the diſtrict, and the fine is impoſed on them. If, on the contrary, the *lower* half only, of the body, be found, or any part of the trunk ſhort of the half, with or without the head, or the hand, foot, or head alone, nothing whatever is impoſed on them. The reaſon of this is, that the law here treated of is founded on the word of GOD, which expreſsly mentions the term "BODY." Now the greater part [of the body] is made ſubject to the rule of the whole, out of reverence to MAN; and accordingly, any principal portion of it is accounted the ſame as the whole in effect; but it is not ſo with any inconſiderable portion, as that is neither the whole body, nor can it be virtually accounted ſuch; whence, in ſuch a caſe, the oath is not required. Beſides, if any inconſiderable portion of the body were accounted ſubject to the ſame rule with the whole, ſo as to require ſwearing and a fine, it might, in ſome inſtances, induce the conſequence of two ſwearings and two fines on account of one body, which would be unlawful. In ſhort, it is a rule, where any part of a human body is found, that if the remainder, ſuppoſing it afterwards to be diſcovered, be ſuch as would require ſwearing and a fine, thoſe are not required on account of ſuch part; and *vice verſa*; for the reaſons already aſſigned.

Rules to be obſerved where only a *part* of a body is found.

IF a new-born infant be found in any place, and there be no marks of violence upon it, the people of the place are not liable to any thing*; for as, if the body of an adult be found without marks of violence nothing is required, ſo likewiſe in the caſe of the infant *a fortiori*. If, on the contrary, there be marks of violence upon the infant's body, and it appear to have been completely formed, the oath is adminiſtered and the fine impoſed upon the people of the place; becauſe it is moſt probable, where the infant is completely formed, that

The body of an infant being found does not ſubject the diſtrict to any thing, unleſs there be marks of violence upon it.

* That is, they are not liable either to have the oath impoſed or a fine levied upon them.

it was born alive. But if it be not completely formed, nothing whatever is required, notwithſtanding it have marks of violence; becauſe it is moſt probable that ſuch an infant could not have been born alive.

A perſon being found ſlain upon an animal, the oath is adminiſtered to the driver, and his *Akilas* pay the fine;

If a perſon be found ſlain, upon a quadruped, which another perſon is driving, the oath is adminiſtered to the driver, and his *Akilas* are reſponſible for the fine; becauſe in this the people of the place have no concern; for as the body is found in the hands of the driver, the caſe is therefore the ſame as if it were found in his houſe. The ſame rule alſo holds where the perſon in queſtion ſits upon the animal [holding the body] and another leads it. If, alſo there be *three* perſons engaged about the animal, one riding, another leading, and a third driving it, they are all ſworn, and the fine is impoſed on their *Akilas*; for as the body is found in their hands, the caſe is therefore the ſame as if it were found in their joint houſe, or tenement,—in which inſtance they would be required to ſwear, and their *Akilas* would be accountable for the fine.

or, if there be no driver, the oath is adminiſtered and the fine levied upon the neareſt inhabited place.

If a perſon be found ſlain, upon an animal, moving along between two villages, the oath is adminiſtered and the fine impoſed upon the inhabitants of the neareſt of thoſe villages; becauſe it is recorded that, in the time of the PROPHET, a perſon having been found ſlain between two villages, the PROPHET directed the diſtances to be meaſured, and impoſed the oath and fine upon the inhabitants of the neareſt; and he alſo, on a particular occaſion, wrote to *Omar* to the ſame effect. It is to be obſerved, however, that if both the villages be ſo near the ſpot as to admit of a man's voice being heard from it, they are both equally liable to the oath and fine; becauſe, where ſuch is the caſe, it was in the power of the people of both to have come to the deceaſed's aſſiſtance, which they neglected to do.

A dead body being found in a houſe,

If a perſon be found ſlain in any man's dwelling-houſe, the oath is impoſed on the maſter of the houſe, as it is in his poſſeſſion;—and the

the fine is impoſed on his *Akilas*, as they are his aiders and coadjutors*.

the maſter is ſworn, and his *Akilas* pay the fine.

IF a perſon be found ſlain in any place, the people of which are of two different deſcriptions, ſome of them being the proprietors, and others merely reſidents upon rent or loan, the oath is adminiſtered to the former, not to the latter, according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* ſays that it is adminiſtered to all indiſcriminately, as all are alike reſponſible; for do we not ſee that the prophet directed the oath to be adminiſtered to the *Jews*, who were merely *reſidents* at *Kheebir*?—To this, however, *Haneefa* and *Mohammed* reply that the preſervation of the peace, in any place, reſts more immediately upon the proprietors, not upon thoſe who are merely tenants, becauſe the reſidence of the former is continual, and not liable to interruption; and hence they in particular are reſponſible, as the neglect is attributed to them. With reſpect to the *Jews* at *Kheebir*, they were, in reality, *proprietors* of the place, as the prophet reſtored them to their poſſeſſions there, and impoſed a tribute upon their lands.

The *proprietors* of a place are ſworn in ſuch caſes, not the *renters*.

IF there be two deſcriptions of reſidents in a place, ſome being *original* proprietors, and others *recent* proprietors, and a perſon be found ſlain there, the oath is adminiſtered to the whole indiſcriminately, but the fine is impoſed ſolely on the *original* proprietors, although this ſhould be only a ſingle perſon. *Aboo Yooſaf* ſays that the fine, as well as the oath, is impoſed on the whole; for it is impoſed ſolely on account of a neglect in the preſervation of the peace; and all are alike to blame in this particular, as the power to preſerve the

Recent reſidents are ſworn, but the fine is levied on the *original* reſidents only.

* The ſtatement of this caſe, by which the *Akilas* are exempted from taking the oath, proceeds upon the ſuppoſition of their not being on the ſpot at the time;—for if they be preſent the oath is alſo adminiſtered to them,—as will appear a little farther on. The ſame rule applies to the driver of an animal, upon which a dead body is found, as before ſtated.

peace depends upon the property people have in the place; with respect to which all the proprietors are on an equal footing. The arguments of *Haneefa* and *Mohammed* on this point are twofold.—FIRST, the original proprietors are the more immediate guardians of the place, as is universally admitted.—SECONDLY, the original proprietors are the old established residents, whereas the more recent proprietors are merely new comers, and the power of regulation and of preserving the peace therefore particularly belong to the former.—(Some say that this doctrine of *Haneefa* is founded on what he saw of the people of *Koofa*; for there the *original* proprietors had the guard of places, not the *recent* proprietors.).

IF there be none of the original proprietors concerned in the place, having entirely parted with it by sale or otherwise, the oath and fine are imposed on the purchasers, or other present possessors, according to all authorities.

Cases of a person being found slain in a house.

IF a person be found slain in any man's house, the oath is administered, not only to the master of the house, but also to his *Akilas*. Those, however, are included in the swearing on the condition only of their being *present*; for if they be absent, the oath is administered to the master fifty times repeatedly, so as to complete the number of fifty depositions. This is according to *Haneefa* and *Mohammed*.—*Aboo Yoosaf* says that the *Akilas* are not required to swear. The argument of *Haneefa* and *Mohammed* is that, where the *Akilas* are upon the spot, the regulation of the place is as much an obligation upon them as upon the immediate proprietor; and consequently they are associated with him in taking the oath.

IF a person be found slain in a house held unequally in partnership among three, one half of it (for instance) appertaining to *Zeyd*, a tenth of it to *Amroo*, and the remainder to *Bikker*, yet the oath is administered

administered according to the number of the persons, not according to the amount or value of their respective shares;—because the possessor of the smallest share is at liberty to obstruct him who possesses a larger share; and such being the case, all are upon an equal footing with respect to the regulation of the house and the preservation of the peace within it, and are consequently alike involved in the charge of remissness.

A person being found slain in a sold house, the fine is imposed on the *Akilas* of the *seller*.

IF a man purchase a house, and, before he takes possession of it, a person be found slain in it, the fine is imposed on the *Akilas* of the seller, whether a reserve of option have been stipulated to either party in the sale or not;—whereas, if the purchaser first take possession of the house, and the man be then found slain in it, the fine is imposed on the purchaser. The two disciples maintain that if there be no option in the sale, the fine is imposed on the purchaser*: but if there be a condition of option, it is imposed on the *Akilas* of that party to whom the house in the end belongs †; for as the fine is imposed solely on account of the neglect of circumspection, it therefore falls only on him who possessed the power to exert such circumspection; and as this power belongs only to the proprietor, on him alone is the fine incumbent;—whence it is that, where a person is found slain in a *deposited* house, the fine falls upon the *owner*, not on the *trustee*. Where, moreover, there is an option in sale, the purchaser becomes the proprietor, and the fine is consequently due from him: but where, on the contrary, there is a condition of option, the ascertainment of the property becomes necessary; in other words, in whomsoever the property of the house is ultimately established, upon him the fine falls. The argument of *Haneefa* is, that the ability of exerting circumspec-

* Whether he have taken possession of the house or not.

† To understand the reasoning upon this case, the reader must refer to *conditions of option in* SALE. (See Vol. II. p. 380.)

tion

tion is in consequence of actual possession, not of mere right of property; for the person in immediate possession is enabled to take a proper care, although he be not the proprietor,—whereas the proprietor, if he be not in possession, has not this in his power. Now where a person sells his house, so long as the purchaser does not take possession, the seller still continues seized of it, whether there be a condition of option in the sale, or not; and hence, in this case, the fine falls upon the *Akilas* of the seller. If, on the contrary, the purchaser have taken possession*, and there be no reserve of option to either party, the fine evidently falls upon him. If a right of option be also stipulated to the *seller*, the house is insured in the hands of the purchaser, to the amount of its value; (in other words, if it be destroyed in his hands, he is accountable to the seller for the value;) in the same manner as holds in a case of usurpation; whence regard is paid to his possession, and he is accordingly enabled to use circumspection;—or if, on the other hand, a right of option be reserved to the *purchaser*, he is in that case exclusively entitled to act with respect to the house; (in other words, he may do as he pleases with it, but no other person;)—from all which it follows that the fine falls upon the purchaser, where he has taken possession of the house.

If the real owner of the house be unknown, it is imposed on the Akilas of the possessor.

If a man be found slain in a house in the possession of any person, the real proprietor being unknown, the fine is not imposed on the *Akilas* of the possessor until evidence be adduced to prove his being the proprietor, in case his *Akilas* should dispute, and deny his being so, alleging that the house is merely a deposit in his hands;—because the possessor's having a *property* in the house is an essential condition to his *Akilas* being liable to the fine; and although possession be an argument of property, yet still it is possible that this person may not be the proprietor. The bare circumstance of *possession*, therefore, does

* Previous to the body being found in the house.

not

not ſuffice to ſubject to the fine, in the ſame manner as it does not ſuffice to eſtabliſh a right of *Shaffa*.

IF a perſon be found ſlain in a ſhip or boat, the oath and fine are impoſed upon the ſailors, boatmen, or other perſons who may be on board, or are employed in tracking it up the ſide of a river, whether they be the proprietors, or otherwiſe, becauſe the veſſel is in their hands;—and the ſame rule alſo obtains with reſpect to carts, or other carriages. This perfectly accords with the doctrine of *Aboo Yooſaf*, as he holds that the oath is impoſed on the reſidents, whether they be proprietors or not. *Haneefa* and *Mohammed*, on the contrary, hold that it is impoſed on the *proprietors* only, not on thoſe who are merely *reſidents*:—but the difference they make between a houſe or place and a veſſel or carriage is, that the latter are moveable from place to place, and therefore, with reſpect to them, regard is paid to *poſſeſſion*, not to *property*, in the ſame manner as in the caſe of animals;—whereas a houſe, or place, is not moveable, and therefore, with reſpect to them, regard is paid to *property*, not to *poſſeſſion*.

A perſon being found ſlain in a carriage of any kind, the oath and fine are impoſed on thoſe in whoſe hands it is at the time.

IF a perſon be found ſlain in the moſque of a diviſion [of a city,] the oath and fine are impoſed on the inhabitants of that diviſion; becauſe the care and regulation of the moſque reſt particularly upon them. If, on the contrary, a perſon be found ſlain in the *Jàma* moſque, or in the highway, or on a bridge, the oath is not adminiſtered to any one; but the fine is paid from the public treaſury; becauſe the *Jàma* moſque, the highway, and bridges are for the uſe of the community at large, and as the property of the public treaſury alſo belongs to them, the fine is therefore payable from it.

A perſon being found ſlain in a moſque, the oath and fine are impoſed upon the inhabitants of that diviſion.

IF

Case of a person being found slain in a *public market*,

If a person be found slain in a *Bazàr* *, which is the property of any one, the oath and fine, according to *Aboo Yoosaf*, are imposed on the inhabitants of such *Bazàr*;—whereas, according to *Haneefa*, they are imposed on the proprietor. If, on the contrary, a person be found slain in a *Bazàr* not belonging to any one in particular, (as where it is situated in common land,) the fine is disbursed from the public treasury, as the *Bazàr* in question belongs to the community at large.

or a prison.

If a person be found slain in a prison†, the fine for him, according to *Haneefa* and *Mohammed*, is disbursed from the public treasury. *Aboo Yoosaf* maintains that the oath and fine are imposed on the prisoners, because they are the inhabitants of the place, and it is evident that they slew the person. The arguments of *Haneefa* and *Mohammed* are twofold.—First, the people of the place in question are in a state of subjection, and therefore cannot be considered as the *coadjutors* of each other; whence they are not liable to any thing incurred under the idea of *aid* and *assistance*.—Secondly, the prison has been constructed with a view to the advantage of the *Mussulman* community; and consequently, where this view is answered, the mulcts incurred in it must be disbursed from the public purse.

No inquest is instituted upon a person

If a person be found slain in a desart, at a distance from any inhabited place, (that is, so far removed as that a man's voice cannot be

* This is a well known term for a street or range of shops, which are occasionally built by the proprietors of lands, and let to the merchants: it is also a term applied to any piece of land hired out, or set apart, for the purpose of a market.

† Arab. *Sawk-al-Mamlook*; Pers. *Bandee-Khàna*; literally, "*the house* (or place) *of slaves*." The term has a reference to local customs, and signifies (perhaps) a square, court, or division of a city, set apart for the reception and accommodation of prisoners taken in war. The translator has not been able to obtain any satisfactory explanation of it.

heard

heard from it,) his blood is of no account; becaufe, the place being at fuch a diftance, no neglect is imputable. This proceeds on a fuppofition of the defart not being the property of any individual; for if it belong to any perfon in particular, the oath and fine are impofed upon him and his tribe or family.—(If the defart be fituated between two inhabited places, the oath and fine are impofed on the inhabitants of that which is neareft to the fpot, for the reafons already affigned.)

found flain in a defart place;

IF a perfon be found flain on a great river, fuch as, the *Euphrates*, floating down with the ftream, his blood is of no account, fuch rivers not being in the hands of, nor particularly belonging to, any perfon. If, on the contrary, a perfon be found flain on the *fhore* of a great river, and not carried down with the ftream, the oath and fine are impofed upon any village, on that fide, within fuch a diftance as admits of a man's voice being heard from the fpot;—and if there be two or more villages within that diftance, they are impofed upon the neareft.

or floating down a river,

IF a perfon be found flain in a fmall river, (that is, fuch as the right of *Shaffa* extends over,) the oath and fine are impofed upon the people who claim a right in fuch river, as it is accounted to be *in their poffeffion*. (It is related, in fome law books, that the oath is impofed on the people, and the fine upon their *Akilas*.)

unlefs fuch river be *private property*.

IF the heirs of the flain impeach any one of the people of the place in particular, ftill the oath is not remitted with refpect to the others, on a favourable conftruction of the LAW; whereas, if the plaint be laid againft any individual *not* one of the people of the place, thofe are not required to fwear. The difference between thefe two cafes is that where any one of the people of a place is accufed in particular, all the reft are in fome degree implicated in the accufation, becaufe of their want of caution in not preventing the bloodfhed; whereas, if a *ftranger* be accufed, they have no concern in it. Befides, the people of

The heirs accufing any perfon not an inhabitant of the place, thofe are not required to fwear.

of the place are liable to the fine, in consequence of the body being found among them, on this condition, that the heirs bring their suit against *them*; but where they accuse a stranger, this precludes any accusation against them, whence such accusation is not afterwards attended to, nor are they liable either to the oath or the fine, because of the requisite condition not existing in this instance.

The oath and fine are imposed on the inhabitants of a district in which a person is found slain after a riot, unless the heirs accuse some person or persons in particular.

If a body of people assemble in a place with arms, and afterwards disperse, and a person be found slain in that place, the oath and fine are imposed on the inhabitants of the division, as the slain is found amongst them, and the regulation and guard of the place rests upon them. If, however, the heirs of the deceased accuse the body of people who had assembled, as above, or any one of them in particular, the oath and fine are not imposed on the inhabitants; because the accusation, being thus laid, exempts them from any concern in the matter, and consequently, from any obligation to take the oath. It is to be observed, however, that where the heirs lay their accusation against the body assembled, or any individual of them, those are not liable to any thing until the heirs produce evidence in proof of their assertion; because a matter of *right* cannot be established on the simple claim of the plaintiff.

Case of a person being found slain in a *camp*.

If a person be discovered slain in a camp, pitched on a plain which does not belong to any one in particular, and the body be found in a tent, the oath and fine are imposed on the owners of the tent,—or, if *not* in a tent, they are imposed on the owners of the tent nearest to the spot.—If, on the contrary, the plain in which the camp is pitched be the property of any one, the oath and fine are imposed on him.

There is no inquest upon a body found after a fight.

If a body of *Mussulmans* and of infidels assemble with arms for the purpose of fighting, and a person be afterwards found slain among them, his blood is of no account, nor is the oath or fine imposed on

8 any,

any, becauſe it is evident that the deceaſed was ſlain by an open enemy. If, on the contrary, they aſſemble with any other view, and not for the purpoſe of fighting, the ſame rules obtain as are ſet forth in the preceding example; that is, if the body be found in a tent, the oath and fine are impoſed on the owners of the tent, or, if *not* in a tent, they are impoſed on the owners of the tent neareſt to the ſpot, provided the camp was pitched on ground not belonging to any perſon;—but if otherwiſe, the owner of the ground is reſponſible.

Form of the oath, in accuſing an individual.

IF a perſon, on being required to take the oath, ſhould declare that "the deceaſed was murdered by *ſuch a perſon*," he muſt be ſworn to this effect,—"By GOD I did not kill the deceaſed, nor do "I know his murderer, *except ſuch an one*;"—becauſe it is to be apprehended that by his allegation, "*ſuch an one* committed the murder," he may mean to ſcreen himſelf from proſecution; and therefore ſuch allegation is not to be credited; but he is ſworn, as aforeſaid; in order to guard againſt the poſſibility of a mental reſervation in his oath.

The evidence of the inhabitants of the place is not admitted, either againſt a ſtranger,

IF two inhabitants of a place* bear evidence againſt a perſon not belonging to that place that "he murdered the deceaſed," ſtill their teſtimony is not credited, according to *Haneefa*. The two diſciples maintain that it muſt be credited; for although they ſtand within the poſſibility of becoming litigants themſelves in the matter †, yet upon the heirs laying their accuſation in another quarter, they are no longer in this predicament. Their teſtimony is therefore credited; in the ſame manner as holds in the caſe of an agent for litigation, diſmiſſed from his employment before he has proceeded in his ſuit,—whoſe evidence is credited notwithſtanding he had ſtood in a predicament to be a litigant.

* In which a perſon is found ſlain.

† In caſe of the heirs laying their accuſation againſt that place.

a litigant. The argument of *Haneefa* is that the people of the place in queſtion ſtand as litigants, they being accounted the murderers*, becauſe of their remiſſneſs in preſerving the peace; whence their teſtimony is not to be admitted although they ſhould be at the time freed from litigation;—in the ſame manner as where an executor accepts of his appointment, and, after being diſcharged from his truſt, offers to give evidence,—in which caſe his teſtimony is not admitted. Our author remarks that the judgment on a great variety of caſes is determined by what is here ſtated.

or another inhabitant.

If the heirs of the ſlain lay their accuſation againſt any individual of a place, and two inhabitants of the place offer to bear teſtimony in ſupport of ſuch accuſation, it is not admitted; becauſe here they are themſelves immediately under proſecution, (as has been already obſerved,) and are deſirous to free themſelves from it, whence their evidence is liable to ſuſpicion. It is recorded from *Aboo Yooſaf* that in this caſe thoſe two are to ſwear † to this effect, "by God I did not "kill him," without adding more; becauſe [in offering to bear teſtimony as above,] they have already declared that they know the murderer.

A perſon dying of a wound received in any place, the people of that place are accountable.

If a man be wounded among any tribe, or in any place, and it be not known who ſtruck him, and he be carried to his own houſe, or to any ſituation out of that place, and there die of his wound; in this caſe, (provided he have continued bedridden until the time of his death,) the oath and fine are impoſed on the people of the ſaid place or tribe, according to *Haneefa*. *Aboo Yooſaf* maintains, that neither the oath nor the fine are impoſed in this inſtance; becauſe the injury received in the place, or among the tribe, was not *murder*, but ſomething leſs;

* Of the perſon found ſlain in their place or diviſion.

† Upon being called on (in common with the other people of the place) to take the oath of *Kiſſamit*.

and

and as the oath and fine are not imposed in any instance short of murder, it follows that they are not required in this instance, any more than where the deceased had not continued bedridden from the time of receiving the wound. The argument of *Haneefa* is, that upon the wounded person dying of the wound, it [the wound] becomes murder;—whence it is that retaliation is incurred where a person wilfully wounded dies of his wound, and the wounder is known.—If, moreover, the wounded person remain continually bedridden until death, his decease is attributed to the wound: but if he should have been able to rise from his bed, it is possible that he may have died of something else than the wound; and consequently the oath and fine are not imposed, because of the doubt thus engendered.

Case of a person found wounded, and dying in the hands of the finder.

IF a man find a person wounded, but still having a little life in him, and carry him on his back to his own house, and the wounded person die there after a day or two, or whilst he is carrying him thither, he is not responsible in the opinion of *Aboo Yoosaf*; although, in analogy with the opinion of *Haneefa*, he would be responsible, as the deceased is thus found in his hands. The arguments on both sides have been already recited.

A person being found slain in his own house, the fine is imposed on his *Akilas*.

IF a man be found slain in his own house, the fine for him is imposed on his *Akilas*, in behalf of his heirs, according to *Haneefa*.—*Aboo Yoosaf*, *Mohammed*, and *Ziffer*, maintain that nothing whatever is due in this instance; for as the house was in the possession of the deceased at the time that he sustained the injury which occasioned his death, he is therefore considered as having slain himself,—whence his blood is of no account. The argument of *Haneefa* is, that *Kissàmit* is imposed only on account of a person being found *slain*, not on account of a person being *wounded*; (whence it is that if one of the *Akilas* should die between the time of the person being wounded, and of his decease, his estate is not liable for any part of the fine;) and, at the

the time of the perſon in queſtion being found ſlain, the houſe, which had belonged to him, is become the property of his heirs, and is (in fact) in their poſſeſſion; whence his *Akilas* are accountable for the fine, as aforeſaid. It is otherwiſe in the caſe of a *Mokâtib*; for if a *Mokâtib* be found ſlain in his own houſe, the houſe ſtill remaining (virtually) in his poſſeſſion after his deceaſe, he is therefore accounted to have ſlain himſelf, and conſequently, his blood is of no account.

One of two reſidents in a houſe being found ſlain therein, the fine is impoſed on the other.

If two men reſide in one houſe, and one of them be found ſlain therein, *Aboo Yooſaf* is of opinion that the fine for him is impoſed on the other. *Mohammed*, on the contrary, maintains that the other is not ſubject to any thing; for it is as poſſible that the deceaſed ſlew himſelf as that he was ſlain by the other; and therefore the fine cannot be impoſed becauſe of the doubt. To this *Aboo Yooſaf* replies, that as it is not probable a man ſhould commit violence upon himſelf, the bare apprehenſion of ſuch a thing is therefore of no weight in this inſtance, any more than where a perſon is found ſlain in the highway, or elſewhere.

Caſe of a perſon being found ſlain in a place belonging to a *woman*;

If a perſon be found ſlain in a village belonging to a woman, the oath, according to *Haneefa* and *Mohammed*, is adminiſtered to the woman fifty times repeatedly, and the fine is impoſed upon her *Akilas*, (that is, her neareſt paternal relations.)—*Aboo Yooſaf* maintains that the oath alſo is impoſed upon her *Akilas*; becauſe it is not incumbent on any to ſwear, excepting ſuch as are *coadjutors*; and as a woman is not of that deſcription, ſhe therefore ſtands in the ſame predicament with an infant, and conſequently, like an infant, cannot be required to ſwear. The argument of *Haneefa* and *Mohammed* is, that the oath is impoſed with a view to repel the ſuſpicion of murder; and as ſuch ſuſpicion exiſts with reſpect to the woman in queſtion, it is therefore incumbent on her to ſwear. Our modern lawyers remark

mark that women are not aſſociated with their *Akilas*, in paying the fine, in any except this one inſtance.

or in lands ſituated near a village.

IF a perſon be found ſlain in lands belonging to any one, and ſituated near a village, and the proprietor be not an inhabitant of the village, he is reſponſible, as the regulation and guard of thoſe lands reſt upon him.

HEDAYA.

BOOK LI.

Of MAWÀKIL, or the LEVYING of FINES.

Definition of terms.

MAWÀKIL is the plural of *Màkolà*, ſignifying a *Deyit*, or *fine of blood*; and *Akilas* are thoſe who pay the fine, which is termed *Akkil* and *Mawàkil*, becauſe it reſtrains men from ſhedding blood,—*Akkil* (among a variety of other ſenſes) meaning *reſtraint*.

The fine incurred by fineable bloodſhed is

THE fine for *manſlaughter*, homicide by *miſadventure*, or by *an intermediate cauſe*, and (in ſhort) for every ſpecies of bloodſhed by which fine is incurred, is due from the *Akilas* of the ſlayer, as has been

been before explained;—because it is recorded that *Haml Ibn Málik* had two wives, one of whom slew the other; and the prophet ordered the *Akilas* of the woman who killed the other to pay a fine to the heirs of the slain;—and also, because the life of man is sacred, and therefore not to be taken without penalty *. A person, moreover, who slays another by misadventure is excusable; (and so likewise, a person who commits *manslaughter*, in consideration of the instrument;) and therefore is not liable to *punishment*, but is rather entitled to an *alleviation*;—and as, if the whole fine were levied on *him*, it might prove utterly ruinous, (which would amount to *punishment*,) his *Akilas* are therefore associated with him in the payment of it, in order that punishment may be avoided, and the penalty alleviated to him. The reason for involving the *Akilas* in particular is, that the slayer is accounted to have committed his offence by means of the strength of his aiders and associates; and, as those are his *Akilas*, *they* therefore, as it were, are guilty of the offence in remitting their vigilance;—and, having been thus deficient in their duty, they alone are associated in the fine, and not others.

due from the *Akilas* of the slayer.

The *Akilas* of a *registered* person are those who are enrolled with him;—and the fine is taken out of their *pay*, in three years;

THE *Akilas* of a man are all those who are enrolled with him, provided he be an enrolled person; and the fine is paid [deducted] from the pay or subsistence they receive from the *Imâm* in the course of three years. (By the *enrolled* is to be understood the *army*, whose names are entered upon the *Divân*, or public records.) *Shafeï* maintains that the fine falls upon the relations of the slayer; for such was the rule in the time of the prophet, whose institutes cannot lawfully be broken after having been once established; and, if the fine were levied upon any others than the relations and tribe of the slayer, it would induce a deviation from the institute of the prophet in this particular. The argument of our doctors is a tradition of *Omar*, who,

* Arab.—"and therefore must not go for *nothing*."

upon his forming a regiſter, ordained that thoſe who were regiſtered ſhould be liable for the fines of all who were enrolled with them,—and this in the preſence of the companions, none of whom oppoſed it; whence it may be inferred that they were unanimous in their opinion upon this ſubject. With reſpect, moreover, to what *Shafeï* alleges, that, "if the fine were levied upon any others than the relations and "tribe of the ſlayer, it would induce a deviation from the inſtitutes "of the prophet in this particular,"—it may be replied that this is not a *deviation*, but rather a *confirmation* of an ordinance prevailing in the time of the prophet; for at that time the fine was levied upon the *aiders* and *aſſociates* of the party; and in thoſe days *aid* and *aſſociation* originated from a variety of cauſes, ſuch as relationſhip, clientage, and ſo forth; but in the time of *Omar* aſſociation became regarded according to regiſter; (in other words, thoſe who were enrolled together ſtood as the aſſiſtants of each other;) and hence it was that he appointed the fine to be paid by them,—nor did he reverſe any ordinance of the prophet in ſo doing. The regulation of paying the fine within three years is for this reaſon, that ſuch was the ordinance of the prophet and (after him) of *Omar*; and alſo, becauſe the troops receive their pay annually, whence if the whole fine were levied at once it would be diſtreſsful, rather than alleviating.

or altogether, if, at the end of three years, they get their whole arrear at once.

If, after the *Kâzee* decreeing a fine, the Sultan diſburſe no pay to the enrolled for three years, and then give them three years pay at once, the whole fine is at once deducted, provided the pay be on account of the years ſubſequent to the *Kâzee*'s decree of fine; becauſe that is due in virtue of his decree, (as ſhall be hereafter explained;) and it is exacted in three years ſolely becauſe the pay is diſburſed only once a year; and where the pay for three years ſubſequent to the *Kâzee*'s decree is iſſued at once, the whole fine is at once exacted, ſince the deſign was, that it ſhould be apportioned to the pay of three years reſpectively, which deſign is here accompliſhed. If, on the contrary, (after

(after the *Kâzee* decreeing the fine,) the Sultan pay the arrears of *antecedent* years, nothing is to be deducted therefrom, as the fine is due only in virtue of the *Kâzee*'s decree.

Regulation with respect to the times of payment.

WHERE a complete fine is incurred*, one third of it is due in the *first* year, one third in the *second* year, and the remaining third in the *third* year. Where, on the other hand, a third only of the fine is incurred†, or less‡, it is due within the year; and any thing beyond that to the amount of two thirds § is due in the *second* year; and whatever is incurred from two thirds to any thing short of the complete fine ‖ is due in the third year.

Three years are also allowed for the payment, where the *Akilas* are composed of the offender's kindred.

ANY fine due from the *Akilas*, being the *tribe* or *family* of the slayer, or from the estate of the slayer (as where a father wilfully murders his son) is payable from the property of the *Akilas*, or of the slayer in three years. *Shafeï* maintains that a fine due immediately from the slayer is payable upon the instant; for, as the delay of three years is designed for an alleviation to the *Akilas*, it cannot therefore apply to a *wilful* case. The argument of our doctors is that the imposition of a fine in compensation for life is contrary to analogy, since between life and property there is no proportion:—but yet as the LAW, in fixing the delay, has declared itself upon this subject, it cannot be departed from;—and therefore the payment is *deferred*, and not *immediate*.

