



EO 2509





A  
DIGEST OF MOOHUMMUDAN LAW

ON THE

SUBJECTS TO WHICH IT IS USUALLY APPLIED BY  
BRITISH COURTS OF JUSTICE IN INDIA

COMPILED AND TRANSLATED FROM

AUTHORITIES IN THE ORIGINAL ARABIC.

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PART SECOND,

CONTAINING

THE DOCTRINES OF THE IMAMFLA CODE OF JURISPRUDENCE  
ON THE MOST IMPORTANT OF THE SAME SUBJECTS.

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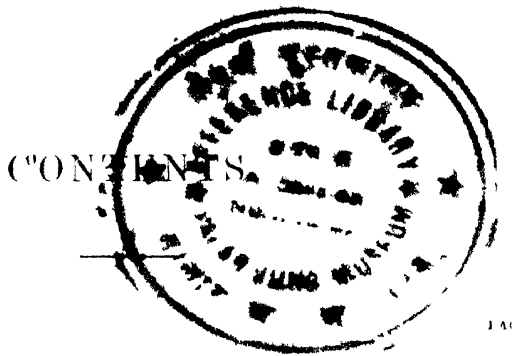
TO THE RIGHT HONOURABLE  
**JOHN LORD ROMILLY,**

MASTER OF THE ROLLS,  
PRESIDENT OF THE INDIAN LAW COMMISSION,  
&c. &c. &c.

THIS SECOND PART  
OF  
A Digest of Moobummudan Law

IS MOST RESPECTFULLY DEDICATED





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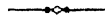
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## INTRODUCTION.

THE Mussulmans of India are generally *Soonnees* of the *Hanifite* sect. But practices peculiar to the *Sheeahs* have long prevailed to a great extent in certain localities, and many avowed professors of the doctrines of that sect are to be found in places that were subject to *Sheeah* governors in Mussulman times. The numbers of these votaries would naturally increase when the governments became hereditary in *Sheeah* families, and would be multiplied more and more as the local governors became practically independent of the Supreme Head at Delhi. At length, when the allegiance became little more than nominal, it is not surprising if, in some places, the sect of the actual ruler should come to preponderate over that of the distant and merely nominal head; according to the Arabian adage, which says that "all people follow the religion of their kings." The saying was exemplified to the fullest extent in Persia, where the whole of the people have become *Sheeahs* since the accession of the *Soofee* dynasty in A.D. 1499.<sup>1</sup> The process of assimilation was less rapid in India, where, though several of the *Nuwabs*, or local governors, were *Sheeahs*, they acknowledged at least a nominal dependence on Delhi, and never ventured to make any ostensible change in the law of their provinces. This was eminently the case in 'Oude, the *Nuwabs* of which were hereditary *Viziers* of the empire, and, though long virtually

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<sup>1</sup> In that year Ismail, the first of the dynasty, proclaimed the *Sheeah* faith to be the national religion of the country.—MALCOLM'S *History of Persia*, vol ii note, p. 347.

independent, did not throw off their allegiance to it till the year 1818, when the *Nuwab Vizier Ghazi-ood-deen Hyder*, with the consent, and, indeed, at the suggestion, of the British Government, assumed the title of Padshah or King. It was not, however, till the accession of *Umjud Ally Shah*, that any formal alteration was made in the law. Until that time the only *Mooftee*, or public expounder of the law, was a *Soonnee*, and all cases that came before the King's tribunals were decided by *Soonnee* law. The last-mentioned sovereign appointed a *Sheeah Mooftee*, and thenceforth the *Sheeah* became the general law of the province. Still, however, in suits where both the parties were *Soonnees*, or one of them was a *Soonnee* and the other a Hindoo, *Soonnee* law continued to be the rule of decision. In all other suits judgment was given according to the *Sheeah* code.<sup>2</sup> This system seems to have continued till the Province was annexed to the British Dominions, by which time the *Sheeahs* had acquired so great an ascendancy that they were found numerically to preponderate very much over the other sect of Mussulmans.<sup>3</sup> After the annexation the more equitable rule of the British Regulations was introduced, and *Sheeah* law is now administered only in suits regarding marriage and inheritance, and other collateral matters, where the parties are *Sheeahs*. There is no doubt, however, that its general importance is much increased by the larger number of persons who have been brought within the sphere of its operation.

The word *Sheeah*, or *Sheeah*, properly signifies a troop or sect, but has become the distinctive appellation of the followers of *Ally*, or all those who maintain that he was the first legitimate *Khuleefah*, or successor to *Moohammad*, though the fourth in actual succession; and that the *Imamah* or spiritual and temporal headship of the Mussulman community belongs by hereditary right to his descendants by *Fatima*, the favourite daughter of the Prophet, and the only one of his children that left any offspring. *Ally* was thus, according to them, the first *Imam*, his eldest son *Hussun* the

<sup>2</sup> *Correspondence relating to Native Laws in Oude*, p.

<sup>3</sup> *Ibid.* p. 3.

second, his second son *Hoossein* the third, and *Aly* surnamed *Zeen-al-Abideen*, the son of *Hoossein*, the fourth. On this *Aly's* death a schism took place in the sect, a part of whom adhered to one of his sons called *Zeyd*, thence taking the name of *Zeydians*, while much the greater part of them acknowledged another of his sons named *Moohummud Bâkir*, as the fifth *Imâm*. *Moohummud Bâkir* was succeeded by his son *Jâfer Sadik*, as the sixth *Imâm*; and these two are the great heads of the *Imameea*, as a distinct school of law. *Jâfer Sadik* appointed his eldest son *Ishmael* to succeed him in the *Imâmut*, and, on his premature death, nominated his second son *Moosa Kazim*, sometimes called *Moosey Reza*, to be his successor. This second appointment gave rise to another and greater division among the *Sheeahs*: for part of them denying *Jâfer Sadik's* right to make it, declared in favour of the son of *Ishmael*, thence taking the name of *Ishmaelians*, while the greater number of them adhered to *Moosa Kazim*, whom they acknowledged as the seventh *Imâm*. From him the dignity descended lineally for five more generations, till it ended in the *Imam Muhudy*, the twelfth and last, who is supposed by the sect to be still alive, though he has withdrawn for a time from human observation since his last appearance on earth. The great body of *Sheeahs* who acknowledge *Moosa Kazim* and his descendants as the true *Imâms* are called *Athna-asheriahs*, or Twelve-eans, as being followers of the twelve *Imâms*, and also *Imameeans*, because, according to Mr. Sale,<sup>4</sup> they assert that religion consists solely in the knowledge of the true *Imâm*. But they arrogate to themselves the title of *Moomineen*,<sup>5</sup> as being the *only* true believers. During the absence of the *Imâm*, the spiritual and temporal government of the whole Mussulman community is supposed by them to have devolved on the *Moqjtahids*, or enlightened teachers of the law. And in Persia, where the sect has prevailed since the accession of the *Soofee* dynasty, it was not till a late period in its history that the actual obedience of the sovereign

<sup>4</sup> *Preliminary Discourse to Translation of the Koran*, p. 238.

<sup>5</sup> *Post*, p. 215.

Christians and Jews, but the *Hanifite* rejects *Majoosceahs* or fire-worshippers, who are included among them by the *Sheeah* (29).

The *Sheeahs* do not appear to make any distinction between invalid and valid marriages, all that are forbidden being apparently void according to them. But the distinction is of little importance to the parties themselves, as under neither of the schools does an unlawful marriage confer any inheritable quality upon the parties; and the rights of the children born of such marriages are determined by another consideration, which will be adverted to in the proper place, hereafter.

With regard to the servile marriage of the *Sheeahs*, it is nothing more than the right of sexual intercourse which every master has, with his slaves; but there is the same difference between the two sects, in this case, as in that of marriage by contract. According to the *Hanifites* the right must be permanent, by the woman's being the actual property of the man. According to the *Sheeahs*, the right may be temporary, as when it is conceded for a limited time by the owner of the slave (52). When a slave has borne a child to her own master, which he acknowledges, she becomes his *oom-i-wulud* or mother of a child, and cannot be sold, while she is entitled to emancipation at her master's death. According to the *Hanifites*, these privileges are permanent, but, according to the *Sheeahs*, the exemption from sale is restricted to the life of her child, and her title to emancipation is at the expense of her child's share in the master's estate (57). If that be insufficient, her enfranchisement is only *pro tanto*, or so far as the share will go. Where the child's father has only an usufructuary right in the mother, the child is free (56), though the mother, being the property of another, does not acquire the rights of an *oom-i-wulud*.

With regard to the persons who may be legally slaves, there seems to be little, if any, difference between the two sects. According to the *Sheeahs*, slavery is the proper condition of *hurubees*, or enemies, with the exception only of Christians, Jews, and *Majooscees*, or fire-worshippers, so long as they continue in a state of *zimmut*, or subjection to the

Mussulman community. If they renounce their *zimmah*, they fall back into the condition of ordinary *hurubees*; and if a person should buy from a *hurubee*, his child, or wife, or any of his consanguineous relations, the person so purchased is to be adjudged a slave.<sup>b</sup> There seems also to be but little difference in the manner in which slaves may be enfranchised, or their bondage qualified by *kitabut* and *tudbeer*. But there is an important difference as to children; for, according to the *Hanifites*, a child follows the condition of its mother, being free or a slave, as she is the one or the other; while, according to the *Sheeahs*, it is free, if either of its parents be so (46.)

Both the sects are agreed that marriage may be dissolved by the husband at any time at his pleasure, and to such dissolutions they both give the name of *tulak*. But the *Hanifites* include under that term *khoola*, which is a release given to the woman by her husband, at her own request; *lian*, where the separation is only consequential on a charge of adultery by the husband against his wife; and *zihar* and *ela*, by which connubial intercourse is suspended until expiation is made by the husband on account of certain expressions used by him towards his wife. They, however, also employ the word *tulak* in a more restricted sense, by which it is confined to dissolutions of the marriage tie effected by the use of that word, or others which are deemed equivalent to it. *Tulak*, in its widest sense, I have translated in what I may now term the First Part of this Digest by the word divorce; and, in its narrower acceptation, by the word repudiation. *Khoola*, and the other subjects just mentioned, are treated by the *Sheeahs* as quite distinct from *tulak*, in separate books; but, as they are all nearly akin to it, I have followed the arrangement of the Digest, and included them all together with *tulak* proper, or repudiation, under one general head of divorce.

There are some important differences between the repudiation of the two sects. : Thus, while the *Hanifites* recognize two forms, the *Soonnee* and *Budawee*, or regular and irregular, as being equally efficacious, and subdivide the regular into



two other forms, one of which they designate as *ahsun*, or best, and the other as *husuz*, or good,—the *Sheeahs* reject these distinctions altogether, recognizing only one form of the *Soonnee*, or regular (118). So, also, as to the expressions by which repudiation may be constituted; while the *Hanifites* distinguish between what they call *sureeh*, or express words, which are inflections of the word *tulák*, and various expressions which they term *kinayat*, or ambiguous, the *Sheeahs* admit the former only (118). Further, the *Hanifites* do not require intention when express words are used; so that, though a man is actually compelled to use them, the repudiation is valid according to them. Nor do they require the presence of witnesses as necessary in any case to the validity of a repudiation; while, according to the *Sheeahs*, both intention (108), and the presence of two witnesses in all cases, are essential (117).

Both sects agree that repudiation may be either *báin* (absolute), or *rujaec* (revocable); and that a repudiation given three times cannot be revoked, nor a woman so repudiated be again married by her husband until she has been intermediately married to another man, and the marriage with him has been consummated. But, according to the *Hanifites*, repudiation may be made irrevocable by an aggravation of the terms, or the addition of a description, and three repudiations may be given in immediate succession, or even *unico contextu*, in one expression; while, according to the *Sheeahs*, on the other hand, the irrevocability of a repudiation is dependent on the state in which the woman may be at the time that it is given; and three repudiations, to have their full effect, must have two intervening revocations (119). To the *báin* and *rujaec* repudiations of both sects, the *Sheeahs* add one peculiar to themselves, to which they give the name of the *tulák-ool-iddut*, or repudiation of the *iddut*, and which has the effect of rendering the repudiated woman for ever unlawful to her husband, so that it is impossible for them ever to marry with each other again (119).

The power of revocation continues until the expiration of the *iddut*, or probationary period for ascertaining whether a woman is pregnant or not. After it has expired, the repudiation becomes absolute, according to both schools. So long

as it is revocable, the parties are still in a manner husband and wife; and if either of them should happen to die, the other has a right of inheritance in the deceased's estate (294).

With regard to parentage, maternity is established, according to the *Hanifites*, by birth alone, without any regard to the connection of the parents being lawful or not. According to the *Sheeahs*, it must in all cases be lawful; for a *walud-ooz-zina*, or illegitimate child, has no descent, even from its mother; nor are there any mutual rights of inheritance between them (305). For the establishment of paternity there must have been, at the time of the child's conception, according to both sects, a legal connection between its parents by marriage or slavery, or a semblance of either. According to the *Hanifites*, an invalid marriage is sufficient for that purpose, or even, according to the head of the school, one that is positively unlawful; but, according to the *Sheeahs*, the marriage must in all cases be lawful, except when there is error on the part of both or either of the parents (373). Again, as to children by slaves, express acknowledgment by the father is required by both the sects, except when the slave is his *oom-i-walud*, or has already borne a child to him; for, though, according to the *Sheeahs*, there are two reports on the subject, yet, by the most generally received of these, a slave does not become the *firash* or wife of her master by mere coition, and her child is not affiliated to him without his acknowledgement (156). With regard to children begotten under a semblance of right, the *Hanifites* require some basis for the semblance in the relation of the parties to each other; while, according to the *Sheeahs*, *bonâ fide* belief on the part of the man that the woman is his wife or his slave seems to be all that is required; while no relation short of a legal marriage or slavery, without such belief either on the part of the man or the woman, would apparently be sufficient.

On the subject of testimony, both schools require that it shall be direct to the point in issue; and they also seem to be agreed that when two or more witnesses concur in asserting a fact in the same terms, the judge is bound by their testimony, and must give his judgment in conformity with

it.<sup>9</sup> They agree in requiring that a witness should in general have full knowledge; by the cognizance of his own senses, of the fact to which he is bearing testimony; but both allow him, in certain exceptional cases, to testify on information received from others, or when he is convinced of the fact by inference from circumstances with which it is connected.

*Nusub*, or descent, is included by both sects among the exceptional facts to which a witness is allowed to testify when they are generally notorious, or when he has been credibly informed of them by others. But, according to the *Hanifites*, it is enough if the information be received from two just men, or one just man and two just women, while the *Sheeahs* require that it should have been received from a considerable number of persons (*jumant*) in succession, without any suspicion of their having got up the story in concert. The *Hanifites* class marriage among the exceptional facts together with *nusub*: but, according to the *Sheeahs*, it more properly follows the general rule which requires that the witness should have the direct evidence of his own senses to the fact to which he is giving his testimony. They seem, however, to admit an exception in its favour; for they reason, that as we adjudge *Khoodeijah* to have been the mother of *Patima*, the daughter of the Prophet, though we know it only by general notoriety and tradition, which is but continued hearsay, so also we may equally decide her to have been the Prophet's wife, for which we have the same evidence, though we were not present at the contract of marriage, nor ever heard the Prophet acknowledge it.<sup>10</sup>

Both sects are agreed that a witness may lawfully infer and testify that a thing is the property of a particular person when he has seen it in his possession; and so, according to the *Hanifites*, "when a person has seen a man and woman dwelling in the same house, and behaving familiarly with

<sup>9</sup> I have not found any express statement to this effect in the *Book of Shuhadut* in the *Shuraya*, but it is everywhere implied.

<sup>10</sup> *Shuraya*, p 504.

each other in the manner of married persons, it is lawful for him to testify that she is his wife, in the same way as when he has seen a specific thing in the hands of another." The *Sheeahs* do not apply this principle of inference to the case of marriage, and there is no ground for saying that according to them marriage will be presumed in a case of proved continual cohabitation.<sup>11</sup>

With regard to the remaining subjects treated of in this volume; there is a difference between the two schools as to the person who is entitled to claim a right of *shoofâ*, or pre-emption. According to the *Hanifites* the right may be claimed, firstly, by a partner in the thing itself; secondly, by a partner in its rights of water and way; and, thirdly, by a neighbour. According to the *Sheeahs*, the right belongs only to the first of these, with some slight exception in favour of the second. The claim of the third they reject altogether (179). In gift the principal difference between the schools is that a gift of an undivided share of a thing, which is rejected by the *Hanifites*, is quite lawful according to the *Sheeahs* (204). In appropriation and alms there do not seem to be any differences of importance between the two schools. And in wills the leading difference seems to be, that, while according to the *Hanifites* a bequest in favour of an heir is positively illegal, it is quite unobjectionable according to the *Sheeahs* (244).<sup>12</sup>

In respect of inheritance there are many and important differences between the two sects, but they admit of being reduced to a few leading principles, which I now proceed to notice, following the order in which the different branches of the subject are treated of in this volume.

The impediments to inheritance are four in number, according to the *Hanifites*, viz., slavery, homicide, difference of religion, and difference of *dar*, or country. Of these the

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<sup>11</sup> This has been said, in the case of the *Hanifites*, on very insufficient grounds, as appears to me for the reasons stated in the notes to my *Digest*, pp. 421, 425, 426.

<sup>12</sup> The following text of the *Korân* seems to support this doctrine:— "It is ordained you when any of you is at the point of death, if he leave any goods, that he bequeath a legacy to his parents and kindred according to what is reasonable."—SALE'S *Translation*, vol. i. p. 31.

*Sheeahs* recognize the first; the second, also, with some modification; that is, they require that the homicide be intentional, in other words, murder; while with the *Hanifites* it operates equally as an impediment to inheritance, though accidental. For difference of religion, the *Sheeahs* substitute infidelity; and difference of country they reject entirely.

Exclusion from the whole inheritance, according to the *Hanifites*, "is founded upon and regulated by two principles. The one is that a person who is related to the deceased through another has no interest in the succession during the life of that other; with the exception of half-brothers and sisters by the mother, who are not excluded by her. The other principle is, that the nearer relative excludes the more remote."<sup>19</sup> The former of these principles is not expressly mentioned by the *Sheeahs*; but it is included without the exception in the second, which is adopted by them (270), and extended, so as to postpone a more remote residuary to a nearer sharer,—an effect which is not given to it by the *Hanifites*.

With regard to partial exclusion or the diminution of a share, there is also some difference between the sects. According to the *Hanifites*, a child or the child of a son, how low soever, reduces the shares of a husband, a wife, and a mother, from the highest to the lowest appointed for them; while, according to the *Sheeahs*, the reduction is effected by any child, whether male or female, in any stage of descent from the deceased (271). Further, when the deceased has left a husband or wife, and both parents, the share of the mother is reduced, according to the *Hanifites*, from a third of the whole estate to a third of the remainder, in order that the male may have double the share of the female; but, according to the *Sheeahs*, there is no reduction of the mother's third in these circumstances, though, when the deceased has left a husband, the share of the father can only be a sixth (383).

The shares and the persons for whom they are appointed being expressly mentioned in the Korán, there is no difference in respect of them between the two schools. But they differ

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<sup>19</sup> *M. L. I.*, p. 58.

materially as to the relatives who are not sharers. These are divided by the *Hanifites* into residuaries and distant kindred. The residuaries in their own right they define as every male in whose line of relation to the deceased no female enters;<sup>14</sup> "and the distant kindred," as "all relatives who are neither sharers nor residuaries."<sup>15</sup> The residuaries not only take any surplus that may remain after the sharers have been satisfied, but also the whole estate when there is no sharer, to the entire exclusion of the distant kindred, though these may, in fact, be much nearer in blood to the deceased. This preference of the residuary is rejected with peculiar abhorrence by the *Sheeahs* (400), who found their objection to it, certainly with some appearance of reason, on two passages of the Korán, cited below.<sup>16</sup> Instead of the triple division of the *Hanifites*, they mix up the rights of all the relatives together, and then separate them into three classes, according to their proximity to the deceased, each of which in its order is preferred to that which follows; so that while there is a single individual, even a female, of a prior class, there is no room for the succession of any of the others (323).

Within the classes operation is given to the doctrine of the return by the *Sheeahs*, nearly in the same way as by the *Hanifites*: that is, if there is a surplus over the shares it reverts to the sharers, with the exception of the husband or wife, and is proportionately divided among them. According to the *Hanifites*, this surplus is always intercepted by the residuary; and it is only when there is no residuary that there is with them any room for the doctrine of the return. When the shares exceed the whole estate, the deficiency is distributed by the *Hanifites* over all the shares, by raising the extractor of the case,—a process which is termed the *awl*, or increase. This is also rejected by the *Sheeahs* (397), who make the deficiency to fall exclusively upon those among them whose relationship to the deceased is on the father's side (395).

With regard to the computation of shares, there does not

<sup>14</sup> *M. L. I.*, 72.

<sup>15</sup> *Ibid.* 127.

<sup>16</sup> "And those who are related by consanguinity shall be deemed the nearest of kin to each other preferably to strangers."—*SALE*, vol. i. p. 218. And there is a confirmation of the doctrine, vol. ii. p. 261.

appear to be any difference between the schools: But the rules given by the Moohummudan lawyers for the purpose are supposed to present some difficulties to beginners, and a few words in the way of explanation may not be improper in this place. The object of the rules is to find some number out of which the shares may be taken, or extracted, as it is termed, without a fraction; but for this purpose the number must be divisible by the fractions which represent the shares, and as these are all of different denominations, it is necessary that they should be reduced to a common denominator; and it is convenient, though not necessary, that this should be the least possible, or in other words, that the fractions should be expressed in their lowest terms. The rules of the Arabian arithmeticians for the purpose are I believe precisely the same as our own.<sup>17</sup> But the Moohummudan lawyers, instead of referring to the general rules, and leaving you to work out the operation, which is sometimes very tedious, by yourself, present you with the results in the lowest common denominators for every possible combination of the shares, or the fractions by which they are represented. These denominators are termed extractors, and they would be sufficient for all cases if there were only a single claimant for each share. But a share has sometimes to be divided among a number of claimants, and then, if the parcels allotted to each share cannot be divided among the parties entitled to it without a fraction, the extractor must be increased by multiplying it by the number of claimants. The resulting number, however, may be inconveniently large, while it is desirable to keep it as low as possible, but this can be done only when there is a common measure of the number of parcels comprising the share, and the number of the persons claiming it. When this is the case, one of these is to be divided by the common measure, and the extractor multiplied by the quotient. When there are several shares in the like predicament, they are to be treated in the same way; and when all have been thus prepared the extractor is again to be multiplied by them all;

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<sup>17</sup> In the *Khoolasut-ool-Hisab*, the same rule is given for finding the greatest common measure as in our ordinary books of arithmetic.

unless the numbers are equal, when a multiplication by one of them will suffice ; or the smaller numbers are aliquot parts of the larger, when multiplication by the latter will be sufficient ; or where there is a common measure of the numbers and they are to be reduced to their lowest terms, and the extractor to be multiplied by the quotient. The result of these operations when reduced as much as possible by any of these methods, will still be a number so inconveniently high as to occasion a great deal of trouble at least, if not difficulty, in carrying out the farther operations for ascertaining the actual portion of each heir in the assets of the deceased's estate. And this trouble will be vastly increased if one of the heirs should die before the partition of the estate, and a further multiplication of the extractor may be required by the number of persons who may be entitled to his share.

Here an important question arises, Is all this multiplication and complication necessary ? or might not the partition be made among the heirs with equal accuracy and more facility by always dealing with the extractors in their original state ? I confess I think it might. Thus, to take the case (p. 277) of a wife, both parents and children. There the share of the wife is one-eighth, of each parent one-sixth, and of the children the remainder, and the case presenting the combination of an eighth with a sixth, the extractor is twenty-four. The wife will have accordingly three parcels, the parents four each, and the children the remaining thirteen. But now suppose that instead of one wife there are four, and the three parcels must be divided among them equally. This cannot be done without raising the extractor, and, being multiplied by four, it will be increased to ninety-six. Each wife will have now three ninety-sixths, each parent sixteen ninety-sixths, and the children the remaining fifty-two ninety-sixths. But it would have been just as easy to say that each wife shall have a fourth part of three parcels, and the parents their fourth each, and the children their thirteen parts as before ; or, better still, to state the actual sum in money to which each heir would be entitled in these proportions, as, for instance, if the whole assets were 240*l.*, the share of each



wife would be 7*l.* 10*s.*, of each parent, 40*l.*, and of the children 130*l.*

The volume which is here presented to the English reader is intended to exhibit the doctrines of the *Shceah* sect on the most important of the subjects to which the Moohummudan law is applied by British Courts of Justice in India. With the exception of the last Book, it is composed entirely of translations from the *Shuraya-ool-Islum*, a work of the highest authority, which has entered largely into the *Digest of Sheeah Law*, compiled under the superintendence of Sir William Jones. The translations have been made from the edition which was published at Calcutta by the Asiatic Society, at the suggestion and with the aid of the Nuwab Seyud Mohummed Hossein Khan Behader Tuhawur Jung. Each subject is given without any abbreviation from the original, except in the few instances mentioned in the foot-notes. The last Book, which is an additional treatise on the Law of Inheritance, is from a manuscript which has come to my possession, as one of the executors of the will of the late Lieutenant-Colonel John Baillie, the translator of the first and only volume that was ever published of the *Digest* before mentioned. It is very carefully copied in the handwriting of the translator, and has all the appearance of being a further portion of the same work, and of having been finally corrected by himself for the Press. Moreover, at page 469 of the printed volume there occurs the following note on the word Patronage or *Wala*: "See a full explanation of the term, and a description of the various rights of *wala*, in the 'Book of Inheritance,' Vol. IV." Corresponding with this there is such a full explanation of the terms, and such a description of the right of *wala* as there alluded to in the manuscript in question. From these and other circumstances, I was led to infer that it was a translation of the "Book of Inheritance," contained in Sir William Jones's *Digest*. The original of the *Digest* I had seen, many years ago, at Calcutta, when it was in the custody of the Court of Sudder Dewanny Adawlut; and, by the kindness of Mr. Justice Macpherson, a Judge of the High

Court, to which it has now been transferred, I have obtained copies of the beginnings and endings of the different sections of which the "Book of Inheritance" is composed. A comparison of these with the manuscript has removed any doubts which might have remained on my mind as to its being a translation of the "Book of Inheritance" in the original *Digest*. Mr. Macpherson has also ascertained for me that the book is composed of extracts from a commentary on the *Mufateeh*, a work called the *Kafee*, and the *Shuraya-ool-Islam*. Having implicit reliance on the scholarship and accuracy of the translator, who, moreover, had the assistance of a staff of native assistants, paid by the Government, I have no hesitation in publishing the work in the form of an additional Book on Inheritance; with the omission, however, of the parts taken from the *Shuraya*, which are included in the seventh book of this volume. I have printed it from the translator's manuscript, without any alteration, except in the correction of a few clerical errors, and with no other addition than two or three notes, marked with the word *Ed.* to distinguish them from notes by the translator.

It will be observed that the note already quoted from the first volume of the *Digest of Sheeah Law* refers to a fourth volume of the work; and there are other notes which allude to intermediate volumes, as if the whole work had been completed, and were ready for publication. It was not till more than twenty years after the death of the translator that any of his papers came into my possession, and the only parts of the work that were then found among them, in any way connected with the matters contained in this volume, were a chapter on connubial rights, comprising dower, partition, rebellion, and discord, and three books on pre-emption, gifts, and wills. The book on gifts is composed chiefly of extracts from the *Tuhreer*; but the others being taken from the *Shuraya*, I have freely availed myself of them in making my own translations, though adhering generally to my own language, as more conformable to the rest of the volume.

I have only now to notice the abbreviations which occur in the foot-notes. *Im. D.* is for the first volume of the *Imameeah*, or *Sheeah* digest, already mentioned; *P. P. M. L.*

for the *Principles and Precedents of Moohummudan Law*, by the late Sir W. Macnaghten, Bart.; *D.* for the *Digest of Moohummudan Law*, on the subjects to which it is usually applied by courts of justice in India; and *M. L. S.* and *M. L. I.* for treatises on the *Moohummudan Law of Sale and Inheritance*; the three last being by the author of the present volume.

A DIGEST  
OF  
MOOHUMMUDAN LAW.  
PART SECOND.

BOOK I.  
OF NIKÁH, OR MARRIAGE.

THERE ARE THREE KINDS OF MARRIAGE ; PERMANENT,  
TEMPORARY, AND SERVILLE.

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CHAPTER I.

OF PERMANENT MARRIAGE.<sup>1</sup>

SECTION FIRST.<sup>2</sup>

*Form and Laws of the Contract.*

MARRIAGE, like other contracts, requires declaration and acceptance for its constitution ; and both must be expressed in such a manner as to demonstrate intention, without any sort of ambiguity.

Marriage is constituted by declaration and acceptance.

The words appropriate to the declaration are *zawwajtohu* and *anukhtoku*, both signifying "I have married thee."<sup>3</sup>

Words appropriate to declaration ;

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<sup>1</sup> *Nikáh al Daim.*

<sup>2</sup> A short preliminary section on the prayers and ceremonies to be observed by a man before entering into a contract of marriage, and also before proceeding to consummation, has been omitted, as belonging to the spiritual rather than to the temporal table of the law.

<sup>3</sup> More literally, the former, "I have joined thee," and the latter, "I have united thee in wedlock." The terminating syllable *ku*

to accept-  
ance.

With regard to the word *muttuátoku*, which signifies, "I have bestowed on thee," or "given thee the enjoyment," there is some doubt of its being legally sufficient; but the opinion which is in favour of its legality has been generally preferred. Acceptance is expressed by saying, "I have accepted the *tuzweej*,"<sup>4</sup> or "I have accepted the *nikáh*,"<sup>5</sup> or by any other words of the like import, or it may be shortened by simply saying, "I have accepted."

Both must  
be express-  
ed in the  
preterite  
tense.

It is necessary that the declaration and acceptance should both be expressed in words of the past tense. If the imperative is employed, as by the man's saying, "Marry me to her," and the other party to the contract should answer, "I have married thee," it is maintained by some of our doctors that the marriage is valid; and this opinion is approved.<sup>6</sup> Even if the future were employed, as by the man's saying to the woman, "I will take thee to wife," and she should answer, "I have married thee," the marriage would be lawful.<sup>7</sup> But in this case it has been said that the man should reply, "I have accepted."

Use of the  
word  
*mootá*.

With regard to the word *mootá*,<sup>8</sup> or enjoyment, it is related in a tradition by *Aban ben Toqlib*, that if thou shouldst say to a woman, "I take thee to wife by way of *mootá*," and she should answer, "Yes," she would be thy wife; or if the guardian of a woman, or the woman herself, should say, "I have conferred on thee the enjoyment for so much," without specifying any particular time, perma-

(thee) in both words is the masculine pronominal affix, and both are supposed to be addressed to the intending husband by the father or guardian of the proposed wife, or other person authorized to act for her

<sup>4</sup> Infinitive of *zurwujto*.

<sup>5</sup> Original infinitive of *ankuho*.

<sup>6</sup> *Husun*, literally *good*, and, technically, a tradition of the second order of authenticity, or classed next to *shueeh* — *Im. D.*, p. 194.

<sup>7</sup> The two last cases appear to be rather inconsistent with the word necessary (*laboodda*), in the first sentence; but it will be observed that in both the preterite occurs in one member of the sentence.— See *D.*, p. 14.

<sup>8</sup> Infinitive of *muttuáto*.

ment marriage would be contracted. And this is evidence that permanent marriage may be constituted by the word *tumuttoó*.<sup>9</sup>

It is not required that the acceptance should agree verbally with the declaration. Nay, the contract would be quite valid though the declaration should be by one of the words before mentioned, and the acceptance by the other; as, for example, by the guardian's saying *zuwujtoku*, and the husband's answering, "I have accepted the *nikáh*," or by the former's saying *ankuhutoku*, and the latter's answering, "I have accepted the *tuzweej*," when, in either case, the marriage would be valid. If one person should say to another, "Hast thou married thy daughter to such an one?" and the person addressed should answer, "Yes," whereupon the husband should reply, "I have accepted," there would be a valid marriage; for "yes" involves a repetition of the question, though it is not repeated verbally. Upon this point, however, there is some room for doubt or hesitation.

Verbal correspondence between the declaration and acceptance, not required.

Neither is it required that the declaration should precede the acceptance, for if one should say *tuzuwujto*, and the guardian should answer *zuwujtoku*,<sup>10</sup> the contract would be valid.

Nor that the declaration should precede the acceptance.

Any deviation from the two words before mentioned is unlawful,<sup>11</sup> though it were only by translating them into some language different from the Arabic, except in a case of positive inability to make use of that language. If either of the parties is unable to use it, each of them may employ his own language. And if both or one of them be dumb, the person labouring under the defect of speech may indicate his or her consent by signs.

No deviation from the appropriate words allowed.

Marriage can in no case be contracted by the words

Words by which mar-

<sup>9</sup> A derivative from *mootá*. According to the *Hanifites*, marriage cannot be contracted by this word or any of its derivatives — *D.*, p. 15.

<sup>10</sup> Both the words are derivatives from the same root; but the first seems more appropriate to the acceptance, and the second to the declaration.

<sup>11</sup> There is a remarkable difference in this respect between the two sects.—*D.*, p. 15.

riage is not contracted. *beya* (sale), *heba* (gift), *tumleek* (transfer), or *ijaruh* (lease).<sup>12</sup>

The laws of the contract are comprehended in the following cases:—

No regard to be paid to the words of a minor, or insane person. *First.* In marriage no regard whatever is to be paid to the words of a boy,<sup>13</sup> whether in expressing declaration or acceptance; nor to those of an insane person. With regard to marriage contracted by one so drunk as to be incapable of discernment, there is some difference of opinion; but according to that which is most agreeable to traditional authority, it is not valid, even though subsequently confirmed by the person when sober.<sup>14</sup> There is one tradition, however, according to which, if a woman in a state of intoxication should contract herself in marriage, and afterwards, on becoming sober, should declare her consent to the contract, or if, being enjoyed while intoxicated, she should subsequently, on becoming sober, acknowledge the man to be her husband, there would, in either case, be a concluded marriage.

A guardian not required to a discreet female, nor witnesses to any marriage. *Second.* A guardian is not required to the marriage of a *rusheedah*,<sup>15</sup> or discreet female; nor is the presence of witnesses necessary in any matter regarding marriage.<sup>16</sup> And though a marriage were contracted by the spouses themselves or their guardians in private, it would still be

<sup>12</sup> All these words, except the last, are sufficient according to the other sect.—*D.*, p. 15.

<sup>13</sup> *Subee*, that is, one under puberty. According to the other sect, marriage contracted by a boy of understanding is valid, though inoperative without the consent of his guardian.—(*D.*, p. 5.) But, according to the *Sheeahs*, “all acts which may be performed before maturity and discretion are considered to be null and void.”—(*Im. D.*, p. 308.)

<sup>14</sup> “Extreme intoxication, so as to remove the power of discernment,” is a ground of nullity in sale.—*Im. D.*, p. 11.

<sup>15</sup> From *rooshd*. “Maturity is not sufficient without discretion to remove the inhibition imposed on infants by law.”—*Im. D.*, p. 310. “Discretion signifies the just and proper management of one’s property.”—*Ibid.*

<sup>16</sup> It is essential to a valid marriage, according to the other sect.—*D.*, p. 5.

lawful. Nor would even a positive injunction to secrecy invalidate it.

*Third.* When a person, after making a declaration, has become insane or fainted away, the effect of the declaration is annulled; and if it were subsequently accepted, the acceptance would be of no avail. The result would be the same if the acceptance were first expressed, and a failure of understanding then taking place on the part of the acceptor, the guardian, or party on the other side, should subsequently interpose his declaration, for in that case the declaration would be equally unavailing, as in a case of sale.

Declaration cancelled by the declarer's becoming insane, before acceptance.

*Fourth.* An option<sup>17</sup> may be stipulated for with regard to the dower especially, that is, it cannot be extended to the marriage itself;<sup>18</sup> and an option so restricted is quite valid, without in anywise vitiating the contract.

An option may be reserved as to dower.

*Fifth.* When a man has declared himself to be the husband of a woman, and she has assented to the truth of the statement, or a woman has declared herself to be the wife of a man, and he has acquiesced in the assertion, they are to be adjudged as ostensibly married, and as having mutual rights of inheritance. If one of them should make such a declaration, judgment for all the effects of the contract is to be given against him or her only, to the exclusion of the other.

Effect of acknowledgment in constituting marriage.

*Sixth.* It is required as a condition in marriage that the wife be distinguished from all others by distinctly pointing her out, or by name and description.<sup>19</sup> So that if a person should marry a man to one of his daughters, without anything else to indicate her, the marriage would be void.

In a contract of marriage the wife must be distinctly indicated.

*Seventh.* If a man should claim a woman as his wife,

Preference of proof in

<sup>17</sup> An option is a power of cancellation, which may be reserved to either party in a contract of sale by express stipulation.—See *Im. D.*, p. 39, and *M. L. S.*, p. 63.

<sup>18</sup> See *post*, p. 77.

<sup>19</sup> This cannot be less necessary with respect to the husband, though the wife only is mentioned, as she is seldom present at the time of contract.



contending claims by a man to a woman as his wife, and by her sister to him as her husband.

and her sister should, on the other hand, claim him as her husband, and both the parties offer proof in support of their respective claims,<sup>20</sup> then if the man had consummated with the female claimant, the preference is to be given to her proof, for her claim is manifestly corroborated by his own act. And, in like manner, her proof should be preferred if prior in date to that tendered by the man. But in the absence of both these circumstances in favour of her proof, preference is to be given to that of the husband.<sup>21</sup>

Marriage of a slave to a bondwoman annulled by her becoming his property.

*Eighth.* When a slave who has married a bondwoman has purchased his wife, with his master's permission, and on his account, the marriage remains as before, being quite unaffected by the purchase. Whereas, if the purchase were on his own account, or if he subsequently acquires by any other means the right to his wife, and we can properly call him her proprietor, the marriage is dissolved; but if we cannot make this supposition (he being a slave) the marriage remains good as before. If the slave is partially emancipated, and then purchases his wife, the marriage between them is in like manner dissolved, whether the purchase were made with his own money, or with money the joint property of himself and his master.

## SECTION SECOND.

### *Persons who have Power to enter into the Contract.*<sup>22</sup>

Who have powers to contract others.

No person has any authority to contract another in marriage except a father, a paternal grandfather in any

<sup>20</sup> The two claims cannot be true, as a man cannot lawfully be the husband of two sisters at the same time.—See *post*, p. 23.

<sup>21</sup> On the subject of preference of proof, see *Digest*, B. xii. cap. vi.

<sup>22</sup> *Awleeth*, plural of *wulee*, the word translated *guardian* a little above (p. 4), but here taken in a more comprehensive sense, as including all persons possessed of authority. Accordingly, though the section relates chiefly to guardians, cases relating to the marriage of slaves and the appointment of agents will be found under it.

degree of ascent, a master, an executor, or a judge. According to one tradition, it is a necessary condition of the grandfather's authority that the father should be alive. But the tradition is not free from doubt as being weakly authenticated, and it would seem that the father's existence is not necessary to the exercise of the grandfather's authority.

The authority of a father and a paternal grandfather over a young girl<sup>23</sup> is clearly established, even though she should have lost her virginity; and, according to the more approved of two traditions, she has no option after attaining to puberty. In like manner, if a father and grandfather should contract a boy<sup>24</sup> in marriage, the contract would be binding on him, and he would have no option after attaining to puberty and discretion,<sup>25</sup> according to the most prevalent doctrine. But whether they have the same power over a virgin who is discreet, is a question on which there are several traditions. According to the most generally approved of these, their authority is at an end, and she is quite competent to contract herself, either by a permanent or a temporary marriage; and if either of them should take upon himself to enter into the contract for her, it would not be effectual without her assent. Some of our masters, however, allow her to contract a permanent but not a temporary marriage; and others the reverse; while some again deny her any power as to either; and there is still another tradition that points to a partnership in the authority, so that it would not be lawful for the guardians to act separately from her in the contract. But if her guardians should refuse to marry her to an equal, when desired by her to do so, there is no doubt that she may contract herself, even against the will of both. And they have no power whatever over a woman who is a *thuyyibah*,<sup>25</sup> that is, not a virgin, and has attained to puberty and discretion, nor over an adult male. Their power, how-

The father and grandfather have authority to contract a young child, whether male or female;

but not an adult,

<sup>23</sup> *Sugheerah* (fem.) and *sugheer* (masc.), literally, "little one." The words always mean persons under puberty.

<sup>24</sup> *Rooshd*, see *ante*, p. 4, note.<sup>16</sup>

<sup>25</sup> Usually pronounced *Siyzebah* in India.

unless the person is insane. ever, is fully established with respect to both of those persons if insane, and neither of them has any option after restoration to reason.

A master may contract his slave. A master may contract his female slave in marriage, whether she be young or full-grown,<sup>26</sup> sane or insane, and she has no option in the matter. The rule is the same also in the case of a male slave.

Authority of a judge, how restricted; The judge has no power in marriage over any one who is not adult, nor over an adult who has discretion. But his authority is fully established with respect to a person who has attained to puberty without discretion, or one on whom insanity has supervened, when marriage is for his benefit.

of an executor. An executor has no authority in marriage, according to the most approved tradition, even if it were expressly given to him by his testator. But an executor may contract a person who though arrived at puberty is deficient in understanding, when there is any necessity for contracting him in marriage.

A person inhibited for prodigality, cannot contract himself, without permission of the judge. Exceptions. A person who has been inhibited for prodigality cannot lawfully marry, except in an extreme case; and if he should do so the marriage would be invalid. But if desperately bent on marriage, the judge may lawfully grant him permission to marry, either specifying a particular woman, or leaving the permission general: and if he should be impatient, and contract himself before obtaining the permission, being in the condition before mentioned, the marriage would be valid; but if the dower be more than what is proper for a person of the same condition as the woman, it is void as to the excess.

A contract entered into without authority, is in suspense till duly confirmed. When a stranger has taken upon him to contract a person in marriage, the contract is in suspense for the permission of the party to whom the right of contract belongs. Some, however, have said that the contract is void; but the first opinion is more agreeable to traditional authority.

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<sup>26</sup> *Kubeer* (masc.) and *kubeerah* (fem), always used in opposition to *sugheer* and *sugheerah*.

*Matters connected with the Preceding.*

*First.* When an adult and discreet female has given a general appointment to an agent to contract her in marriage, he cannot marry her to himself without her special permission. And though she should appoint an agent expressly to marry her to himself, it has been said, on the authority of one report, that such an appointment would not be valid. The more approved doctrine, however, is in favour of its legality. And if a woman's grandfather should marry her to the son of another son than her own father, the marriage would be lawful.

Agent of a woman cannot contract her to himself without special authority.

*Second.* Whether a woman who is contracted in marriage by her guardian for less than her proper dower can object to the contract is a question on which there is some difference of opinion, but, according to the most authoritative doctrine, she has the power to do so.

Woman contracted for less than her proper dower may object.

*Third.* Full regard is to be had in the contract of marriage to the words of a female who is of mature age and discreet, so that she is quite competent to contract herself, or to be the agent of another in giving expression either to the declaration or the acceptance.

Discreet female, competent to contract.

*Fourth.* The contract of marriage may, according to the most approved doctrine, remain in suspense, as already mentioned, for the sanction of the person having authority in the matter; and if a young girl is contracted in marriage by any other person than her father, or paternal grandfather, whether the person be nearly or remotely related to her, the contract cannot pass or be operative unless subsequently allowed or approved by herself, even though the person were her brother or paternal uncle. In the case of a virgin this permission or assent may be inferred from her silence when the matter is propounded to her; but a woman who is not a virgin must be put to the trouble of giving expression by actual speech to her permission or assent. If the person contracted be a female slave, the contract is in suspense until legalized by her master; and if not a slave, but under puberty, and her father or grandfather allows the contract entered into by her, the marriage is valid.

A contract of marriage may remain in suspense till duly confirmed.

Assent of a virgin may be inferred from her silence.

An infidel guardian has no authority.

*Fifth.* When the guardian is an infidel<sup>27</sup> he has no authority over his ward, and if the father be an infidel the authority is established in the grandfather alone. So also when the father is insane or falls into a state of temporary stupor. But on the removal of the impediment his authority revives. If the father should select one husband; and the paternal grandfather another, the husband whose contract was first in date is to be preferred, and the contract of the other is void. But if both contracts should take place simultaneously, the contract of the grandfather is established in preference to that of the father.

Option of puberty; in what cases allowed.

*Sixth.* When the guardian of a female has married her to a person who is insane or an eunuch the marriage is valid, but she has an option on attaining to puberty. So also when the guardian of a boy has married him to a female, having one of the defects which are a sufficient cause for the cancellation of marriage, he has in like manner an option on attaining to puberty. But if the guardian of a girl should marry her to a slave, she would have no option on arriving at puberty. And the law is the same with regard to a boy married in the like circumstances, though some have denied its application in his case.

Marriage of a slave without permission of her master not lawful.

*Seventh.* The marriage of a female slave is not lawful except with the permission of her owner, though the owner be a woman, and whether the marriage be permanent or temporary. Some, however, have maintained that the slave may marry herself by a temporary contract when the owner is a woman. But the first opinion is more agreeable to the general principles of law.

Case of two infants married together and one of them dying before puberty.

*Eighth.* When the fathers of two young children have contracted them to each other in marriage, the contract is binding on them both; and if one of them should happen to die, the other would be entitled to share in the deceased's inheritance. If any other than the fathers<sup>28</sup> of the children should contract them in marriage, and one of

<sup>27</sup> *Kafir.* The term is applied to all who are not of the Mussulman religion.

<sup>28</sup> "Or grandfathers" would seem to be implied. See *ante*, p. 9.

them should happen to die before arriving at puberty, the contract would be void, and both dower and the right of inheritance would fail. If, again, one of them should attain to puberty and be willing to abide by the contract, it would be binding on the side of that person; and if he or she should subsequently die, the share of the other in the deceased's estate must be reserved. If such other on attaining to puberty should allow the marriage, he or she must then be sworn that the marriage has not been allowed from greed of the inheritance, and admitted to the reserved portion if the oath be taken; while if the person who has not allowed the contract should happen to die, the contract would be void, and the party would have no right to share in the estate of the deceased.

*Ninth.* When the owner of a slave has given him permission to marry, the contract entered into by him is valid; but if the permission be given in general terms, it is restricted in respect of claim to the proper dower of the woman who is the subject of the contract. The excess over the proper dower is nevertheless obligatory on the slave himself, and he may be sold for it, if he should ever obtain his liberty. To the extent of the proper dower, the owner is liable; and though it has been said that the proper dower attaches only to the gains or acquisitions of the slave, the first opinion is more conformable to traditional authority. The same doctrine is true with regard to the maintenance of the slave's wife, for which his master is also liable.

A slave may lawfully contract himself in marriage with his master's permission.

*Tenth.* A partially emancipated slave cannot be compelled by his owner to enter into marriage.

Slave partially freed not forced to marry.

*Eleventh.* When the owner of a female slave is himself subject to the authority of another, the right to give her in marriage belongs to his superior; and when the superior has given her in marriage, the contract is binding and cannot be cancelled by the owner, after the removal of the authority to which he was subject.

Power to marry a female slave when master is under authority belongs to his superior.

It is becoming and proper for a woman before entering into marriage to ask the permission of her father, whether she be a virgin or not, and, when she has neither father nor

A woman should appoint an agent to

contract  
her in  
marriage.

grandfather, to appoint her brother to act as her agent in such matters, giving her confidence to the eldest when she has more than one brother. If each of an elder and younger brother should select a husband for her, she should adopt the choice of the elder; but if both were appointed her agents to contract her in marriage, and they should contract her to two different husbands, the contract first entered into would take effect. Yet if the second marriage be consummated, and she becomes pregnant in consequence, the paternity of the child is to be ascribed to the man whose marriage has thus been consummated, and he is liable for her dower, though the woman herself must return to the husband with whom the first contract was made. If, again, the contracts were entered into simultaneously, some of our doctors have maintained that a preference should be given to the contract of the elder brother; but there seems no sufficient ground for this opinion. While, if she had never given authority to either of them, she may approve whichever of the contracts she pleases, though it is considered better that she should give the preference to that entered into for her by the elder brother. If, however, before expressly allowing either of the contracts, she consummated with one of the husbands, the contract with him is binding on her.

A mother  
has no  
power to  
contract  
her child in  
marriage.

A mother has no power in marriage over her child. Nevertheless, if she should enter into such a contract for her son, and he is content to abide by it, the contract is binding upon him; but if he is averse, she is responsible for the dower. On this point, however, there is some room for doubt, and the question of her liability is sometimes held to depend on her having sought for an appointment of agency from her son.

The word  
of a wife,  
when pre-  
ferred to  
her hus-  
band's in a  
dispute as to  
her consent  
to a contract.

When a stranger has contracted a woman in marriage, and the husband says to her, "He contracted thee without thy consent," her word and oath are to be preferred, because she is seeking to maintain the contract.

## SECTION THIRD.

*The Causes of Prohibition in Marriage.*

These are six in number.

## FIRST CAUSE OF PROHIBITION.

*Nusub or Consanguinity.*

By *nusub* seven different classes of women are prohibited to a man. The first class comprises his mother, and grandmothers how high soever, and whether paternal or maternal. The second class comprises his daughters and their daughters how low soever, and also the daughters of his sons to the lowest degree of descent. The third class comprises his sisters, whether by the same father and mother, or by the same father only, or the same mother only. The fourth class comprises the daughters of these, and the daughters of their children. The fifth class comprises a man's paternal aunts, whether the sisters of his father by both his parents, or by the same father only, or the same mother only; and in like manner the sisters of his grandfathers how high soever. The sixth class comprises his maternal aunts, whether sisters of his mother by both her parents, or only by the same father or the same mother; and, in like manner, the maternal aunts of his father and mother how remote soever in ascent. And the seventh class comprehends the daughters of a man's brother, whether he be a brother by both parents, or only by the same father, or by the same mother, and whether the daughter be the immediate child of his brother, or the daughter of his daughter or of his son, and their daughters how low soever.<sup>29</sup>

Among men the like classes are equally prohibited to a woman. So that her father, how high soever, her brother and his son, her sister's son, her paternal uncle, how high

Women prohibited to a man by reason of *nusub* or consanguinity.

Like classes of men unlawful to a woman.

<sup>29</sup> The daughters of sisters are omitted, but it would seem from the next sentence, where a sister's son is among the like classes prohibited to a woman, that this is a mere inadvertence.



soever, and her maternal uncle in like manner, are all unlawful to her.

*Nusub* established by marriage, or the semblance of it, but not by *zina*.

*Nusub*, or consanguinity, is established by a valid marriage,<sup>30</sup> or the semblance of it; and it is not established by *zina* or illicit intercourse. Hence, if a man should have such intercourse with a woman, and a child be generated of his seed, it is not related to him in law. Still, according to the most approved doctrine, the child is prohibited both to him and the woman, because it is in reality the product of his seed, and is, accordingly, termed his child in common parlance.

Case of a child borne by a repudiated woman to another than the repudiator under a semblance of right.

If a man has repudiated his wife, and she is subsequently enjoyed by another under a semblance of right, becomes pregnant, and is delivered of a child at less than six months from the time of the second intercourse, and at full six months from her last connection with the repudiator, the child is to be ascribed to the latter; but if, when there is less than six months from the intercourse with the second husband, there is more than the longest period of gestation from the last intercourse with the repudiator, the child is not to be ascribed to either; and if there is a possibility of the child's being the fruit of either intercourse the case is to be resolved by casting lots, subject, however, to some doubt whether it be not more agreeable to the general principles of law to affiliate the child to the second of the two parties. However the *nusub* or consanguinity may be determined, the law of the milk, or the rules by which the prohibition of fosterage is regulated, will follow it.

*Nusub* of a child, cut off by *lián* from the husband of its mother.

When a man denies the child of his wife, and takes the *lián* or imprecation, its *nusub* is cut off from the master of the bed, or husband of its mother, and the milk in this case, as well as in the former, follows the *nusub*. But if he should afterwards acknowledge the child its *nusub* is restored, though he can have no title to share in the child's inheritance.

<sup>30</sup> Of any of the kinds before mentioned.

## SECOND CAUSE OF PROHIBITION.

*Fosterage.*

• This cause requires the consideration of its conditions and effects.

• The first condition is that the milk must proceed from marriage,<sup>31</sup> for it does not occasion prohibition when it has its source in *zina* or illicit intercourse.<sup>32</sup> With regard to a semblable marriage there is some difference of opinion; but it is most agreeable to the general principles of law to place marriages of that kind on the same footing as valid marriages. If a man should repudiate his wife when in milk, and she should then suckle a child, illegality would be incurred, in the same way as if he were still her husband. And the result would be the same though she should be married to and become pregnant by a second husband. But if the milk be once cut off or cease, and then return at a time when it may possibly belong to the second husband, it will be ascribed to him rather than to the first. And if it continue without intermission up to the birth of a child by the second husband, the milk before delivery should be ascribed to the first husband, and that after delivery to the second.

The second condition has reference to the quantity of the milk that is required to occasion prohibition; and it must be such as gives increase to the flesh and strength to the bones.<sup>33</sup> No effect, therefore, is allowed to anything less than ten acts of suckling, except according to one report which is not well authenticated. Whether even ten be sufficient to occasion prohibition is a question on which there are two distinct traditions, but, according to that which is most valid or best supported, ten are not sufficient. There is no doubt, however, that when the acts of suckling

1. The milk must proceed from marriage.

2. The infant must be suckled on the same milk a certain number of times consecutively.

<sup>31</sup> In its most comprehensive sense.

<sup>32</sup> This is contrary to the Hanifite doctrine. *D.*, p. 195.

<sup>33</sup> Whatever be the quantity, it occasions prohibition according to the other sect, provided that it reaches the child's stomach. *D.*, p. 193.

amount to fifteen, or are continued for a day and a night, illegality is induced. But they are restricted by three conditions. Each act must be complete in itself. They must all be consecutive, and direct from the breast. In determining the quantity of each, regard must be had to what is customary. When it is said that the acts of suckling must be consecutive, what is meant is that only one woman should be engaged in making up the requisite number; for if some of the acts are by one woman, and another woman then intervenes before the completion of the fifteen, all the first go for nothing, or if several women are engaged in nursing the child, prohibition is not incurred till one of them has completed the full number of fifteen in succession. So that the master of the milk, when there has been a change of nurses, does not become the foster-father, nor his father the foster-grandfather, nor the nurse herself the foster-mother of the child. According to the prevalent opinion, it is necessary that the child should be nursed direct from the breast.<sup>34</sup> If, then, the milk is poured into the child's throat, or made to reach its stomach by means of a clyster, or the like, the prohibition of fosterage is not incurred. So, also, if it were made into cheese, and the cheese were eaten, there would be no prohibition. It is farther necessary that the milk should be in its natural state; for if another liquid is put into the child's mouth just before it is suckled, and the milk is thus so much diluted as to be no longer deserving of the name, there is no prohibition. And if the child is allowed to suck the breast of a corpse, or is partially suckled by a woman while alive, and does not complete the full number till she is dead, prohibition is not incurred; for, by death she has passed from the region or cognisance of the laws, and becomes, in that respect, like one of the lower animals. On this point, however, there is some difference of opinion.

3. All the acts of suckling

The third condition is that the suckling of the infant should take place within two years from its birth, by reason

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<sup>34</sup> This is not required by the Hanifites. *D.*, p. 106.

of what has been said by him on whom and his descendants must be blessing.<sup>35</sup> "There is no fosterage after weaning." within two years of the child's birth. According to the most valid opinion, this has no reference to the child of the nurse, so that if her own child be past the age of ten years, and she then suckles an infant who is under that age, prohibition is incurred. But if a child is suckled the full number of times except one, and then completes its two years, after which it is again suckled to make up the full number, there is no prohibition. So, also, there is no prohibition if the two years should expire without any attempt to complete the number by adding the last. But the prohibition is incurred whenever the full number is completed within the two years.

The fourth condition is that the milk should arise from intercourse with one male; and if a woman should suckle a hundred children on milk caused by the same man, they would all be unlawful to her. So, also, if one man were to marry ten women, and each of them should give suck to one or more children, none of them could lawfully intermarry with any of the others of them. But if one woman should suckle two children on milk caused by different men, the children would not be unlawful to each other. There is a tradition the other way upon this point, but it is now rejected as unauthentic.\* There is no doubt, however, that the woman's own children by *nusub*, or natural descent, are unlawful to any who may have been nursed by her.

In conclusion on this head, the woman selected for a nurse should be a person of understanding and of the Mussulman faith, chaste and pure; and an infidel should by no means be taken for such a purpose, except in a case of great necessity, when a *zimmeeah*, or infidel subject may be employed. But she should be restrained from drinking wine and eating pork; and it is accounted abominable to deliver the child to her to be nursed at her own home. The abomination is aggravated when the woman employed to nurse a child is a *Mujooseeah*, or fire-worshipper; and it is

<sup>35</sup> The Prophet.

also abominable to employ a woman for that purpose whose child has been the fruit of *zina*, or unlawful intercourse."

Effects of fosterage.

As regards the effects of fosterage, several cases present themselves for consideration.

The suckling becomes the child of its foster-parents ;

*First.* When a prohibiting fosterage has taken place, the prohibition spreads from the nurse and her husband to the child whom she has suckled, and from it back to them both ; so that the nurse becomes its mother, the nurse's husband its father, their parents its grandparents, their children its brothers and sisters, and their brothers and sisters its paternal and maternal uncles and aunts.

and is prohibited to every child of theirs.

*Second.* Every one in the relation of child to the husband, either by natural descent or by fosterage, is prohibited to the foster-child ; and so, also, every one in the relation of child to the foster-mother by natural descent, how low soever, is prohibited to the foster-child, but those "so related to the foster-mother only by fosterage are not prohibited to it.

The natural father of the suckling is also prohibited to the children of its foster-parents.

*Third.* The natural father of a child that has been suckled cannot intermarry with any of the children by natural descent or by fosterage of its foster-father, nor with any of the children by natural descent of his wife—the foster-mother—for they have become like his own children. Whether his other children who have not been suckled on this milk can intermarry with the children of the foster-mother or her husband, is a question that has been answered in the negative. But it seems more agreeable to the principles of law to say that such a marriage would be lawful. And if a woman should suckle a son of one family and a daughter of another, the brothers and sisters of one of the children so suckled by her may lawfully intermarry with the brothers and sisters of the other of them, for there is neither consanguinity nor fosterage between them.

Retrospective effect of fosterage.

*Fourth.* A prohibiting fosterage not only forbids beforehand the intermarriage of parties between whom it exists, but also cancels an existing marriage to which it attaches. Thus, if a man should marry an infant at the breast, and it is subsequently suckled by his mother, grandmother, or sister, or by the wife of his father or

Where an infant wife is suckled by a rela-

brother when the author of her milk, the marriage is vitiated. If the infant has taken the teat without the knowledge of the nurse it has no right to dower, because the marriage on which the right was founded has become void; but if the nurse has acted voluntarily in the matter, it is maintained by some of our doctors that the infant is entitled to half the dower, because the marriage has been cancelled before consummation, and her right does not abate, because the cancellation is for a cause which has not proceeded from herself; while the husband has a right of recourse against the nurse for whatever he may pay on that account, if she actually intended to vitiate the marriage. On all this, however, there is a difference of opinion arising from a doubt whether the usufruct of a woman's person be a fit subject for responsibility.

If a person has two wives, one adult and the other an infant at the breast, and the infant is suckled by the adult wife, they are both rendered perpetually unlawful to him if he had consummated with the adult wife; but if not, the adult wife alone is prohibited to him. In the former case she is entitled to her full dower, but to no part of it in the latter, because the marriage has been cancelled by her own act; but the infant's right to dower is unimpaired in both cases, because her marriage is cancelled by the conjunction,<sup>36</sup> and for a cause which cannot be ascribed to her. Some of our doctors, however, have maintained that the husband has a right of recourse against the full-grown wife, by whose act the cancellation of the marriage and his consequent liability have been induced.

<sup>37</sup> *Fifth.* When a man has married his infant son to the infant daughter of his brother, and one of the children is then suckled by their common grandmother, the marriage is cancelled, because the child which has been suckled, if a male, becomes the paternal or maternal uncle of his wife, and, if a female, the paternal or maternal aunt of her husband.

*Sixth.* When a man has a female slave whom he has

<sup>36</sup> Of two women who cannot lawfully be co-wives. See *post*, p. 21.

<sup>37</sup> Some alteration has been made in the arrangement of the cases.

slave of her husband : enjoyed, and his infant wife is suckled by her, they are both rendered unlawful to him, and the right of the infant to dower is established. In this case, however, the man has no right of recourse against the slave, because a master can have no claim to any property founded on the responsibility of his slave. If, indeed, the woman had been free, and were enjoyed under a contract of marriage, he would have a right of recourse against her ; and even in the case before us the claim attaches in a manner to her person. On this point, however, I<sup>38</sup> have some doubt ; but if we can say that he has in any case a right of recourse against her for the dower, we may then pronounce for the sale of the slave on account of it ; that is, she may be sold if she should ever obtain her liberty.

or by a wife whom he has divorced. *Seventh.* If a man should divorce his full grown wife, and she should then<sup>39</sup> suckle his infant wife, both would become unlawful to him.

Further illustration of the retrospective effects of fosterage. *Eighth.* When a grown woman has married a little child, and the marriage has been cancelled either for a personal defect or because the woman, being a slave, has been emancipated, or for any other cause, and the woman has then married another man, and suckled the infant on milk caused by him, she is rendered unlawful to her husband, because she was the wife of his son, and to the infant because she has become the wife of his father.

Continued. *Ninth.* If a man has an infant wife and two adult wives, and the infant is first suckled by one of the latter and then by the other, the infant and the adult wife by whom it was first suckled are both rendered unlawful to the husband. But not so the second wife, for at the time of her suckling the infant it had already become his daughter, and consequently ceased to be his wife. It is maintained by some that the second wife is also rendered unlawful to him, because she has become the mother of one who was his wife ; and this opinion is to be preferred. In these cases the marriages are cancelled by the establishment of an unlawful conjunction,<sup>40</sup> and the relationship

<sup>38</sup> That is, the author of the *Shuraya*.

<sup>39</sup> See *ante*, p. 15.

<sup>40</sup> See *post*, p. 21.

which renders the conjunction unlawful is induced by the acts of suckling in the manner supposed.

*Tenth.* When a man has said, "This is my sister," or "my daughter, by fosterage," in such a manner as to make the declaration binding upon him, and it has been made before any contract with the person referred to, judgment must be given against him in any suit for annulling the contract, as he has apparently rendered her unlawful to him. If, again, the declaration is made after a contract, and it is supported by proof of the fact, judgment is also to be given in conformity with the proof, and the woman has no right to her specified dower if the declaration has been made before coition, but otherwise she is entitled to the amount specified. If there is a failure of proof and the woman denies the allegation, the man is liable for the full dower after consummation, and to the half of it if consummation has not taken place.

Effect of a declaration of fosterage by a man.

When a woman has made a similar declaration before a contract, judgment is to be given against herself on the ground of her acknowledgment. But if the declaration is made after a contract, and a claim is founded upon it by the woman, the claim cannot be admitted unless supported by proof.

By a woman.

### THIRD CAUSE OF PROHIBITION.

#### *Affinity.*

This is established by valid or lawful coition, and seemingly also by *zina* or illicit intercourse, and by intercourse under a semblance of right, as also by seeing and touching. But these points will be adverted to hereafter. Meanwhile, with respect to a valid marriage: when a man has had connubial intercourse with a woman, either by virtue of a contract or a right of property, he is rendered unlawful to the mother how high soever of the enjoyed woman, and also to her daughter in any stage of descent, and whether born previously or subsequently to the intercourse, and whether living under his protection or not. In like manner the enjoyed woman is rendered unlawful to the father how high soever of the man who has had intercourse with her, and to his sons in every stage of descent, by a perpetual prohibition.

Affinity established by marriage.

Followed by connubial intercourse.



Effect of a marriage by contract not followed by concubial intercourse.

Marriage by right of property has not the same effect.

A father or son cannot lawfully have connection with the slave of each other, except by virtue of marriage.

If there has only been a contract of marriage without coition, the wife is rendered unlawful to her husband's father, and also to his son, but her daughter is not unlawful in herself to the husband, and only so in conjunction with her mother; so that if he should separate himself from the mother, he may lawfully marry the daughter. Whether a mother is rendered unlawful to a man by a mere contract with her daughter without coition, is a question on which there are two different traditions. According to the more authentic of these she is rendered unlawful to him. But the female slave of a father is not prohibited to his son by the mere fact of her being the father's property; nor is the slave of the son prohibited to the father for the like cause alone. But if either of them should have sexual intercourse with his slave, she would then become unlawful to the other.

It is not lawful for either a father or a son to have connection with the slave of the other, except under a contract of marriage, or by virtue of some right of property. True, that a father may value the slave of his infant son, and so lawfully have connection with her by virtue of the right so acquired; but if either a father or a son should have sexual intercourse with the slave of the other, without at least a semblance of right, he would be a *zance* or fornicator, though the son only, and not the father, would be liable to the *hudd* or punishment specially appointed for the offence; and a semblance of right would also exempt the son from its infliction. If the slave of the father should become pregnant by the son under a semblance of right, the child would be emancipated without any liability for its value; but if the slave of the son should become pregnant by the father, the child would not be emancipated, though the father would be bound to ransom it, unless it were a female. If a father should have connection with the wife of his son under a semblance of right, she would not thereby be rendered unlawful to the son, though some have maintained the contrary, as she had in a manner become the wife of the father; but the father would be liable for her dower. If the son should return to his wife, and it

can be said that coition under a semblance of right induces prohibition, he would be liable for two dowers; but if that cannot be said with propriety, as is really the case,<sup>41</sup> then she can have no right to any dower except the first, or that originally assigned to her on the marriage.

• Among the consequences of affinity is the prohibition of a wife's sister in conjunction with the wife, or of a wife's niece in conjunction with her without her permission. With such permission the conjunction is quite lawful. The paternal or maternal aunt of a wife may be taken in conjunction with her, even against the wife's will. But if a man should marry his wife's niece, whether the daughter of her brother or sister, without the wife's permission, the contract would be void. Some of our doctors are of opinion that in such a case the wife would have an option, and might either allow the second marriage, or cancel it without the cancellation being a divorce. But the first opinion, according to which the contract is actually void, is the most valid.

Women who cannot be lawfully conjoined as wives of the same man.