Where a number of persons are concerned in

IF ten persons slay one person by misadventure, one tenth of the fine is due from the *Akilas* of each, respectively, payable in three years; for each tenth is a portion of the whole fine; and, as the *whole*

* As in the case of *homicide by misadventure*.

† As in the case of a *single cut*.

‡ As in cutting a *finger*.

§ As in the case of *two* cuts.

‖ As in the case of *three* cuts.

accidental homicide, a proportionate part of the fine is levied from the *Akilas* of each.

is deferred, it follows that each portion is ſo likewiſe. It is to be obſerved that the three years are counted only from the time of the *Kâzee*'s decree; for the fine is impoſed as an equivalent, or (as it were) the value of the life which has been taken; and, as *value* is rendered due only by a judicial decree, regard muſt therefore be paid to the *date* of ſuch decree;—in the ſame manner as, in the caſe of a child born to a *Magroor*, regard is paid to the value it bears at the time when the *Kâzee* paſſes his decree concerning it; in other words, if a perſon purchaſe a female ſlave, and ſhe bring forth a child, and the purchaſer claim the child, and another perſon afterwards prove his right to the female ſlave,—the child is free, and the purchaſer muſt pay the value of it to the rightful owner of the mother;—in which caſe regard is paid to the value the child bears at the time of the decree; and ſo likewiſe in the preſent inſtance.

The *Akilas* of a perſon not regiſtered are his neareſt of kin,

THE *Akilas* of any perſon not enrolled or regiſtered are, his *tribe* or *family*, deſcended from one father; becauſe thoſe are his *aſſiſtants*, and in impoſing the fine regard is paid to *aſſiſtance* and *aid*.—The whole fine is divided among the *Akilas* of the offender, payable within three years; and is not to be levied upon any individual at a rate exceeding four *dirms* at one time. Our author remarks that this is mentioned in the abridgment of *Kadooree*; and that it affords an argument that if the whole fine, in the three years, be made to exceed four *dirms* to each individual, it is lawful, ſince if four *dirms* be levied *per annum*, the groſs amount in three years is twelve *dirms*. *Mohammed*, however, expreſsly mentions that no more muſt be levied upon each individual than three or four *dirms* for the three years; and that at the rate of one *dirm* only, or one and a third, each year;—and this is approved.

or (failing of them) the

IF the family be not equal to the diſcharge of the fine*, thoſe

* There being ſo few of them that the fine would *exceed* four *dirms* to each individual.

who

who stand the nearest in point of affinity must be joined with them, according to their degree of relationship;—first the brothers; then their children; then their uncles; and then their children. With respect to the father, grandfather, sons, and grandsons, some say that they are included, whilst others maintain that they are *not* so. The same rule also obtains with respect to *registered* or *enrolled* persons: in other words, if the enrolled *Akilas* be too few, insomuch that the share of each amounts to more than four *dirms*, such registered tribe is associated with them as is nearest to the registered tribe of the slayer in point of *aid*, at the time of the accident taking place; and, if that tribe be also insufficient, the next nearest tribe; and so of the rest. The judgment of which tribe is nearest to the tribe of the slayer is left to the determination of the *Kâzee*. This is according to our doctors. *Shafeï* maintains that each individual is liable to half a *deenar*, whether he be rich or poor; he judging of this from *Zakât*. The former is, however, the better opinion.

next nearest, according to their degrees.

If the *Akilas* be such as receive subsistence*, the fine is levied upon their subsistence, within three years, at the rate of one third every year; for with respect to them subsistence stands in the place of pay †, both being disbursed from the public treasury. Attention, however, must be paid to the time and manner of the subsistence being paid:—if it occur *annually*, the third of the fine must be taken upon its first occurrence after the *Kâzee*'s decree of fine; if *half yearly*, a sixth must be taken; or, if *monthly*, it must be taken monthly, at such a rate as may amount to a third of the whole in the year. If, on the contrary, the subsistence be *monthly*, and the pay *annual*, the fine must be taken from the *pay*, not from the *subsistence*, as from the former it can be more easily deducted than from the latter, because of its being the more considerable of the two. Public maintenance, it

The fine is levied upon *subsistence*, in the same manner as upon *pay*.

* Arab. *Rizk.*

† Arab. *Atta.*—The difference between those is explained a little further on.

is to be observed, is of three sorts or descriptions; subsistence [*Rizk*], gratuity [*Kafayat*,] and pay [*Atta*;] by the first of which is understood the allowance appointed from the public treasury for the supply of immediate necessaries,—by the second, any extraordinary allowance granted on particular occasions,—and by the third, the annual pension or stipend established according to rank and service.

The offender pays his part of the fine at the same rate as his *Akilas*.

THE slayer, in paying the fine, is upon the same footing with his *Akilas*, and must pay his proportion in the same manner as any other individual; for, as it was he who actually shed the blood, it would be unreasonable that he should be exempted, and not the others. *Shafeï* maintains that no part of the fine falls upon the slayer; for, as he is exempted from the *whole* fine, (because of his being excusable, as before observed,) so is he from every part of it. Our doctors, on the other hand, argue that the reason of the *whole* fine not being imposed is, lest it should prove ruinous to the slayer; but the same objection does not hold to the imposition of a *part*. With respect, moreover, to what *Shafeï* urges, that "the slayer is exempted from the fine, "because of his being *excusable*,"—it is not admitted; for, if such were the case, it would follow that his *Akilas*, who were altogether unconcerned in the homicide, are exempt *a fortiori*.

Women and *infants* are not liable to fine, either as *Akilas*,

or as *offenders*.

FINE is not imposed on women or infants, who receive subsistence from the state; because such was the rule observed by *Omar*; and also, because fine is imposed only on coadjutors*, in consequence of their neglect of precaution; and women and children are not coadjutors,—whence it is that they are exempted from capitation tax. In conformity, also, with this rule, if the slayer be a woman, or an infant,

* Arab. *Ahl Noosrit*; meaning all who are in a state either to *assist* or *restrain* their fellows, or to defend the community, make war, &c. It is a technical term, for which we have no expression in our language perfectly analogous.—In the institutes [Vol. II.] it is used to express all those who, being *fit to bear arms*, are liable to be called forth to service.

no

no part of the fine is incumbent upon them. It is otherwiſe with reſpect to a *man*; for upon him a part of the fine is levied in conſideration of his being one of the *Akilas*; becauſe a man comes under the deſcription of a coadjutor, whereas women or infants do not.—This (it may be obſerved) is at variance with the rule before laid down (in treating of *Kiſſamit*, or the adminiſtering of oaths in caſes of ſuppoſed bloodſhed,) where a dead body is found in the houſe of a woman; for in that inſtance our modern doctors have included the woman with her *Akilas* in the payment of the fine. That, however, is a particular exception from the general rule, as has been already remarked.

The inhabitants of a particular city are not liable to pay the fine for the inhabitant of another city, where the citizens of each are regiſtered ſeparately; for fine is impoſed in conſideration of *aid* either by *enrollment* or by *vicinity*; and neither of thoſe exiſt in this inſtance;—not the *former*, becauſe the cities are ſeparately regiſtered; nor the *latter*, becauſe the fellow-citizens of the ſlayer ſtand in a nearer relation to him than the inhabitants of any *other* city.

The inhabitants of a place are not liable to the fine for a perſon of another place, unleſs the places be in one regiſter.

All the inhabitants of a city are liable to the fine for an inhabitant of the ſuburbs or vicinity; becauſe thoſe are dependants on them, having recourſe to them for defence, and for aid in all their undertakings. Hence the inhabitants of a city muſt contribute to pay the fine of an inhabitant of the ſuburbs, in conſideration of being his neighbours and coadjutors.

The inhabitants of a city are liable for the fine of a reſident in the *ſuburbs* or *vicinity*.

If a perſon be reſident in one city, but enrolled in another, his *Akilas* are thoſe with whom he is enrolled, and they muſt pay his fines, not his townſmen, the former being his coadjutors, not the latter. In ſhort, aid by regiſter is of a forcible nature,—whereas aid by reſidence, family, relationſhip, patronage, or manumiſſion, is of a weak

In impoſing the fine upon *Akilas*, regard is paid to *regiſtry*, rather than to *reſidence*.

a weak nature; and no attention is paid to the weaker during the existence of the stronger. It is to be observed that, next in order after aid by *register*, regard is had to aid by *family* and *relationship*; and this is a ground upon which are built a variety of cases.

The inhabitants of a city are liable for a fine incurred by an unregistered resident from the desart;

IF an inhabitant of a city commit a fineable offence, and he have no pay appointed to him in the public register, and the inhabitants of the desart * be more nearly related to him than those of the city, still his fine must be paid by the enrolled inhabitants of the city. Some have alleged that the enrolled citizens are to pay his fine, although there should exist no relationship whatever between them; because the enrolled give aid to all the inhabitants of a place indifferently, and do not confine it to those who are in pay. Others, again, say that this relationship is a necessary condition to paying the fine, as appears from the statement of the case, which says, "and the inhabitants of "the plain be more nearly related to him than those of the city,"—since from this it is to be inferred, that the inhabitants of the city *are* related to him, but in a more distant degree. The fine, moreover, in this instance, is imposed in virtue of relationship; but, as the inhabitants of the city are more immediately connected with the offender by vicinity of residence, and therefore better qualified to afford him aid, the fine is levied on them;—in the same manner as where an infant has two guardians, one connected with him in a nearer and the other in a more distant degree; in which case the right of contracting the infant in marriage appertains to the nearest of the two;—but, if he be absent, the right then devolves to the other who is present, as being best qualified;—and so here likewise.

but not unless he have

IF an inhabitant of the desart come into a city, but have no dwelling-place there, the enrolled citizens are not liable for a fine incurred

* Arab. *Bàdiá*, a general term for all the plains or desarts of *Arabia*.

by

by him, as they are not fuppofed to *aid* any but *refidents*. In the fame manner alfo, and for the fame reafon, the inhabitants of the defert are not liable for the fine incurred by a citizen who may happen to come among them.

become a *refident* there.

If a *Zimmee* kill any perfon, the fine falls upon his *Akilas*, (ftanding in the fame relation to him as *Muffulman Akilas*,) provided he poffefs known *Akilas*, who are accuftomed to pay fines for each other; for *Zimmees* have fubmitted to all the *Muffulman* ordinances which form the temporal law, but more efpecially to thofe of a *reftraining* nature, fuch as punifhment for *theft* or *flander*, retaliation, and fine. *Zimmees*, moreover, are the coadjutors of each other; and confequently the *Akilas* of a *Zimmee* are liable to the fine incurred by him. If, on the contrary, he have no known *Akilas*, the fine is payable from his property, within three years from the date of the *Kâzee*'s decree, (in the fame manner as holds with refpect to *Muffulmans*;)—becaufe the fine is due from the flayer in the firft inftance, and cannot devolve upon his *Akilas* unlefs fuch are to be found; and where they do not exift, it muft remain due from the offender himfelf;—in the fame manner as where one of two *Muffulman* traders flays another in a foreign country; in which cafe the fine falls upon the flayer, as the refidents in the *Muffulman* territory cannot be fubjected to it, fince from them he could not derive aid.

Zimmees are fubject (among themfelves) to the fame rules as *Muffulmans* in this particular.

An infidel is not liable for the fine incurred by a *Muffulman*, nor a *Muffulman* for the fine incurred by an infidel; becaufe *Muffulmans* and infidels are not confidered as the coadjutors of each other. Infidels, therefore, pay the fines incurred by infidels,—and this, notwithftanding any difference of fect.—Lawyers, however, remark that where any *very effential* difference fubfifts between fects, (fuch as between *Jews* and *Chriftians*,) they are not liable for the fines incurred by each other.

Muffulmans and infidels are not liable to pay the fine for each other.

If, between the offence and the decree, the offender's *Akilas* be changed, the decree must issue against his last *Akilas*.

If an inhabitant of *Koofa*, having his pay appointed to him in *Koofa*, kill a person, and he be after that registered and have his pay appointed to him at *Basra*, and the matter be referred to the *Kázee*, he must impose the fine upon the *Akilas* who are of *Basra*.—*Ziffer* maintains that he must impose it upon the *Akilas* who are of *Koofa*; (and such also is the opinion of *Aboo Yoosaf*;) because as the offence, which is the occasion of the fine, was committed at a time when the people of *Koofa* were the offender's *Akilas*, it is consequently due from them, not from the people of *Basra*; in the same manner as if the registry of the offender in the rolls of *Basra* had taken place subsequent to the *Kázee*'s decree. The argument of our doctors is that the fine is due only in consequence of the *Kázee*'s decree, and accordingly falls upon those who are the *Akilas* at the time of passing the decree. It is otherwise where the offender becomes registered in *Basra* after passing the decree; for then the fine falls upon those who were the *Akilas* at the time of issuing it, namely, the people of *Koofa*; because, as it was by the decree rendered obligatory upon *them*, it cannot afterwards devolve upon others, since a fine cannot devolve after being once established. The offender's proportion, however, is taken from his pay at *Basra*; for his share is deducted from his pay, which he then receives at *Basra*.

Objection.—If, after the decree, a diminution were to take place in the number of the *Akilas*, those would be associated with them who are nearest in point of connexion, notwithstanding this be a devolution of the fine, from the *Akilas*, as they stood at the time of the decree, upon others.—Now, if the case be as here stated, how can such a devolution take place?

Reply.—The associating of others, as here mentioned, is a *confirmation* of the decree, not an *annulment* of it; for in consequence of such association the number of those who are to pay the fine imposed by the decree is increased. It is otherwise in the case in question; for there the devolution would amount to an annulment of the decree.

—Accordingly,

—Accordingly, if the reſidence of the ſlayer be at *Koofa*, and he have no pay appointed to him, and he take up his reſidence at *Baſra* before the *Kâzee*'s decree of fine has iſſued, the *Kâzee* muſt in that caſe decree it to be paid by the people of *Baſra*;—whereas, if he had taken up his reſidence in that place ſubſequent to the decree having iſſued, the decree would not revert. In the ſame manner alſo, if an inhabitant of the deſert commit homicide, and the ſovereign afterwards appoint him pay in any particular regiſter previous to the *Kâzee*'s decree of fine, the *Kâzee* muſt decree the fine upon thoſe with whom he is regiſtered;—whereas, if the regiſtry took place ſubſequent to a decree paſſed by the *Kâzee* againſt his *Akilas* of the deſert, the decree could not revert. This is contrary to where one of the inhabitants of the deſert, to whom no pay has been appointed, commits homicide by miſadventure; and the *Kâzee* iſſues a decree of fine, to be paid from their property in three years; and afterwards the ſovereign takes them into his army and appoints them pay;—for in this caſe they are to account for the fine out of their *pay*, notwithſtanding the decree had ordained it out of their *property*; becauſe here the decree is not, in fact, annulled, ſince their pay is alſo their *property*, and the payment from that is more eaſily effected than from their other poſſeſſions.

Examples and rules to be obſerved in this inſtance.

The *Akilas* of an emancipated ſlave are the family and kindred of his emancipator, they being conſidered as his *aiders* and *aſſiſtants*;—and in the ſame manner, the *Akilas* of a client under a contract of *Mawâlat** are his patron †, and the kindred of his patron, as thoſe are his aſſiſtants.

The *Akilas* of a freedman, or client, are, his emancipator's or patron's family.

* See Vol. III. p. 448.—The client under a contract of *Mawâlat* is, generally, a proſelyte, adopted by the perſon to whom he owes his converſion to the faith; and the law thus provides him *Akilas*, as he ſtands unconnected with the *Muſſulman* community otherwiſe than by the contract of *Mawâlat*.

† The perſon who has adopted him.

The *Akilas* are not liable, where the fine is short of a *twentieth*,

Any fine short of the twentieth part of the *deyit*, or *complete* fine, is not due from the *Akilas*; but a twentieth, or any proportion above that, falls upon them;—for *Ibn Abbas* has recorded a saying of the prophet, "Akilas *are not to pay a fine for wilful murder, nor any* "*thing incurred by the offence of a slave, or in consequence of a compo-* "*sition, or by the acknowledgment of the offender, or* (in short) *any* "*thing less than the mulct for a cut*;"—and the mulct for a cut is a twentieth of the *deyit*, or complete fine. Besides, the fine is imposed upon the *Akilas*, for this reason among others, lest the payment of it might prove ruinous to the offender himself; which, however, is not to be apprehended from any thing short of a twentieth of the whole, as that is, comparatively, but a small matter, and therefore not likely to prove essentially injurious to him.—(The limitation, in this particular, to a twentieth, is upon the authority of the Koran.) What is here mentioned applies solely to the fine for offences short of *life*;—for where *life* is concerned, the *Akilas* must pay the fine, notwithstanding it fall short of a twentieth of the *complete* fine;—as where, for instance, a person kills a slave, whose value is less than a twentieth of the *complete* fine; in which case the murderer's *Akilas* are liable for the value, that being the fine for a slave.

unless it be incurred in a case of *homicide*,

when it falls solely on the *offender*.

If, by any offence not affecting life, a fine be incurred short of a twentieth, it is due from the property of the offender, upon a favourable construction. Analogy would suggest that it is the same thing, in this particular, whether the fine be *more* or *less*; in other words, if it be *less* than the twentieth, still it falls upon the *Akilas* in the same manner as if it were *more*; (and such is the opinion of *Shafeï*;) or else nothing whatever falls upon them, whether it be *more* or *less*. The reason, however, for a more favourable construction is, that the prophet decreed that the fine for an embryo in the womb should be paid by the *Akilas*; and the fine for an *embryo* is a twentieth of the fine for a *man*, (as was formerly mentioned.)—Any thing, therefore, short of

of the mulct for a cut stands upon the same footing with a matter of property, as being an equitable adjudgment, rendered obligatory by an arbitration,—in the same manner as a compensation for property is rendered obligatory by appraisement; and accordingly, it is due from the property of the offender.

Cases in which the *Akilas* are not liable to fine.

Akilas are not liable for any thing incurred by the offence of a slave, or in consequence of a composition, or by the acknowledgment of the offender; because of the tradition of *Ibn Abbas* above quoted; and also, because a slave does not come within the description of a coadjutor, nor does he receive *aid* from any one;—and acknowledgment or composition cannot be admitted in proof against the *Akilas*, the acknowledger or compounder not being possessed of any authority over them. *Akilas*, therefore, are not liable for any thing incurred by the acknowledger;—unless, however, they verify his acknowledgment; in which case they are liable for the fine, as they here admit the plea of the avengers of the offence, and such admission is proof against them.

If a person make an acknowledgment of homicide by misadventure, and the avengers of the offence neglect applying to the *Kázee* until after two years, the *Kázee* must then award the fine to be paid in three years from the date of his decree; for as a delay of payment for three years from the date of the decree is admitted in a case of homicide established upon proof, it is consequently allowed in a case of acknowledgment *a fortiori*.

If the murderer and the avenger of offence coincide, and agree that "such a *Kázee*, of such a place, has decreed, upon the testimony of witnesses, a fine against the *Akilas* of him [the slayer] residing in *Koofa*,"—and the *Akilas* deny this, they are not liable for any thing; because each party affirming the other's assertion is no proof against them. Neither is the murderer himself liable for any thing;

 for

for it appears that the fine was decreed against the *Akilas* solely on the ground of a mutual confirmation between the murderer and the avengers of blood, which confirmation is a proof against the *Akilas*, but not against the murderer himself. Nothing, therefore, falls upon him;—unless, however, he be enrolled and have pay appointed to him in the same register with the *Akilas*; in which case he is to pay his proper share of the fine; because with respect to *his* share of it he has made an acknowledgment against himself; and his acknowledgment, so far as it merely affects himself, must be admitted in proof against him; but with respect to the shares of the *Akilas*, he has made an acknowledgment affecting others; and an acknowledgment tending to affect others cannot be admitted.

In case of the murder of a slave, his value is due from the *Akilas* of the murderer;

If a person accidentally kill a slave, the fine, namely, the value of the slave, is due from the *Akilas* of the slayer; because it is a consideration for the *person*, as was before mentioned. According to an opinion of *Shafeï*, it is due from the property of the slayer, as being, in fact, a consideration for *property*; whence (as he maintains,) the slayer is responsible for the slave's value to whatever amount. The former opinion is approved.

but they are not responsible for any thing incurred by an offence upon the *members* of a slave.

If a freeman commit an offence upon any *part* or *member* of a slave, the atonement for such offence does not fall upon the *Akilas*; for as (according to our doctors) the members of a slave are a species of property, it is therefore due from the property of the offender, without affecting any others, agreeably to the arguments already set forth upon that head. According to an opinion of *Shafeï*, on the contrary, it is due from the *Akilas*, in the same manner as where a similar offence is committed upon a freeman. The former opinion is approved.

If there be no *Akilas*, the fine is paid out of the treasury.

Our doctors teach that, in a case where the slayer is destitute of *Akilas*, the fine is due from the public treasury, the whole *Mussulman* community being held to be the aiders of a person so situated. As, moreover,

moreover, if this person were to die, his property would go, as an inheritance, to the public treasury, it follows that any thing incurred by him must be paid therefrom.

Case of fine incurred by a child born under a marriage dissolved by *asseveration*.

The child of a woman divorced by *Làan* [asseveration] has, for his *Akilas*, his maternal kindred, his descent being established from his *mother*, not from his *father* *. If, however, his maternal *Akilas* having paid the fine, his father should afterwards claim or acknowledge him, his maternal *Akilas* are entitled to take, from his paternal *Akilas*, in three years from the time of the *Kázee* passing a decree of reimbursement in their favour, whatever they may have so paid; because it then appears that the fine was due from the paternal *Akilas*, not from the maternal; for the father, by claiming him, falsifies himself, (in other words, acknowledges that he had asseverated falsely;) whence it is evident that the child's descent stood established in the father from the beginning, his asseveration being rendered null by his subsequent falsification;—and upon its thus appearing that the maternal *Akilas* have paid what was in fact due from the paternal, the former are consequently entitled to reimburse themselves from the latter, as they disbursed the fine,—not in a *gratuitous* manner, but *per force*, in pursuance of the *Kázee*'s decree.—In the same manner also, if a *Mokátib* die, leaving property sufficient to discharge his ransom, and a son, a freeman, (by being born of his wife who was free,) and the son neglect discharging the ransom until at length he happens to kill a person by misadventure, and his maternal kindred pay the fine, and he then discharge the ransom, they [the maternal kindred] are in that case entitled to recover from the father's tribe whatever they may have so paid;—because, upon the son discharging the ransom, he becomes connected with his father's family from the last instant of his [the father's] life, wherefore it appears that the maternal kindred have paid what was in fact due from the paternal,—not in a *gratuitous*

* See Vol. I. p. 349.

manner,

manner, but *per force*, in pursuance of a judicial decree. In the same manner, also, if a man instigate a boy to slay any person, and he slay the person accordingly, and his *Akilas* pay the fine, they are afterwards entitled to recover the same from the *Akilas* of the instigator, upon the instigation being established by proof; or, if the instigation be established, not by *proof*, but by the acknowledgment of the instigator, they recover it from his property. It is to be observed, however, that the boy's *Akilas*, in this instance, take their reimbursement from the instigator, or his *Akilas*, in three years from the time of the *Kázee*'s passing a decree in their favour, this indulgence in point of time being allowed, in the payment of fines, in order that distress may be avoided.

Four primary examples, which give rules for determining concerning the imposition of fine upon *Akilas*.

THE compiler of the *Hedáya* remarks that here follow a great variety of cases and examples, stated by *Mohammed*, the primary of which are four.—I. Where the state of the slayer is changed, and his *Willa* transferred to others by some supervenient occurrence, (such as manumission;) in which case his offence is not transferred from his former *Akilas*, whether the *Kázee* issue a decree, or not.—For instance:—the male slave of some person marries the female slave of some other person; and her master emancipates her; and within six months thereafter she brings forth a child; and this child committing manslaughter, the fine falls upon the *Akilas* of the mother;—and the *male* slave's master afterwards emancipates him, in consequence of which the *Willa* of the child appertains to him:—in which case the fine incurred by the child's offence still rests upon the mother's *Akilas*, and does not devolve upon the father's *Akilas*, whether the *Kázee* have issued his decree of fine for the offence or not.—II. Where some unlooked for circumstance occurs (such as a claim laid to a child born of a woman divorced by *Láan*;) in which case the matter is transferred from the *Akilas* on the one side to the *Akilas* on the other;—as has been explained in the example before stated. (The case of the *Mokátib*, there mentioned, also proceeds on this ground; because upon the payment of the ransom he

he appears to have been free from the inftant of his demife; and hence it does not reft upon the *former* ground; for here the caufe is altogether *unexpected*, and is therefore not merely a *fupervenient occurrence*.)—III. Where the ftate of the offender is not altered, but his *Akilas* changed, in this way, that his regiftry was at *Koofa*, and was, after his offence, transferred to *Bafra*;—in which cafe regard muft be paid to the decree of the *Kázee*; in other words, if he have decreed the fine againft the former *Akilas*, and the *Akilas* be then changed, the matter does not devolve upon the latter *Akilas*; but if the *Akilas* be changed previous to the *Kázee*'s decree of fine againft the firft *Akilas*, he muft in that cafe decree it againft the latter *Akilas*.—IV. Where the *Akilas* ftill continue the fame, but obtain an increafe, (by there having been among them an *infant*, who in the interim attains to majority, or by fome of them dying, and others of the neareft tribe being conjoined in the fine;)—in which cafe the additional *Akilas* are affociated with the original *Akilas* in the payment of the fine, whether the *Kázee* have decreed a fine againft the *Akilas*, or not,—excepting only with refpect to fuch part as may already have been paid by the former *Akilas*.—Whoever pays due attention to thefe four primary examples, as grounds of proceeding in this particular, will be enabled to form a judgment, and determine upon almoft every cafe which can occur.

H E D A Y A.

BOOK LII.

Of *WASÀYÁ*, or WILLS.

Definition of the terms used in wills.

WASÀYÁ is the plural of *Waseeat.*—*Waseeat* means an endowment with the property of any thing after death,—as if one person should say to another, "give this article of mine, after "my death, to a particular person."—The thing so given is termed the *Moosee bé hee*, or legacy;—the person who wills that it be given is denominated the *Màwsee*, or testator; the person in whose favour the will is made is called the *Moosee lé hoo*, or legatee;—and the person appointed to carry the will into execution is called the *Wàsee*, or executor.

'6 Chap.

Chap. I. Of Wills that are legal, and Wills that are laudable; and of the Retractation of Wills.
Chap. II. Of the Bequest of a Third of the Estate.
Chap. III. Of Emancipation upon a Deathbed; and of Wills relative to Emancipation.
Chap. IV. Of Wills in favour of Kinsmen, and other Connections.
Chap. V. Of Usufructuary Wills.
Chap. VI. Of Wills made by *Zimmees*.
Chap. VII. Of Executors, and their Powers.
Chap. VIII. Of Evidence with respect to Wills.

CHAP. I.

Of Wills that are legal, and Wills that are laudable; and of the Retractation of Wills.

Wills are lawful, and valid.

WILLS are lawful, on a favourable construction. Analogy would suggest that they are unlawful; because a *bequest* signifies an endowment with a thing in a way which occasions such endowment to be referred to a time when the property has become void in the proprietor, [the testator;]—and as an endowment with reference to a future period, (as if a person were to say to another, "I constitute you pro-

 "prietor

" prietor of this article *on the morrow*,") is unlawful, ſuppoſing, even, that the donor's property in the article ſtill continues to exiſt at that time, it follows that the ſuſpenſion of the deed to a period when the property is null and void, (as at the deceaſe of the party,) is unlawful, *a fortiori*. The reaſons, however, for a more favourable conſtruction, in this particular, are twofold.—FIRST, there is an indiſpenſible neceſſity that men ſhould have the power of making bequeſts; for MAN, from the deluſion of his hopes, is improvident, and deficient in practice; but when ſickneſs invades him he becomes alarmed, and afraid of death. At that period, therefore, he ſtands in need of compenſating for his deficiencies by means of his property;—and this in ſuch a manner, that if he ſhould die of that illneſs, his objects (namely, compenſation for his deficiencies, and merit in a future ſtate) may be obtained,—or, on the other hand, if he ſhould recover, that he may apply the ſaid property to his wants;—and as theſe objects are attainable by giving a legal validity to wills, they are therefore ordained to be lawful*.—SECONDLY, wills are declared to be lawful in the KORAN and the traditions; and all our doctors, moreover, have concurred in this opinion.

to the extent of a third of the teſtator's property;

IF a perſon make a will in favour of a ſtranger, to the amount of a third of his property, it is valid, although the heirs of the teſtator ſhould not be conſenting thereto; for it is ſo recorded in the traditions.

but not to any

A BEQUEST to any amount exceeding the third of the teſtator's

* In this place are ſtated an *objection* and *reply*, which the tranſlator has omitted in the text, in order to avoid an interruption of the ſubject.—*Viz.*

" OBJECTION.—If the right of property in the proprietor become extinct at his deceaſe, " how can his act of endowment be then valid?

" REPLY.—His right of property is accounted to endure at that time from neceſſity,— " in the ſame manner as holds with reſpect to executing the funeral rites, or diſcharging " the debts of the dead."

property

property is not valid. In proof of this the following tradition is quoted, as delivered by *Abee Vekâss*. "In the year of the conquest "of *Mecca*, being taken so extremely ill that my life was despaired "of, the prophet of GOD came to pay me a visit of consolation. I "told him, that, by the blessing of GOD, having a great estate, but "no heirs, except one daughter, I wished to know '*if I might dispose* "*of it* ALL *by*-WILL.' He replied, '*No!*' and when I severally in-"terrogated him '*if I might leave* TWO THIRDS, *or* ONE HALF;' "he also replied in the negative;—but when I asked *if I might leave* "A THIRD, he answered, *Yes, you may leave* A THIRD *of your pro-* "*perty by will: but a third part, to be disposed of by will, is a great* "*portion; and it is better you should leave your heirs rich, than in a* "*state of poverty, which might oblige them to beg of others.*"—Besides, the right of the testator's heirs is connected with his property; for when he is in his last illness he has no further use for it; and as this is the cause of the title to it becoming null and void in him, and vesting in the heirs, their right therefore, at that period, becomes connected with it accordingly. This right, however, is not recognized by the LAW, with respect to a stranger, to the extent of one third of the estate, in order that the testator may be enabled, by bequeathing a third of his property out of his family, to atone for his past deficiencies, as before mentioned. With respect to the heirs *themselves*, on the contrary, this connexion of right is recognized to the extent of the *whole* of the testator's property; (whence it is that if a person should dispose of a third of his property to a part of the heirs, it would not be valid;) for if no regard were paid to the connexion of their right with the whole of the property, with respect to themselves, so as to legalize the bequeathing a third of it to a part of them, in that case the object of a will (namely, a compensation for deficiencies) might not be attended to, as it is possible that the testator, instead of including the whole of the heirs, might leave the third only to a select part of them; and this would be an injury to the others, and would consequently induce a breach of the ties of kindred, which is unlawful. It is to be observed,

further extent,

unless by the consent of the heirs.

observed, however, that although a will, bequeathing more than a third of the testator's property, be not lawful, yet if the heirs, being arrived at the age of maturity, should give their consent to it, after the death of the testator, it then becomes valid; for the objection to its validity is founded merely on a regard to their right, and therefore does not operate any longer, after they themselves agree to forego such right. Their consent, indeed, during the lifetime of the testator, is not regarded; for as this is an assent previous to the establishment of their right, they are therefore at liberty to annul it upon the death of the testator. It is otherwise where the consent is given *after* that event; for as this is an assent subsequent to the establishment of their right, they are not afterwards at liberty to annul it.