With regard to *zina* or fornication, if it be super-venient, the prohibition of affinity is not incurred thereby. Thus, if a man should marry a wife, and then have illicit intercourse with her mother or daughter, or be guilty of an unnatural offence with her father or son, or should commit fornication with the enjoyed slave of his father or his son, in none of these cases would the act have a retrospective effect in rendering the wife or slave unlawful to her husband or master. But if illicit intercourse should occur before a contract, then, according to the common and approved doctrine, the daughter of a paternal or maternal aunt would be rendered unlawful to the man who had committed fornication with their mothers.<sup>42</sup> Whether illicit intercourse in other cases previous to a contract would occasion the prohibition of affinity, in the same way as a valid or legal intercourse, is a question in which there are

Effect of *zina* in establishing affinity.

<sup>41</sup> See *post*, p. 24.

<sup>42</sup> That is, his cousin, whom he might otherwise have legally married, would be prohibited to him by his incestuous intercourse with his aunt.

two traditions,—according to one of which, and that the most patent or generally received, it has that effect, but according to the other it has not.

Effect of intercourse under a semblance of right.

With regard, again, to coition under a semblance of right, the *Sheikh*,<sup>43</sup> on whom be the mercy of God, puts it on the same footing, in this respect, as a valid marriage. But there is a difference of opinion upon this point, and, according to that which is best supported by traditional authority, the prohibition of affinity is not incurred by it, though the *nusub*, or affiliation of any child that may be the fruit of it, is established.

Effect of sight and touch.

As to sight and touch, whatever is lawful to other persons than a husband, or the owner of a female slave, such as the sight of the face, or touch of the palm of the hand, that certainly does not occasion the prohibition of affinity. Where, again, the sight or touch is not competent to any other than a husband, or the owner of a slave, as, for example, the sight of the nakedness, or kissing, or touching with desire such parts of the person as are usually covered or concealed, there is a difference of opinion on the subject; according to that which is best supported by tradition, these are only productive of abomination, and even those who consider that actual prohibition is incurred by them limit its effects to the father and son of the person who has seen or touched the objectionable parts of the person, and do not include within them the mother or daughter of the woman who has been seen or touched.

#### Miscellaneous Cases.

These have been arranged into two classes, as they relate to unlawful conjunctions, or to women who are specially prohibited for causes applicable to their particular condition. The cases that relate to unlawful conjunction are four in number, and as follows:—

Conjunction of two sisters by contract.

*First.*<sup>44</sup> If a man should have married two sisters, the

<sup>43</sup> *Abou Jafer Toosee*.

<sup>44</sup> Two have been omitted, one as being of little importance and insufficiently vouched, being introduced by a *keela*, or “it is said;” and the other, because it more properly belongs to the next cause of prohibition, under which it will be found at p. 28.

contract with the first is valid and that with the second void. If both are included in one contract, it is maintained by some of our doctors that the contract is void as to both. But there is a tradition that he has an option, and may choose whichever of them he pleases. The first opinion, however, is more agreeable to the general principles of the law, and the tradition is weak or insufficiently authenticated.

*Second.* If a man, after having had sexual intercourse with a slave by virtue of his right of property in her, should marry her sister, it is maintained by some of our doctors that the marriage is valid, and the woman first enjoyed by right of property rendered unlawful to him so long as he remains united to the second. Further, if a man, having two female slaves who are sisters, should have connection with them both, it is in like manner maintained that the first is prohibited to him after his intercourse with the second till he has parted with his property in the second. Some, again, are of opinion that if his intercourse with the second was in ignorance of the relationship between them, the first is not prohibited to him, and that if he was aware of the relationship the first is prohibited to him until he parts with his ownership in the second, without any intention of returning to the first; for if he has any such intention, the first is not rendered lawful to him. It seems, however, to be more agreeable to the general principles of law that the second only should be prohibited to him in both cases, and not the first.

*Third.* The marriage of a slave on a free woman, that is, by a man who is already married to a free woman, except with her consent, is unlawful; and a contract entered into without waiting for her consent is void.<sup>45</sup> It is maintained by some of our doctors that the free woman has an option, and may either cancel or allow the marriage with the slave, or cancel her own contract. But the first opinion is more agreeable to the general principles of the law. If, again, a man should marry a free woman on a slave, that is, when

Conjunction of two sisters, one by contract and the other by property; or both by right of property.

Co-adjunction of a slave by contract to a free woman.

<sup>45</sup> According to the Hanifite doctrine, consent is apparently insufficient to legalize the contract. D, p. 36.

already married to a slave, the contract would be lawful, but the free woman, if ignorant of the existing connection, would have an option with regard to herself. And if a free woman and a slave are married by one contract, the contract as to the free woman is valid, but not so as to the slave.

*Fourth.* When a man has had sexual intercourse with a girl under the age of nine years, and has ruptured the parts,<sup>46</sup> it is unlawful for him to have further connection with her, but she is not released from her ties, if connected with him by marriage or slavery. If no rupture has taken place, the prohibition is not incurred according to the most valid opinion.

The second class of cases, or those that relate to women who are specially prohibited for causes applicable to their particular condition, are six in number, and as follows:—

Unlawful  
to marry a  
woman  
during her  
*iddut*.

*First.* When a man has married a woman in her *iddut*, with knowledge of the fact, she is for ever unlawful to him. And even though he were ignorant of the fact, or of the unlawfulness of marriage in such circumstances, yet if consummation has followed, the prohibition of all future connection with her is in like manner incurred. If coition has not taken place, the existing contract only is void, and he is not prohibited from entering into another with her, *de novo*.

Paternity  
of a child  
born in  
such cir-  
cumstances

*Second.* When a man has married a woman in her *iddut*, and pregnancy has ensued, the child of which she may be delivered is to be affiliated to him, if he were ignorant of its mother being in *iddut* at the time of her marriage to him, or of the unlawfulness of marriage in such circumstances, provided that the child is born at six months or more from the time of consummation. The parties are nevertheless to be separated, and the husband is liable for the dower mentioned in the contract, while the woman must complete her *iddut* for the first marriage, and then enter on another on account of the second.

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<sup>46</sup> *Afzaha*. Literally, "has widened her." The legal acceptation of the term in this place is *utrumque meatum naturæ in altero coalescere faciens impetu congressus*. *Im. D.* Note, p. 227. This case more properly belongs to the next class.

*Third.* When a man has had illicit intercourse with a woman, he is not thereby prevented from marrying her, even though she is notoriously profligate. And, in like manner, if a man's wife should commit adultery, and even persist in such courses, she does not become unlawful to him, according to the most valid doctrine. But if a man should commit adultery with a woman who has a husband, or is in her *iddut* for a revocable divorce, she is rendered perpetually unlawful to him according to the common or generally received opinion.<sup>47</sup>

A man is not prohibited from marrying a woman with whom he has had illicit intercourse.

Unless she were the wife or in *iddut* of another.

*Fourth.* A man who has done wickedly with a youth, cannot lawfully contract marriage with his mother, sister or daughter; but none of these to whom he may have been previously contracted is thereby rendered unlawful to him.

*Fifth.* When a *moohrim*<sup>48</sup> has entered into a contract of marriage with a woman, knowing that it is not lawful for him so to do, she is for ever unlawful to him. But if he were not aware of the illegality, though that contract is vitiated, the woman herself is not prohibited to him, that is, he may lawfully enter into another contract with her.

A *moohrim* cannot contract marriage.

*Sixth.* A woman who has a husband is not lawful to another man till after her separation from him and the completion of her *iddut* if she be liable to observe one.

The wife of one man cannot lawfully marry another.

#### FOURTH CAUSE OF PROHIBITION.

##### *Completion of Number.*

By number is here to be understood,—First, the number of wives to which a man is restricted, and, second, the number of repudiations which render a woman unlawful to her repudiator.

*First,* as to the number of wives.—When a free man has filled up the number of four wives by permanent contract, any in excess of that number is prohibited to him;

No man can have more than four wives

<sup>47</sup> This important doctrine does not seem to be recognized by the other sect.

<sup>48</sup> A pilgrim after he has come within the sacred territory, and put on the *ihram* or pilgrim's dress. He is not prevented from marrying by the other sect. *D.*, p. 20.

by permanent contract at the same time.

But no limit by temporary contract or right of property.

After repudiating one of the four revocably he cannot marry another till expiration of her *iddut*;

nor two others by one contract.

A thrice repudiated woman cannot be re-married till intermediately married to another;

nor a wife nine times divorced be re-married at all.

and it is not lawful for him to have more than two slaves by contract out of the four. When a slave has filled up the number of four wives who are slaves, or two who are free women,<sup>49</sup> or three, one of whom is free and the others are slaves, any in excess of these is prohibited to him. But each of the parties, that is, either the free man or the slave, may marry by temporary contracts as many as he pleases. So, also, he may retain them by virtue of bondage or right of property.

When a man has repudiated one of his four wives, he cannot lawfully enter into another marriage until she has completed her *iddut*, if the repudiation were revocable. But if it was absolute or irrevocable, he may immediately enter into a contract with another woman. And the rule is the same as to marriage with the sister of his wife. Further, it is abominable to separate from a woman for the purpose of marrying her sister.

When a man has repudiated one of his four wives irrevocably, and married two others, one before the other, the contract with the first is to be sustained; but if the contracts were simultaneous both are void. There is one tradition, however, that he has a right of choice between the two, but it is weak or insufficiently authenticated.

*Second*, as to the number of repudiations.—When a free woman has filled up the number of three repudiations she is unlawful to the repudiator until she has been married to another husband,<sup>50</sup> whether she were the wife of a free man or a slave. And when a bondswoman has filled up the number of two repudiations she is unlawful to her repudiator until she has been married to another husband, even though she were the wife of a free man. When a repudiated woman has filled up the number of nine repudiations for the *iddut*, being intermediately married to two other men, she is prohibited to the repudiator for ever.

<sup>49</sup> This is the case referred to in page 24. By the other sect a slave is prohibited from having more than two wives at one time, whether they be free or not. *D.*, p. 80.

<sup>50</sup> According to the other sect, marriage is not sufficient without consummation. *D.*, p. 44. And see *post*, p. 124.

## FIFTH CAUSE OF PROHIBITION.

*Lián or Imprecation.*<sup>51</sup>

This is a cause of perpetual prohibition of the imprecated woman to her imprecator. And such slanders of a deaf or dumb woman as would occasion *lián* with regard to one not so afflicted, has the same effect though the *lián* does not actually take place.

## SIXTH CAUSE OF PROHIBITION.

*Infidelity.*

It is not lawful for a *Mooslim* to marry any woman who is not a *kitabecah*; <sup>A *Mooslim* cannot marry any but a *kitabecah*;</sup> <sup>nor any but a *Mooslimah* by a permanent contract.</sup> and so far all are agreed. With regard, again, to a *kitabecah* who is a Jewess or a Christian, there are two traditions, and, according to the most notorious or generally received of these, a permanent marriage with either of them is forbidden to him, but a temporary marriage, or one by right of property, is lawful.<sup>52</sup> And the rule is the same with regard to a *Mujooseah* or fire-worshipper.

If one of two spouses should apostatize from the Musliman faith before connubial intercourse has taken place, their marriage is cancelled on the instant, and the wife has no right to dower if the apostasy be on her side; but if it is on the side of the husband, she is entitled to half the dower. If the apostasy does not take place till after connubial intercourse, the cancellation of the marriage is suspended till the expiration of the *iddut*, whether the husband or the wife be the apostate, and no part of the dower abates, because the right to it has been fully established by consummation. There is an exception, however, if the husband were born in the faith, for in that

<sup>51</sup> This subject is further discussed *post*, p 152. It is not included among the causes of prohibition by the Hanifite sect.

<sup>52</sup> Fem. of *kitabecah*, relative noun, from *kitab*, a book; applied to all who are supposed to have divine revelation, but generally used to the exclusion of Mooslims.

<sup>53</sup> No such restriction recognized by the other sect.—*D.*, p. 40.



case the marriage is cancelled immediately, though it should have been followed by connubial intercourse, because a return to the faith is not allowed.

Effect of conversion to the faith of *Islám* on the marriage of *Kitabees*.

When the husband of a *kitabeeah* is converted to the Mussulman faith, his marriage is unaffected by the conversion, whether it take place before or after consummation. But if the wife of a *kitabee* should embrace the faith of *Islám* before her marriage has been consummated, it is immediately cancelled, and she has no right to dower. If, again, her conversion does not take place till after connubial intercourse, the cancellation of the contract is suspended till the expiration of her *iddut*. It is, however, maintained by some of our doctors that if the husband be a *zimme* or infidel subject, the marriage remains as *before*, except that he is prohibited from approaching her at night, or being in retirement with her by day. But the first opinion is more agreeable to the general principles of law.<sup>54</sup>

Its effect on the marriage of others than *Kitabees*.

With regard to unbelievers who are not *kitabees*, their marriage is cancelled by the conversion of either of them to the faith of *Islám*; immediately if the conversion is before connubial intercourse, but not till the expiration of the *iddut* if such intercourse has taken place. If the wife of a *zimme* or infidel subject should go into any other form of infidelity than her own religion, cancellation would also take effect immediately, even though she should return to her original faith; because no change of religion is tolerated to one in her condition, except a change to *Islám*.<sup>55</sup>

A *zimme* having more than the legal number of wives, must, on conversion, be

When a *zimme* or infidel subject who has more than four wives embraces the faith of *Islám*, his marriage is sustained as to four of them who are free, or two who are free and two who are slaves, that is, if he is himself free; and if he is a slave, it is sustained as to two free women and two slaves. If he has no more than the legal number

<sup>54</sup> It is obvious from this that a Mussulman woman cannot be legally married to any one who is not of that faith; by a permanent, any more than by a temporary contract. See *post*, p. 40.

<sup>55</sup> This distinction does not seem to prevail among the Hanifites, with whom all forms of unbelief are alike.

of wives his marriage is sustained as to all ; but from any excess above the legal number he must at once be separated. He has, however, a right of "selection, which may be exercised in any form of words that is sufficiently demonstrative of his intention to retain a particular wife, as, for example, by his saying to one of them, "I have chosen thee," or "I have held to thee," or the like. When the choice has been duly made, the marriage of the four first (in whose favour it has been exercised) is established, and the remaining wives are discarded. If he should say to any above the legal number, "I have elected to be separated from you," that would be a rejection, and the marriage of the others would be established. So also, if he were to repudiate four, all the remaining ones would be rejected, while the marriage of those whom he had repudiated would first be confirmed, and they would then be divorced ; for repudiation is inapplicable to any but wives, since it is an appointed means of dissolving the marriage tie. But *Eela* and *Zihar* are no evidence of election,<sup>56</sup> because they are sometimes applied to other persons than wives. The election may also be made by deed, as, for instance, by or by deed. connubial intercourse, which is plainly an evidence of choice. So that if a man should have such intercourse with four of his wives, the contracts with these would be confirmed, and all the rest would be rejected. With regard, again, to kissing, or touching with desire, these also may be said to be exercises of the right of choice, as they amount to revocation in the case of a repudiated wife, and may fairly be assumed to have the like effect in the present instance.<sup>57</sup>

<sup>58</sup> If one of the wives should die after their con- Though one of the

<sup>56</sup> As to these, see *post*, pp. 138, 147.

<sup>57</sup> Throughout the whole of this case, it is implied that the *zimnee* is a *kitabec*, and his wives *kitabecahs* ; otherwise his marriage would be cancelled by his conversion to the Mussulman faith.— (P. 30.)

<sup>58</sup> This case will be found at page 277 of the original, being one of several cases relating to *zimnees*, most of which have been omitted as of little practical utility in India.

wives should die before he has made his election, he may still elect her, and is entitled to inherit from her.

version to the faith before he has made his election among them, his right to elect her is not cancelled, and if he should make her his choice, he would be entitled to participate in her inheritance. So also if the whole of them should die, he would still have his right of choice as to four among them, and would participate in the inheritance of those whom he might elect; for election is not the renewal of a contract, but only the means of determining who among the subjects of valid contracts shall retain their condition of wives. But if the husband as well as the wives should die, then it is maintained by some that the right of choice is cancelled. It seems, however, to be more agreeable to principle that in such a case recourse should be had to lots, as among the women there are some who might be heirs to the husband, and some from whom he might have inherited. If the husband should die before all the wives, they must all keep *iddut*, as it must be incumbent upon some of them; and as there are no means of distinguishing between them, the longest of the two prescribed periods<sup>59</sup> should be observed by way of caution, when there is a possibility of each of them being the widow; and when that is not possible,<sup>60</sup> any among them who is pregnant must keep the *iddut* of death, and also of delivery; and the *hail* (or one who is not so), the largest of the two appointed for death and repudiation.

Until he has made his election all the wives are entitled to maintenance.

<sup>61</sup> When the man and the women embrace the faith of *Islám*, it is incumbent upon him to maintain the whole of them until he has made his choice of four, after which the right of the remainder to maintenance is cancelled; for up to the time of making his election they are all in the condition of wives. And the rule is the same in the event of the wives, or some of them, embracing the faith, and he remaining in infidelity. If he should fail to give them their maintenance they may sue him for what is presently due, as also for the past, or what is in arrear;

<sup>59</sup> That is, of the *iddut* for repudiation, and the *iddut* for death.

<sup>60</sup> As, for instance, if any of them should have remained in infidelity.

<sup>61</sup> This follows immediately after the last case in the original.

and that whether he embrace the faith or remain in infidelity. But he is under no obligation to maintain them if he is converted without them, because of the obstruction to connubial enjoyment.

<sup>62</sup> A change of religion is a cancellation of marriage, not a *tulák*, or divorce. If the change is on the side of the wife, and it takes place before consummation, she has no right to any dower; while if it is on the side of the husband, she is entitled to half the dower, according to the generally received doctrine. If the change occurs after consummation, the woman's right, having been once established, is not affected by the supervening event. If the dower mentioned in the contract is invalid, the proper dower is substituted for it after consummation, and also before it, when half of the proper dower becomes due, if the cause of cancellation be on the part of the husband. If no dower whatever has been assigned by the contract, a present only is incumbent on the husband when he has given cause for the cancellation, though on that point there is some difference of opinion.

A change of religion is cancellation of marriage, not a divorce.

<sup>63</sup> When a *Mooslim* has apostatized after consummation of his marriage, he is prohibited from connubial intercourse with his Mussulman wife, and the marriage, as already mentioned, is in suspense until the expiration of the *iddut*. If, notwithstanding the prohibition, he should have such intercourse under a semblance of right, and continue in his infidelity till the expiration of her *iddut*, the *Sheikh* <sup>64</sup> has said that he is liable for two dowers, one being the dower originally specified in the contract, and another on account of the intercourse under a semblance of right. But on this point there is some reason for doubt, since she is still in the condition of a wife, provided that he was not born in the faith. <sup>65</sup>

Connubial intercourse prohibited between a *Mooslim* who has apostatized, and his wife during the *iddut*.

<sup>66</sup> A *Mooslim* cannot compel his *zinnmeeah* wife to wash after ceremonial pollutions, because that is not necessary for the purpose of connubial enjoyment. But if

What restraints may be imposed by a

<sup>62</sup> Page 276 of the original.

<sup>65</sup> See *ante*, foot of p. 29.

<sup>63</sup> *Ibid*.

<sup>66</sup> Page 275 of the original.

<sup>64</sup> See *ante*, p. 24.

*Mooslim*  
on his  
*zimmecah*  
wife.

she persists in what is a hindrance to such enjoyment, such as the use of fetid odours, or keeping her nails of an extreme and formidable length, he may oblige her to refrain. He can also prevent her from going to Christian churches or Jewish synagogues, as indeed he may prevent her from going out of his house. So also he can restrain her from drinking wine or eating pork, or the practice of any uncleanness.

#### SECTION FOURTH.

##### *Things connected with the Contract.*

These are seven in number.

Equality  
in respect  
of *Islám*,  
a condition  
in mar-  
riage ;

*First.* Equality is a condition in marriage, that is, in respect of *Islám*,<sup>67</sup> or the general profession of the Mussulman religion. Whether it is also a condition in respect of *eeman*, or true belief,<sup>68</sup> is a question on which there are

but appar-  
ently not  
in respect  
of *eeman*.

two traditions ; but, according to the most notorious or generally received of these, equality in respect of *Islám* is all that is required. In regard to the husband's ability to maintain his wife, there is a difference of opinion ; some insisting that it is also a condition of the contract, while others deny this position, and their opinion is more in accordance with the general principles of the law. It is

Nor is it  
necessary  
that a hus-  
band  
should be  
able to  
maintain  
his wife.

also a question on which there are opposing traditions, whether a supervenient disability on the part of the husband to maintain his wife confers on her the power of cancelling the marriage. According to the most notorious or generally received of these traditions, she has no such power.

Respects  
in which  
equality is  
not requir-  
ed.

It is lawful for a free woman to marry a slave, or an Arabian woman to marry a Persian, or a woman of the tribe of *Hashem* to marry a man of another tribe, and *vice versa*, or the reverse is also lawful. In like manner, men

<sup>67</sup> According to the Hanifites, it is *Islám* of paternal ancestry that is particularly meant.—(*D.*, p. 63) The same is probably intended here.

<sup>68</sup> The term is restricted by the *Sheeahs* to themselves, as distinguished from other sects. See *Im. D.*, p. 426, note.

engaged in worldly trades may lawfully enter into the contract of marriage with women possessed of property, in debts owing to them and in houses.

.If a *moomin*,<sup>69</sup> or true believer, competent to maintain a wife, should pay his addresses to a woman, it is incumbent on her to accept him, though he be her inferior in respect of *nusub*, or ancestry; and it would be sinful in a guardian to forbid the marriage. According to some of our doctors, if a man, who professed himself to be of one tribe, should prove to belong to another, his wife would be at liberty to cancel the marriage. But this is denied by others, whose opinion is more in conformity with the general principles of the law.

A true believer who is competent to maintain a wife, and addresses a woman, should be accepted.

It is abominable for a woman to marry a profligate; and the abomination is aggravated by his being a confirmed wine-drinker. So also it is abominable for a woman who is a true believer to marry a *mookhalif*, or opposer;<sup>70</sup> but there is no objection to her marrying a *moostuzif*, or one weak in his belief, who does not know the grounds of controversy.

Connections which are accounted abominable.

*Second.* Where a man has married a woman, and afterwards discovers that she had been previously guilty of fornication, he has no right to cancel the marriage, nor has he any claim against her guardian to refund the dower. There is one tradition in favour of his having a right of recourse against the guardian, and one that the woman is entitled only to such a *sudak*, or dower, as may be a sufficient compensation for the enjoyment of her person. But the tradition is not generally received.

Marriage cannot be cancelled on account of previous fornication of the wife.

*Third.* It is not lawful to court a woman during her *iddut* for a revocable repudiation, for she is still the wife of another man; but a woman who has been repudiated three times may be lawfully courted during the *iddut*, either by the repudiating husband or by another man, though by neither should it be done in direct terms. With regard, again, to a woman who has been repudiated

Not lawful to court a woman during her *iddut* for a revocable repudiation :

<sup>69</sup> Participle, from the increased infinitive *ce-man*.

<sup>70</sup> Of any general usage, according to *Freytag*, but here probably meant for some particular sect.

nine times, with two intermediate marriages to other men, it is not lawful for the repudiating husband again to pay his addresses to her, but another may lawfully do so, though not directly during her *iddut* for the first husband or for either of the two others. A *mooátuddah*, or woman in *iddut*, for an absolute separation from her husband, either by *khoodá*<sup>71</sup> or by cancellation, may lawfully be courted by the husband or by another man, and in express terms by the husband, but not so by the other. The indirect way of addressing a woman is to say, "I greatly love" or "desire thee," or the like; and the direct way, that he should speak to her in language that will admit of no other construction than marriage, as, for example, by saying, "When your *iddut* is over, I will marry you." If one should make an express proposal to a woman in circumstances that render it unlawful, and should afterwards marry the woman on the expiration of the *iddut*, she would not be prohibited to him by reason of the irregularity.

Yet if done, and the woman is married on expiration of the *iddut*, she is not thereby prohibited to her husband.

A woman is not bound by accepting a mere proposal of marriage.

*Fourth.* When proposals of marriage have been made to a woman, and she has accepted them, it is maintained by some of our doctors that it is unlawful for another to pay his addresses to her; yet, if she should marry the other, the contract would be valid.

Marriage entered into by a thrice repudiated woman on condition of its being void after she has been legalized to her first husband, is not valid.

*Fifth.* When a thrice repudiated woman enters into a contract of marriage, and stipulates that, as soon as the husband has legalized her to her former husband, there shall be no marriage between them, such a contract is void. It is sometimes maintained, however, that the condition is surplusage, and that if a woman should expressly stipulate for repudiation, the marriage would be valid, and the condition void; and that if consummation should take place, she would be entitled to her proper dower. If there is no express condition in the contract, and it is merely the intention of the parties, or of the wife, or her guardian, that she shall be immediately repudiated, the contract is not invalidated. In every case in which it is said that the

<sup>71</sup> See *post*, p. 129.

contract is valid, the woman is rendered lawful by coition to the first repudiator, that is, after she has been legally separated from the second husband, and her *iddut* has expired; and in every case in which it is said that the contract is invalid, she is not rendered lawful to the first repudiator; for coition with another man is not alone sufficient for that purpose, without a valid contract.

*Sixth.* A *shighar* marriage is void. That is, when two women are married to two men with a condition that the marriage of each is to be the dower of the other, both marriages are void.<sup>72</sup> But if each of two guardians should marry his ward to the other, and they should stipulate for their respective wards a known dower, the marriages would be valid. And if one of the guardians should marry his ward to the other, and stipulate that the other should reciprocate by marrying his ward to him for a known dower, both contracts would be valid; but the dower would be void, because with it there is a stipulation for marrying, which is not binding on the party, and marriage does not admit of an option. The woman is, therefore, entitled to her proper dower. Upon this point, however, there is room for some doubt or hesitation. So also, if one of the guardians should marry his ward to the other, and stipulate that the husband should marry such an one to him, without any mention of dower, the contracts would be lawful, and the woman entitled to her proper dower.

A *shighar* marriage void; what it is.

Cases which resemble it, where the contracts are valid.

Further, if one person should say to another, "I have married my daughter to thee, on condition that thou shalt marry thy daughter to me, so that the marriage of my daughter shall be the dower of thine," the marriage of his daughter would be valid, but that of the other's daughter would be void. But if he should say, "on condition that the marriage of thy daughter shall be the dower of mine," the marriage of the speaker's daughter would be void, and that of the other's daughter, valid.

Continued.

<sup>72</sup> According to the Hanifites, the contracts are effected, but the condition is void, and each woman is entitled to her own proper dower.—*D.*, p. 91.



Some marriages that are accounted abominable.

*Seventh.* It is abominable for a man to enter into a contract of marriage with a nurse who has brought him up, and with her daughter; or to marry his son to the daughter of his wife by another husband, whom she has borne after her separation from himself. But there is no objection to such a contract if the daughter were the fruit of a marriage previous to his own. It is also abominable for a man to marry a woman who was co-wife with his mother, previous to her marriage to his father, or a woman who has been guilty of fornication without repentance for her fault.<sup>78</sup>

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<sup>78</sup> Property, or one of the parties being the slave of the other, is not expressly mentioned by the author of the *Shuraya* among the causes of prohibition in marriage; but it seems to be assumed. For it is stated at p. 48 *post* that, "if a person should marry a female the property of several owners, and should purchase the share of one of them in his wife, that would cancel the marriage;" and the author had already said, in the Book of *T'jarut* (p. 177), "that, when one of two spouses becomes the proprietor of the other, the right of property is confirmed; but the *zoujeent*, or relation of husband and wife, is *not* confirmed." Moreover, it is expressly stated in the *Imameea* Digest (p. 131), on the authority of the *Tuhreer*, that, "if a husband purchase his own wife, or a wife acquire her husband in property, it is valid; but their marriage is thereby annulled." It would seem, therefore, that there is no difference between the Shecas and the Hanifites on the point in question.—See *D.*, p. 42.

## CHAPTER II.

## OF TEMPORARY MARRIAGE.

TEMPORARY marriages are permitted by the Mussulman religion, because they were authorised by lawful authority, and there is nothing to show that the permission was ever abrogated.<sup>1</sup> The subject requires an explanation of the pillars and the laws of the contract.

## SECTION FIRST.

*The Pillars of the Contract.*

These are four in number,—the Form, the Subject, the Period, and the Dower.

*First.* With regard to the Form of the contract, or the Form. words appropriated by law to the declaration and acceptance by which it is constituted. The proper words for the declaration are *zuwujtoku*, *muttuátoku*, and *ankuhtoku*, any of which is sufficient for the purpose; and by none other can the contract be effected, as, for instance, by the words *tumleek* (transfer), *heba* (gift), or *ijaruh* (lease). The acceptance may be expressed by any words indicative of assent to the declaration, as “I have accepted the *nikáh*,” or “the *mootá*.” Or it may be shortened by merely saying, “I am content.” If a commencement be made with the acceptance, by the man’s saying, “*tuzuwujtoki*,” and the woman’s saying, “*zuwujtoku*,”<sup>2</sup> there would be a valid contract. It is, however, a necessary condition that both the declaration and the acceptance should be expressed in

<sup>1</sup> The Hanifites differ on this point.—*D*, p. 18, note <sup>4</sup>

<sup>2</sup> See *ante*, p. 3, note <sup>10</sup>

Must be in the past tense; for if the man were to say “*akbulo*,” or “*arza*,” which mean, “I do or will accept,” or “I am or will be content,”<sup>3</sup> there would be no contract, even though he used the words intending that they should be understood in an initiatory sense. It has been said, however, that if he were to use the word *atuzuwujtoki* (“I do or will take thee to wife”)<sup>4</sup> for such a period, at such a dower, with an initiatory intention, and she should say “*zuwuj-toku*,” there would be a valid marriage. So also, if she were merely to say “Yes.”

Subject of the contract must be a *Mooslimah* or a *Kitabeeah*. *Second.* With regard to the Subject of the contract, it is a necessary condition that the wife be a *Mooslimah* or a *Kitabeeah*, by which is meant a Jewess or a Christian, or even a *Majooseeah*, according to the most common or generally received of two traditions;<sup>5</sup> and the husband should restrain her from drinking wine and other unlawful practices.

And a *Mooslimah* cannot enter into it with any other than a *Mooslim*. A Mussulman woman cannot enter into a *mootâ* contract with any other than one of her own religion. Nor is it lawful for a *Mooslim* to enter into the contract with an idolatress; nor for one who is erect or straight in his own belief to contract with one of a sect who is notorious for enmity, such as the *Kharijites*; nor for a slave to be taken in *mootâ* by one who is already married to a free woman, except with her consent, and such a contract entered into without her consent would be void. So also, if a man should marry by *mootâ* his wife's niece, whether the daughter of her brother or her sister, without the consent of his wife, the contract would be void.

Other requisites proper though not absolutely necessary in the subject of the contract. It is proper, though not necessary as a condition of validity, that the woman who is the subject of the contract should be a *Moomin*, or true believer,<sup>6</sup> and chaste; and that due inquiries be made into her conduct, if liable to suspicion. If the woman is actually a *zaneeah*, or addicted to fornication,

<sup>3</sup> The original words are in the aorist tense, which is employed in the Arabic language for both present and future.

<sup>4</sup> See *ante*, p. 3.

<sup>5</sup> See *ante*, p. 29.

<sup>6</sup> See *ante*, p. 34, note <sup>68</sup>.

tion, it is abominable to enter into the contract with her ; and if she has ever been guilty of anything of the kind, she should be strictly prohibited from a repetition of such conduct. Further, it is accounted abominable to enter into a contract of this kind with a virgin who has no father ; and if one should do so, he ought to refrain from connubial intercourse with her. Still that is not actually prohibited.<sup>7</sup>

*Third.* With regard to Dower. It is an essential condition of this contract, and peculiar to it, that some dower should be specified, so that if there is a failure in this respect the contract is void. It is also a condition that the dower be something that is actually owned and possessed, and is known by measure, weight, inspection, or description. Its quantity is left to be determined by the mutual agreement of the parties, whether it be much or little, even so little as a handful of wheat ; and it becomes binding on the husband by virtue of the contract. So that if he were to make the woman a gift of the term, that is, waive his right to her altogether, before coition, he would still be liable for half the dower ; and if coition should have taken place, she is entitled to the whole dower, on condition of her keeping the term, or adhering to him till its completion ; but if it is not completed, he is entitled to deduct a proportionate part of the dower. If, again, it should prove that there was an inherent defect in the contract, either by its appearing that she was the wife of another man, or the sister or mother of his own wife, or anything similar, that would be a sufficient ground of cancellation ; then, if no coition has taken place, she has no right whatever to dower, and must return any part of it that she may have received. But if the causes of cancellation do not transpire till after connection has taken place, she is entitled to retain whatever she may have actually received, though he is under no obligation to deliver the remainder. Yet, even in this case, it were perhaps better to say that it is only in

Some dower must be specified ;

and is due by virtue of the contract.

<sup>7</sup> Three cases in the original, illustrative of the effect in a *mootâ* marriage of the conversion to *Islam* of one of the spouses, are omitted, as being sufficiently obvious, and substantially the same as those mentioned in page 30.

the event of her having been ignorant of the existence of the cause of cancellation that she is entitled to retain whatever portion of the dower she may have received, and that if she were cognizant of the defect in the contract, she is bound to refund.

There must also be a fixed period, longer or shorter as may be agreed upon by the parties.

*Fourth.* The Period. This is also an essential condition of the *mootá* contract; and if there is no mention of any time, the contract becomes permanent. The extent of the period is left entirely to the parties, who may prolong or shorten it to a year, a month, or a day; only some limit must be distinctly specified, so as to guard the period from any extension or diminution. Even if the time were fixed at part of a day, the contract would be lawful, provided that its limit is distinctly ascertained; as, for example, by the declining or setting of the sun. It is also lawful to specify a month to commence immediately after the contract, or at some interval from it. If mentioned generally, the month next to the contract is to be understood. If he should abstain from her until a part of the specified time has expired, that is to be deducted from the contract, but she is entitled to her full dower notwithstanding. If he should say "once" or "twice," without fixing a time, the contract would not be valid as a *mootá*, but would be permanent. There is, however, one tradition in favour of the legality of such a compact, subject to this condition—that he is not to look upon her after the occurrence of the specified act. But this tradition has been rejected as insufficiently authenticated; and if a contract were made in the terms above specified, it would be held to be permanent; while if the acts were brought within the compass of a particular time, the contract would be valid as a *mootá*, or temporary one.

## SECTION SECOND.

### *The Laws of the Contract.*

These are eight in number.

The term and dower must both

*First.* When the term and the dower have been mentioned the contract is valid; and if there is a failure in

respect of the dower while the term is mentioned, the contract is altogether void; but if there is a failure in respect of the term while the dower is mentioned, the contract, though void as a *mootá*, is valid as a permanent marriage.

. *Second.* Every condition stipulated for in this contract must be mentioned at the time of the declaration and acceptance; and no effect whatever can be given to any previous stipulation unless it be repeated at that time, nor to any condition made after it. With regard, again, to a condition that has been mentioned in the contract, there is no necessity for its repetition after it; though some of our doctors are of opinion that the condition should be repeated after the contract. This, however, is far from being correct.

*Third.* An adult and discreet female may enter into a *mootá* contract; and her guardian has no right to object, whether she be a virgin or not.

*Fourth.* It is lawful to stipulate with the woman that she shall come by night or by day; and also to stipulate for once or twice within the specified period.

*Fifth.* The practice of *izl*<sup>8</sup> is lawful with a *mootá* wife, and is not dependent on her permission. If she should become pregnant notwithstanding the *izl*, the child is the temporary husband's, on account of the possibility of some of the seed remaining contrary to his intention. But if he should deny the child, the denial is to be sustained, apparently without any necessity for *Lián*.

*Sixth.* This form of marriage does not admit of repudiation; but the parties become absolutely separated on expiration of the period. Nor does it admit of *Eela* or *Lián*, according to the prevalent doctrine. With regard to the operation of *Zihar* in such a case, there is some difference of opinion. According to that which is best founded on traditional authority, it may be exercised under this form of marriage.<sup>9</sup>

<sup>8</sup> *Extrahere ante emissionem seminis.*

<sup>9</sup> See *post*, p. 140.

nor confer  
any rights  
of inherit-  
ance.

*Seventh.* By this contract no rights of inheritance are established in favour of the parties, whether there be an express condition to that effect, or the contract is left in general terms, without any stipulation in either way. If there is an express condition for mutual rights of inheritance, or for such a right in favour of one of the parties, some of our doctors are of opinion that effect must be given to the stipulation. Others, again, insist that the condition is not binding, because inheritance is not established except by the law, and the stipulation would be in favour of persons who are not heirs, and therefore the same as if it were made in favour of absolute strangers. The first opinion, however, is most generally approved.

An *iddut*  
must be  
kept at ex-  
piration of  
the term.

*Eighth.* After the expiration of the period, if there has been any connubial intercourse between the parties, the woman must observe an *iddut* of two returns of her courses. According to one tradition, indeed, a single occurrence of them is sufficient; but this tradition is rejected. If the woman has never had them yet does not despair, the *iddut* is forty-five days. For the death of her husband the woman must observe an *iddut* of four months and ten days if she is not pregnant, even though connubial intercourse has not taken place; and if she is pregnant the *iddut* must continue till the more distant of two events, that is, the completion of four months and ten days, or delivery. If the woman be a slave her *iddut*, supposing that she is not pregnant, is two months and five days.

CHAPTER III.

OF THE MARRIAGE OF FEMALE SLAVES.

THIS marriage may be either by contract, or by right of property.

SECTION FIRST.

*Marriage of Female Slaves by Contract.*

The contract may be either permanent or temporary, as May be permanent or temporary. in the case of free women; and many of the rules applicable to both have been already set forth. To those the following are now added:—

*First.* It is not lawful for slaves, whether male or female, to contract themselves in marriage without the permission of their masters. If either of them should do so without such permission, the contract is dependent on the master's assent. Some of our doctors maintain that the assent is as a new contract, while others insist that the contract in both cases, that is, whether the slave be male or female, is absolutely void, and the subsequent assent therefore surplusage and of no use. There is a fourth opinion that would restrict the effect of the master's assent to a contract entered into by a male slave, exclusively of one by a female. But of all these opinions the first is that which is best supported by traditional authority. So that, when the master has given his assent, the contract is valid, and he becomes liable for the dower incumbent on his male slave, together with the maintenance of the slave's wife, while he is entitled to the dower of his female slave. The rule is the same whether each of the slaves belongs to a single master, or to several masters; and in Marriage of slaves not lawful without the permission or subsequent assent of master, which renders him liable for the wife's dower and maintenance, and entitles him to take the dower of a female slave. When there are several



masters,  
all must  
concur.

the latter case, though one of them should consent to the marriage of their slave, the contract would not be lawful without the consent of the others, or their subsequent allowance of it, according to the most approved doctrine.

When both  
the parents  
are slaves  
their child  
is also a  
slave.

*Second.* When both the parents of a child are slaves, the child is also a slave, and if they belong to one owner the child is his exclusive property. If the parents belong to different owners, the child is their joint property in equal shares. If there was a stipulation that the child should be the property of one of them, or that the share of one of them in the child should be greater than that of the other, effect must be given to the condition.

When  
either is  
free, the  
child be-  
longs to  
the free  
parent.

When one of the spouses is free, the child is to be affiliated to him or her, whether the free parent be the father or the mother,<sup>1</sup> unless the master of the other had stipulated that the child should be a slave, in which case effect must be given to the condition, according to the most approved doctrine.

A freeman  
marrying a  
slave with-  
out her  
master's  
permis-  
sion, is  
guilty of  
*zina*, and  
the fruit of  
their inter-  
course be-  
longs to  
the mo-  
ther's  
owner,  
unless the  
father were  
ignorant of  
the ille-  
gality,  
in which  
case, the  
child is  
free.

*Third.* When a freeman has married a slave without the permission of her master, and, before obtaining his approval of the contract, has connubial intercourse with her, knowing the illegality of the connection, he is a *zane* or fornicator, and liable to the *hudd* or punishment specially appointed for the offence. If the slave were also aware of the illegality she has no right to dower, and any child of which she may be delivered is the slave of her owner. If, on the other hand, the freeman were ignorant of the unlawfulness of the contract, or there is any semblance of right in the case, he is not subject to the *hudd*, but is liable for dower, and the child is free, though his father is bound to make good to the owner of its mother the value of the child as of the day on which it was born alive. So also if a freeman should enter into a contract of marriage with a slave on the faith of her own allegation that she is free, he would in like manner be liable for her dower, though some of our doctors are of opinion

<sup>1</sup> According to the Hanifites, the child follows in all cases the condition of its mother.—*D.*, p. 363.

that the liability is only for a tenth of the dower if she is a virgin, and half a tenth if she is not so; and her children by him are slaves, but it is incumbent on him to ransom them by paying their value, which the master is bound to accept, and to surrender them to him on these terms. If the husband has no property he may work out their ransom by emancipatory labour; but whether, if he refuse to do so, it is incumbent on the *Imam*<sup>2</sup> to ransom them, is a question on which there are different opinions, some maintaining the affirmative, in reliance on a weak or insufficiently authenticated tradition, while others insist that the ransom is by no means incumbent on the *Imam*, because the father is liable for the value of the children.

*Fourth.* When a man has married his male to his female slave, some are of opinion that it is incumbent on him to give her something by way of portion, while others maintain that it is not so; and it were, perhaps, more in accordance with the general principles of law to say, that it is proper and becoming in him to make her some allowance on the occasion of her marriage, but by no means an incumbent duty. If he should die, his heirs have the option of either allowing or cancelling the contract.<sup>3</sup> But the slave herself has no option in the matter.

A master marrying his male to his female slave is not bound to give her anything by way of portion.

On his death, his heirs may cancel the marriage.

*Fifth.* When a slave has married a free woman, with knowledge on her part that it was without the permission of his master, she has no right to dower, nor even to maintenance, if she were also aware of the unlawfulness of such an union, and her children are slaves; but if she were ignorant of its illegality, they are free, without any liability on her part for their value. If connubial intercourse has taken place, she is also entitled to dower as against the slave, for which he may be sued if he should ever obtain his freedom.

A free woman marrying a slave without permission of his master is not entitled to dower.

*Sixth.* When a male slave has married a female slave belonging to another than his own master, the children of the marriage belong to the masters jointly, whether they

The issue of a marriage between slaves be-

<sup>2</sup> Head of the Mussulman community.

<sup>3</sup> Even, it would seem, though the marriage had been sanctioned by him.—See *post*, p. 50, as to purchaser's power to cancel.

longing to different masters is their joint property.

both allow or refuse their assent to the marriage. But if one only assents, the children belong exclusively to the other. So, also, if a male slave should have illicit intercourse with a female the property of another, the child would belong to the master of the latter.

A person who marries a slave belonging to two owners, and purchases the share of one of them, is prohibited from connubial intercourse with her.

*Seventh.* If a person should marry a female the property of several owners, and should purchase the share of one of them in his wife, that would cancel the marriage, and it would be no longer lawful for him to have connubial intercourse with her.\* Even though the other partner should allow the marriage subsequently to the purchase, that would not remove the prohibition. Some, however, are of opinion that sexual intercourse with her would thereby be rendered lawful, but the opinion is not well supported. If he were merely to legalize her to him,<sup>4</sup> that, according to others, would render their intercourse

Because a woman cannot be lawfully enjoyed by virtue of two distinct rights.

lawful, and there is a report to that effect. But this has also been denied, because the cause which renders sexual intercourse lawful does not admit of division. In like manner, if one were the owner of half a partially emancipated woman, it would be unlawful for him to have such intercourse with her, either by virtue of his right of property or of a permanent contract. Some, however, have said that it would be lawful if the contract were by *moota* restricted to a particular time, and there is a report to that effect; but the doctrine is still open to doubt and difficulty for the reason just mentioned.

As adjuncts to the marriage of slaves, it is necessary to consider the effects of Emancipation, Sale, and Divorce.

A female slave when emancipated has an option, and may cancel her marriage.

I. As to the effect of Emancipation on the marriage of slaves. When a female slave is emancipated, she may cancel her marriage, whether the husband be free or a slave. Some of our doctors have made a distinction between the two cases, which seems more agreeable to the general principles of law.<sup>5</sup> The option thus allowed to her must,

<sup>4</sup> See *post*, p. 54.

<sup>5</sup> That is, that she has the option only when he is a slave, as is apparent from what follows.

however, be exercised immediately. When a male slave is emancipated, neither he nor his master have any option, nor has his wife, whether she be free or a slave; for, as she was satisfied with her husband when he was a slave, much more should she be so now that he is free. But if they were both the slaves of one master, who emancipates them both, she has her option, notwithstanding the emancipation of her husband. And the result would be the same if they were the property of different owners, who concurred in emancipating them at the same time.

But a male slave has no such option.

The emancipation of a female slave may be lawfully made the subject of her own dower, and the contract may be established against her by making the word of contract precede that of emancipation, as, for example, by the man's saying, "I have married thee, and emancipated thee, and made thy emancipation thy dower;" for if the emancipation were placed first, she would have a choice being free, and might either accept or reject the proposal. But it has been said that this is not necessary, for phrases joined together are but one sentence; and this is correct. It has been further maintained by some that the word of emancipation should have the precedence, for the woman is already lawful to her master, and there can be no necessity for a contract when the right of enjoyment is already established by virtue of the right of property. The first opinion, however, is the most common or generally received.

The emancipation of a female slave may be the subject of dower.

An *oom-i-wulud*, or mother of a child, is not emancipated till after the death of her master, and then only out of the child's share in his estate.<sup>6</sup> If the share is insufficient to make up her value, she must herself perform emancipatory labour for the excess, her child being in nowise liable to work on that account. Some of our doctors, however, maintain his liability; but the first opinion is more agreeable to the principles of the law. If her child should die during the lifetime of its father, she returns to a state of absolute slavery, and may be

An *oom-i-wulud* is emancipated at her master's death, out of her child's share in his estate;

and, if her child dies before him,

<sup>6</sup> According to the Hanifites, she is emancipated out of the whole estate.—*D.*, p. 378.

reverts to  
the state  
of absolute  
slavery.

lawfully sold. And even while her child is alive she may be lawfully sold in payment of her original cost, if still due, and her master has no other property besides herself. Some of our doctors go so far as to maintain that she may be lawfully sold after the death of her master for the payment of his debts, though there may be no original cost, (or, in other words, though she may not have been purchased, or if purchased, though her price be no longer due,) when the debts absorb the whole estate so as to leave nothing after they have been paid. If, while her price is still due by her master, he should marry her, making her emancipation her dower, then get her with child, and finally die insolvent as to her price, she may be sold on account of the debt. But whether her child would, in such circumstances, revert to a state of slavery, is a question as to which, though it has been answered in the affirmative on the ground of a report by *Husban ben Salim*, yet the more approved doctrine on the subject is that neither the emancipation nor the marriage is cancelled, and that the child does not revert to a state of slavery, his freedom and that of his master's having been once completely established.<sup>7</sup>

## II. As to the effect of Sale on the marriage of slaves.

Sale of a  
married  
slave equi-  
valent to a  
divorce.

Where the proprietor of a female slave has sold her, this is equivalent to a divorce, the purchaser having an option either to allow or to cancel the marriage.<sup>8</sup> But the option must be exercised immediately, if he elect to cancel the marriage; for if he is aware of the contract, and delays to cancel it, the contract is binding upon him. The same rule is applicable to the marriage of a male slave when he is married to a slave; and even when he is married to a free woman and is sold, the purchaser has an option according to one tradition, but it is considered weak or insufficiently authenticated. When both the married parties are slaves and belong to one owner, who sells them to

<sup>7</sup> See further on the subject of the *oom-i-wulud* in the section on *Isteelad*, p. 57.

<sup>8</sup> The purchaser has no such option by the *Hanifeea* code.

different purchasers, each purchaser has the option ; so, also, if one person should purchase them both, he would have the like option ; or if the owner should sell only one of them, retaining his right to the other, the buyer and seller would each have an option, and the contract between the slaves would not be established without the consent of both ; while if there should be any children of the marriage, they belong to the master of the parents.

When a man has given his female slave in marriage, he is entitled to her dower as already mentioned ; but if he sells her before connubial intercourse, his right to it is extinguished, because the marriage on which his right was founded is cancelled by the sale. If the purchaser chooses to sanction the marriage he becomes entitled to the dower, because his sanction is like a renewal of the contract. If the sale does not take place till after connubial intercourse, the first owner, that is, the seller, is entitled to the dower, whether the second, or purchaser, sanctions the marriage or cancels it, because the right to the dower was completed by the intercourse while the slave was his property. On this point, however, there are various opinions, though the correct doctrine is as we have stated it.

If a man should contract his male slave in marriage, and then sell him before connubial intercourse, it has been said that the purchaser may cancel the marriage, and that the seller is liable for half the wife's dower. But others of our doctors have denied both these propositions.

When a man has sold his female slave, and claims as his the child of which she is pregnant, while the purchaser refuses to recognize his claim, the assertion of the seller is not to be received in cancellation of the sale, but is to be received as regards the affiliation of the child, because it is an acknowledgment which does not injure anybody.<sup>9</sup> The point, however, is subject to some doubt.

III. As to the Power to divorce, and its Effects on the marriage of slaves.

If the sale of a female slave takes place before connubial intercourse, the seller loses his right to her dower. Otherwise, he retains it.

Effect of sale of male slave on master's liability for half the dower ;

and also on the affiliation of the child of which a female is pregnant, when claimed by the seller.

The master of a male slave has no

<sup>9</sup> A *fetus* in the womb is not included in the sale of the mother. —*Im. D.*, p. 133.

power to  
repudiate  
his wife;

unless the  
wife is his  
own slave.

How the  
power may  
be exer-  
cised.

Effect of  
its exercise  
when with-  
out the use  
of the word  
*tulák*.

When a male slave, with the permission of his master, has married a free woman, or the slave of another, he can neither be compelled to repudiate her, nor can he be prevented from doing so. When, again, a man has married his male to his female slave, though the contract is a real marriage, and not the mere legalizing of sexual intercourse, still the power to separate them is in the hands of the master,<sup>10</sup> and he may exercise it without the use of the word *tulák*, or repudiation, as, for example, by saying, "I have cancelled your contract," or by ordering one of them to withdraw from the other. But whether such an expression would have all the effect of a *tulák* is a question on which there is a difference of opinion, some answering it in the affirmative—so that, according to them, if it were repeated twice, with an intervening revocation, the woman would be prohibited to her husband until she were first married to another—while others maintain that the expression would be a cancellation of the marriage, and this opinion seems to be more in accordance with the general principles of the law. If her husband should repudiate her, and she is then sold by her master, she must complete the *iddut* of repudiation. But must the seller subject her to any further purification, than this *iddut*? This is a question that has been answered both in the affirmative and the negative, but the latter answer is most correct, because she has been already purified by the *iddut*, which is sufficient.

#### SECTION SECOND.

##### *Scrvile Marriage, or the Marriage of Female Slaves by Right of Property.*

Of two  
kinds.

This is of two kinds, according as the right is to the person or to the usufruct of the slave.

1. Where  
the right  
is to the  
person.

I. When the right is in the person. There is no limit to the number of women with whom a man may lawfully have sexual intercourse by virtue of this right. He may also be the owner at the same time of a woman

<sup>10</sup> He does not seem to have any such powers under the *Hanifeca* code.

and her mother; but, when he has once had intercourse with either of them, the other is prohibited to him. Further, he may be the owner of a woman and her sister at the same time; but, when he has once had intercourse with either of them, the other is prohibited to him until he parts with his property in the first. When he has done this, the second is lawful to him. So, also, it is lawful for a son to be the owner of a slave who has been enjoyed by his father, or for a father to be the owner of a slave who has been enjoyed by his son; but neither can lawfully have sexual intercourse with one who has ever been enjoyed by the other.

When a master has given his female slave in marriage, she is prohibited to him until a legal separation has been made between her and her husband, and she has fulfilled her *iddut*, if liable to observe one. Nor can the master cancel her marriage, otherwise than by selling her, which he is at liberty to do, when the seller will have an option, and may cancel it if he please. In like manner, it is unlawful for him to look at any part of her person that may not be seen by others as well as a proprietor.

A married female slave is prohibited to her master till lawfully separated from her husband.

Further, it is unlawful for a man to have sexual intercourse, by virtue of a right of property, with any woman whom he holds in joint ownership with another.

So also is any slave to one who is only part-owner;

It is not lawful for the purchaser of a female slave to have connection with her until she has undergone the usual purification.<sup>11</sup> And if the slave is married, and he has once given his sanction to the marriage, he has no power after that to cancel it. So, also, if he were aware of her being married, and made no objection, he is precluded from cancelling the marriage, or having connection with the woman, until she has been regularly separated from her husband, and has completed her *iddut*, if liable to observe one. But if he does not allow the marriage, there is no necessity for an *iddut*, and purification is sufficient to legalize his connection with her.

and to a purchaser until she has undergone purification.

Nor can the purchaser cancel a marriage which he has once sanctioned.

<sup>11</sup> That is, till after one of her monthly courses, or the lapse of forty-five days from the date of the purchase, provided she has arrived at puberty.—*Im. D.*, p. 136.



Married women may be purchased from enemies.

Purification necessary after every acquisition of a female slave.

It is lawful to purchase from enemies their married women, and also their daughters, and from schismaticks<sup>12</sup> whatever they may have captured from enemies.

Every one who has become the proprietor of a female slave, in any of the ways by which property may be acquired, is prohibited from having sexual intercourse with her until she has been purified by an occurrence of her courses. And if there is any delay in their appearance, when the woman is of the proper age, she must observe an *iddut* of forty-five days. But there is no necessity for this if, at the time of his acquiring the right to her, the courses were actually on her, further than that he must wait for their completion. So, also, if she belonged to a just person, who informed him that she was purified, or if she belonged to a woman, or is an *ayessah*, that is, one who has despaired of offspring, or is pregnant, none of the precautions would be necessary, except that in the last case their omission is accounted abominable.

When it is required after a contract of marriage preceded by emancipation.

When a man who is the owner of a female slave emancipates her, he may lawfully enter into a contract of marriage with her, and proceed to connubial intercourse with her without subjecting her to any purification, though in this case also it were better to do so. But if a man should emancipate a female slave after he has had connection with her, it is not lawful for another to enter into a contract of marriage with her until she has observed an *iddut*, which, in this case, is three months, unless the emancipation were preceded by some *toohrs* or intermenstrual periods.

Where the right is to the usufruct.

How the usufruct may be conferred.

II. Where the right is to the usufruct of the woman. This involves a consideration of its form, or how the right may be conferred; and its laws, or the rules by which its exercise is regulated. And first as to its form or how the right is conferred. This is done by saying, "I have made it lawful for you to have connection with her," or "I have given you the legal right to have connection with her"<sup>13</sup>—and the right cannot be conferred by the word *arecut* or commodate loan. But whether the word *ibahut*,

<sup>12</sup> Literally, *people of error*.

<sup>13</sup> Both expressions contain inflections of the word *hullu*.

which signifies to permit, is sufficient, is a question on which there are different opinions—of which, however, the opinion which is in favour of its legal sufficiency is that which is best supported by traditional authority. With regard, again, to the words *wuhubtoku*, (I have given to thee,) to have connection with her, *suwwughtoku*, (I have authorised thee), and *mulluktoku*, (I have conferred on thee) those who think that the word *ibahut* or permission is sufficient maintain the sufficiency of these also. But this is denied by those who insist that no form of expression can be lawfully employed for the purpose except some inflection of the word *tuhleel*.<sup>14</sup>

Whether the expressions by which this right is constituted are in the nature of a contract, or of a transfer of usufruct, is a question on which there is a difference of opinion among our doctors, founded on a respect for female chastity arising from an idea that sexual enjoyment is unlawful under any other conditions than contract or a right of property; but perhaps the more correct of the two opinions is the last, or that which makes it a transfer of usufruct. Whether, again, a female slave can be legalized to a male slave, is also a point on which there are two traditions. According to one of these, which is supported by the consideration that the legalization is a kind of grant or transfer, of which a slave can hardly be the recipient, it is forbidden; while according to the other, which is supported by the consideration that it is only a permission, of which a slave is quite capable, it is lawful when a particular female is indicated. Moreover, the last of the two traditions seems to be most agreeable to the general principles of the law.

A *moodubburah*<sup>15</sup> and an *oom-i-wulud*<sup>16</sup> may be legalized like an absolute slave. But when a man is only the partial owner of a slave, and she surrenders or legalizes herself as to the other part, the transaction is not lawful;

A *moodubburah* and an *oom-i-wulud* may be the subject of this transaction.

<sup>14</sup> An increased infinitive of *hullu*.

<sup>15</sup> A female slave with whom her master has entered into an agreement of *tudbeer*, or emancipation at his death.

<sup>16</sup> Mother of a child to her master.

though if she were the joint property of several owners, and they all combined in legalizing her, it has been said that the transaction would be quite lawful. The difference between the two cases is that a woman cannot legalize herself. .

Laws or rules.

Next as to the laws or rules by which the exercise of the right is regulated. .

The right is strictly limited by the meaning of the language in which it is conferred.

*First.* The right is limited to what is strictly within the meaning of the language in which the permission is granted, or what the circumstances of the case demonstrate was clearly intended to be included. Thus, if the permission was to kiss, the licence is confined to kissing. So, also, if the permission is to touch, sexual intercourse is not included; but a permission of the latter comprehends all other kinds of dalliance. If the permission is to employ the woman in service, she cannot be used for sexual enjoyment; and if the permission be for sexual enjoyment, she cannot be employed in service. If she is enjoyed without having been duly legalized, the man who has had intercourse with her is a sinner, and is bound to make compensation to her owner, and any child which may be the fruit of such intercourse is a slave and such owner's property.

The child of a woman duly legalized is free.

*Second.* The child of a female slave who has been duly legalized is free; and if freedom is expressly stipulated for when the word *ibahut* or permission is employed, the child is free in that case also, without any manner of doubt, and there is no way of proceeding against the father; but in the absence of any such condition it has been said that the father is bound to ransom the child by paying its value. It is, however, maintained, on the other hand, that he is under no such obligation, and this is the better founded of the two opinions.

Inter-course not subject to the same restraint as under a contract.

*Third.* There is no objection to sexual intercourse with a slave though there is another person in the same apartment with her; nor to the sleeping between two slaves, though this is abominable in the case of free women. It is also abominable to have connection with a *fajirah*, or woman of bad character, or with one who was born of fornication.

SECTION THIRD.<sup>17</sup>*Of Isteelad.*<sup>18</sup>

This requires the explanation of two matters. First, how it is constituted ; and, second, the laws relating to the *oom-i-wulud*, or mother of a child.

I. *Isteelad* is constituted by a female slave bearing a child to her master while she is his property ; for if a man should beget a child on the slave of another, she would not become his *oom-i-wulud*, though he should afterwards become her proprietor. If a man should beget a child on a free woman, and subsequently become her proprietor, she would be his *oom-i-wulud*, according to the *Sheikh* ; but not so according to a report of *Ebn-i-Warid*. But if a man should have connection with a slave impledged to him, and she should become pregnant in consequence, she would be his *oom-i-wulud*, and the result would be the same if a *zimnee*, or infidel subject, should have connection with his female slave, and pregnancy should ensue ; but here, if the slave be converted to the Mussulman religion, the master would be obliged to consent to her sale.

II. The laws relating to an *oom-i-wulud*.

*First.* An *oom-i-wulud* is a slave, and is not enfranchised by the death of her master, but out of the share of her child in his estate.<sup>19</sup> The master, however, is not at liberty to sell her so long as her child survives, except only on account of her own price, when he has bought her on credit, and has no other means of defraying the debt. But if the child should die, the mother returns to a state of absolute slavery, and may be lawfully sold, or otherwise disposed of at the pleasure of her master.

<sup>17</sup> This short section has been introduced here from p. 368 of the original.

<sup>18</sup> The word means literally to claim a child (*D.*, p. 377), but here it is employed in a somewhat different sense.

<sup>19</sup> According to the Hanifites she becomes absolutely free at the death of her master. *D.*, p. 378.

but is so out of her child's share in his estate.

*Second.* When her master has died, leaving her child surviving, she is entitled to emancipation out of the share of the child in the master's property, and if the share be insufficient, she is to be emancipated *pro tanto*, or as far as the share will go, and to work out the remainder of her value by emancipatory labour.

A bequest to an *oom-i-wulud* by her master, to be applied to her enfranchisement before coming on the share of her child.

*Third.* When the master has made a bequest to his *oom-i-wulud*, though some of our doctors maintain that the legacy is to be paid to her, and she is still to be emancipated out of the portion of the child, the better opinion seems to be that the legacy is to be first applied to her emancipation, and that it is only the balance, if the legacy should be insufficient for the purpose, that can be taken out of the portion of the child.

The fine or compensation for offences committed by her, attaches to her person.

*Fourth.* When an *oom-i-wulud* has committed an offence, the fine or compensation due on account of it attaches to her person, which her master is obliged to ransom, but to what amount is a question on which there is a difference of opinion, some saying that it is the less of two sums, viz. the *irish*, or established compensation of the offence, and her value, while others maintain, with more appearance of truth, that it is the *irish*, whatever that may be. He may, however, surrender the slave herself, if he please, to the person against whom the offence has been committed. And it is reported as from *Abec Abdoollah*, on whom be peace, that the master is personally liable for trespasses by her on the rights of individuals, but that if it be against a *jumaut*, or collection of persons, he has an option, and may either ransom her or surrender her to the persons injured, or their heirs, in proportion to the extent of the offence.

## CHAPTER IV.

### OF CAUSES FOR WHICH MARRIAGE MAY BE CANCELLED.

#### SECTION FIRST.

##### *Personal Blemishes in Man and Woman.*

THE personal blemishes of a man are three in number: <sup>Blemishes in a man.</sup> Insanity, Eunuchism and Impotence.

The Insanity of a husband empowers his wife to cancel <sup>Insanity.</sup> their marriage, whether the insanity be continued or occasional, and so also when it is supervenient or occurs after the contract, and whether before or subsequent to connubial intercourse. With regard to supervenient insanity, it has sometimes been made a condition of its being a cause for the cancellation of marriage, that the man should not have understanding sufficient to recognize the stated times of prayer, but the soundness of this opinion is at least liable to doubt.

Eunuchism is the loss of both the testicles, and in- <sup>Eunuchism.</sup>cludes in its meaning their actual destruction by castration. This is a cause for the cancellation of marriage when it has occurred before the contract; and even when it is supervenient to it, according to some of our doctors; but this opinion is not to be relied on.

Impotence<sup>1</sup> is a cause for the cancellation of marriage, <sup>Impotence.</sup> though it should not occur till after the contract, provided, however, in this case, that the man has had no sexual inter-

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<sup>1</sup> *Inin*. A definition of the term is given in the text, which may be dispensed with, as its meaning is sufficiently expressed by the English word.

course either with his wife or another woman ; for if this has occurred, though only once with his wife, or if, while impotent with regard to her, he has had connection with another woman, the wife has no option according to the most approved doctrine. So, also, if he has had connection with his wife against nature,<sup>2</sup> though impotent in the natural way, she has no power to cancel their marriage. Whether, again, *jub* or the removal of the *penis* only be a sufficient cause for cancellation, is a point on which there is a difference of opinion ; but, according to the opinion, which is the more agreeable to the general principles of the law, it does enable the wife to cancel her marriage, provided, however, that so much of the stump has not been left as is sufficient for coition.

A man cannot be rejected for any other cause than one of these above mentioned.

Blemishes in a woman. The blemishes of a woman are seven in number : insanity, *joozam*, *burs*, *kurn*, *ifzao*, blindness and *urj*.

Insanity. Insanity is a total derangement of the intellect, and an option is not established by slight aberrations which easily subside, or by stupors, though of frequent occurrence.

*Joozam*. But if these are confirmed or permanent the option is established. *Joozam*<sup>3</sup> is a disorder in which there is a drying up, or withering of the members, and a falling

*Burs*. away of the flesh. *Burs*<sup>3</sup> is a whiteness which appears on the surface of the body from an excess of the humours ; but if there is any room for doubt as to the symptoms,

*Kurn*. this does not give the power of cancellation. *Kurn* is sometimes described as a fleshy protuberance, and sometimes as a bone growing in the womb, which prevents

*Ifzao*. coition. *Ifzao* is the two passages of nature becoming one.<sup>4</sup>

*Urj*. With regard to *Urj* there is some doubt ; but it seems more agreeable to traditional authority to include it among female blemishes when it amounts to actual lameness.

<sup>2</sup> There are two traditions with regard to this practice, and though according to the more generally received of these it is not unlawful, yet it is deemed to be utterly abominable.—*Shuraya*, p. 260.

<sup>3</sup> Black and white leprosy according to *Im. D.*, p. 82.

<sup>4</sup> See *ante*, note, p. 26.

*Rutuk*<sup>5</sup> has been placed by some among the blemishes of *Rutuk*. a woman which give a right to cancel marriage, and when it has prevented coition from the beginning, there seems to be ground for this opinion, on account of the privation of sexual enjoyment,—that is, when it cannot be removed or has resisted the usual remedies.

A woman cannot be rejected for any other than the seven blemishes above mentioned.

## SECTION SECOND.

### *Laws relating to Blemishes.*

*First.* Blemishes in a woman that existed before the contract afford a cause for the cancellation of marriage; but it cannot be cancelled on account of any that occur after the contract and connubial intercourse. With regard, again, to those that occur after the contract but before such intercourse, there is room for doubt; but, according to the opinion that is best supported by traditional authority, they are not a sufficient cause for cancellation, and this is corroborated by the consideration that at the time of the contract it was free from objection.

A blemish in a woman, to be a ground for cancellation, must have existed at the time of the contract.

*Second.* The option of cancellation must in all cases be exercised immediately, for if a blemish be known to man or woman, and they do not hasten to cancel the contract, it becomes binding upon them. And the rule is the same in the case of option on account of *tudlees* or deception.

The right to cancel must be exercised immediately.

*Third.* Cancellation on account of a blemish is not *tulák* or repudiation. Hence, it does not give occasion for halving the dower,<sup>6</sup> and is not reckoned in making up the number of three repudiations.

Cancellation for a blemish is not repudiation;

*Fourth.* A man may lawfully exercise his right of cancellation without the intervention of a judge. And a woman may do so also. True, that in establishing impotence a judge is required to fix the period allowed to the man in such cases to test his inability. But on the

and does not require the intervention of a judge, except in the case of impotence.

<sup>5</sup> Female organs so narrow as only to allow a passage for the urine—Johnson's *Arab. Diet.*

<sup>6</sup> That is, in case of cancellation before coition.



expiration of the prescribed period, she can cancel the marriage of herself when no connubial intercourse has taken place. <sup>7</sup>

In disputes as to blemish, denier's word preferred.