A bequest to an heir is not valid unless confirmed by the other heirs.

WHERE a person makes a will in favour of part of his heirs, the same rule holds as in the case of bequeathing more than a third to a stranger;—in other words, the deed is not valid, unless the other heirs give their consent to the disposition after the death of the testator; and their consent *previous* to his death will have no effect. It is to be observed that, in every instance where a will is rendered valid by the consent of the heirs, the legatee derives his property from the *testator*, not from the *heirs*. This is the opinion of our doctors. *Shafei* maintains that he derives his property from the heirs. The opinion of our doctors is approved; for the will of the testator is the occasion of the property, the consent of the heirs being only the removal of a bar; and as the law has regard to the cause, not to the removal of a bar, the property is therefore derived from the testator, not from the heirs;—(whence it is that seizin is not requisite *; for if the property were derived from the heirs, seizin would be requisite; because the transfer of property from a living proprietor, without receiving any thing in return, is in effect a *gift*, to the establishment of which

* Meaning, "the testator's taking possession of the bequest is not requisite to the establishment of his right in it."

the

the ſeizin of the donee is a neceſſary condition;)—in the ſame manner as where a pawner ſells the pawn, in which caſe the ratification of the deed of ſale reſts entirely on the pawnee, and if he give his conſent, the ſale is valid, and the purchaſer derives his property in the article ſold from the *pawner*, not from the *pawnee*.

A bequeſt to a perſon from whom the teſtator had received a mortal wound is not valid;

IF a perſon make a bequeſt in favour of another from whom he has received a mortal wound, it is not valid; whether the murderer be one of his heirs, or a ſtranger, or whether he may have wounded him wilfully or by miſadventure, provided he be the actual perpetrator of the deed; becauſe it is recorded in the traditions, that "there is no *legacy for a murderer*;" and alſo, becauſe, as the perſon who gave the wound has haſtened the death of the teſtator, he is, by way of puniſhment, excluded from the benefit of the will, in the ſame manner as a perſon under ſimilar circumſtances is excluded from inheritance.—So likewiſe, where a man, having made a bequeſt in favour of a particular perſon, is afterwards killed by that perſon, ſuch bequeſt is invalid.—If, however, in theſe caſes, the heirs ſhould give their conſent, the bequeſt then becomes valid, according to *Haneefa* and *Mohammed*.—*Aboo-Yoofaf* is of a contrary opinion; becauſe the offence of the murderer, which is the cauſe of the invalidity of the will, ſtill exiſts.—The arguments of *Haneefa* and *Mohammed* upon this point are twofold.—FIRST, the defect in the validity of the will, *with reſpect* to the murderer, is on account of the right of the heirs; becauſe the advantage of ſuch defect reſults to them, as in the caſe of excluſion from inheritance.—SECONDLY, the defect in the validity of the bequeſt, as made *in favour* of the murderer, is owing to the heirs withholding their conſent, in the ſame manner as in the caſe of a will in favour of part of the heirs; and conſequently, as the conſent of the remaining heirs, in that inſtance, eſtabliſhes the validity of the will, it follows that the conſent of the heirs at large muſt have the ſame effect in the caſe in queſtion.

and if a legatee ſlay his teſtator, the bequeſt in his favour is void.

IF

A bequest to a *part* of the heirs is not valid.

If a man make a bequest in favour of a part of his heirs, it is not valid; because of a traditional saying of the prophet, "God *has allotted to every heir his particular right*;" and also, because a will in favour of a part of the heirs is an injury to the rest; and therefore, if it were deemed legal, would induce a breach of the ties of kindred.—Besides, it is said, in the traditions, "*a bequest to particular heirs is unjust*."—It is to be observed that in judging whether the legatee be an heir, or otherwise, regard is paid to the time of the testator's death, not to the period of making the will; because the efficacy of the will is established after the death of the testator.—(The gift of a dying person* is in this respect of the same nature with a legacy, both being the same in effect, and is therefore executed to the amount of a third of the property.)—If, on the contrary, a dying person make an *acknowledgment* in favour of a part of his heirs, regard is paid to the time of such acknowledgment; because the acknowledgment of a dying person is an immediate and complete act of his own, and has not any reference to a future period;—and such being the case, it follows that it is not valid in favour of any who were actually heirs at the time of making it,—and that it *is* valid with respect to such as were not heirs at that time; although they should become so afterwards;—as where, for instance, a person makes an acknowledgment in favour of his child, who is a slave, and the child recovers his freedom before the death of the father; in which case the acknowledgment so made is valid, notwithstanding the child, by the recovery of his freedom, became one of his father's heirs;—for as, at the time of the acknowledgment, he was not an heir †, any acknowledgment made in his favour was virtually made in favour of his master, who was a stranger;—and the validity of the acknowledgment being once established, it does not afterwards admit of being annulled from the circumstance

* Arab. *Mareez.* Literally, *sick*,—but always (in the language of the LAW) meaning, "*sick of a mortal illness.*"

† A slave cannot possess any right of inheritance.

cumstance of the child's becoming an heir.—It is to be observed, however, that although a bequest in favour of a part of the heirs be not valid, yet it is rendered so by their consent, as was already mentioned.—If, moreover, a part should give their consent, and part withhold it, the bequest then becomes valid in proportion to the amount of the shares of those who consent, and invalid in proportion to the amount of the shares of the others.

Bequests are valid between *Mussulmans* and *Zimmees*.

THE bequest of a *Mussulman* in favour of a *Zimmee*, or of a *Zimmee* in favour of a *Mussulman*, is valid: the former, because GOD has said, in the KORAN, "YE ARE NOT PROHIBITED, O BELIEVERS, FROM "ACTS OF BENEVOLENCE TOWARDS THOSE WHO SUBJECT THEM-"SELVES TO YOU, AND REFRAIN FROM BATTLES AND CONTEN-"TIONS;"—and the latter, because *Zimmees*, in virtue of their compact with the *Mussulmans*, are considered in the same light with them in all temporal concerns; and as, on this principle, an intercourse of good offices towards each other is held lawful during life, they are therefore in the same manner permitted to extend beyond the grave.—It is related in the *Jama Sagheer* that a will in favour of an hostile infidel is not valid, as GOD has prohibited, in the KORAN, the exercise of benevolence towards them.

The acceptance or rejection of them is not determined until after the death of the testator.

THE acceptance or rejection of a bequest is not established until after the death of the testator; for as the bequest does not take effect before that event, those cannot be previously regarded.—Hence the acceptance or rejection during the life of the testator has no effect, in the same manner as an acceptance declared before the existence of a contract.—If, therefore, a legatee accept a bequest after the death of the testator, it is valid, notwithstanding he may have rejected it during his lifetime.

It is laudable to avoid making them

IT IS preferable and most advisable not to leave legacies, if the heirs be poor, and their particular portions not such as to enrich them; because

where the heirs are poor.

because this manifests benevolence to the heirs, who have a superior claim to it from the relation in which they stand, God having declared, in the Koran, "The exertions of generosity towards re-"lations is more laudable than towards strangers."—Besides, in this an observance of two claims is maintained, namely, that of poverty and consanguinity. If, on the contrary, the heirs be rich, or the particular portions assigned to them be such as to enrich them, it is most advisable to leave something short of a third of the estate in legacies, as a legacy to a stranger is an act of charity, whereas the bestowal of the whole upon the heirs is a gift; and the former is more laudable than the latter, being calculated to gain the favour and good will of God. Some have said that in such case the proprietor is under no restraint, but is perfectly at liberty to make a will in favour of strangers, or to suffer the whole to pass to the heirs, as each has its particular merit, the first being an act of generosity, and the second an obedience to the dictates of natural affection.

The legatee becomes proprietor of the legacy by his acceptance of it;

The property of a legatee in a legacy is established by his acceptance of it. *Ziffer* is of opinion that a legacy is like an inheritance; because the legatee acquired the property by transition from, and succession to, the testator, in the same manner as an heir acquires it by succession to and descent from the last possessor; and therefore his acceptance is not necessary towards the establishment of the property, in the same manner as holds in the case of inheritance.—Our doctors, on the contrary, argue that a legacy establishes the property in the legatee *de novo*, and does not vest by succession and descent as in the case of inheritance;—(whence it is that a legatee cannot reject the legacy on account of any defect; in other words, if a person, having purchased a *slave*, for example, should bequeath him to another, and the legatee, after the death of the testator, discover the slave to have some fault or defect, it would not, on this account, be in his power to return him to the seller, as an heir, in a similar case, would be entitled to do;—and likewise, that nothing can be returned to a legatee on account of

a defect; in other words, if a perſon ſhould bequeath his whole eſtate by will, and afterwards ſell ſomething belonging to it, and the buyer diſcover a defect in the ſame, ſtill he would not have the power of returning it to the legatee, whereas he might to an heir;)—and ſuch being the caſe, it reſts, therefore, entirely on his acceptance, as no perſon can be made proprietor of any thing againſt his will. Inheritance, on the contrary, is a ſucceſſion; (whence it is that the rules above mentioned have effect in it;) and an heir is therefore, as it were, *forcibly* put in poſſeſſion of his inheritance, by the eſpecial ordinance of the LAW, the validity of it not being ſuſpended on his acceptance or conſent. It is to be obſerved that acceptance, in caſes of bequeſt, is of two kinds.—I. Expreſs, which needs not to be explained.—II. Implied, which is where the legatee dies without having either declared his acceptance or refuſal; for this alſo is an acceptance in effect; becauſe the bequeſt is rendered complete on the part of the teſtator by his death, (in other words, it cannot be reſcinded after that event;) and as it was ſuſpended in its effect purely in deference to his right of rejection, it of courſe falls into his property upon his demiſe;—in the ſame manner as holds in a caſe of ſale with a reſerve of option to the purchaſer; in which inſtance, if the purchaſer die without formally ſignifying his aſſent to the ſale, it is then regarded as complete, and the article ſold is conſidered as part of his eſtate.

which may be either expreſs or implied.

IF a perſon deeply involved in debt bequeath any legacies, ſuch bequeſt is unlawful and of no effect; becauſe debts have a preference to bequeſts, as the diſcharge of debts is an abſolute duty, whereas bequeſts are gratuitous and voluntary; and that which is moſt indiſpenſable muſt be firſt conſidered. If, however, the creditors of the deceaſed relinquiſh their claims, the bequeſt is then valid, the obſtacle to it being removed, and the legatee being ſuppoſed to ſtand in need of his legacy.

Bequeſt by an inſolvent perſon is void;

and so likewise by an infant,

Bequest by an infant is not valid. *Shafei* maintains that it is valid, provided it be made to a discreet and advisable purpose; because *Omar* confirmed the will of a *Yaffai*, (that is, a boy who has nearly reached the age of maturity;) and also, because in the execution of it a degree of advantage results to the infant, inasmuch as he acquires the merit of the deed,—whereas in the annulment of it he is deprived of all advantage. The arguments of our doctors, in support of their opinion upon this point, are twofold.—First, a will is a voluntary act, concerning which an infant has not a capacity of forming a proper judgment. Secondly, the declaration of an infant is not of a binding nature; but if the validity of a bequest by such were admitted, that effect would follow of course.—With regard to the tradition of *Omar*, the term *Yaffai*, there used, must be understood to mean a person just arrived at the age of maturity, or, "the *will* of the *Yaffai*" relates merely to the celebration of his obsequies, which is lawful in the opinion of our doctors. Besides, the annulment of the will is advantageous to the infant, since in allowing his property to pass to the heirs the rights of natural affection are maintained, as before mentioned. With respect to the assertion of *Shafei*, that "in the execution of "the will an advantage results to the infant," it may be replied that the point to be attended to, in cases of advantage or loss, is, the immediate tendency of any act or deed, and not what may eventually result from it; in other words, if the deed itself, in its immediate tendency, produce advantage, the execution of it on account of the infant is preferable; but in the case here considered the deed, (that is, the bequest) in its immediate tendency, leads to a loss of property, although eventually the infant have an advantage, the bequest having been made with a view to obtain merit in the eye of God; and since the bequest of the infant, in its immediate tendency, occasions a loss, it is not valid;—in the same manner as holds in case of a divorce; in other words, if an infant divorce his wife, or his guardian do so on his behalf, it is not binding, notwithstanding a divorce may on many occasions be attended with advantage,—as where an infant, having a wife

wiſe who is poor, wiſhes to divorce her, and marry her ſiſter, who is rich and handſome.—In ſhort, bequeſt by an infant is invalid, according to our doctors;—and in the ſame manner, if an infant ſhould make a will, and die after he had attained to maturity, the will is not valid, as having been made at a time when he was unqualified for ſuch an act; and ſo likewiſe, if an infant ſhould ſay, "It is my will, whenever "I reach the age of maturity, that a third of my eſtate be conſidered "as a legacy in favour of a particular perſon," the will is not valid; becauſe an infant, being unqualified, is not competent to make a will that ſhall be deemed valid immediately, or that can be rendered ſo by being ſuſpended to a future period; in the ſame manner as he is incapable of divorce or emancipation. It is otherwiſe with reſpect to a ſlave or a *Mokatib*; for they poſſeſs a complete competency, obſtructed merely by the right of their maſter; and therefore all their acts (ſuch as divorce, bequeſt, or ſo forth) are perfectly valid if referred to a period when that bar no longer exiſts; as where a ſlave (for inſtance) ſays "I declare my wife to be divorced *whenever I am free*."

or a *Mokátib*.

BEQUEST by a *Mokâtib* is not valid, notwithſtanding he leave effects ſufficient to diſcharge his covenanted ranſom; becauſe the property of a *Mokâtib* is not a fit ſubject of gratuitous acts. Some aſſert that this is according to *Haneefa*; but that the two diſciples hold a contrary opinion.

A bequeſt of (or in *favour of*) a fœtus in the womb is valid.

A WILL in favour of a fœtus in the womb, and a will bequeathing a fœtus, are both valid, provided the birth happen in leſs than ſix months from the date of the will. The ground on which the firſt caſe proceeds is, that a legacy is, in a manner, a ſucceſſion to property; and as a fœtus is capable to ſucceed in the caſe of inheritance, it is ſo likewiſe in the caſe of a legacy, that being analogous to inheritance. If, however, the legatee ſhould reject the legacy, it is rejected accordingly, as a bequeſt bears alſo the ſenſe of an *endowment*, which may be declined. It is different with *inheritance*, as that is purely

purely a *ſucceſſion*, and is not annulled by the rejection of the heir.—Gift, moreover, differs from bequeſt, it not being (like bequeſt) admitted in favour of a fœtus; for gift is purely an *endowment*; and no perſon can endow a fœtus with any thing. The ground, on the other hand, on which the ſecond caſe proceeds is, that the exiſtence of the fœtus is underſtood at the period of making the will; and as the legacy of things not yet in being (ſuch as the fruit a tree may hereafter yield) is valid, it follows that a legacy of a thing actually exiſting is valid *a fortiori*.

A female ſlave may be bequeathed with the exception of her progeny.

If a perſon bequeath a female ſlave, and except the offspring of her womb, both the bequeſt and the exception are valid. The *bequeſt* is valid, becauſe the words "female ſlave" do not include the offspring. As, however, in the bequeſt of a female ſlave, her offſpring is included dependantly, where the bequeſt is abſolute, it follows that where a ſlave is bequeathed with an exception of her offſpring, ſuch bequeſt is valid. The *exception* alſo is valid; becauſe as it is permitted to bequeath a fœtus in the womb, it is alſo allowable to except it from a legacy; for it is a rule that whatever is in itſelf capable of being the ſubject of a deed may alſo be excepted from that deed; and *vice verſa*. Beſides, the acceptance of the legatee is ſuſpended until the death of the teſtator; and the annulment of the declaration, previous to the acceptance, is valid, as in a caſe of *ſale* for inſtance.

A bequeſt is reſcinded by the expreſs declaration of the teſtator; or by any act on his part implying his retractation.

Upon the teſtator either expreſsly reſcinding his bequeſt, (as if he were to ſay, "I retract what I had bequeathed,") or performing any act which argues his having reſcinded it, retractation is eſtabliſhed. It is eſtabliſhed, in the former inſtance, evidently; and ſo likewiſe in the latter; for as acts are demonſtrative of the inclination as much as expreſs words, they are conſequently equivalent thereto.—It is to be obſerved, that if the teſtator perform, upon the article he had bequeathed, any act which, when performed on the property of another,

other, is the cauſe of terminating the right of the proprietor, (ſuch as the ſlaughter of a goat, or the fleaing, roaſting, or boiling of it, the fabrication of a veſſel from a piece of copper, the grinding wheat into flour, or the fabrication of a ſword from iron,)—ſuch act is a retractation of the bequeſt. If, alſo, he perform upon it any act creating an addition to the legacy, and this addition be ſo connected, that the legacy cannot be ſeparately delivered, (as where a perſon bequeaths the flour of wheat, and afterwards mixes it with oil,—or a piece of ground, and afterwards erects a building on it,—or undreſt cotton, and afterwards dreſſes it,—or a piece of cloth, and afterwards lines or covers a gown with it,)—ſuch act is a retractation of the bequeſt. It is otherwiſe with reſpect to plaiſtering the wall of a bequeathed houſe, or undermining the foundation of it; for theſe acts do not indicate a retractation of the bequeſt, as they affect the legacy in its *dependancies* only.

or which extinguiſhes his property in the legacy.

EVERY act or deed which occaſions an extinction of the property of the teſtator is a retractation from his bequeſt,—(as where, for inſtance, a teſtator ſells the article he had bequeathed, and afterwards purchaſes it,—or gives it to ſome perſon, and afterwards retracts the gift,)—and conſequently, the legacy does not go to the legatee after his [the teſtator's] deceaſe;—becauſe a will can hold good only with reſpect to the teſtator's property; and therefore, upon his property being extinguiſhed, the bequeſt becomes null of courſe. (It is to be obſerved that the waſhing of a bequeathed garment is not a retractation from the bequeſt; on the contrary, it is rather a confirmation of it, as it is a cuſtom to waſh garments before they are given to any perſon.)

The teſtator's *denying* his bequeſt is not a retractation of it;

IF a teſtator deny his bequeſt, and the legatee produce witneſſes to prove it, there is in that caſe a difference of opinion among our doctors;—for according to *Mohammed* this is not a retractation;—whereas *Aboo Yooſaf* maintains that it *is* ſo, becauſe *retractation* ſignifies

nifies the teſtator negativing his bequeſt *at the preſent time*; and as the denial is a negative applying both to the *preſent* and to the *paſt*, it therefore amounts to a retractation *a fortiori*. The argument of *Mohammed* is, that the denial of a bequeſt ſignifies the putting a negative upon it with reſpect to the *paſt*, of which its being negatived with reſpect to the *preſent* is a conſequence; and upon the bequeſt being proved, by witneſſes, to exiſt at preſent, the denial is of no effect. Another argument is, that as a retractation implies the former exiſtence of a will, and the preſent annihilation of it, and denial (on the other hand) diſavows both the former and the preſent exiſtence of it, there is therefore an evident difference between a retractation and a denial; whence the latter ought not to be conſidered in the light of the former;—and accordingly, denial not being a retractation, if a huſband deny his marriage, and the wife bring witneſſes to prove it, ſtill a ſeparation does not take place between them.

nor his declaring it *unlawful* or *uſurious*,

If a teſtator declare the will he has made in favour of a particular perſon to be *unlawful* or *uſurious*, this is not a retractation, becauſe the ſpecification of it under the deſcription of illegality or uſury is a plain proof that the ſubject of the deſcription (namely, the will) does actually exiſt. The caſe would be different if he ſhould declare the will to be *null*; for that is evidently a retractation; becauſe, as a thing which is null is non-exiſtent, the deſcription of *null* evinces that the thing ſo deſcribed no longer exiſts. It is otherwiſe with the deſcription of unlawful; for that indicates a continuance of the exiſtence, as illegality cannot apply to a *nonentity*.

or deſiring the execution of it to be deferred.

If a teſtator ſhould deſire that the execution of his will be ſuſpended for ſome time after his death, this is not a retractation. If, on the contrary, he ſay " I depart from my will," he is then held to have retracted it.

If

IF a perſon ſay, "I will that a particular ſlave, which I formerly "bequeathed to *Zeyd*, be given as a legacy to *Amroo*," in that caſe "a retractation from the firſt will is eſtabliſhed, as the tenor of his ſpeech evidently ſhews that it was not his intention they ſhould both partake of the legacy. It is otherwiſe where a perſon firſt leaves a particular article to one man, and then leaves the ſame thing to another;—as if he ſhould ſay, "I will that this thing be given to *Zeyd*," and afterwards make a bequeſt of the ſame thing in favour of *Amroo*;—for in that caſe a retractation of the firſt will does not take place; the ſubject being capable of diviſion, and the ſeparate ſentences bearing that conſtruction.

A bequeſt to one perſon is annulled by a ſubſequent bequeſt of the ſame article to another,

IF a perſon ſay, "the ſlave which I formerly left to *Zeyd* I now "bequeath to *Amroo*," and at that time *Amroo* be not alive, the firſt will, in favour of *Zeyd*, holds good; for *that* was annulled only on account of the legacy having been completely deviſed to *Amroo*; and upon this no longer remaining in force, becauſe of *Amroo*'s death, the firſt will reverts.—If, on the contrary, *Amroo* be alive at the time of the bequeſt in his favour, and afterwards die before the teſtator, the legacy [the ſlave] in that caſe paſſes to the heirs, both bequeſts being void,—the firſt, becauſe of the retractation,—and the laſt, becauſe of the death of the legatee previous to that of the teſtator.

unleſs that other be not then alive.

CHAP. II.

Concerning the Bequeſt of a Third of the Eſtate.

Caſe of a perſon bequeathing two thirds of his property to two perſons reſpectively;

If a perſon bequeath a third of his property to one man, and a third to another, and the heirs refuſe their conſent to the execution of both bequeſts, one third is in that caſe divided equally between the two legatees; for where the will exceeds a third of the eſtate, and the heirs refuſe their conſent to the execution of the whole, it is then reſtricted to one third, as has been already explained; and as, in the preſent inſtance, the right of both claimants is equally good, and the third is capable of diviſion, it is therefore divided equally between them.

or a third to one and a ſixth to the other.

If a man bequeath a third of his property to one perſon and a ſixth to another, and the heirs refuſe to confirm the whole, in that caſe one third of the property is to be divided between the legatees in three equal lots, two to the legatee of the *third*, and one to the legatee of the *ſixth*; becauſe the bequeſt does not hold good for any thing beyond one third; and as both the legatees lay their claims on equally good ground, and it is impoſſible to diſcharge their demands (namely, a third and a ſixth) with one third only, that is therefore ſhared between them in proportion to their reſpective claims, in the ſame manner as is practiſed with creditors, in diſcharging the debts of a perſon who dies inſolvent. Here, moreover, the right of one legatee is to a ſixth, and that of the other to a third; and as a third is twice the amount of a ſixth, the third is therefore divided between the claimants

ants in three ſhares, two ſhares going to the one, and one ſhare to the other.

Caſes of *Mobabàt* wills;

[* A WILL by way of *Mobabàt*, on a deathbed, is the ſame in effect as a bequeſt of property, and is therefore executed to any amount not exceeding a third of the teſtator's eſtate. (*Mobabàt* literally ſignifies a *gift*. In the language of the LAW it means a gift interwoven in ſome compact or deed, as if a perſon ſhould ſell part of his property to another at an inferior value.)

IF a perſon, having two ſlaves, one eſtimated at thirty *dirms*, and the other at ſixty, ſhould on his deathbed will that the ſlave worth thirty *dirms* be ſold to *Zeyd* for ten, and that the other worth ſixty, be ſold to *Omar* for twenty,—in that caſe *Zeyd* obtains a *Mobabàt* of twenty *dirms*, and *Omar* a *Mobabàt* of forty *dirms*; and this is what is denominated a will by *Mobabàt*. But if the teſtator ſhould not be poſſeſſed of any other property than theſe two ſlaves, and the heirs refuſe to ratify the will, in that caſe the *Mobabàt* is executed only in the proportion of a third. Now the whole of the property is ninety *dirms*, that being the aggregate value of the two ſlaves: one third of that, therefore, (being thirty *dirms*,) is divided into three ſhares, two of which are given in *Mobabàt* to *Omar*, and one to *Zeyd*; that is, the ſlave worth ſixty *dirms* is ſold to *Omar* for forty, and the other, worth thirty, to *Zeyd*, for twenty.

IF a perſon, having two ſlaves, one valued at thirty *dirms*, and the other at ſixty, ſhould on his deathbed emancipate both, ſuch manu-

* The whole paſſage within the crochets ſeems to be an interpolation of the *Molovees* employed in the compoſition of the *Perſian* verſion of the HEDAYA, as the tranſlator has conſulted various *Arabic* copies, without finding it in any of them. It may poſſibly have been inſerted in ſome copies of the work in the manner of *marginal illuſtrations*, which induced the *Molovees* to give it a place in the text.

mission is in effect a bequest.′ If, therefore, the person in question leave no other property than these two slaves, and the heirs refuse their consent to the emancipation, it takes effect in the proportion of one third; that is to say, each of the slaves is rendered free in one third of his value, and must earn the freedom of the remaining two thirds by emancipatory labour.

and bequests of specific sums of money.

If a person bequeath a particular number of *dirms*, without specifying the relative proportion they bear to his estate,—such as a half, a third, a fourth, or the like,—it is valid, but is executed only to the extent of a third of his whole property, unless the heirs be willing to confirm the whole. Thus if a person, having only ninety *dirms*, should bequeath thirty to *Zeyd*, and sixty to *Omar*, and the heirs refuse their assent to it, in that case the sum of the two legacies is reduced to thirty *dirms*, of which *Zeyd* receives ten, and *Omar* twenty.]

Case of a person bequeathing the *whole* of his estate to one, and then a *third* of it to another.

If a person first bequeath the whole of his estate to one man, and then a third of it to another*, and the heirs refuse their assent, in that case one third of his estate is divided into four shares, of which three are given to the legatee of the whole, and one to the legatee of the third. This is according to the two disciples. *Haneefa* alleges that the third of the estate must be divided equally between the two legatees; for in his opinion, when a legacy is extended beyond a third, the excess is of no weight in the determination. The argument of the two disciples is, that the testator has two objects in view; for *first*, he designs that each of the legatees shall receive the whole of his legacy; and *secondly*, that a superiority of the one over the other shall be maintained. Now the attainment of the *first* of these objects is impossible, because of the right of the heirs, and is, indeed, in itself impracticable; but as there is no bar to the full accomplish-

* This supposes the testator, first, to say "I bequeath the *whole* of my property to *Zeyd*," (for instance,) and again, at some future time, "I bequeath a *third* of my property to *Amroo*."

ment

ment of the *second* object, the superiority of the one over the other is preserved, in the same manner as in the cases of bequest by *Mohabàt*, or emancipation, or, of legacies of a specific number of *dirms*. The argument of *Haneefa* is, that a will is null and void in whatever degree it may exceed a third of the estate, where the heirs refuse their assent; and cannot on any sort of pretext be executed in that amount, as being repugnant to the ordinance of the LAW in this particular. Since, therefore, the will is rendered null in the excess above a third, one object of the testator (namely, to establish a superiority) is also rendered null, as being comprehended in it; in the same manner as a *Mohabàt* is rendered null when interwoven in a contract of sale which is afterwards invalidated; as where, for instance, a person sells, by *Mohabàt*, a slave valued at thirty *dirms* for twenty, and the sale afterwards becomes void in consequence of the loss of the subject of it previous to the delivery,—in which case the *Mohabàt* also becomes void. It is otherwise in the cases of bequest by *Mohabàt* or emancipation, or of legacies of a specific number of *dirms*; for there the validity does not rest on the consent of the heirs; it being eventually possible that the bequests may become valid notwithstanding the heirs should refuse to ratify them, by the testator, (for instance,) after making the bequest, increasing his property to a degree that might render the amount of the bequest no more than equal to, or less than, one third of the whole. Since, therefore, in these cases, the bequest is not in itself null, but rather stands within the possibility of being valid, a regard must consequently be paid, in such instances, to the superiority of one of the parties. It is otherwise in the case here considered; for it is in this instance impossible that the will should be valid, as has been already shewn. It is also otherwise where a person bequeaths a particular slave, valued at one thousand *dirms*, to *Zeyd*, and another, valued at two thousand *dirms*, to *Bicker*, and has himself no other property than these slaves; for although, in this case, there be a possibility that the testator may so increase his property as to render the amount of the two slaves equal to, or less than, a third of the whole, yet *Bicker* would receive

a proportion

a proportion according to the third, not according to the amount of the legacy, (viz. two thousand *dirms*;) because here the right of the legatees is connected with the substance of the slaves, on this ground, that if the slave should be destroyed, the will would be rendered void, notwithstanding the testator might have acquired other property. Hence the apprehension before stated is of no weight in this instance, as the right of the legatee is here connected with the very article with which the right of the heirs has a connexion. In the case, on the contrary, of a legacy of a specific number of *dirms*, if the property of the testator be destroyed, and he afterwards acquire more, the legacy would be valid, and executed by means of the newly acquired property; whence it is plain that the right of the legatee, in the case of a legacy of a specific number of *dirms*, is not connected with the substance, and consequently is not annulled on account of its destruction.

The bequest of "a son's "portion of "inheri-"tance" is void, but not the bequest of an *equivalent* to it.

If a person bequeath to another "*his son's portion of inheritance**," such bequest is null; whereas, if he bequeath "*an* EQUIVALENT *to* "*his son's portion*," such bequest is valid; for the first is a bequest of what is the property of another, whereas the second is merely a bequest of something similar; and the semblance of a thing is different from the thing itself, notwithstanding its rate be determined thereby. *Ziffer* is of opinion that a bequest of the former nature is likewise valid; because at the time of making it the portion belonged evidently to the testator. In reply to this, however, it is to be observed, that the legacy does not take place until after the death of the testator, when the property does not belong to him, and hence his bequest of his son's portion is a bequest of property not his own.

* In this, and several subsequent examples, the effect depends entirely upon the terms in which the bequest is conceived, and which must therefore be particularly attended to.—Thus, in the present instance, the testator is supposed to say, "*I bequeath to* SUCH AN ONE "*my son's portion of inheritance*;" and so of the rest.

A bequeſt of "*a portion*" of the eſtate is executed to the extent of the ſmalleſt portion inheritable from it.

IF a perſon bequeath "*a portion of his eſtate*," the legatee is in that caſe entitled to the ſmalleſt portion allotted to any of the heirs,—provided, however, that ſuch portion be not leſs than a ſixth, for then a complete ſixth muſt be given to him; and if it ſhould *exceed* a ſixth, in that caſe alſo a ſixth is given to him; for he is in no wiſe to get more than a ſixth. A caſe in which one of the inheritable portions is leſs than a ſixth is where, for inſtance, a perſon bequeaths to another "*a portion of his eſtate*," and leaves heirs, at his death, a ſon and a wife;—in which caſe, although the ſhare of the wife be only an eighth, yet the legatee receives a ſixth, and the remainder is then divided between the wife and ſon [the heirs] according to the ordinances of the LAW. A caſe, on the contrary, in which all the inheritable portions exceed a ſixth, is where, for inſtance, a perſon makes a bequeſt in the terms here ſtated, and dies, leaving heirs a full brother and wife; in which caſe, although the ſmalleſt portion be a fourth, yet the legatee is only entitled to a ſixth; and that being paid to him, the remainder is then divided between the brother and wife, agreeably to the ordinances of the LAW. This is according to *Haneefa*. *Aboo Yooſaf* and *Mohammed* are of opinion that the legatee is entitled to the loweſt ſhare, whatever be its amount, provided it do not exceed a third; but if it exceed a third, an exact third muſt be given him, and not more, unleſs the heirs be conſenting thereto. The argument on which they ground this opinion is, that the word *Sehm* [portion,] both in its literal and received ſenſe, means *a portion allotted to an heir*; and as the ſmalleſt ſhare is a matter of certainty, it is therefore adopted as the ſtandard; except where the ſmalleſt portion of inheritance exceeds a third, in which caſe the bequeſt is executed in the proportion of a third, as a legacy exceeding a third is not valid, unleſs confirmed by the heirs. The argument of *Haneefa* is, that *Sehm*, according to the interpretation of the LAW, means a ſixth; a legacy of a *Sehm* having been left in the time of the prophet, who ordained that a ſixth of the property of the teſtator ſhould be given to the legatee. In its literal ſenſe, moreover, it bears the ſame meaning,

meaning, because *Ayâss*, a man skilled in the *Arabic* language, who was *Kâzee* of *Bagdad*, declared that *Sehm* literally signified a sixth. Since, therefore, *Sehm*, both in the practice of the LAW, and the literal signification, means a sixth, the legatee in cases of this kind is always entitled to it, and to no more.—(Several lawyers, however, remark, that although this was the received sense of *Sehm* in those days, yet in our time it means, indefinitely, a *portion*, or *part*.)

A bequest of "*part* of the "estate" undefined, may be construed to apply to *any* part.

IF a person bequeath "*a part of his property*" to another without specifying *to what amount*, the heirs are at liberty to give whatever they please to the legatee; for here the amount of the bequest is unknown; but as the uncertainty with respect to that is no bar to its validity, it is therefore valid; and such being the case, and the heirs being the representatives of the testator, it is consequently at their discretion to fix the amount, in the same manner as the testator himself might do if he were living.

Case of a person bequeathing first a sixth, and then a third, to the same person;

IF a person bequeath "*a sixth of his property*" to another, and afterwards, before the same or another company, bequeath "*a third* "*of his property*" to that same person, in this case the legatee is entitled to a third of the testator's estate, whether the heirs be consenting or not, the sixth being included in the latter bequest of a third.

or, first a third, and then a sixth, to the same person.

IF a person bequeath "*a third of his property*" to another, and afterwards, either before the same or another company, bequeath "*a* "*sixth of his property*" to the same person, in that case the legatee is entitled only to the sixth. (The proofs, in this instance, are drawn from the *Arabic*.)

A person bequeathing a third of any particular property, if

IF a person bequeath to another "*a third of his* DIRMS," amounting in all to three thousand, or "*a third of his goats*," amounting in all to three, and afterwards two thirds of the *dirms* or goats be lost or destroyed,

destroyed, so that only one third remains, and the remaining third do not amount to a third of the whole of the testator's property, (he having been in possession of *other* things besides the *dirms* or goats,) the legatee is entitled to the complete remaining third; that is, to a thousand *dirms* in the first case, and to one goat in the second. *Ziffer* maintains that the legatee is entitled only to one third of what remains,—that is, in the first instance to one third of one thousand *dirms*, and in the second to the third of the value of the goat; because the heirs and the legatee having had proportionate claims to the whole in an indefinite manner, are to participate in the loss according to the proportion of their claims;—in the same manner as holds where the effects are of different kinds, such as a gown, a slave, and a house; for if "*one of these three*" be bequeathed to a particular person in an indefinite manner, and two of them be afterwards destroyed, the remaining one is divided between the heirs and the legatee; and so likewise in the present instance. Our doctors, on the other hand, argue that it is possible completely to maintain the right of one of two partners (such as the *legatee*, in the present instance) in one of three articles, where they are all of the same class; (whence it is that the holder of a partnership property may be compelled, if it be of a homogeneous nature, to make a division of it among the partners; the division, with respect to any unique and specific article, being the right of each partner respectively;)—and as the bequest precedes the right of the heirs *, the right of the legatee is therefore completely maintained with respect to the thousand *dirms* in question;—the case being in fact the same as where a person bequeaths another three *dirms*, two of which are afterwards lost,—when the remaining *dirm* goes completely to the legatee, according to all our doctors. It is otherwise where the effects bequeathed are of different kinds; for there, after the loss or destruction of two of the articles, neither the complete

two thirds of it be lost, and the remainder come within a third of the testator's estate, the legatee is entitled to the whole of such remainder.

* The debts and bequests due from an estate are discharged previous to the distribution of the portions of inheritance.

right of the whole, nor the complete particular right of any one of the parties, can be maintained by means of the remaining article; and therefore the diviſion is not ſet aſide in favour of the legatee on account of the priority of his claim; on the contrary, the remaining article is divided among the parties, according to the nature of their reſpective claims.

A bequeſt of "*the third of*" an article, part of which is afterwards deſtroyed, holds with reſpect to a third of the remainder.

If a perſon bequeath to another "*a third of his clothing*," of which two thirds are afterwards deſtroyed, and the remaining third exceed in value a third of the whole property of the teſtator, the legatee is in that caſe entitled to only one third of the veſtments that remain. Lawyers, however, have obſerved that this is only where the veſtments are of different kinds; for otherwiſe they are conſidered in the ſame light as *dirms*;—and ſo likewiſe of all articles of weight, or meaſurement of capacity, as it is poſſible, in thoſe alſo, to maintain complete the right of particular partners to particular portions,—whence it is that a diviſion of ſuch among partners may be compelled.

If a perſon bequeath to another "*the third of his three ſlaves*," and two of them afterwards die, the legatee is entitled only to a third of the value of the remaining ſlave; and the ſame rule alſo holds with reſpect to different houſes. Some ſay that this is according to *Haneefa* only; and others, that it is the opinion of all our doctors. The compiler of the *Hedàya* remarks that it is approved, proceeding upon the general rule before ſtated, that "in all articles which admit of the "rights of the partners being united in them, it is practicable to unite "the right of the legatee."

A legacy of money muſt be paid in full with the property in hand, although all

If a perſon whoſe eſtate conſiſts, partly of ready money, and partly of debts due to him from others, bequeath to another one thouſand *dirms*, and that ſum exceed not a third of the *exiſtent* property, it is paid to the legatee without any deduction. If, on the contrary, it exceed

exceed a third of the ready property, he is only to receive a third of the amount in hand; and afterwards a third must be paid him, of whatever sums may occasionally be recovered by the heirs, until in this manner the amount of the legacy be completely discharged. The reason of this is that the legatee is (as it were) a partner with the heirs; and therefore, if his claim in particular were discharged with the ready property (by its being applied to the payment of the whole of his legacy,) an injury would be occasioned to the right of the heirs, as ready money is allowed to be preferable to money that is due.

the rest of the estate should be expended in debts.

If a person leave a third of his property "*to* ZEYD *and* OMAR," and *Omar* be at that time dead, the whole of the third is given to *Zeyd*, whether the testator, at the time of making the will, have been acquainted with the death of *Omar* or not; for as a defunct is not capable of becoming a legatee, he therefore cannot prevent a living person from being so;—in the same manner as where, for instance, a person bequeaths something "*to* ZEYD *and to a* WALL." According to one tradition from *Aboo Yoosaf* it is said, that if the testator were not acquainted with the death of *Omar*, *Zeyd* is then entitled only to one half of the third; for on such a supposition the will in favour of *Omar* was valid in the opinion of the testator; which sufficiently indicates his will and intention to have been that *Zeyd* should receive only one half of the third. But if, on the other hand, he was acquainted with the circumstance of *Omar*'s death it is evident that he intended that *Zeyd* should receive the whole, as a will in favour of a dead man is vain and useless.

A legacy left to *two* persons, one of them being at that time dead, goes entire to the living legatee.

If a person will that one third of his property "*be divided, as a legacy, between* ZEYD *and* OMAR," and *Omar* be at that time dead, *Zeyd* is entitled to only one half of the third; for the words used by the testator clearly denote his intention that each should have an half; but *Omar* being at that time dead, the will with respect to him is void.

A legacy being bequeathed to two persons indefinitely, if one of them die, a *moiety* of it only goes to the other.

If

A bequest made by a *poor* man is of force if he afterwards become rich.

If a person who is poor bequeath to another "*the third of his property*," and afterwards become rich, the legatee is in that case entitled to a third of his estate, to whatever amount; for the bequest does not take effect until after the death of the testator; and therefore the condition of its validity is, his being possessed of property *at the time of his decease*. The LAW is also the same in case the testator, being rich at the time of making the will, should afterwards become poor, and again acquire wealth.

A bequest of any article, not existing in the possession or disposal of the testator at his decease, is null,

If a person bequeath "*a third of his* GOATS" to another, and it happen either that he has no goats, or that such as he had were destroyed before his death, the bequest is null; for the condition of its validity is, the testator being possessed of the property *at the time of his decease*, which is not here the case. If, on the contrary, having no goats at the time of making the will, he should afterwards acquire goats, so as to leave some at his death, one third of them goes as a legacy to *Zeyd* (according to the *Rawâyet Saheeh*;) for here the condition of validity (namely, that the testator die possessed of the property) exists.

unless it was referred to his *property*, in which case it must be discharged by a payment of the *value*.

If a person bequeath "*a* GOAT *of his property*" to *Zeyd*, and afterwards die without leaving any goats, the price of a goat must in that case be paid to *Zeyd*; for the testator's expression "*a* GOAT *of his* "*property*" denotes his intention to bequeath the *worth* of the animal. If, on the contrary, he neither bequeath "*a goat of his property*," nor "*one of his goats*," but simply "*a goat*," (to *Zeyd*) without any relation to his property or herd of goats, in that case there is a difference of opinion, some saying that the bequest is not valid, as the absolute expression of the testator denotes his intention to have been a legacy of the animal itself, of which he had none,—whilst others maintain it to be valid, for this reason, that the testator having specified a *goat*, of which he had none, must be supposed to have intended the *worth* of it. If, on the other hand, the words of the testator were "*I bequeath*

"*I bequeath one of my goats*," in that case the bequest is evidently invalid; because the relation to his herd of goats determines the legacy to have been restricted to the animal itself. (A variety of cases of this nature occur, and are determined on the principle now stated.)

Distribution of a bequest made indefinitely to three different descriptions of persons;

IF a person bequeath "*a third of his property to his* AM-WALIDS, "*to the distressed, and to beggars*," and the *Am-Walids* amount to three in all,—in that case, according to the two *Elders*, a third of his property is, after his death, divided into five shares, of which three are given equally among the *Am-Walids*, one to the distressed, and one to beggars. *Mohammed*, on the contrary, says that it is to be divided into seven shares, of which three are distributed in equal portions among the *Am-Walids*, two given to the distressed, and two to beggars *.

or, to an individual, and a particular class of people,

IF a person bequeath "*a third of his property to a certain person and to the distressed*," in that case, according to the two *Elders*, the third is divided into two equal parts, one of which is given to the person named, and the other to the distressed; whereas *Mohammed* maintains, that it must be divided into *three* shares, one to be given to the said person, and two to the distressed.

or to a particular class of people alone.

IF a person bequeath "*a third of his property to the distressed*," the two *Elders* are of opinion that the executor may in that case give the whole of the third to one distressed person; whereas *Mohammed* holds that it cannot be given to fewer than *two*.

Case of a third person being admit-

IF a person bequeath one hundred *dirms* to *Zeyd*, and one hundred to *Amroo*, and afterwards declare *Bicker* to be a participator with them,

* The arguments are here omitted, as (in this and some following instances) they turn on certain peculiarities in the grammar of the *Arabic* language.

ted, by the testator, to a participation with two other legatees.

by saying "I have made thee *Bicker* a sharer with *Zeyd* and *Omar*," *Bicker* is in that case entitled to a third of each of their portions, in order that he may be put on an equality, as the words of the testator evidently imply that intention, for the term used by him [*Shirkat*] literally means equality, which it is here possible to preserve, and there is no impracticability in the execution of the bequest. It is otherwise, where the portions of the legatees are unequal, as if the legacy of *Zeyd* were four hundred *dirms* and that of *Omar* two hundred, and *Bicker* were declared by the testator to be a sharer with them; for in that case the establishment of an equality is impracticable, and therefore *Bicker* is entitled to receive a moiety of each of their shares, that they may be brought as nearly on an equality as possible.

An acknowledgment of debt, upon a deathbed, is efficient to the extent of a third of the estate.

If a person, on his death bed, say to his heirs, "I am indebted to "*Zeyd*, and you must credit what he says," in that case the claim of *Zeyd*, to any amount not exceeding a third of the estate, must be admitted, although the heirs should falsify it. This proceeds on a favourable construction. Analogy would suggest that the declaration of *Zeyd* is not to be credited; for although an acknowledgment concerning a thing undefined be approved, still its effect depends upon the ascertainment of it; and as that cannot be had, because of the death of the acknowledger, it would follow that the declaration of *Zeyd* is of no weight. The reason, however, for a more favourable construction, in this particular, is, that the object of the acknowledger is evidently to give *Zeyd* a preference over his heirs; and it being possible to execute his design in the way of a bequest, and men being (moreover) desirous of discharging themselves of obligations where they may know of the debt itself, but are uncertain as to the amount, (as having forgotten it,) the acknowledgment is therefore considered equivalent to a bequest of which the amount is left to the determination of the legatee,—whence the matter is regarded in the same light as if the acknowledger had said to his heirs, "if *Zeyd* come and claim any "thing from you on my behalf, pay him the same, to whatever "amount,"

"amount,"—which declaration would be recognized and complied with, to the amount of one third of the eſtate; and the acknowledgment being thus equivalent to a bequeſt, the declaration of *Zeyd* muſt be credited to the amount of one third of the acknowledger's eſtate, and no more. If, therefore, beſides the acknowledgment in queſtion, the dying perſon had made various bequeſts in favour of others, one third of his eſtate muſt be ſet apart for the legatees, and two thirds for the heirs, when both parties muſt be required "to verify the declaration of *Zeyd* to ſuch extent as they may think proper." Now, if both parties acknowledge that there is ſomething owing to *Zeyd*, it is evident that there reſts a debt upon the eſtate affecting the ſhares of each reſpectively; and accordingly, a deduction is made from the legatees, to the amount of one third of what they acknowledge to be owing to *Zeyd*, and from the heirs, to the amount of two thirds of what they have ſo acknowledged, in order that the acknowledgment of each party may be carried into execution in proportion to his right in the whole eſtate. If *Zeyd* ſhould claim ſtill more than what falls to him in virtue of this acknowledgment of the parties, each party [the heirs and legatees] muſt be reſpectively required to make oath, to the *beſt of their knowledge*, or, in other words, to this effect, that "they do not *know* of any more being due to *Zeyd*;"—for they cannot be required to ſwear *poſitively*, as their oath regards a matter between the claimant and the acknowledger merely, and in which they are not principals.

A joint bequeſt to an heir and a ſtranger is executed in favour of the

IF a perſon bequeath any article jointly to one of his heirs and a ſtranger, in this caſe the bequeſt in favour of the heir is not admitted, and a moiety only of the legacy is given to the ſtranger; becauſe, as an heir poſſeſſes the capacity of being a legatee *, he therefore obſtructs

* The incapacity of an heir to ſucceed to a legacy does not ariſe from any *natural* or *original* defect in him, but is occaſioned ſolely by the ordinance of the LAW in this particular, which ſuſpends it upon the conſent of his co-heirs.

latter only, to the extent of one half;

ſtructs the ſtranger in the title which he would otherwiſe have to the complete legacy. It is not ſo where a legacy is left between one perſon living and another dead, for here the whole goes to the living legatee, ſince as a dead perſon is incapable of ſucceeding to a bequeſt, there is no obſtruction in this inſtance.

and ſo likewiſe a joint bequeſt to the *murderer* of the teſtator and a ſtranger.

If a perſon make a will jointly in favour of his murderer and a ſtranger, in that caſe the murderer is not entitled to any thing, and the ſtranger receives only a moiety of the legacy, for the reaſon aſſigned in the foregoing caſe, to wit, that the murderer (like an heir) poſſeſſes the capacity of being a legatee, and therefore obſtructs the ſtranger's title to the whole, as there ſtated. It is otherwiſe where a perſon, on his deathbed, makes a declaration of any ſpecific thing or ſum due by him to one of his heirs and a ſtranger jointly; for there the declaration is invalid as well with reſpect to the ſtranger as the heir. The reaſon of this diſtinction is, that a will or bequeſt is an indication of endowment; and as, by it, a joint concern is eſtabliſhed between the two legatees, the bequeſt is therefore valid with reſpect to him, of the two, who is not under a legal incapacity, namely, the ſtranger;—whereas a declaration or acknowledgment is an annunciation of the right of the parties in whoſe favour it is made, referred to a paſt time, under the deſcription of joint concern, a thing which cannot be eſtabliſhed; for the eſtabliſhment of it with reſpect to the ſtranger only, independant of the deſcription of joint concern, is contrary to the tenor of the dying perſon's declaration; and the eſtabliſhment of it (on the other hand) in the manner of joint concern, occaſions the eſtabliſhment of a declaration in favour of an heir, upon a deathbed, which is unlawful.

Any accident occaſioning uncertainty with reſpect to the legatees annuls the will.

If a perſon bequeath three garments of different prices, leaving the beſt to *Zeyd*, the next in value to *Omar*, and the worſt to *Bicker*, and one of theſe garments be afterwards loſt, without its being known which of them it was, and the heirs of the teſtator declare, to each

legatee

legatee in particular, that "his ſhare is loſt," the bequeſt is null *in toto*, as it is in this caſe uncertain who are the legatees, and ſuch uncertainty occaſions an annulment of the will, ſince the *Kâzee* cannot paſs a decree concerning a thing unknown. If, on the contrary, the heirs make over the two remaining garments to the legatees, the bequeſt is not null, but ſtill continues in force, and thoſe two garments are divided among them, by two thirds of the beſt being given to *Zeyd*, two thirds of the worſt to *Bicker*, and the remaining third of each to *Omar*.

Bequeſt of an apartment in a partnerſhip houſe.

IF *Zeyd* bequeath to *Omar* a ſpecific apartment of a houſe held in partnerſhip between him and *Bicker*, it is requiſite that a partition be made of the houſe; and then, if the apartment ſo bequeathed ſhould fall within the ſhare of *Zeyd*, it muſt be given to *Omar* as his legacy, according to the two *Elders*; whereas, according to *Mohammed*, he is entitled only to one half of it. If, on the other hand, the apartment ſo bequeathed ſhould not fall within the ſhare of *Zeyd*, then, according to the two *Elders*, a number of cubits equal to the ſize of the bequeathed apartment muſt be given to *Omar* from the ſhare of *Zeyd*, whereas, according to *Mohammed*, he is entitled only to *half* that number. The argument of *Mohammed* is that in this caſe the teſtator has bequeathed partly his own property, and partly the property of another, inaſmuch as the houſe was ſhared equally between him and *Bicker* in all its parts. The bequeſt, therefore, takes effect with reſpect to the former, but remains ſuſpended with reſpect to the latter; and if, upon the partition, (which is a ſpecies of exchange) the apartment fall within the ſhare of *Zeyd*, ſtill that part of the bequeſt which had remained ſuſpended does not take effect, any more than where a perſon bequeaths to another ſome article which does not belong to him, and afterwards purchaſes that article. Where, moreover, upon a partition of the houſe, the apartment in queſtion falls to the ſhare of the teſtator, his bequeſt takes effect with reſpect to the actual legacy,

 namely,

namely, an half of the apartment; whereas if, on the contrary, it fall to the lot of *Bicker*, *Amroo* (the legatee) is to receive from the share of *Zeyd*, a number of yards equivalent to half the apartment; because, upon the actual legacy failing the bequest must be executed by means of the consideration received in exchange for it; in the same manner as where a person bequeaths a slave who is afterwards killed; in which case the legacy must be executed from the compensation received for his blood: (contrary to where the slave is *sold*; for in this case the bequest has no connexion with the price received, but is completely annulled by the sale; whereas a bequest is not annulled by a partition, as that is also a species of *separation* of property.)—The argument of the two *Elders* is, that the testator has certainly meant to bequeath an article in which his property may be firmly and solidly established by means of partition; for his apparent object is to bequeath an article which in every respect may be productive of use; and that can be accomplished only by *partition*, as the use of a thing of which the property is shared in common with another is defective.—Where, therefore, the apartment bequeathed, upon a partition being made, falls to the share of *Zeyd*, and his property in it is firmly established *in toto*, his bequest of it takes complete effect. With respect to what is urged by *Mohammed*, that "partition is a sort of *exchange*," it may be replied that the quality of *exchange*, in partition, is merely secondary, the original design of partition being, that each may enjoy the complete use of his own share, (whence it is that the parties may be *compelled* to a partition of it;) according to which original design the apartment may be said to have been in the possession of *Zeyd* from the beginning. Where, on the other hand, it falls to the share of *Bicker*, in that case the bequest of *Zeyd* takes effect from the share allotted to him, to the quantity of cubits of the whole apartment; because that quantity is the consideration for the apartment, as has been already stated;—or, because the bequest must be thus construed, that the testator, by the *apartment*, merely meant a sum of measurement equivalent thereto, in order that his design may

may be anſwered as far as the nature of the caſe admits *;—or elſe, becauſe the teſtator may have meant that the apartment ſhould go to *Omar*, provided it fell to his ſhare upon a partition, or otherwiſe a ſum of meaſurement equivalent to it;—this caſe being analogous to that of a man ſuſpending the freedom of a child born of his female ſlave, and the divorce of his wife, upon the circumſtance of his female ſlave bearing the child, (by ſaying, "upon my female ſlave being deliver-"ed of her firſt-born child, ſuch child is free and my wife divorced;") which is conſtrued to mean *any* child, to produce the divorce, and a *living* child to produce the emancipation.—‡ It is to be obſerved that where the apartment does not fall to the ſhare of *Zeyd*, if the extent of the whole houſe be one hundred cubits, and that of the apartment ten, *Mohammed* in that caſe is of opinion that the ſhare of *Zeyd* is to be divided into ten parts, of which nine muſt be given to the heirs, and one to *Omar*;—whereas the two *Elders* hold that the ſhare of *Zeyd* is to be divided into five parts, of which one muſt be given to *Omar*, and four to the teſtator's heirs. (With reſpect to what is mentioned in the *Hedâya*, that [according to the two *Elders*] "the ſhare of the "teſtator is divided into *eleven* parts, of which two are given to *Omar* "and nine to the heirs," it is a miſtake, for this mode of diviſion obtains only in caſes of *declaration* or *acknowledgment*.) It is here proper to remark that if an *acknowledgment* be made under the ſame circumſtances as are here ſtated, as if *Zeyd* ſhould declare an apartment of

* An objection and reply are here ſtated, which the tranſlator prefers inſerting in a *note* in order to avoid an interruption of the context.

"OBJECTION.—If ſuch be the teſtator's meaning, why is the particular apartment given "to *Omar* when it falls to the ſhare of *Zeyd?*"

"REPLY.—The apartment in queſtion is made the legacy, where it falls to the ſhare "of *Zeyd*, for this reaſon, that in thus ſettling the matter a regard is paid to the two chief "diſtinguiſhing circumſtances of the caſe, namely, the quantity or ſum [of the thing be-"queathed,] and the inveſtiture [of the legatee] with the actual apartment:—and as, "where the apartment falls to the lot of *Bicker*, it is impoſſible to pay attention to *both* "circumſtances, it accordingly in that caſe ſuffices to pay attention to the firſt."

 the

the extent of ten cubits, in a houſe of one hundred cubits, which he poſſeſſed in common with another, to be the property of *Omar*, ſome ſay that in this caſe alſo a difference of opinion obtains between the two *Elders* and *Mohammed*; whilſt others maintain that there is no difference of doctrine in this point, *Mohammed* alſo holding (in common with the two *Elders*) that in caſe the ſaid apartment fall to the ſhare of *Zeyd*, it goes complete to the acknowledgee [the perſon in whoſe favour the acknowledgment is made,] or otherwiſe, that the ſhare of the acknowledger is divided into eleven parts, of which two are given to the acknowledgee and nine to the acknowledger. The reaſon of this laſt adjuſtment is that the acknowledger here makes his acknowledgment to this purpoſe; "the houſe which, excluſive of that apartment, meaſures "ninety cubits, is the joint property of me and my partner,—of which "forty-five appertain to me;" and the acknowledgee claims ten cubits from the fifty which fall to the ſhare of the acknowledger. The fifty cubits therefore, which conſtitute a moiety of the houſe, are divided between the acknowledger and acknowledgee in this way, that the acknowledgee takes in the proportion of ten cubits, and the acknowledger in the proportion of forty-five, and accordingly that moiety of the houſe is diſpoſed of in eleven ſhares. It is otherwiſe with reſpect to a bequeſt, as before ſtated; for there this mode of diviſion cannot obtain, as the teſtator, in making his bequeſt, cannot be ſuppoſed to have ſaid "this houſe, except ſuch an apartment, is in common between me "and my partner," ſince if he were to ſpeak thus his bequeſt would be null, as the bequeſt of another's property is not approved. *Mohammed* further remarks that the difference between a bequeſt and an acknowledgment is this, that an acknowledgment affecting the property of another is approved, (inſomuch that if a perſon were to declare that "ſuch a thing, held by *Zeyd*, is the property of *Amroo*," and this perſon ſhould at any time thereafter become proprietor of that thing, he is directed to deliver it up to *Amroo*,) whereas a bequeſt of the property of another is utterly null and void, inſomuch that if a perſon bequeath any thing belonging to another, and afterwards become

come proprietor of that thing, and die, ſtill the bequeſt is of no effect *.

The validity of a bequeſt of money belonging to another reſts upon the proprietor's conſent.

IF a perſon bequeath a thouſand *dirms* that belong to another, the execution of the bequeſt reſts entirely on the conſent of the proprietor, and it is optional in him to confirm it, or not, as he pleaſes. If he, therefore, after the death of the teſtator, give his conſent, the bequeſt is valid, and the money paid to the legatee accordingly. This conſent, however, is purely voluntary and gratuitous; whence if, after having ſignified it, the perſon refuſe to pay the money, it is lawful.

An heir, after partition of the eſtate, acknowledging a bequeſt in

IF two ſons make a partition of their father's eſtate, and one of them then declare that " his father had bequeathed a third of his pro- " perty to *Zeyd*," he [the declarer] muſt in that caſe make over a third

* There being here a conſiderable deviation from the original text, and alſo ſome confuſion in the ſubject, (owing to the quantity of extraneous matter introduced by the *Perſian* commentators,) the tranſlator thinks it his duty to give the whole paſſage literally, from ‡ to *, as ſtated in the *Arabic* copy.—" Where the apartment falls to the other partner, " not the teſtator, the houſe meaſuring one hundred cubits, and the apartment ten cubits, " the teſtator's ſhare is divided into ten lots, nine for the heirs, and one for the legatee.— " This is according to *Mohammed*; for he ſuppoſes the legatee to multiply a moiety of the " apartment by five, (the number of cubits it meaſures,) and the heirs the half of the re- " mainder of the houſe by forty-five; and thus the whole will compoſe five lots [of ten " cubits,] which makes ten [lots of five cubits.]—But according to the two [*Elders*] it is " divided into eleven lots; becauſe they ſuppoſe the legatee to multiply by ten, and the " heirs by forty-five; and thus the whole compoſes eleven lots, two for the legatee, and " nine for the heirs.—If declaration [*acknowledgment*] be put in the place of bequeſt, it is " ſaid there is a difference of opinion:—but it is alſo ſaid that there is no difference on the " part of *Mohammed*,—the only difference, according to him, being that an acknowledg- " ment affecting the property of another is valid,—inſomuch that he who makes an acknow- " ledgment concerning property poſſeſſed by another in favour of a different perſon, and " afterwards obtains poſſeſſion of the ſame, muſt be directed to give it up to the acknow- " ledgee;—whereas a bequeſt affecting the property of another is null; inſomuch that if " the teſtator ſhould by any means afterwards become poſſeſſed of that property, and then " die, ſtill his bequeſt does not paſs," [is of no effect.]

of

favour of another, must pay the acknowledged legatee *his* proportion of such bequest.

of his portion to *Zeyd*. This proceeds upon a favourable construction. *Mohammed*, on the contrary, maintains that the declarer is to make over an *half* of his portion to *Zeyd*; (and such is what analogy would suggest;) because when this son made the declaration that *Zeyd* was entitled to a third, he then in fact declared *Zeyd* to be entitled to as much as himself, whence it is requisite that he make over a moiety of his portion to him, in order that both may be placed on an equality. The reason, however, for a more favourable construction in this particular is, that the son has here made a declaration, in favour of *Zeyd*, of one third, affecting the whole estate indefinitely; and as the whole estate has gone in two portions, each falling to each son respectively, it follows that the son has made his declaration in favour of *Zeyd* with respect only to a *third* of his own portion.

Bequest of a female slave who (previous to the partition of the estate) produces a child.