*Fifth.* When there is a difference between the parties as to the existence of the blemish, the word of the denier is to be received in the absence of proof.

How the right to dower is to be determined on cancellation of a marriage.

*Sixth.* When a husband has cancelled his marriage for one of the blemishes before described, and this is done before consummation, the wife has no right to dower; but if it is not done till after consummation, she is entitled to the full amount specified in her contract; for the right being once established by coition, is so completely confirmed that it cannot be extinguished by cancellation. The husband, however, has a right of recourse against the person by whom he was deceived. In like manner, if a wife should cancel her marriage before consummation, she has no right to dower, except in the single case of impotence; while if she does not cancel it till after consummation, she is entitled to the full sum specified in the contract. So also, where the blemish for which the marriage has been cancelled is the husband being an eunuch, the wife is equally entitled to her full dower if coition has taken place.

Special rules for the establishment of impotence.

*Seventh.* Impotence is not established without the husband's acknowledgment before the judge, or proof of a previous acknowledgment by him, or by his refusal to swear. If there is none of these, and the wife prefers a claim on the ground of impotence, the word of the husband is to be received when confirmed by his oath. Some, however, contend that he should be placed standing in cold water, and that if there is a contraction of the parts, judgment should be given according to his assertion, while if they remain relaxed, judgment should be given in favour of the woman. But no reliance is to be placed on this experiment as any test. If impotence has been established against the husband, and he subsequently alleges connubial intercourse with his wife, credit is to be given to his assertion when confirmed by his oath. And if he alleges

<sup>7</sup> According to the Hanifites, a decree of separation by the judge seems to be necessary. *D.*, p. 347.

that he has had connection with other women, his word is still to be received if accompanied by his oath. But judgment should be given against him if he refuse to swear. Some, however, maintain that in this case the oath is to be tendered to the wife, and the opinion is recommended by the usual course of procedure in cases of refusal.

*Eighth.* When impotence has been established, and the wife is patient, or declines to proceed in the matter, nothing further is to be said; but if she insists on bringing it before the judge, the case is to be postponed for a year from the day of her appeal to him, and if, in the interval, connubial intercourse takes place, or the husband has had connection with another woman, the wife has no option; but if nothing of the kind has happened, she has a right to cancel her marriage, and has a right to half the dower.

Course to be followed before the judge.

### SECTION THIRD.

#### *Tudles,<sup>8</sup> or Deception.*

Where a man has married a woman on condition of her being free, and she proves to be a slave, he has a right to cancel the marriage, even though connubial intercourse should have taken place. Some go further and say, that the marriage is void; but the first opinion is better founded on traditional authority. If the marriage is cancelled before coition, the woman has no right to dower; but if the cancellation does not take place till after it has occurred, her right to dower is fully established. Some say, however, that the dower named in the contract is extinguished, and that her master can claim only the tenth if she were a virgin, and half the tenth if she were not so; but the first opinion seems to be more agreeable to the general principles of the law. And the husband has a right of recourse for a refund of whatever he may be obliged to pay, against the person who practised the deception upon him. If that person were the master of the

A man who marries a woman on condition of her being free, may cancel the marriage if she proves to be a slave.

<sup>8</sup> Literally, "concealment of faults."

slave, some of our doctors are of opinion that the marriage is valid, and the wife made free by virtue of his declaration, if the words of which he made use were such as can fairly be construed to imply emancipation, while if they cannot bear that construction, she is not emancipated, but has no right to dower. If the woman herself were the deceiver, her master is entitled to compensation for the enjoyment of her person; but the husband is entitled to a refund of it as against the woman herself if she should ever be emancipated; and if he has actually paid her the dower, he may immediately recover whatever of it may be still in her hands, and proceed against her for the remainder when she has obtained her freedom.

And a woman has the like power in similar circumstances.

When a woman has married a man on condition of his being free, and he proves to be a slave, she has power to cancel her marriage before or after connubial intercourse; but if the marriage is cancelled before it, she has no right to dower, while her right to it is fully established if the cancellation does not take place till after coition.

A man who contracts with another for his daughter on condition of her being the child of a free woman, may cancel the marriage if she proves to be the child of a slave.

When a man has contracted with another for his daughter on condition of her being the child of a free woman, and it proves that her mother was a slave, some of our doctors maintain that he has a right to cancel the marriage; and it would seem that he has such an option when there was an express stipulation to that effect; but not so, if the contract were in general terms. If he should avail himself of his option, and cancel the marriage before coition, the woman has no right to dower; but if the cancellation does not take place till after coition, her right to dower is fully established, the husband having at the same time a right of recourse against the deceiver for a refund of it, whether he be the father of the damsel or another person.

Every person to whom another woman has been brought instead of his wife,

If a man should marry his daughter to another as the child of a free woman, and should send him, instead of her, his daughter by a slave, the husband may return her to her father; but if coition has taken place, he is liable for her proper dower; for which, however, he is entitled to a refund from the father, who must also restore to him the

daughter whom he had actually married. So also may every one act to whom another than his own wife has been brought, whom he supposes to be his wife, whether the woman be higher or lower in degree than the person whom he has married.

When a man has married a woman stipulating for her being a virgin, and finds that she is not so, he has no power to cancel the marriage, because the marks of virginity may have been destroyed by some concealed cause other than coition. But he is entitled to a deduction from the dower equivalent to the difference between the dower of a virgin and one who is not so. Some, however, maintain that the amount to be deducted is a sixth of the dower, but this is erroneous.

When a man has taken a woman in *mootâ*, or by temporary marriage, and finds that she is a *Kitabeeah*, he has no power to cancel the marriage, without giving up his right to her during the time or period for which the marriage has been contracted; nor can he deduct any part of the dower. And even though the contract were a permanent one, the result would be the same according to one of two opinions on the subject. If, indeed, there were a positive condition that the woman should be a *Mooslimah*, there is no doubt that he would have the power of cancelling the marriage should she prove to be of a different religion.

When two men have married two different women, and the wife of each has been brought to the other, and he has had connection with her, each of the women is entitled to her proper dower as against the man who has had such connection with her, and must be restored to her own husband, who is liable to her for the dower specified in her contract; but it is unlawful for him to have connubial intercourse with her until the expiration of her *iddut* on account of the first connection. If both the women should die during the *iddut*, or the husbands should die, each of the men would inherit to his own wife, and each of the women inherit to her own husband.

In every place in which we have judged the contract to be void, the wife is entitled, when connubial intercourse

may return her, but is liable for her proper dower if coition takes place.

A man who marries a woman on condition of her being a virgin, has no right to cancel the marriage if she proves to be otherwise.

A temporary marriage cannot be cancelled because the woman is not a *mooslimah*, in the absence of an express condition.

Case of two men having the wives of each other brought to them on the night of their marriage.

Whenever a contract is void *ab*

*initio*, the wife is entitled to the proper dower ; and wherever it is valid, but cancelled, she is entitled to the dower specified in it.

has taken place, to her proper dower, and not to the dower appointed for her by the contract ; and in every place in which we have judged the contract to be valid, the wife is entitled, on cancellation of her marriage, to the full dower specified. It is maintained by some of our doctors that if the marriage is cancelled on account of a blemish antecedent to coition, the proper dower is due, whether the blemish were in existence before the contract, or did not occur till after it ; but the first opinion is more agreeable to the general principles of the law.

CHAPTER V.

OF MUHR OR DOWER.

SECTION FIRST.

*Valid Dower.*

ANYTHING whatever which is capable of being legally acquired, whether it be substance or usufruct, is a valid subject of dower; and marriage may be lawfully contracted for the usufruct of a freeman, that is, for service to be rendered by him in the teaching of a trade, or instruction in a chapter of the Korán, or any other lawful business, or even for the personal service of the husband himself for a stated period, although some of our doctors have prohibited the latter on the authority of a report, which, however, is but weakly authenticated, and further, falls short of the prohibitive sense which these doctors have put upon it.

Anything that can be lawfully appropriated may be the subject of dower.

If two *zimmees*, or infidel subjects, should contract marriage together for wine, or a hog, the contract would be valid, because these are things which may be lawfully acquired by them. But if both or either of them should embrace the faith before possession has been taken of the dower, the husband must deliver its value, as the thing itself is incapable of being the property of a believer. And it makes no difference whether the subject of the dower were specific, or engaged for in general terms, and left on the responsibility of the husband. If both of the parties to a contract in which wine or a hog is the dower, be *Mooslims*, or professors of the faith, or the husband only be a *Mooslim*, some doctors have pronounced such a contract to be null, and others have supported its validity,

Things unlawful to Mussulmans may be the subject of dower between *zimmees*.

decreeing the *muhr-ul-mithl*,<sup>1</sup> or proper dower to the wife, in the event of coition. According to a third opinion, she is to receive the estimated value of the wine or hog; but the second opinion is most generally approved.

The amount of dower is dependent on the will of the parties.

There are no bounds to the quantity or value of the dower, which is left entirely to the will of the husband and wife, so long as it is capable of appreciation, that is, not totally destitute of value, like a single grain of wheat, for example.<sup>2</sup> Some of our doctors have declared that a dower cannot legally exceed the *muhr-ul-soonnut*, or the dower bestowed by the Prophet on his wives, and have declared that any excess over that amount must be returned to the husband; but this opinion is not to be relied upon.

If the subject of dower be seen, its amount need not be ascertained.

It is sufficient in the assignment of dower that the article which is the subject of it be seen, if produced, although of unknown measure or weight, like a heap of grain, for instance, or a bit of gold; and it is lawful to marry two or more women for one dower, which must in that case, according to some of our doctors, be divided equally among them, or, according to others, in proportion to their proper dowers,—which latter opinion is more agreeable to the general principles of law.

When a slave or house is assigned in general terms, one of medium value must be delivered.

If a man should marry a woman for a servant or slave, in general terms, without his being seen or described, a slave of medium value must be delivered to her; and the same rule applies to a *beyt*, or house, stipulated for in general terms, founded on a report by *Aly Ebn Ally Humzah*; as also to a *dar*, or mansion, as recorded by *Ben Aby Ameer* from some of our doctors, quoting the authority of *Aby al Husn*,<sup>3</sup> on whom be peace.

Dower of the *soonnut* is 500 *dirhems*.

If a man should marry a woman “according to the Book of God, and the *soonnut*, or traditions, of his Prophet,” without any specification of dower, she is to receive, in that case, five hundred *dirhems*. If, again, a dower is specified for the woman, and also something for

<sup>1</sup> Usually pronounced *muhr-i-misl* in India.

<sup>2</sup> According to the Hanifites, the lowest amount of dower is ten *dirhems*.—*D.*, p. 92.

<sup>3</sup> The *Imam Moosey Reza*.

her father, the husband is legally bound only for the first, and the stipulation in favour of the father is of no avail. It is otherwise where a husband endows his wife with a dower, and stipulates that something is to be given out of it to her father; for in that case both the dower and the stipulation are valid, in opposition to the former example.

It is indispensable in marriage contracts that the dower be specified in such a manner as to remove all doubt and uncertainty. Thus, if the dower agreed upon be instruction in a chapter of the Korán, the chapter must be specified; and if it is left in general terms the dower mentioned is invalid, and the woman must receive her proper dower in the event of consummation. Whether, also, the mode of reading<sup>4</sup> must be specified, is a question which some have answered in the affirmative, and others maintain that it is not necessary, but that the husband must instruct her in a manner that is lawful,—which last opinion appears to be the best founded. Should the wife direct him to instruct another in her room, this is not incumbent upon him, as not included in the stipulation.

If a husband should assign as the dower of his wife the teaching her a business in which he is not expert, or a chapter of the Korán of which he is ignorant, such dower is nevertheless valid, for the engagement is established on the husband's responsibility; and if he is unable to perform it himself, he is bound to pay the hire of such instruction. If, again, he assign to her as dower a vessel said to contain vinegar, and it afterwards appears that the contents are wine, some of our doctors have maintained that she is entitled to have the value of the wine as if it were lawful, and others a similar quantity of vinegar, which latter appears to be the better opinion. In like manner, should he assign a particular slave, and if it afterwards appears that the person is free, or the property of another, the

The dower must be so indicated as to remove all uncertainty.

If a thing is assigned which proves to be unlawful, or not the property of the husband, its value must be given instead.

<sup>4</sup> This case has a reference to the seven different modes or tones prescribed for reading the Korán in the science of reading the sacred book, which is considered, in Arabia, a most important branch of study.



Case of a private and public assignment of dower.

woman is to receive a slave of like value as the person mentioned. And if he should marry her for one dower privately and another openly and in public, the first is her dower.<sup>5</sup>

The husband is responsible for the dower unblemished.

The husband is responsible for the dower. If, then, it should perish before delivery, he must make good its value at the time of its loss, according to the most commonly received doctrine among us; and if it is found to be blemished, the wife may return it on account of the defect. But if it should be blemished after the contract, it has been said that she has an option, and may take either the thing itself, blemished as it is, or its value. It were better, however, to say that she has no title to claim its value, and can only take the thing itself, with a compensation for the blemish.

A wife may refuse to surrender herself till her dower is paid.

A woman may refuse to surrender her person till she has received delivery of her dower, whether the husband be wealthy or in straitened circumstances. But whether she can do so after the marriage has been consummated, is a question that has been answered both in the affirmative and the negative. The latter opinion, however, is the more conformable to the general principles of law, because fruition is a right in the husband to which he is entitled by the contract.

Moderation in the amount of dower laudable.

Moderation in the amount of the dower is commendable; and to exceed the *mahr-ul-soonnut*, or dower of the traditions, (five hundred *dirhems*.) is abominable. As it is, also, for a husband to have connubial intercourse with his wife till he has first paid her the dower, or at least some part of it, or has given her something else as a present or gift.

## SECTION SECOND.

### *Tufweez, or Gratuitous Surrender.*

*Tufweez* is of two kinds.

This is of two kinds, *Tufweez-ool-Boozá*, or surrender of the person,<sup>6</sup> and *Tufweez-ool-muhr*, or surrender of the

<sup>5</sup> See *Digest*, note on p. 118.

<sup>6</sup> Literally, *arvum genitale mulieris*.

dower. By the first is to be understood a contract, in which no mention whatever is made of dower, as if an agent should say, "I have married thee to such an one," or the woman herself should say, "I have contracted myself in marriage to thee," the man saying, "I have consented."

This species of contract includes the following cases :—

*First.* The mention of dower is by no means a condition of validity in a contract of marriage. If, therefore, a person should marry a woman without any mention of dower, or with an express condition that there shall be none, the contract would be valid. And if he should divorce her before consummation, she would have no right to dower, though entitled to a *mootât*, or present, whether she be free or a slave. But if divorced after consummation, she must receive her proper dower, having no claim to a present in that case. Further, should one of the parties die previous to coition and before settlement of the dower, neither dower nor a present can be claimed in such a case; and it is to be observed that the proper dower is not established in any case by virtue of the contract alone, but is determined by its consummation.

*Second.* The *mûhr mithl*,<sup>7</sup> or proper dower of a woman, is regulated by the nobility of her birth, the beauty of her person, and the custom of her female relatives, provided that it does not exceed the dower of the *soonnut* or five-hundred *dirhems*. And the *mootât* or present is regulated by the condition and circumstances of the husband. Thus a rich man is to present his wife with a quadruped, a rich dress, or ten *deenars*; a man of the middle class with five *deenars*, or a dress of middling value; and a poor man with one *deenaar*, a ring, or the like. Further, no woman is entitled to a present except a woman for whom no dower has been assigned, and who has been divorced before consummation.

*Third.* If the parties agree, subsequent to their contract of marriage, upon the settlement of a dower, it is legal and valid, for the right is with them, whether

1. When no mention is made of dower in the contract.

A present must be given to the woman if divorced, before coition, or her proper dower if she is divorced after it.

How the proper dower and present are to be regulated.

Dower may be settled after marriage.

<sup>7</sup> Usually pronounced *misl* in India.

the amount agreed upon is equivalent to the proper dower, or is more or less than it, and whether the parties, or one of them, be acquainted with the proper dower or ignorant thereof, for the settlement of the dower rested with them at the first, and it is equally lawful to the end.

Marriage with a slave invalidated by her husband's purchasing her, and she has no right to dower.

*Fourth.* If a man marry a slave and then purchase her, the marriage is invalidated,<sup>8</sup> and she has no right either to dower or a present.

*Tufweez* restricted to the case of women who are adult and discreet.

husband's purchasing her, and she has no right to dower.

*Fifth.* *Tufweez*, or voluntary surrender, is established only on the part of a woman who is adult and discreet, and is not valid if made by a child or even a full-grown woman that is of a weak or facile disposition. If, again, a guardian should contract his ward in marriage for less than her proper dower, or without any mention of dower, though the contract would be valid the woman would be entitled to her proper dower in virtue of the contract alone. But this decision is liable to doubt on the principle that a guardian is vested with powers to act as he thinks best for his ward, and may therefore be trusted with the *tufweez* or surrender of her person, in confidence that it is for her benefit in the particular instance; and this decision appears to be the most proper. Supposing, however, the first to be correct, and that the husband divorces his wife previous to coition, she would on that supposition be entitled to half her proper dower; whilst, according to the doctrine that we prefer she would be entitled to no more than a present. Further, it is lawful for a master to surrender his slave without any mention of dower, as he has an exclusive right to the dower.

Case of a female slave being married without specification of dower, and being then sold.

*Sixth.* When a master has contracted his slave in marriage without any mention of dower, and has subsequently sold her, the future settlement of dower rests in that case with the husband and the second master, should he ratify the marriage; and he alone is entitled to

<sup>8</sup> According to the Hanifites, marriage is invalidated by either party becoming the proprietor of the other.—*D.*, p. 203, and see *ante*, p. 38.

the dower without any participation of the first. But if her first master should emancipate her previous to the consummation of her marriage, and she should approve or be content to abide by the contract, she would herself alone be entitled to the dower.

· With regard to the second kind of surrender, or that of the dower, which is that kind of contract in which the dower is mentioned in general terms and the amount left to be fixed by one of the spouses. When the husband is the appointed judge, he is not restricted on the side of either more or less, and may lawfully fix anything that he pleases; but when the amount is left to the judgment of the wife, though she is in nowise restricted on the side of less she is limited on the side of more, and cannot lawfully exceed the dower of the *soonnut*, or five hundred *dirhems*. Should the husband divorce his wife before coition, and also before the settlement of the dower, the person to whose judgment the matter was left must immediately fix the amount, and the wife is entitled to the half of it; provided that when the wife is the party invested with the power, whatever she awards must not exceed the dower of the *soonnut*. If the judge or referee should die before fixing the amount, and previous to coition, some of our doctors have said that the dower is cancelled, and the wife entitled only to a *mootât* or present, while others insist that she has no right to either; but the first opinion is supported by express tradition.

Second kind of *tufweez*, where the dower is left to be subsequently fixed.

### SECTION THIRD.

#### *The Laws of Dower.*

These are comprehended in the following cases:—

*First.* When a marriage has been consummated before delivery of the dower, the right to it is by no means cancelled by the consummation, but remains a debt against the husband, for which he is responsible, however long or short may be the delay in its payment, and whether it be demanded or not. There is indeed a report the other way, but that has been set aside or abandoned.

Right to dower not cancelled by consummation, but husband always responsible for it till actual payment.

Consummation, what.

It is to be observed that by consummation, as a means of establishing a right to dower, is to be understood actual coition, either naturally or against nature,<sup>9</sup> and the right is by no means established by mere retirement, as some of our doctors have maintained,<sup>10</sup> the first opinion being better supported by traditional authority.

When no dower has been specified, a gift before consummation must be assumed to be the dower, unless otherwise stipulated.

*Second.* When no dower has been named in the contract, but the husband has given something to his wife, and then consummates the marriage, it has been said that the thing so given previous to coition is to be accounted the dower, and that the wife has no right to demand anything more after the coition, unless it was previously stipulated that the dower should consist of something else. This is founded on an analogical exposition of a report, and is supported by the well-known opinion of our doctors.

Wife entitled to half the dower if divorced before coition, and if the whole has been paid, must return half, or its value.

*Third.* When a man has divorced his wife before consummation of their marriage she is entitled to half the stipulated dower, and if the whole were paid in advance, he is entitled to a refund of half of it if still in existence, or half of a similar to it if the thing itself have perished, or half of its value if a similar cannot be procured. If there should be any difference between its value at the time of contract and at the time of taking possession, the wife is bound only for the lowest of the two values. If, again, the identical substance remain in her possession, but it has become injured in some of its qualities, as, for instance, if the dower were an animal which has become blind of an eye, or a slave who has forgotten the trade in which he was instructed, the husband is in this case entitled to half the value, and cannot be compelled to take the thing itself, although this decision is liable to some doubt. If, however, the diminution of value should arise merely from a change in the price, he is entitled to no more than half of the article itself, as he is also, on the other hand, entitled to the half of it if an increase in its value should take place from a rise in the market price, because

<sup>9</sup> See *ante*, note, p. 60.

<sup>10</sup> And as is the doctrine of the Hanifite sect.—*D.*, p. 96.

no reference can be made to value so long as the actual substance remains unchanged. Where, again, an essential increase of the substance has taken place, as by natural growth in the case of a young animal, or by an addition of fat in the case of a lean one, he is entitled only to half of the original value without the increase, and the wife cannot be compelled to make over half of the thing in its improved condition, according to the best founded opinion. Further, any produce of the original dower, such as the milk or young of an animal, is the exclusive property of the wife, and the husband is entitled to no more than half of what was specified in the contract. But if he had endowed her with a pregnant animal as her dower, half of both the animal and its offspring would be his; while if instruction in a trade were the dower, and he had divorced her before consummation, she would be entitled to half the hire of instruction, and if he had already instructed her previous to the divorce, he would be entitled to a refund of half the hire.

*Fourth.* If a woman exonerate her husband from the dower, and he then divorces her before consummation, he has a claim against her for half the dower; and in like manner if he should enter into a *khooli* with her, or bargain for release from the marriage tie, in exchange for the whole dower, he would be entitled to have recourse against her for a refund of half of it, if he should divorce her before consummation.

Effect of an exoneration by wife of the dower;

*Fifth.* Where a man has given his wife in exchange for her dower a fugitive slave, and something besides, and then divorces her previous to coition, he has a claim against her for a refund of half the original dower specified in the contract, and not of that subsequently exchanged for it. In like manner, if he should commute it for any other article, either moveable or immoveable, restitution, in the event of divorce, takes place only in the original dower, and not in the article exchanged for it.

or a commutation of the dower for something else.

*Sixth.* When a *moodubburah* has been assigned as dower, and the wife is divorced (before consummation), the slave becomes their joint property in equal shares, and

Case of a *moodubburah* being assigned as dower.

of our doctors have alleged that this power belongs to every person who has authority to contract a woman in marriage. The father and paternal grandfather may forgive the husband a part of the dower, but neither of them can give up the whole. The husband's guardian, however, has no legal power to give up his ward's right to half the dower in the event of a divorce previous to consummation, for he is appointed to take care of the interests of his ward, who can have no possible benefit from the abandonment of his right. Further, when either the wife has forgiven her half, or the husband has forgiven his half, in neither case does the right of property pass out of the person foregoing the right, by the mere act of forgiveness, for that is only a gift which is not completed without possession. If, indeed, the dower were a debt against the husband, or if it should happen to perish in the hands of the wife, mere forgiveness of the responsibility would be quite sufficient, because it would be a release which does not require even acceptance. It is otherwise in the case of *mal*, or tangible property, for which a person is liable, for that cannot be transferred by mere forgiveness, or anything short of actual delivery.

A wife cannot deny herself to the embraces of her husband when the dower is deferred.

*Fourteenth.* If the dower is *moowujjul*, or deferred, the wife cannot deny herself to the embraces of her husband; and if she has contrived to withhold herself till the arrival of the stipulated period, a question may arise whether she can then lawfully deny herself till the dower is paid. To this question some of our doctors have answered in the affirmative, but others in the negative, with better reason, because she was already bound to surrender herself before the arrival of the period agreed upon for payment of the dower.

Where the dower is a piece of silver which has been manufactured, and the wife is divorced before coition, she may re-

*Fifteenth.* If the husband should assign as the dower a piece of silver bullion, which the wife has converted into a vessel, and he divorces her previous to coition, she has an option, and may deliver half the identical article or its value in money; for it is not incumbent upon her to give up the price of the manufacture. If, on the other hand, the dower were a piece of cloth which she has sewed up into a shift, the husband is not obliged to take it, and may demand half

the value, because silver does not lose its identity by being store half manufactured, whereas it is otherwise with cloth. its value.

*Sixteenth.* If the dower be instruction in a chapter of When the dower is instruction in a chapter of the Korán, the husband is bound to make his wife capable of reading the chapter by herself, and it is not sufficient that she merely follow him in repeating his words. True, if rendered capable of independently reading one verse, he then teaches her another and she forgets the preceding, he is not bound to go over it again; but if she require the assistance of, or be instructed by any other person than her husband, she is entitled to receive from him the hire of such instruction, in the same way as if he had assigned something as the dower which he is unable to deliver up. Korán, she must be taught to read it by herself.

*Seventeenth.* It is lawful to combine marriage and sale in one contract, and the whole consideration must be divided in the proportion of the wife's proper dower and the market price of the article. But if a woman, holding a *deenar* in her hand, should say, "I have contracted myself to thee in marriage, and sold this *deenar* to thee for a *deenar*," the sale would be void on the ground of usury, and the dower invalidated, the marriage, however, being valid. If, again, the articles were of different kinds, as if, for instance, a garment were substituted for the first *deenar*, she should say, "I have sold you this garment and contracted myself in marriage to thee for one *deenar*," the whole would be valid. Sale and marriage may be joined in one contract, and the consideration is to be divided in proportion to the proper dower, and the market price of the thing sold.

#### *Branches from the Preceding.*

*First.* If a husband should assign as his wife's dower a slave whom she emancipates, and the wife is then divorced before coition, she is liable for half his value. If, again, she should have made the slave a *moodubbur*, it is said that she has an option and may either revoke<sup>14</sup> or abide by the *tudbeer*. Should she adopt the latter course, the husband has half the slave, but if she decline this exercise of the option she cannot be compelled, and is only liable for half the value. Further, if she should pay that amount Case of a slave being assigned for dower, who is afterwards emancipated by the wife, or made a *moodubbur*.

<sup>14</sup> *Tudbeer* is like a legacy, and may be lawfully revoked.—*Shuraya*, p. 358.



and then revoke the *tudbeer*, it is said that the husband may renew his claim to half the slave, having accepted the value merely from the intervention of the *tudbeer*. But this decision is liable to doubt, from a consideration that by payment of the value the woman's right of property in the slave was once fully established.

Though a guardian should contract his ward for less than her proper dower, it is valid.

*Second.* If a guardian contract his female ward in marriage for a smaller sum than her proper dower, some doctors have alleged that the dower is null, and that she is entitled to the proper dower. Others have asserted that the appointed dower is valid, and this doctrine is the most approved.

Cases where an exoneration by the wife of her dower is valid, and where it is not.

*Third.* If a person marry a woman, assigning as her dower some property pointed out, but of unknown weight, which perishes before delivery, and the wife releases him from it, this is valid. As also, where he has assigned her a dower that is invalid, and the wife being in consequence, entitled to her proper dower releases him from it in whole or in part, such acquittal is, in like manner, valid, although the amount is yet unascertained, because this is merely the cancelling a right which in law is not affected by ignorance of the amount. If, however, a wife should exonerate her husband of the proper dower before coition, such acquittal is invalid, because her right to it is not yet established.<sup>15</sup>

A father contracting his son in marriage is liable for the dower unless the son has means of his own.

*Fourth.* If one should contract his infant son in marriage, and the child has independent means of his own, he is liable for the dower. If the child is poor the obligation rests entirely on the father, and, in the event of his death, must be discharged out of the whole of his property, whether the child should arrive at maturity and become wealthy, or die before it. If, therefore, the father should have paid the dower, and the youth should come to maturity and then divorce his wife before coition, the son and not the father has a right to reclaim half the dower, the payment by the father being considered, in the light of the law, as a gift to the son.

<sup>15</sup> It is only by coition that the right to the proper dower can be established. *Ante*, p. 71.

*Fifth.* If a father should gratuitously pay the dower on account of his adult son, and the son should divorce his wife before coition, he is entitled to revert to her for half the dower, and the father cannot object to his doing so, notwithstanding what we have just said in the case of an infant child. But in both cases there is room for doubt.

Adult son can revert to his wife for half the dower though given by his father.

## SECTION FOURTH.

*Disputes regarding Dower.*

*First.* If the dispute is upon the fact whether a dower was assigned or not, the word of the husband is to be preferred; without any difficulty if the dispute has arisen previous to consummation, because a contract of marriage without specification of dower is common and probable. And though the dispute should have arisen after consummation, here also the word of the husband is to be preferred, as supporting the original and radical conclusion of freedom from obligation until the contrary is proved. Further, there is no difficulty in assigning the preference to the husband's assertion if he fix an amount of dower, however trifling, down to a grain of rice,<sup>16</sup> because here the probability is established, and the excess alleged being contrary to the probable conclusion and unknown, must be supported by proof. If the difference between the parties is as to the amount or quality of the dower specified, here still the word of the husband is to be preferred. Whereas, if he acknowledge the dower claimed by his wife, and allege his delivery of it, but fails to adduce any proof of his assertion, credit must in this case be given to the word and oath of the woman. Where, however, there has been an actual delivery of the dower, but the wife alleges that what was given was intended as a gift, here, again, the word of the husband is to be preferred, as he must necessarily be best acquainted with his own intention.

Word of the husband to be preferred if the dispute is as to the fact of any dower having been assigned.

Or its amount or value. But the word of the wife must be preferred if the dispute is as to delivery of the dower.

*Second.* If the husband and wife should have retired together, and the wife alleges that carnal intercourse took

Where the parties have re-

<sup>16</sup> Or it may mean the weight in money of a single grain.

tired together, and the dispute is as to coition, the word of the husband is preferred.

place between them, then, if the case admits of proof on the part of the husband, as where the wife was a virgin at the time of the marriage, and asserts coition in the natural way, the decision is obvious. Where, again, she was not a virgin at the time of the marriage, or alleges coition unnaturally,<sup>17</sup> the husband's declaration on oath must be credited, because the original condition is an absence of coition, and he denies what she alleges, which therefore requires to be established by proof. Some doctors, however, are of opinion that her assertion upon oath must be received as supported by the natural conclusion to be drawn from a man and woman in good health retiring together when no obstruction to the carnal act is alleged. But the first doctrine is the most approved.

In dispute as to instruction wife's word preferred.

*Third.* When the dower is instruction in a chapter of the Korán, or in a trade, and the wife alleges she has been taught something else, her word is to be preferred, for she is a denier of what he claims.

Where there have been two separate contracts, and the man alleges that the second was only a repetition of the first, the word of the wife is preferred.

*Fourth.* If a woman should adduce evidence to prove that her husband married her at two different times by two separate contracts, as founding a claim to two dowers, and he should insist that what she supposed to be two contracts was merely a repetition of the one contract, her word is to be preferred, because appearances are in her favour. Whether he is liable for the two dowers is a question which has been answered in the affirmative, in reliance on the fact of there having been two separate acts of contract; but it has also been said that he is only liable for a dower and a half. The first opinion, however, is the most approved.

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<sup>17</sup> See note on page 60.

CHAPTER VI.

OF KISM, NUSHOOZ, AND SHEKAK.

SECTION FIRST.

*Kism, or Partition.*

EACH of the spouses possesses certain rights which it is incumbent on the other to respect ; and, as a husband is bound to maintain his wife by providing her with raiment and food and a place to reside in, so also it is incumbent on the wife to submit herself to his embraces, and to avoid everything that may render her repulsive or disagreeable to him.

Mutual duties of the parties.

*Kismut*, or a partition of his time amongst his wives, is a duty which is incumbent on a husband, whether he be free or a slave, and even though he should be impotent or an eunuch ; as also though he be insane, but in that case the partition should be regulated by his guardian.

Equal partition of time among wives is incumbent on a husband.

Some of our doctors are of opinion that partition is not incumbent on a husband until he has once begun to cohabit with his wives ; and this doctrine is the most approved, though others have maintained its necessity from the beginning of the married state.

Not due till it has been once commenced.

If a man be married to one wife she has a right to one night out of every four, and the other three are at his own disposal to sleep where he pleases. If he has two wives they are entitled to two nights, and if he has three they are entitled to three, while he has a right to dispose of the excess in each case up to four, as he pleases. If he has the full complement of four wives, each one of them has a right to a night in her turn, and he cannot absent himself

Where he has only one wife three nights are at his own disposal, and so on where he has only two or three.

from the proper partner of that night without a just pretext, or being on a journey, or her permission.

The pe-  
riods, as  
one or two  
nights  
with each,  
to be de-  
termined  
with their  
consent.

Whether the husband can lawfully regulate the partition by giving more than one night to each wife, is a question that has been answered in the affirmative, but it would seem that he cannot do so without their consent. And if he should marry four wives at once, the order of cohabitation should be determined by lot. Some, however, have said that he may begin with any one of them at his pleasure, and so on till he has gone through the whole, after which he is bound to equality in the same order, and this opinion is the most generally approved.

Partition  
limited to  
spending  
his time  
equally  
with his  
wives.

What is incumbent on a man in respect of partition is merely to spend his time with the wife to whom it is due, and does not extend to coition. It is also confined to the night, to the exclusion of the day. But some say that he should not only remain with her during her night, but should prolong his stay for the morning, and there is a tradition to that effect.

A free  
woman en-  
titled to  
twice the  
time of a  
slave, and  
a *mooslim-  
ah* to twice  
the time of  
a *kita-  
becah*.

If a person be married to a slave and a free woman, or several free women, each of them is entitled to two nights for one to the slave, and a *zimmeeah* or infidel subject is in respect of partition on the same footing as a slave; so that if a man be married to a *mooslimah* and a *kitabecah*, the former is entitled to two nights for one night to the latter; while if he has a *mooslimah* who is a slave, and a *kitabecah* who is free, they are both to be treated exactly alike in respect of partition.

The time to  
which each  
wife is en-  
titled may  
be spent  
with her in  
her own  
apartment,  
or by call-  
ing her to  
his.

A woman enjoyed by right of property has no title to partition, whether she be single or there be several in that predicament. And a man is at liberty to go the round of his wives in their own houses or apartments, or to call them to his own apartment. He may also practise the one course with some of them, and the other course with others, impartiality in this respect not being required.

Seven  
nights al-  
lowed  
for con-  
summation  
of mar-

A man should remain seven nights with a virgin for consummation of his nuptials, and three nights with a woman who has lost her virginity, such times being specially appointed by law for these respectively, and he is

not obliged to make up to his other wives for the deficiency. If two or more wives are conducted to a man in one night, he may commence, according to some, with whichever of them he pleases, while, according to others, he ought to cast lots; but the first opinion is most generally approved, though the latter would perhaps be better.

The duty of partition abates on a journey. Some, however, have said that if the journey be only a migration from place to place, with intermediate residences at places on the way, he ought to make up for it to his other wives on his return, and that it is only with regard to distant journeys that the right abates. When he intends that any of his wives should accompany him on a journey, he should cast lots between them. Whether he may pass by the person on whom the lot has fallen, is a question that has been answered in the negative, because she has been in a manner appointed for the purpose, though the point is open to doubt.

The right of a slave to partition is not dependent on the permission of her master, because this is a matter in which he has no portion.

Equality among wives should be observed in respect of maintenance, general behaviour, and coition.<sup>1</sup> A husband ought also to remain in the morning with the wife who is entitled to the preceding night. Further, he should allow his wife to visit her father and mother on the approach of death, though it is in his power to forbid her visiting them or her other relatives, or going out of his home except on necessary occasions.

Partition is a connubial right common to both husband and wife, or one in which both are partners, because they both participate in its fruit or advantages; and if a wife should release her husband from the duty to her, he has an option and may accept or decline availing himself of it. She may also bestow her right as a gift upon her husband, or any other of his wives with his consent; and if the gift is to her husband he may spend the night wherever he

riage with a virgin, and three with a *siyyibah*.

Right to partition abates on a journey.

Slave's right to partition not dependent on master.

Equality should be observed in maintenance and general behaviour.

A wife may give up her right to her husband, or her co-wives, but not without his consent.

<sup>1</sup> That is, it is proper, though not an incumbent duty. See *ante*, p. 84.

pleases ; but if she bestows it upon his other wives, he must divide it between them ; while if she should give it to one of them in particular, it must be devoted specially to the donee. In like manner, if three of them should give up their nights to the fourth, it is incumbent on him to remain with her constantly and exclusively.

A gift by a wife of her time to a co-wife may be retracted.

When a wife has bestowed her right on another with the husband's consent the gift is valid, and she may retract the gift, but not so as to give the retraction a retrospective effect. The husband, therefore, is not bound to make up to her for the past, though he is obliged to have respect to her right for the future. Should she revoke without informing him, he is not bound to make up for any nights that may have passed previous to his becoming acquainted with the revocation.

Man not bound to keep promise to give an exchange for wife's time.

If a woman should ask anything in exchange for giving up her right, and he should consent, is he bound to perform ? It has been said not, because this is a right which does not admit of separate valuation, and the exchange therefore is not valid.

Infants or mad women not entitled to partition.

An infant has no right to partition, nor has a woman who is permanently mad, nor a *nashizah*, that is, one who is in a state of rebellion to her husband, nor one who has gone on a journey without her husband's permission ; so as to lay the husband under any obligation on account of what is past.

A husband cannot visit any of his wives during the night of another.

A husband is not entitled to visit one of his wives during a night belonging to another, unless she be sick, when it is lawful to visit her. Whether, if he spend the whole night with her, he is bound to make up for it to the other, is a question that has been answered in the affirmative, because she has not obtained her night, and also in the negative, because it is like a visit to a stranger ; and this view seems most agreeable to the principles of law. If he should enter the chamber of another and copulate with her, and then return to the wife whose night it is, he is not bound to make up for such coition to the wife whose turn is thus encroached upon, for coition is not one of the rights of partition.

When a man has oppressed his wife in the matter of partition, he is bound to make up to her for any deficiency in her nights. Man bound to make up to wife for deficiency.

When a man has four wives, and one of them is rebellious, and he then fixes a period of fifteen nights in succession for each of his wives,<sup>2</sup> and he has fulfilled their time with two of them, after which the rebellious one returns to her duty, he is obliged to fulfil her fifteen days to the third wife, and five to the one who was rebellious, giving the latter one night and the other three nights for five times in succession, by which means the third wife will obtain her fifteen nights, and the rebellious one her five, after which he reverts to the original measure of partition between the whole four alternately. Case of a rebellious wife returning to her obedience.

If a man has two wives in different cities, and has remained with one of them for ten days, it is said that he should abide for the like time with the other. Case of two wives in different cities.

If a man should marry a wife, and before consummation should have to draw lots for one of his wives to accompany him on a journey, and the lot should fall upon her, it is lawful for him, on his return, to make up to her her appointed time,<sup>3</sup> for this does not enter into the journey, nor does a journey enter into partition. Time for consummation must be made up to a wife, if he has gone on a journey before it.

## SECTION SECOND.

### *Nushooz, or Rebellion.*

*Nushooz* in law signifies a departure from obedience, its original meaning being elevation or raising up. And it may be exhibited on the part of the husband, as well as that of the wife.<sup>4</sup> Should the symptoms of it appear on the part of the wife, as, for example, when she frowns in her husband's face, or appears languid and wearied in administering to his wants, or has otherwise changed her Legal definition.

<sup>2</sup> That is, with their consent — See *ante*, p. 84.

<sup>3</sup> See *ante*, p. 85.

<sup>4</sup> A husband can hardly be said to be rebellious towards his wife, and perhaps "*elated*," or "*overbearing*," better expresses the meaning of the word in its application to both the spouses. On the first symptoms a wife may be admonished;



respectful behaviour towards him, he should first rebuke or admonish her; and if she persist in such behaviour, he may then lawfully abstain from matrimonial converse with her, by turning his back on her in bed, or, according to some, totally banishing her therefrom; but there is a positive tradition in favour of the first opinion. It is not lawful for him to beat her until some positive instance of *nushooz*, by refusing to obey him in some particular case in which he is entitled to a compliance with his will. When that occurs even for the first time, he may lawfully chastise her, but only so far as may afford a reasonable hope of her returning to obedience, and by no means to the extent of violent blows, or the effusion of blood.

but not beaten until some positive act of disobedience.

How it is to be treated when exhibited by the husband.

When *nushooz* appears on the part of the husband, by depriving his wife of any of her rights, she may complain to the judge, who should compel him to their observance. A wife, however, may abandon any of her rights, as her right to partition or maintenance, in order to conciliate her husband; and he may lawfully accept the surrender.

### SECTION THIRD.

#### *Shekak, or Discord.*

Etymology of the word.

This is derived from the word *shuk*, which signifies to separate or divide, as if the spouses were in a state of separation from each other.

When it appears the judge should appoint two persons to arbitrate between the parties.

When there is *nushooz* on the part of husband and wife, and reason to apprehend an actual rupture, the judge should appoint two umpires, one from among the relatives of the husband, and the other from among those of the wife, to decide as may be best in the case. It is lawful, however, that these umpires be not of the family of either, or that one of them be of the family of one party, and the other a stranger to both. These persons should, according to the most authentic doctrine, be sent, not merely as agents, but with powers to decide between the parties as judges. If they agree as to measures of accommodation, they can give them effect without reference to the consent of the parties. Except that, though the umpires should

agree as to the necessity of a separation between them, this cannot be effected without the husband's consent, if it is to be by a *tulák* or a divorce; or without the wife's agreeing to a compensation, if it is to be by *khoolá*, or release.

When the umpires have been sent by the judge, and the parties, or either of them, refuse to appear before them, some are of opinion that judgment cannot be given, as it would be against an absent person. But it were better to say that it can be given, for it is limited to what is for the good of the parties, and actual separation is made dependent on their own permission.

Whatever is stipulated for, or directed by, the umpires, must be lawful, or otherwise it may be dissolved or cancelled. If a husband should prevent the wife from exercising any of her rights, or should render her jealous by taking another wife, and she should in consequence expend something on her husband as an inducement to him to grant her a *khoolá*, or release, such concession on her part would be valid, and not be considered compulsory.

Who may decide in the absence of the parties, or the refusal of either to appear before them.

Their decision must be according to law.

## CHAPTER VII.

## OF LAWS RELATING TO CHILDREN.

## SECTION FIRST.

*Of the Establishment of Parentage.*

Three descriptions of children. CHILDREN are of three descriptions: children by wives; children by slaves; and children by women enjoyed under a semblance of right.

Children born under a contract of permanent marriage belong to their mother's husband, on three conditions. With regard to the first:—All children born under a contract of permanent marriage appertain to the husband,<sup>1</sup> upon condition of coition and the lapse of not less than six months<sup>2</sup> nor more than the longest period of gestation from the time of its occurrence till the birth of the child. That period is nine months, according to the most common opinion; but some of our doctors have extended it to ten months, and this is considered to be good<sup>3</sup> or correct. Others, again, have gone so far as to extend the period to a year; but their opinion is now exploded or abandoned.<sup>4</sup>

Which are indispensable. The conditions above mentioned are indispensable. So that if there has been no coition there can be no

<sup>1</sup> It would seem, from what has been said at pp. 14, 43, that children born under a temporary contract also belong to the husband.

<sup>2</sup> This appears to be the shortest period of gestation in the human species, by the unanimous consent of all Moohummudan lawyers. See *D.*, p. 393.

<sup>3</sup> *Husun*. See *ante*, p. 2, note <sup>b</sup>. The author of the *Shuraya* is supported in this respect by the *Sheikh*, in his *Mubsoot*, and by *Allamee*.

<sup>4</sup> The Hanifites extend the period to two years, on the faith of a tradition by *Ayesha* of a saying of the Prophet.—*D.*, p. 393.

affiliation of the child to the woman's husband ; and though such has taken place, yet if the woman be delivered, at less than six months from its occurrence, of a perfect and living child ; or if both the parties should concur in declaring that its birth has happened at more than nine or ten months from the time of coition ; or this fact can be established by the husband's absence from his wife longer than the longest period of gestation : in none of these cases can the child of which she has been delivered be affiliated to her husband, nor can he lawfully claim it as his own. But, on the other hand, where all these conditions are found, though an adulterer should have done wickedly with the wife, yet her child belongs of right to her husband, and cannot be repudiated by him, otherwise than by *lian* or imprecation ; for an adulterer cannot be legally the father of a child ;<sup>5</sup> and if married parties differ as to the fact of coition or the birth of the child, a preference must be given to the word of the husband when confirmed by his oath. With coition and expiration of the shortest period of pregnancy, or delivery just at six months from the act, it is unlawful for the husband to deny his parentage, on suspicion of the mother's misconduct, or even though he should know her with certainty to have committed adultery ; and if he should deny her offspring to be his child, its parentage as from him cannot be rescinded in any other way than by going through the process of *lian*.

If a man should divorce his wife, who thereupon observes an *iddut* or period of probation, and gives birth to a child within the longest period of pregnancy from the date of the divorce, such child belongs to him, if its mother has not been intermediately enjoyed by another man under a contract of marriage or a semblance of right. But if a man should have carnal intercourse with a woman, get her with child, and then marry her ; or, if the woman being a slave, he should subsequently marry her, in neither of these cases can the child be lawfully affiliated to him.

Case of a divorced woman bearing a child within the longest period of gestation from the date of the divorce.

It is incumbent on a husband to acknowledge the child A child born in

<sup>5</sup> See *ante*, p. 14.

wedlock cannot be rejected by the husband of its mother, otherwise than by *lián*.

of his wife when he admits that he has had conjugal intercourse with her, and that the child has been born by her; and if he should deny the child his denial is of no avail to the rescinding of its parentage, unless he goes through the process of *lián*. And the same rule holds good though the parties should differ as to the period between the birth of the child and the date of their intercourse.

Case of a divorced woman bearing a child within the shortest period of gestation from the date of the divorce.

When a man has divorced his wife, who, after observing an *iddut*, has married again, or has sold his female slave, who is subsequently enjoyed by the purchaser, and the woman in either case gives birth to a child at less than six months from the divorce or the sale, the child belongs to the first husband, or the seller; whereas, if it is born at six months or more from these respective dates, it belongs to the second husband, or the purchaser.

A man who has had connection with his female slave should acknowledge her offspring, if born in due time; but may reject its parentage without *lián*.

With regard to children by slaves:—If a man has connection with his female slave, who produces a child at six months or more from the date of coition, he is bound to acknowledge the offspring as his own; but if he reject or deny the parentage *lián* or imprecation cannot be required of him, and judgment must be given in favour of his rejection on the outward appearance of the case. If, however, he should subsequently acknowledge the child, that would establish its parentage. When a slave has been enjoyed by her master, and also by a stranger, her child must be decreed to the master; and if she should be transferred to several owners successively, each of whom has carnally enjoyed her, the offspring is in this case to be adjudged to him in whose possession she is at the time of its birth, provided that it take place at six months or more from the date of his intercourse with her; otherwise it belongs to the next antecedent proprietor, should the delivery correspond to his connection with the mother; and if not, to the next preceding, and so on.

How the parentage of a child born by a slave, the

If a slave, being the joint property of several persons, is carnally enjoyed by each of them, and is delivered of a child, who is claimed by them all, the parentage must be decided by drawing lots, and he who is thus established as

the father must make good to all the other proprietors their shares as well in the value of the mother as of the child on the day of its being born alive. If one only of them should claim the child, it is to be affiliated to him, and he becomes liable to the others for their shares in the value of the mother, and of the child, which he cannot reject on the pretence of *izl*.<sup>6</sup>

If a person has had connection with his female slave who is wickedly enjoyed by another, the offspring appertains to her master. If at its birth there should appear no traces of resemblance between him and the child, but on the contrary there is strong reason to confirm his suspicion that the child is not his, it has been said that he cannot properly either acknowledge or deny the child, but should bequeath something to it, and not give it a claim to inheritance with his children. This opinion, however, is liable to some doubt and difficulty.

With regard to children begotten under a semblance of right:—If a man should erroneously cohabit with a stranger, supposing her to be his wife or his slave, and she should produce a child, its parentage is established in him. The same is the law when a person has erroneously had carnal connection with the slave of another, but in this case the father is liable to the mother's master for the value of the child at the period of its being born alive.

If a man, supposing a woman to be unmarried, or a widow, or divorced from her former husband, should enter into a contract of marriage with her, and it should afterwards appear that the former husband was not dead, or had not divorced her, the woman must be restored to her first husband, after observing an *iddut* on account of her connection with the second; but her child, if she is pregnant, belongs exclusively to the second, subject to the conditions formerly mentioned, whether she acted, in the matter of the supposed death or divorce, on the decree of a judge, or the information of a single person, or the testimony of witnesses.

<sup>6</sup> See *ante*, p. 43.

## SECTION SECOND.

*Of the Suckling<sup>7</sup> and Custody<sup>8</sup> of Children.*

A wife is not bound to suckle her child, and may lawfully demand hire from her husband for doing so. But a slave may be compelled by her master to suckle her child.

A mother is not bound to suckle her child, and may lawfully demand hire for doing so. If she has been irrevocably divorced from the father, it is positively incumbent on him to hire her for the purpose. But some of our doctors have maintained that he is under no such obligation if the mother be still his wife; and it does not appear to be a positive duty, though it is quite lawful to hire her for the purpose in such circumstances. A master may compel his slave to suckle her child. The hire for suckling an infant should be paid by the father out of his own pocket when the infant has no property of his own. And the mother may either suckle the child herself, or employ another nurse for the purpose, retaining the hire.

A child should be suckled for two years.

The time during which an infant should be suckled is two years, though it may be shortened to one year and ten months: but a further reduction of the time is unlawful, and an act of oppression or cruelty to the child. It may, however, be lawfully prolonged for a month or two beyond the two years; though the father is not liable for the hire of any excess over the two years.

A mother has a preferable right to the suckling of her child, when willing to do it on the same terms as another woman.

A mother has a preferable right to the suckling of her own child when she demands no more than another is willing to do it for. But if her demand is greater than the other woman's, the father may remove the child from its mother, and deliver it to the other. So also if a stranger should offer to suckle the child gratuitously, the mother has a preferable right on the same terms; but if she is not satisfied to suckle it gratuitously, the father is in like manner at liberty to deliver it to the other. When the father claims that he had found a woman who was willing to suckle the child gratuitously, and the mother denies the fact, his word is to be preferred, because he is removing a liability from himself. This, however, is subject

<sup>7</sup> Arab., *Rizaa*.

<sup>8</sup> *Hizanut*.

to some doubt; and it is certainly becoming and more proper that an infant should be suckled on the milk of its own mother.

With regard to the custody of the child, the mother has certainly a preferable right during the whole time of suckling (that is, two years), whether the child be male or female; provided that she is free, and of the Mussulman faith,—for a slave or an infidel can have no right to the custody of an infant, with a Mooslim.<sup>9</sup> After the child has been weaned the father has a preferable right to its custody if a male, and the mother if a female, until the child has attained the age of seven years, or ten, according to some; while others maintain the mother's right to the custody of a female child till she marries. The first opinion, however, is more agreeable to traditional authority, and the father is then entitled to her custody. If the mother should enter into another marriage, her right to the custody of either male or female child at once drops, and the father has a preferable right to the custody of both. But if he should die, the mother has a preferable title over his executor to the custody of both the children. So also if the father be a slave or an infidel, the mother has a preferable claim to the custody of a child, whether male or female, even though she should have entered into a second marriage. If, however, the father should be emancipated, he has all the rights of a free man, and the custody of his children among them.

When both the parents of a child are dead, his or her custody belongs to the father's father; and, failing him, it has been said that the custody belongs to the relatives in the same order as they are entitled to inheritance. But this is liable to doubt. According to the *Sheikh*, to whom God be merciful, when there are both a sister on the father's side and a sister on the mother's, the custody of the infant belongs to the former, because she has the larger share of the inheritance. But there is a doubt of the preference in this case, arising from the fact that they are both equal

The custody of the child belongs to the mother till the child is weaned.

After that, the custody of a male child, until it has attained the age of seven

years, belongs to the father, and, if a female, to the mother.

After seven years complete, the father is entitled to the custody of both.

The custody of a child, both of whose parents are dead, belongs to its father's father.

<sup>9</sup> That is, I think, the father being a *Mooslim*.



in degree; and the same remark applies to his preference of the paternal to the maternal grandmother. Further, he has said with regard to a grandmother and sister, that the former is to be preferred because she is a mother. But he has said, with regard to the combination of a paternal and maternal aunt, that their rights to the custody of an infant are equal; and that when there is a combination of persons equal in degree, as in the case just mentioned, the right to the infant's custody is to be determined by casting lots between them.

In connection with what has been said of the suckling and custody of infants it is to be observed:—

Mother loses her right to the custody of her child while it is suckled by another woman.

Effect of puberty on the authority of parents.

A woman, by marriage, loses the custody of her child.

*First.* When a mother demands more than another woman for suckling her child, the father may, as already mentioned, deliver it to a stranger; but there is some doubt as to the mother's losing her right to the custody of the infant in that case. The better opinion, however, seems to be that she does forfeit her right.

*Second.* When a child has attained to puberty<sup>10</sup> and discretion, the power of the parents is at an end; and he is free to join himself to whomsoever he pleases.

*Third.* When a woman marries, she loses the right to the custody of her child. If she is divorced reversibly, matters remain as before; but if the divorce is irreversible, though there is some difference of opinion as to the revival of her right, it seems more reasonable to say that it does revive in that case.

<sup>10</sup> Puberty is established by natural signs, which it is unnecessary to mention, or by age, which is fifteen years in males, and nine in females (*Im. D.*, p. 308; *Shuraya*, p. 193). According to the Hanifites, the age for both, in the absence of the natural signs, is fifteen years. This is on the authority of the two disciples, and also of *Aboo Huneefu* himself by one report; and the *futwah*, or judicial decision, is in accordance with it—(*Kafee*, as cited in the *Kifayah*, vol. iii. p. 845, and adopted by the *Fut. Alum*, vol. v. p. 93). There are, however, other reports of sayings by *Aboo Huneefu*, which extend the time for males to eighteen and nineteen years. It seems to be agreed by all the Hanifites that no one can be adjudged an adult before twelve years, if a boy, or nine if a girl, though the party should claim to be so, or the natural signs are present. (*Fut. Al. ibid.*)

## CHAPTER VIII.

OF MAINTENANCE.<sup>1</sup>

THERE are only three grounds of liability for maintenance, Three viz. *Zawjceet*, or the relation of a husband to his wife; grounds of main- *Kurabut*, or relationship by blood; and *Milk*, or property. tenance.

## SECTION FIRST.

*Of the Maintenance of Wives.*

This involves the consideration of its conditions, quantity, and appendages.

The conditions under which maintenance is due by a husband to his wife, are two in number:—1st, a permanent contract of marriage; and 2nd, *tumkeen*, or such a placing of herself by the wife in the power of her husband as to allow of his free access to her at all times; for, if his enjoyment of her is restricted to any particular time or place, to the exclusion of all others, there is no *tumkeen*. There is some doubt as to one of these conditions being sufficient of itself without the other; and, according to that opinion of our masters, which seems most agreeable to traditional authority, *tumkeen* is indispensable to the husband's liability. Consequently, it is necessary that the wife should not be too young for conjugal intercourse. It makes no difference whether the husband be a minor or adult. The *Sheikh*, indeed, has said that a wife, though adult herself, is not entitled to maintenance if the husband has not also attained to puberty. But there is a difficulty in the case, arising from the fact of the *tumkeen* being complete on the part of the wife; and the better opinion seems to be in favour of the husband's liability. He is

<sup>1</sup> *Nufukat*, pl. of *nufukat*.

also liable though she should be sick or afflicted with a malformation of the generative organs obstructive to conjugal intercourse.<sup>2</sup>

The right not affected by her undertaking a journey with his permission, or without it, in performance of an incumbent duty.

A husband's liability for the maintenance of his wife is not suspended while she is on a journey, provided that it was undertaken with his permission, or in performance of some incumbent duty, such as the *hujj* or pilgrimage. But if the duty was voluntary or self-imposed, and she has departed without his permission, he is under no obligation to maintain her during her absence. Where, again, she has betaken herself to prayer, or fasting, or religious retirement, he is obliged to maintain her, though she should have done so without first asking his permission, because it is always in his power to cancel or put a stop to that by recalling her to her duties. If, however, she should persist in such conduct, in opposition to his wishes, that would amount to an act of *nushooz* or rebellion, for which he would be quite justified in stopping her maintenance.

A divorced wife entitled to maintenance, if the divorce be revocable; otherwise when irre-

A woman revocably divorced is entitled to maintenance, in the same way as a wife is entitled to it. But a woman absolutely separated from her husband loses all right to it, whether the separation has been induced by an irreversible divorce or by a cancellation of the marriage. If she be pregnant, however, his obligation to maintain and provide her with a residence continues until her delivery. But here, according to the *Sheikh*, the maintenance is due, not on account of herself, but of the *fetus* in her womb. Hence, it would follow that, if a freeman should marry a slave, under a condition with her master that the offspring shall be slaves; or a slave should marry either a free woman or a slave under a like condition with his own master that the offspring shall be slaves; and the women were divorced, being pregnant at the time, there would be no liability for maintenance on the part of the husband in either case. On the other hand, a pregnant widow would be entitled to maintenance till the birth of her child. But

is pregnant.

Doubt as to a widow's

<sup>2</sup> *Kurn* and *Rutuk* are the particular deformities mentioned, for which see *ante*, pp. 60, 61.

with regard to her, there are two reports ; according to one of which, and that the most common or generally received, she has no title whatever to maintenance ; and the other, that she must be maintained out of the child's share in his father's inheritance. title to maintenance, even though she be pregnant.

In respect of maintenance, there is no distinction between a wife that is a *Mooslimah* and one that is a *Zimmeeah*, or infidel subject, or between one that is free and one that is a slave, all being alike entitled to it. Zimmeeah and slave wives entitled to maintenance.

As to the quantity of maintenance, the standing rule is that it should be determined by the woman's requirements in respect of food, condiments, clothing, residence, service, and implements for anointing,<sup>3</sup> a due regard being also had to the custom of her equals among her own people in the same city. According to some of our doctors, the proper quantity of food is a *moodd* for high and low, without any distinction between the wife of a poor and a rich man ; but, according to others, whose opinion is more reasonable and generally preferred, there is no fixed quantity of food, and the woman should have as much as is necessary. Service is to be regulated by what has been usual with the woman herself. If she is of the class of persons who are usually served by others, she must be provided with a servant ; otherwise, she must serve herself. In the former case, it is optional with the husband to maintain her own servant if she has one, or to buy or hire one for her, or to serve her himself, for that is sufficient. And even though she should be one who has not been accustomed to have a servant, yet, in the event of sickness, she must be provided with one, from a regard to what is customary in such cases. In no case is her husband obliged to provide her with more than one servant, even though she should be a person of rank. Condiments and dress are to be regulated by what is customary among the woman's equals in the same city. The same rule is applicable to residence ; but the woman may demand, and is entitled to, a separate apartment for her- Quantity of maintenance :  
in respect of food ;  
in respect of service ;  
in respect of condiments, dress, and residence.

<sup>3</sup> This is a literal rendering of the word, but in common parlance it means, I believe, adorning generally, and includes a comb, looking-glass, &c.

self, free from any companionship but that of her husband. With regard to dress, she has a right to something additional in winter, such as a cloak for warmth when awake, and a quilt, for the like purpose, when asleep—the kind and quality of both to be regulated by what is usual among her equals; and, if she belong to the higher orders of society, she should have something better than the dress in ordinary wear, equalling in splendour the dresses of women of the like rank in life.

Appen-  
dages.

Of appendages the most important are comprised in the following cases:—

Husband  
not obliged  
to let wife  
serve her-  
self, and  
also allow  
her for a  
servant.

*First.* If a woman should say, “I will take the allowance for a servant, and serve myself,” the husband is not bound to comply; and if she should actually proceed to do what is necessary for herself in the way of service, without waiting for his permission, he is not bound to pay what she may demand of him on that account.

A wife is  
entitled to  
arrears of  
mainten-  
ance,  
though the  
amount  
should not  
have been  
previously  
fixed by a  
judge.

*Second.* A wife, when she has placed herself in the power of her husband, is entitled to her maintenance day by day, and if he refuse to give it, and the day passes, her right is confirmed; and so on for other days in succession, though the judge should never have fixed the amount, nor made any order in her favour.<sup>4</sup> If when the husband has agreed to pay her periodically, he has delayed to do so, and the whole period has passed, she being all the while within his power, she is fully entitled to the maintenance for that period, and for any excess during which she has maintained herself out of other means. So also she is entitled to a new dress, if the time has passed during which the former should have lasted. If, on the other hand, he has paid her maintenance in advance for a stipulated period, and divorces her before its expiration, he is entitled to demand back from her a proportionate part of the maintenance for the unexpired period,<sup>5</sup> excepting only maintenance for the day on which the divorce is pronounced. The same rule

<sup>4</sup> According to the Hanifites, arrears of maintenance cannot be recovered, unless it has been fixed by agreement or a judicial decree.—*D.*, p. 443.

<sup>5</sup> This is opposed to the Hanifite doctrine.—*D.*, p. 444.

is applicable to any dress which he may have given to her in advance.

*Third.* When consummation has taken place, and the woman has remained with her husband eating and drinking at his table, she has no right to make any demand for the time during which she has thus continued to live with him. If the marriage has not been consummated, and some time has passed without her making any demand on him for maintenance, he is not obliged to render it, according to those who say that *tumkeen* is the ground of the husband's liability, or a condition of it, for he may have no certainty of obtaining full power over her if he should demand it.

A wife who, after consummation, continues to live and board with her husband, not entitled to demand maintenance for the same time.

As a consequence of this view of *tumkeen*, it follows that if a husband should be absent, and his wife should appear before the judge offering to place herself within the power of her husband, he would not be liable for her maintenance till apprised of the offer, and the lapse of a sufficient time for his coming to her, or sending an agent, with the actual surrender of herself to him or the agent. If, when informed of her offer, he should be in no haste to send an agent or come himself, still his liability would drop for the time necessary for the journey, and he would be bound only for the excess. So also, if she were contumacious, and should return to obedience, he would not be liable for her maintenance till informed of her submission, and the lapse of a sufficient time to allow of his own coming to her or sending an agent. If a wife should apostatize from the faith of *Islám*, her right to maintenance would cease; but it would immediately revive if she should return to the faith, though her husband were absent; for the apostasy which was the cause of its abatement has ceased to exist. It would not be so in the case of *nushooz*, or contumacy, for by that she actually passes out of subjection to her husband, and her right to maintenance does not revive till he has again received possession of, or power over her.

Some consequences of *tumkeen* being a necessary condition of maintenance.

*Fourth.* When a woman, absolutely separated from her husband, alleges that she is pregnant, maintenance must

Allegation of pregnancy on

the part of a divorced woman. be rendered to her day by day until her delivery. But if it should turn out that she was not with child, she must restore whatever she may have received. And no woman absolutely separated from her husband, except one who has been divorced and is pregnant, has any right to maintenance. The *Sheikh*, however, maintains, as already observed, that every pregnant woman is entitled to it, though at the expense of the child in her womb.

A debt due by wife to husband may be set off against her maintenance, if she is in good circumstances. *Fifth.* When the husband has a debt against his wife, he may set it off against her maintenance, day by day, if she is in good circumstances; but it is not lawful for him to do so if she is indigent, as debts are payable only out of the surplus that may remain over one's own food. Yet if the wife is content, there is no objection to his making the set-off.

Maintenance of a wife has precedence over that of relatives. *Sixth.* The maintenance of a wife has precedence over the maintenance of relatives; so that the surplus over the husband's food is first to be expended on his wife, and never to be applied to relatives unless there is a reserve over what is sufficient for her maintenance, because her maintenance is in the nature of an exchange for her subjection to his will, and is established as a debt against him.

## SECTION SECOND.

### *Of the Maintenance of Relatives.*

Who are liable for maintenance. Parents and children are together liable for a person's maintenance. With regard to the fathers and mothers of parents, there is some doubt as to their liability; but it is most agreeable to traditional authority to say that they also are liable. Beyond the two pillars, that is, ascendants and descendants, the liability does not extend to any other relatives, such as brothers and sisters, or uncles and aunts paternal or maternal, though it is becoming and proper for a person to maintain them also,<sup>6</sup> particularly when he is one who would inherit from them.

<sup>6</sup> According to the Hanifites, the liability extends to all relatives within the prohibited degrees.—*D.* p. 163.

Poverty is a condition of the right to maintenance. But is inability to earn anything by one's own exertions also a condition? It is more agreeable to traditional authority to answer this question in the affirmative; for maintenance is measured by necessity, and one who is able to earn anything for himself cannot be said to be necessitous. It is not necessary, however, to have a judge's order or decree pronouncing the poverty or inability of the recipient. And though he should be profligate in his manners, or an infidel, he does not thereby forfeit his right to maintenance. It is otherwise if he be a slave, for then his master would be bound to maintain him.

Conditions of the right to maintenance.

Ability on the part of the *Moonfik* or maintainer is a condition of the liability to maintenance. When he has a surplus over what is necessary for himself, it is first to be applied to the sustenance of his wife, and then if there is anything over, to the support of his parents and children. There is no fixed quantity for the maintenance of relatives, any more than of wives, the criterion being what is necessary in respect of food, clothes, and residence, with something *extra* for clothing in winter, such as a cloak for warmth while awake, and a quilt for sleeping. Abstinence from what is unlawful or indecorous, is not necessary on the part of the person to whom maintenance is due.

Conditions of the liability to maintenance.

Maintenance is due to a person's father, but not to the father's children, for these are in the relation of brothers and sisters to the maintainer. But it is due to a person's children, and their children, for the latter are also the children of the maintainer.

Maintenance not due to the children of one's father.

A person is not bound to repay what may have been laid out by another on his maintenance; for maintenance is limited to necessities, and does not constitute a debt against the maintainer, even though the judge should have actually fixed its amount. True, that if the judge should have authorised the person entitled to maintenance to borrow on the credit of the maintainer, the amount so borrowed is a debt against the latter, which it is obligatory on him to discharge.

Arrears of maintenance not recoverable.

The maintenance of a child is incumbent first on its

Order in which



relatives  
are liable.

father. Failing him, or in the event of his poverty, it is incumbent on the father's father how remote soever in ascent. Failing these, it is the duty of the mother, and in the event of her death or poverty, it is the duty of her father and mother how high soever. The nearer in all cases is liable before the more remote, and with equality of degree they are all partners in the liability.

When the  
maintainer  
has only  
enough for  
one of two  
relatives, it  
must be  
divided  
between  
them.