If a person bequeath a particular female slave to *Zeyd*, and after his death the said slave bring forth a child, the legatee is in that case entitled to both the mother and child, provided, however, that their added value do not exceed a third of the estate, for then *Zeyd* is to receive the female slave, as far as a third of the estate, and if her value be short of the third, the residue must be made up to him from the value of the child. This is according to *Haneefa*. The two disciples, on the contrary, maintain that in this case the legatee is to receive to the amount of a third of the property from both the mother and child, in proportion to their respective values. Thus if the value of the mother be three hundred *dirms*, that of the child the same, and the other effects amount to six hundred *dirms*, the whole forms an estate of one thousand two hundred *dirms*, of which a third is four hundred. Now *Haneefa* holds that in this case the female slave must be made over to the legatee in payment of three hundred *dirms*, and he also receives one hundred deducted from the value of the child;—whereas the two disciples maintain that he is entitled to a deduction of two thirds from the value of each. The argument of the two disciples is, that the child is virtually included in the bequest, from its being (as it were) a dependant

on the original ſubject of it, and that therefore the bequeſt muſt be executed proportionally from both, without preference or diſtinction.— The argument of *Haneefa* is, that the mother is the original ſubject of the bequeſt, and the child only a dependant; and the dependant cannot obſtruct the original. If, moreover, the bequeſt were executed equally from both, it induces this conſequence, that a part of the legacy is ſplit off from the original ſubject, which is unlawful. All that is here advanced proceeds on a ſuppoſition of the birth of the child happening prior to the partition, and the acceptance of the legatee; for if it ſhould take place afterwards, the child inconteſtibly belongs to him, as being the offspring of his property; for his right in the ſlave was fully and completely eſtabliſhed by the partition.

SECTION.

Of the Period of making Wills.

Gratuitous acts, of immediate operation, if executed upon a deathbed, take effect to the extent of one third of

IT is to be obſerved, as a general rule, that where a perſon performs, with his property, any gratuitous deed, of immediate operation, (that is, not reſtricted to his death,) if he be in health at the time, ſuch deed is valid to the extent of all his property,—or, if he be ſick *, it takes effect to the extent of one third of his property; and where a perſon performs ſuch deed, with his property, reſtricted

* Arab. *Mareez.*—This term (as has been already obſerved) literally means ſick. In the language of the LAW, however, it is always uſed to ſignify a *dying* perſon,—that is, "ſick *of a mortal illneſs*;" and in that ſenſe it is invariably to be underſtood throughout this book.

to

the property only.

to the circumstance of his decease, it takes effect to the extent of a third of his property, whether, at the time, he be sick or in health. If, on the contrary, a person make an acknowledgment of debt, such acknowledgment is of effect to the whole extent of his property, notwithstanding it be made during sickness, as this is not a *gratuitous* deed. Still, however, a declaration of this nature, made in health, precedes a declaration of the same nature made in sickness. It is also to be remarked, that a sickness of which a person afterwards recovers is considered, in LAW, as health *.

An *acknowledgment* on a deathbed is valid in favour of a person who afterwards becomes an heir; but not a *bequest* or *gift*,

IF a sick person make an acknowledgment of debt in favour of a strange woman, or make a bequest in her favour, or bestow a gift upon her, and afterwards marry her, and then die, the acknowledgment is valid; but the bequest or gift is void; for the nullity of an acknowledgment in favour of an heir depends on the person having been an heir at the time of making it, whereas the nullity of a bequest in favour of an heir depends on the legatee being so at the time of the testator's death, as has been already explained; and as the woman was not an heir at the time of the acknowledgment, but had become so [by marriage] at the time of the testator's death, the acknowledgment is therefore valid, but the bequest is void; and so likewise the gift, it being subject to the same rule as the bequest.

neither is an *acknowledgment* so made valid, if the principle of inheritance had existed in the person previous to the deed.

IF a sick person make an acknowledgment of debt due by him to his son, or make a bequest in his favour, or bestow a gift upon him, at a time when the son was a Christian, and he [the son] afterwards, previous to his father's death, become a *Mussulman*, all those deeds of acknowledgment, gift, or bequest, are void: the bequest and the gift, because of the son being an heir at the death of his father, as above explained; and the acknowledgment, because, although the

* This passage has no place in the *Arabic* copy. It has been introduced in the *Persian* version as a *premiss* necessary to the completely understanding of what follows.

son,

ſon, on account of the bar, (namely difference of religion,) was not an heir at the time of making it, ſtill the *cauſe* of inheritance (namely conſanguinity) did then exiſt, which throws an imputation on the father, as it ingenders a ſuſpicion that he may have made a *falſe* declaration, in order to ſecure the deſcent of part of his fortune to his ſon. It is different in the caſe of marriage, as above ſtated; for *there* the cauſe of inheritance, (namely, marriage,) occurred poſterior to the acknowledgment, and had no exiſtence previous thereto; for ſuppoſing the marriage to have exiſted at the period of making the acknowledgment, and that the wife, being then a chriſtian, ſhould afterwards, before the huſband's death, become a *Muſſulman*, in that caſe it [the acknowledgment] would not be valid.

IF a ſick perſon make an acknowledgment of debt due by him to his ſon, who is an abſolute ſlave or *Mokatib*,—or beſtow a gift upon him, or make a bequeſt in his favour, and the ſon ſhould afterwards, before the death of his father, obtain his liberty, in that caſe none of theſe deeds are valid, becauſe of the reaſons explained in the preceding example. It is related, in the *Mabſoot*, under the head of *Acknowledgments*, that "the acknowledgment of a ſick perſon in favour "of his ſon who is a ſlave is valid, provided the ſlave be not in debt; "for in that caſe the acknowledgment is, in effect, in favour of the "maſter, who is a ſtranger; and an acknowledgment in favour of a "ſtranger is valid;—whereas, if the ſlave were involved in debt, "his father's acknowledgment in his favour would not be valid, as "in ſuch caſe it could not be conſtrued to be in favour of the maſter, "ſince an indebted ſlave is the proprietor of his own acquiſitions."—The *bequeſt* is, however, invalid, becauſe to eſtabliſh it regard muſt be paid to the time of the teſtator's death, and the ſon is at that time an heir, as being then free. With reſpect, indeed, to the *gift*, it is ſaid to be valid*, provided the ſlave be not indebted; becauſe a gift is

Such acknowledgment, gift, or bequeſt, in favour of a ſon, being a ſlave, who afterwards becomes free previous to the father's deceaſe, is nevertheleſs void.

* Probably meaning "in the *Mabſoot*."

an immediate transfer and investiture; and as the son is at that period a slave, the gift is in effect in favour of his master: but if he be involved in debt the gift is invalid, as in that case he is master of his own acquisitions, and a gift is considered as such. According to the more commonly received authorities, however, the gift is void on either supposition; for as a gift during a mortal illness is equivalent to a bequest, it is therefore invalid, in the same manner as a bequest would be which was made in favour of the same person.

Rule for ascertaining a *deathbed illness*.

PARALYTIC, gouty, or consumptive persons, where their disorder has continued for a length of time, and they are in no immediate danger of death, do not fall under the description of sick [*Mareez*,] whence deeds of gift, executed by such, take effect to the extent of their whole property; because, when a long time has elapsed, the patient has become familiarized to his disease, which is not then accounted as *sickness*. (The length of time requisite, by its lapse, to do away the idea of *sickness* in those cases is determined at one year; and if after that time the invalid should become bedridden, he is then accounted as one recently sick.) If, therefore, any of the sick persons thus described make a gift in the beginning of their illness, or after they are bedridden, such gift takes effect from the third of their property, because at such a time there is apprehension of death, (whence medicine is then administered to them,) and therefore the disorder is then considered as a *deathbed illness*.

CHAP.

CHAP. III.

Of Emancipation upon a Deathbed; and of Wills relative to Emancipation.

Emancipation, gift, and acts of *Mohabàt*, on a deathbed, take effect to the extent of a third of the property.

If a person, on his deathbed, emancipate a slave, or give a portion of his property to another, or make a *Mohabàt* *, in purchase or sale, by buying an article at an *over*-value, or selling it at an *under*-value, —or concerning the dower, hire, or so forth,—or become security for another, all these deeds are considered in the light of a bequest, and take effect to the extent of a third of his estate.

Case of a *Mohabàt*, and an emancipation by the same person.

If a sick [dying] person make a *Mohabàt* [of any kind †,] and then emancipate his slave, and [after his death] the third of his property suffice not for both, in that case *Haneefa* is of opinion that the *Mohabàt* has the preference;—in other words, if, after executing the *Mohabàt*, any part of the third remain, the slave is, without recompence, free in that proportion, and must perform emancipatory labour for the remainder of his value,—or for his *full* value, if *nothing* re-

* *Mohabàt* literally signifies *connivance*.—Thus, a purchaser or seller who gives more, or takes less, for an article than its real value, *connives* at the loss.—This term, therefore, is not confined to sale, but extends to every act in which the person connives at his own loss, such as (in the case of dower) paying the wife more than she is entitled to, or (in a case of hire) paying the hireling more than he had agreed for.—The translator preserves the original term, as it is purely *technical*.—The *Arabic* text expresses this passage with great brevity: "Whoso frees his slave in sickness, or sells, or connives, or gives, it is lawful, and recognized to the extent of a third of his property."

† That is, "*execute any contract, or perform any act, by which he sustains a wilful loss.*"

 main.

main.—If, on the contrary, the person first emancipate the slave, and then make the *Mohabàt*, the slave, and the person in whose favour the *Mohabàt* is made, are upon a perfect equality, and each takes from the third of the estate in proportion to his right;—as, for instance, the slave is emancipated from the third of the estate in the proportion of his value, and performs emancipatory labour for the remainder,—and the person in whose favour the *Mohabàt* is made takes in the proportion of his *Mohabàt*, and makes good the remainder.—The two disciples maintain that the emancipation has the preference in both cases, for it is the stronger, inasmuch as it does not admit of retractation. *Haneefa*, on the contrary, maintains that *Mohabàt* is the stronger, as being interwoven in a compact of exchange: contrary to emancipation, for in that there is no exchange. If, therefore, the *Mohabàt* be first made, it sets aside the emancipation, because of the comparative weakness thereof;—whereas, if the emancipation be first made, it obstructs the *Mohabàt*, because of its priority; but still does not set it aside, as emancipation is incapable of setting aside a *Mohabàt*;—whence, in this instance, both are placed upon a footing. According, therefore, to this difference of opinion, if a person be possessed of two slaves, one valued at two hundred *dirms*, and the other at one hundred, and first sell the former by a *Mohabàt* sale, for one hundred *dirms*, and afterwards emancipate the latter, and die, leaving no other property, in that case, according to *Haneefa*, the *Mohabàt* is executed in full, and the other slave is required to perform emancipatory labour to the full amount of his value;—whereas if, on the contrary, the emancipation precede the *Mohabàt*, then a third of the value of both slaves, amounting to one hundred *dirms*, is divided equally between both parties, (that is, between the emancipated slave and the person in whose favour the *Mohabàt* was made;) and accordingly, a moiety of the slave is emancipated without any consideration, and he is to perform emancipatory labour for fifty *dirms* more, being the remaining half of his value;—and fifty *dirms* are deducted, in the

the manner of a *Mohabât*, from the ſlave ſold by *Mohabât*, and his price is then one hundred and fifty *dirms*, for which the purchaſer is accountable:—but the two diſciples maintain that the ſlave is completely free in both inſtances. In the ſame manner, if a perſon, upon his deathbed, firſt ſell a ſlave by *Mohabât*, then emancipate a ſecond, and afterwards ſell a *third* by *Mohabât*, and have no other property beſides theſe three ſlaves, in that caſe, according to *Haneefa*, the half of the third of the property muſt be allowed to the perſon in whoſe favour the firſt *Mohabât* was made, and the remaining half of the third is equally divided between the emancipated ſlave and the one in whoſe favour the laſt *Mohabât* was made;—whereas, had he firſt emancipated one, then ſold the ſecond by *Mohabât*, and afterwards emancipated the third, in that caſe one third of the eſtate would be divided into two equal ſhares, of which one would be given to the perſon in whoſe favour the *Mohabât* ſale was made, and the other equally divided between the two emancipated ſlaves:—but the two diſciples maintain that in both caſes the emancipation is to be preferred.

Mohabât or emancipation precede, in their execution, the actual bequeſts.

IT is to be obſerved, as a ſtanding rule*, that where a perſon bequeaths ſeveral legacies, and the third of his property ſuffices for the payment of the whole, they are all carried into execution without a preference being given to either. But if, beſides theſe legacies, he ſhould in his laſt illneſs emancipate a ſlave, or direct the emancipation to take place after his death, or ſell ſomething by *Mohabât*,—in that caſe both kinds of emancipation, as well as the *Mohabât*, are preferred to the legacies, and muſt therefore be firſt executed from the third of the eſtate, and the remainder (if there be any) is then divided equally among the legatees.

* Arab. *Aſl*; literally, a *root*; meaning (in this place) a principle or ground of deciſion in all parallel caſes.

IF

The appropriation of a sum, by bequest, to the emancipation of a slave is annulled by the subsequent loss or failure of any part of it; but not the appropriation of a sum to the performance of a pilgrimage.

If a person, on his deathbed, set aside one hundred *dirms*, and will that "after his death the said sum be applied to the emancipation of "a slave," and one *dirm* of the number happen to be lost, in that case *Haneefa* maintains that the will is annulled, and that the remaining ninety-nine *dirms* cannot be applied to the purpose of emancipating a slave. If, on the contrary, the person will that "the said sum be "appropriated to defray the expence of a pilgrimage to *Mecca*," in that case the loss or destruction of one *dirm* does not invalidate the will, but the remaining ninety-nine *dirms* are applied to the purpose prescribed by the testator, by deputing a person from such a distance as may enable him to reach *Mecca* by means of the said sum. (If also, in this last case, part of the sum have been lost or destroyed, and there remain a part after the return of the pilgrim, it must be restored to the heirs.) The two disciples maintain that the will is valid in the former instance likewise, and the ninety-nine *dirms* applied to the emancipation of a slave, in the same manner as (in the other instance) to the performance of the pilgrimage. The argument of *Haneefa* is that, in the former instance, the will directs the emancipation of a slave valued at one hundred *dirms*; and therefore, if it were executed with ninety-nine *dirms*, it would take effect in favour of a person different from the intended legatee, which is not lawful. It is otherwise with a bequest concerning pilgrimage, as pilgrimage is purely a religious duty, and religious duties appertain exclusively to God; and as God therefore is the legatee in this instance, a diminution of the sum does not induce an execution of the will in favonr of any *other* then the legatee, since a pilgrimage for ninety-nine *dirms* is performed on behalf of God, as much as a pilgrimage for one hundred *dirms*. Some have observed that this difference of opinion between *Haneefa* and the two disciples is founded on the different sentiments they entertain with respect to the emancipation of a slave; the two disciples holding it to be a religious act, in the same manner as the performance of a pilgrimage; and *Haneefa* considering it as an act in favour of the slave alone.

5 (The

(The compiler of the *Hedâya* remarks that this laſt opinion is approved.)

IF a perſon during his laſt illneſs emancipate a ſlave valued at one hundred *dirms*, and die, leaving two ſons and one hundred *dirms*, and the emancipated ſlave and his heirs give their conſent to the emancipation, the ſlave is not required to perform any emancipatory ſervice whatever, but is free without ſo doing; for although the manumiſſion was equivalent to a bequeſt in the proportion beyond a third of the emancipator's property, yet it is valid on the heirs aſſenting to it.

A ſlave exceeding a third of the property, emancipated on a death-bed, is exempted from emancipatory labour by the heirs aſſenting to his freedom.

IF a perſon will that "his heirs emancipate his ſlave at his de-"ceaſe," and the ſlave, after the death of the teſtator, commit an offence, and the heirs ſurrender him, as a compenſation, to the avenger of offence, the will is void; becauſe the ſurrender of him in compenſation for the offence is approved; for as the right of the teſtator muſt yield to that of the avenger of offence, the right of the legatee muſt conſequently yield to it likewiſe, ſince a legatee obtains his right in the legacy from the teſtator; and as, upon the ſlave being ſurrendered in compenſation for the offence, he paſſes out of the property of the teſtator, the will is void of courſe. If, on the contrary, the heirs prefer paying a redemptionary atonement, the will remains valid, and does not become void; (but in this caſe the redemptionary atonement falls entirely upon their property, as they have themſelves undertaken the payment of it;) and as the ſlave, by the payment of the redemption, is purified from the offence, the caſe is therefore the ſame as if he had not offended at all, and the will takes effect of courſe.

A bequeſt of emancipation, in favour of a ſlave, is annulled by his being made over in compenſation for an offence committed by him.

IF a perſon bequeath to another "a third of his property," and leave, among his other effects, a ſlave, and the legatee and heirs agree that the teſtator had emancipated the ſlave, but differ with reſpect

Where the heir and the legatee agree concerning a ſlave having

been emancipated by the testator, the allegation of the heir is credited with respect to the *date* of the deed.

ſpect to the *time* of ſuch emancipation, (the legatee aſſerting that it was during his health, and the heirs, on the other hand, maintaining that it was during his ſickneſs,) in that caſe the word of the heirs muſt be credited, and the legatee is entitled only to what remains after the value of the ſlave is deducted from the third of the teſtator's whole property*; becauſe the legatee here pleads his title to a third of what remains after the emancipation of the ſlave, ſince manumiſſion granted during health does not ſtand as a bequeſt, (whence it is that it takes effect from the *whole* of the property,) and the heirs reſiſt his plea, aſſerting that the teſtator had emancipated the ſlave during ſickneſs; and as manumiſſion during ſickneſs is a ſpecies of bequeſt, and takes place of a bequeſt of a third of the property, the heirs are therefore *negators*; and as the aſſertion of a negator [the defendant,] upon oath, muſt be credited, the legatee is therefore entitled to nothing whatever; —unleſs there ſhould remain ſome exceſs in the third of the property over and above the value of the ſlave, in which caſe the legatee is entitled to ſuch exceſs; or, unleſs the legatee confirm his aſſertion by evidences, in which caſe he is entitled to a third of what remains of the whole eſtate after the emancipation of the ſlave.

Caſe of an alleged emancipation and debt, credited by the heirs.

If a perſon die, leaving no other property except one ſlave, and the ſlave ſay to the heirs "your father, whilſt he was in health, "emancipated me," and another perſon ſay to them "your father "was indebted to me one hundred *dirms*," and the heirs credit both theſe aſſertions, (as, for inſtance, by replying to them *together*, "you "both ſpeak truly,") the ſlave is, in that caſe, required to perform emancipatory labour to the full extent of his value, according to *Haneefa*. The two diſciples, on the contrary, maintain that the ſlave is emancipated without performing any ſervice whatever, becauſe the

* Literally, "*is entitled to nothing whatever.*" The tranſlator renders the paſſage in a *modified* ſenſe, becauſe of the reſervation afterwards ſtated.

proof

proof of the debt and of the emancipation during health are eftablifhed, jointly, as the heirs have acknowledged both at the fame time, and the emancipation of a flave during health does not induce the neceffity of labour notwithftanding the emancipator fhould be involved in debt. The argument of *Haneefa* is, that the acknowledgment of the debt on the part of the heirs is ftronger than that of the emancipation; becaufe the former is valid at whatever period it may have been contracted, and is difchargable from the whole eftate; whereas the latter, if performed during ficknefs, is limited to a *third* of the eftate; and fuch being the cafe, it would follow that the emancipation is utterly annulled. As, however, emancipation, after having been made, does not admit of being *abfolutely* annulled, it is therefore *virtually* annulled, in this inftance, by the impofition of emancipatory labour.— The fame difference of opinion fubfifts in the cafe where a perfon, dying, leaves one thoufand *dirms*, and one perfon afferts that the deceafed owed him one thoufand *dirms*, and another, that he had depofited one thoufand *dirms* in truft with the deceafed, and the heirs confirm both affertions at one and the fame time; for in fuch cafe the two difciples are of opinion that both claims are upon an equal footing, and that the one thoufand *dirms* are therefore to be divided equally between the parties; whereas *Haneefa* maintains that the claim of the depofitor is the ftrongeft, as his right relates to the identical *dirms* whilft the creditor has only a general claim on the perfon.

SECTION.

Of Bequests for pious Purposes *.

In the execution of bequests to *sundry* pious purposes, the *ordained* duties precede the *voluntary*;

If a person make several bequests, for the performance of sundry religious duties, such as *pilgrimage*, *prayers*, and so forth, it is requisite to execute first such as are absolutely incumbent and ordained†; and this, whether the testator have mentioned them first or not; for the discharge of the *ordained* duties is of more importance than that of acts which are merely voluntary; and the law therefore supposes that the object of the testator was to begin with the performance of them.

unless all the purposes mentioned be of equal importance, in which case the arrangement of the testator must be followed,

But if the several duties, the objects of the will, be all of the same importance, and of similar force, and the third of the estate suffice not for the discharge of the whole, they must in that case be executed agreeably to the order in which they have been specified by the testator, as it may be inferred that those to which he gave the precedence were, in his opinion, the most urgent. *Tahawee* maintains that alms are to be executed before pilgrimage. There is also one report from *Aboo Yoosaf* to the same effect. Another opinion reported from him is, that pilgrimage precedes alms; and such is the opinion of *Mohammed*. The argument in favour of the first report is, that both are in an equally strong degree enjoined by God: but yet alms, as being connected with the rights of mankind, must be preferred, the right of the individual preceding the right of God.—

* Literally, "*of bequests to the rights of* God."

† Arab. *Farz:* a term applied to any thing enjoined as an indispensable duty, and more particularly to the five *primary* duties; *purification*, *prayer*, *alms*, *fasting*, and *pilgrimage*.

The argument in ſupport of the ſecond report is, that the performance of pilgrimage, beſides the expenditure of money, requires alſo an exertion of the body; and as this is not the caſe with alms, pilgrimage has therefore precedence. Either of thoſe, however, is preferable to expiation, becauſe they have been in a greater number of inſtances, and in a ſtronger degree enjoined by GOD.—Again: expiations for murder, for *Zihdr*, and for a broken vow, are preferable to *Sadka-fittir*, [charity given on the day of breaking faſt,] becauſe theſe expiations have been enjoined in the KORAN, whereas the latter has not. *Sadka-fittir*, on the other hand, is preferable to ſacrifice, becauſe it is an incumbent duty in the opinion of all our doctors, whereas a difference of opinion ſubſiſts with reſpect to the abſolute obligation of ſacrifice.

as well as where the purpoſes of the bequeſts are purely of a *voluntary* nature.

IN the execution of all pious wills, where the objects of them are not incumbent duties, (ſuch as the erection of a moſque, of a receptacle for travellers, or of a bridge,) it is requiſite to follow the arrangement of the teſtator, ſince it may be inferred that he conſidered thoſe firſt mentioned as the moſt urgent. Lawyers, moreover, have remarked that if a perſon make ſeveral bequeſts, ſome for the performance of religious duties immediately enjoined by GOD, and others for benevolent purpoſes amongſt mankind, in that caſe a third of his property muſt be ſet aſide for the execution of them; and whatever may be the ſhare appropriated for the performance of the duties belonging to GOD, it muſt be applied agreeably to the order of arrangement, as already explained.—It is to be obſerved, alſo, that every different duty is to be conſidered in the nature of a diſtinct legacy; for, the object of each being the attainment of the goodwill of the ALMIGHTY, every ſeveral duty has an object in itſelf, and each is therefore to be conſidered in the nature of a legacy left to a different perſon.

Rules in bequests towards the performance of a *pilgrimage.*

If a person will that "the pilgrimage incumbent on him be performed on his behalf after his death," in that case the heirs must depute a person for this purpose from the city of the testator, and furnish him with such conveyances and equipments as are suitable to his [the testator's] rank; because, being performed on his account, it must be executed in the same manner as if actually performed by himself. But if the property of the testator be inadequate to the expence of sending a person from his own city, in that case a person must be sent from some other nearer place, the distance of which from *Mecca* may be proportioned to the amount of the property.

If a person set out from his own city, with an intention of performing the pilgrimage to *Mecca*, and die on the road, after having willed that the pilgrimage be performed [by others] on his behalf, a person must be deputed for this purpose from the city of the testator, according to *Haneefa*; (and such also is the opinion of *Ziffer*.) The two disciples, on the contrary, maintain that a person is to be sent from the place at which the testator had arrived in the prosecution of his intention;—and the same difference of opinion obtains where a person, having undertaken the pilgrimage on account of another, dies in the like manner on the road. The reasoning of the two disciples is, that the performance of a part of the journey, with the intention of having prosecuted the remainder, is in itself an act of piety, which is entitled to merit with God, and which annuls, in a proportionate degree, the obligation of the duty. Hence the pilgrimage is to be recommenced from the place in which he died, and which in effect has become (as it were) his city. It is otherwise where a person, with a view of *trading*, sets out on a journey to *Mecca*, and dies on the way, after having willed that the pilgrimage be performed on his behalf; for in this case the part of the journey already performed not being an act of piety, there is an evident necessity for sending a person from the city of the *testator*.—The reasoning of *Haneefa* is, that

that the will muſt be conſtrued as meaning a commencement from the city of the teſtator, in order that the pilgrimage may be completely performed in the manner in which it was originally incumbent on the teſtator.

CHAP. IV.

Of Wills in favour of Kinſmen and other Connexions.

A bequeſt to "a neighbour" is in favour of the owner of the next adjoining houſe;

IF a perſon make a bequeſt in favour of "his *neighbour* *, this, according to *Haneefa*, is a bequeſt to the perſon whoſe houſe is immediately adjoining to that of the teſtator. The two diſciples, on the contrary, maintain that it comprehends all the inhabitants of the vicinity, who belong to the ſame *moſque*, without any regard to the immediate adjunction of the houſes; ſince, according to the common acceptation of the word, they all fall equally under the deſcription of *neighbours*. The arguments adduced by *Haneefa* in ſupport of his opinion upon this point are twofold.—FIRST, the perſon whoſe houſe adjoins to that of the teſtator is in reality the *neighbour*.—SECONDLY, the modes and deſcriptions of *neighbourhood* are many; and as it would be impracticable to carry the will into execution with reſpect to the *whole*, it is therefore neceſſary to reſtrict it to him whoſe title, from the

* Specifying the legatee by *deſcription* only, without mentioning his name; as thus, "*I bequeath one thouſand* DIRMS *to* MY NEIGHBOUR."—In this and the ſucceeding examples, the effect turns entirely on the terms in which the teſtator ſignifies his bequeſt.

and comprehends all competent descriptions of persons.

the circumstance of adjunction, is the most perfect and indisputable. It is to be observed that the learned in the law are of opinion that every person may be included under this description of neighbour, whether the proprietor of a house or not, or, whether a man or a woman, a *Mussulman* or a *Zimmee*, the term *neighbour* being equally applicable to all these. *Haneefa* also holds that an absolute slave, possessed of a house in the neighbourhood, is entitled to the benefit of the will.—The two disciples hold a different opinion; because, in such case, the benefit of the will would ultimately revert to the master of the slave, who is not supposed to be a neighbour. The argument of *Haneefa* is, that the term *neighbour* applies indiscriminately to all.

Rules in bequests to "the *As'hâr*" of the testator;

If a person make a bequest in favour of "his *As'hâr* *," all the relations of his wife within the prohibited degrees (such as her *father*, *brother*, and so forth) are therein included; and likewise all the relations of his father's wife [his step-mother] and of his son's wife [his daughter-in-law] within the prohibited degrees, as these all stand in the relation of *As'hâr* to the testator. This explanation of *As'hâr* has been followed by *Mohammed* and *Aboo Obeydah*. It is to be observed that all the kindred of the wife within the prohibited degrees are included in the bequest, notwithstanding she were, at the time of the death of the testator, in her *edit* from a reversible divorce. But if the divorce was irreversible, her relations are not to be included, as the existence of that degree of relation entitled *As'hâr* depends on the actual existence of the marriage at the time of the testator's death; and by an irreversible divorce marriage is utterly annulled.

and to "his "*Khatn*;"

If a man make a bequest in favour of "his *Khatn*," it is a bequest to the husbands of his female relations within the prohibited degrees;

* *As'hâr* is the plural of *Sehr*, (pronounced, in *Arabia*, *Dehr*,) which is a general term for all relations by *marriage*.

and

and in it are likewiſe included all the relations of theſe huſbands within the prohibited degrees, theſe alſo falling under the deſcription of *Khatn*.—(Some commentators remark, that this explanation is agreeable to the ancient cuſtom; but that in the preſent times *Khatn* comprehends only the huſbands, as above.)—It is alſo to be obſerved that in this reſpect freemen and ſlaves, and the near and the diſtant relations are all upon a footing, becauſe the term *Khatn* comprehends the whole of theſe.

and to his *Akrabá*;

IF a perſon make a will in favour of his "relations" [*Akrabá* *,] it is executed in favour of the neareſt of kin within the prohibited degrees, and failing of them, in favour of the next in proximity, and ſo on with reſpect to the reſt within the prohibited degrees, in regular ſucceſſion. The will, in this caſe, includes two or more; but the father, mother, or children of the teſtator are not comprehended in it. This is the opinion of *Haneefa*. According to the two diſciples, the will includes only ſuch as are deſcended from the moſt diſtant progenitor of the teſtator, profeſſing the *Muſſulman* faith.—(Concerning the meaning of "the moſt diſtant progenitor *profeſſing the faith*," there is a difference of opinion; ſome maintaining that this applies to the remoteſt anceſtor who actually embraced the faith, and others alleging that it extends to the remoteſt anceſtor who may have known of the exiſtence of the faith, although he himſelf may not have acceded to it; as is exemplified in the caſe of *Aboo Tâlib*, who, although he underſtood the *Muſſulman* faith, never embraced it.) The argument of the two diſciples is, that the term *relations* being in general applied to all of the *ſame blood*, the will therefore extends to all ſuch as fall under this deſcription, to whatever degree removed. The arguments of *Haneefa* are that legacies are a ſpecies of inheritance; and as, in inheritance, the arrangement here deſcribed is obſerved with

* *Akrabá* is the plural of *Kareeb*, and ſignifies (collectively) *kindred*.

reſpect

respect to the heirs, it is also observed in the payment of legacies.—As, moreover, the plural term [*Akrabá*] mentioned in inheritance means *two*, so likewise in bequest *.—Besides, the object of the testator, in his bequest, is, to compensate for his deficiences, during life, with respect to the *ties of kindred* †, which affects only his relations within the prohibited degrees. The parents or children, moreover, are not styled relations, [*Akrabá*,] insomuch that if a person were to call his father "*his* RELATION," [*Kâreeb*,] he would be considered as denying his parentage. The reason of this is that, in common usage, by the term relation [*Kareeb*] is understood one related to a person by means of another: but the relation of parent and child is personal, and not by means of another.—In short, according to *Haneefa*, the will in question is restricted, in its operation, to the prohibited relations of the testator; whereas, according to the two disciples, it extends to [all the descendants of] the most distant progenitor professing the faith;—whilst *Shafeï* maintains that it is confined solely to the testator's father [and his offspring.]

If a person, having two paternal and two maternal uncles, make a will in favour of "his relations," [*Akrabá*,] it is in favour of the *paternal* uncles only, according to *Haneefa*, he holding that regard is to be paid to the order of relationship;—whereas, according to the two disciples, all the four uncles are included, they holding that no regard is to be paid to the order of relationship. If, on the other hand, the testator have only one paternal and two maternal uncles, the half of the legacy, in that case, goes to the paternal uncle, and the other half to the two maternal uncles, out of attention to the

* Here is something like a contradiction; for it was before said that "the will includes "two *or more*." This, however, is not to be taken as excluding any number *above* two, but merely as comprehending the *dual* as well as any higher number.

† Arab. *Sillá Rihm*.—It is a technical term, comprehending, in its application, the kindred *within the prohibited degrees only*.

plural

plural number, which, in bequeſts, comprehends *two*, (as before obſerved;) for as, if there were *two* paternal uncles, the whole legacy would go to them, it follows that where there is *one* only, he gets no more than an half, and the other half goes to the two maternal uncles. It would be otherwiſe if the perſon had expreſſed his bequeſt for "his *kinſman* *;" for in this caſe the whole legacy would go to the paternal uncle, and nothing whatever to the two maternal uncles; becauſe, as the term *kinſman* expreſſes a *ſingular*, not a *plural* number, the paternal uncle therefore takes the whole, he being next of kin.—If (in the caſe of a bequeſt to "*relations*") the teſtator have a paternal uncle only, [and no maternal uncles,] he is entitled to no more than a moiety of the third of the eſtate; for as, if there had been *two* paternal uncles, they would have had the whole between them, one conſequently gets only an half.—If, on the contrary, he have a paternal uncle and aunt, and a maternal uncle and aunt, the legacy goes in equal ſhares between the paternal uncle and aunt, both being related to the teſtator within an equal degree of affinity,—and their connexion being of a ſtronger nature than that of the *maternal* uncle or aunt.—A paternal aunt, moreover, although ſhe be not entitled to inherit, is nevertheleſs capable of ſucceeding to a legacy,—in the ſame manner as holds with reſpect to a relation who is a *ſlave* or an *infidel*.—It is to be obſerved that, in all theſe caſes, if the teſtator have no prohibited relation, the bequeſt is null, becauſe it is reſtricted, in its operation, to thoſe within the prohibited degrees, as before noticed.

or to the *Ahl* of a particular perſon,

IF a perſon make a bequeſt "to the *Ahl* † of ſuch an one," it is a bequeſt to the wife of the perſon mentioned, according to *Haneefa*.

* Arab. *Zee-Kirrâbit*.

† The word *Ahl*, in its moſt common acceptation, denotes a *people* or *family*, as *Ahl Iran*, "the people of *Perſia*,"—*Ahl-nee*, "my family."—(This and ſeveral ſucceeding examples turn entirely upon the meaning of the terms uſed by the teſtator.)

The

The two disciples, on the contrary, maintain that the bequest comprehends every individual of the family, entitled to maintenance from that person, such being (with them) the common import of the word. The argument of *Haneefa* is that *Ahl*, in its literal sense, signifies a wife, a proof of which is drawn from this sentence of the KORAN, "*Moses* WALKED WITH HIS *Ahl*," [wife,] (whence also the common mode of expression "such a person made *tdàhul* [married] in a "particular city;")—and as the word *Ahl*, in its literal sense, means a wife, it follows that whenever it is used absolutely it must be resolved into its *literal* sense, which is the *true* one.

(or of the *house* of a particular person;)

IF a person make a bequest "to the *Ahl* of the house of such an "one," the father and grandfather of the person named are included in such bequest, as well as all the descendants from the remotest progenitor, on the paternal side, professing the *Mussulman* faith; - and if a person make a bequest "to the *Al* of such an one," it is a bequest "to the *Ahl* of his house," the term *Al* applying to the tribe from which he is descended.

IF a person make a bequest "to the *Ahl* of such a person's *Nisb* "[race] or *Jins*" [generation,]—by the former is understood all those descended from his ancestors in general,—but by the latter those only descended from the *paternal* stock, not from the *maternal*, because men are said to be of the generation of their *fathers*, not of their *mothers*.—It is otherwise where the term *Kirràbit* [affinity] is used; for that appertains both to father and mother.

or to the *orphans, blind, lame*, or *widows*, of a

IF a person make a bequest "to the orphans,—the blind,—the "lame,—or the widows,—of the *race* * of such an one,"—and the individuals of the race named can be enumerated, the bequest includes

* Arab. *Binnee.* It is an irregular plural from *Ibn*, "a son," and expresses a *generation* or *tribe*.

 them

them all indiscriminately, whether rich or poor, males or females; for the execution of the bequest is practicable in this instance, because of the ascertainment of the legatees.—(It is to be observed that, concerning the exposition of the expression "if they can be enumerated," there is a difference of opinion; for, according to *Aboo Yoosaf*, this phrase comprehends "as many as can be counted without the aid of written calculations," whereas *Mohammed* holds that it extends no farther than to *one hundred*, any greater number being considered as beyond enumeration. Some, on the other hand, allege that the determination of this point rests entirely with the *Kazee*, and decrees pass accordingly.)—But if the individuals of the race named be incapable of enumeration, the *poor* only are in that case included in the bequest, not the *rich*; for it [the bequest] is of a pious nature, and the object of it (namely, the goodwill of GOD) is best attainable by removing the wants of the poor. Besides, as the very descriptions used indicate a degree of want and distress in the legatee, it is therefore proper to admit this to have been the testator's meaning. It is otherwise where a person makes a bequest "to the *youths* (or the "*virgins*) of a particular race," who are innumerable; for in such case the bequest is void; because, as the description used does not indicate want, the words of the testator cannot be construed to apply to the *poor*: neither can the bequest possibly hold valid in favour of all the individuals of the class named, since, as they are not to be enumerated, it is impracticable to define them, and a bequest to unknown legatees is null,—for bequest is an act of endowment, and it is impossible to endow persons unknown. It is to be observed that, in the case of bequests "to the *poor* or *distressed*," the legacy must be paid to at least *two* paupers, two being the smallest number of plurality in bequest, as was before stated.

particular race;

IF a person make a bequest "to the race of such an one," in that case, according to the two disciples, and also according to the first opinion of *Haneefa*, the women of the said race are included, the plural

or to the race of a particular person;

plural term *Binnee* extending to females as well as males. *Haneefa*, however, afterwards retracted this opinion, and maintained the males of the race only to be included, not the females; becaufe the term *Binnee* applies to men *literally*, but to women only *metaphorically*; and a word muft be taken in its *literal* not its *figurative* acceptation. It is otherwife where "*the race of fuch a perfon*" is the proper name of any particular tribe; for in that cafe the bequeft includes the women alfo, as the term *Binnee*, in fuch inftance, comprehends the females of the tribe along with the males,—in the fame manner as the general expreffion *Benni-Adim* [the fons of *Adam*,]—whence the bequeft includes the freedmen, the fworn confederates [*Haleefs*,] the flaves, and the *Mawalàt* confederates of the tribe named.

or to the *awlàd* of a particular race.

If a perfon make a bequeft "to the children [*awlàd*] of the race "of fuch an one,"—the males and females have an equal right in fuch bequeft, as the term *awlàd* comprehends the whole.

A bequeft to the heirs of a particular perfon is executed agreeably to the laws of inheritance.

If a perfon make a bequeft "to the *heirs* of fuch an one," the legacy is in that cafe divided among the heirs of the perfon named, in the manner of an inheritance, a male getting as much as two females; becaufe there is reafon to imagine that the object of the teftator, in ufing the word heirs, was, that the fame diftinction might be obferved in the partition of the legacies as obtains in the cafe of inheritance.

Cafe of a bequeft to "the "*Màwlas*" of the teftator.

If a perfon make a bequeft "to his *Màwlas* *," and he have fome *Màwlas* who had emancipated him, and others whom he had emancipated, the bequeft is void; becaufe the term *Màwla* partakes of two different

* *Màwla* is a term applying either to the *patron* or the *client*, (see Willa;) and expreffes the relation between the *emancipated* and his *emancipator*. (See Vol. I. p. 425.)

meanings,

meanings, an *emancipator*, and a *freedman*, and it cannot be diſcovered which of theſe the teſtator intended. Neither can the intention be conſtrued to comprehend both; becauſe a word bearing a double meaning cannot be uſed in more than *one* of its ſenſes at a time; and as it is unknown which ſenſe the teſtator meant it in, the legatee is therefore uncertain; and any uncertainty concerning the legatee annuls the bequeſt. (In ſeveral of the books of *Shafeï* it is recorded that the bequeſt is conſtrued in favour of all the *Màwlas*, both the emancipators and the emancipated, as the term uſed applies to both.) It is to be obſerved that where the term *Màwla* is mentioned, in bequeſt, it comprehends every one whom the teſtator may have actually emancipated, whether in health or in ſickneſs; but not his *Modabbirs* or *Am-Walids*, as their emancipation does not take place until after his death, and his bequeſt is in favour of ſuch only as are free *previous* to that event. *Aboo Yooſaf* maintains that a *Modabbir* or *Am-Walid* is alſo included, becauſe, although theſe be not free previous to the teſtator's deceaſe, ſtill as a *cauſe* of freedom has taken place, and is eſtabliſhed in them, they may be ſaid to have been emancipated.— In this bequeſt is alſo included any ſlave of the teſtator to whom he may have ſaid, " you are free if I beat you not before my death;" (provided he did not afterwards beat him;) becauſe the ſlave is in this caſe free before the teſtator's deceaſe, and from the time that his ſtrength and power of beating failed him. If the teſtator have *Màwlas* whom he had emancipated, and alſo the children of thoſe *Màwlas*, and likewiſe *Màwlas* by *Mawalát* *, his freedmen *Màwlas* and their children are included in the bequeſt, but not his *Màwlas* by *Mawalát*. It is recorded from *Aboo Yooſaf*, that thoſe laſt are likewiſe included, and that all thoſe three deſcriptions equally participate in the bequeſt, as the term *Màwla* comprehends the whole. *Mohammed* argues that *Màwla* is a term which partakes of two different meanings; but a word of double meaning cannot be uſed in more than one ſenſe at a

* See Vol. III. p. 437 and 448.

time;

time; and as emancipation is an absolute and unretractable act, and a contract of *Mawalàt* may be rescinded at pleasure, a *Màwla* by manumission has precedence of a *Màwla* by *Mawalàt*, and those are consequently included in preference. But the *Màwlas* of the testator's *Màwlas* * are not included in the bequest, which relates only to the *Màwlas* of the testator, not to those of another. It is otherwise with the children of the testator's *Màwlas*; for they stand related to the testator because of their freedom proceeding from him. It is also otherwise where the testator has no *Màwlas* by manumission, nor children of those *Màwlas*; for in that case the *Màwlas* by *Mawalàt* are included in the bequest, as the term *Màwla* applies to those by manumission, literally, and to those by *Mawalàt*, metaphorically; and where the literal sense cannot be followed, the figurative sense may be adopted.

If, in the above case, the testator have only one freedman, and several freedmen of his freedman, the half of the legacy goes to the freedman, and the remaining half reverts to the testator's heirs; and there is nothing whatever for the freedmen of his freedman; for the term *Màwla* applies literally to the freedmen of the testator, and figuratively to the freedmen of those freedmen; and it is impossible that the word should be meant in two senses, as it cannot bear, at once, a *literal* and a *figurative* meaning. Neither are the freedmen of the testator's parents or children included, they not being *his* freedmen either actually or virtually.

* That is, "*the freedmen of his freedmen*," or "*the emancipators of his emancipators*."

CHAP.

CHAP. V.

Of Usufructuary Wills.

IF a person bequeath the service of his slave, or the use of his house, either for a definite or an indefinite period, such bequest is valid; because as an endowment with usufruct, either gratuitous or for an equivalent, is valid during life, it is consequently so after death; and also, because men have occasion to make bequests of this nature as well as bequests of actual property. So likewise, if a person bequeath the wages of his slave, or the rent of his house, for a definite or indefinite term, it is valid, for the same reason. In both cases, moreover, it is necessary to consign over the house or the slave to the legatee, provided they do not exceed the third of the property, in order that he may enjoy the wages or service of the slave, or the rent or use of the house during the term prescribed, and afterwards restore it to the heirs.—If the whole property of the testator consist of the slave or the house, in that case the slave is to be possessed one day by the legatee, and two by the heirs, alternately; but the house, on the contrary, is to be portioned into three equal parts, of which one is given to the legatee, and two to the heirs,—the legatee being entitled to one third of the estate, and the heirs to two thirds. The reason of the distinction here made between a house and a slave is, that a slave is incapable of being divided, and therefore an alternate use of him is established from necessity; whereas a house, on the contrary, is capable of division; and as division is the most fair and equitable mode, (since retaliation necessarily induces a preference of one over the other in point of time,) it ought to be adopted where it is practicable. Still, however,

An article bequeathed in usufruct

must be consigned to the legatee;—

but if it constitute the *sole estate*, being a *slave*, he is possessed by the heirs and legatee alternately, or being a *house*, it is held among them, in their due proportions;

ever, if the parties agree to enjoy the houſe by turns, it is lawful, as the right reſts entirely with them:—but diviſion is the moſt equitable mode.—It is not in this caſe lawful for the heirs to ſell the two thirds of the houſe which are allotted to them. This is according to the *Zâhir Rawâyet*. It is recorded from *Aboo Yoosaf* that ſuch ſale is lawful; becauſe theſe ſhares are purely their own property. The ground on which the *Zâhir Rawâyet* proceeds is, that a right of reſidence may eventually be eſtabliſhed to the legatee in the whole houſe, by ſo much other property of the teſtator being afterwards diſcovered as may cauſe the houſe to come within a third of his property. Beſides, the legatee has a controlling power over the heirs with reſpect to their portions, ſo far as to reſtrain them from executing any deed which may injure or affect his ſhare. If the legatee ſhould die before the expiration of the limited term of uſufruct, the article bequeathed in uſufruct immediately reverts to the heirs of the teſtator; for the bequeſt was made with a view that the legatee might derive a benefit from the teſtator's property; but if the article were to devolve to the legatee's heirs, it induces the conſequence of their being entitled to the uſe of the teſtator's property without his conſent, which is contrary to law. If the legatee die during the teſtator's lifetime, the bequeſt is void; becauſe the acceptance of it is ſuſpended upon the death of the teſtator, as has been already explained.

nor are the heirs (in the latter inſtance) allowed to *ſell* their ſhare.

The bequeſt becomes void on the death of the legatee.

A bequeſt of the *produce* of an article does not entitle the legatee to the perſonal uſe of the article;

If a perſon bequeath the *produce** of his houſe or of his ſlave to *Zeyd*, in that caſe ſome are of opinion that it is lawful for *Zeyd* to reſide in the ſaid houſe himſelf, or to uſe the ſlave for his own ſervice, becauſe an equivalent for the uſe is in fact the ſame as the uſe itſelf, ſo far as relates to the accompliſhment of the teſtator's object. The more approved opinion, however, is, that it is not lawful; for a bequeſt of produce is a bequeſt of money, as it is that which conſtitutes pro-

* By the term "*produce*" [Arab. *Hâſil*] as here uſed, is to be underſtood the *earnings* or *hire* of a ſlave, or the *rent* of a houſe, &c.

duce;

duce; whereas residence or service is an enjoyment of the use; and the effect of these is different with respect to the heirs; for if any just debt should afterwards appear against the testator, it might be repaid by means of a restitution of the rent by the legatee, which could not be done in case of his having had the actual use.

nor does a bequest of the *use* entitle him to let it to hire.

IT is not lawful for the usufructuary legatee of a slave or a house to let them out to hire. *Shafei* maintains that he is at full liberty so to do, because, in consequence of the bequest, he becomes (as it were) proprietor of the article; and, as such, he is entitled to transfer it either for a return or otherwise, usufruct (according to him) being equivalent to actual property. It is otherwise with a *loan*, that being (according to his tenets) simply a *licence* [to the use of a thing,] not an *investiture* *. The arguments of our doctors upon this point are twofold.—FIRST, a bequest is an endowment with property, without a return, referred to the testator's decease; and hence the legatee is not empowered to make a transfer of the legacy even *without* a return, because of the analogy it bears to a *loan*; for a *loan*, according to our doctors, is an investiture with the use of a thing granted in the lifetime of the lender; and the borrower is not permitted to *hire out* the article lent, (hire being an investiture for a return) so here likewise.—A proof of this is that an investiture for a return is strong and binding, whereas investiture without a return is weak and not binding; and a person who is not empowered with respect to the *weakest* of the two cannot be empowered with respect to the *strongest*. Bequest, moreover, as being a gratuitous deed, is weak and not binding.—Now in gratuitous deeds the voluntary agent is at liberty to retract, not the other party:—but as, in the case of a bequest, the voluntary agent is the *testator*, and it is impossible for him to retract after his decease, retractation is therefore not supposed possible in this instance;—yet still as the bequest is not originally of a forcible and irrevoc-

* See Vol. III. p. 277.

able nature, the legatee of usufruct is of course not at liberty to let the article to hire, since hire, as being a contract of exchange, is forcible and irrevocable. SECONDLY, usufruct (according to our doctors) is not property; but the investiture of it for property induces a creation of the character of worth in it, necessarily, in order to establish an equality between the articles opposed to each other in exchange. Now the power of such creation rests only with one who is a proprietor of usufruct as a dependant of his right of property, or in consequence of a contract of exchange, and who is consequently empowered to make over the property to another in the same manner in which he himself may have held it. But when a person who acquires the property of usufruct without any return on his part, and in an original manner, (that is, not in virtue of its subjection to something else,) afterwards makes it over to another for a return, it follows that he makes another proprietor of a thing in a degree superior to what he himself in effect was, which is unlawful.

A bequest of the use of a slave does not entitle the legatee to carry him out of the place, unless his family reside elsewhere.

IF a person bequeath the service of his slave to another, the legatee is not entitled to carry the slave from the city of the testator;—unless his own family reside in another city, in which case he may carry him thither, provided he exceed not a third of the testator's property. The reason of this decision is, because the bequest must take effect and be executed in conformity with the intent of the testator; and in a case where the family of the legatee reside in the same city with the testator, his intent is that the legatee shall take the service of the slave there, without exposing him [the slave] to the trouble of a journey elsewhere;—whereas, on the other hand, where the family of the legatee reside in a different city, the intent of the testator is that the legatee shall carry the slave thither in order that the family may enjoy the use of his service, without putting them to the trouble of removing to his [the testator's] city to enjoy this advantage.

If a perſon leave one year's product of his ſlave or houſe to another, and he have no other property except ſuch houſe or ſlave, the legatee in that caſe receives one third of a year's product; becauſe product, as being property, is capable of diviſion. If, therefore, the legatee require the heirs to make a diviſion of the houſe, in order that he may himſelf collect the product from his own ſhare, (being a third,) it would not be admitted. *Aboo Yooſaf*, indeed, according to one report, holds a contrary opinion; for he argues that the legatee is a partner with the heirs; and a partner has a right to demand a diviſion of the common property. In anſwer to this, however, it may be obſerved that this right amongſt copartners ariſes from their having a property in the article itſelf; whereas the legatee, in the preſent inſtance, has a property only in the *product* of the article, and conſequently is not entitled to demand a diviſion.

A bequeſt of a year's product, if the article exceed a third of the eſtate, does not entitle the legatee to a conſignment of it.

If a man bequeath the *perſon* of his ſlave to *Zeyd*, and the *ſervice* of him to *Omar*, and the ſlave exceed not a third of the teſtator's eſtate, his perſon belongs to *Zeyd*, and his ſervice to *Omar*; for as the teſtator has bequeathed a ſpecific thing to each legatee reſpectively, each is therefore entitled to his own right. As, moreover, (the bequeſt to the uſufructuary legatee being at any rate valid,) if the ſlave's perſon had not been bequeathed, that would have belonged to the heirs, at the ſame time that his ſervices would have belonged to the legatee; ſo in the ſame manner his ſervices belong to the legatee of uſufruct where the teſtator has bequeathed his perſon to another; for bequeſt reſembles inheritance, inaſmuch as the right of property to the article is eſtabliſhed after death in both inſtances.

In a bequeſt of the uſe of an article to one, and the ſubſtance of it to another, the legatee of uſufruct is excluſively entitled to the uſe during his term.

If a perſon bequeath his female ſlave to one and the child in her womb to another, or a ring to one and the ſtone of it to another, or a leathern bag, containing dates, to one, and the dates to another, and the legacy do not exceed a third of the eſtate,—in this caſe the firſt legatee gets his legacy, but the legatee of the *contained* article is not entitled

A bequeſt of an article to one, and its contents to another, if *connectedly* expreſſed, entitles the ſe-

cond legatee to nothing.

entitled to any thing. This is where the second bequest is immediately connected in the same sentence with the first. But if they be mentioned separately, (as if the testator should first say "I bequeath "my female slave to *Zeyd*," and then remain silent, and afterwards say "I bequeath the child with which she is pregnant to *Amroo*,") the effect, according to *Aboo Yoosaf*, is the same as above mentioned; whereas *Mohammed* maintains that in this case the female slave goes to the first legatee, and her child is shared equally between the two; (and the same holds with respect to the two other cases of the *ring* and the *bag*.) The argument of *Aboo Yoosaf* is that as the testator first bequeathed the female slave, and afterwards the child in her womb, it may be inferred that his object in the first bequest was the female slave only, the second bequest being merely an explanation of his meaning in the first,—which explanation is approved, whether it be connected in the same sentence or not; for as the bequest is not binding till after the death of the testator, his explanation connectedly or *un*connectedly is one and the same*; in the same manner as holds where a person first bequeaths the person of his slave to one and afterwards the service of him to another,—in which case the legatee of the person is not a partner of the legatee of usufruct with respect to the service of the slave. The argument of *Mohammed* is that the word *ring* comprehends both the stone and the hoop, and so likewise, the word *female slave* comprehends both the slave herself and also the child in her womb,—and the word *bag* includes both the bag and its contents. With respect, therefore, to the ring-stone, the child, and the contents of the bag, there are two different bequests to two different persons, where both the legatees are equal partners in each. Nor is the second bequest, in this instance, a retractation of the first, it being, in effect, the same as where a person first bequeaths a ring (for instance) to one, and again bequeaths the same ring to another,—in which case

* In other words, "he is at liberty, at any period after making the bequest, to alter "or amend it."

th

the ſecond bequeſt is not a retractation of the firſt, but the two legatees are equal partners in the ring; and ſo here likewiſe. It is different where a man firſt bequeaths the perſon of his ſlave to one, and then the property of him to another, as the word *ſlave* does not comprehend the *ſervice* of that ſlave. It is alſo different where a ſecond bequeſt follows in immediate connexion with the firſt; for in that caſe the whole forms (as it were) one ſentence, indicating the deſign of the teſtator to be that the *hoop* of the ring (for inſtance) ſhall go to one, and the ſtone to the other.

A bequeſt of the fruit of a garden implies the *preſent* fruit only, unleſs it be expreſſed *in perpetuity*.

IF a perſon bequeath to any one "the fruit of his garden," in that caſe the legatee gets the fruit actually in being at the time of the teſtator's death, not what may be produced afterwards. If, however, the teſtator ſay "I bequeath the fruit of my garden *perpetually* "to ſuch an one," the legatee is in that caſe entitled to the fruit then exiſting, as well as to whatever may afterwards grow there during his life. But if, on the other hand, the teſtator bequeath the *produce* of his garden, (not the *fruit*,) the legatee is then entitled to the preſent produce and to whatever may be collected from it until his death, although the word *perpetual* ſhould not have been expreſſed; for as the word *fruit*, in its common acceptation, means a thing actually in being, it cannot therefore be applied to what is *not* in being, unleſs by an expreſs proviſion for that purpoſe;—whereas *produce*, in the common acceptation of the term, comprehends not only what at preſent exiſts, but alſo what may hereafter exiſt in ſucceſſion; and therefore its including what may appear after the teſtator's deceaſe does not depend upon the mention of any particular proviſion or term.

A bequeſt of the produce of an *animal* implies the *exiſtent* produce only, in

IF a perſon bequeath the *wool* of a ſheep, or its *milk*, or *young*, and then die, the legatee is in that caſe entitled to whatever may be extant (of theſe things) at the period of the teſtator's death, and not to what may afterwards appear, notwithſtanding the word "*perpetual*"

have

every instance.

have been expressed; as the term *wool*, or so forth, (as mentioned above,) do not comprehend what is not actually in being. It is otherwise with respect to *fruit*, (although that term also, in its common acceptation, comprehends only what is actually existent, and a bequest of non-existent fruit be nevertheless valid,) because ordained contracts * (such as of gardening and hire) with respect to non-existent fruit being good in LAW, it follows that the word *fruit*, mentioned with a condition of *perpetuity*, comprehends also what is non-existent, and that a bequest of such is valid. It is otherwise with the wool, the milk, or the young of a sheep; for as, with respect to the non-existent of those articles, there are no ordained contracts, a bequest of such is not valid:—contrary to what is existent; for these are subjects of a valid contract (such as *Khoola* and the like,) and therefore a bequest of them is likewise valid.

CHAP. VI.

Of Wills made by *Zimmees*.

A *church* or *synagogue*, founded during *health*, descends to the founder's heirs.

If a *Jew* or a *Christian*, being in sound health, build a church or a synagogue, and then die, such building is an inheritance, according to all our doctors; because *Haneefa* holds an erection of this nature to be equivalent to a *Wakf*, or pious appropriation, which (agreeably to

* *Ordained* contracts are such as are authorized and sanctioned by the KORAN, and concerning the validity of which, therefore, no doubt can be entertained.

his tenets) is not abſolute *, but deſcends to the heirs of the founder; and the two diſciples, on the other hand, hold all ſuch erections to be ſinful in their nature, whence they are of no validity [as a public foundation,] and therefore deſcend to the heirs [in the ſame manner as any other of the founder's property.]

In the bequeſt of a houſe to the purpoſe of an infidel place of worſhip, it is appropriated accordingly,

IF a *Jew* or *Chriſtian* will that, " after his death, his houſe ſhall " be converted into a church or ſynagogue for a particular ſet of peo- " ple," the bequeſt is valid, according to all our doctors, and takes effect to the extent of a third of the teſtator's property; becauſe a bequeſt has two different characters, the appointment of a ſucceſſor, and an actual endowment; and the teſtator is competent to either of theſe.

whether any particular legatees be mentioned, or otherwiſe.

IF a *Jew* or *Chriſtian* will that " his houſe be converted into a " church or ſynagogue for a ſect of people," without ſpecifying the particular ſect, the bequeſt is valid, according to *Haneefa*. According to the two diſciples, on the contrary, it is not valid; for a deed of that nature is in reality ſinful, although it may appear pious to the teſtator; and a will for a ſinful purpoſe is null, becauſe the execution of it would be a confirmation of ſin. The argument of *Haneefa* is, that the founding of churches or ſynagogues is held, by theſe perſons, to be an act of piety; and as we are enjoined to leave them to the exerciſe of whatever may be agreeable to their faith, the bequeſt is therefore lawful, in conformity with their belief.

OBJECTION.—What is the difference between the building a church or ſynagogue in the time of health, and the bequeathing it by will, that *Haneefa* ſhould hold it inheritable in the former inſtance, and not in the latter?

REPLY.—The difference is this: that it is not the mere *erecting* [of the church, &c.] which extinguiſhes the builder's property, but

* See Vol. II. p. 334.

the

the exclusive dedication of the building to the service of God, as in the case of *mosques* erected by *Mussulmans*; and as an infidel place of worship is not dedicated to God, indisputably, it therefore still remains the property of the founder, and is consequently inheritable [in common with his other effects;]—whereas a *bequest*, on the contrary, is used for the very purpose of destroying a right of property.

The bequests of *Zimmees* are of four kinds*.—I. Those made for purposes held pious in their belief, but not in the belief of *Mussulmans*, such as the building a church or a synagogue, (as already mentioned,) or the slaughter of hogs to feed the poor of their sect; in which cases *Haneefa* holds the bequest to be valid, in conformity with the faith of the testator, whereas the two disciples deem it invalid, as being sinful.—II. Those made for purposes held pious with *Mussulmans*, but not with *Zimmees*, such as the erection of a *mosque*, a pilgrimage to *Mecca*, or burning a lamp in a *mosque*, in all of which instances the bequest is invalid in conformity with the belief of the testator, according to all our doctors; unless, however, it be made in favour of some particular persons, in which case it is valid, as under such circumstance it is an investiture, the mention of "building a *mosque*," or so forth, being considered merely in the light of a *counsel*, —(in other words, as if the testator had bequeathed his property to particular persons, *counselling* them therewith to erect a *mosque*.) III. Those made for a purpose held pious both by *Mussulmans* and *Zimmees*, such as burning a lamp in the holy temple [of *Jerusalem*,] or waging war against infidel *Tartars* †,—which are valid, whether made in favour of specific persons or not.—IV. Those made for purposes not held pious either by *Zimmees* or *Mussulmans*, such as the support of singers and dissolute women,—which are invalid, as being

* The distinctions here stated apply solely to bequests for *particular purposes*.

† *Koofr al Toork*: the name by which the bands of robbers who used to infest the northern provinces of *Persia* were formerly distinguished.

of

of a sinful tendency;—unless, however, they be made in favour of particular persons, and then they are valid.

The will of a *sensualist* or *innovator* is the same as of an orthodox *Mussulman*, unless he proceed to avowed apostacy.

A SENSUALIST *, or an innovator †, provided he proceed not to open and avowed infidelity, is, in point of bequest, in the same state with a perfect believer, because the law regards only his *apparent* state, which is that of a *Mussulman:* but if he proceed to open infidelity, he is then considered as an apostate, and with regard to his will there is a difference of opinion, (in the same manner as our doctors have differed with regard to every other deed of such persons,)—*Haneefa* holding that in this case his bequest remains in suspense, and becomes valid upon his repentance, or null upon his death or expatriation,—and the two disciples (on the contrary) maintaining that it is in every respect valid ‡.

The will of a female apostate is valid.

THE will of an apostate woman is valid. This is approved; because women in such cases are left to themselves, and not put to death, as in the case of men §.