When a person has both parents equally in need of maintenance, and a surplus over what he requires for himself sufficient for only one of them, he should divide it between them equally. So also he should make an equal division between a son and a parent. But when he has a father and grandfather, or a mother and a grandmother, the whole must be given to the immediate parent.

A person's  
father and  
son are  
equally  
liable for  
his main-  
tenance.

When a man has a father and grandfather both in good circumstances, the father is liable for his maintenance exclusively of the grandfather. But if he has a father and son in good circumstances the liability falls upon them equally.

A person  
liable for  
mainten-  
ance may  
be com-  
pelled by  
imprison-  
ment, or  
sale of his  
property,  
if still  
recusant.

When there is a delay in the delivery of maintenance, the judge should compel the person who is liable for it, and if he is still recusant may imprison him. Further, the maintenance may be taken out of his property; or if he has only goods or land, they may be lawfully sold, for the maintenance is a debt against him.<sup>7</sup>

### SECTION THIRD.

#### *Of the Maintenance of Slaves and of Beasts.*<sup>8</sup>

The maintenance of these is incumbent on their proprietors.

How  
slaves are  
to be main-  
tained.

With regard to slaves both male and female, their master

<sup>7</sup> Yet it has been said above that it is not a debt;—but there the reference is to arrears, which are not a debt, because maintenance to a relative is due only in case of necessity, and the necessity, if there ever was any, is now past, the relative having been able to maintain himself.

<sup>8</sup> *Buheemah*—a quadruped, or every animal without distinction.—(*Freitag*).

may maintain them out of his own means, or out of the earnings of the slave. The quantity of maintenance is not fixed, but should comprise a sufficiency of food, condiments, and clothing, the quality being regulated by what is usual in the families of masters of like means among the people of the same city. In this respect no difference is to be made between the absolute slave, the *moodubbur* and the *oom-i-wulud*. With the slave's consent, the master may send him out to work for himself, fixing an amount which he is to render to the master, and leaving him to take the surplus for himself. But in no case is it lawful to fix a sum exceeding the slave's earnings; and which will not leave a surplus sufficient for his maintenance.

With respect to beasts, whether fit for food or not, their owners must supply them with a sufficiency of pasturage or of dry food, and if they neglect to do so, may be compelled to sell, or slaughter them if kept with that design, or to feed them properly. If the animal has a young one, it must be allowed a sufficiency of its mother's milk until it is fit for pasturage, or other food, when the milk may be lawfully taken by the owner.

How  
beasts are  
to be  
treated.



BOOK II.  
OF DIVORCE.

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CHAPTER I.  
OF TULÁK OR REPUDIATION.

SECTION FIRST.

*Its Pillars.*

THESE are four in number ; of which the first is the First pillar, *Mootullik*, or Repudiator ; and in him four conditions the Repudiator. are required.

The first condition is puberty. No regard whatever is Condi- to be had to the words of a boy under ten years of age.<sup>1</sup> tions : With respect to one who has attained to that age with Puberty ; understanding, and repudiates his wife according to the *soonnut*, or traditions, there is one report that the repudiation is legal, but the report is not well authenticated. And if the guardian of such an one should take upon him to repudiate the wife of his ward, there is no doubt that the act would be invalid, because the right to repudiate belongs exclusively to a husband ; and the inhibition which the law imposes on a minor is one which in the natural course of things will soon be removed. If, however, a minor should attain to puberty and be deficient in understanding, his guardian is not debarred from exercising the right of repudiation on his behalf when it is advisable with a due regard to his interests ; and though some of our doctors have forbidden the exercise of the guardian's

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<sup>1</sup> See *ante*, p 4

authority in such circumstances, yet their opinion has not been generally received or adopted.

Under-  
standing ;

The second condition is understanding ; and repudiation by an insane person is not valid. It is likewise invalid when pronounced by one in a state of intoxication, or who has lost the use of his faculties by temporary stupor, or drinking a narcotic, as there can be no real intention in such cases. Nor can a guardian repudiate on behalf of a person in a state of intoxication, because the cause which prevents his own exercise of the power is likely soon to be removed, and he is for the time like one asleep. But a guardian may repudiate for an insane person ; and if he has no guardian, the Sultan or ruler, or any person to whom he may have delegated the superintendence of such matters, may repudiate on behalf of the insane person.

Free-will ;

The third condition is choice, or free-will ; and repudiation by a person under compulsion is not valid.<sup>2</sup> But, three things are necessary to the establishment of compulsion. The compeller must be able to do what he threatens. There must be strong ground to apprehend that he will do what he threatens if compliance with what he desires is refused. The threat must involve some serious injury to the person under compulsion, or to some one dear to him as his own soul, such as a father or a child. It makes no difference whether the threat be of death, or wounding, or abuse, or beating. But in estimating the *quantum* of abuse which may be endured without amounting to compulsion, the places where the compeller and the compelled are residing must be taken into consideration. A trifling injury is not sufficient to establish compulsion.

Intention.

The fourth condition is design, or intention ; and this is required though an express form of words is also necessary ; insomuch that if there is no intention on the part of the repudiator, repudiation cannot take effect ; as, for example, if he were careless, or asleep, or labouring under a mistake. And if a person, forgetting that he is married,

<sup>2</sup> According to the Hanifite sect it is valid. *D.*, p. 210.

should say, "My women are repudiated," or, "My wife is repudiated," and should then recollect that he is married, no separation would take place. Or if, after repudiating his wife, he should say, "I did not intend it," outwardly his assertion must be received and credited, though inwardly and in conscience he is bound by his intention, whatever it may really have been. This is the case even though he should make some delay in explaining his intention, provided that the woman is still in her *uldut*, because it is a declaration of intention.

An absent person may lawfully appoint an agent to repudiate his wife, without any difference of opinion. And so also may a husband who is present with his wife, according to the most valid opinion. And though the *Sheikh* has said that the appointment of a woman as her husband's agent to repudiate herself would not be valid, yet it would seem that such an appointment is lawful. If a man should say to his wife, "Repudiate thyself thrice," and she should do so only once, it has been said that the repudiation would be void; while others insist that a single repudiation would take effect. And so also if he should say, "Repudiate thyself once," and she should do so three times, it has been said that the repudiation would be void; but here also others maintain that one would take effect; and this opinion is more in conformity with the general principles of the law.<sup>3</sup>

Power to repudiate may be committed to an agent;

or seemingly to the wife herself.

The second pillar of repudiation is the *Mootullukah*, or Repudiated; and in her five conditions are required.

Second pillar, the Repudiated.

The first condition is that she be a wife; for if one should repudiate a woman whom he has enjoyed by virtue of a right of property, or who is at the time a stranger to him though he should subsequently be married to her, the repudiation would have no effect; so also if a man should suspend a repudiation on marriage, that is, make it conditional on the occurrence of that event, the repudiation would not be valid, and that, whether a particular woman were indicated as by saying, "If I marry such a woman she

Conditions:

That she be a wife;

<sup>3</sup> *Ushbuho*, literally, more likely.

is repudiated," or the repudiation is in general terms, as by saying "Every woman whom I marry is repudiated."<sup>4</sup>

Married by permanent contract ;

The second condition is that the woman was married by a permanent contract ; for there can be no repudiation of a legalized slave, or of a woman enjoyed under a *mootâ* or temporary contract, even though she be free.

And not in her courses, or in a *nifas*.

The third condition is that the woman is not in her courses, or in a *nifas*<sup>5</sup> after childbirth. This condition is applicable only to a woman who has been enjoyed, is ordinarily subject to the courses,<sup>6</sup> and whose husband is present with her, or if absent, has not been away from her so long as to be assured that she has passed from the period of purity<sup>7</sup> in which he had connubial intercourse with her to another such period. If a man should repudiate his wife while they are both living in the same city, or he has been absent from her less than the time mentioned, and she is then in her courses or in a *nifas*, the repudiation is void, whether he were aware of the fact or not. If, again, he has been absent from her so long as to feel assured that she must have passed from one period of purity to another, and he should then repudiate her, the repudiation would be quite valid, even though they should both subsequently agree that she was actually in her courses at the time ; so also, if he should have departed from her during a period of purity<sup>8</sup> in which he had not approached her matrimonially, or if a man should repudiate a wife with whom he never had connubial intercourse, the repudiation would in either case be lawful, though she

<sup>4</sup> The repudiation would be effectual in both cases, according to the other sect. *D.*, p. 263, *et seq.*

<sup>5</sup> The puerperal discharge. The extreme legal term, according to the other sect, is forty days (*D.*, note <sup>2</sup>, p. 340), but by the *Sheeahs* it is limited to ten days (*Shuraya*, p. 14).

<sup>6</sup> Arab. *Hail*, active participle of *halu*, which has several meanings. The radical idea seems to be change. I have adopted the meaning which the context seems to require. In law the word is frequently opposed to pregnant.

<sup>7</sup> Arab. *Koora*. The word is so explained farther on.

<sup>8</sup> Arab. *Toohr*. This is the usual term for the time between two occurrences of the courses.

were actually in her courses at the time. Some of our lawyers have fixed upon a month as the period which gives effect to repudiation by an absent man, relying on a tradition to that effect, which is strengthened by the usual recurrence of the courses at intervals of that duration. Others of them, again, have fixed the period at three months in a reliance on a good tradition of *Aboo Abdoollah*,<sup>9</sup> on whom be peace. The result of the whole, however, or the truth, is as we have stated it, even though the time mentioned should be exceeded. If a husband is present, that is, in the same city with his wife, without meeting her so as to know when her courses are on her, he is to be accounted the same as if he were absent.

The fourth condition is that the woman be *moostubrat*<sup>10</sup> or purified; for if a man should repudiate his wife during a *toohr*, or period of purity in which he has had connubial intercourse with her, the repudiation would be ineffectual. This condition is not required in a *yáissah* or woman who is past child-bearing,<sup>11</sup> nor in one who has not attained to puberty or is pregnant. With regard again to a *moostubrat*, when three months have passed without any appearance of the monthly discharge, if such an one is repudiated before the expiration of the three months, the repudiation is without effect.

The fifth condition is that the *mootullukah* or repudiated woman be distinctly indicated, that is, by the man's saying, "Such an one is repudiated," or by pointing to her in such a manner as to remove all doubt on the subject. If he has only one wife, and should say, "My wife is repudiated," the repudiation would be valid, as there is no room for ambiguity. But if he has two or more wives, and should say, "My wife is repudiated," he must intend some one of them in particular to give any effect to the repudiation; and his explanation of the one whom he

<sup>9</sup> The *Imám Jaafer Sálik*.

<sup>10</sup> Participle from *istibra*, purification. The object of the condition seems to be to prevent a confusion of seed, and consequent doubt of paternity, if the woman should marry again, and have a child.

<sup>11</sup> See *post*, p. 162



intended must be received. If, again, he had no particular one in his mind, or used the words without any positive intention, some of our doctors maintain that they would be entirely nugatory for want of distinct indication, while others insist that there would be a valid repudiation, and that the particular woman must be determined by lot,—an opinion which seems to be more agreeable to the general principles of the law. If he should say, “This one is repudiated, or this one,” he may, according to the *Sheikh*, apply the repudiation to whichever of them he pleases; but many of our doctors insist that it is void for want of specification; while, if he should say, “This one is repudiated, or this one and this one,” the third would be certainly repudiated, and of the other two he might apply the repudiation to either at his pleasure. In the event of his death one of them must be taken by lot. Many, however, are of opinion that in such a case the alternative is between the first and the two last together; so that he must determine for either the first or for the two last. In all the cases it is obvious that the difficulty arises from the want of specification, or a compliance with the condition under consideration. If a person, looking upon his wife and a strange woman, should say, “One of you two is repudiated,” and should add, “I intended the stranger,” his assertion must be accepted. But if, having a wife and a maid both named *Sooda*, he should say, “*Sooda* is repudiated,” and then assert, “I intended the maid,” his word would not be accepted. For, in the first case, the expression “One of you two” is equally applicable to the wife and the strange woman, as both are capable of being repudiated, but in the second case, where the repudiation is made to depend on the name, it must be restricted to the wife, as she is the only person to whom the repudiation can be applied. If a person, supposing a stranger to be his wife, should say to her, “Thou art repudiated,” his wife would not be repudiated, for he must be assumed to have intended the person addressed. And if, having two wives, *Zeinub* and *Amrah*, he should say, “O *Zeinub*,” and *Amrah* should answer, “Here am I,” whereupon he

says, "Thou art repudiated," the person intended would be repudiated. If he intended the one that answered, supposing her to be *Zeinub*, the *Sheikh* has said that *Zeinub* would be repudiated. But there is some difficulty in the case; for the repudiation was directed to the person who answered, only on the supposition that she was *Zeinub*; she therefore cannot be repudiated for want of intention; nor can *Zeinub*, for the repudiation was not directed to her, but to the other.

Third pillar, the form.

• The third pillar of repudiation is its Form.

Its conditions.

As a general rule, marriage, being a chaste<sup>12</sup> or protected condition, favoured by the law, and in its own nature not admitting of being dissolved,<sup>13</sup> it is necessary in taking off or removing the tie to adhere strictly to the terms of the legal permission. The form of words specially appointed for that purpose is, "Thou art repudiated,"<sup>14</sup> or "Such an one," or "This person," or any similar word clearly indicative of the individual who is intended to be repudiated. And if a man should say, "Thou art the repudiation," or "repudiated," or "among the repudiated," the words would be without effect, even though he intended to repudiate thereby. So also they would be ineffectual if he were to say, "A repudiated person." The *Sheikh*, however, has said that in this case repudiation would take effect if intended; but the opinion is not supported by the grammatical construction of the phrase. On the other hand, he has said that it would not take effect if a man were to say, "I have repudiated such an one;" but this also is attended with some difficulty, arising from the fact that if the question were asked, "Is thy wife repudiated?" and the person addressed should answer "Yes," there would be an effectual repudiation.

Words which are specially required;

Repudiation cannot be effected by writing,<sup>15</sup> nor in any other language than the Arabic when there is ability to

cannot be in writing or in any

<sup>12</sup> *Ismut*—defence, protection, chastity.

<sup>13</sup> That is, it does not admit of *Ekalut*, like sale. See *Im. D.*, p. 168.

<sup>14</sup> Arab. *Unti Talikoon*.

<sup>15</sup> It may according to the Hanifites. *D.*, p. 233.

other language than Arabic.

pronounce the words specially appointed, nor by signs except where the party is unable to speak. If he is dumb, repudiation may be effected by any signs sufficiently indicative of his purpose. And, though it cannot be given in writing by one who is present and able to pronounce the proper words, yet if he is unable to do so and writes them, fully intending repudiation, it takes effect and is quite valid. Some persons have maintained that a wife may be lawfully repudiated in writing by her husband when he is absent from her; but this opinion is not to be relied upon. And if one should say to his wife, "Thou art vacated," or "free," or "The reins are on thy neck," or "Betake thyself to thy people," or "Thou art absolutely separated," or "unlawful," or "cut off," the expressions would be quite nugatory, and no repudiation take place, whether it were intended or not.<sup>16</sup> If he should say "Count," intending *Talak* thereby, it is maintained that there would be a valid repudiation, and there is a tradition to that effect, recorded by *Hulbee* and *Moohummud*, from *Aboo Abdoollah*, on whom be peace; but this has been disputed by many of our doctors, whose opinion is more in accordance with the general principles of the law.

Words that are not sufficient.

A right of choice given to a wife is apparently not a power to repudiate herself.

When a person gives his wife an option, intending that she may repudiate herself, and she chooses him, or remains silent without looking aside, nothing follows. And even if she were immediately to choose herself, though some of our doctors are of opinion that there would be an absolute, and others a revocable repudiation, a third party maintains that in this case also the choice would be ineffectual; and their opinion is the most common or generally received.

Repudiation effected by affirmation to question, "Hast thou repudiated?"

If a person were asked, "Hast thou repudiated such a person?" and he should answer "Yes," there would be a valid *tulak*. But not so if the question were, "Hast thou separated," or "vacated" or "released?" and he should answer in the affirmative; for then nothing would follow.

The form

*Tulak*, in respect of its form, must be entirely free from

<sup>16</sup> If intended, they would be sufficient, according to the Hanifites. *D.*, p. 228.

any condition or description, according to the most common opinion; <sup>17</sup> for I <sup>18</sup> take no account of those who think differently on this subject. And even though the husband, in pronouncing the repudiation, should merely explain himself by saying, "twice" or "thrice," some insist that it would be void. Others, however, maintain that a single repudiation would take effect by reason of the word "repudiated," the rest being surplusage according to them; and this opinion is supported by the more common or generally received of two traditions. If he should say, "Thou art repudiated for the *soonnut*," the repudiation would be valid, supposing that the woman were pure <sup>19</sup> at the time; and so also if his words were "for the *budae*." But in this case it were better to say that the repudiation would not take effect, because we don't allow that kind of *tulak*, and the words would be without meaning. <sup>20</sup>

Further, if a husband should say to his wife, "Thou art repudiated this very instant, if repudiation has effect upon thee," the *Sheikh* has said that there would be no *tulak*, by reason of its being made dependent on the condition; and this is right, if the repudiator were not aware of the woman's state at the time. But if he knew that she were in a state to be legally repudiated, effect should be given to his words; for though there is a condition in appearance, there is none in reality. If he should say, "Thou art repudiated the most just of repudiations," or "the most perfect," or "the best," or "the worst," or "the best and worst," the repudiation would be valid, as it is not impaired by the words superadded to it. So also it would be valid if he were to say, "the full of Mecca," or "the full of the world." If he should say, "To the contentment of such an one," intending a condition thereby, or that the repudiation should be dependent on the person's will, it would be void. Otherwise, if he had no such

of *tulak*  
must be  
entirely  
free from  
condition  
or descrip-  
tion.

Illustra-  
tions.

<sup>17</sup> This is opposed to the doctrine of the Hanifites. *D.*, cap. iv. and cap. ii., sect. 3.

<sup>18</sup> The author of the *Shuraya*.

<sup>19</sup> *Tahir*, that is, not in her courses.

<sup>20</sup> See *post*, p. 118.

intention, it would take effect, according to his purpose. So also, if he should say, "In thou enterest into the house, thou art repudiated," applying the vowel *kasrah* (*i*) to the first letter of the word (so as to make it equivalent to *if*), there would be no repudiation, while if the vowel *futha* (*u*) were applied to the first letter of the word, so as to make it sound *un* (or *that*), the repudiation would be quite valid, provided that he knew the distinction between the two sounds, and intended that his wife should be repudiated. If he should say, "I am repudiated to thee," the words would have no effect, as a man is not a fit subject for repudiation. Nor if he should say, "Thou art repudiated half," or "a fourth," or "a sixth of a repudiation," would the words have any effect, for they do not amount to one whole repudiation. If he should say, "Thou art repudiated (*talik*)," and then add, "I intended to have said, 'Thou art pure (*tahir*),' " the explanation is to be accepted outwardly, but inwardly and in conscience he is bound by his real intention, whatever it may have been. If the expressions were, "Thy hand," or "Thy foot is repudiated," they would be wholly without effect. So also, if he were to say, "Thy head," or "thy bosom," or "thy face," or "thy half," or "thy third," or "two-thirds," the expressions would, in like manner, be ineffectual.<sup>21</sup> If he should say, "Thou art repudiated before repudiation," or "after it," or "before it," or "with it," nothing would follow, whether she were an enjoyed wife or not. But if it were said that a single repudiation would take effect on his saying, "Repudiated with repudiation," or "after it," or "upon it," and that there would be none on his saying, "before repudiation," or "after repudiation," that would be right or proper.<sup>22</sup> If, again, he were to say, "Repudiated two halves," or "three thirds of a repudiation," there would be none, according to the *Sheikh*. But here, also, if it were said that there would be a repudiation, by force of the

<sup>21</sup> Otherwise, according to the Hanifites. *D.*, p. 215.

<sup>22</sup> I have translated the words literally. The distinction seems to depend on the position of the term "repudiation."

words "Thou art repudiated," and that the rest is surplusage, that would be right or proper. Not so, however, if the husband should say, "A half of two repudiations."

Further, the *Sheikh* has said that if a man should say Continued. to his four wives, "I have effected four repudiations between you four," each one of them would be repudiated. But the opinion is not free from doubt and difficulty. If, again, a man were to say, "Thou art repudiated, three except three," one repudiation would be valid, by virtue of the first part of the expression, if such were his intention, and the exception would be void. If he should say, "Repudiated without repudiation," intending revocation thereby, it would be valid, because the denial of a *tulák* is equivalent to revocation; while if he said, "Repudiation except repudiation," the exception would be surplusage, and repudiation take effect, by virtue of the words, "Thou art repudiated" (supposed to precede the others). If he should say, "*Zeinub* is repudiated," and then add, "I meant *Amrah*," the explanation is to be received, supposing both the women to be his wives. And if he say, "*Zeinub* (but) *Amrah*," both are repudiated together, for each was intended at the time of his naming them. But this is attended with some difficulty, arising from the form of the expression.

The fourth pillar of repudiation is Testimony; and it is necessary that two witnesses should be present and hear the repudiation given, whether they are called upon to attest it or not. It is a condition essential to the validity of a *tulák* that the witnesses should hear the actual words. So that if they are merely present, repudiation does not take effect, though all other conditions are complied with. So also there can be none with only one witness, though he be a just person, nor even with two witnesses if they are not just, or are reprobates. Nay, it is required that two witnesses of known probity should be present. Some of our lawyers, however, think it sufficient that the witnesses are *Mooslims*; but the first opinion is better

Fourth pillar. Presence of witnesses necessary.

One not sufficient.

And the witnesses must be persons of character.

<sup>23</sup> This is not required by the Hanifites.

founded on traditional authority. If one of the witnesses should testify to the constitution of the *tulák*, and the other should then testify to it separately from the first, repudiation would not take effect. But when they testify to an acknowledgment of the fact, it is not necessary that their testimony should be given together. Yet, if one should testify to the fact of the *tulák*, and the other to an acknowledgment of it, their testimony could not be received.

The testimony of women not sufficient.

The testimony of women cannot be received to repudiation, whether they are alone or together with men. If a man should repudiate his wife without witnesses, and then repudiate her again when witnesses are present, the first repudiation would go for nothing. And the true time for a *tulák* taking effect is when the witnesses are present, provided that the appropriate words are employed.

#### SECTION SECOND.

##### *Of the Different Kinds of Tulák or Repudiation.*

Two forms :  
The *bidâut*, of which there are three kinds.

The term *Tulák* includes the *Bidâut* and the *Soonnut* forms of repudiation. Of the *Bidâut*, or new and heretical form, there are three different kinds. The first is the repudiation of an enjoyed wife during her courses, or a *nifas*, while her husband is present with her, or if absent from her, when his absence has been short of the time conditioned or required in such cases.<sup>24</sup> The second is the repudiation of a wife during a *toohr*, or period of purity, in which there has been connubial intercourse between the parties. And the third is, three repudiations without any intermediate revocation. All these forms of *tulák* are void with us,<sup>25</sup> no repudiation taking effect in any of the cases.

But all are void.

The *Soonnut* :  
Three kinds :  
*Báin*, or irrevocable.

Of the *Soonnut*, or regular form of *Tulák*, there are also three different kinds,—the *Báin* or absolute, the *Rujáee* or revocable, and the *Tulák-ool-iddut*, or repudiation of the *iddut*. The *Báin* or absolute is that with respect to which

<sup>24</sup> See *ante*, p. 110.

<sup>25</sup> That is, the *Sheeah* sect. According to the Hanifites they are all valid, though irregular. *D.*, p. 207.

the husband has no power of revocation ; and of it there are six different species. The first is when the wife who is repudiated is one with whom connubial intercourse has never taken place. The second is when she is a *yáissah*, or past child-bearing. The third is when she has not yet attained to puberty. The fourth and fifth are when she is *mookhtullah*<sup>26</sup> or *moobarat*, that is, released or freed for a ransom, so long as she has not reclaimed the ransom for which the release or freedom was given. The sixth is when the wife is repudiated three times with two intervening revocations.<sup>27</sup>

The *Tulák Rujáec* is that in which the husband has the power of revocation whether he exercises it or not.<sup>28</sup>

*Rujáec*, or revocable.

The *Tulák-ool-iddut*, or repudiation of the *iddut*, is after the following manner:—A man repudiates his wife under the requisite conditions, he then recalls her before the expiration of the *iddut*, has connubial intercourse with her, and repudiates her again, but in another *toohr* than that in which the intercourse took place, recalls her a second time, has intercourse with her, and repudiates her a third time, but in a subsequent *toohr*. She is now rendered unlawful to him till she has married another husband. If she should do so, be released from him, and her first husband should remarry her, and repeat the series of repudiations as at first, she would become a second time unlawful to him until married to another husband. And if this also were done and she were again free, and the first husband should marry her a third time, and repeat the series of repudiations, she would become, after the ninth, unlawful to him for ever.<sup>29</sup> It is to be observed that the *tulák* of the *iddut* does not take effect unless there has been connubial intercourse after each

*Tulák-ool-iddut* described.

Renders her perpetually unlawful to the repudiator.

<sup>26</sup> Wife released by *khoodá*, for which and *moobarat*, see *post*, ch. iii.

<sup>27</sup> To these may be added the ordinary *tulák*, when given in exchange for property. See *post*, p. 137.

<sup>28</sup> The power of revocation lasts till the expiration of the *iddut*, after which the repudiation becomes absolute.

<sup>29</sup> This kind of repudiation is unknown to the Hanifites.



revocation. If he should repudiate her before such intercourse, the repudiation would indeed be valid ; but it would not be a *tulák* or repudiation of the *iddut*.

Three repudiations render a woman unlawful to the repudiator. Every woman on whom three repudiations have been fulfilled is rendered unlawful to the repudiator until she marries another husband ; and it makes no difference whether he had enjoyed her or not, or whether he had recalled her or abandoned her.

### Miscellaneous Cases.

Repudiations after completion of the *iddut*, do not render a woman perpetually unlawful, though they should amount to nine. *First.* A man repudiates his wife and she completes her *iddut* ; he then marries her a second time, repudiates her again, and leaves her to complete her *iddut* ; after which he marries her a third time, and a third time repudiates her. She now becomes unlawful to him till she has been married to another husband. After which, if separated from him, and her *iddut* for him has expired, her first husband may lawfully return to her, that is, marry her again ; and a wife so treated is not perpetually prohibited, even after the ninth repudiation. But the *iddut* which she has to observe does not prevent her from becoming immediately prohibited to him after the third, that is, until she has been married to another.

A pregnant wife may, after revocation, be again repudiated for the *iddut*. *Second.* When a man has repudiated a pregnant wife, and recalled her, he may lawfully have connubial intercourse with her, and then repudiate her a second time for the *iddut* by general consent. Some maintain that it is unlawful by the *soonnut* ; but the opinion in favour of its legality is more agreeable to the principles of law.

So also, a wife that is not pregnant. *Third.* When a man has repudiated a wife that is not pregnant, and recalled her, if he then has connubial intercourse with her, and repudiates her again in another *toohr*, the repudiation is valid without any difference of opinion. But if he repudiate her in the other *toohr*, without having previously had intercourse with her, there are two traditions upon the point—one of which denies the efficacy of the repudiation, while according to the other and more valid tradition, it takes effect. Assuming the latter view to be correct, if he should now recall her again

and repudiate her a third time in another *toohr*, she would become prohibited to him until married to another man. In like manner, if he should repudiate her after the revocation without having connubial intercourse with her in the first *toohr*, there are two traditions upon this point also ; but here a preference is given to that which requires that the repudiations should be in different *toohrs*, though connubial intercourse may not have taken place ; while if it has, the repudiation would be positively unlawful, except when given in a second *toohr*, if the repudiated person be one with respect to whom *istibra*, or purification, is necessary.

*Fourth.* When a repudiator is in doubt as to the efficiency of a repudiation he is not obliged to repeat it to remove the doubt, and the marriage remains as before.

Doubtful Repudiation need not be repeated.

*Fifth.* When a man who has repudiated his wife while absent from her, enters into her apartment on his return, and then claims that the repudiation was effective, his claim is not to be received, because it is to be presumed that a Mussulman's acts are in accordance with the law, and his claim gives the lie to what is tantamount to proof. Accordingly, if there is a child it is affiliated to him.

Repudiation during absence cannot be alleged by one who resumes cohabitation with his wife.

*Sixth.* When a man absent from his wife has repudiated her, and desires to marry her sister, or a fourth wife, he must wait for nine months for the possibility of his wife's being pregnant. Some of our doctors for greater caution insist that he should wait for a full year, having a view to the possible pregnancy of a *moostubrat*, which occasionally happens. But if he knew that she was not pregnant at the time of the repudiation, three courses and three months are sufficient.

An absent man who repudiates one of four wives must wait for nine months before he can marry another.

## CHAPTER II.

## OF APPENDAGES TO REPUDIATION.

## SECTION FIRST.

*Of Repudiation by a Sick Man.*

Valid, though abominable. Its effect on the mutual rights of inheritance of husband and wife.

It is abominable for a sick man to repudiate his wife ; yet if he should do so the repudiation is valid, and he is entitled to a share in her estate if she should happen to die during the *iddut*, and the revocation were revocable. But he has no such right if the repudiation were *báin*, or absolute, or her death should not occur till after the expiration of the *iddut*. She, however, has a right to participate in his estate if he should die at any time within a year from the repudiation, whether it were revocable or absolute, provided that she has not married in the meantime, nor he has recovered from the disease in which the repudiation was given. If he should recover, fall sick again, and then die, her right of inheritance would be lost, unless she were still in her *iddut* for a revocable repudiation.

His word to be credited when he says that he repudiated her in health.

Lián in sickness.

If he should say, "I repudiated three times when in good health," his word is to be received, and it bars her right of inheritance, though it would seem that no credit ought to be given to his word as against her. And if he should slander her, being sick at the time, and should go through the form of *lián*, or imprecation, against her, when she would be absolutely divorced by the *lián*,<sup>1</sup> she

<sup>1</sup> According to the *Sheeahs*, this is the immediate effect of the *lián* (see *post*, p. 157), though by the Hanifite code there is no separation of the parties without a divorce by the husband or decree of the judge. *D.*, p. 336

would have no right of inheritance in virtue of the special effect of a repudiation in sickness. But it may be asked would she not have such a right on account of the suspicion which attaches to his slandering her in such circumstances? This question has been answered in the affirmative. It would rather seem, however, that the usual effect of a repudiation in sickness should be given to his act without any regard to the suspicion attaching to it. There is also a doubt of her right to inherit when repudiated on her own solicitation. And here it is more in accordance with the general principles of law to say that her right of inheritance is lost.<sup>2</sup> So also when she has been released from the marriage tie by a *khoodâ* or *moobarât*.

Its effect on wife's right of inheritance.

Wife repudiated in sickness at her own request does not inherit. Nor one released by *khoodâ*.

#### *Branches from the Preceding.*

*First.* If a man should repudiate his slave wife revocably, and she is emancipated during the *iddut*, and he then dies while labouring under the disease, she inherits during the *iddut*, but not after its expiration, on account of the flaw in her condition at the time of the repudiation.<sup>3</sup> Yet, if it were said that she does inherit, that would be proper, and even though the divorce were irrevocable. Some, however, contend that she has no right whatever to inherit, because she had no *ahlecut*, or legal status, at the time of the repudiation. So also if one should repudiate a *kitabceah* who is afterwards converted to the Mussulman religion.<sup>4</sup>

A slave repudiated by her husband, but emancipated in the *iddut*, entitled to inherit.

Case of a *kitabceah*.

*Second.* When a repudiated woman claims or alleges that the repudiation was given to her by her deceased husband when he was sick, and the fact is denied by his heir, who alleges that he was in good health at the time,

In a dispute whether a repudiation was given in health

<sup>2</sup> Such is the Hanifite doctrine in that case. *D.*, p. 278.

<sup>3</sup> According to the Hanifite code, that would prevent her inheriting even during the *iddut*. *D.*, p. 278.

<sup>4</sup> That is, she would in like manner inherit during the *iddut*, her case, according to both codes, being similar to that of the emancipated slave.

orsickness, the word of the heir is to be received,<sup>5</sup> because the probabilities on either side are equal, and it is a principle of law that there is no right of inheritance except by establishing a sufficient cause for it, such as consanguinity or marriage.

Case of four wives repudiated, and other four married, by a sick man. *Third.* If a man should repudiate four wives during his illness, marry four others, consummate with them, and then die, the fourth of his estate, or in the case of his having a child, the eighth of it, would be equally divided between them all.

## SECTION SECOND.

### *How the Prohibition incurred by three Repudiations is removed.*

A woman repudiated three times must be married to, and enjoyed by, another husband before she can be re-married by the repudiator. When a woman has been repudiated three times with the requisite conditions, she is rendered unlawful to the repudiator until she has been married to another husband, and in removing the prohibition regard must be had to four conditions:—1st, the new husband must be adult, for though there is some difference of opinion in respect to a *moorahik*, or boy approaching to puberty, yet it is more agreeable to the principles of law to say that he is not competent to legalize the woman to her first husband;<sup>6</sup> 2nd, the new husband must have carnal knowledge of the woman in the natural way, so as to require ablution; 3rd, this must be under a contract, and not merely by virtue of a right of property, or of permission from her master; 4th, the contract must be permanent, and not by way of *mootâ*, or temporary. When all these conditions have been fulfilled, the prohibition incurred by three repudiations is removed.

Such marriage destroys the effect of all previous repudiations, though less than three. With regard to the value of a second marriage in effacing the effect of any number of repudiations less than three, there are two traditions. The most common or generally received of these is in favour of the extinction. So that, if a woman who was once repudiated should be

<sup>5</sup> The preference is given to her words by the Hanifites. *D.*, p. 282.

<sup>6</sup> He is competent according to the Hanifites. *D.*, p. 290.

married to another man, and, after the dissolution of that marriage, should be re-married by her first husband, she would abide with him on a fresh footing as to three repudiations, the effect of the first repudiation being cancelled by the intermediate marriage to another person.

If a Mussulman should repudiate his *Zimmeeah* wife three times, and, after the expiration of her *iddut*, she is married to a *Zimnee*, then absolutely separated from him, and finally converted to the faith, it is quite lawful for the first husband to marry her by a new contract.

Marriage to a *Zimnee* sufficient in the case of a *Zimmeeah*.

When a bondwoman has been twice repudiated, she is rendered unlawful to the repudiator until she has been married to another husband, whether she were the wife of a freeman or a slave; and carnal intercourse with her master is not sufficient to remove the prohibition; neither is it removed by the repudiator himself becoming her proprietor, because the prohibition was incurred previous to his acquisition of the right. If one should repudiate his slave wife, and she is then emancipated, after which he marries her a second time or revokes the repudiation, she remains with him on the single repudiation as connected with her former condition of slavery, so that, if he should repudiate her again, she would become unlawful to him until married to another husband.

A bondwoman twice repudiated must be married and enjoyed by another man before she can be re-married by the repudiator.

An eunuch is competent to legalize a thrice-repudiated woman to the repudiator when he has had carnal intercourse with her. But there is one tradition opposed to his sufficiency.

An eunuch is competent to legalize a woman.

Intercourse with the new husband in the natural way, though it should take place without emission, is sufficient to legalize the thrice-repudiated woman, because the act is the occasion of mutual pleasure to the parties.

Emission not necessary.

If the legalizer, after marrying a repudiated woman, should, before connubial intercourse with her, apostatize from the faith, any subsequent intercourse with her during his apostasy would not be sufficient to render her lawful to her first husband, because the contract was cancelled by his apostasy.<sup>7</sup>

Intercourse after apostasy not sufficient.

<sup>7</sup> See *ante*, p. 29.

When the word of a thrice repudiated woman is to be credited as to the fact of her having been subsequently married ;

If, after the lapse of some time, a thrice-repudiated woman should allege that she was duly married to another husband, and, after being completely separated from him, had fulfilled her *iddut*, and if all the occurrences could possibly have taken place in the interval since the third repudiation, some of our doctors maintain that her word must be received, because in the whole matter a fact is involved, viz. coition, which cannot otherwise be ascertained. There is one tradition, however, to the effect that it is only when she is a trustworthy person that her assertion is to be credited in such circumstances.

And the marriage consummated.

When the legalizer has entered into the woman's apartment, and she alleges that connubial intercourse took place between them, that is sufficient to render her lawful to her first husband, provided that the legalizer assents to the assertion. When, on the other hand, he contradicts her, some of our doctors are of opinion that the conduct of the first husband should be regulated by his estimate of the probability of her or of the other party's speaking the truth. It would be better, however, to say that he should in all cases act in dependence on her assertion, from the impossibility of obtaining any other evidence of the fact than her own word.

Doubt as to connection with legalizer being sufficient in circumstances when connubial intercourse is prohibited.

If connection with the legalizer should take place under circumstances when connubial intercourse is interdicted, as during pilgrimage or an obligatory fast, some of our doctors are of opinion that the woman would not be rendered lawful to her husband, because the act being prohibited, cannot be supposed to be within the scope of the legislator's intention. Others, however, insist that she would be rendered lawful by the establishment of marriage on a valid contract.

### SECTION THIRD.

#### *Of Rujât or Revocation.\**

May be effected by words or by deed.

*Tulák* or repudiation may be validly revoked in words, as by saying, "I have recalled thee," or in deed, as by

\* Literally, *return* ; as if the man returned to his wife, or restored her to her former position.

connubial intercourse; and even though the husband should only touch or kiss his repudiated wife with desire, that would be a revocation. Permission by the repudiated woman is not a necessary preliminary to the revocation, for she is still his wife. And even a mere denial of the repudiation would be equivalent to revocation, for it implies a retention of the woman as his wife.

It is not necessary though proper to have witnesses to a verbal revocation.

Witnesses not necessary.

If a husband should say to his wife, "I have recalled thee when thou wilt or if thou wilt," the revocation would not take effect, even though she should answer, "I have willed." This, however, is open to doubt.

Doubt as to revocation dependent on the wife's will;

If a man should repudiate his wife and recall her after she has apostatized from the faith, the revocation would not be valid, as a marriage *ab initio* in such circumstances, that is, with an apostate, would not be valid.<sup>9</sup> On this point, however, there is room for doubt, arising from the consideration that the woman revocably repudiated is still a wife;<sup>10</sup> and if she should return to the faith the revocation would revive.

or after she has apostatized from the faith.

If a man having a *Zimmecah* wife should repudiate her revocably, and then recall her during her *iddut*, it has been said that the revocation would not be lawful, for revocation is like a new contract. But it would seem that the revocation is lawful, as the woman has never ceased to be his wife, and the revocation is rather to be viewed as a prolongation of the existing contract.

Similar doubt when the woman is a *Zimmecah*.

Revocation by a dumb man may be effected by intelligible signs. Some say that he ought to raise the veil from off her face, but this opinion is rarely entertained.

Revocation by a dumb man.

When a man has repudiated his wife and recalled her, but she denies that the marriage was ever consummated, with a view to avoid the necessity of *iddut*,<sup>11</sup> and to render the repudiation irrevocable, while he insists on the other

In a dispute as to consummation, the word of the wife to be received.

<sup>9</sup> An apostate is legally disqualified from contracting marriage. *Shuraya*, p. 531.

<sup>10</sup> See above.

<sup>11</sup> It is only on an enjoyed wife that *iddut* is incumbent (*post*, p. 160).



hand that consummation had taken place, her word and oath are to be received, for the *zahir* or apparent is in favour of her allegation.

So also when the question is as to expiration of *iddut* by courses.

Otherwise when it is by months.

When a woman claims that her *iddut* has expired,<sup>12</sup> by occurrence of the courses, and the time admits of the fact being so, while the man denies its expiration, her word and oath are to be received. But if the claim be that the *iddut* had expired by lapse of months, his assertion is to be preferred; for here the difference is merely as to the time when the repudiation took effect. If again, the husband should claim that the *iddut* had expired, the word of the wife is to be received; for the original state of things is the continuance of the marriage, which he is trying to impeach.

In disputes as to pregnancy and delivery, whose word is to be received.

If the woman was pregnant and claims that delivery has taken place, her word is to be received without requiring her to produce the infant. But if the dispute be as to the fact of her having been pregnant, which the husband denies, and she produces an infant which he denies to be his offspring, the word rests with him, because the fact is one which admits of proof by witnesses. If she claims the expiration of the *iddut*, and he alleges that he recalled her before its expiration, the word of the woman is to be preferred. But if he has recalled her, and she then claims after the revocation that the *iddut* had expired, his word is to be received, since the original state of things is the validity of the *iddut*.

In a dispute between the husband and master of a slave as to revocation during *iddut*, word of former to be received.

If the husband of a slave should claim that he recalled her during her *iddut*, and she confirms the allegation, while it is denied by her master, who insists that the *iddut* had expired before the revocation, the word of the husband is to be received; and some of our doctors are of opinion that he is not required to confirm his assertion by his oath, since the right of marriage is sustained by both the spouses; but this opinion is liable to doubt.

<sup>12</sup> The power of revocation terminates with the expiration of the *iddut*, as is obvious from the introduction, at this place, of the remaining paragraphs of this section, which would otherwise more properly belong to the chapter on *iddut*.

## CHAPTER III.

## OF KHOOLÂ AND MOOBARÂT.

## SECTION FIRST.

*Of Khoodâ: its Form, Ransom, Conditions and Laus.*

IN respect of form it is as if one should say, "*Khulatoki kuza*" ("I have *khoodâ'd* thee for so much"), or "*Fulanutoon mookhtullatoon ula kuza*" ("Such an one is *khoodâ'd* for so and so");<sup>1</sup> and if it be asked whether the *khoodâ* is effected by this alone, the answer must be that the tradition is to that effect. The *Sheikh*, however, insists that it is not effected by those words unless they are followed up by *tulâk* or repudiation. And there is no doubt that it is not effected by the words "*Padeetoki*" ("I have liberated thee for a ransom") without the addition of the word *tulâk*; nor by the words "*Fasulhtoki*" ("I have cancelled thee"); "*Abuntoki*" ("I have separated thee"), or "*Buttuttoki*" ("I have cut thee off"); nor by *tukail* (dissolution).

Form.

Supposing that the word *khoodâ* is sufficient, another question arises whether it is a cancellation of the marriage contract or a repudiation. According to *Al Moortuza* it is the latter, and his opinion is supported by tradition. The *Sheikh*, however, prefers to consider it as a cancellation; and in this view of it no account can be taken of it in the number of repudiations.

Doubt whether it is a cancellation of the original contract or a repudiation.

<sup>1</sup> The author has not given any definition of *khoodâ*, and I forbear to translate these terms, otherwise than by putting them into an English form, though, as it will appear a little farther on that *khoodâ* has the effect of an absolute divorce, they might very well be rendered, "I have divorced thee," or "Such an one is divorced."

Repudiation for a ransom is absolute.

*Tulák* or repudiation when given for a ransom takes effect absolutely, though no use has been made of the word *khoolá*. If a woman should ask her husband for a *tulák* in exchange for something, and he should *khoolá* her without using the word *tulák*, it would not take effect according to either of the opinions before mentioned. While, if she asked for a *khoolá* in exchange for something, and he gave her a *tulák* for it, she would not be liable for the exchange, according to those who think that *khoolá* by itself is a cancellation, and liable, according to those who consider it as a repudiation, or as not requiring the addition of the word *tulák*. Again, if the husband should say, "Thou art repudiated for a thousand," or, "with a liability for a thousand," the repudiation would take effect revocably without any obligation on her part for the thousand, even though she should afterwards voluntarily give a security for it, as it would be a security for what was not due. And if she should actually pay the amount, it could only be considered as a new gift, and the repudiation would by no means become absolute or irrevocable. Further, when a woman says, "Repudiate me for a thousand," the answer should be immediate; for if there is any delay the husband would not be entitled to the exchange, and the repudiation, if given, would be revocable.

When asked for must be given immediately; otherwise it is revocable.

II. The ransom: not limited;

With regard to the ransom, whatever may be validly given as dower is also valid as the ransom of *khoolá*; and there is no limit to the amount, so that it may lawfully exceed whatever was given to the woman as her dower or on any other account. When the ransom is not produced, its kind, quality, and quantity must be mentioned; but if produced mere inspection is sufficient. When it is money it must be paid in the coin most prevalent in the city, unless some particular currency is mentioned, when it must be paid in that. Where, again, the *khoolá* is for a thousand, and nothing has been said to show what was the intention of the parties, the *khoolá* is invalid. So also it is invalid, when the ransom is something the property in which is unlawful to Mussulmans, as wine for instance. Some say, however, that the *khoolá* should take effect

but must be something that is lawful to Mooslims.

revoably; which would be right if it were followed by a *tulák*; but otherwise, it is better to say that the *khoolá* is void. If the *khoolá* was for vinegar, and it proves to be wine, the transaction is valid, but the husband is entitled to have the full quantity in vinegar. Where, however, the ransom is the *factus* of which a beast or a female slave is pregnant, the *khoolá* is not valid.

The ransom may be disbursed by the woman herself or by her agent, or any one who has become her security for it, with her permission. But whether it may be paid by a mere voluntary is liable to doubt, the better opinion being against such payment. Yet if a person should say, "Repudiate her for a thousand of her own money on my guarantee," or "for this slave of hers on my guarantee," the transaction would be valid; insomuch that, though she should be unwilling to deliver what was specified, the *khoolá* would be valid, and the voluntary liable on his guarantee. Upon this point, however, there is room for doubt.

If a woman should enter into a *khoolá* during her death illness, the transaction would be valid though the ransom were in excess of a third of her estate. But here it is maintained by some of our doctors that any excess over the proper dower must come out of the third; and the opinion seems to be in accordance with the principles of law. If the ransom be the suckling of the husband's child, it is valid provided that the time during which the suckling is to last is distinctly specified. So also, if a man should repudiate his wife in exchange for the child's maintenance, the transaction would in like manner be valid, subject to the like condition that the quantity of the food and clothing which may be required, and the time for which they are to be provided, are all distinctly specified. If in either of the last two cases the child should die before the completion of the time, the repudiator would be entitled to a suitable compensation for so much of it as should remain unexpired, namely, the hire of a nurse for so long if the ransom were the suckling of the infant, and the value of the food and clothing if it were the infant's maintenance.

If a husband should enter into a *khoolá* with his wife

May be paid by the woman, or her agent, or surety.

*Khoolá* valid, though entered into by a woman in her last illness, and for more than a third of her estate.

If the ransom is not

equal to the description it may be returned. for a consideration sufficiently described, and which when delivered does not come up to the description, he may return what has been so delivered, and demand its exchange for something corresponding to the description. So also, if the thing delivered be blemished, he may return it and claim an exact similar unblemished, or its value; or if he please he may retain the thing and require a compensation for the blemish. So also, the same course is open to him if the consideration were a slave who proves to be of a country, or a piece of cloth that is found to be of a place, different to that described. Not so, however, if the consideration was a piece of silk and it proves to be cotton; for, though in that case the *khoolá* is valid, and the husband is entitled to the value of the silk, he cannot insist on retaining the cotton, by reason of the difference of kind between the two things.

*Khoolá* not valid when left to the husband's option. If a wife should deliver a thousand to her husband, saying, "Repudiate me for it when you please," the payment would not be valid, and if he should repudiate her the repudiation would be revocable, and the woman entitled to the money.

May be granted to two women for one ransom. If a *khoolá* is made with two women for one ransom, the *khoolá* is valid and the ransom payable by them equally. If two should say, "Repudiate us for a thousand," and he repudiates only one of them, he is entitled to half the sum; but if he should subsequently repudiate the other the repudiation would be revocable, and he would have no title to the remainder, on account of his delay in responding to what required an immediate answer.<sup>2</sup>

Valid though the ransom be specified, and the property of another. If a man should enter into a *khoolá* with his wife for a specific article, which proves to be the property of another, it has been said that the *khoolá* is void; but it were better to say that it is valid, and the man entitled to the value of the article specified, or a similar to it if it belong to the class of similars.

Ransom may be paid by a The payment of ransom by a female slave is valid. If permitted generally by her master the amount is limited

<sup>2</sup> See *ante*, p. 130.

to the proper dower, and for any excess beyond it she herself is liable, and may be sued for it if emancipated and able to pay, while she is liable for the original even in the absence of any permission by her master. And if she should give a specific thing with his permission, both the *khoolá* and the delivery would be valid; otherwise, the *khoolá* only would be valid, and the slave herself liable for the value or a similar of the article, to be sued for after emancipation. Payment of ransom by a repudiated *mookatubah* is also valid, and her master has no right to object.

With regard to the conditions of *khoolá*, those which are required on the part of the *khali* or man granting it are four in number—viz. puberty, sanity, freedom of choice, and intention; so that no *khoolá* is valid if made by a boy under puberty, or by an insane person, or one acting under compulsion, or in a state of intoxication, or in a paroxysm of anger so great as to take away all real intention. If *khoolá* is to be considered in the light of a *tulák*, or repudiation, it is void when entered into by a guardian for his ward; but if *khoolá* is not a *tulák*, it is valid when given by a guardian for something in exchange.

The conditions required in a *mookhtullah*, or woman receiving a *khoolá*, are that she be *tahir*, or pure for a *toohr* or period of purity in which no connubial intercourse has taken place; that is, when she is a woman whose marriage has been consummated, is not past child-bearing, and whose husband is present with her. It is also requisite that there be some aversion on the part of the woman to her husband. But though a woman should say to her husband, "I will most certainly bring in upon you some one whom you won't like," that would not render a *khoolá* imperative, though it would be proper and expedient in such circumstances. *Khoolá* of a pregnant woman is valid, though there should be some appearance of a sanguinary discharge, as repudiation would be valid in such circumstances, though it might be said that the courses are upon her. So also it is valid in the case of a woman whose marriage has not been consummated, though she

female  
slave,

appa-  
rently  
without  
her mas-  
ter's per-  
mission.

III. Con-  
ditions of  
*khoolá*.—  
Required  
in the hus-  
band.

Required  
in the wife.

were actually subject to them at the time; and a woman who is past child-bearing may be the subject of a *khoolá*, though connubial intercourse should have taken place in the *toohr* in which it is effected.

Two witnesses necessary.

It is farther required, to the validity of the contract, that it should be entered into before two witnesses who are present at the same time; for if they are separate it is not valid. It is also necessary that it be free from conditions.

*Khoolá* by an inhibited person, *zim-mee* or *hur-bee*, lawful.

*Khoolá* may be lawfully entered into by a man who is under inhibition, whether it be for profusion or insolvency; or by a *zim-mee*, or infidel subject, or by a *hur-bee* or alien enemy. And if in the two last cases the consideration is wine or a hog, the contract is valid notwithstanding; but if both or either of the parties should be converted to the faith before delivery of the exchange, the woman would be liable for its value.

*Khoolá* nullified by conditions inconsistent with the contract.

The conditions that nullify a *khoolá* are those which the contract itself does not require. For if the husband should say, "If you revoke, I revoke," such a condition would not nullify the contract, for it is one which it requires." So also if the wife should expressly stipulate for a right to reclaim the consideration, the *khoolá* would still be valid. But if he should say, "I have given you a *khoolá* if you will," the *khoolá* would not be valid, though she should say, "I have willed it;" for this is not a condition which the contract requires. So also if he should say, "If thou wilt be responsible to me for a thousand," or, "If thou wilt give me," or words to the like effect; or if he should say, "when," or "whenever," or "at what time," the *khoolá* would not be valid.

IV. Laws.

With regard to the laws of *khoolá*, they may be gathered from the following cases:—

Not lawful if the wife is compelled to enter into it.

*First.* If a man should compel his wife into an agreement for a ransom, he would do what is unlawful; and if he should thereupon repudiate her, the repudiation would be valid without any obligation on her part to deliver what she had agreed to give. The repudiation, however, would be revocable.

\* See next page.

*Second.* If a husband should give a *khoodā* to his wife while their dispositions or tempers are still in harmony, the *khoodā* would not be valid, and he would not become the proprietor of the ransom. And if he should repudiate her for an exchange in like circumstances, he would not become the proprietor of the exchange, but the repudiation would be valid, though with liberty to him to revoke.

Nor when the husband and wife are on good terms with each other.

*Third.* If a woman has been guilty of any shameful or profligate act, her husband may lawfully annoy her so as to induce her to ransom herself. It has been said, however, that this has been abrogated, and is no longer permitted.

Doubt whether a profligate woman may be teased into ransoming herself.

*Fourth.* When a *khoodā* has been established, the husband has no power of revocation. The wife, however, may reclaim the ransom at any time during the subsistence of the *iddut*; and if she should do so, he may then revoke the *khoodā* if he please.

*Khoodā* not revocable until the ransom is reclaimed by the wife.

*Fifth.* If a man should enter into a *khoodā*, and stipulate for a power to revoke it, the *khoodā* would not be valid. So also repudiation for an exchange would be invalid with a like stipulation.

Not valid with a stipulation to revoke.

*Sixth.* A *mookhtullah* or woman who has received a *khoodā* is not affected by a repudiation pronounced subsequently to it, because the latter is, in its nature, revocable. True, that if she reclaim the ransom, her husband may lawfully revoke the *khoodā*, and then repudiate her.

Woman who has received a *khoodā* not susceptible of being repudiated.

*Seventh.* When a woman's father says to her husband, "Repudiate her and thou art free from her dower," and he does repudiate her, the repudiation is valid revocably, and she is neither obliged to discharge her husband from the payment of the dower, nor is her father responsible.

Agreement by a woman's father for a repudiation not valid.

*Eighth.* When a woman has appointed an agent for *khoodā* generally, the ransom must not exceed her proper dower to be paid in the coin of the place. And in like manner, when the husband appoints an agent for *khoodā* in general terms, and the woman's agent gives more than the proper dower, the ransom is void, and the repudiation takes effect revocably, without any responsibility on the part of the agent. And if the husband's agent should grant

An agent for *khoodā* must not exceed the proper dower.



the *khoodá* for less than the proper dower, the *khoodá* would be void. So also if he should repudiate her for such a ransom, the repudiation would not take effect, as he acted contrary to his instructions.

Connected with the laws of *khoodá*, are the following cases regarding disputes :—

In disputes as to *khoodá* how the burden of proof is regulated.

*First.* When the parties are agreed as to the quantity of the ransom, but differ as to its kind, the word of the woman is to be preferred.

*Second.* When they agree that the quantity was mentioned, and that nothing was said as to the kind, but differ as to what was intended, the *khoodá* is void, according to some of our doctors, while others maintain that the burden of proof is on the husband ; and this opinion is the more approved.

*Third.* If the husband should say, "I granted the *khoodá* for a thousand on your responsibility," and the wife should say, "Nay, but on the responsibility of *Zeid*," the burden of proof is on him, and the oath is on her ; and if she should take it, she is released from the ransom, though *Zeid* does not thereby become liable. So, also, if she should say, "Such an one made the agreement with you, and he is liable for the ransom," the result would be the same. But if she should say, "I made the agreement myself, and such an one was my surety," she is liable for the thousand so long as there is no proof, and nothing is established against the third party merely on the ground of her allegation.

## SECTION SECOND.

### *Of Moobarát.*

How effected.

Requires mutual aversion.

*Moobarát* is effected when the husband has said, "*Barcetoki ula kuzá fu unti talikoon*" ("I have liberated thee for so much, and thou art repudiated"). It is founded on the mutual aversion of the husband and wife ; and it is a condition that the *moobarát*, or liberation, be followed by the word *tulák*, in so much that, if the husband should stop at the word *moobarát*, no separation of the parties

would take effect. And though, instead of *Barectoki*, other words, such as *fasukhtoki*, *abuntoki*, were employed, they would be equally effective if followed by the word *tulák*, since it is that word alone which is required for the separation, and none other. Even though the husband should merely say, "Thou art repudiated for so much," it would be valid and a *moobarát*, which is only another expression for repudiation for an exchange, with mutual repulsion between the spouses; in each of whom the same conditions are required as in the case of *khoodá*.

Repudiation for an exchange is absolute, so that the husband has no power to revoke it, unless, indeed, the wife should reclaim the ransom, which she may do at any time during the subsistence of the *iddut*; and if she should avail herself of the right, he may also revoke the repudiation. Repudiation for an exchange is irrevocable unless the exchange is reclaimed.

• *Moobarát* is like *khoodá*, except that the former is founded on the mutual aversion of the husband and wife, while the latter is founded on the aversion of the wife alone, and that in *moobarát* no more can be taken in exchange for it than what she had actually received from him, any excess being unlawful, while in *khoodá* it is quite lawful. Further, we are all agreed that in *moobarát* the word *tulák* is necessary to effect a separation between the parties, while with regard to its being required in *khoodá*, there is a difference of opinion among us. Distinctions between *moobarát* and *khoodá*.

## CHAPTER IV.

## OF ZIHAR.

## SECTION FIRST.

*Its Form, Conditions, and Effects.*

- I. Form. IN respect of Form, it is as if one should say to his wife, "Thou art on me like the back of my mother;" so also, if he should say, "This person," or make use of any other word indicative of a particular individual, "is on me like the back of my mother," the *zihar* would in like manner be constituted. The particular word of connection is of no importance; so that, if he should say, "Thou art *to* me or *with* me," it would make no difference. If, again, he should liken her to the back of any other woman related to him within the prohibited degrees by consanguinity or fosterage, there are two traditions on the subject, and, according to the most notorious or generally received of these, *zihar* would be effected. But if he should liken her to the hand of his mother, or her hair or belly, it has been said that there would be no *zihar*, though there is a weak tradition in favour of its taking effect in such a case, while, if the likening were to any other than his mother in any part of the person but the back, there is no doubt that there would be no *zihar*. And if he should liken his wife to a woman prohibited to him only by affinity, even though the prohibition were perpetual, as in the case of a wife's mother, or the daughter of an enjoyed wife, or the wife of a father or son, *zihar* would by no means be induced. So, also, his words would be alike ineffectual if the likening were to the wife's sister, or her aunt, whether paternal or

maternal, or if he should say, "Like the back of my brother," or "father," or "paternal uncle," or if she should say, "Thou art on me like the back of my father," or "my mother."

In respect of conditions, it is necessary with regard to the *zihar* itself that two just persons should be present when it is pronounced, and hear the words of the *moozahir*, or husband, pronouncing them; and also that the *zihar* should take effect immediately. So that if the effect should be suspended till the expiration of the month or the entering upon Friday, there would be no *zihar*, according to the best opinions. Where, again, *zihar* is made dependent on a condition, though the grant is also subject to doubt, yet it is more agreeable to traditional authority to say that it would take effect.

With regard to the *moozahir*, it is required that he be adult and sane, have freedom of choice and intention. So that the *zihar* of a child, an insane person, or one acting under compulsion, or temporarily incapable of intention through drunkenness, stupor, or a paroxysm of passion, are all equally invalid. And if one should use the formula of *zihar*, intending repudiation, there would neither be repudiation, for want of the appropriate word *talak*, nor *zihar* for want of intention. *Zihar* by an eunuch is valid, if we say that dalliance short of connubial intercourse is prohibited by it; so also it is valid when pronounced by an infidel or a slave.

With regard to the *moozahurah*, or woman who is the subject of the *zihar*, it is a condition that she have been married by contract; and, accordingly, *zihar* cannot take effect with reference to one who is a stranger to the *moozahir* at the time, though he should suspend, or make it dependent on his marrying her. It is further required that the woman be *tahir*, or pure, for a *toohr*, or period of purity during which there has been no connubial intercourse, that is, provided her husband be present with her, and she is of an age to be subject to the courses; for if any of these conditions are wanting the *zihar* is valid, though they were on her at the time. As to consumma-

II. Conditions of the *zihar* itself.

Of the *moozahir*.

Of the *moozahurah*.

tion being a necessary condition there is some room for doubt. There is a tradition, indeed, which supports its necessity; but later opinions favour the more general view, being against any restriction in this respect. With regard to a woman married by a *mootá*, or a temporary contract, there are various opinions; but, according to that which is best supported by traditional authority, *zihar* may take effect on such a woman. And even in the case of a woman enjoyed by virtue of a right of property, there is some room for doubt; for there is a tradition in favour of its efficacy in the case of a bondwoman, as well as one who is free.

III. Effects      The effects of *zihar* have been arranged under several cases, of which the following are the most important:—

When the necessity of expiation arises.      *First.* Expiation is not due merely on pronouncing the *zihar*, but is rendered incumbent by a return to the wife, by which is meant an intention to resume connubial intercourse. And the more correct view seems to be that nothing is established by the *zihar* itself except a prohibition of such intercourse until expiation is made. If connubial intercourse should take place before expiation, two expiations would be necessary, and if repeated, the expiation must be repeated also.

Expiation not evaded by repudiation and recall;      *Second.* When a husband has repudiated his wife, and then recalled her, that does not render her lawful to him without expiation. But if she should pass out of her *iddut* without revocation, and he were then to marry her again, no expiation would be due. So, also, if the divorce had been absolute, and he should marry her again in the *iddut*, and have connubial intercourse with her, no expiation would be due. Neither would it be incumbent if both or either of the parties should die, or any of them apostatize from the Mussulman faith.

but obviated in the case of a slave wife by her purchase.      *Third.* If a man should *zihar* his slave wife, and then purchase her, the marriage being cancelled by the purchase, he might have sexual intercourse with her by virtue of his right of property, without any necessity for expiation. So, also, if a third party should purchase her after the *zihar*, and cancel the marriage, which he is at liberty to do, the

effect of the *zihar* would be extinguished, and if her husband should marry her by a mere contract he would not be liable to any expiation.

*Fourth.* If a man should *zihar* four wives by one expression, a distinct expiation is due for each of them; and if he should *zihar* one several times he is liable for a distinct expiation for each time, whether the *zihars* were consecutive or separated by some intervals of time, though some of our doctors distinguish between the cases; and if he have matrimonial intercourse before making expiation, he is liable for a distinct expiation on each repetition of the act.

*Fifth.* When the *zihar* is in general terms conjugal intercourse is forbidden until expiation is made; but when it is suspended, or made dependent on a condition, such intercourse is lawful until the occurrence of the condition, and consequently no expiation is due for any previous intercourse. If the intercourse itself has been made the condition, the *zihar* is not established till it has taken place, nor any expiation due till a subsequent return to the wife. Some, however, have maintained that it becomes due on the first occurrence of the intercourse; but this opinion has not by any means met with general reception.

*Sixth.* Connubial intercourse is prohibited to the *moozahir* until he has made expiation, whether the expiation be by emancipation, fasting, or feeding the poor; and if he should break the prohibition during the fast he must begin it anew,—though some few have erroneously said that this is not necessary if the intercourse were during the night. But whether expiation is due for anything short of connubial intercourse, such as kissing or touching, is a question on which there is a difference of opinion; and the affirmative, which is maintained by some, is attended with a good deal of difficulty.

*Seventh.* When the *moozahir* is unable to make expiation, or offer any other substitute for it than asking pardon of God, prohibition continues, according to some, until expiation is made, but others, with more probability, maintain that to ask pardon is enough.

Distinct expiations due when four wives are *zihared* together.

When the *zihar* is conditional, expiation not due till the condition occurs.

When expiation is commenced, it must be renewed if the prohibition is broken before its completion.

If the *moozahir* is unable to expiate he must ask pardon of God.

Course to  
be pursued  
by the  
judge  
when com-  
plaint is  
made to  
him by the  
wife.

*Eighth.* If the *moozahural* or woman who is the subject of the *zihar* chooses to have patience no other has a right to object. But if she brings the matter before the judge, the husband must be put to his choice, either to make expiation and return to his wife, or to repudiate her, and three months are to be allowed to him to make up his mind. If the time is allowed to expire without making his choice, he is then to be straitened in respect of meat and drink, till he comes to a determination as to one or other of the courses; but he is not to be compelled by means of the straitening to repudiate his wife, nor is the judge empowered to make the repudiation in his stead.

## SECTION SECOND.

### *Expiation.*

Is of several  
kinds.  
That ap-  
plicable to  
*zihar*.

Expiations are of several kinds, some of which are obligatory and some voluntary. In this place it is only necessary to notice the expiation of *Zihar*, which belongs to the former class, and requires the emancipation of a slave, or, in case of inability to emancipate, fasting for two successive months, and in the case of inability to fast for that time, the feeding of sixty poor persons.

1. By  
emancipa-  
tion of a  
slave;  
who must  
be a *Moos-*  
*im*.

The obligation to emancipate is special to those who have it in their power to do so by actually possessing a slave, or by having the money and opportunity to buy one. In the slave are required the three following qualities.—First, he must have *eman* or the true faith. This is universally required in the expiation for intentional homicide, and, according to the best or most approved opinion, is also a condition in the other cases of obligatory expiation. But here nothing more is to be understood than *Islám* or a profession of the Mussulman faith; and it makes no difference whether the slave be male or female, young or full grown. An infant may come under the category of *Islám*, and is sufficient for the purpose of expiation in *zihar*, if both or either of his parents be of the Mussulman faith at the time of its birth. But one in the womb is not sufficient, though both its parents

should be *Mooslim*, and itself is such in the eye of the law. When a slave who is dumb attains to puberty, and professes the faith by signs, he is accounted a *Mooslim*, and is sufficient for the purpose of expiation, though both his parents should be infidels. By the quality of *Islám* in the matter of expiation is not required such a profession of the faith as entitles one to the full enjoyment of its blessings. It is quite sufficient if the slave be firm and established in the two testimonies, that is, the Unity of God and the Mission of the Prophet; and it is not a condition that he be free from everything besides. A youth under puberty, the child of infidel parents, cannot be accounted a *Mooslim*, whether they be with him, or the youth professing himself to be a *Mooslim* is separated from them. Even a *moorahik*, or boy closely approaching to puberty, who professes the faith, is not to be so accounted; though on this point there is room for doubt and hesitation, as also whether he should be separated from his infidel parents. This question, however, though it is admitted that he is still to be accounted an infidel, has been answered by some of our doctors in the affirmative, as a precaution to guard his good intentions from being marred by the influence of his parents. The second quality required in the slave to be emancipated is freedom from defects. So that one who is blind, leprous, or unable to walk, is not sufficient. Other infirmities, however, do not disqualify the slave, such as dumbness, deafness, or the loss of one leg or one arm; but one who has lost both his legs is not sufficient because unable to walk. The third requisite is that the slave be the entire property of the emancipator. So that a *moodubbur* not sufficient so long as the *tudbeer* is undissolved, nor a *mookatub* who has paid any part of his ransom; but an *abik* or absconded slave is sufficient so long as there is no positive intelligence of his death. So also a *moostuw'ludah*, or slave who has borne a child to her master, is sufficient, for slavery is still established in her.

Free from defects;

and the entire property of the emancipator.