A *Moostâmin* may bequeath the *whole* of his property:

IF a *Moostâmin* bequeath the *whole* of his property to a *Mussulman* or a *Zimmee*, it is valid; for a bequest of the *whole* of an estate is deemed illegal only as it affects the right of the testator's heirs; (whence it is that if they assent such bequest is valid;) but the heirs of the *Moostâmin* are possessed of no cognizable rights, they being, as it were, dead, so far as relates to the *Mussulman* government, because of their being in a hostile country. Besides, the property of a *Moostâ*-

* Arab. *Sàhib-al-hàwa*. *Hàwa* signifies the sensual passions, a complete conquest over which is essential to the character of a good *Mussulman*.

† Arab. *Sàhib-al-biddât*. A free-thinker or sectary.—A broacher of new and heterodox opinions in matters of faith.

‡ For a full explanation of this see Vol. II. p. 236. § See Vol. II. p. 227.

min

min is in ſecurity only in virtue of the protection he receives from the ſtate, which protection he enjoys in his own right, not in right of his heirs.

but if he bequeath a *part* only, the reſidue is tranſmitted to his heirs.

If a *Mooſtâmin* bequeath a part of his property, the bequeſt is executed accordingly, and the remainder is tranſmitted to his heirs, notwithſtanding they be reſidents in an hoſtile country; ſuch being the law with reſpect to *Mooſtâmins*.

An emancipation, or *Tadbeer*, granted by him on his deathbed, takes effect *in toto*.

If a *Mooſtâmin*, immediately before his death, emancipate his ſlave, or make him a *Modabbir* in the *Muſſulman* territory, it is valid, and the ſlave is accordingly free, notwithſtanding his value exceed a third of his maſter's eſtate; for a bequeſt beyond a third of the property is deemed illegal only as it affects the right of the teſtator's heirs; but a *Mooſtâmin*'s heirs poſſeſs no cognizable right, as was already mentioned.

Any bequeſt in favour of a *Mooſtâmin* is valid.

If a *Muſſulman* or *Zimmee* make a will in favour of a *Mooſtâmin*, it is valid; for a *Mooſtâmin*, ſo long as he reſides in a *Muſſulman* country, is conſidered in the light of a *Zimmee*; and as the exerciſe of generoſity and benevolence in favour of ſuch is therefore allowed to *Muſſulmans* during life, it is alſo permitted them to extend ſuch acts to a period after their death.—(It is related of *Haneefa* and *Aboo Yooſaf*, that they held wills in favour of *Mooſtâmins* to be illegal, becauſe of their intention to return to their own country; and alſo, becauſe the *Muſſulmans* not only allow this, but even do not ſuffer them to reſide in their dominions more than a year, unleſs they ſubmit to the payment of the capitation-tax.—The former is, however, the better opinion.)

The bequeſts of a *Zimmee* are ſubject to

If a *Zimmee* bequeath more than a third of his eſtate to a ſtranger, or to an heir, it is not valid, as being contrary to the laws of the *Muſſulmans*,

Muſſulmans, to which they have agreed to conform with reſpect to all temporal concerns.

the ſame reſtrictions with thoſe of a *Muſſulman*.

IF a *Zimmee* make a will in favour of an infidel of a different perſuaſion, it is valid, becauſe of the analogy of legacies to ſucceſſion by inheritance, all the different deſcriptions of thoſe perſons who diſbelieve the true faith being conſidered as of one claſs.

He may make a bequeſt in favour of an unbeliever of a different ſect,

IF a *Zimmee*, reſiding in the *Muſſulman* territory, make a will in favour of a hoſtile infidel, it is not valid; for as inheritance does not obtain between thoſe, becauſe of the difference of country, it follows that a bequeſt from the one to the other is of no effect, bequeſt being ſimilar to inheritance.

not being a *hoſtile infidel*.

CHAP. VII.

Of Executors and their Powers.

IF a perſon appoint another his executor, it remains with that other either to accept of or decline the appointment, in the preſence of the teſtator; becauſe no one has the power of compelling another to interfere in his concerns. But if the executor accept his appointment in the preſence of the teſtator, and afterwards, either in his abſence, or after his death, decline it, ſuch refuſal is not admitted; becauſe the teſtator had placed a reliance on his conſent; and therefore, if the

An executor, having accepted his appointment in preſence of the teſtator, is not afterwards at liberty to reject it.

rejection were allowed of, either in his absence or after his decease, he would necessarily be deceived.

His silence leaves him an option of rejection;

but any act indicative of his acceptance binds him to the execution of the office.

If a person appoint another his executor, and that other remain silent, without giving any indication of his acceptance or refusal, he is in that case at liberty, after the death of the testator, to accept or refuse the appointment, as may be most agreeable to him. But if a person, under such circumstances, should, immediately after the death of the testator, dispose of any part of the effects by sale, then, as an act of this kind is a clear indication of his acceptance, the executorship becomes obligatory on him. The sale, moreover, is valid in this instance, notwithstanding the executor may not have considered himself as such at that time; for his executorship (like inheritance, bequest being a sort of succession as well as inheritance,) does not depend on his knowledge; and, as being an executor, a sale transacted by him is valid.

Having rejected the appointment, after the testator's decease, he may still accept of it, unless the magistrate appoint an executor in the interim.

If a person appoint another his executor, and the person so appointed remain silent until the testator's decease, and then reject the office, and afterwards declare his acceptance of it, such acceptance is valid, unless the *Kázee*, during the interim, should have set him aside, and appointed another, in consequence of his first declaration; because the refusal does not immediately annul the appointment, that being injurious to the deceased; and although the continuance of it be prejudicial and troublesome to the executor, still he has the *merit* of it, which is an equivalent for the disadvantage,—whereas the injury to the deceased has nothing to counterbalance it. The executorship therefore endures in this case. If, however, the *Kázee* set him aside, his decree to that effect is valid, as he possesses the power of removing an inconvenience, to which executors are frequently subjected, and which may render the continuance of the office injurious to them. The *Kázee*, therefore, to remedy this, may discharge the executor

executor from his office, and appoint another in his room, to act with the estate, thereby preventing an injury both to the executor and the deceased. If, moreover, the executor, after being thus dismissed by the *Kázee*, declare his willingness to undertake the executorship, such declaration is not admitted or attended to, as he here assents after his appointment having been altogether annulled by the order of the *Kázee*.

Where a *slave*, a *reprobate*, or an *infidel*, are appointed, the magistrate must nominate a proper substitute.

A PERSON may appoint a slave, a reprobate*, or an infidel, to be his executor; but it is incumbent on the *Kázee* to annul such appointment, and nominate another person, because of the disadvantages which would attend the confirmation of it in either of those instances; for a slave could not act but by the power of his master; a reprobate may be suspected of fraud; and it is not fit such a trust should be committed to an infidel, as the enmity which every infidel may be supposed to entertain towards a *Mussulman* on the score of religion will occasion a disregard to his interest. The dissolution of such appointments is therefore incumbent on the *Kázee*, notwithstanding their original validity.

The appointment of the testator's slave is invalid, if any of the heirs have attained to maturity; but not otherwise.

IF a person appoint his own slave his executor, any of the heirs being arrived at the age of maturity, it is not valid; because such heirs may prevent the slave from the execution of his office by selling their property in him to another, and thereby rendering him incapable of acting but by the consent of the purchaser. If, on the contrary, the heirs be all infants, the appointment is in that case valid, according to *Haneefa*. The two disciples maintain that it is not valid; (and such is what analogy would suggest;) because slavery is incompatible with the exercise of power; and also because, in this particular instance, it would follow that the property was master over the proprietor, which is contrary to LAW. The argument of *Haneefa*

* Arab. *Fâsik*. (The term has been repeatedly defined.)

is,

is, that the ſlave is ſane and adult, and therefore capable of the diſcharge of ſuch truſt. Neither has any perſon the power of prohibiting him from it, becauſe the heirs, although they be his maſters, yet cannot exert this power, on account of their youth. As, moreover, the deceaſed appointed him to this truſt, it may hence be inferred that his tenderneſs, and regard for the heirs was ſuperior, in his opinion, to that of any other. This appointment, therefore, is valid; in the ſame manner as that of a *Mokâtib*;—in other words, if a perſon appoint his *Mokâtib* his executor it is valid; and ſo here likewiſe.

In caſe of the executor's incapacity, the magiſtrate muſt give him an aſſiſtant:

If an executor be unequal to the execution of his office, it is incumbent on the *Kâzee* to aſſociate another with him, in order that the duties of the office may be properly executed.

but he muſt not do ſo on the executor pleading incapacity, without due examination;

If an executor repreſent to the *Kâzee* his inability to execute the duties of his charge, it is requiſite, in ſuch caſe, that the *Kâzee*, before he attends to his repreſentation, make particular enquiry into the truth of it, as complainants of this kind often aſſert falſehoods, with a view to alleviate their own burden. But if it ſhall appear to the *Kâzee*, on due examination, that the executor is utterly incapable of the office, he muſt releaſe him, and appoint another in his place, this being advantageous both to the executor and to the eſtate.

and if he appear perfectly equal to the office, he cannot be removed.

If an executor be perfectly equal to the diſcharge of his office, and truſtworthy therein, the *Kâzee* is not at liberty to diſmiſs him; for any perſon whom the *Kâzee* may appoint in his place muſt be leſs eligible, as the deceaſed had particularly ſelected him, and ſignified his confidence in him. He therefore muſt be continued in preference to all others; even to the teſtator's father, notwithſtanding his ſuppoſed tenderneſs; and conſequently to others *a fortiori*.

IF all or part of the heirs prefer a complaint against the executor, still the *Kázee* must not dismiss him immediately, nor until his guilt be ascertained, as he acts under an authority derived from the deceased. If, however, he prove culpable, it is incumbent on the *Kázee* to dismiss him and appoint another in his place; for the deceased nominated him to the office from supposing him worthy of confidence; but upon being found culpable he no longer continues so, insomuch that if the testator were living he would himself discharge him;—and as *he* is incapacitated, by death, from so doing, the *Kázee* must take this upon him as his substitute.

He cannot be removed on the complaint of the heirs, unless his culpability be ascertained.

IF a man appoint two executors, neither of them is entitled, according to *Haneefa* and *Mohammed*, to act without the other, except in particular cases, of which an explanation shall be hereafter given.—*Aboo Yoosaf* is of opinion that in all cases either of them may act without the other, because, an executor is endowed with his power of action in virtue of the will of the testator; and as power of action is a thing sanctioned by the LAW, and incapable of division*, he enjoys his power complete and perfect in the same manner as a complete authority to contract their infant sister in marriage appertains to each of her brothers respectively.—(The ground of this is, that executorship is a succession, which succession cannot be established in the executor, unless the authority of the testator devolve to him in the same degree in which it had appertained to the testator, that is, completely and perfectly.)—The testator's choice, moreover, of the *two* to be his executors is an argument of the particular attachment of each to his interest, which attachment is equivalent to the consanguinity of two brothers in the point of contracting their infant sister in marriage.—The arguments of *Haneefa* in support of his opinion are twofold.—FIRST, the power of an executor, being derived from the testator, is of consequence to be exercised in the manner prescribed by him; and

One of two joint executors cannot act without the concurrence of the other;

* That is, cannot be enjoyed or exercised *partially*.

in the cafe in queftion the teftator has entrufted this power to both the executors, on the condition of their being *united* in the truft, for he does not exprefsly affent to their acting otherwife than jointly, and the above condition is moreover attended with advantage, as the deliberations of *two* perfons are better than of *one*. It is otherwife with two brothers, in the circumftance of contracting their infant fifter in marriage, (as adduced by *Aboo Yoofaf*,) fince the caufe of fuch authority being vefted in them is *relationfhip*, a caufe which exifts equally in each. The contracting in marriage, moreover, is a right of the infant, refting upon her guardian, (infomuch that if the infant require her guardian to contract her to any perfon, being her equal, for whom fhe has a liking, he muft comply,) whereas, in the cafe here confidered, the acting [with the eftate] is the right of the executor himfelf, not of another *refting upon him*. In the cafe of contracting the infant in marriage, therefore, if one of the two brothers fo contract her, he merely difcharges a *duty* incumbent on the other brother, and his act is therefore valid; whereas, in the cafe of executorfhip, if one of the two act alone, he exercifes a right appertaining to the other, and his fo doing is therefore invalid;—in the fame manner as where two perfons owe a fum of money to one, in which cafe it would be perfectly lawful for either of them to difcharge the whole debt, whereas, fuppofing *one* man to owe a fum of money to *two* others, it would not be lawful for him to pay the whole to either of them. The cafes excepted by *Haneefa* and *Mohammed*, in which they hold the acts of either executor, fingly, to be valid, are fuch as require *immediate* execution. Thus it is lawful for either executor, fingly, to difburfe the funeral charges, as a delay in this might occafion the body to become offenfive; whence it is that a fimilar power is vefted in the neighbours. In the fame manner, either of the executors, fingly, may purchafe victuals or clothes for the infant children of the teftator, this being a matter of urgency, and which admits of no delay. So, likewife, it is lawful for either of the executors to reftore a depofit, an ufurped article, or a thing purchafed by the teftator under

except in fuch matters as require immediate execution,

or which are of an *incumbent* nature,

under an invalid contract. In preserving the estate of the testator, also, and in discharging his debts, the act of either executor is lawful independant of the other. For none of these are considered as an *exercise of power*, but merely the performance of a duty,—insomuch that the depositor has himself a right to seize and carry away his deposit, if he find it among the effects of the deceased, and the creditor has a similar right with regard to his debt;—and it is, moreover, the duty of every one into whose hands property may fall, to attend to the preservation of it, whence this comes under the description of *aid* and *assistance*, not of an *exercise of power*;—neither do any of these acts require thought or consideration. Either of the executors has also a right singly to discharge a legacy, or emancipate a slave, if directed by the testator, because such deeds require no thought or consideration. In the same manner, either of them may institute a suit in claim of the rights of the testator, because a conjunction of both in so doing would be impracticable, since, if they were to do it at one and the same time in the assembly of the *Kâzee*, they must occasion noise and confusion;—(whence it is that only one of two agents for litigation is allowed to plead at a time.) The acceptance of a gift for an infant is likewise an act which either may perform singly; for in case of delay there is a possibility of the gift being rendered null by the death of the donor previous to the seizure. These acts, moreover, being permitted to a mother and nurse, is a proof that they are not *exertions of power*. It is likewise permitted to any of the executors, singly, to sell goods where there is an apprehension of their spoiling, as in the case of fruit, and the like; and also to collect together and preserve the scattered property of the testator, as a delay might occasion the destruction of it; and such permission is, moreover, given to every person into whose hands property may fall, whence it may be inferred that this is not an exertion of power. (It is recorded, in the *Jama Sagheer*, that none of the executors, where there are more than one, has singly the power of selling goods, or receiving payment of

or in which the interest or advantage of the estate are concerned.

 debts,

debts, becauſe theſe are exerciſes of power which they muſt perform jointly, in conformity with the will and intention of the teſtator.)

Caſe of a teſtator appointing different executors at different times.

If a perſon appoint two executors in a ſeparate manner, (as if he ſhould firſt ſay to the one "I have appointed you my executor," and again, at a different period, to the other "I have appointed you my executor,") ſome allege that in this caſe each of them has individually a power of exerciſing the functions of his appointment, without conſulting the other, in the ſame manner as two agents, where they are appointed by different commiſſions;—the reaſon of which is that the teſtator, in appointing the two ſeparately, indicates his aſſent to each acting from his own judgment, without the others aſſiſtance or advice. Others, again, ſay that concerning this caſe alſo a diſagreement ſubſiſts between *Haneefa* and *Mohammed* on one ſide, and *Aboo Yooſaf* on the other; becauſe a will is not eſtabliſhed until the death of the teſtator; and at that time both are executors together, notwithſtanding they had been appointed ſeparately. It is otherwiſe with two agents appointed under different commiſſions; for the appointment of each of thoſe ſtill continues diſtinct and ſeparate, as ſettled by the conſtituent.

In caſe of the death of a joint executor, the magiſtrate muſt appoint a ſubſtitute,

If one of two executors die, it is incumbent on the *Kâzee* to appoint another in his room. This is the opinion of *Haneefa* and *Mohammed*; becauſe, according to their doctrine, the remaining executor has not, of himſelf, power to act on every occaſion, and the intereſt of the deceaſed therefore requires the appointment of another to operate with him; and it is alſo the opinion of *Aboo Yooſaf*, becauſe, although the remaining executor be (according to him) empowered to act of himſelf, ſtill it behoves the *Kâzee* to appoint another his companion; for the deſign of the teſtator evidently was, to leave *two* ſucceſſors the management of his concerns; and as this may be fulfilled by the appointment of a ſubſtitute for him who dies, one muſt be appointed accordingly.

If

IF the deceaſed executor have appointed the living executor to act for him, it is in that caſe lawful for the latter (according to the *Zâhir Rawâyet*) to act alone, nor is it incumbent on the *Kâzee* to appoint another in the room of the deceaſed; becauſe here the judgment of the deceaſed executor virtually ſubſiſts in the living one, as it were, by ſucceſſion.—(There is a tradition of *Haneefa* having contradicted this doctrine, becauſe of its repugnance to the object of the teſtator, namely, the agency of two perſons: in oppoſition to the caſe where a dying executor appoints ſome other perſon to ſucceed him; for ſuch appointment is valid, becauſe of its being attended with the advantage of the judgment of two diſtinct perſons, as was intended by the teſtator.)

unleſs the deceaſed have himſelf nominated his ſucceſſor.

IF an executor, previous to his death, appoint another perſon *his* executor, in that caſe the perſon ſo appointed is entitled to act as executor, both to him, and alſo to the perſon to whoſe affairs his immediate teſtator had acted as executor. This is according to our doctors. *Shafeï* maintains that the perſon ſo appointed is not entitled to act as executor to the firſt deceaſed, becauſe of the analogy his appointment bears to that of an agent; in other words, if a perſon, during his lifetime, appoint an agent to act for him, that agent is not permitted to delegate his powers to another without having previouſly obtained the conſent of his conſtituent.—(The ground of analogy between theſe two caſes is, that in the ſame manner as the conſtituent is ſuppoſed to place a reliance on the agent, and on him only, ſo alſo the teſtator may be ſuppoſed to act with regard to the executor.) The arguments of our doctors upon this point are twofold.—FIRST, an executor derives his power from the teſtator; and it is therefore lawful for him to appoint an executor to ſucceed him;—in the ſame manner as in the caſe of a grandfather; in other words, a father has the power of beſtowing his child in marriage, which devolves upon *his* father after his death; and the grandfather has in ſuch caſe the power of appointing an agent for the execution of the child's mar-

The executor of an executor is his ſubſtitute in office.

 riage;

riage; and so likewise, it is lawful for an executor to appoint another executor, as the power appertaining to the testator devolves upon his executor, in the same manner as a father's right to dispose of his child in marriage devolves upon the grandfather. As, moreover, the grandfather is the father's substitute with regard to the power which devolves to him, so in the same manner the executor is the substitute of the testator; because the nomination of an executor is, in effect, an appointment, by the testator, of a substitute with respect to the matters in which he is himself empowered; and as the executor, at the time of *his* death, possessed a power with respect to both estates, (his own, and also that of his testator,) it follows that the second executor (that is, the one appointed by him) is his substitute with respect to both estates also.—SECONDLY, as the testator had recourse to the existence of the executor, notwithstanding he knew there was a possibility of his dying in the interim, and thereby leaving his object unaccomplished, it may be inferred that his intention was that his executor should in such case appoint another. It is otherwise with an agent; for he is not at liberty to appoint any other person *his* agent without the consent of his constituent; because, as the latter is still living, and consequently has it in his power to accomplish his object himself, it is therefore not to be supposed that he will consent to his agent appointing another agent under him.

An executor is entitled to possess himself of the portions of infant and absent *adult* heirs, on their behalf;

IF an executor, the legatees being present, divide off the estate of the testator from the legacies, on behalf of his heirs who are infants, or adult absentees, and take possession of their portions, it is lawful; for an heir is successor to the deceased; and as an executor is also a successor to him, he is of course a competent litigant on behalf of infant or absent heirs, and may, of consequence, make a division, and possess himself of their portions on their behalf,—insomuch that if those portions were to perish in his hands, still they are not at liberty to participate with the legatees in what remained to them after such division.

IF, on the contrary, an executor, the heirs being adult and present, divide off the legacies from the estate, and take possession of them on behalf of infant or absent legatees, it is unlawful; for a legatee is not a successor to the deceased in *every* respect, he being constituted a proprietor by a new and supervenient cause; and as, therefore, the executor does not stand as litigant on his behalf, his taking his [the legatee's] portion is not valid,—insomuch that if the legacy were to perish in his [the executor's] hands, the legatee would be entitled to take a third of whatever had remained to the heirs. Neither is any compensation due from the executor in this instance; because an executor is a trustee; and as the power of conserving the effects of the testator is lodged in him, the case is therefore the same as if the loss had happened previous to the division of the effects.

but not of the legacies of infant or absent legatees.

IF a person bequeath a sum for the performance of a pilgrimage to *Mecca*, and then die, and the executor divide off the said sum from the heirs, and take possession of it, and it be afterwards lost or destroyed, either in his charge, or in that of the person whom he had appointed for the performance of the pilgrimage, in that case, according to *Haneefa*, a third of the remaining property of the deceased must be appropriated for the pilgrimage. *Aboo Yoosaf*, on the other hand, holds that if the sum thus lost have been originally equivalent to a third of the property, nothing is afterwards to be taken from the heirs; but that if it was less, the deficiency must be applied to the purpose of the pilgrimage. *Mohammed*, on the contrary, is of opinion that in neither case is the executor to take any thing from the heirs; because the setting aside of a particular sum, for the performance of the pilgrimage, was the undoubted right of the testator; and as, if he had himself set aside the sum for that purpose, and it had afterwards been lost or destroyed, nothing further would have been required, and the legacy would have been void, it is in the same manner void where the sum was set aside by the executor, as he acts for, and stands in the place of, the deceased. The argument of *Aboo Yoosaf*, in

A legacy appropriated to pilgrimage, if lost, must be repaired, to the extent of a third of the estate.

in ſupport of his opinion, is that a third of the whole property is a fund for the execution of wills, to which extent only they are to be executed, and no farther. The arguments of *Haneefa*, in ſupport of his opinion on this point, are twofold. FIRST, the performance of the pilgrimage was the object of the teſtator, not the ſetting aſide a ſum for that purpoſe; and therefore the appropriation or delivery of the money, without the accompliſhment of the object, is of no conſideration, it being, in effect, the ſame as if the ſum had been loſt previous to the diviſion,—in which caſe a third of the remainder would be appropriated to the pilgrimage. SECONDLY, the diviſion, with reſpect to the legacy, is not perfect and complete until the portion bequeathed for the purpoſe of pilgrimage be expended thereupon, as there is no perſon to take poſſeſſion of it *. Where, therefore, this ſum is not expended in the performance of pilgrimage, the partition is incomplete, and the caſe is (conſequently) the ſame as if the ſum had been loſt or deſtroyed before the partition.

A legacy, after being divided off by the magiſtrate, deſcends to the legatees heirs in caſe of his deceaſe.

IF a perſon bequeath a third of one thouſand *dirms* to another who is at that time abſent, and the heirs conſign the ſaid ſum to the *Kâzee*, in order to divide and ſet apart the ſhare of the abſent legatee, the diviſion thus made by the *Kâzee* is valid, becauſe of the original validity of the will, inſomuch that if the abſentee ſhould afterwards die, previous to his having declared his acceptance, the legacy nevertheleſs devolves to his heirs. The office of *Kâzee*, moreover, is inſtituted with a view to the benefit of mankind, that he may attend to the conſervation of their rights, eſpecially with reſpect to ſuch as are dead or abſent;—and as among theſe attentions to the rights of mankind is the ſetting aſide and taking poſſeſſion of the portions of abſentees, ſuch acts by him on behalf of an abſentee are valid of courſe,—inſomuch that if ſuch portion were deſtroyed in his poſſeſſion, and the

* In other words, there is no *individual* legatee.

legatee

legatee ſhould afterwards appear, ſtill he would have no claim upon the heirs.

An executor may ſell a ſlave of the eſtate, for the diſcharge of the debts upon it, in abſence of the creditors,

IT is lawful for an executor, in order to diſcharge the debts of the deceaſed, to ſell a ſlave for a ſuitable price, in the abſence of the creditors; for as the teſtator might have done ſo during his lifetime, the executor, as his repreſentative, is entitled to do the ſame. The ground on which this proceeds is, that the right of the creditors to the effects of the deceaſed lies, not in the things themſelves, but in their worth; and the worth of the ſlave is not annihilated by the ſale, as the price (which is in reality the worth) ſtill remains. It is otherwiſe with reſpect to an indebted ſlave; for the ſale of ſuch in the abſence of the creditors is not valid, as their right lies in the *perſon* of the ſlave, they having a claim to the earnings of his labour, which would be annihilated by the ſale of him.

unleſs the ſlave be involved in debt.

An executor, having ſold and received the price of an article which afterwards proves to be the property of another, is accountable to the purchaſer for the price he had ſo received;

IF a perſon appoint another his executor, directing him, after his deceaſe, to ſell a ſlave, and beſtow the price in charity, and the executor accordingly ſell the ſlave and take poſſeſſion of the price, and it be afterwards loſt or deſtroyed with him, and the ſlave prove to be the property of another perſon, he [the executor] is accountable to the purchaſer for the price, agreeably to the laws of ſale; and he is entitled to take an equivalent from the effects of the deceaſed, being, as it were, an agent on his behalf. This indemnification, according to *Haneefa*, he is to take from the whole of the eſtate at large, and ſuch is the *Záhir Rawáyet*. It is recorded from *Mohammed*, on the contrary, that he is to indemnify himſelf from the third of the effects, as the inſtructions of the deceaſed were in the nature of a will; and the third of the property is the fund for the execution of a will. The ground of the doctrine of the *Záhir Rawáyet* is, that as the executor, in the ſale of the ſlave, was deceived by the teſtator, the reſtitution made by him to the purchaſer is therefore a debt due to him from the teſtator; and the debts are diſcharged from the *whole* of the eſtate,

 not

not from the third. It would be otherwise if the *Kâzee*, or his *Ameen*, should sell the slave, and he afterwards prove the property of another; for in this case the obligations of the sale do not rest upon those officers, but the purchaser comes at once upon the estate for an equivalent to the price lost or destroyed as above; since otherwise the door of magistracy would be shut, and the rights of mankind consequently injured, as no man will undertake the office of *Kâzee* unless he be exempted from responsibility. It is to be observed that what is now advanced, that "the executor is to take an equivalent from the effects of the deceased," proceeds on the supposition of these being sufficient to answer this purpose; for if they be inadequate to it, the executor is entitled to an indemnification only in the greatest possible degree; and if the deceased should have no effects whatever, the executor (like any other creditor) has no claim for indemnification.

but if this have been lost, he may reimburse himself from the person to whom the article had fallen by inheritance.

If an executor sell a slave which had fallen to the share of a child of the deceased, and take possession of the price, and it be afterwards lost in his hands, and the slave prove the property of another person, the purchaser has in that case a claim for restitution from the executor, who is entitled to indemnify himself from the share of the child in whose behalf he acted;—and the child is entitled to an equivalent from the shares of the other heirs; for upon the slave proving the property of another person, the distribution of inheritance, as at first executed, is annulled, the case being, in fact, the same as if no such slave had ever existed, or been accounted upon as part of the estate.

An executor may accept a transfer for a debt due to his infant ward,

If a person indebted to an orphan give a transfer on some other person, and the executor (the guardian of the orphan) accept the same, such acceptance is approved, provided it be for the interest of the orphan, because of the person on whom the transfer is made being richer (for instance) than the transferrer, and also a man of probity; for the power of acting is vested in the executor, merely that he may employ it for the interest of the orphan:—but if the transferrer be

richer

richer than the other, the acceptance is not approved, as being, in its tendency, prejudicial to the orphan.

It is lawful for an executor to ſell or purchaſe moveables, on account of the orphan under his charge, either for an equivalent, or at ſuch a rate as to occaſion an inconſiderable loſs,—but not at ſuch a rate as to make the loſs great and apparent; becauſe, the appointment of an executor being for the benefit of the orphan, he muſt avoid loſſes in as great a degree as poſſible;—but with reſpect to an *inconſiderable* loſs, as in the commerce of the world it is often unavoidable, it is therefore allowed to him to incur it, ſince otherwiſe a door would be ſhut to the buſineſs of purchaſe and ſale.

or ſell or purchaſe moveables on his account.

AN executor, in giving a bill of ſale, muſt not inſert his power as an executor in it, but muſt give a ſeparate paper to that effect, out of caution; for if the latter alſo were inſerted, it might happen that the witneſs to the ſale might ſet his name to the bottom of the inſtrument without examination, which would implicate a falſe teſtimony, ſince with the executorſhip he has no concern. Some, moreover, have aſſerted that the atteſtation of the witneſs ought to run in this manner—"Sold by *Zeyd* the ſon of *Omar*," and not "by *Zeyd* the "executor of ſuch a perſon:"—but others maintain that this is immaterial, and that the latter mode may with propriety be adopted, as executorſhip is a matter of notoriety.

AN executor has the power of ſelling every ſpecies of property belonging to an adult abſent heir, excepting ſuch as is immoveable;—for as a father is authoriſed to ſell the moveable property of his adult abſent ſon, but not ſuch as is immoveable, his guardian [the executor] has the ſame power. The ground of this is, that the ſale of moveable property is a ſpecies of conſervation, as articles of that deſcription are liable to decay, and the price is much more eaſily pre-

He may alſo ſell moveables on account of an abſent adult heir.

ferved than the article itfelf. With refpect, on the contrary, to immoveable property, it is in a ftate of confervation in its own nature, whence it is unlawful to fell it,—unlefs, however, it be evident that it will otherwife perifh or be loft, in which cafe the fale of it is allowed.

He cannot trade with his ward's portion.

It is not lawful for an executor to trade with the property of the orphan; for the *confervation* of it, merely, is committed to him, not the power of *trading* with it,—according to what is mentioned in the *Awzah* upon this fubject.

He may fell moveable property on account of the infant or abfent adult brother of the teftator.

According to *Mohammed* and *Aboo Yoofaf*, the executor of a brother, with refpect to an infant brother, or one of mature age, who is abfent, ftands in the fame predicament as the executor of a father with refpect to his adult abfent fon;—(in other words, he is empowered to fell the moveable property of the orphan or abfentee;) and fo likewife of an executor appointed by the mother or uncle; for as the mother and uncle are permitted to interfere in the management of the property fo far as relates to its prefervation, fo alfo is the executor who reprefents them.

The power of a father's executor precedes that of the grandfather.