The emancipation is subject to some conditions. First, Conditions of the emancipation. there must be intention, that is, an intention to expiate;



for emancipation is an act of piety which is susceptible of different phases, and must be pointed to one in particular by intention. There must also be in the intention a *koorbut*, or a desire of drawing near to God. Hence expiation by an infidel is invalid, whether he be a subject, an alien, or an apostate. Second, the emancipation must be entirely gratuitous; for if the master should say to his slave "Thou art free and liable for so much," it would not suffice for expiation, since it is evident that he intended to get something in exchange. And if a third party should say to the master, "Emancipate thy slave as an expiation, and thou hast so much against me," and he should emancipate accordingly, it would not suffice for expiation. Even though the master should restore the exchange after he had taken possession of it, still there would be no expiation; for the emancipation being insufficient for that purpose at the time it took place, cannot be rendered sufficient by any subsequent act. Thirdly, there must be no cause for the emancipation in an unlawful act of the emancipator. Thus, if he should have put out the slave's eyes, or cut off both his legs, and should emancipate him, intending expiation for *zihar*, the emancipation would take effect, but not suffice for that purpose.

2. Fasting necessary in case of inability to emancipate.

In obligatory expiation fasting is required when there is inability to emancipate; and such inability is established either by the non-possession of a slave and the absence of the means of purchasing, or by the impossibility of finding a suitable slave, though there may be the means of purchasing him. Though the person should be actually possessed of a slave, yet if he is required for service, or if his price be necessary for the person's food or clothing, he is not obliged to emancipate. Nor is he under any obligation to sell his house or his clothes for the purpose of buying a slave to emancipate, though any excess above what is necessary ought to be sold. When inability to emancipate is clearly established, it is necessary, as the expiation in *zihar*, to fast for two consecutive months, or one month if the person be a slave. If the fast is broken in the first month without a sufficient excuse, it must be

begun anew ; but should he fast, though only for one day of the second month, the fast is held to be completed and he is absolved. Some indeed consider him guilty of sin in breaking the fast, but there is some doubt on the point, and the better opinion seems to be that he is not. It may be observed that the only proper excuses applicable to a case of this kind are sickness, fainting, and insanity.

In the event of inability to fast, expiation must be made by feeding the prescribed number of persons, that is, by giving to each one *moodd*.<sup>1</sup> Some say indeed that the proper quantity is two *moodds*, and that it is only in case of necessity that one *moodd* can be deemed sufficient, but the first opinion is not approved. Any abatement from the full number of persons to be fed is not allowed, though the quantity should be the full allowance for the prescribed number,—that is, when the prescribed number can be found, otherwise the expiation is satisfied by repeating the allowance even to one person. The kind of food should be the medium of what is given to the expiator's family ; or what is the prevalent food of the place may be lawfully given. The prescribed number may be fed separately or all together. But it is not sufficient to feed children by themselves, though they may be lawfully fed among the general mass. If they should be fed separately two must be counted as one grown person. It is proper to confine the feeding to true believers,<sup>2</sup> and those who are reckoned as such, their children for instance. According to the *Mubsoot* the persons to whom the food is to be distributed, are the same as those on whom the *zukat* of the *fitr* is to be expended ; and those who cannot be lawfully included on that occasion are not lawful here. It would seem that profligate Mooslims may be included in the feeding ; but it is by no means to be extended to infidels.

In connection with the subject of expiation generally, the following cases are worthy of attention :—

*First.* Ability has reference to the time when expiation

3. Feeding the poor when there is inability to fast.

Miscellaneous cases.

Ability has reference

<sup>1</sup> A weight estimated at  $1\frac{1}{2}$  *rutl*. *Im. D.*, p. 78.

<sup>2</sup> *Moonineen*, but apparently not here restricted to *Sheeahs*.

to the time is to be made, not to the time when it became incumbent. So that, if a man who was at first able to emancipate, should subsequently become incompetent to do so, and should fast instead, he is no longer under an obligation to emancipate.

**A man who has begun one mode of expiation, not obliged to revert to another though able.** *Second.* When a man is unable to emancipate, and has begun to fast, but subsequently becomes possessed of sufficient means to enable him to emancipate a slave, he is not obliged to return to that mode of expiation. So, also, when he is unable to fast, and has taken to feeding the poor instead, but subsequently finds himself able to endure the first mode of expiation, he is not obliged to return to it.

**Expiation before intention to return not sufficient.** *Third.* When one has emancipated a slave before intending to return to his wife, that, according to the *Sheikh*, does not suffice to expiate the *zihar*, because the expiation was made before it was due; and the opinion is quite correct.

**Expiatory food, how to be disposed of.** *Fourth.* The food of expiation is not to be given to an infant, but to his guardian.

*Fifth.* Nor is expiation to be expended on one whom the expiator is otherwise obliged to maintain, as his father, wife, children, or slaves. But it may be expended on any others than these, though they should be near relatives.

**Value not a substitute.** *Sixth.* It is not sufficient to give value in a case of expiation, instead of the thing itself, which is obligatory.

**Alternative of inability to fast the full time, &c.** *Seventh.* Any one on whom it is incumbent to fast for two months, but is unable to do so, let him fast for eighteen days. If unable for that, let him bestow in charity to the extent of one *moodd* per day. If unable for that, let him ask pardon of Almighty God, and nothing more is required of him.

## CHAPTER V. -

## OF EELA.

IN form, *Eela* is an oath by God, and cannot be contracted Form. without one of the Divine names ; but it may be effected in any language when so intended. The words by which it is constituted are either plain and express, being specially appropriate to sexual intercourse, or capable of being so interpreted. For the former, there are no corresponding terms in the English language. The latter are such as, "By God, I will have no connection with thee ;" and, if used designedly with a view to *eela*, they are sufficient to constitute it ; but, unless so intended, they are not sufficient, while the others are sufficient in themselves. Whether *eela* can be made in dependence on a condition, is a question on which there are two reports of the *Sheikh's* opinion. According to the most notorious or generally received of these, it cannot be constituted either in dependence on a condition or to take effect from a future time, and, if attempted, the condition would be surplusage. If a man should swear "by emancipation," or "by alms," or "by prohibition," that he would not have connection with his wife, there would be no *eela*, even though intended. Neither would it be affected by his saying, "If I do so I am liable for so much." And if a man, having properly made an *eela* with one wife, should say to another, "I have associated thee with her," there would be no *eela* with the second, though it were intended, since *eela* cannot be effected except by an expression involving some name of God.

Conditions required in the *moolee*, or husband; With regard to the *moolee*, or person pronouncing the *eela*, it is required that he be adult and sane, and have freedom of choice and intention. But *eela* by a slave is valid, whether his wife be free or a bondwoman. So, also, that by a *zimnee* and an eunuch; even a *mujboob*, or one who has lost the *penis*, is valid, though, with regard to the latter, there is some room for doubt.

in the *moola*, or wife. With regard to the *moola*, or woman who is the subject of the *eela*, it is necessary that she be married by contract, and not merely by virtue of a right of property; and also that the marriage has been consummated. With regard to a woman married by *mootá*, or a temporary contract, there is some doubt; but, according to the better opinion, she is not a subject for *eela*. It makes no difference, however, whether a woman be free or a slave; and in either case she is competent to bring the matter before a judge, to have a time fixed, and after its expiration to demand a return to conjugal intercourse. *Eela* may also take effect with a *zimneeah*, or infidel subject, as well as with a *mooslimah*.

Laws of *eela*.

The laws of *eela* are comprehended under the following cases:—

Must be for more than four months.

*First.* *Eela* is not contracted unless the prohibition is absolute, perpetual, or for a time exceeding four months,<sup>1</sup> or to continue until the occurrence of something which certainly cannot, or in all probability will not, happen before the expiration of that time, as if a man should say, being in *Irak* at the time, “Until I go to and return from a town in *Turkey*.” If the time is four months only, or somewhat less, or is limited by an event which will certainly, or probably, or possibly happen within that time, *eela* will not be effected. And if he should say, “By God, I will not have connection with thee until I enter this mansion,” there would be no *eela*, for he might be freed from the necessity of expiation by having connection in the entrance, which would evade the *eela*.

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<sup>1</sup> Four months are sufficient, according to the other sect. *D.*, p. 295.

*Second.* The time for the woman to wait is four months, whether she be free or a slave, and whether her husband be the one or the other. And this time is the husband's right; so that within it she cannot demand his return to her. Nor when it has expired, is she divorced by the mere expiration. Neither has the judge any power to divorce her. But if she should bring the matter before him, the husband must then make his choice either to repudiate or to return to her. If he should repudiate her, that would put an end to her right, though the repudiation would be revocable, according to the best opinions. So also, if he should return to her, that would equally put an end to her right. But if he refuse to do either of the things required of him, he is to be imprisoned and straitened until he either repudiates or returns to her. The judge, however, has no power to compel him to do either of these in preference to the other. If the *eela* should be for a definite time, and he procrastinates after the matter is brought before the judge till the time expires, the effect of the *eela* abates, and he is not liable for any expiation, though he should have connection with his wife. If she should deem it her right to demand a return, it would not thereby be extinguished, for it is constantly renewed; and it is only rights that are not thus susceptible of renewal that can be extinguished by forgiveness.

Woman must wait for four months before she can lay the matter before a judge.

*Branches from the Preceding.*

*First.* If the husband should have conjugal intercourse within the time of expectation, he is liable to expiation according to general agreement; but if the intercourse should not take place till after the expiration of that time, it is stated in the *Mubsoot*<sup>2</sup> that there would be no necessity for expiation; but it is said in the *Khilaf*<sup>2</sup> that he would still be liable, and this opinion is the better founded.

Conjugal intercourse within the time induces expiation.

*Second.* When a man has pronounced an *eela* with respect to a wife who is a slave, and then purchases, emancipates, and remarries her, the *eela* does not revive.

Expiation not required when the wife, being a slave, is

<sup>2</sup> Both works are by the *Sheikh*.

emancipated and re-married by her husband. Case of four wives included in one *eela*.

And the result would be the same if the conditions were reversed, and the wife being free should purchase, emancipate, and then remarry her husband.

*Third.* When a man has said to four wives, "By God, I will not have connection with you," he does not become a *moollee* on the instant, and may lawfully have intercourse with three of them; but then the prohibition will attach to the fourth, with respect to whom the *eela* becomes established. Consequently, she may bring the matter before the judge, to have a time fixed for her. If one of the wives should die before the husband has had connubial intercourse with any of them, he is released from his vow, for a breach of it cannot be established except by connection with the whole four. The case would be different if he should repudiate one or two or three of them; for then the vows would remain in full force as to the remaining wives or wife, since connection with those whom he may have repudiated is still within his power under a semblance of right. If, however, he had said, "I will not have connection with one of you," *eela* would be established as to all, and a time must be fixed for all. True, that if he should have connection with one of them, he would be released from his vow as to the remainder; though if he should repudiate one or two or three of them, the *eela* would still be good as to the rest.

*Eela* of a wife revocably repudiated valid.

*Fourth.* When a man has pronounced an *eela* with respect to a wife repudiated revocably, the *eela* is valid, and the *iddat* is to be reckoned from the expiration of the time. And the rule is the same if he should repudiate his wife revocably, and then pronounce an *eela* with respect to her, and subsequently recall her.<sup>3</sup>

Expiation in case of *eela*.

It is to be observed that the expiation in a case of *eela* is the same as for a *yumeen* or oath; and in expiating a *yumeen* it is optional, either to emancipate a slave, or to feed the poor, or clothe them. If clothing be preferred, two garments should be given if the party be able, or one

<sup>3</sup> Some of the cases have been omitted, as not likely to be of any practical utility.

only if he cannot give more. Some have said, however, that in either case it is optional to give only one ; and this seems to be the better opinion. If, again, feeding should be preferred, one *moodd* is the proper quantity of food for each poor person, even though the party should be able to give two *moodds*. If a man should beat his slave excessively, it is proper to make expiation by emancipating him.<sup>4</sup>

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<sup>4</sup> The authority for the last paragraph is taken from the chapter on *Zihar*, pp. 341-2.



## CHAPTER VI.

## OF LIÁN.

## SECTION FIRST.

*Its Pillars.*

First  
pillar :  
Causes.  
1st. Scand-  
dal.

THESE are four in number. The first pillar is its cause, or rather causes, for there are two. The first cause is scandal; but *Lián* is not induced by this cause, except when a husband charges his *moohsunnah*, or chaste wife whom he has enjoyed, with adultery, and alleges that he has had ocular demonstration of the fact, but has no other proof of it. If the woman charged be a stranger to him, he is liable to the *hudd* or specific punishment for scandal, and there is no *lián*. So also, if he should charge his wife without alleging that he was witness to the fact, the result would be the same. But if he has proof, there is neither *hudd* nor *lián*. So also, if the accused woman be notorious for *zina* or adultery. It follows, from ocular demonstration being required on the part of the husband, that there can be no *lián* for scandal in the case of a blind man, though there may be for denial of a child. If the accuser has proof but declines to produce it in order to a *lián*, it is a question whether *lián* would be valid. According to the *Khilaf* it would; but this is denied in the *Mubsoot*, on the ground that the want of proof is made a condition in the sacred text;<sup>1</sup> and this opinion is more agreeable to the general principles of law. If the charge of adultery be referred to a time previous

<sup>1</sup> Those who charge their wives with adultery, and have no witnesses but themselves.—See *Inayah*, vol. ii. p. 252.

to the marriage of the parties, the husband is liable to the *hudd* for scandal; and whether he can avoid it by *lián* is a question on which the authorities differ. The author of the *Khilaf*, looking to the fact charged, insists that he cannot; while the same author in the *Mubsoot*, having a view to the time of the charge, maintains that he can; and this opinion seems to be most in accordance with the principles of law.

It is not lawful for a husband to accuse his wife on mere suspicion, nor even with a strong probability of her guilt, founded on information given to him by a person in whom he can confide, nor though it should be a matter of common fame that such an one has committed adultery with her.

A wife must not be accused on suspicion, or even strong presumption.

When a husband accuses his wife during her *iddut* for a revocable repudiation, he may have recourse to *lián*. But not so if the repudiation were absolute or irrevocable; for in that case he would be liable to the *hudd*, even though he referred the charge to a time when she was still his wife.

May be accused during the *iddut* for a revocable repudiation.

The second cause of *lián* is the denial of a child. But for the operation of this cause it is necessary that delivery should take place at six months or more from the time of conjugal intercourse, and not beyond the extreme period of gestation. It is further requisite that the intercourse should have been under a permanent contract. If the woman should give birth to a full-grown child within six months from conjugal intercourse the child is not affiliated to her husband, and may therefore be denied by him without *lián*. But if they differ, after consummation, as to the time of the pregnancy, recourse must be had to mutual *lián*. And a child is not affiliated to the husband unless access to his wife was possible, and he was able for matrimonial intercourse. If, then, a boy under nine years of age should go in to his wife, and she should give birth to a child, it is not affiliated to him; otherwise, however, if the boy should have attained to ten years or more, from the possibility of his being adult, as puberty is sometimes, though rarely, found at that early

2nd. Denial of a child.

age. Yet if he should deny the child there can be no *lián*, as there is no law for it in such circumstances, and it must be delayed until he has attained to puberty and discretion. But if he should die, whether before or after attaining to both, without denying the child, it must be affiliated to him, and both wife and child are entitled to participate in his inheritance. A child is not affiliated to an eunuch who is *mujboob*, though this is liable to doubt; and if the person is only one of these, that is, an eunuch or a *mujboob*, the child is affiliated to him, and cannot be denied without *lián*.

Child may be denied at any time before acknowledgment;

When a husband is present with his wife at the time of her childbirth, and does not deny the child when congratulated on the event, he is precluded from afterwards denying it if the delay to do so exceeds what is customary in such cases. It would be more proper, however, to say that he is at liberty to deny it, so long as he has not acknowledged the child to be his. And if he refrain from denying a child of which his wife is pregnant till her delivery, he may lawfully deny it after its birth, according to both opinions; because he may have refrained till then, on account of some doubt whether there was a real pregnancy or only the appearance of it. But a person who has once acknowledged a child expressly or in words that leave no doubt of his meaning, cannot afterward deny it, as if, when congratulated on its birth, he has answered in words indicative of satisfaction. For instance, if the terms of congratulation were, "God has blessed you in your child," and he should answer, "Amen," or "If it please God." But if he should say by way of answer, "God has blessed thee," or "God has done good to thee," there would be no acknowledgment.

but once acknowledged cannot be subsequently denied;

and, though denied, its paternity cannot be rejected, except by *lián*.

When a man has slandered his wife and denied her child, he is delivered from the *hudd* or specific punishment for the scandal if he can prove what he has laid to her charge; but the child cannot be rejected except by *lián*. And if a man should repudiate his wife absolutely, and she should be delivered of a child, it is affiliated to him according to appearances, and cannot be denied otherwise

than by *lián*. If she should marry again and be delivered of a child at less than six months from intercourse with her second husband, and at nine months or less since her separation from the first, the child cannot be denied by the first otherwise than by *lián*.

The second pillar of *lián* is the *Mooláin* or imprecating husband, of whom it is required that he be adult and sane. With regard to *lián* by an infidel there are two reports, and, according to the more generally received of these, it is valid. The same may be said of a slave. And the *lián* of a dumb person is also valid when his meaning can be ascertained by approved signs, in the same way as repudiation and acknowledgment by him are valid. But *lián* is in no case valid without speech or approved signs. If a person should deny a child begotten under a semblance of right to intercourse with its mother, the paternity of the child is negated, and there is no room for *lián*. And when there is an absence of all or any of the conditions of affiliation, it is an incumbent duty on a man to deny a child and have recourse to *lián*, that its *nusub* or paternity may not be established in one who has no right to him. But it is not lawful to deny a child on suspicion, or presumption, or want of resemblance between it and its progenitor.

The third pillar is the *Mooláinah* or imprecating wife, of whom it is required that she be adult and sane, and free from deafness or dumbness. It is also required that she was married by a permanent contract. With regard to consummation there are several reports. According to one of these there is no *lián* without it; according to another the *lián* is lawful; while a third restricts its legality to a case of scandal, excluding denial of a child. *Lián* is established between a free man and a slave wife, though here also there are two other opinions, one of which forbids it, while the other allows it only for denial of a child, to the exclusion of slander. *Lián* is valid with respect to a pregnant woman, though the *hudd* cannot be inflicted till her delivery.

A female slave does not become a *firash* or wife<sup>2</sup> merely

Child of a female

<sup>2</sup> *Firash* means literally *bed*.

slave may  
be denied  
without  
*lián*.

by virtue of the right of property; whether she becomes so by sexual intercourse with her master is a question on which there are two reports. According to that which is best supported by traditional authority, she does not become a *firash*, and her child is not affiliated to her master, without his acknowledgment. Even though he should admit his intercourse with its mother, he may still deny the child, and the case does not require *lián*.

Fourth  
pillar:—  
Form.

The fourth pillar of *lián* is its form or the manner in which it is conducted. It is not valid except in presence of the judge, or some one appointed by him for the purpose. Yet if the parties are content with a private person, and take the *lián* before him, it is lawful. Its effect is established on the mere order when pronounced, though some say that it requires the subsequent consent of the parties. The proper form of the *lián* is that the man should four times call God to witness that he is among the truth-speakers in respect of what he has laid to her charge, and that he should then add, May the curse of God be upon him if he be among the liars. The woman should then call God to witness four times, that he is among the liars in respect of what he has laid to her charge, and should then add, May the wrath of God be upon her if he is among the truth-speakers. The words of testimony are as just explained, and it is proper that the man should stand when uttering them, and that the woman should also stand when doing so. Some, however, insist that they should both be standing together before the judge. The man should begin the formula as just stated, and then the woman. He should also designate her in such a manner as to prevent her from being mistaken for any other, as by mentioning her name and that of her father, or specifying some of her distinguishing marks. The parties should also make use of the Arabic language if able to do so, and are only to be excused by inability; and the judge, when unacquainted with that language, should take the assistance of two interpreters, one being insufficient. The man should begin with testifying, and conclude with the word "curse;" while the woman should also begin

with testifying but conclude with the word "wrath." And if, instead of saying, "I testify by God," the parties should say, "I swear," using the words *kusum* or *huluf*, both signifying an oath, the formula would not be lawful.

## SECTION SECOND.

*Laws of Lián.*

These are contained under several cases, of which the following are the most important:—

*First.* A man by slandering his wife becomes liable Its effects. to the *hudd*, but his liability ceases on his taking the *lián*, and this is his right. The liability to *hudd* is then cast upon the wife, and on her taking it four consequences follow:—both the liabilities are at an end; the child is cut off from the man,<sup>3</sup> but not from the woman; she ceases to be a wife; and becomes perpetually prohibited to the man. If he should give himself the lie, or retract in the midst of the *lián*, or refuse to take it, the liability to *hudd* is established against him, but none of the other consequences are established. If she should refuse, or acknowledge the truth of the charge, she is to be confined, and he is relieved from the *hudd*, but her *jirash* or wifehood does not abate, nor is prohibition established. If he should give himself the lie, or retract after the *lián*, the child's paternity is restored, and with it his right of inheritance; but neither the father, nor any one related through him, can inherit to the child, while the mother, and those related through her, retain their right of inheritance to him. Her wifehood, however, does not return, nor is there any abatement of the prohibition. On the question whether his liability to the *hudd* revives, there are two reports, but, according to that which is most in accordance with traditional authority, he is not liable to it. If, again, she should make an acknowledgment subsequent to the *lián*, she would certainly not be liable to the

<sup>3</sup> That is. when the cause of *lián* is denial of a child.

*hudd* unless the confession were repeated four times,<sup>4</sup> and even with that there is some doubt of her liability.

After denial of slander recourse cannot be had to *lián*. *Second.* When a woman complains that her husband has slandered her in such a manner as to induce *lián*, and he denies the charge, but she adduces proof of it, he cannot now have recourse to the *lián*, for that would be falsifying himself.

The *hudd* for scandal avoided by proof of the fact alleged; *Third.* When a man has slandered his wife with another man in such a manner as to imply that they have committed adultery together, he becomes liable to two inflictions of the *hudd*, but can save himself from that due to his wife by taking the *lián*, and from both if he can produce proof of the charge.

or by wife's confession before *lián*; *Fourth.* When a man has slandered his wife, and she confesses before *lián*, then, according to the *Sheikh*, she is liable to the *hudd* if the confession is repeated four times, but her husband is absolved though she should confess only once. If, however, the paternity of a child is

involved in the case, that cannot be rejected except by *lián*, which the husband may have recourse to of himself; because the concurrence of the husband and wife as to the fact of adultery does not ignore the paternity of a child, since that is established by the *firash*, or wifehood, of the woman. There is also some doubt as to the *lián*.

Doubt as to four witnesses being required to an acknowledgment of *zina*, though necessary to the fact itself. *Fifth.* When a man has slandered his wife, and she has acknowledged the fact, and he adduces two witnesses to the acknowledgment, they cannot be received, according to the *Sheikh*, and he is liable to the *hudd*.<sup>5</sup> There is, however, some difficulty in the case, because the testimony adduced is to the acknowledgment, not to the fact of adultery.

*Lián* not available after wife's death. *Sixth.* When a man has brought a scandal against his wife, and she dies before the *lián*, the *lián* drops and the husband is entitled to inherit from his wife, but is liable to the *hudd* at the instance of her heirs. He may

<sup>4</sup> This is required by the *Imameea* code, as well as by the *Hanifeea*.—*Shuraya*, p. 513.

<sup>5</sup> Four witnesses are required to establish a charge of *zina*.

then, however, to save himself from the *huld*, have recourse to the *liân*. According to a report of *Abu Buseer*, if one of her people should arise and put the husband to the *liân*, he would have no right in her inheritance, otherwise his right remains; and this opinion has some support from the *Khilaf*; but the principle of law in the case is that the right to inheritance is established by death, and cannot be taken away by a subsequent *liân*.

*Seventh.* If there has been a failure in any of the words required in the formula of *liân*, it is not valid, and any order which the judge may have passed upon it is inoperative.

*Eighth.* The separation induced by *liân* is a cancellation of the marriage, not a repudiation.

*Liân* not valid if there is a failure of any of its conditions. Separation by *liân* is a cancellation of marriage.



## CHAPTER VII.

## OF IDDUT.

## SECTION FIRST.

*Women on whom it is not Incumbent.*

No woman whose marriage has not been consummated is obliged to keep *iddut*, except a widow. No woman is obliged to keep *iddut* whose marriage has not been consummated, whether she was repudiated by her husband or separated from him by a cancellation of the contract, except only when the cancellation is by his death. A widow is in all cases bound to observe an *iddut*, whether her marriage was consummated or not.

Consummation is established by the insertion of the *glans penis*, without emission; and even though the husband be an eunuch. Some have said that an *iddut* is also incumbent when he is a *mujboob*, from the possibility of pregnancy by friction; but this is liable to doubt, as *iddut* is dependent on coition. If, however, pregnancy should actually ensue, an *iddut* must necessarily be observed till delivery.

Mere retirement without coition does not require an *iddut*. In no case is *iddut* required in consequence of the mere retirement of the husband and wife together without coition, according to the most common or generally received opinion. When retirement has taken place, and a dispute subsequently arises between the parties as to the fact of coition, the word of the husband with his oath is to be preferred.

SECTION SECOND.<sup>1</sup>*Women who reckon by Kooras.*

These are women who are subject to the courses, and the *iddut* prescribed for them, when free, and whether their husbands be free or not, is three *kooras*, by which is to be understood, according to the most common or generally received of two traditions, three *toohrs*, or periods of purity. If a man should repudiate his wife, and she were then to menstruate a single *luhzah*, or instant, after, this *luhzah* would be reckoned as one *koora*, and the two remaining *kooras* would be completed on the appearance of the third discharge; so that the *iddut* would expire on the instant. This is the case when the courses are regular, returning after stated intervals. When, on the other hand, there is any irregularity, the woman should wait for caution till the expiration of the shortest time when they usually recur, which, in reckoning for the *iddut*, is taken to be twenty-six days and two *luhzahs*. Not that the last of the *luhzahs* is included in the *iddut*, but it is added for greater caution, as evidence of its completion. If a man should repudiate his wife while the courses are actually on her, the repudiation would have no effect, as already mentioned; but if the repudiation were given in a *toohr*, or period of purity, it would be quite valid, though the woman should menstruate when the man had done speaking, without an appreciable instant of time intervening, because it took effect in the *toohr*. Still, however, that *toohr* could not be reckoned in the *iddut*, because it did not follow the repudiation, and three new *kooras* would be required after the menstruation. If there should be any difference on this point, the wife insisting that a part of the *toohr* remained after the repudiation, while the husband denies that such was the case, the word of the woman is to be preferred, because she had the best opportunity of knowing the fact.

<sup>1</sup> This and the following sections, to the fifth, relate to free women who have been repudiated, or whose marriage has been cancelled otherwise than by the death of their husbands.

## SECTION THIRD.

*Women who reckon by Months.*

Adult women not subject to the courses must keep *iddut* for three months.

Women past child-bearing not obliged to keep *iddut*.

When deemed to be so.

Course to be observed in a doubtful case.

The longest possible *iddut*.

Months to be reckoned by the moon.

A woman who is not subject to the courses, though she has arrived at the proper age, must observe an *iddut* of three months after repudiation or other cancellation of her marriage, provided that it has been consummated and she is free. With regard to a *yússah*, or woman who is past child-bearing, and one who has not yet arrived at puberty, there are two traditions. According to one of these, they are both obliged to observe an *iddut* of three months; but, according to the other and more generally received tradition, no *iddut* of any kind is obligatory on either of them. The age when women are supposed to be past child-bearing is fifty years, though it is said that, among the *Koreish* and *Nabateans*, the age is sixty years. If, in a particular case, the monthly discharge should have ceased while women of the same age are generally subject to it, the *iddut* is three months by general agreement. In such a case, however, the woman should have regard both to courses and to months; so that, if three *toohrs* should first be completed, or if three months should first expire, the *iddut* would be at an end in either case. But if she should perceive the discharge in the third month, and the second and third appearance should be delayed, she must have patience for nine months, for the possibility of her being pregnant, and then keep an *iddut* of three months. This of all *idduts* is the longest. A woman whose courses occur only once in four or five months should keep *iddut* by months.

When a woman has been repudiated at the beginning of the *hillal*, or first appearance of the new moon, the three months of the *iddut* are to be reckoned by *hillals*. Where, again, she was repudiated in the middle of the month, the *iddut* is to be measured by two *hillals*, and so much of the third month as to make up for what was wanting of the first. Some, however, are of opinion that here also the three months must be reckoned by three *hillals*, and

the opinion seems to be more in accordance with the general principles of the law.

If, after the *iddut* of a woman has expired, and she has entered into a second marriage, any suspicion should arise of her having been pregnant, the *iddut* is not invalidated thereby. Nor is it invalidated even though no new marriage should have been contracted. But if there should be any suspicion of pregnancy before the expiration of the *iddut*, the woman ought to refrain from entering into another marriage. And it would be proper to do so when there is any suspicion of the kind, even though the *iddut* should have expired. In this case, however, it is right to observe that the marriage would be lawful so long as there is no certainty of the woman's being pregnant. But in all the cases, if she should subsequently prove to have been pregnant, a second marriage entered into in such circumstances would be void, by reason of the *iddut* being still subsisting at the time of the contract.

A marriage entered into after the expiration of the *iddut* is not invalidated;

unless the woman should subsequently prove to have been pregnant at the time of contract.

#### SECTION FOURTH.

##### *Of Pregnant Women.*

A pregnant woman, when repudiated, must keep *iddut* till delivered of her child. If a woman, after being repudiated, should allege that she is with child, her husband ought to wait patiently till the extreme term of gestation, which is nine months; but after that her claim is no longer to be regarded. According to one tradition, he should wait for a year; but this tradition has not been generally received. If a woman is pregnant of twins, she becomes absolutely separated or divorced from her husband on the birth of the first of them; though she cannot lawfully enter into a second marriage until delivered of the last also. It seems preferable, however, as more in accordance with the principles of the law, to say that she is not completely divorced from her husband until delivered of both.

A pregnant woman when repudiated must keep *iddut* till delivery.

But if her husband die, she must enter

If a man should repudiate a pregnant wife revocably, and then die while her *iddut* is still unexpired, she must

on a new *iddut* for his death, if the repudiation was revocable. enter anew into an *iddut*, on account of his death. But if he repudiate her irrevocably, she is only required to complete the *iddut* already commenced for the repudiation.

When a woman has become pregnant by *zina*, and is then repudiated by her husband, it is the *iddut* of months which she has to observe, and not that of delivery. But if she was enjoyed under a semblance of right, and her child has been affiliated to the man with whom the intercourse took place, by reason of her husband being at a distance from her at the time, and she is then repudiated by her husband, she should keep *iddut* till delivery, on account of the father of the child, and after the delivery observe a new *iddut*, on account of the repudiator.

Disputes as to time of delivery. When a husband and wife are agreed as to the time of a repudiation, but differ as to the time of delivery, the word of the woman is to be preferred, because the difference is with regard to her own act. If, again, they are agreed as to the time of delivery, but differ as to that of the repudiation, the word of the man is to be preferred, because here the difference is with regard to his act. There is, however, some difficulty in both the cases, because the original facts are, the non-existence of the repudiation, and the non-existence of the delivery; and according to the general rules of procedure, the word of the person who denies these facts should be preferred.

or repudiation: continued. If a woman should declare that her *iddut* has expired, and be subsequently delivered of a child at six months or more from the date of the repudiation, some are of opinion that the child is not to be affiliated to the repudiator; but the better opinion seems to be that it ought to be ascribed to him, so long as the time does not exceed the extreme term of gestation.

## SECTION FIFTH.

### *Iddut for Death.*<sup>2</sup>

For a woman who is not preg. A free woman married by a valid contract should keep *iddut* for the death of her husband during four months and

; <sup>2</sup> This section relates to free women only.

ten days when she is not pregnant, whatever be her age, whether she is a child or full grown, and whether her husband had arrived at maturity or not; and she becomes absolutely separated from her husband, or all connection with him entirely cut off at sunset of the tenth day, for that is the end of the day. If she is pregnant the *iddut* is the largest of the two periods, that is, it is prolonged to delivery if that should not occur till after the expiration of four months and ten days from her husband's death, whereas if she is delivered before the expiration of that time she is to wait for its completion.

nant the  
*iddut* is  
four  
months  
and ten  
days.

For one  
who is  
pregnant  
the same  
on delivery

*Hedál*, or mourning, is incumbent on a widow; by which is to be understood abstinence from everything in dress and ointments intended to adorn or beautify the person. There is no sort of objection to black or blue garments, for in these there is an entire absence of anything like ornament. In those respects there is no difference between the young and the full grown, the *mooslimah* and the *zimmeeah*. But there is some doubt with regard to a slave, on whom it would seem that *hedál* is not incumbent. Neither is it incumbent on a woman who has been repudiated by her husband, whether the repudiation were revocable or irrevocable.

*Hedál* is  
incumbent  
on a widow  
What it is.

Not incum-  
bent on a  
woman  
who has  
been repu-  
diated.

A woman who has been enjoyed under a semblable contract, and whose husband has died, should observe the *iddut* prescribed in the case of repudiation, not that appointed for a husband's death, whether she be pregnant or not; the observance being due to the carnal intercourse, not to the contract, for in reality she is not a wife.

*Iddut* of a  
woman en-  
joyed  
under a  
semblable  
contract.

When a person is missing but something is known as to where he is, or his wife is maintained by his guardian or some one acting on his behalf, she has no option but must wait for his return. Where again there is no intelligence regarding him and no person who maintains her, though she may also in such circumstances remain content with her condition, and no one has a right to interfere, yet if she please she may bring the matter before the judge. In the event of her taking that course the judge should postpone the consideration of the subject for four years, and make

Missing  
person,  
when not  
heard of,  
and his  
wife is  
without  
mainte-  
nance, she  
may apply  
to the  
judge;

who, if nothing is heard of the husband for four years, may direct her to keep *iddut* as for his death; after which she may marry again.

diligent inquiry in the meantime regarding the husband. If some certain intelligence of him be then received, she must still have patience, but it is incumbent on the *Imám* to maintain her out of the *Beit-ool-Mal*, or public treasury. If, on the other hand, nothing can be heard of her husband, the judge should direct her to keep *iddut* as for his death; and on its completion she may lawfully marry again. If after all this the missing husband should appear, and find that she had completed her *iddut* and married again, he is without any remedy against her. But if he should appear while she is still in her *iddut*, he retains his right to her. Where again the *iddut* has expired, but she has not availed herself of the privilege to marry again, there are two traditions on the question of his rights; and by the most generally received of these he is entirely without any remedy against her.

And she is not obliged to keep a second *iddut*, though the first husband were really dead.

If she has availed herself of her right to marry again after the expiration of her *iddut*, and it then proves that the first husband is dead, the second contract is valid, and she is not under any obligation to keep a second *iddut*, whether the death occurred before or during the currency of the *iddut*, or after its expiration: for the first contract was extinguished in the eye of the law, and no effect can be given to the death of the husband, as none would be given to his life if he were still in existence.

Nor is he obliged to maintain her if he return before completion of the *iddut*.

The missing husband is not liable for the maintenance of his wife during her *iddut*, even though he should come back before its expiration. This seems to be a necessary effect of the judge's order of separation between the parties; but there is some doubt or difference of opinion on the point.

A repudiated woman may be the subject of another repudiation or a *zihar* during the *iddut*.

If a husband should repudiate or *zihar* his wife during her *iddut*, maintaining her at the same time, the repudiation or *zihar* would be quite valid, for the coverture<sup>3</sup> still remains. But though he should continue to maintain her after the *iddut* has expired, a repudiation or *zihar* in such circumstances would be entirely inept, because the coverture has been cut off and is at an end.

<sup>3</sup> Arab. *Asmut*—defence, protection modesty.

. When a repudiated woman who has entered into a second marriage is delivered of a child after the lapse of six months from its consummation, the child is to be affiliated to the second husband, though it were claimed by the first. And even if he were to support his claim by an allegation that he had privately intercourse with the child's mother, still no regard should be paid to it. The *Sheikh*, however, has said that the claimants should cast lots for the child. But this opinion is far from being generally received.

If she should enter into a second marriage a child born at six months to be affiliated to the husband.

A husband has no right of inheritance to a repudiated wife if she should die after the expiration of her *iddut*; nor has she any right to inherit from him if he should die after its expiration. But there is some room for doubt as to their respective rights if either should die during the currency of the *iddut*. It seems more agreeable to the general principles of law to say that the survivor has in that case a right to inherit.<sup>4</sup>

No right of inheritance in case of death after expiration of the *iddut*.

SECTION SIXTH.

*The Iddut and Purification of Slaves.*

The *iddut* of a female slave on account of repudiation, after her marriage has been consummated, is two *kooras*; by which is to be understood two *toohrs* or periods of purity. According to some doctors it is two occurrences of the courses, but the first opinion is the more probable. The shortest time allowed for the completion of the *iddut* is thirteen days and two *luhzahs*, with the same remark with regard to the second *luhzah* as has been already made in the case of a free woman.<sup>5</sup> If the woman is not subject to the courses, yet of an age when they usually appear, her *iddut* is a month and a half, whether she be the wife of a free man or a slave. If she is emancipated and then repudiated, her *iddut* is that of a free woman. So also if she has been repudiated revocably and then emancipated during

*Iddut* of a slave for repudiation is two *kooras*.

<sup>4</sup> See *post*, Book of *Furaiiz*.

<sup>5</sup> See *ante*, p. 161



the *iddut*, it is to be completed like that of a free woman. But if the repudiation were irrevocable she is obliged to complete the *iddut* only as that of a slave, notwithstanding the emancipation.

*Iddut* of a *Zimneeah* same as of a free woman. The *iddut* of a *Zimneeah* is the same as that of a free woman, both for repudiation and for death, though, according to one tradition, it is that of a slave ; but this is rarely accepted.

*Iddut* of a slave for death, two months and two days. The *iddut* of a slave for the death of her husband is two months and two days. If she is pregnant she must keep *iddut* for the longest of two terms, namely, that just mentioned or till delivery. If she be an *oom-i-wulud* to her master, her *iddut* is four months and ten days ; and if repudiated revocably by her husband who then dies while she is still in her *iddut*, she is obliged to keep a new *iddut* as that of a free woman ; but if she were not an *oom-i-wulud* the *iddut* for death incumbent on her would be only that of a slave, while if the repudiation were absolute she would only be obliged to complete the *iddut* required in the case of divorce.

Case of a slave emancipated during her *iddut*. If the husband of a slave should die, and she is then emancipated, she has to fulfil the *iddut* of a free woman, from a preference given to the side of freedom. And if the master of a female slave, after having carnal intercourse with her, should make her a *moodubburah*, and she should consequently be emancipated at his death, her *iddut* would be four months and ten days ; whereas, if she were emancipated in his lifetime, it would be three *kooras*.

Purification of a slave, when necessary, must be observed in all cases of acquisition. Every one on whom it is incumbent to observe the purification of a slave when he has purchased her, is equally obliged to observe it when he has acquired the right to her by any other means, such as spoil of war, composition of a claim, or inheritance ; and when purification is not required in the first of these cases, it is not required in the others. When a man who is the husband of a slave purchases her from her owner, the marriage is cancelled ; but he may lawfully have carnal intercourse with her without purification. And if a slave should buy a female slave and purify her, that would be sufficient for

his own master if he should desire to have carnal intercourse with her.

If a man should enter into a contract of *kitabut* or ransom with a female slave it is no longer lawful for him to have carnal intercourse with her; but if the contract is cancelled, the prohibition is at once removed, and purification is not required before he proceeds to have such intercourse with her. In like manner, when the master or the slave apostatizes from the Mussulman faith, and again returns to it, purification is not required to legalize their intercourse.

Not necessary in the case of a cancelled *kitabut*;

When a female slave is repudiated by her husband her master cannot lawfully have carnal intercourse with her till she has fulfilled her *iddut*; but the *iddut* suffices for purification. And if a man should purchase a female enemy, and purify her, after which she embraces the faith, any further purification of her is unnecessary. So also when a *moolhrim*, or person on pilgrimage, has purchased a female enemy, and then, purified her, any further purification is unnecessary before he proceeds to have intercourse with her when it becomes lawful to do so at the termination of his pilgrimage.

nor after an *iddut* for repudiation.

*Miscellaneous Cases.*

*First.* It is not lawful for one who has repudiated his wife revocably to turn her out of his house, except for some glaring impropriety, or at least for something injurious to the other members of his family. And it is forbidden to the woman herself to leave his house, except on some urgent necessity; and even when such an occasion requires her going abroad, she should do so only at midnight, and should return before the morning. On any less occasion she cannot go out without his permission; but where there is any urgent necessity, and the business cannot be otherwise accomplished, she may go out of his house even without his permission. A woman repudiated absolutely may go out whenever she pleases.

A woman repudiated revocably cannot be turned out of her husband's house except for some grave offence; nor can she leave it without his permission, except on urgent necessity.

*Second.* A woman revocably repudiated is entitled to maintenance, clothing, and a place to reside in during her *iddut*, day by day, whether she be a *mooslimah* or *zimneeah*.

A woman repudiated revocably entitled to maintenance during the *iddut*.

Not so one  
repudiated  
irrevocably.

But a woman repudiated irrevocably has no right to maintenance or lodging unless she is pregnant, when she is entitled to both till delivery. A woman enjoyed under a semblance of right is bound to observe an *iddut*. • But is she entitled to maintenance in the event of her becoming pregnant? The *Sheikh* has answered this question in the affirmative. But the case is attended with some difficulty, because it is supposed that among women absolutely separated (from those with whom they may have been connected) it is only the repudiated woman who is pregnant that is entitled to maintenance.

Cases  
where a  
woman  
repudiated  
revocably  
is obliged  
or entitled  
to leave her  
residence  
during  
*iddut*.

With more particular reference to a woman's residence it may be observed, that if it has fallen to ruin, or, being held only on lease or commodate loan, the term has expired, she may be lawfully removed from it, or may leave it herself; and if she is repudiated when living in a place lower than she is entitled to, she may leave it immediately for one more suitable to her condition; but this point is liable to some doubt. Further, if the house in which she is living at the time of the repudiation should be sold, and her *iddut* is one of *kooras*, the sale is not valid, because she is entitled to remain in it for their completion, the time of which is unknown, and the sale is vitiated by the uncertainty.<sup>6</sup> If, on the other hand, the *iddut* is one of months, the sale is quite valid, the uncertainty being removed. Again, if her husband should die, leaving several heirs, they are not entitled to make a partition of so much of the house as is necessary for her residence without her permission, or till the expiration of her *iddut*, because she is entitled to a lodging in it. It would seem, however, that after the death of her husband she has no right to a residence except in the single case of her being pregnant. When the woman is residing in her own house and makes no demand for another residence, she is not entitled to claim rent on account of her own house, because remaining in it appears to be voluntary on her part. In like

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<sup>6</sup> It is a condition to the validity of sale that the thing sold shall be known at the period of contract.—*Im. D.*, p. 24.

manner she would have no claim to rent if she should hire a house and abide in it during her *iddut*, because, though entitled to be provided with a residence, it is not where she, but where her husband pleases.

*Third.* A widow has no right to maintenance even though she be pregnant. According to one tradition, she has a right to it in that particular case out of the share of the child in her womb; but the tradition is far from being generally allowed. And she is entitled to live wherever she pleases.

*Fourth.* If a repudiated woman should marry during her *iddut*, the marriage is not valid, and the *iddut* is not cut short by it. So that if the second marriage is not consummated, she continues in the *iddut*. And even though it were consummated, the effect would be the same, provided the husband were conscious of the illegality, and that whether pregnancy follow or not. If, on the other hand, he were ignorant of the illegality and pregnancy has not ensued, the woman must complete the first *iddut*, and then enter on another, on account of the second marriage, according to the more generally received of two traditions; while, if she has become pregnant, and there is anything to show that it is due to intercourse with the first husband, she must keep *iddut* till delivery on his account, and then after the delivery observe another *iddut* of three *kooras* on account of the second husband. But if there is anything to show that the pregnancy is the fruit of intercourse with the second husband, she is to keep *iddut* on his account till delivery, and then complete the *iddut* for the first after delivery. If there is anything to show that the pregnancy is due to neither, she is to complete after delivery the *iddut* of the first, and then renew the *iddut* on account of the second; while, if the pregnancy may possibly be due to both, it is said that lots should be cast between them, and *iddut* be observed on account of the person to whom the child may be ascribed by lot. But this is attended with some difficulty, arising from the fact of the woman being the wife of the second by means of the connection under a semblance of right,

A widow has no title to maintenance during the *iddut*.

Marriage by a woman during her *iddut* is invalid.

so that he should have the preferable right to the child.

From what time the *iddut* is to run.

*Fifth.* The wife of a person who is present with her is to keep *iddut* from the time of the repudiation or death; and the wife of one who is absent is to observe it, in the event of repudiation, from the date of its occurrence, and in the case of death, from the time of the accounts of it reaching her, even though the tidings may be brought to her by a person who may not be trustworthy; but she is not to marry again till certain of her husband's death. And if she knows that she has been repudiated, but does not know the exact time, she is to keep her *iddut* from the time of the tidings reaching her.

A new *iddut* necessary where a repudiated woman is recalled during the *iddut*.

*Sixth.* When a man has repudiated his wife after their marriage has been consummated, then recalled her during the *iddut*, and repudiated her again without touching her, she must keep *iddut* anew, on account of the first being nullified by the revocation. And if he should release her by a *khoolâ* after the revocation, the *Sheikh* has said that in such a case the presumption is that there is no *iddut*; but this seems to be far from correct, since it is *khoolâ* from a contract which was followed by consummation. But if he should release her after consummation, and marry her again in the *iddut*, and then repudiate her before enjoyment, she is not bound to keep *iddut*, for the first *iddut* was nullified by the bed (marriage), and the second marriage was not consummated. It is said, however, that she ought to keep *iddut*, because the first *iddut* was not completed; but the former opinion seems more agreeable to the general principles of law.

Connection under a semblance of right requires an *iddut*.

*Seventh.* Connection under a semblance of right does not induce the necessity of *hudd*, or specific punishment, but requires an *iddut*; and if the woman was aware of its illegality, but the man ignorant of it, the *nusub*, or child's paternity, is to be ascribed to him, while she is obliged to keep *iddut*, and is subject to the *hudd*, but not entitled to dower. If the woman was a slave, the child is to be ascribed to the man, who is liable for his value to the woman's master as at the time of its birth, together with

the dower of the slave, which, according to a tradition, is a tenth (of her value) if she was a virgin, and a twentieth if otherwise.

*Eighth.* When a man has repudiated his wife absolutely, and then had connection with her under a semblance of right, the two *idduts* are mingled together,<sup>7</sup> because they are on account of one man; and this seems proper whether she be pregnant or not.

*Ninth.* When a woman has married in the *iddut* for a revocable repudiation, and become pregnant to the second husband, she is to keep *iddut* for him till delivery, and then complete the *iddut* for the first after delivery; and the first may recall her during this *iddut*, but not during the time of the pregnancy.

Two *idduts* required when a woman has been recalled, and intercourse had with her under a semblance of right.

Two *idduts* necessary in case of pregnancy under a marriage during the first.

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<sup>7</sup> Arab. *Tudakhooh*.



## BOOK III.

### OF SHOOFÂ, OR PRE-EMPTION

*Shoofâ* is the legal title of one partner in joint property Definition. to the share of another partner<sup>1</sup> therein, in consequence of its transfer by sale.

#### CHAPTER I.

##### OF THE THINGS IN WHICH SHOOFÂ IS ESTABLISHED.

THE title of *Shoofâ* is established with respect to lands,<sup>2</sup> The right is established as such as dwellings,<sup>3</sup> vacant spaces, and orchards, by general consent. With regard to moveables, such as wearing-apparel, household utensils, shipping, animals, and the like, there are different opinions: Some doctors have maintained that the right extends likewise to these, to obviate the inconvenience of division, and further upon the ground of a report to this effect, by *Yoonus*, from the *Imâm Jafer Sadik*, on whom be peace. Others, again, have limited the title to the former class, upon the principle that the conferring of dominion over the property of a Mussulman ought to be restricted to those cases on which all are agreed, and also because the report alluded to is weak or not well authenticated. This latter doctrine is the most approved.

<sup>1</sup> Arab. *shureek*. According to the Hanifites, not only a partner in the property, but also one in its rights, and a neighbour, have a legal claim to pre-emption.—*D.*, p. 476.

<sup>2</sup> *Arzeen*, pl. of *arz*.

<sup>3</sup> *Musakin*, pl. of *muskin*.



Trees, &c. . . . . With respect to date and other trees and buildings,<sup>4</sup> affected by the right when sold with the ground ; but not so when sold separately. if sold as appendages of the ground on which they stand, the privilege of *Shoofá* is fully established ; but if sold separately and distinctly, the same difference of opinion above stated exists, and upon the same principle the most approved doctrine in this case also rejects its operation.

Some doctors extend the right to slaves. It is to be observed that some of our doctors distinguish between slaves and the lower animals, allowing the right of *Shoofá* in respect of the former, though denying it in the case of the latter.

Exception as to some immovable property incapable of division without loss. With regard to the establishment of *Shoofá* in respect of rivulets, ways, baths, and other property the division of which would occasion loss or damage, a considerable degree of doubt has prevailed. But the most approved opinion denies its operation as to these. By damage we understand such as would render the property useless after division, in which case the person who would be injured cannot be compelled to make a partition.<sup>5</sup> Where, again, the bath, or way, or rivulet, is of such a character that its utility would not be destroyed by division, the co-owner may be compelled to admit of a partition ; and if he should sell his share, the right of pre-emption would have effect in favour of his partner.<sup>6</sup>

The right also extends to a well and the adjoining ground. In like manner, in the case of a well to which there is waste ground adjoining as an appendage, so as to admit of a division without loss, by surrender of the well to one person, and of the land to the other, here also the judgment of law would enforce a partition of the joint property, and establish the right of pre-emption if one partner should sell his share. With regard, again, to the apparatus of a well, such as wheels and buckets made use of in drawing water, which, though strictly moveable, are by custom never removed from the well, there is some doubt whether the

<sup>4</sup> *Abneent*.

<sup>5</sup> A mere diminution of value would prevent a compulsory partition, according to the authority cited in the *Im. D.*, p. 425.

<sup>6</sup> It would seem, from this, that the right of *shoofá* is in some way dependent on that of partition.

right of *shoofá* applies to those when sold together with the ground; but with respect to the ropes on which these buckets are suspended, their exclusion from its operation is universally allowed, except by those who maintain that the right attaches generally to every kind of property sold—a doctrine which we have already shown to be the least approved.

The right of pre-emption has no effect with respect to fruits, even when sold on date or other trees in connection with the roots and ground which they occupy. It is otherwise in the case of lands which have been divided off, where the roads or rivulets passing through them continue to be held in joint property, and one of the partners in the latter sells his share together with his portion of the divided land; for there the other partner's right of pre-emption attaches not only to the share in the road or rivulet which was held in joint property, but extends also to the portion of the land divided off, as being connected in sale with the other. If, however, the land should be sold separately, there can be no ground for the claim of pre-emption in respect of it; and even with respect to the road or rivulet which continued in joint property, it is only when sufficiently wide to admit of a division that the right can attach to either of them.<sup>7</sup>

If a person should sell a piece of land his own exclusive property, and with it his share in another joint tenement, by one *sufkut* or bargain,<sup>8</sup> the right of pre-emption attaches to the share exclusively, at a due proportion of the general price.

It is an indispensable condition of the right of pre-emption, that the share of property to which the claim is preferred should have been actually transferred by sale, for if it has been assigned as the dower of a wife, or given in charity, or bestowed by way of gift or in composition for a debt, it is by no means subject to the claim of pre-emption. In like manner, if a mansion should be partly *wukf*, or

But not to fruit, although sold with the trees on which it grows, yet it affects lands though divided off, by virtue of partnership in the roads and rivulets passing through them.

Land not subject to the right, though sold together with a share in other land.

Property disposed of by sale alone affected by it;

and the person en-

<sup>7</sup> See *ante*, p. 176.

<sup>8</sup> Literally, "striking of hands."

titled to the benefit of a *wukf* has no title to claim it. appropriated to pious or charitable purposes, and partly free, and the latter portion of it is sold, the person entitled to the benefit of the appropriation has no right of pre-emption, not even if he be a single individual, because he is not the proprietor of the substance of the *wukf*, and is entitled only to its usufruct.

## CHAPTER II.

OF THE SHUFEE OR PERSON TO WHOM THE RIGHT OF  
PRE-EMPTION BELONGS.

THE *Shufee* is every partner of a share in joint and undivided property who is able to pay the price at which it has been sold. It is, however, a condition that he be a *Mooslim* when the purchaser is of that religion.

The right of *shoofâ* belongs to every partner;

There is no privilege of pre-emption to a neighbour, nor in property that has been divided, unless the road or rivulet of water running through it is still held in partnership. The privilege is established by general assent when there are only two partners. When there is more than one claimant opinions are divided. According to one of these it is established absolutely whatever be the number. By another it is established with a plurality of partners in the case of lands but not of a slave. By the third it is not established in respect of anything when there is more than one partner. And this last opinion is the most prevalent and best supported by traditional authority.<sup>1</sup>

but not to a mere neighbour.

It affects only the case of two partners.

The right of *shoofâ* is extinguished by the *shufee's* inability to pay the price, and also by his delay to claim the privilege, or absconding at the time of sale. If he should claim the privilege, but allege the absence of funds to pay for it, a delay of three days must be allowed to him, at the expiration of which, if he is unable to produce the money, his right is extinguished. If, again, he should assert that his property is in another city, a delay pro-

May be lost by delay to claim it;

<sup>1</sup> According to the Hanifites, several persons may have the right and exercise it.—*D.*, p. 494.

portionate to the distance should be given him, to enable him to obtain the money, and three days additional, unless the purchaser would be injured thereby.

but not by absence, minority, &c., in which cases the guardian should exact it; and his dereliction does not affect the right.

The privilege of *shoofâ* is established in favour of absent persons, and such as are imbecile, insane, or minors, of all of whom their guardians should avail themselves of the right, if for the advantage of their wards; and if the guardian should abandon the claim, the minor on attaining to puberty, and the insane person on recovering his reason, may still assert it, because in either case there is a sufficient legal excuse for the delay in prosecuting it. Where, again, the assertion of the claim is of no advantage to the ward, but the guardian has nevertheless assumed it, such assumption is invalid, and may be repudiated by the party himself on attaining to puberty or recovering his reason.

It holds in favour of infidels against infidels, but not against believers.

The right of *shoofâ* is established in favour of an infidel against a purchaser of his own persuasion, but not against a *Mooslim*, even though he should have purchased from a *Zimnee* or infidel subject.<sup>2</sup> But it is established in favour of a *Mooslim* against a *Mooslim* and an infidel.

A father or grandfather selling his child's share in property held jointly with himself, may assert the right of pre-emption.

If a father or grandfather should sell the share of his child or grandchild in property held in joint ownership with himself, he may lawfully assert the right of pre-emption in his own favour, any ground of objection being obviated by the consideration that it is no more than selling the ward's share directly to himself.<sup>3</sup> But has an executor the same power? The *Sheikh* has answered this question in the negative, on account of the suspicion which naturally attaches to such a transaction; the affirmative, however, appears to be better supported, as in the case of an agent who may lawfully claim the privilege in such circumstances.<sup>4</sup>

<sup>2</sup> This distinction is not recognized by the Hanifites.—*D.*, p. 473.

<sup>3</sup> Which it is quite lawful for him to do.—*Im. D.*, p. 14.

<sup>4</sup> That he can lawfully sell to himself, see *ibid.* pp. 15 and 16, and *post*, p. 192.

A *mookatub*<sup>5</sup> may assert a right of *shoofâ* and his master cannot object. But if an agent in *Moozarabut*<sup>6</sup> should purchase property of which the owner of the capital stock is the *shufec*, the latter would become the proprietor by the mere act of purchase, and not by virtue of any right of pre-emption. Nor could the agent make any objection unless there should appear to be some profit on the transaction. He would, however, be entitled to the hire of his agency in the transaction.<sup>7</sup>

It also holds in favour of a *mookatub*; but not of an agent in *Moozarabut*.

<sup>5</sup> A slave with whom his master has entered into a contract of emancipation for a ransom.

<sup>6</sup> A contract in which the capital is contributed by one party and the labour and skill by the other, with a mutual participation of profits. See *Im. D.*, p. 433.

<sup>7</sup> The author here enters into a long digression, comprised in what he terms ten branches, on the supposition of the right of *shoofa* being established when there is plurality of *shufees*. But as he has admitted that the doctrine which rejects the right in such a case is most in conformity with traditional authority, and the branches afford no illustration of general principles, I have omitted them entirely as of no practical utility. They also appear to have been omitted in the *Digest of Imaneea Law*, compiled under the superintendence of Sir William Jones.

## CHAPTER III.

OF THE MANNER IN WHICH THE CLAIM OF SHOOFĀ IS  
TO BE ASSERTED.

A *shufee* is entitled to claim on the conclusion of the contract ;

THE *shufee* is entitled to assert his claim on the conclusion of the contract and expiration of the option,<sup>1</sup> for it is then that the contract becomes binding. Some doctors, however, maintain that the right is established by the mere contract, without waiting for the expiration of the option, on the principle that a transfer is legally effected by the mere contract ; and this opinion is the most generally approved ; while in cases where an option is stipulated only to the purchaser there can be no doubt that the *shufee's* right is established on the mere conclusion of the contract,<sup>2</sup> which in such case completes the transfer to the purchaser.

but not to partial exercise of his right ; and must pay the full price, but is not liable for contingent charges.

A *shufee* is not entitled to relinquish his privilege in part and to exact it as to the remainder of the property to which it applies ; but, on the contrary, must take the whole or abandon his right entirely. Further, he must take it at the price of the contract whether more or less than the value of the share ; but, on the other hand, he is not liable for any contingent charges incurred by the purchaser, such as brokerage, agency, or the like.

Augmentation or the price

If the purchaser should add something to the price after completion of the contract and expiration of the

<sup>1</sup> The doctrine of option in contracts is fully explained under the head of sale.—*Im. D.*, p. 33.

<sup>2</sup> From what is said (*post*, p. 191) it would seem that it is only when the option is reserved to the purchaser that the *Sheikh* considered the right of *shoofā* to be established on the mere conclusion of the contract.

period of option, such addition is not considered in law an increase of the price, but a gift, and the *shufee* is under no obligation to pay it. In cases, again, where this augmentation is made during the period of option the *Sheikk* has declared that it constitutes a part of the original price, and is the same as if stipulated for in the contract; but this opinion is attended with some difficulty, as being inconsistent with what has been already said of the transfer being completed by the contract.<sup>3</sup> In like manner, if the seller should make any abatement from the price, such abatement is unconnected with the contract, and the purchaser is by no means bound to surrender the share until he has received the full price originally agreed upon.<sup>4</sup>

after conclusion of the contract does not affect the *shufee*.

Who, on the other hand, does not benefit by any abatement from it.

If a person should purchase by one bargain or *sufkut* a share in property, together with something to which the right of *shoofá* does not apply, the share may be taken at its proportion of the general price, and the purchaser has no option in consequence to rescind his contract, because the claim of *shoofá* is supervenient on what is his own property.

Where a share is sold with property to which *shoofá* does not apply, the *shufee* may take the former at its price.

If the price be of the class of similars, such as gold or silver, the *shufee* must produce a similar to it, that is, an equal quantity of either metal. Where, again, there is no similar to the price, as where it is an animal, or a piece of cloth, or a jewel, some doctors have said that the right of *shoofá* must drop for want of a similar to the price, and also by reason of a tradition by *Aly Ben Rabey* from the *Imám Jáfer Sádik*, on whom be peace. Others, however, maintain that the *shufee* may take the article at its value at the time of purchase; and this doctrine is more generally approved.

If the price consist of similars, it must be discharged in the same kind; and where it is a specific thing, by paying its value.

A *shufee* should prefer his claim as soon as he is informed of his right; but should he delay to do so from any necessary cause preventing his personal appearance, or the appointment of an agent to assert it on his behalf, his

A necessary delay to claim the privilege does not extin-

<sup>3</sup> *Ante*, p. 182.

<sup>4</sup> According to the *Manífites*, the *shufee* is entitled to the benefit of the abatement.—*Hidayah*, vol. iv. p. 933. *Trans.*, vol. iii. p. 581.



right is not extinguished. In like manner, if he should abandon his claim, supposing the price to be high when it was really moderate; or that it was gold when it turns out to be silver; or an animal when it proves to be some other article; his dereliction in such circumstances would have no effect in extinguishing his right. So, also, if he were imprisoned for a claim which he is unable to discharge, or is unable to appoint an agent to prefer a claim on his behalf, the apology would be sufficient to preserve his right notwithstanding his delay, to assert it.

The *shufec*, however, is bound to make all proper expedition in preferring his claim; It is at the same time incumbent on him to use all proper diligence in preferring his claim as soon as he becomes acquainted with his right, that is, so far as is customary, in so much that when travelling with that intent, he is not obliged to use greater expedition in his journey than is habitual to himself. Further, should he be engaged in the performance of any religious duty, whether indispensable or discretionary, he is not obliged to break it off, but may lawfully wait till it is completed. In like manner, if the time of prayer is at hand, he may lawfully wait till he has purified himself, and then performed his devotion without hurry or restraint. Again, should he receive intelligence of the occurrence of his right whilst on a journey, and be unable to prosecute his claim by personally appearing or appointing an agent, the right is not extinguished, even although he should also neglect to call upon witnesses to attest his intention to demand it.<sup>5</sup> If, however, while able to use the proper exertions, either in person or by appointing an agent, he should neglect to do so, his right is entirely lost.

and should he neglect it without a valid cause, the right is lost. It is not cut off by a dissolution of the sale. The right of *shoofa* is not annulled by a dissolution of the sale on the part of the seller and purchaser, because it is established by virtue of the original contract, and cannot be cut off by any subsequent act of the parties. Moreover, the *durk*, or future responsibilities, rest still on the

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<sup>5</sup> This should not be omitted, according to the Hanifites.—*D.*, p. 483.

purchaser.<sup>6</sup> True, that if the *shufee* should acquiesce in the sale, and the buyer and seller should then concur in dissolving it, he could not again lay claim to the privilege, because the dissolution of the contract is a cancellation, not a sale *de novo*.

If the purchaser of a share in property should sell it, the *shufee* is entitled to annul the sale, and take the property from the first purchaser; and he may also take it from the second. So, in like manner, if the purchaser should make a *wakf*, or appropriation of the property to any special purpose, or should convert it into a *musjid* or place of worship, the *shufee* may do away with all such acts, and take possession of the property under his right of pre-emption.

The *shufee* takes the property from the purchaser on whom the *dark* or future responsibility lies, and does not take it from the seller, except that if, when he makes his demand on the purchaser, the property is still in the hands of the seller, it may fairly be said to him, "Take it from the seller, or relinquish your right;" and the purchaser cannot be put to the trouble of taking possession from the seller if he decline to do so, even though required by the *shufee*. In such circumstances, the *shufee's* possession comes into the place of the purchaser's, the *dark*, however, or responsibility for future claims, still resting on the purchaser; and the *shufee* has no right to cancel the sale. On the contrary, if he attempt to do so, and take possession from the seller, the act would be invalid.<sup>7</sup>

If the subject of sale should perish or become damaged, and this happens either by the act of the purchaser, or without his instrumentality, before demand by the *shufee*, the latter has an option, and may take the property at the full price, or abandon it entirely; and, in the event of his taking it, he is entitled to all the ruins or fragments that

<sup>6</sup> That is, as the *shufee* takes his title from the purchaser, the latter remains responsible to him, notwithstanding the dissolution, for all future claims that may be made against his title.

<sup>7</sup> If valid, the act would necessarily be suicidal, as his own right is dependent on the sale.

Sales and other disposals of the property by the purchaser may be cancelled by the *shufee*.

The *shufee* takes the property from the purchaser, not the seller, unless it is still in his possession.

If the property falls to ruin, previous to the *shufee's* demand, he must

take it at the full price or relinquish his claim ; but if damaged by the purchaser subsequent to demand, he is responsible.

remain, whether they are still on the spot or have been removed from it, because they are obviously opposed to part of the price. If, on the other hand, the injury to the property has been done by the purchaser after demand by the *shufec*, the purchaser is responsible, although some doctors have denied his responsibility, on the ground that the *shufec* does not become proprietor in virtue of his demand, but rather by taking possession. The first opinion, however, appears to be better supported and more generally adopted.

If the purchaser plant trees or erect buildings he is entitled to remove them ;

If the purchaser of ground subject to the right of *shoofá* should plant trees or erect buildings upon it, and the *shufec* should afterwards demand possession, the purchaser is entitled, if he think proper, to pull up and remove his trees and buildings, and it is not incumbent on him to level the ground ; but, on the other hand, it is optional to the *shufec* to take it at the full price, or to relinquish his right altogether.\* If, again, the purchaser should decline to remove his trees or buildings, the *shufec* has three things in his option : he may either remove them himself, paying the purchaser a compensation for any loss he may sustain thereby, or he may take possession of the whole, paying, in addition to the price, the value of the trees or buildings, which thus become his property, with the consent of the purchaser, or he may abandon his claim altogether.

An increase connected with the subject belongs to the *shufec* ; but if separated, it belongs to the purchaser.

Case of a date-tree which has only blos-

If the subject of *shoofa* should increase in such a manner that the increase remains connected with it, as, for example, if a young plant or shoot of a date or other tree is sold together with the ground on which it stands, and it becomes enlarged by natural growth, the advantage belongs to the *shufec* ; but if the increase be separated from the original subject, such, for instance, as of residence in a mansion, or the fruit of a tree, it belongs to the purchaser. If, however, a date-tree should blossom in the buyer's possession, but is assumed by the *shufec* before impregnation,<sup>8</sup> the *Sheikh*, to whom God be merciful, has

<sup>8</sup> Arab. *tabeer*. It seems to be the universal practice in Arabia to impregnate the female date-trees.—*Im. D.*, note, p. 56.

declared that the blossom in this case belongs to the *shufec*, considering the blossoms in the same light as the branches; but this principle applies exclusively to sale by traditional authority, and cannot, therefore, be extended to the case before us, according to the most approved opinion.<sup>9</sup>

somed, and is taken possession of by the *shufec* before impregnation has taken place.

If a person should sell his shares in two mansions, and the partner or *shufec* in both is one and the same person, he may take or abandon both, or he may take one and forego his claim to the other. But in the case of a single mansion he cannot assert his claim as to part of it, and forego his claim to the remainder.

A *shufec* of two mansions may take both or one at his option.

If the price is a specific article and it turns out to be the property of some other person than the purchaser, there can be no right of *shoofa*, for the sale is null. But if the price was not specific, and merely stipulated for in general terms,<sup>10</sup> the right would be fully established, because the purchase would be good in such circumstances. And although the price after delivery by the *shufec* should turn out to be the property of another person, that would not affect his right in either of the cases supposed.

If the price turns out to be the property of another, this cancels the sale and the right of *shoofa*.

If the subject of sale should appear to be defective, and the purchaser in consequence should receive a compensation for the defect, the *shufec* is entitled to a similar deduction from the price. And if the purchaser should determine to keep the subject of sale without seeking any compensation for the defect, the *shufec* must either take it at the full price or abandon his claim altogether.

Any compensation for defect received by the purchaser must be abated to the *shufec*.

### Miscellaneous Cases.

*First.* If a person should say, "I purchased the half for a hundred," upon which the *shufec* relinquishes his claim, and it subsequently appears that the fourth was purchased for fifty, the privilege is not lost, and he may still assert his claim. So, also, if it were said, "I pur-

*Shufec's* right not lost by relinquishment on misinformation by the pur-

<sup>9</sup> The fruit of an unimpregnated date-tree belongs to the buyer of the tree.—*Ibid.* p. 57.

<sup>10</sup> As if it were a quantity of some commodity estimable by weight or measure.

chaser as to the terms of his purchase.

chased the fourth for fifty," upon which the *shufee* relinquished his claim, and it should subsequently appear that the half was purchased for a hundred, the privilege would not be lost; because in the one case the *shufee* might not be able to give the larger price; and in the other he might not be inclined to avail himself of the defective or partial sale.

Declaration by the *shufee* that he has assumed his right invalid if he were ignorant of the price.

*Second.* If, when intelligence of the sale has reached the *shufee*, he says, "I have taken the thing sold under my right of pre-emption, being at the time cognizant of the price," the declaration is valid; but not so if he was at the time ignorant of the price. And even though he should say, "I have taken it at the price whatever it may amount to," still the declaration would be invalid if he were ignorant of the actual price, as leaving room for deception which ought to be avoided.

The price must be paid to the purchaser before delivery.

*Third.* The price must first be delivered by the *shufee*, and if he should refuse to deliver it, the purchaser is not bound to make delivery of the subject of sale till he has received the full amount.

Relinquishment by the *shufee*, on misinformation regarding the purchaser, does not invalidate his right.

*Fourth.* If the *shufee* is informed that there are two purchasers, and thereupon abandons his claim, after which it appears that there was only one, or if he was informed that there was only one purchaser, and it turns out that there were two; or should he be told that the purchaser bought for himself, and it afterwards appears that he bought for another, or the reverse of this is the case, in all these instances the right is not lost, because in each he might have a different object in view which was frustrated by the false information.

*Shoofá* cannot be enforced on sown land until the crop is gathered.

*Fifth.* When the subject of sale is a sown field, it must be suffered to remain in that state until the crop is gathered,<sup>11</sup> and the *shufee* may either take immediate possession of the ground, allowing the crop to remain, or he may wait until it is reaped; because in this option he has a manifest interest, viz. the use of his money, while he is debarred from all benefit from the land, which is

<sup>11</sup> See *Im. D.*, p 56.

rendered useless to him by the crop remaining on it. There is, however, some doubt as to the legality of this delay without prejudicing the right of *shoofá*.

*Sixth.* If the seller should ask the *shufee* to dissolve the sale, and he should do so, the dissolution would be invalid, because it is only the contracting parties themselves, that is, the seller and purchaser, that can dissolve a sale. Dissolu-  
tion of sale  
by *shufee*,  
at request  
of seller,  
invalid.

## CHAPTER IV.

APPENDAGES TO THE ASSUMPTION OF PROPERTY UNDER A  
RIGHT OF SHOOFĀ.

In case of a purchase on credit the *shufce* may take possession, on giving security for the price when it becomes due.

*First.* When a person has purchased for a price deferred, or on credit, the *Sheikh* has declared in his *Mubsoot* that the *shufce* may take possession immediately on paying down the price, or may wait till the stipulated time of payment arrive, and then pay the price and take possession.<sup>1</sup> But the same author has stated in his *Nihayah*, that the *shufce* may take immediate possession of the subject of sale on his own responsibility for the price, provided that, if not in opulent circumstances, he must give security for the amount. And this doctrine is the more approved.

The right of *shoofā* is hereditary.

*Second.* *Mofeed* and *Moortuza* have both pronounced the right of *shoofā* to be hereditary. But the *Sheikh* has declared that it is not so, founding his decision on a report by *Tulha Ben Zeyd*, who, however, is a *Butturee*; <sup>2</sup> and the first doctrine is more approved, as being agreeable to the general and comprehensive sense of the sacred text on the subject of inheritance.<sup>3</sup>

<sup>1</sup> That is, he is not entitled to the benefit of the credit, which is agreeable to the *Hanifceea* doctrine on the subject.—*D.*, p. 491.

<sup>2</sup> A particular sect of the *Zeylians*, held in necessary detestation by the followers of the twelve *Imāms*, as disputing the title of their seventh spiritual leader, the *Imām Moosey Kasim*, son of *Jāfer Sādik*, in favour of another brother.—See *Salc's Preliminary Discourse to his Translation of the Koran.*

<sup>3</sup> According to the Hanifites the right abates on the death of the *shufce*.—*D.*, p. 499.

*Third.* The right is inherited like any other property, like any so that if the *shufee* should leave a widow and a child, the other widow would take an eighth and the child the remainder. property. Further, if one heir should relinquish his share of the right, it would not drop or be extinguished, but the other might take the whole. This, however, is liable to some slight doubt.

*Fourth.* When the *shufee* sells his own share of the property, with a full knowledge of his right of pre-emption, the *Sheikh* has declared that his right is extinguished, because such share is the sole ground of his claim; but that if he should sell his share before he has been informed of his right, it would not be extinguished, as existing previous to his own sale. It would, however, appear to be better to say that in neither of these cases would he have any claim to the exercise of the right. It is extinguished by the *shufee* selling his own share of the property;

Upon a principle formerly laid down by the *Sheikh*,<sup>4</sup> and is it would follow as a necessary consequence, and the *Sheikh* established in first has declared, that if a partner should sell his share of any purchaser. joint property with an option to the buyer, and the *shufee* should afterwards sell his own share, the right of *shoofà* in such share will belong to the first purchaser; whereas if in the first contract an option had been reserved to the seller, or to both the parties, the right of *shoofà* would belong to the seller; because, in the first case, the transfer would be completed by the contract alone, while in the second, its completion would not take place till after the lapse of the period of option.<sup>5</sup>

*Fifth.* If a person on his deathbed should sell his share in the case of joint property to one of his heirs by a contract of *Muhabat* sale on deathbed, that is, for a price under its value, and if the

<sup>4</sup> See *ante*, p. 182. note <sup>2</sup>. It would seem that the *Sheikh* was of opinion that it is only in cases where an option is reserved to the purchaser that the right of *shoofà* is established by the contract of sale, without lapse of the period of option.

<sup>5</sup> The more prevalent opinion being that the transfer is completed in both cases by the contract alone, the right of *shoofa* ought to belong to the first purchaser alike in both.—See *ante*, p. 182.



the *shufee's* right can operate only as to so much of the share as is compensated for by the price, and so much more of it as falls within a third of the deceased's estate.

abatement does not exceed a third<sup>6</sup> part of his estate, the contract of sale is valid, and establishes a right of pre-emption in the partner of the deceased. Should the abatement exceed a third part of the deceased's estate, and the other heirs refuse to ratify the sale, it is valid only to such extent as is opposed to the price, and so much more as the third of the estate will admit of; and, consequently, to this extent only the privilege of *shoofa* can operate in favour of the partner. Some doctors, however, have maintained that the *muhabat* is good as against the whole of the deceased's property, and that the *shufee* is accordingly entitled to take the whole, on the principle that no limitation to a third can affect deathbed acts, which are absolute and unconditional.

The right is extinguished by the *shufee's* compounding it; but not by his guaranteeing the sale, or acting as agent for either party therein.

*Sixth.* If a *shufee* agree to compound his privilege for a compensation, it is valid, and his claim is thereby extinguished; for it is a right to property, and, therefore, a fit subject of composition.

*Seventh.* If a share of joint property be sold, and the *shufee* should himself become *zamin bil durk*, or general security, either for the seller or purchaser, or if both should stipulate an option to the *shufee*, his right of pre-emption would not be extinguished in either case. Neither would it be so if he acted as agent in the sale for either of the parties.<sup>7</sup> Upon this point, however, there is room for some doubt, founded on his apparent acquiescence in the sale.

The *shufee* after taking possession may return the property for a defect.

*Eighth.* When the *shufee* has taken possession of the property and discovered a defect in it which existed prior to the sale, then, if both he and the purchaser were aware of the defect, neither has any option in the matter; but if they were both ignorant of the defect, and the *shufee* returns the property to the purchaser, the latter has an option either to reject the sale altogether, or to demand a compensation for the defect from the seller. If, however, the *shufee* should elect to retain the property, the purchaser

<sup>6</sup> To which amount the operation of deathbed gifts is limited. -*Post*, p. 209.

<sup>7</sup> See *ante*, p. 180.

has, in that case, no right to cancel the sale, because the share has passed out of his hands. And the *Sheikh* has said that he has no right to demand a compensation for the defect; but on this latter point the more prevalent opinion is in favour of his claim. So also if the *shufee* were acquainted with the defect, and the purchaser ignorant of it.<sup>8</sup> But if the purchaser was informed of it and not the *shufee*, the latter only would have the right of rejection.

*Ninth.* If a person should sell his share in joint property for a specific thing which has no similar, as a slave, for example, and we adopt the doctrine that, in such a case, there is no right of pre-emption,<sup>9</sup> nothing farther is to be said. If, on the other hand, we adopt the more prevalent opinion which supports the right of the *shufee* on payment of the value, and he avails himself of his privilege, but the slave, for example, is found to be defective, the seller has a right to return him to the buyer, and demand from him the full value of the share, unless prevented by some recent obstacle, such as a new blemish occurring in the slave while in his possession; but cannot demand restitution of the share from the *shufee*, because no subsequent cancellation of a sale originally valid can extinguish the right of *shoofá*. Further, should the share revert to the purchaser by a new title of property, such as gift or inheritance, he cannot return it to the seller; nor, if the latter should call upon him to do so, on account of the defect in the price, is he bound to comply with the request. Again, if in the like circumstances the value of the share were less than the value of the slave, the *shufee*, according to the most prevalent doctrine, has no recourse for the difference, for the price to him is that which was stipulated in the contract. Further, if whilst the share remains in possession of the purchaser the seller should reject the price in conse-

Case of defect in price when it is a specific article.

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<sup>8</sup> That is, the *shufee* having no option in the case, the purchaser could not cancel the sale, but he would still have a right to claim compensation for the defect, which, when obtained, must in all cases be allowed to the *shufee*, in abatement of the price.—*Ante*, p. 187.

<sup>9</sup> See *ante*, p. 183.

quence of the defect, he cannot thereby prevent the *shufec* from exercising his right, for it was established prior to the rejection, and he is entitled to take possession on paying the value of the price, that being what the contract required, and the seller has merely a right to the value of the share from the buyer. If, again, the value of the share were more than the value of the price, and any new obstacle has occurred whilst it remained with the seller to prevent its return, he may have recourse against the purchaser for a compensation for the defect, but has no such recourse against the *shufec*, since he took the share for the value of an exchange or consideration supposed to be free from defect.

Case of  
the sale of  
share in  
the absence  
of the  
owner, by  
a person  
pretending  
to have his  
authority.

*Tenth.* If a mansion is the joint property of a person on the spot and one who is absent, and the share of the absentee being in the hands of a third party is sold by him, alleging that he has the authority of the absent owner, the *Sheikh* has said in his *Khilaf* that the right of *shoofā* is fully established; but the contrary would seem to be the more approved opinion, because the right of *shoofā* is dependent on the validity of sale, which cannot be established without the owner's consent. If, therefore, the *shufec* has taken possession of the mansion, and the owner should appear and admit his authority for the sale, there is no room for objection; but if he deny it, his assertion upon oath must be credited, and he will recover not only his share in the property, but also the hire or rent thereof, from the time that possession of it was taken until it is restored; and his claim for rent may be made against the seller, as the primary cause of his loss, or against the *shufec*, as the immediate agent therein. Should he elect to proceed against the pretended agent, and recover from him, the latter has no recourse against the *shufec*; whereas, if he sue and recover from the *shufec*, the latter has a good ground of recourse against the agent, on account of the deceit practised against him. The *Sheikh* has expressed a different opinion, but this is the most approved and prevalent doctrine.

If a person should purchase a share of joint property

for a hundred (deenars), and deliver to the seller an article equal in value only to ten, the *shufec* is nevertheless bound either to pay the full hundred or to relinquish his claim; because the price which he must pay is to be determined by the contract of sale, not by any subsequent arrangement between the parties.

*Questions connected with the voiding of the right of Shoofā.*

*Shoofā* is extinguished by a failure to institute the claim after information thereof, unless under some valid excuse.<sup>10</sup> Some doctors have maintained that no delay can extinguish the claim unless it is expressly released by the party himself; but the first opinion appears better supported by traditional authority. Further, if a *shufec* should himself expressly relinquish his claim previous to sale of the property, the right is not thereby forfeited in the event of a subsequent sale, because that would be cancelling a right which has no legal existence. This doctrine, however, is liable to difficulty, and has given rise to a difference of opinion;<sup>11</sup> and the same difficulty applies to the case of a *shufec* being present and witnessing the sale, or congratulating the purchaser or the seller on the conclusion of the bargain, or authorising the former to make the purchase; in neither of which cases is the right of *shoofā* extinguished, because none of them affords a stronger proof of acquiescence on the part of the *shufec* than his express declaration before the sale.

If intelligence of the sale is conveyed to the *shufec* in such a manner as to establish the truth of its having taken place, such as the concurrence of several successive reports, or the testimony of two upright witnesses, notwithstanding which he delays to prefer his claim, pretending to distrust their authority, the right is forfeited, and such pretext cannot be admitted in law. If, on the other hand, his information was received from a youth under age, or from a *fasik*, or profligate person, he is not bound to receive it,

*Shoofā* is lost by a delay to claim it without a sufficient excuse; but not even by express relinquishment prior to sale.

A delay to claim after receiving credible information of the right involves a forfeiture; but not if the information

<sup>10</sup> *Ante*, p. 184.

<sup>11</sup> On the ground of acquiescence.—See *ante*, p. 192.

does not amount to legal evidence.

and his right is not forfeited by the delay. So, also, his right is not forfeited if the information is conveyed to him by only one just person, and he fails to act upon it, because the evidence of a single individual is not proof in law.

When the price cannot be ascertained the right is necessarily extinguished. Also when it turns out to be the property of another ; or is known to have been usurped ; or is lost or destroyed previous to possession by the seller.

If both the purchaser and *shufee* are ignorant of the price (having perhaps forgotten it) the right is necessarily extinguished from the impossibility of delivering the price, and if the property to which the right applies is in a distant country, and the *shufee* postpones his claim until his arrival there, this invalidates his title altogether. Further, if the price paid by the purchaser should turn out to be the property of another person, this also, invalidating the sale, has necessarily the same effect on the right of the *shufee*. In like manner, if both the purchaser and *shufee* knew the price to have been usurped, or if the latter only should acknowledge this fact, he is thereby debarred from making any claim. And further, where a specific article stipulated to be the price has perished previous to possession of it by the seller, here also, the original contract being null, the right of *shoofā* also becomes void. This point, however, is the subject of doubt and difference of opinion.

Devices by which the right may be evaded.

Some of the devices for defeating the right of *shoofā* are as follow :—The property may be sold for a price above its value, and then something of trifling value may be received in exchange for it, which would compel the *shufree* to pay the full price stipulated in the contract if he chose to avail himself of his privilege. Again, if the property is sold at an excessive price, and the seller receives part of it, giving a release of the remainder, this also obliges the *shufree* to submit to a considerable loss or to abandon his claim. In like manner, if the seller transfer his share without sale, as by gift or composition, and on a purchase being alleged, the buyer should admit the fact, but say that he had forgotten the price, in such a case his word must be credited when accompanied by his oath ; and if he should swear, the right of *shoofā* would be extinguished. If, however, he should merely say that he does not know the quantity or amount of the price, that would be no valid

answer, and he must be required to give one more explicit. The *Sheikh*, however, has declared that the *shufee* must in that case be called upon to swear.<sup>12</sup>

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<sup>12</sup> Literally, "that the oath must be returned to the *shufee*," that is, that he must specify and swear to a price, and the purchaser's knowledge of it, both of which seem necessary to the validity of his claim. According to the *Imameea* jurisprudence, when a plaintiff, in default of evidence, refers the matter to the defendant's oath, the latter has the option of swearing to the negative of the plaintiff's assertion, or calling upon him to confirm the affirmative by his own oath (*Shuraya*, p. 477), a course not open to him by the *Hanifeea* code.

## CHAPTER V.

## OF DISPUTES RELATIVE TO SHOOFĀ.

In disputes regarding the price between the purchaser and *shufee*, the assertion of the former is preferred ;

as also the evidence adduced by him.

His evidence likewise preferred in disputes between him and the seller regarding the price.

*First.* If the purchaser and *shufee* differ as to the price, and neither of them has evidence, the assertion of the former upon oath is to be credited, for he is the person whose possession of the property is disputed, and who is consequently defendant in the cause. But if one of the parties should be able to adduce evidence this must necessarily guide the decision. The testimony of the seller, however, it is to be observed, is inadmissible on the part of either. If, again, both the parties should adduce evidence, that of the purchaser must be preferred, although there is nearly equal ground for giving the preference to that of the *shufee*, who is out of possession and therefore the plaintiff in the cause.<sup>1</sup> If the difference as to the price is between the seller and purchaser, and only one of them has evidence, such evidence, by whichever of them it is produced, must guide the decision. If, on the other hand, evidence is adduced by both parties, the *Sheikh* has declared that the case must be decided by casting lots. But this is attended with difficulty, for the casting of lots is a method of decision strictly confined to cases of perfect equality on both sides, which cannot be said to exist in this case, for there is a general rule with regard to contracts of sale that where the thing sold is still in existence the word upon oath of

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<sup>1</sup> There was a difference upon this point among the *Hanifite* doctors also—*Aboo Huncefa* and *Moohammad* supporting the evidence of the *shufee*, while *Aboo Yoosuf* was in favour of that of the purchaser.—See *Hamilton's Hedeya*, vol. iii. p. 578.

the seller is to be credited, whence it follows that when both adduce evidence that of the purchaser must be preferred ;<sup>2</sup> and when the price is thus determined, it rests with the *shufee* to make his choice either to take possession at that price or to relinquish his right altogether.

*Second.* If one of the partners in joint property should allege that he has sold his share to a stranger, and the stranger denies the purchase, the *Sheikh* has said, in the *Khilaf*, that the apparent acknowledgment involved in the suit of the seller is sufficient to sustain the right of *shoofā* in his partner. But this decision has been questioned on the ground that *shoofā* is dependent on the establishment of purchase. It nevertheless appears to be most generally approved, and is supported by the common rule of law, that the acknowledgment of a possessor is valid as against himself.

If one partner acknowledges the sale of his share, this acknowledgment, though denied by the purchaser, is sufficient to found the *shufee's* right.

*Third.* If one of two owners in joint property should claim the right of *shoofā* against the other, by asserting priority of purchase, which the other denies, the word of the latter upon oath must be credited, and it is sufficient if he merely swear that there is no right of *shoofā* as against him ; and he cannot be required to swear that his purchase was not subsequent to that of the claimant. If, again, both the partners should allege priority of purchase respectively, and consequently a right of *shoofā* over the share of the other, as in that case they are both equally claimants, if neither of them can adduce proof, each must be called upon to swear in refutation of the other's priority of purchase, which being done, the property is established between them as before. Further, should one of the partners adduce evidence in general terms to prove merely his purchase, still no decision can be given in his favour, as in the matter of priority he has no advantage over the other. If, however, there is testimony in favour of one as to his priority of purchase, this must necessarily determine the decision ; but if both adduce proof of their purchase in general terms without assigning any dates, or of the

Case of dispute and mutual claim of two partners founded on priority of purchase.

<sup>2</sup> See *Im. D.*, p. 69.



purchase of both being on the same day, there can be no preference to either. If, again, the witnesses of each should testify to his priority of purchase over the other, some doctors have said that recourse must be had to lots for deciding the case; while others maintain that the claims of both the parties must drop, and the property remain in partnership as before.

Continued *Fourth.* When a claim of *shoofá* is made by one of the partners on the ground of a purchase, and the other alleges that he acquired his share by inheritance, and both parties offer evidence of their assertion, the *Sheikh* has declared that a reference must be had to lots by reason of the perfect equality on both sides. If, however, the defendant should plead that the possession of the claimant is in virtue of a deposit by the owner, and both parties should offer proof, preference must be given to that of the *shufee*, or claimant; because deposit does not controvert the establishment of purchase.<sup>3</sup> If, on the other hand, the witnesses of the claimant should merely testify to the purchase generally, while those of the other party testify that the depositor, being in possession of the subject of dispute, made the deposit of it subsequently to the alleged purchase, the *Sheikh* has said that preference must be given to the proof of deposit, with this further proviso, that the depositor is to be written to, and that if he confirm the statement, judgment is to be given in terms of the proof, and for rejection of the *shufee's* claim; but if he should deny the statement, judgment should be given in terms of the *shufee's* evidence, and consequently in his favour. If, again, the witnesses of the *shufee* should testify that the seller sold at a time when he was actually proprietor, while those for the deposit merely testify to it in general terms, the witnesses produced by the *shufee* are to be preferred, and there is no occasion for any reference to the alleged depositor.

<sup>3</sup> For, though the property were deposited, it might be subsequently purchased from the owner by the trustee.

*Fifth.* If both the seller and purchaser of a share in joint property unite in declaring that the price was usurped, while the *shufee* denies the assertion, his word is to be credited without any necessity for his oath, unless they assert his knowledge of the usurpation.<sup>4</sup>

Concurrence of the seller and purchaser no bar to the *shufee's* right.

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<sup>4</sup> The price may have been "an animal, or a piece of cloth, or a jewel," (*ante*, p. 183,) and so have been usurped, in which case the sale would be invalid, and if so there could be no right of *shoofà*, but the concurrence of the seller and purchaser as to that fact is not proof against the *shufee*.



## BOOK IV.

### OF HEBBAT, OR GIFTS.

#### CHAPTER I.

##### INTRODUCTORY.

*Heba*, or gift, is a contract by which the property of a substance<sup>1</sup> is transferred immediately and unconditionally, without any exchange, and free from any pious or religious purpose on the part of the donor ;<sup>2</sup> and it is sometimes termed in law *nukhut* and *atecut*. This contract requires declaration and acceptance, with seizin or taking possession.<sup>3</sup> By declaration is here to be understood every word that serves to express a transfer of property as above described, such as " I have given you," or " I have made you the proprietor of this." But the contract is not valid except when proceeding from a person who is of full age, sound understanding, and unrestrained in the use of his property.<sup>4</sup>

How constituted.

The donation of a debt, or what rests on the obligation of another, is not valid to any other than the debtor or person by whom it is due, according to the most approved doctrine, by reason of the condition already mentioned, that it requires possession to complete it ; whereas, if made to the debtor himself, it is quite valid, and operates

Gift of a debt not valid to any other than the debtor ;

to whom it is a release.

<sup>1</sup> *Ayn* : Res præsens ; Rei substantia, essentia.—(*Freytag*.)

<sup>2</sup> This distinguishes it from *wukf*.

<sup>3</sup> *Kubz*, inf. of *kubuzu*, cepit.—(*Freytag*.)

<sup>4</sup> According to *Allamee*, in his *Tuhreev*, the donee must also be of mature age and intellect ; but this seems inconsistent with what is said hereafter of gifts to minors.

as a release of the debt; a release not requiring acceptance, according to the most approved opinion.

Gift not complete without seizin by the donee; and if donor die before seizin the gift reverts to his estate.

No decree can be given for a gift until it is completed by seizin or taking possession. Yet, if the donor should acknowledge the gift and delivery of possession,<sup>5</sup> judgment must be given against him on his own acknowledgment, though the thing given may be still in his hands; and any subsequent denial of it cannot be received.

If the donor should die after the contract, and before possession has been taken of the gift, it falls back into his inheritance.

Permission of the donor a condition of valid seizin.

Permission of the donor is a condition of valid seizin; and if the thing given be taken possession of without his permission, it is not transferred to the donee.<sup>6</sup> But if a thing be given which is already in the hands of the donee, that is sufficient, and the donor's permission to take possession is not required, nor is it necessary that any time should elapse to enable the donee to repeat his seizin, as some of our doctors have said.

Gift by a parent to his child of a thing in his own possession, complete by the contract.

When the father or grandfather of a little child has made him a gift, it is complete and binding on the donor by the contract itself, because seizin by the guardian is seizin on his part. But if any other than the father or grandfather of the child should make him a gift, the donor's possession would not be sufficient, whether he have power over the child or not;<sup>7</sup> and the legal guardian or the judge must obtain power over the gift in order to complete the right of the child.

Gift of *mooshââ* valid.

The gift of *mooshââ* or a share in joint and undivided property is lawful, and seizin of it is to be taken in the same way as seizin in sale.<sup>8</sup> And if a thing is given to two

<sup>5</sup> *Ikbaz*, causal form of *kubz*.

<sup>6</sup> Even, according to the author of the *Tuhreer*, though the donor were present at the time.

<sup>7</sup> According to the other sect, possession of a gift to a minor may be taken by any person in whose family he is living.—*D.*, p. 530.

<sup>8</sup> That is, by mere surrender or vacating by the donor. According to *Allamee*, in his *Tuhreer*, this is sufficient in all cases of gift where the subject is immovable; where it is moveable, actual transportation or removal seems to be required.

persons jointly, and they both accept and both take possession, each donee becomes the proprietor of the portion given to him. If, again, one only of them should accept the gift, and take possession, while the other refuses, the gift to the acceptor is valid.<sup>9</sup>

A father may lawfully give a preference to one child over another in gifts and presents; but it is accounted abominable in him to do so.

A father may give more to one child.

After possession has been taken of a gift, it cannot be lawfully retracted when made in favour of parents, according to general agreement, nor even when the donee is any other relative by consanguinity of the donor, though on this point there is some difference of opinion. But if the gift be to a stranger, it may be retracted at any time, so long as the substance of the thing given is in existence. After it has perished, there can be no retraction. In like manner, a gift cannot be retracted if anything has been received in exchange for it, though the exchange should be of little value. Whether, again, mere use by the donee has the effect of doing away with the donor's power of retraction, is a question to which some lawyers have answered in the affirmative, whilst others have denied that effect; and their opinion is the more reasonable and approved.<sup>10</sup>

Gift to blood relation cannot be revoked;

to a stranger may be revoked.

Exception.

Presents to relatives, and especially to children, are highly proper and becoming. In presents to children, equality should be observed. Further, it is abominable in

Presents to children and relatives proper and becoming.

<sup>9</sup> The whole doctrine with regard to *mooshiû* is opposed to that of the other sect — *D.*, p. 515.

<sup>10</sup> The regular forms of retraction of gifts, according to the author of the *Tuhreeer*, are that the donor should say, "I have retracted," "I take back my gift," or "demand its restitution," and all similar expressions, which sufficiently establish the retraction without any decree of the judge, for this is by no means required for its confirmation; whilst, on the other hand, mere re-assumption of the gift from the donee, without some other proof of revocation on the part of the donor, does by no means constitute this act in law; and should he die without affording any other proof of his intention to retract the gift, it is still, although found in the donor's possession, the lawful property of the donee.—From MSS. of the translator of the first volume of the *Im. D.*

a wife, to retract a gift made to her husband, and in a husband to retract a gift made to his wife. Some doctors have considered a husband and wife in respect to their mutual gifts on the same footing as kindred by consanguinity ; but the first opinion appears to be better supported by analogy.<sup>11</sup>

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<sup>11</sup> According to the other sect, the marriage relation prevents the revocation of gifts.—*D.*, p. 525.

## CHAPTER II.

## OF THE LAWS OF GIFT.

THESE are comprehended in the following cases :—

*First.* If a person should make a gift, put the donee in possession, and then sell it to another, the sale is invalid if the donee were a relation by consanguinity ; so also though he were a stranger, if he had given anything in exchange for the gift. But if the donee were a stranger, and had not given anything in exchange for the gift, some have said that the sale would be void, as of a thing not the property of the seller, while others maintain that it would be valid, because he has the power of retractation ; but the first opinion is best supported.<sup>1</sup> If, however, the gift were invalid, there is no doubt that the sale would be good in both views of the case. And the effect would be the same with respect to the sale by an expectant heir of property belonging to his ancestor, when he believes the ancestor to be alive ; for if it should prove that he was actually dead at the time, the sale is valid. So also in the case of a bequest by a person of his slave whom he had emancipated, if it should prove that the emancipation was invalid, the sale would be good.

Sale by a donor of a thing already given of which the donee has taken possession, not valid.

*Second.* If there has been any delay after the contract in giving possession of the gift, but possession is at length given, the transfer of property is to be decreed as having taken effect from the time of seizin, not from the date of the contract. It is not so in the case of a bequest ; for there the transfer is to be decreed as having effect from the

The transfer of property in a gift dates from the time of taking possession.

<sup>1</sup> See *ante*, p. 205, note <sup>10</sup>.



death of the testator, if the bequest is accepted by the legatee, and not from the date of taking possession, though there should have been some delay in taking it.

When the donor admits the gift, but denies delivery, his word to be credited.

*Third.* If a person should say, "I gave, but did not put him in possession," the word is with the donor, but the donee may demand his oath if he insists that possession was given. So also if a person should say, "I gave him and made him the proprietor of it," and then deny the giving possession; for it is possible that he may have made the first statement, supposing that seizin was not necessary to make the donee proprietor of the gift.

On retraction of a gift the donor is not entitled to compensation for defects.

*Fourth.* When a person has retracted a gift and finds it to be defective, he has no claim to any compensation on account of the defect. If the gift has increased, and the increase is of such a nature as to be united to the original, it belongs to the donor. But if the increase be separated from the original, as the fruit of a tree, or the child of a slave, and if it be entirely new, it belongs to the donee, while if it were formed, or in existence at the time of the gift, it is the property of the donor.

Retraction barred by acceptance of any exchange subsequent to the gift.

*Fifth.* When a person has made a gift in general terms there is no condition or obligation on the part of the donee to give any gratuity in return. Still if he should do so, the donor would thereby be debarred from retracting the gift. If again a reciprocal gratuity were actually stipulated for at the time of the contract, the condition would be valid, whether the article to be given were indefinite or particularly specified, and the original donor would retain his power to retract until the stipulated exchange were actually delivered to him. When the stipulation is entirely indefinite as to the quantity, the donee may make any return, however small in value, and should the donor accept and take possession of the exchange, he is no longer at liberty to retract his gift. Further, the donee cannot be compelled to make the stipulated return; nay, he is absolutely free in the matter, and if the gift should perish or suffer any injury in such circumstances, he is in nowise responsible for the loss or injury which has occurred while the thing was actually his property; although upon this

point there is some room for doubt, on account of the stipulation for an exchange.

*Sixth.* When the gift is of a piece of cloth, and the donee has dyed it, this, according to those doctors who think that use by the donee of the subject of the gift debars the donor from retracting it, has the effect of preventing the retraction; but if we agree with those who say that use of the gift is no impediment to its retraction though the donee is a stranger,<sup>2</sup> he becomes in the event of such resumption a partner with the donor for the value of the dye.

*Seventh.* When a person has made a gift, being dangerously ill at the time but afterwards recovers, the gift is valid. If, however, he should die of the disease, and the heirs refuse their assent to the gift, it is valid only to the extent of a third of his estate, according to the best traditional authority.

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<sup>2</sup> The more approved opinion.—*Ante*, p. 205.



## BOOK V.

OF WOOKOOF<sup>1</sup> AND SUDUKAT, OR APPROPRIATIONS  
AND ALMS.

### CHAPTER I.

OF WUKF, OR APPROPRIATION.<sup>2</sup>

#### SECTION FIRST.

##### *Introductory.*

WUKF is a contract the fruit or effect of which is to tie up Definition  
the original of a thing and to leave its usufruct free. The  
only express word by which it can be constituted is How con-  
stituted.  
“*Wukufto*,” “I have appropriated;” for with regard to  
“*Hurrunto*,” “I have consecrated,” and “*Sudūukto*,” “I  
have bestowed,” they are not sufficient to constitute *wukf*  
without accompanying circumstances, as by themselves  
they are susceptible of another interpretation besides *wukf*.  
If, however, they are used with the design of constituting  
*wukf*, they are obligatory on the conscience of the person  
employing them without any circumstances to fix their  
meaning. And if he should actually acknowledge that he  
used them with that design, judgment should be given  
against him in terms of his acknowledgment.<sup>3</sup> It has been  
said, indeed, that if he should say, “*Hubbusto*<sup>4</sup> o *subbulto*,”<sup>5</sup>  
*wukf* would be constituted even without any circumstances

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<sup>1</sup> Plural of *wukf*.

<sup>2</sup> Literally, *detention*.

<sup>3</sup> That is, when completed by giving possession.

<sup>4</sup> Increased conjugation, from *hoobs*, which has the same meaning  
as *wukf*, and is used instead of it by the followers of *Malik*.

<sup>5</sup> From *subeel*, a way.

to point their meaning, because He on whom peace has said, “*Hubbis ul usul o subbil ul thoomrut*” (“Tie up the original and give way to the fruit”). Others, however, have maintained that there would be no *wukf* in the case without corroborative circumstances, as the words by themselves would not commonly be so understood; and this is the more approved opinion.

Not obligatory till possession is given.

When made in death illness valid only to the extent of a third of deceased's property.

The contract is not rendered obligatory except by giving possession;<sup>6</sup> but when so completed it cannot be revoked if made in health, and even when made in death illness it is equally valid if allowed by the heirs, though, if disallowed by them, it is valid only to a third of the deceased's estate, in the same way as a gift or a *muhabat*<sup>7</sup> in sale. Some of our doctors insist that it should be sustained out of the whole of the estate; but the first opinion is the more approved. If one in death illness should make a *wukf*, a gift, a *muhabat* sale, and also emancipate a slave, and neither of the acts is allowed by his heirs, all are valid if they can be carried into effect out of a third of his estate. Otherwise, they are to be preferred according to priority of date, and effect given to each in order until the third of the estate is exhausted, after which any that remain are void. The same rule is to be observed when a man has made bequests in excess of a third of his property. If the priority cannot be determined, some of our doctors maintain that the third should be rateably divided among the different objects; but the better opinion seems to be that the question should be determined by lot.

The *wukf* of a sheep includes the existing wool and milk.

If a man should appropriate a sheep, the wool and milk existing at the time are included in the *wukf*, unless specially excepted, from a regard to custom, and as would be the case if the animal were sold.

<sup>6</sup> *Ikbaz*. See *ante*, p. 204. Not required by the Hanifites.

<sup>7</sup> Where the price is inadequate, there is said to be *muhabat* in the transaction.

## SECTION SECOND.

*Conditions.*

These are of four kinds.

*First.* Conditions that relate to the *mowkoof*,<sup>8</sup> or thing appropriated, which are also of four kinds. It must be a substance, the property of the appropriator, capable of being used without being consumed, and also capable of being delivered. Hence, the *wukf* of anything which is not in *ayn*, or distinctly specified, as *deyn* or indeterminate things, is not valid.<sup>9</sup> So also if one should say, "I have appropriated a horse, or a mansion," without mentioning some one in particular, the *wukf* would be invalid. But the appropriation of *akar*, or lands and houses, of clothes, furniture, lawful instruments,<sup>10</sup> and generally of everything from the use of which any benefit can be lawfully derived with the preservation of the thing itself, is quite valid.<sup>11</sup> So also the *wukf* of a trained dog or of a cat, from the possibility of employing them for some useful purpose. But the *wukf* of a hog is not valid, because it cannot lawfully be the property of a *Mooslim*, nor of an absconded slave, because he cannot be delivered. Whether, again, *deenars* and *dirhems* can be validly appropriated, is a question which some of our doctors have answered in the negative; and their opinion is the most manifest, or best supported by traditional authority, because they are things from which no benefit can be derived except by spending them. Others, however, insist that the appropriation of them is valid, because some advantage from them may easily be imagined, with preservation of the originals.<sup>12</sup> If one should appropriate a thing which is

Conditions that relate to the thing appropriated.

<sup>8</sup> Past participle of *wukf*.

<sup>9</sup> For the meaning of *deyn*, as distinguished from *ayn*, see *Im. D.*, p. 60, note †.

<sup>10</sup> For such as are unlawful see *Im. D.*, p. 3.

<sup>11</sup> According to the Hanifites, no moveables, unless attached to lands or houses, except beasts of burden, weapons of war, and things which it is customary to appropriate, can be made the subject of *wukf*.—*D.*, p. 561.

<sup>12</sup> Money usually falls under the head of *deyn* or indeterminate things, and must, therefore, be made *ayn*, by actual production or specification, before it can in any view be made the subject of *wukf*.

'not his own, the *wukf* would not be valid. But if the real owner should sanction the appropriation, that would give it validity according to some of our doctors, the sanction being tantamount, in their opinion, to a new appropriation. And the *wukf* of a *moosháá*, or undivided share in a thing, is valid, and possession of it is to be taken in the same way as in a case of sale.

Conditions that relate to the appropriator. *Second.* Conditions that relate to the *wakif*,<sup>13</sup> or appropriator. And of him it is required that he be of full age, sound understanding, and unrestrained in the use of his property. With regard to one who has attained to ten years only, there is room for doubt, as there is a report which favours the legality of charity by such an one. But the preferable opinion seems to be that appropriation by him is forbidden, because the inhibition under which he is placed by reason of his youth is not removed until he has attained to puberty and discretion.

He may lawfully reserve the superintendence to himself or appoint another. It is lawful for an appropriator to retain the superintendence of the *wukf* to himself, or to appoint another to the office. If he has not appointed any superintendent, the office belongs to the person on whom the settlement has been made,<sup>14</sup> because the right of property is vested in him.

Conditions that relate to the persons for whose benefit the appropriation is made. *Third.* Conditions that relate to the *mowkoof alehi*, or person on whom the settlement is made. And in him three conditions are required. He must be in existence, and capable of owning property; he must be distinctly indicated; and he must be one on whom it is not unlawful to make a *wukf*. Hence, if one should make a settlement beginning with a person not in existence, as for instance, one to be born, or a fœtus not yet separated from its mother, the *wukf* would not be valid. But if it were in favour of one not in existence, in succession to a person actually in being, it would be quite good. Where, again,

<sup>13</sup> Present participle of *wukf*.

<sup>14</sup> When the appropriation is for the benefit of persons, I use the word *settlement*, as in the *Digest*, though the original word is the same.

a commencement is made with one who is not in existence,\* followed by a person in being, some of our doctors maintain that the *wukf* is not valid, while others insist that it should be sustained so far as concerns the person in being; but the first opinion is the more approved. So also where the person first in order is one who cannot be the owner of property, and he is followed by one who can; but here there is some room for doubt, though the better opinion seems still to be that which is against the *wukf*. A settlement in favour of a slave is not valid, and the thing appropriated cannot be made use of by his master, which would be contrary to the intention of the appropriator.

A *wukf* for *musalih*,<sup>15</sup> or works of general utility, such as bridges and *musjids*, or places of worship, is quite valid; for such a *wukf* is, in truth, a settlement on all Mussulmans, though some only can participate in their advantages.

*Wukf* for objects of public utility, valid.

A *Mooslim* cannot make a settlement on an alien enemy, though his blood relation; but he may make it on a *zimme*, or infidel subject, even though a stranger, or in no way related to him. Yet an appropriation by him for Jewish synagogues or Christian churches is not valid. So, also, if he should make an appropriation in favour of fornicators, or highway robbers, or drinkers of wine, or for the copying of what are now called the *Towreet* and *Injeel* (the Law and Gospels), for they are altered or perverted versions. But if the appropriation were by an infidel it would be lawful.

Appropriations by a *mooslim* in favour of an alien enemy or for unlawful objects, not valid.

If a *Mooslim* should make an appropriation for the poor, it is to be applied for the benefit of poor *Mooslims* only, to the exclusion of all others: and a similar appropriation by an infidel is to be applied in like manner to the poor of his own persuasion.

Appropriations for the poor, how to be applied.

An appropriation in favour of *Mooslims* is to be applied for the benefit of all those who pray towards the *Kiblah*.<sup>16</sup> But one in favour of the *moomineen*, or true believers, is

*Mooslims* described. *Moomineen*, who are.

<sup>15</sup> Pl. of *musluhut*, commodum, res conveniens.—(*Freytag*.)

<sup>16</sup> Mecca.



to be applied only for the benefit of the followers of the Twelve Imams.<sup>17</sup> Some, however, maintain that it is for all those who abstain from grave offences against the law; but the first opinion is the more approved. If the appropriation be for *Sheeahs*, it is to be applied to *Imameeans* and *Jaroodians*, to the exclusion of all other *Zeydeans*. In like manner, whenever the *mowkoof alehi* is described by a particular relationship, all those who come within it are held to be included in the benefits of the *wukf*; so that if the *wukf* is on *Imameeans*, it is for all the followers of the Twelve Imams. In like manner, when it is for *Zeydeans*, all those who assert the Imamship of *Zeyd*, the son of *Aly*, are included. So, likewise, when the connection is relationship to a particular ancestor, all those lineally descended from him by their fathers are included. As, for instance, *Hashemees*, who comprehend all those descended from *Hashem*, through *Aboo Talib*, *Harith*, *Abbas*, and *Aboo Luhub*; or *Talibees*, who comprehend the descendants of *Aboo Talib*, on whom be peace, both males and females participating if connected with him on the side of their fathers, from a regard to custom; though upon this point there is some difference of opinion.

Who are  
neighbours

If one should make an appropriation for neighbours,<sup>18</sup> a reference must be made to custom for determining who are to be included.<sup>19</sup> Some say, however, that any one whose house is within forty cubits is a neighbour, and this opinion is good, or well supported; while others maintain that the meaning of the term extends to all the occupants of forty houses on either side; but this opinion is now abandoned.

*Wukf* for  
a *musluhut*,  
when no  
longer  
used, to be  
applied to  
good pur-  
poses.

If one should make an appropriation for a *musluhut*, or object of general utility, which has ceased to be used, it is to be applied to any good and pious purposes.<sup>20</sup> And if it is for such purposes generally, it is to be expended on

<sup>17</sup> *Athna-asheriat*; literally, twelve-eans.

<sup>18</sup> *Jeeran*.

<sup>19</sup> According to the Hanifites, all who worship in the same *Musjid*.—*D.*, p. 579.

<sup>20</sup> *Woojooh-ool-birr*.

the poor and indigent, and in any other way by which an approach is made to Almighty God.

If one should make an appropriation for the *Bunee Tumeem*, it would be valid, and should be applied to any of them who can be found. Some say, however, that such an appropriation is not valid, because the persons referred to are unknown; but the first opinion is more in conformity with our way or doctrine. A *wukf* in favour of a *zimme* or infidel subject is lawful, because it is a transfer of property, and is like a permission to take the usufruct. Some say, however, that it is not valid, because it implies a pious intention, and is good only when made for the benefit of a parent; while others maintain that it is good when for the benefit of any relative. But the first opinion (which sustains it generally) is the most approved. So also a settlement in favour of an apostate is valid, while there is some doubt as to one in favour of an alien enemy, the more approved opinion, being entirely against it.

If a man should make an appropriation without mentioning its objects, the appropriation would be void. So also where the objects are not distinctly specified, as if he should say, "For one of these two," or "For one of the two *Mushkids*,"<sup>21</sup> or "two *Furecks*," the whole would be void.

*Wukf* not valid where the object is not properly defined.

If one should make a settlement on his children, and his brethren or his kindred, so general an expression requires the participation of males and females, and of the near and the remote, with equality of partition among them, unless some order or detail is made a condition, or some one is specially indicated. If the settlement were on maternal and paternal uncles, they would share equally together. But if it were for the nearest of mankind to him, his parents and children, how low soever, should first be taken, and so long as one of them survives none other of his relatives can be allowed to participate. After those above mentioned, when they all fail, the grandparents and brethren with their children, how low soever, would be

Settlement on children, brethren, and kindred comprehends all equally.

<sup>21</sup> Sepulchres of Aly and Hoossein.

entitled; and after them paternal and maternal uncles in the order of inheritance; all (in each class) participating equally, unless some are specially mentioned in detail.

Conditions that relate to the *wukf*, which are four.

*Fourth.* Conditions that relate to the *wukf* itself, which are four in number. 1st, it must be perpetual; 2nd, absolute and unconditional; 3rd, possession must be given of the *moukoof* or thing appropriated; and, 4th, it must be entirely taken out of the *wakif* or appropriator himself.

Illustrations of the first;

So that, if the appropriation is restricted to a particular time, or made dependent on some quality of future occurrence, it is void. So also when made in favour of persons who will probably fail, as, for instance, if one should make a settlement on *Zeyd*, with a restriction to himself, or extend it only to generations that will probably fail, or say generally, "for his successors," without mentioning what is to be done after they fail,—in all these cases it is maintained by some that the *wukf* would be entirely void; but others insist that due course should be given to the purposes actually named, which seems more reasonable. Then, when they do fail, the property will revert to the heirs of the *wakif* or appropriator; but some of our doctors maintain that it reverts to those of the *moukoof alahi*. The first opinion, however, is best supported by traditional authority. If one should say, "I have appropriated" when the beginning of the month has come, or if *Zeyd* shall arrive, the appropriation would not be valid. Seizin is a condition of the validity of *wukf*. So that, if one should make an appropriation, and die without giving possession, the subject of it would be part of his inheritance. But if it were in favour of his young children, his own possession would be possession on their behalf. So also in the case of a grandfather on the father's side. But with regard to a *wusee* or executor, there is some room for doubt, though the validity of the settlement in such a case is better supported by traditional authority.

of the second;

of the third;

of the fourth.

If a person should make a settlement on himself, it would not be valid. So also if it were first on himself and then upon another, though some maintain that it would be void only with respect to himself, and valid with regard

to the other; the first opinion, however, is the more approved. In like manner, if the settlement were on another, with a condition for the payment of the *wakif's* debts or current expenses, it would not be valid. But if one should make an appropriation for the poor and should himself subsequently become poor, or for lawyers, and himself become a lawyer, there is no objection to his participating in its benefits.

If one should make an appropriation with a condition that the property is to revert to him in case of need, the condition would be valid, but the *wukf* void, and the property would remain in the condition of a *hoobs*<sup>22</sup> until the occasion should arise, while if he should die it would go to his heirs. And if he made it a condition that he shall have the power of excluding whomsoever he may please, that would invalidate the *wukf*. But if the condition were that he may add to those in whose favour the appropriation has been made some yet to be born, the condition would be lawful, whether the appropriation were for others or his own children. If, again, the condition were that he may make an entire transfer from those on whom the settlement has been made to others subsequently to come into being, that would not be lawful, and the *wukf* would be void. Some have said that when one has made a settlement on his young children, he may lawfully make others to participate with them without reserving any express power to that effect; but this opinion is not to be relied upon.

The seizin which is required is that of the first of the *mowkoof alchi*, or persons for whom an appropriation is made; and all regard to possession ceases in the subsequent steps. In the case of an appropriation for the poor, or for lawyers, a *kuyyim*<sup>23</sup> or superintendent must be appointed to take possession, while in the case of an appropriation for a *musluhut*, or useful purpose, the creation of the *wukf* is sufficient, the condition of acceptance being entirely dispensed with, and as to possession that of the *Nazir* or superintendent is sufficient. If one should appropriate a *musjid*

Conditions that vitiate the *wukf*.

Possession by first in order sufficient, when *wukf* is for particular persons; but when it is for the poor a *kuyyim* must be appointed.

<sup>22</sup> See *post*, p. 226.

<sup>23</sup> See *D.*, p. 587, note 1.

or place of worship, it is valid though only one person should pray in it. So also if the appropriation is of a cemetery, it becomes a *wukf* by the interment in it of a single corpse. But though people should pray in a *musjid*, or bury in a cemetery, without the formal words of *wukf* being pronounced, neither would pass out of the property of the original owner. So, also, the result would be the same, though the proper words were used, if possession were not also given of the subject of the *wukf*.

## SECTION THIRD.

*Appendages.*

The right of property in the *wukf* is transferred to the *mowkoof alchi*.

*First.* The *wukf* or subject of appropriation is transferred so as to become the property of the *mowkoof alchi*, for he has a right to the advantage or benefits to be derived from it, and the prohibition to sell does not negative his right of property in the substance, any more than it has that effect in the case of an *oom-i-wulud* or mother of a child; and indeed, the sale of the *wukf* is sometimes in a manner valid, as will be seen hereafter. If then a person should appropriate his share in a slave, and subsequently emancipate him, the emancipation would not be valid, because the right of property in the slave has passed out of him; but neither would it be valid if the *mowkoof alchi* should emancipate the slave, because of the right which future generations have in the slave.

How a *wukf* "In the way of God" is to be applied.

*Second.* When a person has made an appropriation "In the way of God," it is applied to whatever is productive of reward in a future state, such as religious warfare, the greater and lesser pilgrimages, and the erection of *Musjids* or places of worship, and bridges. So, also, if he should say "In the way of God, and way of reward, and way of good," the purposes are all considered as one or the same, and there is no necessity for dividing the proceeds of the *wukf* into three different parts.

In a *wukf* on chil-

*Third.* When a man has made a settlement<sup>24</sup> "on the

<sup>24</sup> See *ante*, p. 214, note <sup>14</sup>.

children of his children," the children of sons and daughters participate, both males and females, without any superiority of one over another. But if he should say "those among them who are lineally related<sup>25</sup> to me," the children of daughters would not be included. And if the settlement were "on his children," it should be applied only to the children of his loins, the children of his children being excluded. Some maintain that they would all participate together; but the first opinion is more agreeable to traditional authority, for by the word child, the child of a child would not generally be understood.<sup>26</sup> And if he should say "on my children and children of my children," it would be confined to two generations. While if he said "on my children, and when they fail, and the children of my children, then to the poor," the *wakf* would be for his children, and though on their failure some of our doctors are of opinion that the proceeds should be expended on the children of his children, and only when they fail on the poor, yet others maintain that the proceeds are not to be expended on his children's children, for they are not comprehended in the *wakf*. their failure being only a condition of the application to the poor; and this opinion is more likely to be right as being more conformable to the grammatical construction of the words.

*Fourth.* When a person has made a *wakf* of a *musjid*, and it has fallen to ruins, or the village or *muhallah* (district) in which it is situated has gone to decay, the property does not revert to the appropriator; nor does the space of ground on which it was built cease to be *wakf*, nor can it be sold.

dren's children, children of sons and daughters participate equally.

The grant of a *musjid* does not cease to be *wakf* though the *musjid* should fall to decay.

*Fifth.* If the mansion belonging to a *wakf* should fall into ruins the space would not cease to be *wakf* nor would its sale be lawful. But if dissensions should arise among the persons for whom it was appropriated, insomuch as to give room for apprehension that it will be destroyed, its sale

Same rule applicable to a mansion. Exception.

<sup>25</sup> An inflection of the word *nusub* is here employed, on which the distinction depends.

<sup>26</sup> See *D.*, p. 570

would be lawful. And even though there should be no such differences, nor room for such apprehensions, but the sale would be more for the advantage of the parties interested, some are of opinion that the sale would be lawful, but it would rather seem that it ought to be forbidden. And if palm-trees are rooted out of appropriated ground, the same persons would say that it may be sold, on the plea that no benefit can otherwise be derived from it; but others are of opinion that it cannot lawfully be sold in such circumstances, from the possibility of turning it to some use by letting it on hire; and this opinion seems the more reasonable.

*Query*  
whether  
the lease of  
a *wukf* is  
cancelled  
by death of  
the lessees.

*Sixth.* When the first generation has granted a lease of the *wukf* for a certain term, and all die in the midst of the term, then if we can say generally that all leases are cancelled by death, nothing farther need be said in the matter; if we cannot go so far as that generally,<sup>27</sup> then it may be asked whether it has that effect in this particular case, and there is room for doubt as to the proper answer to be given to the question. But it is more agreeable to traditional authority to say that it is cancelled, for we have already explained that this part of the term does not really belong to the lessors. The second generation would therefore have an option either to cancel the remainder of the lease, or to grant a new lease, leaving the tenant to have recourse to the estates of the first generation for so much of the term as belongs to the second.

In a *wukf*  
for the  
poor, those  
present in  
the town  
are to be  
under-  
stood.

*Seventh.* When a man has made a *wukf* for the benefit of the poor it is to be applied to the poor of the town who are present. In like manner when a *wukf* is for the descendants of *Aly* the income is to be similarly applied to those of them who are present. So also, when it is for the children or descendants of an ancestor who are scattered in different places, the income is to be applied to those extant, and there

<sup>27</sup> There are different opinions on the subject, some saying that it is cancelled by the death of the lessor, some by that of the lessee, and others that it is not cancelled by the death of either, which last is the opinion of the moderns, and most approved.—*Shuraya*, p. 220.

is no necessity for following into difficult places those who are not present.

It is not lawful for the *mowkoof alchi* of a female slave to have connection with her, for she is not his sole property, but if he should get her with child the child would be free without any liability on his part for its value, as a person cannot be creditor to himself. With regard to the mother some of our doctors maintain that she would become an *oom-i-wulud*, and be therefore entitled to emancipation on the death of the child's father, his estate being liable for her value to the person next in succession. But this opinion is open to doubt. It is quite lawful to give a female slave who is the subject of an appropriation in marriage, and her dower will belong to the *mowkoof alchi*, for this is an advantage arising from the *wulf*, in the same way as the rent of a mansion. He is in like manner entitled to her children, for they are her increase, whether they be the fruit of marriage with a slave or of illicit intercourse. Where, however, they have been begotten by a free man under a valid marriage they are free, unless there was a stipulation in the contract that they should be slaves. And though begotten only under a semblance of legality they are still free, but in that case the father is liable for their value to the *mowkoof alchi*. If the *wakif* or appropriator should have connection with the slave whom he has appropriated the consequences would be the same as if he were a stranger.

Not lawful for the *mowkoof alchi* of a female slave to have connection with her.



## CHAPTER II.

## OF SUDUKAH, OR ALMS.

Requires  
declaration  
and accept-  
ance and  
possession in  
n.  
THIS is a contract which requires declaration and acceptance, and also delivery of possession.<sup>1</sup> And if the donee should take possession without the assent of the donor, there would be no transfer of property to him. Among its conditions is an intention on the part of the donor of an approach to Almighty God. And after possession has been given it is not lawful to retract the gift, according to the most valid doctrine, for the hire or object in view has been attained, and the gift is like one for which an exchange has been made.

Cannot be  
revoked.  
When the *sudukah* is an incumbent duty, it is not lawful to bestow it on the descendants of *Hashem*, unless it is a *Hashemy sudukah*, or when it is any other, except in a case of urgent necessity. But when the *sudukah* is voluntary, there is no objection to bestowing it upon them.

*Miscellaneous Cases.*

Cannot be  
revoked  
though  
bestowed  
without  
exchange  
on a  
stranger.  
First. It is not lawful to revoke a *sudukah* after possession has been given of it, whether an exchange has been received or not, and whether the person on whom it has been bestowed be or be not a blood relation, according to the most valid doctrine.

May be  
bestowed  
on a  
*Zimnee*.  
Second. It is lawful to bestow charity on a *zimnee* or infidel subject, though an entire stranger to the donor, by

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<sup>1</sup> *Ikkaz* See *ante*, p. 204.

reason of a saying of his, on whom be peace, and of the sacred text, "God has not given any prohibition against those who do not contend with you in religion."

*Third.* It is better to give one's charity in secret than in public, unless to obviate the suspicion of avarice, when it is allowable to do so openly. Should be given privately.

CHAPTER III.<sup>1</sup>OF SOOKNA AND HOOS.<sup>2</sup>

Requires declaration and acceptance with seizin. THIS is a contract which requires declaration and acceptance, with seizin or taking possession; and its object or the advantage to be derived from it is the empowering a person to receive the profit or usufruct of a thing, with a reservation of the owner's right of property in it. It is known by different names, according to the difference of connection. Thus, if connected with the *oomr* or life of the grantee, it is called *oomra*, if with *iskan*<sup>3</sup> or residence, it is called *sookna*, and if with a term, it is called *rookba*.

Different names. The words of constitution are, "I have bestowed on thee" (*ashuntoku*, *aámurtoku*, *arkubtoku*, or the like,) "this mansion, or this land, or this dwelling, for thy life or my life, or for a fixed period;" and the contract is rendered binding or obligatory on the donor by seizin on the part of the donee. Some of our doctors maintain that it is not rendered obligatory, while others maintain that it is so only when there is an intention on the part of the donor of an approach to God. But the first opinion is the most common or generally received. If one should say, "The residence of this mansion is to thee while thou survivest or livest," the contract would be lawful, and after the death of the person so addressed, the mansion would revert to the speaker, according to the most reasonable and approved opinion. While, if he should say, "When you die it will revert to me," the reversion would take place on that event without any question. If he should say, "I have given this mansion

Words by which it is constituted. It is rendered obligatory by seizin,

<sup>1</sup> This is the subject of a separate book in the original.

<sup>2</sup> Retention; but also devotion to a particular purpose

<sup>3</sup> Active or causal form of *sukunu*, "he inhabited."

to thee for life, and to thy successor," it would be only an *oomra*, or for his own life, and there would be no transfer to the life holder, according to the most approved opinion; just as if he had not said "to thy successor." When a term is specified for the residence, the contract becomes binding by possession, and cannot be lawfully revoked until after expiration of the time. So also, if the residence is to be for the life of the proprietor, the contract cannot be revoked, though the life tenant<sup>4</sup> should die, and what was his is transferred to his heir till the death of the proprietor. But if it were for the life of the tenant, and he should die, there would be no transfer to his heir, and the house would revert to the proprietor. If the period is left in general terms without any exact definition, the proprietor may revoke whenever he pleases.

Of everything of which the *wukf* is valid the *iâmar*<sup>5</sup> or granting for life is valid also, such as a mansion, a slave, furniture, &c.; and the grant is not invalidated by a sale of the thing, for the purchaser must fulfil to the life tenant whatever was conditioned on his behalf. When the residence is left in general terms, it is restricted to the grantee himself, his family, and children; and it is not lawful for him to allow any others to occupy the house, unless there is a stipulation or condition that he may do so. Nor is it lawful for him to let the house to hire, as it is not lawful for him to allow another to reside in it without permission of the *mooskin*<sup>6</sup> or granter.

When a man has devoted<sup>7</sup> his house "in the way of God," or his slave for the service of a house, or of a *mausjid*, the act is lawful; and he cannot lawfully make any alteration, so long as the thing lasts. But if he should devote the house or slave to a person without specifying a time, and the *habis* or *devoter* should die, the house or slave would be part of his heritage. And so also if a time were specified and it should expire, they would be heritage, and belong to the heirs of the *habis* or *devoter*.

<sup>4</sup> Arab. *mooâmur*.

<sup>5</sup> Infinitive, of which the preceding is the past participle.

<sup>6</sup> Active participle of *Iskan*.

<sup>7</sup> *Hubusu*, from *hoobs*.



## BOOK VI.

### OF WILLS.<sup>1</sup>

#### CHAPTER I.

##### INTRODUCTORY.

To bequeath is to confer a right to the substance or the usufruct of a thing after death ; and it requires declaration and acceptance. By declaration is to be understood any word demonstrative of such an intention, as if a person should say, " Give such an one after my death," or, " This is for such an one after my death," or, " I have bequeathed it to him." And by these or the like expressions a transfer is effected to the legatee on the testator's death and the legatee's acceptance. It is not effected by the death alone without acceptance, according to the most authentic doctrine. If the legatee should accept before the death of the testator, the acceptance is lawful or discretionary ; but if interposed after his death, it is established or conclusive, even though it should be delayed for some time after the occurrence of that event, provided that the legacy has not been rejected. And though a legacy should be rejected during the lifetime of the testator, it may still be accepted after his death, as such a rejection has no effect in law. But if rejected after his death, without having been accepted, the legacy is cancelled. So also, even though possession has been actually taken, provided there has been no acceptance. Where, again, there has been

Definition  
and con-  
stitution.

Accept-  
ance by  
legatee ne-  
cessary.

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<sup>1</sup> *Wasaya*, plural of *wasiyyut*, a will or bequest, or the act of bequeathing.—See *D.*, p. 613, note.<sup>2</sup>

no possession, but the legacy is rejected after death and acceptance, it is cancelled, according to some of our lawyers, while others maintain that it is not; and this opinion is more approved. If, however, there has been both acceptance and possession, and the legacy is subsequently rejected, there is no doubt that the rejection is ineffectual, and the legacy is not cancelled according to general agreement, because the right of property has then become firmly established in the legatee.

May be partial.

If a legatee should reject part of a bequest and accept the remainder, such partial acceptance would be valid, and his right established to that extent.

In the event of legatee's death, his heirs may accept.

If a legatee should die before acceptance, his heirs come into his place, and may accept the bequest. Hence, if a person being possessed of a female slave who is married and pregnant by her husband, should bequeath both the slave and the fœtus in her womb to the husband, and he should die without accepting the legacy, the right of acceptance would descend to his heir; and if the heir should accept, he would become the proprietor of the child, provided that he is one who can validly become its proprietor;<sup>2</sup> for the child has not been emancipated as against the original legatee (his father), who could not acquire a right of property in him after death; nor is he heir to his father, being a slave, unless he is so nearly related to the heir as to entitle him to emancipation against the heir, in which case they would be heirs together—the child inheriting by reason of his emancipation before partition.

Bequest for sinful purposes not valid.

A bequest for sinful purposes is not valid; thus, if a person should make a bequest of property for the building of Jewish synagogues or Christian churches, or for transcribing what are now termed the *Towreet* and *Injeel* (the

<sup>2</sup> When a man or woman becomes the owner of a parent or ancestor how high soever, or child or descendant how low soever, the slave is emancipated on the instant; and the effect is the same when a man becomes the owner of any blood relation within the prohibited degrees, though not so when a woman becomes the owner of such a relation.—*Shuraya*, p. 356.

Law and Gospels), or aiding a tyrant or oppressor, the legacy would be void.

A bequest is a contract discretionary and reversible on the part of the testator so long as he lives, whether it be of property or a nomination of executor;<sup>3</sup> and the revocation is established in law either by express language or by any act which ignores or contradicts the legacy. Thus, if the testator should sell the subject of bequest, or by another will direct it to be sold, or should bestow it in gift, putting the donee in possession of it, or should pledge it, every such act would be a revocation of the first bequest. In like manner, if he should make such a use of it that it could no longer be called by the same name; as, for instance, if he had made a bequest of grain, and should afterwards grind it into flour or meal, or a bequest of flour or meal, and should then convert it into leaven or bread, this would be a revocation of the bequest. Further, if a person should bequeath a quantity of oil, and afterwards mix it with some of a better quality, or of grain, and then mix it with some of another species, so as to remove the possibility of distinguishing and separating one from the other, that likewise would be equivalent to a retraction of the bequest. Whereas, if he should make a bequest of bread, and subsequently break it into crumbs, there would be no revocation of the legacy.

A bequest may be revoked at any time by the testator.

*Wilayat*, literally, *power or authority*.



## CHAPTER II.

## OF THE MOOSEE OR TESTATOR.

- Must be sane and adult. PERFECT intellect and freedom in a testator are indispensably requisite to the validity of a bequest; and the will of a madman or a youth under ten years of age is not valid. When he has attained to that age all proper bequests by him in favour of his relatives and others are lawful according to the most common and approved doctrine—if he is capable of discernment.<sup>1</sup> Some have maintained that such bequests are valid though he should be no more than eight years of age, but the tradition in favour of this opinion is uncommon and not well authenticated.
- Will by a suicide, when valid. If a person should wound himself mortally and then make a will his bequest would not be valid; whereas if he should first make the will and then commit suicide, there would be no objection to the validity of the bequest.
- None but a father or grandfather can appoint a guardian to a child. A testamentary appointment of a guardian to children is invalid, except by their father or paternal grandfather; and a mother can neither be herself the guardian of her children, nor can she make a testamentary appointment of guardians to them. Should she, however, bequeath any property to them, and appoint an executor for its management, his intrusions to the extent of a third of the estate she may have left, as well as for the payment of her debts, are quite valid, but he has no authority over the children.

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<sup>1</sup> According to the other sect, a bequest by a person under puberty is not lawful.—*D.*, p. 617.

## CHAPTER III.

## OF THE MOOSA-BIHI, OR THING BEQUEATHED.

## SECTION FIRST.

*What may be Bequeathed.*

A BEQUEST may be either of the substance or the usufruct of a thing ; but with regard to both it is indispensable that they are such as can lawfully be possessed or enjoyed. Hence the bequest of wine, or a hog, or of a noisy or common dog, or of anything from which no benefit can be derived, is illegal and invalid.<sup>1</sup> Further, legacies whether of substance or of usufruct are restricted to one third of the testator's estate ; and if the whole of his bequests should exceed that amount they are void as to the excess, unless allowed by the heir. When there is a plurality of heirs, and one or more of them allows the excess, it is valid to the extent of his share in it. The allowance of an heir is effective when conceded after the testator's death. Whether it is equally valid before his death is a question on which there are two opinions, the more common and approved of which is in favour of its being binding on the heir.<sup>2</sup> When the consent is interposed after the testator's death, it is a ratification of his act, and not a gift *de novo* from the heir ; consequently it does not require possession by the legatee to complete its validity.

A bequest must be of something that can be lawfully possessed ;

and cannot exceed a third of the testator's estate ;

unless allowed by the heirs.

<sup>1</sup> All traffic in these is illegal and prohibited.—*Im. D.*, pp. 2 and 3.

<sup>2</sup> The other sect differs on this point.—*D.*, p. 615.

Testator's directions must be strictly followed. It is incumbent on the legatee to obey implicitly the directions of his testator in respect of the legacy if they are not contrary to law.

The third which a person may lawfully bequeath is a third of what he may be possessed of at his death. The third of a testator's property, and consequently the extent to which he may lawfully bequeath out of it, is determined by its state at the time of his death, and not by its state at the time of making his will. So that if a person who was in good circumstances at the time of making his will should be indigent at the time of his death, no regard is to be paid to his previous wealth in determining the amount of his valid bequests. In like manner if he were poor at the time of making his will, and has become opulent at the time of his death, it is his latter condition and not the former that must determine the legal amount of his legacies.

If the testator is murdered, the *deut*, or fine of death, falls into his estate. If a man after making his will is murdered or wounded, his legacies have effect over a third of what he has left, and of the *deut* or fine of blood, and the *irish* or compensation for the wound; both of which form a part of the testator's estate.