The power of the father's executor, in the management of the property of his orphans, is fuperior to, and precedes that of the grandfather. *Shafeï* is of opinion that in this refpect the grandfather has the fuperior power; becaufe the LAW has ordained him to be the reprefentative of the father, where the latter has ceafed to exift,—whence it is that [failing the father] the grandfather inherits to his grandfon. The argument of our doctors is, that as, in confequence of the will, the authority of the father devolves upon his executor, the executor's authority is therefore that of the father, in effect,—and confequently the father's executor precedes the grandfather, in the fame manner as the father himfelf would. The ground of this is,

that

that as the father, notwithſtanding the exiſtence of the grandfather, appointed another to act for his children, it may be thence inferred that he conſidered ſuch appointment more beneficial to them than if they had been left to the management of the grandfather.

IF a father die without appointing an executor, the grandfather repreſents the father *; becauſe a grandfather is moſt nearly related to the children of his ſon, and moſt intereſted in their welfare;—whence it is that the grandfather is empowered to contract the infant wards in marriage, in preference to the father's executor,—notwithſtanding the latter have precedence of him in point of managing and acting with the property, for the reaſons already aſſigned.

If there be no executor, the grandfather is the father's repreſentative.

CHAP. VIII.

Of Evidence with reſpect to Wills.

IF two executors give evidence that the deceaſed had aſſociated a third perſon with them, and that perſon deny his having done ſo, the evidence of the executors is of no effect; becauſe their aſſertion having a tendency to their own advantage, in the caſe it will afford them from part of their labour, lays them open to ſuſpicion. If, on the contrary, the third perſon claim or admit of the executorſhip, their

The evidence of two executors to the appointment of a third is not valid unleſs he claim or admit it.

* Literally, "*is in the ſtead of,*" or "*ſtands in the place of.*"

evidence is valid, on a favourable conſtruction. Analogy would ſuggeſt that here alſo the evidence is null, in the ſame manner as in the former inſtance, and for the ſame reaſon. The ground of a more favourable conſtruction, in this particular, is that as the *Kâzee* has the power of either appointing an executor at the firſt, or aſſociating a third perſon (by that perſon's conſent) with the two executors, without any teſtimony on their part, it follows that their teſtimony merely prevents the *Kâzee* from the trouble of nomination, by rendering it unneceſſary for him to ſeek out and name a proper perſon to aſſiſt in the executorſhip;—the perſon ſtill, however, holding his office in virtue of the *Kâzee*'s nomination.

The evidence of *orphans* to the appointment of an executor is not admitted if he deny it.

If two orphans give evidence that their deceaſed father had appointed a particular perſon his executor, and the perſon mentioned deny the ſame, their evidence is not credible, being liable to a ſuſpicion in the advantages they would draw from the labours of a perſon exerted towards the preſervation of their property.

The teſtimony of executors with reſpect to property, on behalf of an infant,

If two executors give evidence, on behalf of an infant heir [their ward] concerning property of the deceaſed, or of any other perſon, it is of no effect; becauſe their teſtimony merely tends to prove their right to the management of ſuch property.

or of an abſent adult, is not admitted.

If two executors give evidence, on behalf of an *adult* heir, concerning property of the deceaſed, it is of no effect; but it is valid concerning property appertaining to any other perſon. This is the doctrine of *Haneefa*. The two diſciples are of opinion that in both caſes the evidence is valid, becauſe it is not liable in either of them to any ſuſpicion, as the power of an executor over the property ceaſes after the heir attains to maturity. The argument of *Haneefa* is, that as executors have the power of conſervation, and alſo of ſelling the moveable property of an adult heir in his abſence, it follows

follows that their evidence, in favour of an adult heir, concerning any part of the deceafed's eftate, is not altogether free from fufpicion. It is otherwife with refpect to their evidence, in behalf of an adult heir, concerning any other property, for over that the executors cannot poffefs any authority, as the deceafed conftituted them his fubftitutes with refpect to his own eftate only, not with refpect to the property of others.

The mutual evidence of parties, on behalf of each other, to *debts* due to each from an eftate is valid; but not their evidence to *legacies*,

IF two perfons bear evidence to a debt of one thoufand *dirms*, due from a perfon deceafed to *Omar* and *Zeyd*, and *Omar* and *Zeyd* give a fimilar evidence in favour of thefe two, the evidence on both parts is valid. If, on the contrary, each of the parties in the fame manner give evidence that legacies had been left by the deceafed to the other, their atteftations are of no effect. This is the doctrine of *Haneefa* and *Mohammed*. *Aboo Yoofaf* maintains that in neither cafe are thefe evidences valid; and fuch alfo (according to the relation of *Khafáf*) is the opinion of *Haneefa*. There is alfo a tradition of *Aboo Yoofaf* having concurred in the opinion of *Mohammed*. The reafons urged in fupport of the validity of the evidence, in the cafe of debt, is that debt relates folely to the perfon; and as the perfon admits a great variety of rights, the evidence of both parties is therefore admitted.—Neither does it follow, in this cafe, that either party is to partake of what may be obtained in payment by the other, fo as to caufe the evidence of this party to be a mere eftablifhment of their own right of participation,—infomuch that if a ftranger were to pay, to one of the parties, of his own accord, the debt alleged to be due to that party, ftill the other party is not at liberty to claim any fhare in fuch payment. The reafons, on the other hand, againft the validity of the evidence, in this inftance, is that as the death [of the debtor] occafions the relation to fhift from the perfon to the property, fince in confequence of the deceafe the perfon no longer remains, (infomuch that if any one party were to obtain payment of his right from the eftate of the deceafed the other party participates with them therein, provided

provided the estate suffice for the discharge of the debts of both,) it follows that the evidence of each respectively, in behalf of the other, tends to establish a right of participation in whatever payment that other may obtain in consequence; and accordingly, the testimony is here liable to suspicion. It is otherwise where the debtor is *living*; for in that case the testimony of each party [of creditors] on behalf of the other is admitted; since as the debt, at that time, rests upon his *person*, not upon his *property*, (the former still continuing existent,) a participation, therefore, is not established in this instance.

unless each legacy, respectively, consist of a slave.

If two persons give evidence that a particular person had bequeathed his female slave in a legacy to two others, and the two others give evidence that the same person had bequeathed a male slave to these two, both evidences are valid; for as their testimony does not in any respect tend to establish a participation, it is therefore liable to no suspicion, and must be admitted accordingly.

A mutual evidence of this nature is void where it involves a right of participation in the witnesses.

If two persons give evidence that a particular person had bequeathed the third of his property to *Zeyd* and *Amroo*,—and *Zeyd* and *Amroo*, on the other hand, give evidence that the same person had bequeathed a third of his property to these two, the evidence of both parties is void and of no effect; (and so likewise if the two were to give evidence that the person had bequeathed his male slave to *Zeyd* and *Amroo*,—and *Zeyd* and *Amroo*, on the other hand, give evidence that the said person had bequeathed his female slave to those two;)—because as the evidence on each part tends, in those instances, to establish a right of participation, it is therefore not altogether free from suspicion.

HEDAYA.

BOOK LIII.

Of HERMAPHRODITES.

SECT. I.

Of who are HERMAPHRODITES.

Hermaphrodites are either *male*, *female*,

AKHOONSA, or hermaphrodite, is a perſon poſſeſſed of the parts of generation of both a man and a woman. If, therefore, ſuch perſon diſcharge urine from the male member he* is accounted

* The *gender* of an *abſolute* hermaphrodite is dubious. The tranſlator follows the *Arabic* text in expreſſing it throughout in the *maſculine*, that being the moſt generally applicable.

counted a male, or if from the female member, a female;—because it is so recorded in the traditions, and likewise reported from *Alee*; and also, because the circumstance of the urine being discharged from either member in particular, denotes that member to be the original, and the other merely a defect. If, on the contrary, the person discharge the urine from both members, regard is paid to that from which it first proceeds, as this denotes that member to be the original. If, on the other hand, the person discharge his urine from both members equally (that is, at one and the same time) he is a *Khoonsá-mooſh'kil*, or equivocal hermaphrodite, according to *Haneefa*;—nor is any regard paid to the superior or inferior quantity of the urine in this instance, because a superiority of discharge from either member does not denote that member to be the primary, since this circumstance arises merely from the urinary passage in the one being wider than in the other. The two disciples maintain that regard must in this case be paid to the comparative quantity of urine; and consequently, that the sex is determined according to the member from which the greatest quantity proceeds; because this denotes that member to be the superior and original; and also, because the greater quantity is, in effect of law, the *whole*. From whichever member, therefore, the principal quantity of urine is discharged, that member is accounted the superior. If, however, the urine proceed from both passages alike, (that is, at the same time, and in equal quantity,) the person is accounted an equivocal hermaphrodite, according to all our doctors, as in this case neither member possesses any superiority over the other.—What is here advanced applies solely to hermaphrodites not yet arrived at the age of maturity;—for upon an hermaphrodite attaining to maturity, if his beard grow, or he have connexion with a woman, or nocturnal emissions, or his breasts appear as those of a man, he is accounted a male, those being indisputable tokens of manhood;—but if the breasts swell like those of a woman, or the menstrual discharge appear, or pregnancy, or carnal connexion with a man, the hermaphrodite is accounted a female, such being the tokens of womanhood.

or *ambiguous*.

If,

If, on the contrary, no diſtinguiſhing tokens of either ſex appear, or the tokens of both, (ſuch as a beard, with the breaſts of a woman,) the perſon is an *equivocal* hermaphrodite.

SECT. II.

Of the Laws reſpecting equivocal HERMAPHRODITES.

An equivocal hermaphrodite

It is a rule, with reſpect to equivocal hermaphrodites, that they are required to obſerve all the more *comprehenſive* points of the ſpiritual law, but not thoſe concerning the propriety of which [in regard to *them*] any doubt exiſts.

muſt take his ſtation, in public prayers, between the *men* and the *women*.

An equivocal hermaphrodite, in ſtanding behind the *Imâm* for the purpoſe of prayer, muſt take his ſtation immediately after the men and before the women, as it is poſſible that he may be a man, and it is alſo poſſible that he may be a woman. If, therefore, he chance to ſtand among the women, he muſt recite the prayers repeatedly, for as it is poſſible he may be a man they would otherwiſe be nugatory. If, on the contrary, he ſtand among the men, his prayers are valid; but the men who are next to him are to recite their prayers repeatedly, out of caution, as it is poſſible that he may be a female.

obſerving (in other reſpects) the cuſtoms of women.

It is laudable in an equivocal hermaphrodite to cover his head, during prayer, with the ſkirt of his garment, and alſo to ſit in the poſture of women; for if he be a man, this is merely a deviation from cuſtom, which does not imply any poſitive illegality; but if he be a female,

female, his neglecting so to do would induce an abomination, it being indispensably incumbent on women to be covered upon that occasion. It is also laudable in him, if he be without a garment, to recite the prayers repeatedly; but still the prayers are lawful although he should neglect so to do. It is, moreover, abominable in him to wear silk or jewels.

He must not appear naked before man or woman, or travel along with either, except a relation; and he must be circumcised by a slave purchased for that purpose.

It is abominable in an equivocal hermaphrodite to appear naked before either man or woman, or to be in retirement with either man or woman except his prohibited relations. In the same manner, it is abominable in him to journey in company with a man other than his prohibited relation,—or with a woman notwithstanding she be a prohibited relation, as it is not lawful for two women to travel together, although they be relations. It is also abominable that he be circumcised by either a man or a woman; and therefore, to perform this ceremony, a female slave must be purchased at his expence;—or, if he be destitute of property, the price of such slave must be advanced to him, by way of loan, from the public treasury, with which he may purchase her for the purpose of circumcising him; and having so done, she is to be sold, and her price paid into the treasury, as he has then no farther occasion for her.

Rules to be observed by him during a pilgrimage.

If an equivocal hermaphrodite undertake a pilgrimage during his adolescence, (that is, when nearly arrived at maturity,) *Aboo Yoosaf* declares he is uncertain which mode of dress is most proper for him to adopt; for if he be a male, his wearing a seamed garment is abominable; and if he be a female, it is abominable to wear any thing else. *Mohammed*, however, says that he ought to wear a seamed garment, in the same manner as women; because it is still more abominable for a woman to neglect this during pilgrimage than for a man to wear it.

If

If a man ſuſpend the emancipation of his ſlave, or the divorce of his wife, upon the circumſtance of her producing " a male child," and ſhe be delivered of an *hermaphrodite* child, the divorce or emancipation do not take place until the ſex or condition of the child be fully aſcertained, ſince the perſon cannot incur the penalty, in this inſtance, becauſe of the doubt.

Divorce or emancipation, ſuſpended upon the circumſtance of *ſex*, are not determined, in relation to an hermaphrodite,

If a man declare, " all my male ſlaves are free," or, " all my " female ſlaves are free,"—and he be poſſeſſed of an hermaphrodite ſlave, this ſlave is not emancipated until his real condition be aſcertained, ſince here the maſter cannot be forſworn, becauſe of the doubt. If, on the contrary, he thus mention his male and female ſlaves together, the hermaphrodite is in that caſe emancipated, ſince one or other deſcription applies to him indiſputably, as he muſt be either a male or female.

until his ſex be aſcertained.

If an hermaphrodite declare himſelf to be a male, or a female, and he be of the equivocal deſcription, his declaration is not credited, as his plea is repugnant to the ſuggeſtion of proof. But if he be not of an equivocal deſcription, his declaration may be credited, he being better acquainted with his own ſtate than any other perſon.

His declaration of his ſex is not admitted.

If an equivocal hermaphrodite die before his condition be aſcertained, the ceremony of ablution muſt not be performed upon his body by either man or woman, neither of thoſe being allowed to perform it to the other. Ablution, therefore, being impracticable in this inſtance, the ceremony of *teyummim* [rubbing with duſt or ſand] muſt be ſubſtituted for it;—and it is mentioned in the *Jama Ramooz*, that if the *teyummim* be performed by any other than a prohibited relation, the hand muſt be covered with a cloth.

Rules to be obſerved in his interment.

If a hermaphrodite die at an age bordering on maturity, (at twelve years of age, according to the *Jama Ramoos*,) the corpse is not to have the ceremony of ablution performed upon it, whether it be male or female. Upon depositing it, moreover, in the tomb or grave, it is laudable to cover the same with a cloth, this being indispensable with respect to women, although not with respect to men.

When there is occasion to repeat the funeral prayers over a man, a woman, and a hermaphrodite, at the same time, the bier of the man must be placed next the *Imám*, that of the hermaphrodite next, and beyond all the bier of the woman.

Where there is any reason for interring a hermaphrodite in the same tomb [or grave] with a man, the former must be deposited after the latter, as it is possible that he may be a female; and a partition of earth must also be constructed between them. If, on the other hand, a hermaphrodite be interred in the same tomb [or grave] with a woman, he must be deposited first, as it is possible that he may be a man.

It is laudable to shroud the body of a hermaphrodite in the same manner as that of a woman, by wrapping it in five cloths; for, if it be a female, such is the ordained practice with respect to women; and if it be a male, this is merely an excess of two cloths, which is a matter of no moment.

Rules of inheritance with respect to hermaphrodites.

If a man die, leaving two children, one a hermaphrodite, and the other a son, in that case, according to *Haneefa*, the whole inheritance is divided between them in three shares, two going to the son, and one to the hermaphrodite; because he holds a hermaphrodite to be subject to the law of a woman, unless his condition be ascertained to be

be otherwiſe. *Shobbàia*, on the contrary, maintains that in this caſe the hermaphrodite is to receive half the ſhare of a male heir, and half the ſhare of a female,—by firſt calculating the amount of his ſhare, ſuppoſing him to be a male, and then the ſame ſuppoſing him to be a female, and adding the two together, and paying him a moiety of the added ſums. *Mohammed* and *Aboo Yooſaf* ſubſcribe to this opinion. They, however, differ in their expoſition of it; for *Mohammed* holds that the whole inheritance is to be divided into twelve parts, ſeven of which go to the ſon, and five to the hermaphrodite;—whereas *Aboo Yooſaf* alleges that it is to be divided into ſeven parts, four of which go to the ſon, and three to the hermaphrodite. The argument of *Aboo Yooſaf* is that the ſon, if he ſtood alone, would be entitled to the whole inheritance; and the hermaphrodite, if he ſtood alone, would be entitled to three fourths of the inheritance,—he being entitled (when ſtanding alone) to an half, if accounted a male, or to the whole, if accounted a female; for the whole property conſiſts of four quarters, the half of which is two quarters,—and theſe, being added together, make ſix quarters, the half of which is three. Where, therefore, thoſe two unite in one inheritance, the eſtate is divided between them according to their reſpective proportions of right; and as the right of the ſon is to *four* fourths, and that of the hermaphrodite to *three* fourths, the former gets in the proportion of four, and the latter in the proportion of three;—and accordingly, the whole inheritance is divided into ſeven parts, four of which go to the ſon, and three to the hermaphrodite. The argument of *Mohammed* is that, ſuppoſing the hermaphrodite to be a male, the inheritance would be divided between him and the ſon in equal ſhares; or ſuppoſing him (on the other hand) to be a *female*, it would be divided between them in three lots. We muſt therefore have recourſe to the ſmalleſt number which admits of diviſion by *two* and by *three*; and as this number is ſix, it follows that on the former ſuppoſition the inheritance is to be divided equally

between

between the two, three ſhares of the ſix going reſpectively to each,—or that, on the latter ſuppoſition, it is to be divided between them in three lots, two ſhares of the ſix going to the hermaphrodite, and four ſhares to the ſon. The hermaphrodite, therefore, is entitled to two ſhares, unqueſtionably; and there being ſtill a doubt with reſpect to the one redundant ſhare, that is divided into two. Hence the hermaphrodite gets two ſhares and an half; and a fraction thus falling to his ſhare, the root of the propoſition (ſix) muſt be multiplied by two, in order that there may be no fractions*; and the whole calculation, being twelve, will come out right, in this way, that five go to the hermaphrodite, and ſeven to the ſon. The argument of *Haneefa* is, that it is neceſſary, in the firſt place, to eſtabliſh the hermaphrodite's right in the inheritance; and as the ſmaller portion of inheritance (namely, that of a woman) is unqueſtionable, and any thing beyond it is doubtful, that alone is to be eſtabliſhed, and due, which is certain and indiſputable, not any more, as a right to property is not admitted under any circumſtance of doubt,—the point in queſtion being, in fact, the ſame as where a doubt exiſts with reſpect to a right in property, founded on any other cauſe beſides inheritance, in which caſe the *unqueſtionable* proportion only would be decreed, and ſo here likewiſe;—excepting, however, in the caſe of a *ſmaller* ſhare † going to the hermaphrodite, ſuppoſing him to be a *male*; for then he would be entitled to the ſhare of a ſon, ſince, in ſuch inſtance, that would be his indiſputable right; as where, for inſtance, a woman dies, leaving heirs her huſband, mother, and a full ſiſter ‡

* That is, in order to reduce the whole to integral parts.

† Namely, a ſmaller ſhare than the half of the whole.

‡ This might be rendered, with more ſtrict propriety, "*a fraternal connexion*," an hermaphrodite being, in fact, neither a brother nor ſiſter. The tranſlator, however, thinks it moſt adviſeable to adhere literally to the original.

who is an hermaphrodite,—or, where a man dies, leaving heirs his wife, two maternal brothers, and a full ſiſter who is an hermaphrodite;—in the former of which caſes (according to *Haneefa*) one half of the property would deſcend to the huſband, a third to the mother, and the remainder to the hermaphrodite,—and in the latter, a quarter would deſcend to the wife, a third to the two brothers, and the remainder to the hermaphrodite; for in both theſe caſes the remainder is ſmaller than either of the two full ſhares,—that is, the ſhare of the hermaphrodite ſuppoſing him to be a man, and the ſame ſuppoſing the hermaphrodite to be a woman.

HEDAYA.

H E D A Y A.

CHAPTER THE LAST.

MISCELLANEOUS CASES.

The intelligible ſigns of a dumb perſon ſuffice to verify his bequeſts, and render them valid; but not thoſe of a perſon merely *deprived of ſpeech*.

WHERE people read a deed of bequeſt to a dumb perſon, and deſire to know whether they ſhall teſtify ſuch deed on his behalf? and the dumb perſon makes a ſign by an inclination of the head, equivalent to the expreſſion of aſſent "*Yes!*"—or, where a dumb perſon himſelf writes ſuch deed, and they thus deſire to know whether they ſhall teſtify it on his behalf? and he makes a ſign, by an inclination of his head, in the affirmative,—the bequeſt, provided the ſign be made in ſuch a manner as is commonly uſed to denote affirmation, is valid:—but this mode of affirmation by a ſign does not

not suffice with respect to a person whose inability to speak is supervenient, occasioned (for instance) by some recent disorder.—*Shafeï* maintains that the sign in question is cognizable and valid equally with respect to both; for the inability alone is the cause of its being at all admitted as sufficient, a cause which exists alike in both.—Our doctors, however, conceive a natural difference between a person originally dumb, and one who merely labours under a recent incapacity of speech, for various reasons.—FIRST, signs are not cognizable, unless they be habitual and their meaning ascertained, which is the case with the signs of a dumb person, but not with those of one who has merely lost his speech. (Still, however, our doctors hold that if this person be so long deprived of speech as to render signs habitual to him, and their meaning ascertained, he then stands in the same predicament with a *dumb* person in this particular.)—SECONDLY, the person in question is chargeable with a neglect in not having made his will before he had lost his speech, whereas no such neglect can be charged to the *dumb* person.—THIRDLY, it is most probable that a recent incapacity of speech will be removed and yield to remedies, which is not the case with dumbness, and therefore there is no analogy between them.

A dumb person may execute marriage, divorce, purchase or sale, and sue for or incur punishment, by means of either signs or writings; but he cannot thereby sue

WHERE a dumb person is capable of either writing intelligibly, or making intelligible signs, marriage, divorce, purchase, or sale, declared by him, are valid, and retaliation is also executed on his behalf, or upon him; but he is not liable to punishment*, nor is punishment inflicted on his behalf.—His written deeds are valid, and cognizable, for this reason, that the writing of an absentee is equivalent to the oral declaration of a person actually present; (insomuch that the prophet, in promulgating his laws, sometimes used one mode, and sometimes another;) and *necessity* is the ground of validity with respect

* Meaning, *punishment for offences against* GOD, namely, for *whoredom* and *slander*; as is explained a little farther on.

for or incur retaliation.

ſpect to the writing of an abſentee, which ground exiſts ſtill more ſtrongly in the caſe of a *dumb* perſon.—It is to be obſerved that writings are of three different ſorts or deſcriptions: I. *regular teſtimonials* *, (meaning, ſuch as are executed upon paper, and have a regular title, ſuperſcription, and ſo forth, as is cuſtomary,) which are equivalent to oral declaration, whether the perſon be preſent or abſent: II. *irregular* teſtimonials †, (meaning, ſuch as are not written upon paper, but upon a wall, or the leaf of a tree, or, upon paper without any title or ſuperſcription,) which are not admitted as proof farther than merely as they ſignify the writer's object or deſign: and III. writings which are *not* teſtimonials in any ſenſe ‡, (meaning ſuch as are delineated in the *air*, or upon *water*,) which, as they are merely equivalent to words not heard, are no way cognizable, nor attended with any effect.—With reſpect to *ſigns* made by a dumb perſon, they are recognized in the caſes of marriage, divorce, and ſo forth, (as mentioned above,) from neceſſity, ſince thoſe are matters in which the right of the *individual* alone is concerned, and which are not reſtricted to any particular form of words, but are even, in ſome inſtances, (ſuch as of *Beeya-Taata*, or ſale by a mutual ſurrender §,) effected without any words whatever; and retaliation alſo is a right of the individual.—But there is no *neceſſity* for *puniſhment*, as that is a right of God, whence the prevention of it by the exiſtence of any doubt,) and therefore, if a dumb perſon verify the report of a ſlanderer, ſtill he is not liable to puniſhment,—neither is puniſhment inflicted upon him if he himſelf ſlander another by ſigns, becauſe the ſlander is not *expreſs*, which is the condition of its being puniſhable.—The difference between puniſhment and retaliation is, that the former is not

* Arab. *Mooſt'been Marſoom.* It is a technical term, applied to all regular deeds, contracts, &c.

† Arab. *Mooſt'been Ghayr Marſoom.* This is the ſame term, only with the addition of the privitive *Ghayr.*

‡ Arab. *Ghayr Mooſt'been.*

§ See Vol. II. p. 361.

eſtabliſhed

eſtabliſhed by *doubtful* evidence, whereas the latter is ſo;—for if witneſſes charge a particular perſon with "*illegal carnal connection*," or a perſon make confeſſion of "*illegal carnal connection*," ſtill puniſhment is not to be inflicted; whereas if witneſſes teſtify to "*a* "*murder*" in general terms, or a perſon make a confeſſion of "*a murder*," retaliation is inflicted, although the term "*wilful*" ſhould not have been expreſsly mentioned.—The ground of this is that retaliation poſſeſſes the character of *reciprocity*, as having been ordained for the reparation of injuries; and it is therefore admitted to be eſtabliſhed notwithſtanding a doubt, in the ſame manner as all other matters of reciprocity which concern the rights of the individual.—With reſpect, on the contrary, to ſuch puniſhments as are inflicted purely in right of God, they have been ordained for the purpoſe of determent; and as that does not bear the character of reciprocity, puniſhment, as not being a matter of neceſſity, is not eſtabliſhed under any circumſtance of doubt.—*Mohammed*, in treating of Acknowledgments*, ſays "the writing of an abſentee is not cognizable as proof, with reſpect to retaliation;"—(in other words, if an abſentee ſend a written acknowledgment, inducing retaliation upon himſelf, ſuch acknowledgment is not cognizable.) Our author remarks, upon this paſſage, that it may be taken in two ways. First, by the abſentee may be meant *any* abſentee, whether dumb or otherwiſe; and on this conſtruction the point admits of two determinations; the one, what is here mentioned; and the other, what has been before recited. Secondly, by the abſentee may be meant a perſon who is *not* dumb;—as if he [*Mohammed*] had ſaid "the writ-
"ing of an abſentee, *not being dumb*, is not cognizable as proof with
"reſpect to retaliation, ſince, having the power of ſpeech, it is
"poſſible that he may himſelf appear, and make an expreſs confeſſion
"by word of mouth;—an expectation which cannot be entertained
"with reſpect to a *dumb* perſon, ſince it is impoſſible that ſuch

* Probably in the *Mabſoot*.

" person ſhould ſpeak, ſo as to make an expreſs oral confeſſion."—Some of our doctors entertain an apprehenſion that the ſigns of a dumb perſon, who is at the ſame time able to write, are cognizable; becauſe ſigns are admitted as proof purely from neceſſity, which does not exiſt in this inſtance.—This apprehenſion, however, is repugnant to what has been before mentioned, as from *that* we are to infer that the ſigns of a dumb perſon are cognizable, notwithſtanding he be capable of writing; for as it is there ſaid that " if a dumb perſon make " ſigns, or write, it is valid," it follows that ſigns and writings are of equal weight, and that either of them ſuffices;—the reaſon of which is that ſigns and writings are, both of them, admitted as proofs purely from neceſſity; and as, on the one hand, writing poſſeſſes an explicitneſs of which ſigns are deſtitute (the deſign or meaning of the perſon being aſcertained indubitably from what he writes,) whereas ſigns are of an ambiguous nature, ſo, on the other hand, ſigns poſſeſs an explicitneſs of which writings are deſtitute, as they approach ſtill nearer to ſpeech;—and ſigns and writings are therefore upon an equal footing.

THE writing of a perſon who has been deprived of the uſe of ſpeech by any accident, for two or three days, is not cognizable, any more than that of an abſentee who is not dumb, ſince there is ſtill room to hope that he may be able to ſpeak, as his organs of ſpeech remain.

Caſe of ſlaughtered carcaſes be-

IF the carcaſes of ſlaughtered* goats be promiſcuouſly mixed with thoſe of carrion† goats, and the one be not known from the other,

* Arab. *Mazbooh*, meaning thoſe regularly ſlain according to the preſcribed form of *Zabbah*. (See Vol. IV. p. 62.)

† Arab. *Moordâr*, meaning thoſe which have died a natural death, or have not been ſlain according to the preſcribed form.

and

and the number ſlaughtered exceed the number of carrion, the perſons about to uſe them muſt make a deliberate ſelection, and eat ſuch only as they ſuppoſe moſt likely to have been lawfully ſlain.—But if the number of carrion exceed the number ſlaughtered, or if they be equal in number, none of them muſt be uſed.—What is here advanced applies ſolely to a ſituation which admits a latitude of choice; for in a ſituation of neceſſity the ſelection may be made under either circumſtance, and thoſe uſed which the people ſuppoſe moſt likely to have been lawfully ſlain; becauſe as, in time of want, indubitable carrion is allowed to be lawful, it follows that what comes within the poſſibility of having been duly ſlain is lawful *a fortiori*: but ſtill a deliberate ſelection muſt be made, ſince it is moſt likely that by this means thoſe will be uſed which have been duly ſlain; and the ſelection is therefore not to be diſpenſed with except in caſes of extreme urgency. *Shafeï* maintains that, in a ſituation which admits a latitude of choice, it is not lawful to eat any of the goats, notwithſtanding the number of thoſe duly ſlain exceed the number of the carrion; for as the ſelection is an argument of neceſſity, it is not to be practiſed except in a caſe of neceſſity, which does not apply to a ſituation admitting a latitude of choice. The argument of our doctors is, that the circumſtance of the ſlain goats exceeding the carrion in number is equivalent to neceſſity, whence the eating of ſome of them is lawful after a due ſelection;—in the ſame manner as it is lawful to take and uſe articles ſold in a *Muſſulman* market, becauſe of the greater number of commodities there exhibited being lawful, notwithſtanding a market be not altogether free from certain prohibited articles, ſuch as *ſtolen* or *uſurped* goods, and the like; the ground of which is, that as it is not always poſſible to make a diſtinction with reſpect to *ſmall* matters, a regard to them is remitted, ſince otherwiſe the buſineſs of life could not be carried on; and accordingly, a ſmall degree of dirt, or of nakedneſs, in prayer, is not of any moment. In a caſe, therefore, where the number of ſlaughtered goats exceeds that of the carrion, the

ing promiſcuouſly mixed with carrion.

the eating of ſome of them is allowed, from a ſpecies of neceſſity. It is otherwiſe where the number of the carrion exceeds or equals that of the ſlain; for in this caſe, ſuppoſing the ſituation to be ſuch as admits a latitude of option, no neceſſity whatever exiſts.

THE END.

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Page 37, line 23, *for* maintaining, *r.* maintains.
76, —— 2, — *Eed*, r. *Yd*.
116, —— 11, — dependances, *r.* dependancies.
219, —— 14, — consider, *r.* considered.
244, —— 8, — on, *r.* in.
403, —— 2, (note,) for *version*, r. *text*.
505, —— 4, for *ingenders*, *r.* *engenders*.
548, —— 14, — existence, *r.* assistance.