Testator may direct the whole of his property to be employed in *moozarubut*. If a person should bequeath the whole or a part of his property to be employed by the legatee in *moozarubut*,<sup>3</sup> on the terms of an equal division of profits between him and his heirs, the bequest is valid. Some of our doctors have restricted this kind of bequest to a third of the testator's property; but the first doctrine is supported by positive tradition.

Requests for the performance of duties, some incumbent and others discretionary. When a person has bequeathed property for the performance of certain duties, some of which were incumbent on the testator, and others only discretionary, they are all to be carried into effect if a third of his estate be sufficient for the purpose. If the third should not suffice, and the heirs refuse their consent, those duties that were incumbent on the testator must first be discharged out of the general mass of his estate, and then the others out of a third of what remains, beginning with the first mentioned by the testator, and so on in order. If none of the duties

<sup>1</sup> See *ante*, p. 181, note.<sup>6</sup>

are of the incumbent description, but all discretionary, they can take effect only to the extent of a third of the estate, and are to be discharged beginning with the first mentioned by the testator, and so on in order until the third is exhausted.

If a person should bequeath a third of his estate to one legatee, a fourth to another, and a sixth to another, and the heirs should refuse to confirm his bequests, a third of the estate is to be given to the first legatee, and the other legacies are void.<sup>4</sup> But if he should bequeath a third of his estate to one person, and then a third, or the same portion, to another, this would be a revocation of the legacy to the first in favour of the second; and should a doubt arise as to the person first mentioned, it must be determined by drawing lots.

In bequests of different portions, or of the same portion, to several legatees, preference how determined.

If a person should direct by his will the emancipation of his slaves, the bequest would include not only those who are his exclusive property, but also his share in those of whom he may be joint owner with others; and such share is emancipated accordingly. Some of our doctors are further of opinion that the shares of his copartners in the slaves are also to be valued as against him if a third of his estate will bear it, and the slaves are to be totally emancipated. Otherwise, that is, if the third will not suffice for their complete emancipation, they must be partially emancipated to the full extent of the third. A tradition is quoted in favour of this opinion, but it is weak or of questionable authenticity.

General bequest of emancipation to slaves includes those of whom the testator is only part owner.

If a person bequeaths one article to two persons, and the value of the article exceeds a third of his estate, while the heirs refuse their assent to the excess, so much of the article as is covered by a third of the estate is the joint property of the legatees. If, on the other hand, he

Distinction between a specific bequest to two persons and a

<sup>4</sup> According to the other sect. the third is to be divided between the legatees, though as to the proportions there is some difference of opinion between *Abou Huneefa* and his two disciples.—*I.*, p. 626.

<sup>5</sup> According to the other sect. the third is to be equally divided among the legatees.—*Ibid.*

bequest to each of the two. bequeath a thing to each of the two, a beginning must be made in favour of the person to whom the bequest was first made, and the deficiency must fall solely on the second.<sup>6</sup>

Assent by heirs to a bequest in excess of the third; how affected by subsequent declaration that they thought the excess was trivial. If a person should make a bequest of half of his property, for example, and the heirs at first should assent, but afterwards declare that they thought the amount to be trifling, decree is to be given against them for the amount which they insist that they thought the legacy to be, and they are to be put upon their oaths as to the excess; but this is subject to some doubt. And if the bequest were of a slave or a mansion, and the heirs, after first assenting to it, should then allege that they thought it was no more than a third of the deceased's estate, or if more, only so in a trifling degree, such claim or allegation on their part cannot be attended to, because their consent in this case involves a known object of the value of which they cannot pretend ignorance at the time of assenting to the bequest.

The bequest of a third share undividedly entitles the legatee to a third of everything. And the bequest of a specific thing entitles him to the whole of it, if not in excess of a third of the estate. If a person should bequeath a third of his property by way of *moosháá*, or undividedly, the legatee is entitled to a third of everything of which he died possessed. If, again, he bequeaths a specific article which is of the value of a third of his estate, the legatee becomes by his death the sole proprietor of the article bequeathed; nor have the heirs any ground of objection thereto. And if the deceased should have left both present and absent effects (such as ready money and debts, for example), so much of the specific thing must be surrendered to the legatee as a third of the property presently available will admit of,<sup>7</sup> while he will have to wait for the remainder of it until it is recovered by the heirs; since what is absent is liable to loss or destruction, and may never be realized. Consequently, if the bequest were of a third of his slave, two-

<sup>6</sup> According to the other sect, they would apparently become partners in the thing bequeathed. *D.*, p. 620.

<sup>7</sup> There is some obscurity in the passage, but this is, I think, its meaning, and it tallies with what follows, which in the original is marked as a branch of what precedes it.

thirds of whom prove to be the property of other parties, effect is to be given to the bequest over the whole of that third which belonged to the testator, and it is not restricted to a third of the third; because effect can be given to the will without encroachment on the rights of the heirs, that is, assuming that the rest of the testator's property is equivalent in value to two-thirds of the slave.

If a person should grant a specific legacy by a name which is applicable to what is lawful and to what is forbidden, the former construction must be put on the bequest, to preserve the intention of a *Mooslim* free from what is unlawful; as, for instance, if the bequest were of an *ood* out of the *cedan*<sup>8</sup> in his possession, the name being applicable both to a staff, or lawful implement, and a *flute*, which is forbidden,<sup>9</sup> the testator must be held to have intended the former. If, however, no other than the latter is found in his possession, some lawyers have declared the legacy to be void; while others maintain its validity, but say that the forbidden quality must be defaced from it, and that it is only when that is impossible without destroying all that is of any use in the article, that the legacy is void.

When the name of a specific bequest is applicable to what is lawful and unlawful, it must be taken in the lawful sense.

Bequests of dogs, the property of the testator, are valid, such as dogs trained for hunting, or catching of game, or for domestic purposes—as guarding homes and watching in corn-fields.

Bequest of trained dogs lawful.

## SECTION SECOND.

### *Of Ambiguous Legacies.*

When a person has bequeathed a *joozz*, or part of his property, there are two traditions as to the proper interpretation of his words. Of these the most authentic assigns a tenth of the testator's estate to the legatee; but, according to the other, he should receive only a seventh of the third. If, again, he should bequeath a "*suhum*," or share, the proper interpretation is an eighth; while if it

Meaning of *joozz*.

OF *suhum*.

<sup>8</sup> Plural of the same word.

<sup>9</sup> See *Im. D.*, p. 3.

were *shai*, or a thing, it should be interpreted as meaning a sixth.<sup>10</sup>

Executor forgetting purpose of a bequest should apply it in some good way.

If a person should make a bequest for several purposes, of which the executor has forgotten one or more, he should dispose of it in some good or proper way,<sup>11</sup> although some of our lawyers have expressed an opinion that it should fall back into the deceased's inheritance.

Bequest of a sword includes its scabbard.

If a person should bequeath a particular sword which is in a scabbard, the scabbard and mounting or ornaments are included in the bequest. In like manner, if he should

And of a box or a bag, its contents.

bequeath a box containing clothes, or a boat or vessel which has merchandise on board of it, or a bag containing linen, in all these cases, the things actually bequeathed, and the other things contained in them, are included in the legacy. There is, however, another opinion on this matter, though it merits but little attention.

A will excluding children from their share in deceased's estate invalid.

If a person should make a will excluding some of his children from their shares in his succession, the exclusion is not valid. But whether his words are to be treated as entirely inept is a question on which there are two opinions. According to one of these, they are quite futile and of no efficacy whatever; but, according to the other, the same effect should be given to them as in the case of the bequest of the whole of a person's estate to a stranger, excluding his heirs, when the bequest is valid as far as a third of his property, and the heirs have their legal portion in the remaining two-thirds.<sup>12</sup> The first opinion, however, appears to be better founded in law, though the other is supported by a tradition which is now rejected.

And ineffectual even as to a third.

Where the bequest is altogether uncertain,

If a person should make a bequest in terms so ambiguous that the law affords no interpretation of them, it must be left to the heir to explain them as he may think

<sup>10</sup> The constructions are probably founded on the traditions referred to, as they do not correspond with the literal meanings of the words.

<sup>11</sup> *Woojook-ul-birr*. See *ante*, p. 216.

<sup>12</sup> That is, those who are of this opinion would deprive the disinherited children of any interest in a third of the estate, leaving them only their legal portion in the remainder.

proper; as, for instance, where the testator has said, "Give <sup>its inter-</sup> him a part <sup>13</sup> of my property," or "a lot," <sup>14</sup> or "portion," <sup>15</sup> <sup>pretation</sup> or "a little" or "a trifle," "a valuable," or "a handsome <sup>to be left</sup> present." If, again, the testator should say, "Give him much of my property," some lawyers are of opinion that eighty *dirhems* should be given to him, as in the case of a vow, whilst others have maintained that this construction is peculiar to the case of vows, as being so limited in the place where this is recorded of them.

It is preferable that bequests should be kept below a <sup>Moderation in be-</sup> third of the testator's property, insomuch that the bequest of <sup>queathing</sup> a fourth is better than that of a third, and of a fifth better <sup>recom-</sup> than a fourth. <sup>mended.</sup>

In cases, like the preceding, of ambiguous legacies, if <sup>In dis-</sup> the legatee should specify any particular thing, and insist <sup>putes as to</sup> that such was the testator's intention in the words employed <sup>deceased's</sup> by him in making the bequest, the word of the heir is <sup>intention,</sup> preferred, accompanied by his oath, if the legatee should <sup>the word</sup> also assert his knowledge of the fact, but otherwise there <sup>of the heir</sup> is no necessity for the heir's confirmation of his word by <sup>to be pre-</sup> his oath. <sup>ferred.</sup>

<sup>13</sup> *Huzz.*

<sup>14</sup> *Kist.*

<sup>15</sup> *Nuseb*



## CHAPTER IV.

## OF THE LAWS OF BEQUESTS.

**Repugnant bequests.** WHEN a person has made a bequest, and then another which is repugnant to it, effect must be given to the latter.

**Bequest of a foetus valid if born within six months from its date.** If a person should bequeath a foetus in the womb, and the birth should take place within six months from the time of the bequest, the legacy is valid; but if the birth should not take place till ten months from the date of the bequest, the legacy would not be valid. If, again, the birth should occur at any period intermediate between six and ten months, and the mother should have neither master nor husband, the child is still to be decreed to the legatee. But if the mother has either a master or a husband, the offspring cannot be decreed to the legatee, because, while it is possible that it may have been conceived at the time of the bequest, it is also possible that the conception may not have occurred till after it.

**Case of a bequest to a foetus in the womb varied according to its sex.** When a person has said, "If there be a male in the womb of this woman he is to have two *dirhems*, and if there be a female she is to have one *dirhem*," and the mother is delivered of both a male and a female, they are to have three *dirhems*; but should he have said, "If what is in her womb be a male he is to have so and so, and if a female so and so," and the woman is delivered of both a male and a female, they are not to have anything.

**Bequest of a foetus, or of the future produce of a slave or of** The bequest of a foetus in the womb, or of whatever may be produced by a female slave, or a particular tree, is quite valid, as is also that of the residence of a mansion for a future period. Further, if a person should bequeath the

service of his slave, the fruit of his garden, the residence of a tree his house, or anything else of a usufructuary nature, for ever or for a fixed time, the advantage or profit to arise therefrom must be valued, and should it not exceed a third of the testator's estate the bequest is valid, while if more than a third the legatee is to have as much as the third will cover, and the legacy is void as to the excess.

Usufructuary bequests.

When a person has bequeathed the service of his slave for a fixed period, the expense of the slave's maintenance must be defrayed by his heirs, as this is a duty which follows or is dependent on the ownership of the slave, and the legatee is entitled to no more than the service of the slave, while all the other rights of ownership appertain to the heirs, as sale, manumission, and the like, none of which, however, has the effect of invalidating the rights of the legatee.

When the service of a slave is bequeathed, he must be maintained by the heir.

If a person should bequeath a *kows* or bow, this is to be construed as meaning an Arabian bow for shooting arrows, or what is known as a *kows al nushab*, *kows al nuhl*, and *husban*, unless there is some circumstance from which it may be inferred that he meant a bow of some other description; and in all cases where a testator may have employed a term which is common or equally applicable to several things, the heirs have an option to fix on whichever of the things they please and give it to the legatee. If, again, the testator should say, "Give him my bow," and only one is found in his possession, that one must be given to the legatee of whatsoever description it may be.

How the word *kows* or bow is to be interpreted.

Generally where a word is applicable to different things, the heirs have an option to fix it to either.

If a person should bequeath to another "one of his slaves," the option of fixing upon one in particular belongs to the heirs, and they may give the legatee a young or an old, a perfect or defective one, as they think proper. But if all the slaves but one should die after the testator's decease, that one must be given up in terms of the bequest; while if they should all die the legacy is null. But not so if they are murdered; for in that case the heirs have still their option to fix on a particular slave, and must give the legatee his value if recovered from the murderer, and otherwise leave him to his remedy against the latter.

So also if the bequest is of "one of the testator's slaves," they may give any one they please.

Wills require two witnesses for their establishment; except where property only is concerned. when one may suffice.

Appointment of executors or guardians requires two.

Testimony of an executor cannot be received in matters connected with his executorship.

Wills or bequests are established in law by the testimony of two witnesses who are *mooslims*, and just persons, or in case of necessity, when two just *mooslim* witnesses are not to be had, by that of two *zimnees* or infidel subjects. And in cases where property only is concerned, the testimony of one witness on oath may be received, or of one male witness and two females, and the testimony of even a single female witness may be received as establishing the right of a legatee to a fourth part of what she testifies to, of two women as supporting his claim to a half, of three as to three-fourths, and of four as to the whole.<sup>1</sup> But an appointment of executors or guardians by will can be established only by the testimony of two male witnesses; and in this case the testimony of women cannot be received; nor further, according to the most obvious analogy, can that of one male witness on his oath be received, although with respect to the latter there is some difference of opinion.

The testimony of an executor cannot be received in matters connected with his own executorship, nor as to any thing from which he may derive advantage to himself or to his office. And if appointed executor for the expenditure of a specific part of his testator's property, his testimony cannot be received in favour of the deceased to prove that this property does not exceed a third of his estate.

#### Miscellaneous Cases.

When the testator has directed the emancipation of all his slaves, and the third of his estate is insuffi-

*First.* If a person should direct by his will the emancipation of all his slaves, when he has no other property besides them, a third only of the number can be emancipated, and these are to be determined by lot. Should the testator have arranged them in any order for emancipation, the first in the order is to be first emancipated, and so on as to the remainder, until the third of the property is

<sup>1</sup> In questions relating to debts and property generally, the testimony of one man or two women is held to be sufficient; and in questions relating to legacies and inheritance, the testimony of one woman is enough, but only to the extent above mentioned.—*Shuraya*, p. 306.

exhausted; and the bequest is void as to any that may be over. If, again, he direct a certain number to be set free, without specifying the individuals, so many are to be determined by lot. According to some the heirs are at liberty to select the number specified; but the mode of determining by lot is recommended by its justice, and is the most approved.

*Second.* If a person should on deathbed emancipate a slave by free gift without any compensation, and having no other property besides, some of our doctors have maintained that the slave is emancipated *in toto*, while others are of opinion that he is emancipated only to the extent of a third, and that he must perform emancipatory labour to the heirs for the remaining two thirds. This latter opinion is the more common or approved. Should the deceased have emancipated only a third of the slave, he has also in this case to work out the remainder of his value. But if the deceased has left any other property the remainder of the slave must also be emancipated out of the third of his estate.

*Thirdly.* If a person should direct by his will the emancipation of a slave who is a true believer, it is an incumbent duty to give effect to the will, and should no slave of this description be found, one must be emancipated who is not known to be a *nasib* or enemy of the sect of Aly: and if the executor, supposing a slave to be a true believer, should emancipate him, and it should afterwards appear that the slave is the reverse of this, the pious intention of the testator is notwithstanding effectual with regard to him.

*Fourthly.* If a person should bequeath a specific sum for the emancipation of a slave, and none can be found at that price, it is not incumbent on the heirs to make any purchase, but they may wait till one can be found at the specified price; or if they can find one at a less price, they should purchase and emancipate him, and bestow on him the remainder of the sum.

cient, how the particular slaves are to be determined.

Emancipation on deathbed good only as to a third of the slave's value where the deceased leaves no other property.

Where the testator directs the emancipation of a slave who is a true believer, such an one must be sought for emancipation.

Where a slave cannot be found immediately, the heirs are entitled to wait.

## CHAPTER V.

## OF THE MOOSA-LUHO OR LEGATEE.

He must be in existence at the time of the bequest. It is an indispensable condition that the legatee be in existence at the time of the bequest, and if he should not be then alive the legacy is not valid, in the same way as a legacy to a person deceased, or to one supposed to be alive but who afterwards proves to have been dead at the time of the bequest. In like manner, if one should make a bequest in favour of a fetus hereafter to be conceived by a particular woman, or "to whomsoever may hereafter be found of the children of such a man," the bequest is altogether null and void.

Legacies to strangers, heirs, or *zimmee* valid ; A legacy is valid whether it be in favour of a stranger, or an heir, or a *zimmee*, though he be a stranger. Some doctors, however, have maintained the last, or legacies by a Mochummudan to a *zimmee*, to be absolutely unlawful, while others have restricted their legality to cases where the legatee is a consanguineous relative of the deceased. But the first doctrine, or that which sanctions the legacy without any qualification, is the most approved. With regard, again, to legacies in favour of *Hurubees* or hostile Infidels, there is some doubt; but according to the most authentic traditions they are forbidden and null.

Legacies to the slaves of others invalid. Bequests in favour of the absolute slave of a stranger, and of his *moodubbur*, *oom-i-wulud*, and provisional *mookatub*, or one who has not paid any part of the stipulated ransom, are all equally invalid, even though sanctioned by the master. But legacies in favour of the testator's own slave, *moodubbur*, *mookatub*, and *oom-i-wulud*

Otherwise to one's own slaves.

are all valid, provided that they do not exceed a third of his estate. Should the legacy to the slave be equivalent to his value, he is forthwith emancipated, and the amount bequeathed reverts to the heirs. Should it exceed his value, the slave himself is entitled to the balance; and, upon the other hand, should it fall short of his value, the slave must make up the difference by working for the heirs till his full value is completed, unless his value should be double the amount bequeathed, in which case the legacy is void. Some lawyers, however, consider that it is still valid, and that the slave must work out the difference whatever it may be; and this opinion is the most entitled to approbation.

When a person who is in debt directs by will the emancipation of his slave, and the value of the slave is twice the amount of the debt, the slave is emancipated, but must labour for five-sixths of his value; but if the value of the slave is less than the debt the legacy is void. The reason is, that debts taking precedence of legacies must be first discharged, and it is only out of a third of what remains of the estate that the emancipation can take effect. It is otherwise in the case of a gratuitous emancipation by a master on his deathbed, when the law is as before mentioned, on the ground of an express decision recorded by *Abd-oor-Rulman* as of the *Imám Jáfer Sádik*, on whom be peace.

If a person makes a bequest in favour of the absolute or unconditional *mookatub* of another, and the *mookatub* has already paid a part of his ransom, he is entitled to as much of his legacy as is equal to the amount of the ransom so discharged. And when a person makes a bequest to his own *oom-i-wulud*, the legacy is valid as already mentioned, to the extent of a third of the estate. But whether her emancipation is to be put to the account of the legacy, or to the share of her son in the testator's estate, is a question that admits of different solutions, some saying that she is to be emancipated out of the child's share and to have her legacy besides, while others argue that she is to be emancipated out of the legacy because

Effect of a direction to emancipate a slave when the testator is in debt.

Bequest to a *mookatub* who has paid part of his ransom. Question as to a legacy to one's own *oom-i-wulud*, whether it is to be applied towards her emancipation or to be paid to her.

there is no inheritance according to law until after payment of legacies.

A legacy to several persons to be equally divided among them, without regard to sex, though they should be the testator's children.

When a legacy is bequeathed to several persons absolutely, it is to be construed as divisible equally among them. Thus, if a person should make a bequest to his children, some of whom are males and some females, they all take alike. So also in the case of a legacy to his uncles and aunts, whether paternal or maternal. In like manner if the legacy were both to his maternal and paternal uncles, they would all take equally according to the most valid doctrine, though there is a tradition the other way, which, however, is rejected as unauthentic. On the other hand, should the testator make a distinct allotment of shares to each, giving more to some than to others, his directions must be strictly followed.

Bequest to kindred, how interpreted ;

If a person should make a bequest to his kindred (*curce kurabat*), it is to be understood as intended for all known to be of his race (*nusub*) or of the same paternal descent. Some writers have said that it includes all those who are related to him through his most remote progenitors, both father and mother, who professed the faith of *Islam* ; but this opinion is destitute of any testimony in its support. If, again, the bequest be to his *koum* or nation, it includes all those who speak the same language ; and if to the people of his house (*ahl-beit*) it includes his children, father and paternal grandfather. Further, if he say to his *asheerah* (family), the nearest only of his *nusub* are to be understood as included in the bequest.

to *koum* ;

*ahl-beit* ;

*asheerah* ;

*jeeran*.

If a person make a bequest to his neighbours (*jeeran*), it includes, according to some doctors, all those whose houses are within forty cubits (*ziraas*) of his in every direction. But there is another opinion which is far fetched and unreasonable, that extends it to the occupants of forty houses on either side of his.<sup>1</sup>

A bequest to a fetus valid if it is born alive.

A bequest to a fetus in the womb actually existent is valid as already described, but it requires that the child be produced alive, and if it is still-born the bequest is void.

<sup>1</sup> See *ante*, p. 216.

While if it is born alive, though it should die immediately after, the legacy descends to its heirs.

When a *Mooslim* has made a bequest to beggars (*fukker*) it is payable only to those of his own religion; and in like manner if the testator be an infidel, such a bequest is payable only to those of his own persuasion.

Bequest to beggars to be applied to those of testator's religion.

In all cases of bequest where the legatee happens to die before the testator, some doctors are of opinion that the legacy is void; but others have maintained that, although if the testator should retract the bequest it would be null, whether the retractation take place before or after the death of the legatee, yet if there is no retractation the legacy descends to the heirs of the legatee. This of the two reports is the most authentic and approved. If, however, the legatee should leave no heirs the legacy reverts to those of the testator.<sup>2</sup>

Legacy does not lapse by death of legatee, according to the best opinion, if he has left heirs.

If a person should say, "Give such an one such a sum," without specifying any purpose, it must be given to the legatee, who may dispose of it without restriction in any way he pleases. If again the testator should direct it to be expended in the way of God (*subeel allahi*), the bequest must be applied in some way to which reward is promised in a future state; but according to some, exclusively in holy warfare. The first opinion, however, appears to be better founded.

When a legacy is directed to be applied in a particular way, testator's directions must be strictly obeyed.

A bequest in favour of one's kindred is highly proper whether they be his heirs or not; and when a person bequeaths a legacy to his *akrub*, or nearest of kin, it is to be regulated by the rules of inheritance, and nothing is to be given to a remote heir while there is a nearer in existence.

Bequest to nearest of kin, how construed.

<sup>2</sup> See *D.*, p. 614, note <sup>2</sup>, where it is inferred "that the death of the legatee before the testator would occasion a lapse of the legacy." The inference is founded on death being a substitute for acceptance, which, according to the *Hanifites*, "must be after the testator's death." But according to the *Sheeahs*, it may be in his lifetime.—*Ite.* p. 229.



## CHAPTER VI.

OF EXECUTORS.<sup>1</sup>

Must be  
*Mooslims.*

*Query*  
whether  
they must  
also be  
just at the  
time of  
appoint-  
ment.

If they sub-  
sequently  
prove to  
be *fasik* or  
profligate,  
they may  
be removed  
by the  
judge.

A slave  
cannot be  
appointed  
an execu-  
tor, nor a  
minor  
singly.

IT is requisite that an Executor should be a person of understanding and a *Mooslim*, as also, according to some doctors, that he be an *adil* or just person, because a *fasik* or profligate is unworthy of trust. Others again consider that this is unnecessary because all *Mooslims* are trustworthy, and may accordingly be agents and depositaries, and also because the appointment of an executor is dependent on the devise of the testator, and is established by it. Yet if one who was *adil* or just at the time of his appointment should prove to be *fasik* after the death of the testator, we may say that the appointment is nullified, for the confidence placed in him by the testator was founded on a belief of his probity, and would have been withdrawn on its decline; the judge should therefore remove him and appoint another in his place.

It is not lawful to appoint a slave as an executor without the consent of his master, nor a minor singly, though he may be validly joined with an adult in the office; but even in that case he cannot interfere with the management of the deceased's estate until he has attained to puberty. When two persons are appointed executors, one of whom is a minor and the other adult, the adult executor may act alone until the minor has arrived at puberty, but when that happens the adult executor can no longer act singly. If, however, the minor should die, or on attaining to puberty should prove to be of unsound judgment, the other may

<sup>1</sup> *Auseeah*, pl. of *Wusee*.

continue to act singly, and the judge cannot in this case force an associate on him, because there is still an executor to the deceased, appointed by himself. Farther, whatever may have been done by the adult executor during the minority of the other cannot be undone by the latter on his attaining to puberty, unless contrary to the nature and object of the trust.

An infidel cannot be lawfully appointed executor to a *Mooslim*, even though he be his relation by blood; but an infidel may be the executor to one like himself. Further, a woman may be legally appointed an executrix when found in possession of the qualities and conditions requisite for the office.

An infidel may be executor to another. A woman may be appointed.

When two persons have been appointed in general terms, or with an express condition that they are to act jointly, one of them cannot act singly without the other, and if either of them should persist in doing so, none of his acts are lawful except such as are positively incumbent or necessary, as for instance the providing of clothes and food for the young children of the testator. Further, it belongs to the judge to compel them to act jointly, and if that be impracticable, he may appoint others in the stead of both. Further, should they make a partition of the property between themselves for the purpose of separate management that also is unlawful; and if one of them should fall sick or become incapable of performing the duties of the office, the judge must appoint an associate to the other who is competent; whereas if one of them should die or become profligate, the judge has no such power, and the remaining executor is empowered to act singly,<sup>2</sup> the judge having no authority while there is an executor of the deceased surviving and competent to act. This point, however, is open to some doubt and difficulty. If the testator has made it a condition that the executors are to act jointly and separately, the intromissions of each singly are in that case quite lawful. They may also lawfully divide the

Joint executors cannot act singly,

except in the case of survivorship,

or under special authority by the testator.

<sup>2</sup> According to the Hanifites, the interposition of the judge seems necessary.—*D.*, p. 671.

property between them and each take upon him the management of a part, in the same way as they might have acted separately before the partition.

An executor may refuse to accept the office.

An executor may lawfully reject his office while the testator is alive, provided that he is duly informed of the rejection; but if the testator should die before the rejection, or after it without the information having reached him, no effect can be given to the rejection, and it is incumbent on the executor to take upon him the duties of the office.<sup>3</sup>

To an incompetent executor an assistant may be appointed.

If an executor is incapable of discharging the duties of his office the judge may appoint an assistant to him; but if he is guilty of fraud he must be displaced and another appointed in his room.

Executor not responsible except for neglect;

An executor is an *ameen* or trustee, and therefore not responsible for any loss or destruction of the deceased's property, unless occasioned by his departure from the conditions or rules of his office, or by some personal neglect. And if he be a creditor of the deceased, he may lawfully pay himself out of the property in his hands, without the order of a judge when he has no proof of the debt. According to some lawyers he may do so absolutely, that is in all cases without a judge's order. But whether he can purchase the deceased's property from himself on his own account is a question that admits of some doubt, though, according to the most approved doctrine, he may lawfully do so at a just valuation.

and may pay himself if a creditor to the deceased; and even purchase his property at a just price.

But cannot at death devolve his authority on another unless sanctioned by the testator;

When an executor has his testator's authority for bequeathing the management of the estate at his own death, he may lawfully do so by general agreement. But whether he can do so when the testator has neither authorised nor forbidden such appointment, is a question on which there are different opinions.<sup>4</sup> Of these the opinion which forbids such exercise of power on his part is that which is most approved. Accordingly in such case at his death the superintendence of the original testator's

and the care of the original

<sup>3</sup> I think some previous acceptance is implied. See *ante*, p. 229, and *D.*, p. 666.

<sup>4</sup> He can, according to the Hanifites, without any difference of opinion.—*D.*, p. 672.

estate devolves upon the judge. In like manner, if a person should die without appointing an executor, the superintendence and care of his estate belongs to the judge. And if there is no judge present on the spot, any true believer in whom confidence can be placed may lawfully assume the care and management of the estate. But on this point there is room for doubt and difference of opinion.

If a person whose father is alive should appoint a stranger his executor to superintend the property of his son the appointment is not valid, and the power over the orphan belongs to his grandfather, to the exclusion of the father's executor. But some doctors are of opinion that the nomination by the father is valid to the extent of a third of his property, and for the discharge of all rights or claims upon his estate.

When a person has appointed an executor for the superintendence of one particular matter, his power is restricted to that specific object, and any other intrusions by him with the estate are unlawful; an executor being in this respect exactly like an agent who is strictly confined to the bounds of his commission.

### *Miscellaneous Cases.*

*First.* The qualifications required in an executor have reference to the time of his appointment. Some lawyers, however, maintain that they should be referred to the death of the testator, and that, accordingly, if a youth should be appointed an executor and become adult before his death the appointment is valid; and in like manner as to the conditions of freedom and understanding. But the former doctrine is the most generally approved.

*Second.* The appointment of an executor or guardian to every one over whom the testator has control is valid, as for example a child how low soever in descent, provided that he is of tender age or a minor. But if a person should nominate an executor for his children who are adult and of sound understanding, the nomination is of no value and cannot be sustained. And even though the

estate belongs to the judge.

A guardian cannot be appointed by a father to his son when the grandfather is alive.

Limited executorship.

Qualifications of an executor have reference to the time of his appointment.

A testamentary guardian may be appointed to any one over whom the deceased has control.

appointment should be for the superintendence of property which the testator himself has left to the parties, the executor has no right to intromit with it, not to the extent even of a third. He may, however, lawfully separate from it what lawfully belongs of right to the deceased, that is, enough for the discharge of his debts and alms.

Superintendent of an orphan's property may deduct his expenses.

*Third.* It is lawful for every one who has the superintendence of the property of an orphan to take from it the ordinary hire or recompence due for his trouble. Some doctors are of opinion that he is limited to what may be sufficient for his expenses; while others maintain that he may take both (that is, hire and expenses). But the first opinion is the most approved.<sup>5</sup>

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<sup>5</sup> That is, I suppose, hire *only*, as including expenses.

## CHAPTER VII.

## APPENDAGES.

THESE are of two kinds, the first of which comprehends the following cases.

*First.* When a person has bequeathed to a stranger the like of his son's portion, having only one child, this is in fact a partition of his estate between them, and the legatee is entitled to a half of it, unless the heir refuses his consent to the full bequest, in which case the legatee's interest is reduced to a third. If, again, the testator has two sons, the legacy is a third of the estate, and if three, it is a fourth. The general rule is that the legatee be added to the other heirs and treated as one of them, if they are all entitled to share equally in the inheritance; while if their shares differ, some being more and some less, he ranks with the weakest of them, or the one whose share is the least, unless the testator has expressly said that his share is to be equal to that of the highest,<sup>1</sup> in which case effect must be given to the terms of the bequest. Further, if the testator should have said "like the share of my daughter," the legatee, according to us, is entitled to a half when there is no other heir besides the daughter; but his share is reduced to a third if she refuses her consent to the full legacy, because, according to our doctrine,<sup>2</sup> daughters inherit the whole estate to the exclusion of the *asubah* or residuaries, and the legatee thus becomes like a third daughter.

Bequest of the like of a son's portion.

The like of a daughter's, when there are no other heirs.

If a person having three half-sisters by the mother, and

The like of one of his

<sup>1</sup> Or like some one's in particular, as in the case of the son's portion.

<sup>2</sup> As opposed to that of the Hanifites.

heirs, when he has left only half-brothers and half-sisters. three half-brothers by the father, should bequeath to a stranger the like of the portion of one of his heirs, the legatee is to be treated as one of the sisters, and so to receive one share out of ten parts into which the estate must be divided, while the half-sisters take three, and the half-brothers the remaining six, conformably to the rules of intestate

The like of a daughter's when he has left one and a widow. succession. If, again, the testator having a wife and daughter bequeaths "the like of the share of my daughter," and the heirs assent, the legatee is entitled to seven parts of the estate, the daughter to as many, and the wife to two, the whole being divisible in such a case into sixteen portions. Nevertheless, it would be more proper to say in this case that the wife is entitled to no more than one part out of fifteen, that being the number of shares into

The like of one of them when he has left four wives and a daughter. which the estate should be divided." If, again, a person having four wives and a daughter should say "like the share of one of them," the division of the estate would be into thirty-two portions, whereof an eighth or four shares would be equally divided among the wives, the legatee would take one share like one of them, and the remaining twenty-seven would pass to the daughter. Yet if we were to say in this case that the division should be into thirty-three shares it would be more agreeable to the general principles of law.

Bequest of his child's portion ; *Second.* If a person should bequeath to a stranger "the portion of his child," the bequest according to some is void, because it is a bequest of what belongs to another ;<sup>1</sup> but it is more agreeable to principle to say that the bequest is valid, and should be construed in the same way as if it were the like to his share. If, again, the testator, having a son who afterwards becomes his murderer, should bequeath the like to his share, here, though some say that the bequest is valid, yet it is more in conformity with the principles of law to say that it is invalid.

of the like to the share of a son who after becomes a parricide ;

<sup>3</sup> The original division being into eight parts, of which one is to the wife and seven to the daughter, a "like to the share of my daughter" is seven, and  $7 + 7 + 1 = 15$ .

<sup>4</sup> The Hanifites appear to be of this opinion.—*D.*, p. 629.

*Third.* When a person has bequeathed the double of his child's portion, the legatee has two equivalents of the portion; and if he were to say *zoâfan* (in the dual) or two doubles of it, the legatee would have an equivalent to four portions, but only to three according to some whose opinion is preferred as being more certain: and the same is the law when the testator has used the expression *zoaf-i-zoâf*, or double of the double of his portion.

*Fourth.* When a person whose property is scattered about in different places has bequeathed a third of it to the poor it is lawful to apply whatever is found in the city to the poor of the place; and even the whole of it may be lawfully expended on the poor of the testator's city, and on those of them who are on the spot, without following or searching for any who are absent. The number of those who are to share in the gift must, however, be three or more, by reason of the testator's expression being in the plural, according to the best authority. In like manner, if he should say, "Emancipate slaves," in the plural, it is incumbent on the executor to emancipate at least three, unless a third of the testator's estate should fall short of the object.

*Fifth.* When a person has bequeathed a slave to one, and the whole of the remainder of the third of his estate to another, and the slave becomes defective previous to his delivery to the legatee, the other legatee is entitled only to the balance of the third, after deducting the value of the slave, if supposed to be perfect or without defect; because the testator evidently intended a perfect slave and the balance, as the subjects of his respective legacies. In like manner, should the slave die before the testator, though the first legacy is necessarily annulled, the second legatee is entitled to no more than the balance of the third after deducting the value of the slave, as if the slave were still alive and in good condition; and if such value should amount to a third of the testator's estate, the second legacy would also be annulled.

*Sixth.* When a person has bequeathed his slave to the slave's own son, who accepts the bequest on his deathbed, the slave is emancipated as against the whole property of

of the  
double of  
his child's  
portion.

Bequest to  
the poor of  
property at  
different  
places,  
how to be  
disposed  
of.

Bequest of  
a slave  
means one  
that is not  
blemished.

A slave be-  
queathed  
to his own  
son, and



accepted on deathbed, is emancipated as against the whole of his property.

the legatee, according to all our doctors, without any reference to the value of the slave coming within a third of it, for this necessarily refers only to what a testator bequeaths out of his own property, and here the father becoming the property of the son by his acceptance of the legacy, his emancipation immediately follows as a necessary consequence.

Bequest of a mansion which falls down before the testator's death.

*Seventh.* When a person has bequeathed a mansion which falls down and is levelled to the ground before the testator's death, the legacy is void because the name of mansion (*daw*) is no longer applicable to it. But this is liable to doubt.

Joint bequest to an individual and to the poor.

*Eighth.* When the testator has said, "Give *Zeid* and the poor such a sum," *Zeid*, according to some doctors, is entitled to a half, but, according to others, only a fourth. But the first doctrine is the best supported.

Acts on deathbed. Such as are not to take effect immediately are to be treated as legacies.

The second kind of appendages relates to disposals of property by a sick person, or on deathbed. These are of two descriptions—or such as are deferred or not to take effect till after the testator's decease, and such as take effect immediately. The first are to be treated in every respect as legacies according to the unanimous consent of our doctors, and like the acts of a person in health which are done with reference to his death, so as not to take effect till after it.

Such as are to take effect immediately, difference of opinion regarding them.

The second description of acts, or such as are of immediate operation, like *muhabat* or connivance at loss in contracts of exchange, and gift, appropriation, and emancipation. These are good according to some of our doctors as against the whole of the maker's property, and according to others only as against a third.<sup>5</sup> Both opinions, however, agree in this, that if he should recover from his sickness they are valid against himself and against his heirs; and the difference of opinion is only when he dies of the same disease.

Death, illness.

Here it is necessary to note the diseases which restrain

<sup>5</sup> This is the opinion of the Hanifites. See *D.*, pp. 542, 601, and 640.

a man from disposing of more than a third of his property, Upon this point, then, we may say that every disease which is usually accompanied with apprehension of death, is said to be dangerous, such as hectic fever, consumption, hæmorrhage, bilious or bloody swellings, fetid purgings, and such as are mixed with oleaginous matter or black excrement, and the like. Diseases, again, from which there is usually recovery have no other effect on a man's disposal of his property than if he were in a state of health, such as temporary fever, headache whether with continued augmentation or not, ophthalmia, and a tubercle on the tongue. Diseases, again, which admit of being classed as either, that is as dangerous and undangerous, are putrid fever, diarrhœa, and phlegmatic swelling. It were, however, better to ascribe the effect under consideration to all diseases which are in fact accompanied with or terminate in death, whether they are customarily dangerous or not. But occasions of actual conflict in war, or of childbirth in women, or of storms at sea, have not the effect alluded to, namely, that of impairing a person's power to dispose of his property, because, in point of fact, the term disease is quite inapplicable to them.

Dangerous diseases.

Diseases not usually so considered.

Dubious.

General rule.

Here some miscellaneous cases present themselves for consideration.

*First.* When a person in sickness has made a gift and also entered into a *muhabat* transaction, and the third of his property suffices for both purposes, there is no question that effect is to be given to both. But if it should fall short, the first act of the deceased is entitled to a preference, and so on as to the others in succession, until the third is exhausted, when the deficiency falls solely upon the last.

Gratuitous acts on deathbed take effect according to priority.

*Second.* When a gift of immediate operation, and one whose effect is postponed or suspended, are entered into at the same time, a preference is to be given to the former, effect being also given to the latter if the third of the estate is sufficient for both purposes; but if not, the latter is valid so far as the third will bear, and void as to the remainder.

But preference given to those of immediate operation over such as are deferred.

*Third.* When a sick person having no more than a

In a *muhabat* of

grain on deathbed, where the loss exceeds a third of the estate, how the excess is to be restored so as to avoid the objection of usury.

*koorr* of grain of some kind, of the value of six *deenars*, sells it for a *koorr* of inferior grain of the value of three *deenars*, the loss by the *muhabat* is a half of his whole estate, whereas all that he can lawfully dispose of is no more than a third, and the purchaser should accordingly restore a sixth to the heirs, but that would be usurious, and in order to make a valid transaction, it is necessary that he should give back to the heirs one-third of their good *koorr*, and that they should give back to him one-third of his inferior *koorr*; there will thus remain with the heirs two-thirds of the *koorr*, or two *deenars* in value, and with the purchaser two-thirds of a *koorr*, or four *deenars* in value, which will only be an excess of two *deenars* or one-third of six (the whole estate), which is just the amount which the seller could lawfully dispose of in his last illness.

*Muhabat* of a slave on deathbed for half his value, how to be adjusted between the purchaser and the heirs when they refuse to allow it.

*Fourth.* If a sick person should sell a slave of the value of two hundred for one hundred, and afterwards recover of his disease, the contract is necessarily binding. But if he should die, and the heirs refuse to ratify the sale, it is valid so far as a half of the slave is opposed to what he actually paid, and that is three parts out of six, and the *muhabat* is good as to two sixths, or one third of the six, and these together amount to five sixths of the slave, to which extent, then, the sale is valid, and void only as to the remaining one sixth, which therefore must be returned to the heirs. The purchaser, however, has an option, and may cancel the sale on account of the partial invalidity of the bargain, or abide by it; but should he adopt the latter alternative and offer the heirs a compensation for a sixth of the slave, they also have an option either to reject or accept, their right being involved in the substance or person of the slave.

Case of emancipation of a female slave and marriage with her on deathbed, both valid.

*Fifth.* When a person in his mortal sickness has emancipated a female slave, married and consummated with her, the emancipation and the contract are both valid, and the widow is entitled to succeed as an heir to her husband, if her value is within a third of his estate. But if her value exceeds the third there is the same difference

of opinion with respect to all three, that is, the emancipation, marriage, and right of inheritance, as has been already described regarding the immediate acts of a person on deathbed.<sup>6</sup>

*Sixth.* If a sick person should emancipate his female slave whose value amounts to a third of his property, marry her at a dower equal to another third of his property, consummate his nuptials with her, and then die, the marriage is valid, but the specified dower is void, because it is in excess of the third. The widow, however, is entitled to her share as an heir according to the ordinary rules of inheritance. And some doctors are of opinion that she is farther entitled to the *mahr-i-misl*, or proper dower. On this point, however, there is room for doubt. Others again maintain her right to the whole, or emancipation, marriage, and dower.

But if her value amounts to a third of his estate, the specified dower is void.

See *ante*, p. 256.



## BOOK VII.

### OF FURAIZ, OR INHERITANCE.

#### CHAPTER I.

##### INTRODUCTORY.

##### SECTION FIRST.

##### *Causes of Inheritance.*

THE right to inheritance is founded on *nusub* or consanguinity, and on *subub* or special connection. Under *nusub* are comprehended three classes or series of persons: *First*, the parents, and the children how low soever. *Second*, the brethren and their children, how low soever, and the grandparents, how high soever. And *third*, the maternal and paternal uncles and aunts. *Subub* is of two kinds: *zowjeent*, or the relation between husband and wife; and *wala*, or dominion—of which there are three descriptions; the *wala* of emancipation, the *wala* of responsibility for offences, and the *wala* of *Imamut*, or headship of the Mussulman community.

Two causes of inheritance:

*Nusub* or consanguinity;

*Subub* or special connection.

Heirs may be divided into three classes. *First*, those who have no right except by *furz*, or special appointment by law to a share in the deceased's estate; *second*, those whose right is sometimes by *furz*, and sometimes by *kurabut*, or kindred to the deceased; *third*, those whose right is exclusively by *kurabut*.<sup>1</sup>

Heirs divided into three classes.

The first class comprehends the mother from among those whose right is by *nusub* or consanguinity, and the

First class

<sup>1</sup> The enumeration must not be considered as indicating any order of precedence. The third class, in fact, includes the son.

husband and wife from among those whose title is by *subub* or special connection. The second class comprehends the father and the daughter or daughters, the sister or sisters, and the *kululut* of the mother, or those relatives who are connected through her only. The third class comprehends all other heirs besides those who are comprehended in the two first classes.

When the heir is a person for whom no share has been appointed, and there is none to participate with him, that is, no other heir equal to him in degree, the whole inheritance is his, whether his right be by *nusub* or by *subub*. If there is another associated with him, for whom also no share has been appointed, they take the inheritance between them. When associates in the succession differ in the channels through which they are connected with the deceased, each set (*stirps*) takes the portion of the person through whom they are connected with him; as, for instance, when there are maternal and paternal uncles or aunts of the deceased, the former take the portion of a mother, which is a third, and the latter the portion of a father, which is two-thirds.

When the heir is a *zoo furz* or sharer, he takes his appointed portion as such; and if he has no equal, that is, if there is no other heir in the same degree, he takes the surplus also by *rudd* or reversionary right. Thus, when there is a daughter with a brother, or a sister with a paternal uncle, the daughter or sister takes first her appointed portion, and the remainder then reverts to her because she is nearer to the deceased.

It is to be observed that the surplus never reverts to a wife, and reverts to a husband only in the single case of there being no other heir than the *Imám*.

If the sharer has an equal in degree who is a sharer also, and the shares are not in excess of the whole estate, it is to be divided according to the shares; and if there is any surplus it returns to them all by reversionary right, unless any of them is excluded by a *hajib*,<sup>2</sup> or unless a

single one of them is entitled to the surplus by virtue of his connection with the deceased. If there is a deficiency, it falls upon the portion of the daughter or daughters, or those who are related by the father to the deceased, and not upon those whose relationship is only through the mother.<sup>3</sup>

of the deceased's father.

As examples of the first case, or that where the shares are not in excess of the whole estate, suppose that the deceased has left both parents, and two or more daughters,—or two children of his mother, that is, half-brothers or sisters on her side, with two full sisters or two half-sisters on the father's side—or a husband with a half-sister by the father. As an example of the second case, or that where there is a surplus, suppose that the deceased has left both parents and a daughter. And as an example of the third case, or that where there is a deficiency, suppose that the heirs are both parents, a husband and two daughters,—or both parents, a husband and a daughter,—or a husband or wife and two children of the mother only, with two full sisters or half-sisters on the father's side.<sup>4</sup>

Examples.

If the equal of the sharer is not himself a sharer, he takes the whole of what remains after satisfying the shares; as in the case of both parents or one of them, and a son,—or a father with a husband or wife,—or a son with a husband or wife,—or a brother with a husband or wife.

A non-sharer, with a sharer, takes the whole surplus.

SECTION SECOND.

*Impediments to Inheritance.*

The impediments to inheritance are three:—Infidelity, Homicide, and Slavery.<sup>5</sup>

Three impediments to inheritance.

By infidelity as an impediment to inheritance is to be understood everything that excludes the believers in it

Infidelity.

<sup>3</sup> According to the Hanifites, it is distributed among all the sharers by what is called the *Awl*, or increase.—See *M. L. I.*, p. 89, and *D.*, p. 713.

<sup>4</sup> Illustrations of these cases will be found *post*—of the first at p. 395, of the second at p. 399, and of the third at p. 396.

<sup>5</sup> According to the Hanifites, difference of religion generally, and difference of country, are impediments to inheritance.—*M. L. I.*, p. 21.



from the title of *Islám*. And no unbeliever, whether a subject or an alien, nor an apostate from the Moohummudan faith, can inherit to a *Mooslim*; but a *Mooslim* may inherit to an original infidel or to an apostate; and if an infidel should die leaving several heirs who are infidels and one heir who is a *Mooslim*, the whole inheritance would go to the *Mooslim*, though he were only an emancipator or a patron by responsibility,<sup>6</sup> to the total exclusion of the infidels however near they might be by blood to the deceased. If, however, an infidel should have no heir whatever who is a *Mooslim*, another infidel may in that case inherit to him, provided that the deceased were an infidel by origin; but if he were an apostate, the inheritance would devolve on the *Imám* upon failure of Mussulman heirs. According to one report the infidel heir would in that case also be entitled to inherit; but the report is not considered authentic.

If a believer has left only infidel heirs, they do not inherit his property, which goes to the *Imám* upon failure of Mussulman heirs. If, however, an infidel should embrace the faith after his ancestor's death, previous to the partition of the property, he would be entitled to participate with those who are equal to him in degree, or be preferred to the whole inheritance if nearer to the deceased than the other heirs. But if the conversion does not take place till after the partition of the estate, or if there is only one other heir (when of course no partition would be required), the conversion of the infidel is of no avail, and he has no share in the inheritance; except that in cases where there is no other heir than the *Imám*, and an unbelieving heir embraces the faith, he is to be preferred to the *Imám* according to a report by *Aboo Buseer*. Some, however, have alleged that conversion only when previous to the transfer of the property to the public treasury confers a preferable title on the heir, and that after such transfer it confers no right whatever. While others, again, have denied his right in both cases, upon the ground that the *Imám* ought properly to be considered the same as a single

Conversion after the ancestor's death removes the impediment.

Exceptions

<sup>6</sup> See *post*, p. 301.

heir. If the heir is a husband or wife, and there is another heir who is an infidel but embraces the faith of *Islám*, he is entitled to the surplus after payment of the share appointed to the husband or wife. Such at least is the prevalent opinion, but it is liable to some difficulty arising from the impossibility of making a partition in the case of the husband; and if therefore it were said that the convert participates with a widow only, and not with a husband, it would appear to be the most just decision, because in the case of the widow partition is possible as the convert has a preferable title to the *Imám*, whereas a husband in virtue of his reversionary right becoming entitled to the surplus, there is no room for partition in his case,—which, is like that of a believing daughter and an infidel father, or a believing sister and an infidel brother.

Connected with this impediment of infidelity are the four following cases:—

*First.* If one of the parents of an infant be a believer, the construction of law is in favour of the *Islám* of the infant, and if one of the parents of a child, both being infidels at the time of its birth, should embrace the faith during its infancy, the rule of law is the same. If the child on attaining to puberty should reject the faith, he is to be treated rigorously and accounted an apostate if he persists in his rejection of it.

Construction of law in favour of a child one of whose parents is *Mooslim* or converted in its infancy.

*Second.* If a Christian should leave infant children, and a brother's son and a sister's son who are believers, the estate must be divided between the believers, the brother's son taking two-thirds, and the sister's son one-third, but they must maintain the children of the deceased by contributions proportionate to their respective shares. If on attaining to puberty the children should profess the faith of *Islám*, they have a preferable title to the inheritance, according to a report of *Malik Ibn Ayoon*; but if they make choice of infidelity, the property of the heirs is established in what they first inherited, and the children are entirely excluded. This decision, however, is not free from difficulty, because, in the first place, an infant is in the same situation as its parent in respect of infidelity;

Children of a Christian whose heirs are *Mooslim* must be maintained by them in proportion to their shares.

and secondly, because a partition of property previous to an adoption of *Islám* precludes any future right to it.

*Third.* Believers inherit to each other, though they belong to different sects; and infidels inherit to infidels, though of different persuasions.

*Fourth.* The property of an apostate who was by birth or parentage a believer, is to be divided amongst his heirs at the date of his apostasy; and his wife also becomes immediately divided from him, and must observe an *iddut* as in the case of her husband's death, whether he is immediately slain or continues to live; and he is not to be called on to repent. A woman, however, is not to be slain for her apostasy, but is to be imprisoned and scourged at the times of prayer, and her property is not to be divided until her actual death. With regard to a male apostate who

was not by birth or parentage a believer, he is to be first called to repentance, and if he repent, well; if not, he is then to be slain, but his property is not to be divided until his actual death, either naturally or by the hand of justice. The *iddut* of his wife, however, commences from the date of his change of religion; and if he returns to the faith before the expiration of the *iddut* he has still a preferable right to her; but if the *iddut* has once expired his right is gone for ever, and he has no means of retaining her.

By homicide as an impediment to inheritance is to be understood that a person who has slain another wilfully and unjustly is precluded from inheriting to him; but if the deed has been done rightfully, it is no impediment. Homicide by mistake also is no legal bar to succession, according to the most prevalent doctrine,<sup>7</sup> although *Mofeed* has, apparently with some propriety, excluded from the operation of this rule the *deent* or fine to be paid in expiation of the deed, which the slayer is prevented from inheriting. This impediment applies equally to the father and the child, and all others connected with the deceased, whether by consanguinity or special connection; and if there is no other heir besides the slayer, the inheritance must go to the public treasury.

<sup>7</sup> It is, according to the Hanifites.—*M. L. I.*, p. 23, and *D.*, p. 697.

If a person should slay his father, and the parricide has a child, this child may inherit from the grandfather, should he leave no issue of his loins, for the crime of a father is no bar to the succession of his children; but if the heir of the murderer be an infidel, they are both excluded together, and the inheritance goes to the *Imám*, unless the infidel should embrace the faith, when he would be entitled both to the inheritance and the quest of blood. But upon this point there are the following cases:—

*First.* If a murdered person leave no other heir than the *Imám*, he may either demand retaliation, or the expiatory fine with the consent of the murderer, but he is not at liberty to forgive the offence altogether.

*Second.* The fine of blood is considered by law as the property of the person slain, and is subject to the payment of his debts and legacies, whether the homicide were intentional or murder, supposing the fine to be accepted, or by mistake.

*Third.* All persons connected with the deceased, whether by consanguinity or special connection, may lawfully inherit the *decut* or fine of blood, except those connected only through the mother, with respect to whom there is a difference of opinion. And a husband or wife does not inherit the right of retaliation for the murdered spouse; but if the right is commuted by mutual consent for the *decut* or expiatory fine, they enjoy their appointed shares of the amount.

The third impediment or slavery operates with respect to both the heir and the ancestor.\* If therefore a person should die leaving an heir who is free and another who is a slave, the whole inheritance would go to the former, though remote, to the exclusion of the latter, though near. But if the slave heir should have a child who is free, he is not debarred from the succession by the slavery of his parent. And, further, if there are two or more heirs, one of whom is a slave at the ancestor's death but is emancipated before the partition of the property, he is entitled to participate in

Child of a murderer not debarred from succession by his father's crime; unless an infidel, when the *Imám* is the heir.

*Imám* may follow the quest of blood, but cannot pardon.

Fine of blood is in law part of the estate of the person slain;

and may be inherited by any heir except one connected only by the mother.

Slavery operates both as to the heir and the ancestor.

\* *Mowroos*, literally, *inherited*.

the succession if equal in degree to the others, or to take the whole alone if he is nearer to the deceased. But emancipation after partition confers no title to a share in inheritance. So, also, it is ineffectual when there is only one person who is entitled to the inheritance, and there is consequently no occasion for partition ;—in which case the slave gets nothing by his emancipation.

When a slave is the sole heir he is to be purchased out of the estate and emancipated, and is entitled to the residue.

When the deceased has left no other heir than a slave, the slave is to be purchased out of the estate and then emancipated, whereupon he becomes entitled to the residue, and his proprietor may be compelled to dispose of him. Should the property left by the deceased be inadequate to the purchase, some doctors have said that the slave must be ransomed to the extent of the property, and left to work out the remainder of his price by emancipatory labour, while others have maintained that he is in no respect to be ransomed, but that the whole property goes to the *Imám* ; and this opinion is better supported by traditionary authority. So, also, if the deceased have left two or more heirs who are slaves, and the share of each or of one of them should fall short of his value, none is to be ransomed, but the whole estate passes to the *Imám*. If, however, a slave is partially emancipated, he is entitled to receive out of his share a part proportioned to the extent of his freedom, while he is debarred from a portion proportioned to the extent of his slavery. The same rule is applicable to the person from whom an inheritance is derived ; and female slaves are considered by law in the same predicament with males. Upon these points two cases arise :—

Slaves to be ransomed out of property left by their free children.

*First.* It is universally agreed that parents are to be ransomed out of the property of free children ; but with respect to the converse of this, or the ransom of children out of the estate left by their deceased parents, there is some doubt. The affirmative is, however, the better founded opinion. With regard to all others besides parents and children, whether they are to be ransomed or not, there is also a difference of opinion, but the negative of this proposition appears to be the more prevalent and is better founded.

*Second.* An *oom-i-wulud*, or female slave who has borne a child to her master, has no claim to inherit from him. So, also, neither has a *moodubbur*, or person to whom freedom has been granted at the proprietor's death, though he should happen to be in the predicament of heir to his *moodubbir* or person who has so granted him his freedom. And in like manner with respect to a *mookatub* or person who has stipulated to pay a ransom for his liberty, whether the contract were conditional or absolute,<sup>9</sup> provided that no part of the ransom has been paid.

An *oom-i-wulud* has no share in her master's inheritance.

As appendages to the whole subject of impediments to inheritance the following cases present themselves for consideration:—

*First.* *Lián*, or imprecation, has the effect of cutting off the *nusub*, or descent of a child. But if the child be subsequently acknowledged by the husband, the connection between him and the child is so far restored that the child can inherit from him, though he cannot inherit from the child.

*Lián* cuts off the succession of a child.

*Second.* When a person is absent from his home or country, at so great a distance as not to be known or heard of, his property cannot be divided among his heirs until his death is fully established, or until such a period shall have elapsed as to remove all probability of a person like him being still alive. His property may then be decreed to his heirs who may be in existence at the time of the decree. Some, however, have said that the division should be made after the expiration of ten years, while others have denied the legality of the distribution altogether, directing that the property should be entrusted to the keeping of an heir in opulent circumstances. But the first opinion is to be preferred, as best founded in reason and justice.

The property of an absent or missing person cannot be divided among his heirs until it may be reasonably presumed that he is dead.

*Third.* A *fœtus*, or embryo in the womb, is entitled to inherit if born alive, but if still-born it has no title to

A *fœtus* may inherit if

<sup>9</sup> The distinction between the two kinds of *Mookatubut* is, that in the one there is a condition that, on any failure in payment of the ransom, the *mookatub* shall revert to a state of absolute slavery; and in the other, the contract contains merely the term, the ransom, and the intention.—*Shuraya*, p. 320.

produced  
alive.

any portion ; whereas if born alive, though death should ensue immediately after its birth, its share belongs to its own heirs. If miscarriage is produced by violence, regard is to be had to any motion which may be exhibited by the child, whether it be such as cannot proceed except from a living being, or is merely a quivering<sup>10</sup> of the limbs, which sometimes takes place involuntarily after death, and the child is to be pronounced as having been born alive or dead accordingly.

Debt ex-  
cludes any  
claim of  
inheritance  
until it is  
paid.

*Fourth.* When a person has died involved in debt to the full amount of his property, it is not to be transferred to his heir, but remains subject to the same conditions as if it still belonged to him. If the debts should not absorb the whole of his estate, so much of it as is required for the payment of his debts remains subject to the same conditions, while the surplus is to be transferred to his heirs.

### SECTION THIRD.

#### *Exclusion from Inheritance.*

Entire or  
partial.  
Entire—  
the nearer  
excludes  
the more  
remote.  
Illustra-  
tions.

Exclusion is either from the whole inheritance or from a part of one's share. With regard to the first, the rule of law is that respect is to be paid to nearness of blood to the deceased. Thus the child of a child cannot inherit with a child, whether male or female, in so much that there is no inheritance for a son's son, when there is only a daughter ; whilst, when there are several children's children together, the nearer of them always excludes the more remote. Further, a child excludes all persons who are related to the deceased through his parents, or one of them,—as brothers and sisters and their children, grandfathers and their parents, paternal and maternal uncles and aunts and their children ; and none can participate with children in the inheritance, except the immediate parents of the deceased and a husband or wife.

Continued. Upon failure of parents and children of the deceased, brothers and grandfathers succeed, a brother excluding the

<sup>10</sup> Arab. *Tukulloos*.

child of a brother, and when there are several generations together, in different degrees of descent, the nearer is always preferred to the more remote. Further, brothers and sisters and their children, however remote, exclude all those who are related through grandfathers—as paternal and maternal uncles and their children—but do not exclude the parents of these grandfathers, for a grandfather, how high soever, is always a grandfather, though when there are several generations together, in different degrees of ascent, the lowest in descent, or nearest to the deceased, is always preferred to the more remote.

Uncles, paternal or maternal, and their children, how low soever, exclude the paternal and maternal uncles of the father, and, in like manner, the children of the father's paternal or maternal uncles exclude the paternal and maternal uncles of the grandfather. Continued.

Further, a person who is related to the deceased by the father only is excluded by one who is related to him by both father and mother, provided they are equal in class and degree. Full kinsmen exclude half by father only ;

Lastly, a relation by blood, however remote, excludes an emancipator ; and, in like manner, an emancipator, or his representative in the inheritance of the freedman, is preferred to the surety for offences, and the surety for offences is preferred to the *Imám*. and any blood relation excludes an emancipator.

Partial exclusion, or the diminution of a share, is of two kinds : exclusion by a child, and exclusion by brothers and sisters. A child, how low soever, and whether male or female, excludes the parents of the deceased from more than two-sixths of the estate, except in the case where, with one daughter or two or more daughters, there is only one parent ; and reduces the husband or wife from the highest to the lowest share appointed for them respectively. Here it may be observed that there are three states in which a husband or wife may be with reference to the inheritance. First, there may be a child in any degree of descent, and in that case the share of the husband is a fourth, and that of a wife an eighth. Second, there may be neither a child nor any descendant of a child, and then the husband's Partial exclusion.  
A child reduces the shares of parents ; and of a husband and wife, who may be in three states.



share is a half, and the wife's a fourth; and these shares can never be reduced by *awl* or increasing the divisor, as *awl* is not recognized by us. Thirdly, there may be neither an heir by blood nor any other by special connection, and in that event a husband has his half and the remainder by virtue of the return or reversionary right, while the widow is restricted to her fourth. Upon this point, however, there are three different opinions. According to one of these, she takes the remainder by virtue of reversionary right; according to another it never reverts to her; while according to the third opinion, it reverts to her on failure, that is during the absence of the *Imám*,<sup>11</sup> but not if he is present. The right doctrine, however, is that it never reverts to her.

Brothers and sisters reduce the mother's share to a sixth, upon four conditions.

With regard to exclusion by brothers and sisters, they prevent a mother's share from exceeding a sixth of the inheritance upon four conditions.

1st. That they consist of two or more males, or one male and two females, or four females.

2nd. That they be neither infidels nor slaves. Whether a murderer would exclude is liable to doubt; but according to the most prevalent doctrine he would not.

3rd. That the father of the deceased be in existence.

4th. That the brothers or sisters themselves be either of the full blood, that is, connected with the deceased by both parents, or be of the half blood on the father's side; as also, according to the best founded opinion, that they exist separate from the mother, not in her womb. Further, the children of brothers and sisters have no effect in excluding the mother or reducing her share; nor of hermaphrodites have less than four any such effect, from the possibility of their all being females.

<sup>11</sup> "By all the followers of the twelve *Imáms*, *Imám* MUHUNDY, their twelfth and last spiritual as well as temporal leader, is believed to be still living, but to have retired from human observation since his last appearance on earth."—*Im. D*, note p. 142.

## SECTION FOURTH.

*Shares and their Combinations.*

The shares are six in number; a half, a fourth, and an eighth, two-thirds, one-third, and a sixth. A half is the share of a husband when there is no child nor descendant of a child how low soever, of a single daughter and of a single sister of full blood, or of half on the father's side. A fourth is the share of a husband when there is a child or descendant of a child how low soever, and of a widow when there is none of these. And an eighth is the share of the widow when there is a child or descendant of a child how low soever.<sup>12</sup> Two-thirds are the share of two or more daughters, and of two or more sisters of the full blood, or half blood on the father's side. A third is the share of the mother when there is no child nor descendant of a child, nor two brothers or sisters, to exclude or reduce her share in manner before mentioned, and of two or more children of the mother only, that is, half brothers or sisters of the deceased on the mother's side. And a sixth is the share of each one of the immediate parents of the deceased when he has left a child or descendant of a child how low soever; and of his mother when he has left full brothers or sisters or half brothers or sisters on the father's side, the father himself being also in existence; and also the share of a single child of the mother only, that is a half brother of the deceased on her side, whether the child be male or female.

Shares and the persons for whom they are allotted.

Of the above-mentioned shares, some are susceptible of combinations with others, and some are not. Thus, a half may be combined with its like, and with a fourth and an eighth; but it does not combine with two-thirds, on account of the nullity of the doctrine of the *awl*, the deficiency in case of such a concurrence falling entirely on the two or more sisters, to the entire immunity of the

Shares that do and do not combine with others.

<sup>12</sup> When there is more than one wife, the fourth or eighth, as the case may be, is divisible among them equally.—*Post*, p. 294.

husband. The half may also be combined with a third and with a sixth. A fourth and an eighth do not combine; but a fourth may be combined with two-thirds, one-third, and a sixth. An eighth combines with two-thirds and a sixth; but does not combine with a third. A third does not combine with a sixth by name.<sup>13</sup>

*Usubat*, or lineal relatives, when equal in degree to sharers, take the residue.

Connected with this subject of shares and their combination, are the two following rules:—*First*. There is no room with us for succession by *taaseeb* or lineal right<sup>14</sup> so long as there is any right by *fuzezut* or appointment of shares; so that, when there is an equal in the case, but one who has himself no share, he takes the surplus after the others have had their portions, by virtue of *kurabat*, or nearness of relationship to the deceased. Thus, suppose that there are both parents and a husband or wife. Here, the mother has a third of the estate, the husband or wife his or her share, and the father<sup>15</sup> the surplus; and, if there were brothers also who would reduce the mother's share to a sixth (without deriving any benefit themselves), she would have that share, the husband a half, and the father the remainder. So also in the case of both parents, a son, and a husband, or of a husband and two half brothers on the mother's side, and a full brother or sister, or half on the father's side. Further, if the lineal relative be remote, he has no portion in the inheritance, and the surplus reverts to the sharers, with exception of the husband and wife; as, for instance, when there are both parents, or one of them and a daughter and a brother or paternal uncle.

The *Awl* not recognized by *Sheeahs*.

*Secondly*. The *awl* is null or not recognized with us. The occasion for it arises only in consequence of conflict between the claim of a husband or wife with the claims of the other heirs, and in cases of that kind the loss falls

<sup>13</sup> For examples of the above combinations, see *post*, p. 382.

<sup>14</sup> That is, for the succession of *Usubat*, as such, according to the Hanifites.

<sup>15</sup> The father, though sometimes a sharer, is here only a residuary, his share being merged in the residue.

upon the father,<sup>16</sup> or the daughter or daughters, or a sister or sisters related by both parents, or on the father's side only, to the exception of those who are related only through the mother ; as, for instance, when the deceased has left a husband, both parents, and a daughter, or a husband, one parent, and two or more daughters, or a widow, both parents, and two daughters, or a husband with relatives on the mother's side, and a sister or sisters by father and mother or by the father only.<sup>17</sup>

<sup>16</sup> So in the original ; but in pp 263, 395, the deficiency is said to fall only on the daughters, or sisters by full or half-blood, without any mention of the father.

<sup>17</sup> These cases will be found on p. 396.

## CHAPTER II.

## OF INHERITANCE BY "NUSUB" OR CONSANGUINITY.

- Three classes :  
Class  
First,  
Parents  
and  
children.
- Parents  
when there  
are no  
children.
- Children  
when there  
are no  
parents.
- Parents  
and  
children  
together.
- With a  
husband or  
wife.
- THIS comprises three classes or series of persons. The first class comprehends the father and mother of the deceased and his children.
- If the father be alone, the whole property is his ; and if the mother be alone, a third of the property is hers in right of her share, and the remainder by virtue of the return or reversionary right. If the deceased has left both his parents and no children, his mother has a third, and his father the remainder. But if there are also brethren of the deceased, the share of the mother is reduced to a sixth, and the father has the remainder, while the brethren have nothing.
- If the son be alone, the whole property is his ; and if there are more sons than one, it is divided equally among them. If a daughter be alone, half the property is hers in right of her share, and the remainder by virtue of the return. If there are two or more daughters, they have two-thirds as their share, and the remainder by the return. When there are children of both sexes, the portion of each male is double that of a female.
- When parents are combined with children, or when one parent is combined with children, each parent or the single parent, as the case may be, has a sixth, and the children have the remainder equally if they are all males, and if there is a female or females among them, each male has the portions of two females. And if the deceased has left a husband or wife with parents and children, the husband or wife takes the lowest share appointed for them

respectively, and the parents in like manner, and the remainder goes to the children. When with the parents there is only one daughter, the parents have two-sixths, the daughter a half, and the remainder reverts to them all in fifths.<sup>1</sup> But if there be also brethren of the deceased on the father's side, the remainder reverts to the father and daughter in fourths.<sup>2</sup> If there is a husband with the parents and daughter, the husband takes the smallest share to which he is entitled; so also do the parents, and the daughter has the remainder.<sup>3</sup> While, if for the husband we substitute a wife, each sharer takes his or her share, and the remainder reverts to the parents and daughter, to the exclusion of the wife. But if there were brethren, the remainder would revert to the daughter and the father in fourths.<sup>4</sup> If there is only one of the parents with a daughter, the property<sup>5</sup> belongs to them both in fourths; and if there is a husband or wife with them, the surplus reverts to the daughter and the single parent, to the exclusion of the husband or wife. When there are two or more daughters, the parents have two-sixths, and the two or more daughters two-thirds equally divided among them. If to these we suppose a husband or wife to be added, he or she would take the lowest share appointed for them respectively, the parents would have two-sixths, and the two or more daughters the remainder; while, if there is only one parent, he or she would have a sixth, the two or more daughters have two-thirds, and the remainder reverts to them in fifths; and if there were a husband also, the deficiency would fall on the two or more daughters. If

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<sup>1</sup> That is, one-fifth of it to each parent, and three-fifths to the daughter.

<sup>2</sup> One to the father and three to the daughters, in proportion to their original shares.

<sup>3</sup> Here there is a deficiency of one-twelfth, which falls on the daughter.—See *ante*, p. 263.

<sup>4</sup> Because brethren reduce the mother to a sixth.—See *ante*, p. 272.

<sup>5</sup> Arab. *Mal*. Here it matters not whether the whole property or the remainder be mentioned, for they are divisible in the same proportions.

again there were a widow, she would have her share, which would be an eighth, and the remainder would pass to the single parent and the daughters in fifths. But if there is a husband with both parents, he would have a half, the mother a third of the original estate, and the father the remainder; while, if we suppose brethren to be added to these, the mother's share would be only a sixth, while the father would still have the remainder. If with both parents there is a widow, she has a fourth, the mother a third of the original, if there are no brethren, or a sixth if there are, and the father the remainder.

*Miscellaneous Cases.*

Children's  
children  
represent  
their  
parents;

but are  
excluded  
by immediate  
children,

and the  
nearer  
generations  
of them  
exclude the  
more  
remote.

*First.* When there are no immediate children of the deceased, the children of his children represent their own parents, dividing the property with the immediate parents of the deceased. It seems to have been once made a condition of the succession of children's children that there should be a failure of both the parents of the deceased; but this opinion is now exploded, and has been abandoned. But children prevent the succession of every one connected with the deceased through them, and also of every one connected with him through his parents, as his brethren and their children, his grandparents and more remote ancestors, and his paternal and maternal uncles and their children. And all the descendants of the deceased are so arranged that the nearest to him is nearest also in succession to his property; so that one generation does not inherit with another that is nearer than it to the deceased, and each person inherits the portion of the person through whom he is connected with the deceased. Hence, the child, whether male or female, of a daughter inherits her portion (which is a half if she was alone or in conjunction with both parents), and the remainder reverts to such child in the same way as it would have done to her mother if she were alive; and the child, whether male or female, of a son inherits the whole property if he was alone, and the surplus, after deducting the shares of other heirs, if there were any in conjunction with him, as, for instance,

parents, or one of them, and a husband or wife. If there are only children of a son and children of a daughter, the former take two-thirds of the property, and the latter one-third, according to the best-founded doctrine. And if the deceased should have left a husband or wife, he or she would take the lowest share appointed for them respectively, while of the remainder, a third would pass to the children of the daughter, and two-thirds to the children of the son.

*Second.* In the division of a daughter's share among her children a male takes the portion of two females, in the same way as in the division of a son's share among his children. But it has been said that a daughter's children share her portion equally. This opinion, however, is now abandoned.

Children of a daughter take in the proportion of two shares to a male and one to a female.

*Third.* The following things are to be given to the eldest child of the deceased out of his property, viz. his body clothes, his ring, his sword and his Koran; and he is liable for the payment or fulfilment of his unperformed prayers and fasts. Among the conditions of his right to these things it is required that he be neither a prodigal, nor deficient in understanding according to the approved opinion, and that the deceased should have left some other property besides them; for if he has not, the eldest child has no special right to them. And if the eldest child be a female, they are to be given to the eldest male.

Primogeniture, how far recognized.

*Fourth.* The grandfather and grandmother have no right to any part of the deceased's estate when he is survived by either of his immediate parents; but it is proper and becoming that a sixth of the original property should be bestowed on them when the parent's own portion exceeds that amount; as for instance, when the deceased has left both parents, with a paternal and maternal grandfather and grandmother, his mother, having a third of the property, should bestow a half of her portion on his grandfather and grandmother equally, or if there is only one of them give the whole of the half to that one; and the father having two-thirds should bestow a sixth of the original property on the grandfather and grandmother equally, or if there is

Grandparents should be maintained out of the shares of immediate parents.



only one of them give the whole of the sixth to that one. If one of the parents should obtain only a sixth of the inheritance and no more, while the other obtains a sixth and something in excess of it, the duty of maintaining the grandparents falls upon the latter to the exclusion of the former. And, if the deceased has left both parents and brethren, the maintenance of the grandparents is incumbent on the father alone and not on the mother; while if the deceased is survived by both parents and a husband, the duty of maintaining the grandparents falls on the mother exclusively of the father. The paternal grandfather and paternal grandmother have no claim to maintenance except in the case of the deceased being survived by his father; nor the maternal grandfather or maternal grandmother any claim to maintenance except in the case of the deceased being survived by his mother.

Class  
second—  
Brethren  
and grand-  
parents.  
Full  
brothers  
and sisters.

The second class of consanguineous heirs comprehends brethren and grandparents.

When a full brother stands alone without any other heirs, he has the whole property. When there is another full brother or brothers with him, the property is equally divided amongst them. If among the brethren there is a female or females, each male takes two portions and each female one portion. If there is a full sister and no other heirs, she takes a half of the property as her share, and the remainder reverts to her by the return; while if there are two or more full sisters alone, they take two-thirds of the property in the first instance, and the remainder reverts to them in like manner.

Half  
brothers  
and sisters  
on the  
father's  
side.

When there are no full brothers or sisters, the half-brothers and sisters on the father's side come into their place. And the rule for them, when single or several, is the same as is applicable to the full brothers and sisters in like circumstances. No brother or sister on the father's side only can inherit with a full brother or sister, by reason of the union of two causes of inheritance in the latter.

On the  
mother's  
side.

When a child of the mother only, that is, a half-brother or sister of the deceased on her side, stands alone without any other heir, the child, whether male or female, takes a

sixth first, and then the remainder by the return; and if there are two or more such children, they take a third equally divided among them, whether they be males or females, or males *and* females.

If there are brethren of different kinds, those connected by the mother only take a sixth if there is only one such, or a third if there are two or more, the third being equally divided among them in that case; and those connected by father and mother take two-thirds, whether there be one or more; but if there is only one, and that one a female, she has a half of the two-thirds by appointment, and the remainder by the return; while if there are two or more, and they are females, they take two-thirds by appointment, and the surplus, if any,<sup>6</sup> by the return. Again, if those connected by the father be males, the remainder, after satisfying the portions of those connected by the mother only, belongs to them equally; while if there are both males and females, the division among them is in the proportion of two shares to each male, and one share to each female.

Full brethren, or half on the father's side with half on the mother's side.

The grandfather when alone takes the whole property, whether he be on the father's or mother's side. So also the grandmother. And if there is a grandfather or grandmother, or both, on the mother's side, together with a grandfather or grandmother, or both, on the father's side, those connected through the mother take a third in equal portions, and those connected by the father take two-thirds in the proportion of two parts to a male and one part to a female.

Grandparents.

When a maternal grandfather and grandmother, or one of them, is combined with half-brethren on the mother's side, the grandfather is as a brother and the grandmother as a sister, and the mother's third is divided among them all equally. And in like manner, when a paternal grandfather and grandmother, or one of them, is combined with a sister, or two or more sisters, by father and mother, or by the father's side only, the grandfather is as the brother,

Grandparents with brothers or sisters.

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<sup>6</sup> As there would be with only one half brother or sister.

and the grandmother as the sister, and the remainder, after satisfying the relatives connected by the mother, is divided among them in the proportion of two parts to the male for one part to the female.

Husband  
or wife  
with  
brethren.

The husband and wife take the largest shares appointed for them respectively, when they are combined with brethren, whether the brethren agree or differ as to the side of their connection with the deceased; those on the mother's side taking their appointed portions of the original estate, and the surplus passing to those connected by father and mother, or failing them, to those connected through the father only. The deficiency, if any, falls on the portions of the full brethren or of those connected only by the father; as when the deceased has left a husband with a half-brother or sister on the mother's side, and a full sister; and if there is a surplus, as when there is only one on the mother's side and a sister by both father and mother, the surplus goes to her alone. But if instead of a sister by both father and mother there were a sister by the father only, would she also have this special right to the surplus after satisfying the shares? The question has been answered in the affirmative, because the deficiency, if there is any, by reason of the contending claims of a husband or wife, falls upon her, and also by reason of what is reported from *Abou Jaaffer*, on whom be peace, in the case of the son of a half-sister by the father and the son of a half-sister by the mother, in which he said, "A sixth to the son of the sister by the mother, and the remainder to the son of the sister by the father." But the report is weak, and it has also been maintained that the surplus should revert to those connected through the mother, and to the sister or sisters on the father's side, in fourths or fifths, as there may be one or more of them, on account of the equality of degree; and this opinion is preferred.

#### *Miscellaneous Cases.*

Great-  
grand-  
parents  
inherit

*First.* A grandfather though remote participates with brethren when there is none lower than him or nearer to

the deceased: but if there are grandfathers in different degrees of ascent in combination with brethren, the lower participate and the higher are excluded.

*Second.* When the deceased has left a paternal grandfather and grandmother of his father, and a maternal grandfather and grandmother of his father, and the like of his mother, her grandparents have a third of the property in fourths, and the grandparents of the father have two-thirds of it between them in thirds, two of these being for his grandparents on the father's side in the proportion of two parts to a male and one to a female, and the other of them being for his grandparents on the mother's side, according to what has been reported by the *Sheikh*, on whom may God have mercy. So that the original number of shares, or three, has to be divided among two classes, and four must be multiplied by nine, and the product, or thirty-six, again multiplied by three, which will give one hundred and eight as the number of parts into which the estate must be divided in order to give the several parties their respective portions without a fraction.<sup>7</sup>

*Third.* When there is a half brother by the mother, and the son of a full brother, the former has the whole of the inheritance because he is nearer to the deceased. But *Ibn Shazan* maintains that he ought to have only a sixth, and the son of the full brother the remainder, by reason of the junction of two causes of inheritance in his case. The reason, however, is weak, for the rule with regard to the junction of several causes has effect only when accom-

with brethren when there are no grandparents. Great-grandparents, paternal and maternal.

A half-brother by the mother preferred to a full brother's son.

<sup>7</sup> The 108 parts are thus apportioned:—One-third, or thirty-six parts, to the grandparents of the mother (being nine to each of the four), and two-thirds, or seventy-two parts, to those of the father. Of these seventy-two, one-third, or twenty-four, go to the father's grandparents on the mother's side, among whom, being equally divided, they give twelve to each; and two-thirds, or forty-eight, go to his grandparents on the father's side, but must further be divided between them, giving two-thirds, or thirty-two, to the grandfather, and sixteen to the grandmother. If these are all collected, it will be found that they make the exact sum of 108.

panied with equality of degree,<sup>8</sup> and does not operate when the degrees differ.

Brothers  
and sisters  
represented  
by their  
children.

*Fourth.* On failure of brothers and sisters their children come into their places, and each one among them inherits the portion of the person through whom he is connected with the deceased. If there be only one, he takes the whole of the portion, or if there be several and they are all males or all females, they take the portion equally between them; but if they are partly male and partly female, the division between them is in the proportion of two shares to a male for one to a female, unless they are children of half-brethren on the mother's side, when the division among them is also equal. And the children of a brother take the remainder, like their father; the children of a full sister take a half, that is, the share of their mother, but take nothing by way of return; and the children of two or more sisters have two-thirds, except when there is a deficiency of property by reason of the concurrence of a husband or wife, when they have the remainder, as happens to those who are connected with the deceased through his father.

And on  
failure of  
children  
of full  
brethren,  
those of the  
half on the  
father's  
side come  
into their  
place.

If there are no children of full brethren the children of half-brethren by the father come into their place; and the children of a half-brother or sister on the mother's side have a sixth; while if there are children of both they have a third, each set taking the share of the person through whom they approach to the deceased, and dividing it among themselves equally. If there are children of brethren of different kinds, the children of half-brethren on the mother's side take a third, and the children of full brethren take two-thirds, while the children of half-brethren by the father are entirely excluded. If in combination with them there is a husband or wife, these take respectively the largest share appointed for them; and those connected through the mother only take a third if they are more than one, or a sixth if only one, and the remainder goes to the full brethren whether it be more or less, or, failing them,

<sup>8</sup> See p. 332.

to the children of brethren connected through the father only, though as to the more there is some doubt, as has been already said. And if grandfathers are combined with them, they divide the estate with them, as they do with brethren, as already explained.

The third class of consanguineous heirs are the paternal and maternal uncles and aunts of the deceased. A paternal uncle, when he stands alone without other heirs, inherits the whole property. So also do two or more such uncles in the like circumstances, dividing it equally among them. The same is true with regard to one or more paternal aunt or aunts. When there are paternal uncles and aunts together, each male has the portion of two females. When they are of different kinds, the half paternal uncle or aunt on the mother's side has a sixth, or if there is more than one, a third, males and females taking equally, and the remainder goes to the full paternal uncle or uncles, and aunt or aunts, in the proportion of two shares to a male for one to a female; half paternal uncles and aunts on the father's side being entirely excluded by full paternal uncles and aunts, and coming into their place when there are none.

Class third:  
Uncles and  
aunts,  
paternal  
and  
maternal.

The son of a paternal uncle does not inherit with a paternal uncle, nor any one who is more remote from the deceased inherit with one who is nearer to him, except in one case, which is that of the son of a full paternal uncle with a half paternal uncle on the father's side, when the former is preferred while the case remains exactly so; but if it is changed by the addition of a maternal uncle the son of the paternal uncle is excluded.

Paternal  
uncle ex-  
cludes the  
son of one.

A maternal uncle when he stands alone without other heirs has the whole property. So also have two or more maternal uncles; and in like manner a maternal aunt, or two or more maternal aunts. When there are both maternal uncles and aunts, there is no distinction in favour of the male sex and all share alike. But if they are of different kinds, those connected through the mother only have a sixth if single, or a third if there are several of them, males and females sharing alike, and the remainder passes

Maternal  
uncles and  
aunts.

to the full maternal uncles and aunts in the proportion of two parts to a male and one to a female; the half maternal uncles and aunts on the father's side being excluded by them or coming into their place when there are none.

Paternal  
and  
maternal  
uncles and  
aunts com-  
bined.

If there are both paternal and maternal uncles or aunts, the maternals take a third, even if there is only one of them, and whether male or female, and the paternals two-thirds, even though there is only one of them, and whether male or female. If the maternals are of one kind, a male has the portion of two females. But if they are of different kinds, those connected by the mother only take a sixth of the third if single, or a third of it if there are more than one in equal shares, and the remainder of the third goes to those among them who are connected by both father and mother, and the paternals take the remaining two-thirds, in the proportion of two parts to a male for one to a female, if they be all on the same side; and if they be of different sides, then those connected by the same mother only take a sixth if single, or a third if two or more equally between them; and the remainder of the two-thirds goes to the full paternal uncles, in the proportion of two parts to a male for one to a female; and those of them who are connected by the father only are entirely excluded except on failure of those connected through both father and mother.

Paternal  
and  
maternal  
grand  
uncles and  
aunts com-  
bined.

When a paternal and maternal uncle and aunt of the father, and a paternal and maternal uncle and aunt of the mother are combined, it is said, in the *Nihayah*, that those connected through the mother only have a third equally between them; and those connected through the father have two-thirds, one being for his maternal uncle and aunt equally, and two-thirds for his paternal uncle and aunt in the proportion of two parts to a male for one to a female; so that the original number of shares, or three, being divisible among two classes, four must be multiplied by nine, and the product, or thirty-six, again multiplied by three, which will give one hundred and eight, as the number of parts into which the estate must be divided to give the several parties entitled their respective portions without a fraction.

*Miscellaneous Cases.*

*First.* Paternal uncles and aunts of the deceased and their children, how low soever, and maternal uncles and aunts of the deceased and their children, how low soever, have a better right to his succession than the paternal and maternal uncles and aunts of his father, and the paternal and maternal uncles and aunts of his mother, because his own uncles and aunts are nearer to him in degree, and their children come into their places. When there is a failure of full paternal and maternal uncles and aunts of the deceased and of their children, how low soever, the paternal and maternal uncles and aunts of his father, and the paternal and maternal uncles and aunts of his mother and their children, how low soever, come into their places; and so on to other ascending generations, the lower generation being always preferred to the higher.

Uncles and aunts and their children preferred to uncles and aunts.

*Second.* The children of uncles and aunts on different sides take the shares of their parents; so that the sons of a half paternal uncle on the mother's side take a sixth; and if there are sons of two such uncles, they take a third, while the sons of the full paternal uncle and aunt have the remainder. And the same rule is applicable to the sons of maternal uncles and aunts.

Children take the portions of their parents.

*Third.* When two causes of inheritance combine in the same person, he inherits by virtue of both, if one of them does not counteract or impede the operation of the other; as in the case of a son of a half paternal uncle on the father's side, who is also the son of a half maternal uncle on the mother's side, or the son of a paternal uncle who is also the husband, or the daughter of a paternal uncle who is also the wife, or a half paternal aunt on the father's side who is also a half maternal aunt on the mother's side. If one of the causes is an impediment to the operation of the other, the person in whom they combine inherits by virtue of the impeding cause, as in the case of the son of a paternal uncle who is also a brother, and inherits by virtue of brotherhood alone.

When two causes combine in one person he may inherit by both.



Husband or wife combined with uncles and aunts have their highest shares. *Fourth.* When there is a husband or wife with maternal uncles and aunts and paternal uncles and aunts, the husband or wife takes the highest share appointed for them respectively, and those connected by the mother have their original share of the inheritance, while the remainder goes to those who are connected both by father and mother; or failing them, to those connected through the father only.

Children of maternal uncles and aunts when combined with a husband or wife follow the same rule as their parents. *Fifth.* The rule for the children of maternal uncles and aunts combining with the husband or wife is the same as the rule for the uncles and aunts themselves in that combination. Thus, if there is a husband or wife with sons of a maternal uncle, and also sons of a paternal uncle, the husband or wife takes his or her appointed share, and the sons of the maternal uncle have a third of the original estate, while the remainder passes to the sons of the paternal uncle.

CHAPTER III.<sup>1</sup>

## OF THE ACKNOWLEDGMENT OF NUSUB.

This comprehends the following cases :—

*First.* The acknowledgment of a young child's *nusub* is not established unless the sonship be possible, the child unknown, and there is no one who disputes it with the acknowledger. The acknowledgment is restricted by these three conditions, so that, if the person acknowledged be older than the acknowledger, or his equal in age, or only so much younger than him that the difference between their ages is less than is usual between parent and child, the acknowledgment cannot be accepted. So, also, if one should acknowledge the child of a woman belonging to him, between whom and himself there has been such a distance as to preclude his having access to her during the like of the child's age,<sup>2</sup> or if the child be of known *nusub*, the acknowledgment cannot be accepted. In like manner, if there is any one who disputes the sonship of the child with the acknowledger, the acknowledgment cannot be received without proof. The assent of a young child is of no importance. But should not some regard be had to the assent of the person acknowledged when he is adult? Apparently not, according to what the *Sheikh* has said in the *Nihayah*, but otherwise, according to what he has said in the *Mubsoot*, and is most agreeable to the general principles of the law. So that, if the adult should

Three conditions necessary to establish the acknowledgment of a young child.

Its assent of no importance.

Otherwise when the person acknowledged is adult.

<sup>1</sup> This short chapter has been introduced here from the Book of *Ikrar*, or acknowledgment.—*Shuraya*, p. 376.

<sup>2</sup> *Oomr*. The words which I have translated literally seem to indicate access, at or about the time of the child's conception.

And assent of the person acknowledged essential in the case of any other relation. deny the *nusub*, it is not established. And it is quite clear that the *nusub* of any other than a child cannot be established by acknowledgment, without the assent or concurrence of the person in whose favour it is made. When the acknowledgment is of any other than a child of the loins, and the acknowledger has no other heirs, and the person acknowledged has assented to the truth of the acknowledgment, mutual rights of inheritance are established between the parties; so, however, as not to affect the rights of others than themselves. And if the acknowledger has any known heirs, his acknowledgment of *nusub* is not to be accepted.

Acknowledgment not defeated by child's denial on attaining puberty. *Second.* When a person has acknowledged a young child as his offspring, and the *nusub* is established, but is subsequently denied by the child on his attaining to puberty, no regard can be had to his denial, because the *nusub* had already been established previously to it.<sup>3</sup>

If the child of a deceased person acknowledges another to be his child, and they both acknowledge a third, his *nusub* is established. *Third.* When the child of a deceased person has acknowledged another to be his child also, and the two then concur in acknowledging a third, the *nusub* of the third is established, provided that the two first are just or righteous persons; but if the third should deny the second, the *nusub* of the second would not be established, and the third would take half the estate, the first a third, and the second a sixth, being the complement of the share of the first. If, again, the two first were of known *nusub*, and should both acknowledge the third, his *nusub* would be established, provided the two were just or righteous persons; and though the third should deny the *nusub* of either of the other two, no regard should be had to his denial, and the estate of the deceased must be divided among them all in thirds.

An heir to a deceased person who acknowledges another to *Fourth.* If a deceased person has left brothers and a wife, and the wife acknowledges a child to be his, her share of the estate is only an eighth; and if the brother should assent to her acknowledgment, the whole of the

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<sup>3</sup> This reason would apply equally to a subsequent denial by the acknowledger himself.

remainder would go to the child, to their own entire exclusion. In like manner, every one who is in appearance an heir, and acknowledges another person to be nearer to the deceased than himself, must surrender to such person the whole of whatever may be in his hands that belonged to the deceased. But if the person acknowledged is equal in degree to himself, he has only to surrender out of his own share a due proportion for the share of the person so acknowledged. If the brothers in the supposed case should deny the person acknowledged by the wife, they would take three-fourths of the property, and the remainder of her share would go to the child.

*Fifth.* When a youth<sup>4</sup> of unknown *nusub* has died, and a person acknowledges him to have been his son, the *nusub* is established, whether he were of tender age or more advanced,<sup>5</sup> and whether he has left any property or not. Accordingly, his inheritance belongs to the acknowledger; and the case is not affected by any suspicion that may attach to his motives in such circumstances, as it would be if the person were alive and had property. In the case of a deceased person, the absence of assent is of no importance, even though he were adult, for, being dead, he comes within the meaning of the case of a little child. So also, if a person should acknowledge an insane person to be his son, the absence of his assent is of no consequence, as no regard can be had to the words uttered by a person in such circumstances.

*Sixth.* When a female slave has borne a child, and her master acknowledges the child to be his son, it is affiliated to him, and adjudged to be free, provided that the woman has no husband. And if a man should acknowledge as his son the child of one of his slaves, particularizing the child, he is in like manner to be affiliated to the acknowledger; and if another of his slaves should allege that it was her child which he acknowledged, the question is to be determined by the word and oath of the acknowledger.

<sup>4</sup> *Subee.*

<sup>5</sup> The word in the original is *hubeer*; but its usual meaning, *adult*, is inconsistent with his being a *subee*.

If he should die without particularizing the child, the *Sheikh* has said that the heir should specify some one in particular, and that, if he should refuse to do so, the question must be determined by casting lots. But it were better to say that recourse should be had to lots absolutely, that is, without any such distinction, when the acknowledger himself has died without particularizing the child.

When the slave has several children and the acknowledgment is only of one of them.

*Seventh.* If a person having three children by a slave should acknowledge one of them to be his son, then, whichever of them he may particularize as the one intended, would be free, and the others be slaves; and if there should be any doubt as to the individual particularized, or the acknowledger should die without particularizing any of them, the individual must be determined by casting lots.

Two male witnesses required to establish a case of *nusub*.

*Eighth.* The testimony of two just or righteous men is required for the establishment of a case of *nusub*. The testimony of one man and two women is not sufficient for the purpose according to the most approved opinion. Nor can it be established by the testimony of one man and an oath; nor by the testimony of two profligates, even though they should be heirs to the deceased.

Testimony of two brothers of a deceased person in favour of a child sufficient to establish its *nusub*.

*Ninth.* If two brothers, being just persons, should testify to another being a son of the deceased, his *nusub* and right to the inheritance would be established, but there would be no reciprocity; and if the brothers are profligates, though his *nusub* would not be established, he would still have a right to the inheritance in preference to them.

Acknowledgment of the heir of a deceased person of two others as preferable to himself, does not establish their *nusub* but obliges him to surrender

*Tenth.* If a person should acknowledge two heirs of a deceased person preferable to himself, and each of them should assent for himself, their *nusub* would not be established, but they would still have a right to the inheritance, and he must surrender to them whatever may have come to his hands that belonged to the deceased; and though they should mutually deny as between themselves, that is, each deny the right of the other, no regard is to be had to their denial. If again, a person should acknowledge an heir preferable to himself, and then acknowledge another preferable to them both, and the person first

acknowledged should assent to or confirm the latter the property to them. acknowledgment, any property which belonged to the deceased in the hands of the acknowledger must be surrendered to the person secondly acknowledged. But if the person first acknowledged should refuse his assent to the second acknowledgment, the property must be surrendered to the person first acknowledged, and the acknowledger become debtor to the person secondly acknowledged. Where the person secondly acknowledged is equal in degree to the person first acknowledged, and the latter has refused his assent to the second acknowledgment, the acknowledger must make over to the person secondly acknowledged a similar half of what was obtained by the first.

*Eleventh.* If a person should acknowledge another as the husband of a deceased woman who has left a child, he must give up a fourth of his own share, or a half if there be no child, to the person so acknowledged; and if he should then acknowledge another husband, the acknowledgment could not be received. If the person first acknowledged should negative the acknowledgment in his favour, he would make the acknowledger debtor to the person secondly acknowledged for a similar of what the first acknowledger may have obtained. If again, a person should acknowledge a woman to be the wife of one deceased, who has also left a child, he must give up to her one-eighth of whatever may be in his hands, or a fourth if there be no child. If he should now make a similar acknowledgment in favour of another woman, he becomes debtor to that other for a similar to half of the portion of the first, that is, if she refuse her assent to the second acknowledgment; and if he should acknowledge a third, he must give her a third of the share; and if he should acknowledge a fourth, he must give her a fourth of the wife's share; and if he even go so far as to acknowledge a fifth, and one of the others should deny it, no regard is to be had to the denial so far as he is concerned, and he must give to the person last acknowledged an equivalent to the portion of one of the others.

An heir acknowledging another as the husband or wife of the deceased must give up an adequate portion of his own share.

## CHAPTER IV.

## RULES REGARDING THE INHERITANCE OF SPOUSES TO EACH OTHER.

Mutual rights of inheritance not affected by repudiation if revocable. Otherwise if irrevocable.

*First.* A wife inherits from her husband, though he should not have consummated with her; and he in like manner inherits from her. And though she should have been revocably repudiated, yet still their mutual rights of inheritance remain if one of them die during the *iddut*. But a woman absolutely separated from her husband has no right to inherit from him, nor he from her; as for example, a wife who has been repudiated three times, or before consummation, or when past child-bearing, or not within the years of menstruation, or one who has been released by *khoodá*,<sup>1</sup> or *moobarat*,<sup>2</sup> or is in her *iddut* after connection under a semblance of right, or after cancellation.

When there are several wives they share equally.

*Second.* A wife, when there is no child of the deceased, has a fourth part of his estate, and an eighth if he has left a child. If there are more wives than one, they divide the fourth or the eighth, as the case may be, equally between them.

Case of one being repudiated and another married in her stead.

*Third.* When a man has repudiated one out of four wives, and married another, and there is a doubt as to which of the first four the repudiation applied, the last married has a fourth of the eighth, and the remainder is to be divided amongst the others equally.

Case of children married by their father

*Fourth.* When a girl under puberty has been married by her father or paternal grandfather, her husband inherits from her, and she from him. So also if two young children

<sup>1</sup> See *ante*, p. 129.

<sup>2</sup> *Ante*, p. 136.

are married to each other by their fathers or paternal grandfathers, they have mutual rights of inheritance. But if they should be contracted in marriage by any other than their fathers or paternal grandfathers, the contract remains in suspense till assented to by the spouses themselves after arriving at puberty and discretion; and if one of them should die before such assent has been given, the contract would be void and there would be no right of inheritance. And the same would be the result though one of them should attain to puberty and assent to the marriage, if the other should die before puberty. But if the one who assented should die, the share of the other ought to be separated from the rest of his or her estate, and kept while the other survives, and if on attaining to puberty he or she should reject the marriage, the contract would be void, and the party have no right to a share in the inheritance. If, on the other hand, the marriage were assented to, the contract would be valid, and the party must be sworn that the assent has not been given from greed to partake in the deceased's inheritance.

or paternal  
grand-  
father.  
By others  
than these.

*Fifth.* When the wife has had a child by the deceased she inherits out of all that he has left; and if there was no child she takes nothing out of the deceased's land,<sup>3</sup> but her share of the value of the household effects<sup>4</sup> and buildings is to be given her. It has been said, however, that she is to be excluded from nothing except the mansions and dwellings; while *Moortusa* (may God be pleased with him) has expressed a third opinion to the effect that the land should be valued and her share of the value assigned to her. But the first opinion is that which appears to be best founded on traditional authority.

A wife  
who has  
had no  
child does  
not share  
in her  
husband's  
land.

*Sixth.* Marriage contracted by a man in sickness is dependent on consummation. So that if he should die of the illness without having consummated the contract, it is void, and the woman has no right to dower or a share in his inheritance. This doctrine is according to a report of *Zurarat*, from one of the two on whom be peace.

Marriage  
contracted  
in death  
sickness  
void if not  
consum-  
mated.

<sup>3</sup> Arab. *Arz*.

Arab. *Alat*.



## CHAPTER V.

## OF INHERITANCE BY WULA OR PATRONAGE.

Three kinds. THIS cause of inheritance is of three kinds, as already mentioned:—<sup>1</sup>

I.—*The Wula of Emancipation.*

Emancipator is heir to his freedman.

The emancipator is heir to the freedman when the emancipation is voluntary and gratuitous, and when the emancipator is not freed from responsibility on account of his offences, provided that the freedman has no consanguineous heir to succeed to him. But if the slave were emancipated as a matter of duty, as in the case of expiations or vows, the emancipator has no right to his inheritance. So also if, in making the emancipation, he stipulated to be freed from responsibility on account of the slave's offences. Here a question arises whether it be necessary for security from such responsibility that witnesses should be called upon to attest the stipulation. It would seem not. When the responsibility for offences is renounced at the time of the emancipation, the slave is termed a *saibah*. If the emancipated slave has a consanguineous heir, whether he be near or remote, a sharer or otherwise, the benefactor has no title to the succession. And if the slave has left a husband or wife, the spouse's share is to be deducted, and the remainder only given to the benefactor, or his representative in the event of his death.

When there are several emanci-

When all the above conditions concur, the benefactor, if alone, takes the inheritance; or if there are several of

<sup>1</sup> *Ante*, p. 261.

them, they are partners in the *wula* in shares,<sup>2</sup> whether they be one man and one woman, or there be several of each sex. On failure of the benefactor, the *wula* belongs to his children, both male and female, according to *Ibn Babooya*; and the opinion is good, and agreeable to what is stated in the *Khilaf* in the case of a male emancipator. But according to *Mofeed*, the *wula* belongs only to the male children, to the exclusion of females, whether the benefactor were male or female. While the *Sheikh* has said, in the *Nihayah*, that the *wula* belongs to the males, exclusively of females, if the emancipator were a male; and if she were female, that it belongs to her *asubát*, or paternal male kindred. And this opinion is attested or confirmed by several traditions.

The father and mother of the emancipator participate with his children in the *wula* or inheritance of his freedman; but none other of his relatives share, so long as there is any of these. And the children's children come into the place of their parents on failure of them, each taking the share of the person through whom he was connected with the deceased emancipator, as in the case of ordinary inheritance. On failure of parents and children of the emancipator, his brothers succeed. But as to the right of sisters to participate in the inheritance, there is a difference of opinion, though, according to that which is best supported by traditional authority, they ought to succeed; for *wula* corresponds to *nusub* or consanguinity. Grandfathers and grandmothers participate with brothers; and, on failure of all these, paternal uncles and aunts and their children, the nearer being preferred to the more remote; while no relative connected only through his mother with the emancipator, such as his brethren on her side, and his maternal uncles and aunts, or grandfathers and grandmothers, has any title to inherit the *wula*. On failure of relatives of the benefactor, the *Moollee-al-mowlá*<sup>3</sup> inherits; and on his failure, his relatives on the father's

pators the estate is divided amongst them. Failing the emancipator, his children succeed.

But if he has left father or mother also, he or she participates.

Then his brethren.

With his paternal grandfathers and grandmothers.

<sup>2</sup> I suppose in proportion to their original shares in the slave.

<sup>3</sup> Emancipator of the emancipated. This supposes that the emancipator may have been an enfranchised slave.

side succeed, to the exclusion of those related only through the mother.

Freedman In no case is the freedman heir to his benefactor, whose inheritance, if he has left no heirs of his own, belongs to the *Imám*, to the exclusion of the freedman. And *wula* can neither be sold, nor given, nor made the subject of a condition in sale.

*Wula* cannot be sold or given.

### Miscellaneous Cases.

The inheritance of the children of an enfranchised slave belongs to their own emancipator.

*First.* The inheritance of the children of an enfranchised female belongs to their own emancipator, though they were emancipated with their mother, in the womb, and their *wula* is not shifted or transferred to her emancipator. But if not conceived till after her emancipation, their *wula* would belong to the mother's emancipator if their father be a slave. If, however, their father were free by origin, the *wula* of the children would not belong to the emancipator of their mother; while if their father was an enfranchised slave, it would belong to his emancipator. And in like manner if their father were emancipated after their birth, their *wula* would shift from the emancipator of their mother to the emancipator of their father.

But if born after the mother's enfranchisement, and their father is a slave and alive, their *wula* belongs to the emancipator of the mother.

*Second.* If a slave should marry an enfranchised woman, and have children by her, their *wula* would belong to their mother's emancipator. But if the father were dead, and their grandfather were emancipated, the *Sheikh* has said that the *wula* would shift to the emancipator of the grandfather, because he is in the place of the father. And in like manner, if the father were alive, and should be emancipated after all this, the *wula* would shift from the emancipator of the grandfather to the emancipator of the father, because he is nearer in degree.

Though the father were enfranchised, yet, if he deny the children, their *wula* still be-

*Third.* If an enfranchised slave should deny the child of his enfranchised wife, and the child should die without any consanguineous heir of his own, his *wula* would belong to the emancipator of his mother. And though the father should subsequently acknowledge the child, neither he nor his emancipator would have any title to his inheritance;

for though the *nusub* or paternity of the child revives in such a case, the father does not inherit to him, nor, consequently, any one connected through him with the child.

*Fourth.* *Wula* shifts from the emancipator of the mother to the emancipator of the father, and, failing him, to the *usubah*, or lineal relative, of the emancipator, and, failing him, to the emancipator of the *usubah* of the father's emancipator; and it does not revert to the mother's emancipator. If, then, the emancipators and their *usubat* should all fail, and the enfranchised slave should have left any one responsible for his offences, such person would take the *wula*, otherwise it passes to the *Imám*.

*Fifth.* A woman has emancipated a slave who subsequently emancipates another; if the first should die without consanguineous heirs, his inheritance would belong to his emancipator; and if the second should die without such heirs, his inheritance would belong to his emancipator; and if he be dead without leaving heirs of blood, the *wula* of the second would belong to the emancipator of the first. And if a woman should purchase her father, and he becoming free in consequence should emancipate another slave, and subsequently die, after all which the slave enfranchised by the father should die also without any other heir besides the woman, the inheritance of the emancipated slave would belong to her,—half by name or as her share, and the remainder by virtue of the return, and not by *táseeb* or lineal right, if we can say that the children of an emancipator inherit the *wula*, though they be females; but if we cannot say so, she succeeds by virtue of the *wula*.

*Sixth.* If a slave should beget two daughters on an enfranchised woman, and they should both concur in purchasing their father, and he being now free should then die, his inheritance would belong to the daughters by virtue of their appointed shares in his estate, or their right to the return, and not by right of *wula*; for inheritance by the latter right does not combine with inheritance by *nusub*

longs to mother's emancipator.

*Wula* shifts from the mother's to the father's emancipator.

The *wula* of a slave enfranchised by a freedman belongs to the latter, or, failing him and his heirs, to his emancipator.

The inheritance of a slave purchased by his daughters, and consequently become free, belongs to

<sup>4</sup> Pl. of *Usubah*.

them as ordinary heirs, and not by *wala*.

The inheritance of a slave purchased and enfranchised by a father and one of his two sons, belongs, in case of the father's death, to the two sons, in the proportion of three-fourths and one-fourth.

The *wala* of a son begotten by a slave on a freed-woman belongs to her emancipator, but shifts to the emancipator of the father if he is enfranchised.

or consanguinity. And if the two daughters should die, or one of them should die, leaving the father surviving, the inheritance would belong to the father; but if he were dead the inheritance of the daughter who died first would belong to her surviving sister by share and return, and there would be no inheritance for emancipators by reason of the existence of an heir of blood. If we suppose the surviving sister were to die, would the emancipator of her mother inherit? Upon this point there is some doubt, the removal of which depends on the question whether the *wala* is drawn to the daughters by means of the emancipation of their father or not? Perhaps, however, it is nearer the truth to say that there would be no such drawing of the inheritance on the ground that *wala* does not combine with consanguinity and emancipation.

*Serenth.* If one of two sons should concur with their father in purchasing a slave and then emancipating him, and the father should then die, after which the enfranchised should also die, the child who purchased him in concurrence with the father would have three-fourths of his inheritance, and his brother the remaining fourth.

*Eighth.* When a slave has begotten a son on a freed-woman the *wala* of the son belongs to the emancipator of his mother, and if the son should purchase a slave and emancipate him, the *wala* of that slave would belong to the son. But if the same slave should purchase the father of his emancipator, and then enfranchise him, the *wala* of the son would shift from the emancipator of his master to the emancipator of his father, and each of the two (that is, the son and the slave) would become *mowla* to the other. If in these circumstances the father should die, his inheritance would belong to the son, but if the son should die without a consanguineous heir, his *wala* would belong to the emancipator of his father; and if the enfranchised slave should die without consanguineous heirs his *wala* would be for the son who originated his emancipation, and if they both die without consanguineous heirs the *Sheikh* has said that the emancipator of the matter would have a preferable right to the *wala*; but this is liable to doubt.

II.—*The wula of responsibility for offences.*

When one person engages with another that he will be responsible for whatever may happen to him, and have his *wula*, the engagement is valid, and the inheritance of the person on whose behalf the engagement is made is the established right of the engager. But such an engagement can be entered into for a *saibah* only who is not subject to a *wula*, as, for example, one enfranchised for expiation or in performance of vows,—or for one who has no heir of origin; and such a person, that is the engager, does not inherit except on entire failure of consanguineous heirs, and on failure of an emancipator. But he is before the *Imám*. A husband and wife, however, take with him the highest shares appointed for them respectively.

How this *wula* is constituted.

III.—*The Wula of Imamut.*

When there is no surety for offences the *Imám* is the heir of a person who has no other heirs; and this is the third kind of *wula*. If then the *Imám* be present the property belongs to him to do with it as he pleases. *Aly*, on whom be peace, was accustomed in such cases to give the property to the poor and indigent of the deceased's city, and the weak and infirm among his neighbors, gratuitously. And if the *Imám* is absent the property is to be divided among the poor and indigent, and not to be given up or surrendered to any other but a righteous sultan or ruler, except under fear or actual compulsion.

The *Imám ultimus* fares.

*Miscellaneous Cases.*

*First.* Whatever is taken from associators<sup>6</sup> in actual warfare belongs to the combatants, after deducting the *lhooms* or prescribed fifth. But whatever is taken from them by a band of assailants<sup>7</sup> without the permission of

Spoils of war belong to the combatants, but what is taken from infidels by troops acting without the au-

<sup>5</sup> See ante, p. 272, note <sup>11</sup>.

<sup>6</sup> All people who deny the unity of the Deity, among whom Christians are supposed to be included.

<sup>7</sup> Literally, cavalry from five up to three or four hundred.—*Freytag*.

thority of the *Imám* belongs to him; and whatever is abandoned by associators through fear, or becomes separated from them without warfare, also belongs to the *Imám*; while what is taken from them by way of composition or *juzyut* (poll-

tax) belongs to the warriors, and failing them is to be divided among poor *Mooslims*.

*Second.* What is taken by sudden attack from enemies, if in time of peace, must be restored to them; otherwise it belongs to the takers, but is subject to the fifth.

*Third.* When a soldier dies leaving property and having no heir, the property belongs to the *Imám*.

The *Imám* *ultimus hæres* of soldiers.

## CHAPTER VI.

## APPENDAGES TO THE LEGAL CAUSES OF SUCCESSION.

## SECTION FIRST.

*Of Succession to the Child of a Moolainah, or Woman who has been separated from her Husband by Lián, and to a Wulud-ooz-zina or Illegitimate Child.*

THE heirs to the child of a woman who has been separated from her husband by *lián* are his own children and his mother; the mother taking a sixth, and the children the remainder, in the proportion of two shares to a male for one to a female. If there is no child, the whole of the property goes to the mother, a third as her appointed share, and the remainder by virtue of the return. But, according to one report, she inherits only a third, and the remainder goes to the *Imám*, who is responsible for the fines of such a person. The first, however, is the more prevalent doctrine on the subject. Upon failure of both mother and offspring, the inheritance of such persons passes to their brothers and sisters on the mother's side, and their children in due order, and to their maternal grandfather, however remote in ascent, in order of proximity; on failure of these it passes to maternal uncles and aunts in the usual order of inheritance. In all these degrees males and females inherit alike. When all the relatives on the mother's side have completely failed so as not to leave a single one of them to succeed as the heir, the inheritance passes to the *Imám*. In all cases, however, it is to be observed that the husband and wife take the shares respectively appointed for them, that is, a half

The heirs of the child of an imprecated woman are his own children, and relations by his mother's side.



To whom  
also he  
may in-  
herit.

and a fourth when there is no child, and a fourth and an eighth when there is one. With regard, again, to the right of children of the description under consideration to succeed to the relatives of their mother, some have said that they have the right because their *nusub* or descent on her side is established, while others have maintained that they have no such right of succession, unless subsequently acknowledged by their father; but this opinion is now abandoned. The father and those related through him can never inherit to such a child, even though it were acknowledged by him after the *lián*; but in that case the child would inherit to the father. It does not follow, however, that the child should, after the acknowledgment, be entitled to inherit to the relatives of his father, and according to the more prevalent opinion, neither does he inherit to them nor they to him, since his *nusub*, or paternal descent, has been entirely cut off by the *lián*, and because the effect of an acknowledgment is confined to the person who makes it.

#### *Miscellaneous Cases.*

Paternal  
relation-  
ship not  
taken into  
account  
with  
respect to  
such  
persons.

*First.* In distributing the inheritance of persons of this description paternal relationship is not taken into account at all; and thus, should the deceased have left two brothers, one of them by both father and mother, and the other by the same mother only, they share the inheritance equally. By the same rule, if there had been two sisters, or a brother and sister, one by the same father and mother, and the other by the same mother only, they would be equal sharers in the estate. And further, if he left the son of a sister by both parents, and the son of a sister by the same mother only, or a brother and sister by both parents, with a grandfather or grandmother, the property would be divided between them in thirds, as the paternal relationship is entirely disregarded.

*Second.* If the mother of such a person dies leaving no other heir besides him, the whole of her inheritance must go to him; but if with him her parents, or one of them, should exist, these together receive two-sixths, or one of

them receives one-sixth, and the remainder goes to the son. If instead of a son she had left a daughter, the half of the estate would go to her, and the surplus would revert to all of the heirs in proportion to their respective shares.

*Third.* If a husband disavows the parentage of a *fœtus* or embryo in the womb of his wife, and the *lián* or mutual imprecation takes place, after which she produces twins, they are both heirs to each other as brothers by the mother's side, but not by the father's. Case of a husband disavowing the parentage of a *fœtus*.

*Fourth.* If a father should renounce before the Sultan or ruler all responsibility for the offences of his child and right to his inheritance, and the child should subsequently die, the *Sheikh* (on whom God be merciful) has said in his *Nihayah*, that the succession of such a child rests with the *usubát* or male kindred of his father, and not with those of his mother. But this opinion is now obsolete; and the prevalent doctrine maintains the father's right, notwithstanding his renunciation. Renunciation by a father of his right of inheritance to his son does not affect his title, but is in itself invalid.

The *wulud-ooz-zina*, or illegitimate child,<sup>1</sup> has no *nusub* or parentage. Consequently, neither the *zance*, or he who has unlawfully begotten, nor she who bore him, nor any of their relations, can be his heir,<sup>2</sup> nor has he any title to their succession. His inheritance, therefore, is only for his own children, and on failure of them it goes to the *Imám*. This law, however, does not affect the rights of a husband or wife, who accordingly receive their appointed shares, the lowest if there be issue of the deceased, and the highest if there be none. According to one report, the mother and her relatives can inherit the property of a *wulud-ooz-zina* in the same way as that of the child of a woman separated from her husband by *lián*; but this report is now rejected. An illegitimate child has no parents in law; and his only heirs are his children, and failing them the *Imám*.

<sup>1</sup> Literally, child of fornication or adultery.

<sup>2</sup> There is a remarkable difference between the *Imameca* and *Hanifeea* codes on this point, for which see Digest, p. 411.

## SECTION SECOND.

*Of a Fœtus or Embryo in the Womb, and of Lost or Missing Persons.*<sup>3</sup>

Title of a  
fœtus to  
inherit.

A fœtus inherits if brought forth alive; so also if still-born in consequence of violence to its mother, or without such violence if it has shown any signs of life at the birth. But if when half-born these signs of life should appear, and totally cease before complete separation from the womb, no right of inheritance is established. In like manner, if it exhibits motions that are not indicative of life, as those of an animal just slaughtered, it has no claim to inheritance. But, on the other hand, it is reported by *Rubáy*, from *Aboo Jáfer*,<sup>4</sup> on whom be peace, that when an infant displays at its birth evident motion as if it were alive, it both inherits and is inherited from. And there is a report to the same effect by *Aboo Buseer*, from *Aboo Abdoollah*,<sup>5</sup> on whom be peace. It is by no means a necessary condition that the child should be produced alive before the death of the ancestor; insomuch that, if born at six months from the death of its father, the right of inheritance is established; or even if born at nine months, if its mother has not married again.

In cases of  
pregnancy  
all exist-  
ing sharers  
take the  
lowest  
appointed  
shares.

When a deceased has left both his parents, or one of them, or a husband or wife, and also a fœtus in the womb, all the sharers take their lowest appointed shares, and the residue is secured till the birth of the child; and if born dead the shares are then to be completed in full.

If a person deceased should leave an existing son and a fœtus in the womb, the *Sheikh*, to whom God be merciful, has declared that only one-third is to be given to the existing son, and two-thirds must be reserved for the event of the birth, because it is probable that these may be twins; but more than two is extremely rare, though possible. If, on the other hand, the existing

<sup>3</sup> The first part of this section, which, in the original, is occupied with hermaphrodites and monsters, has been omitted as of little practical use.

<sup>4</sup> The *Imám Mohummud Bâkir*.

<sup>5</sup> The *Imám Jáfer Sâdik*.

child be a female only, a fifth part of the estate is to be given to her, and the remaining four-fifths reserved for the event of the birth. This doctrine is good or universally approved.

The fine or penalty for occasioning the death of an embryo is inherited by both its parents and relatives through them jointly or through the father only, whether by descent or special cause, as emancipation or otherwise. Fine of embryo's blood, how inherited.

If two persons mutually acknowledge each other as relations, they inherit as such from each other, and are not obliged to prove their connection. But if generally known to be of a different *nusub* or descent than that implied in their acknowledgment, their word alone cannot be received. Mutual acknowledgment of relationship confers a mutual title of succession.

Of lost or missing persons, the property is to be reserved for a term; but with respect to the length of this term there are various opinions. Some doctors have prescribed four years, and this is founded on a report of *Asman Ben Eesa* from *Sumaut*, as having been so decided by *Aboo Abdoollah*, on whom be peace; but this report is weak or not sufficiently authenticated. Others have alleged that the mansion of such a person may be sold after ten years; and this is approved by *Moofeed*, on the ground of a report of *Aly Ben Muhriar*, as having been so decided by *Aboo Jâfer*, on whom be peace, with respect to the sale of a small part of a mansion; but a general inference from a decision of this nature appears to be unreasonable. And the *Sheikh*, to whom God be merciful, is of opinion that the property may be lawfully given up to persons who are present on their becoming responsible for it. Further, according to a report by *Ishak Ben Omar* of a decision by *Aboo Abdoollah*, on whom be peace, the property of the absent person may be divided among his heirs when they are in opulent circumstances, to be restored to him if he should return. But, with regard to *Ishak*, there are some doubts of his fidelity, and though his report is maintained by *Suhul Ben Zeead*, it is still considered weak or insufficiently authenticated. Upon the whole, the opinion upon the point stated in the *Khilaf*, Of lost or missing persons, the property is not inheritable until their death is ascertained.

that the property of a missing person is not to be distributed among his heirs until such a time has elapsed that there is no probability of a person of his age being alive, is that which is preferred or most generally approved.

### SECTION THIRD.

#### *Of Persons drowned or overwhelmed in Ruins.*

Persons drowned or overwhelmed in ruins, if the time of the death is unknown, are heirs of each other, if connected so as to form a title to inheritance.

These inherit from each other when all or some of them leave property, and they are so connected as to be heirs to each other, and that they died in such circumstances as to render it doubtful which of them died first. If, therefore, they had no property, or if there were no mutual right of inheritance between them, or if one was heir to another without his companion being heir to him, as in the case of two brothers one of whom has left a child, in none of these cases has this law any effect; nor further when their death is not from the same cause, nor where they are all known to have died at the same instant of time, nor where one is ascertained to have died before another. Whether, again, the application should be extended to the case of dying together by any other cause than that of being drowned or overwhelmed in ruins, where a doubt prevails as to the time of the respective deaths, is a question upon which there is a difference of opinion, though the *Sheikh*, in his *Nihayah*, has expressly extended it to all cases where this doubt may prevail.

This rule applies only to the original property of each, not to what one has inherited from the companion of his fate.

Supposing all the conditions to be established, the parties dying together succeed respectively to the original property of each other, but not to that which is inherited from himself by the other, as maintained by *Mofeed*, because the principle of law in this case proceeds upon the supposition of a possibility, whereas making a person the heir of property inherited from himself would require him to be alive after we have supposed him to be dead, which is impossible. Moreover, there is an express tradition to the effect that "where one only of the parties has property, it goes to him who has none."

As to the necessity of presuming that the person

having the weakest right of inheritance—that is, the smallest share—should have survived the other, there is considerable doubt. The *Sheikh*, in his *Ecjaz*, has positively rejected the maxim. But in reality, as observed by him in the *Mubsoot*, its application does not alter the effect of the law, unless we follow out the doctrine of *Mofeed*, in which case the effect of the preference is obvious. The opinion, however, expressed in the *Ecjaz*, that there is no necessity in law for observing the arrangement, seems to be by far the best founded; and even if the necessity for the supposition were established, it could be of no advantage to either of the parties.

Thus, if a husband and wife are drowned together, we first suppose the death of the husband, and append to the widow her share in his estate; we then suppose the death of the wife, and append to the husband his share in her original estate; but by no means a share in that which we suppose her to have inherited from himself. In like manner, if a father and son are drowned together, the share of the father is first assigned, and then that of the son; but if each should have a preferable title to the remainder of the other's estate than his other heirs, a mutual transfer, or an exchange of property takes place, and the succession of each devolves upon the heirs of the other. For example, the son leaves brothers or sisters on the mother's side only, and the father also leaves brothers, in which case the property of the son is transferred to the father, and the property of the father is transferred to the son, and then what has thus become the property of each devolves upon his own heirs respectively. If, again, we suppose that each one of the parties has associates with him in his right of inheritance, as, for instance, when the father had other sons than the one drowned with him, and the son leaves also children of his own, the father, in this case, being first supposed the survivor, has a sixth part of the son's property added to his; and then supposing the son to have survived, a portion of the inheritance, in common with the other children, is set apart in his name, which portion, together

Case of a  
husband  
and wife.

Of a father  
and son.

with the remainder of his own original property, descends to his own children.

Where, again, the heirs who perish together have equal rights in the succession of each other, as, for instance, two brothers, neither is supposed to have preceded the other, and the rights of both being equal, the estate of each one of them is transferred to the other: and if neither of them leaves any heir, the succession to both devolves on the *Imám*; or if one of them leaves an heir, what has become his property by the transfer goes to such heir, and what has become the property of the other goes to the *Imám*.

#### SECTION FOURTH.

##### *Of the Inheritance of Mujoosees, or Fire-Worshippers.*

*Nusub* and *subub* in the case of *mujoosees* may be valid and invalid. *Mujoosees* sometimes enter into unlawful marriages which have a semblance of right, as being permitted by their own religion. Hence arises both a valid and an invalid *nusub*, or consanguinity, and a valid and invalid *subub*, or special connection, as causes of inheritance among them. By invalid, we mean what results from a marriage that is unlawful with us but not so with them; as, for example, when one of them marries his mother and begets a child by her, the *nusub* of the child is invalid, and also the *subub*, or marriage relation between the parties themselves, is invalid.

*Nusub* a good ground of inheritance whether valid or invalid, but *subub* so only when valid. Some of our doctors have held that there is no true title of inheritance except for a valid *nusub* and a valid *subub*; and this was the doctrine of *Yoonus Ben Abdoorukman* and his followers. Others, again, allow the title by a valid and invalid *nusub*, and by a *valid subub* to the exclusion of a *subub* that is invalid, and this was preferred by *Fuzl Ben Shazan* as the doctrine of the ancients on the subject. It has also been adopted by our *Sheikh Mofeed*, and is generally approved. The *Sheikh Aloo Jáfer* admitted succession by both *nusub* and *subub*, whether valid or invalid;—and upon this supposition, if two causes of succession should meet in the same person, he or she would be entitled to inherit by virtue of both, as, for example, a mother who is also a wife

would have both a wife's share, which is a fourth on failure of issue, and a master's, which is a third if there were none to participate with her such as a father, while the remainder would revert to her in the latter capacity;—or a daughter who is also a wife would have a half and an eighth, while the remainder would revert to her by reason of propinquity to the deceased when there is no other heir associated with her;—or a sister who is also a wife would have a fourth and a half as her shares, with the remainder by reversionary right if there is no other heir.

If two causes of succession are combined, one of which would have the effect of excluding the other, inheritance can only be by virtue of the excluding cause; as for instance in the case of a daughter who is also a half-sister on the mother's side and would have a half as a daughter's share and nothing in the other capacity, because with us a sister has no title to inheritance when the deceased has left a daughter,—or a daughter who is also a daughter's daughter, and would have a share in the first capacity but none in the second;—or a paternal aunt who is also a half-sister on the father's side, and would have a share only as a sister, to the exclusion of her title as an aunt;—or a paternal aunt who is also the daughter of such an aunt, and would have only an aunt's share.

When two causes of inheritance combine, one exclusive of the other, the first only effectual.

#### Miscellaneous Cases.

*First.* A *Mooslim* has no title to inheritance for an invalid *subub*. So that if we were to marry a relative within the prohibited degrees, neither of them would be heir to the other, whether the prohibition is one as to which all are agreed, as for instance when a man marries his mother by fosterage, or one with regard to which there is a difference of opinion, as when he marries the mother of a woman with whom he has had illicit intercourse; and it makes no difference whether the husband were aware of the illegality or not.

An invalid *subub* no ground of inheritance for a *Mooslim*.

*Second.* A *Mooslim*, however, may inherit for both a valid and invalid *nusub*; for a semblable contract is like a valid one in establishing the paternity of a child.

Otherwise as to *nusub*, which is a good ground whether valid or invalid.



## CHAPTER VII.

## OF THE COMPUTATION OF SHARES.

## SECTION FIRST.

*Extractors of the Six Shares, and how they are to be treated when several Persons are entitled to the same Share.*

Extractors  
are  
numbers  
by which  
the shares  
can be  
extracted  
without a  
fraction.

By the extractor of a share we mean the smallest number by which the share which it represents can be extracted from the mass of the deceased's property without a fraction; and for the six appointed shares there are five such numbers. Thus, a *half* can be extracted by the number 2; a *fourth* by 4, an *eighth* by 8, *one-third* and *two-thirds* by 3, and a *sixth* by 6. So that every case that presents two halves, or one half and a remainder, is to be arranged by the number 2, and every case that presents a fourth and a half, or a fourth and a remainder, is to be arranged by the number 4. Where, again, there is an eighth with a half, or an eighth with a remainder, the arrangement is by 8; where one-third and two-thirds combine, or there is one of these with a remainder, the arrangement is by 3; where there are a sixth and a third, or a sixth and two thirds, or a sixth and a remainder, it is by 6; where there is a half with a third, or two thirds and a sixth, or with one of these two, it is by 6; but if for the half we substitute a fourth, the arrangement must be by 12; while if, in the place of the half, we put an eighth, it must be by 24.<sup>1</sup>

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<sup>1</sup> In all cases the estate is to be divided into the number of parts indicated by the extractor.

This being premised, we have next to consider whether the number of parts into which the deceased's estate has to be divided agrees with the shares, or exceeds, or falls short of them.

I. Let us suppose that the parts agree with the shares, and that each of the shares can be divided among the individuals entitled to it without a fraction. On this supposition no difficulty can arise; as, for instance, where the deceased has left a sister by the same father, with her husband, and the estate is to be divided into two parts, or where the survivors are two daughters and both parents, or both parents and a husband, in each of which cases the division is by six, and the estate can be distributed among the persons entitled to it without a fraction.

But though the parts into which the estate is to be divided may agree with the shares, yet the shares may not be divisible among the individuals entitled to them without a fraction: and this may happen with one share, or with several. When there is only one share in this predicament, the original extractor of the case is to be multiplied by the number of the individuals entitled to the share, that is, when there is no common measure between the individuals and their share. Thus, take the case of the deceased being survived by both parents and five daughters; here the extractor is six, and the share of the daughters four-sixths, but these cannot be divided among five without a fraction; and there is no common measure of four and five: the extractor is accordingly to be multiplied by the whole number of the daughters, and the product ( $6 \times 5 = 30$ ) will be the new extractor of the case; the share of each heir, as it stood before the multiplication, being now also multiplied by five, the product will be the amount that each is entitled to. When, again, there is only one share that cannot be divided without a fraction among the individuals who are entitled to it, but there is a common measure between the individuals and the share, the extractor is to be multiplied by the measure out of the number of individuals, not out of the shares; or, in other words, the number of individuals is to be divided by the

When the parts into which an estate is divided agree with the shares, and each share is divisible without a fraction, extractor remains unchanged.

When the parts agree with the shares, but one of the shares is not divisible among the individuals entitled to it, the extractor must be multiplied by the number of the parties;

unless there is a common measure of the share and of the individuals, when the latter is to be divided by the

measure, and the extractor multiplied by the quotient.

measure, and the extractor multiplied by the quotient. Thus, take the case of two parents and six daughters; here, the share of the daughters being four-sixths, it cannot be divided among them without a fraction; but there is a common measure (2) of the share (4), and the number of individuals (6); the extractor is accordingly to be multiplied by half of the number, or three, by which means it will be raised to eighteen, and as the shares of the parents, in the original division, were two, they are now also to be multiplied by three, by which means they will become six, while the four shares of the daughters, in the original division, being multiplied in the same way, will become twelve, giving two portions to each.

When there is more than one share indivisible without a fraction, the same course to be followed with the shares in that predicament.

When there is more than one share that cannot be divided without a fraction among the persons who are entitled to it, there may be a common measure of all the shares that cannot be so divided, and of the individuals entitled to them, or there may be no common measure in any of the cases, or there may be a common measure in one of the cases and none in the others. In the first of these cases, the number of the person is to be reduced in correspondence with the common measure; in the second, the numbers are to be dealt with as they stand; in the third, the single class in which there is a common measure between their numbers and their shares is to be reduced in correspondence with the common measure, and the others to be dealt with as they stand. After all this has been done, the resulting numbers will be found to be *mootumathil* (equal), or *mootudakhil* (one an aliquot part of the other), or *mootuwafik* (commensurable), or *mootubayyun* (prime) to each other. If they are the first or equal, it is sufficient to take one of the numbers, and multiply the original extractor by it, as, for instance, where the deceased has left two brothers by the same father and mother, and two brothers by the same mother only. Here, the extractor being three, the shares cannot be divided among the persons entitled to them without a fraction, but one only of the numbers or two is to be

And the resulting number operated with differently, according as they are *mootumathil*,

taken to multiply the extractor, or three, which will thence become six, and give two parts to the brothers by the mother only, and four parts to the brothers by father and mother, to be divided among them equally. Where again the numbers are *mootudakhil*, or one, a measure of the other, reject the least of the numbers, and multiply the extractor by the greater. Thus, where the deceased has left three brothers by the same mother only, and six by the father, the estate is to be arranged into three parts; but these cannot be divided among the parties without a fraction; the number, however, of one of the classes is half that of the other, the numbers being *mootudakhil*, the extractor is accordingly to be multiplied by the higher of the numbers, or six, and will thus be raised to eighteen, by which it will be found that the estate can be arranged without a fraction. When the numbers are *mootuwafik* or commensurable, you are first to multiply one of the numbers by the measure of the other (that is, by the quotient of the other when divided by the measure), and then multiply the original extractor by the product. Thus, where the deceased has left four wives and six brothers, the extractor is four, but the estate cannot be so divided without a fraction; there is, however, a measure of four and six, which is two, and you are to multiply one of them (six) by half of the other (four), and you have twelve, by which you are now to multiply the original, which is four, and you have in the result a number which will satisfy the case. If the numbers are *mootubayyun* or prime to each other, one of them is first to be multiplied by the other, and then the original extractor by the product. Thus, when there are two brothers by the same mother only, and five by the same father, the original extractor being three, the estate cannot be divided without a fraction among the persons entitled to it, and the numbers are neither commensurable nor one a part of the other; one of them is accordingly to be multiplied by the other, which will give ten, and that number multiplied by the original extractor, when the product will be found to satisfy the case.

Difference  
of numbers  
explained.

Numbers are either equal<sup>2</sup> or different, and if different, they are *mootudakhil*, *mootuwaqik*, or *mootubayyun*. They are *mootudakhil* when the smaller being subtracted once or more times from the greater, exhausts it completely, and the smaller does not exceed half the greater. If you like, you may call them *mootunasib* or proportional, as three to six and nine, or four to eight and twelve. They are *mootuwaqik* when the smaller being subtracted once or oftener from the greater, the remainder is more than one; as, for instance, ten and twelve, for when you subtract the former from the latter, the remainder is two; and if you subtract two from ten several times, the latter is completely exhausted.<sup>3</sup> When the remainder<sup>4</sup> is two, the numbers are said to agree in a half; when it is three, the agreement is by a third; and so on up to ten. When it is eleven, you must take one part of that number to express the agreement.<sup>5</sup> The numbers are *mootubayyun* when, if you subtract the less from the greater once or oftener, the remainder is unity; as, for instance, thirteen and twenty, for if you subtract the former from the latter, there remain seven; and if seven from thirteen, there remain six; and if six from seven, there remains only one.

When the  
number of  
parts into  
which an  
estate is  
divided  
falls short  
of the  
shares.

II. Let us now suppose that the number of parts into which the deceased's estate must be divided falls short of the shares to be provided for,—a case that can only happen when a husband or a wife intervenes; as, for example, when the deceased has left both parents, two or more daughters, and a husband or wife,—or both parents, a daughter and a husband,—or one parent, two or more

<sup>2</sup> These are what are previously described as *mootumathil*, which literally means *similar*.

<sup>3</sup> If it be considered that division is only a continued subtraction, this rule is the same as our own for finding the greatest common measure.

<sup>4</sup> That is, a remainder which, being subtracted from the last subtrahend, completely exhausts it.

<sup>5</sup> The numbers in Arabic above ten are compound, as 1-10, 2-10, &c., and there is no word to express a part of them, as an *eleventh*, or a *twelfth*, &c.

daughters and a husband. In all these cases the husband or wife takes the lowest share appointed for them respectively, each parent has a sixth, and a daughter or two or more daughters the remainder, as the extractor is never to be increased. In like manner, when there are two brothers by the same mother only, two or more sisters by the same father and mother, or by the same father only, with a husband or wife,—or one brother or sister by the same mother only, with a sister and a husband,—in these cases the husband or wife takes the highest share appointed for them, and the deficiency falls specially on the sister or sisters by the same father and mother, or the same father only. If the estate can now be divided without a fraction, well; if not, you must multiply the shares<sup>6</sup> of those whose portions will not divide among them without a fraction by the original extractor. As an example of the first case, let us suppose that the deceased has left both parents, a husband, and five daughters; here the extractor being twelve, the husband has three of the parts, the parents four, and the remaining five, which are the daughters, are divisible among them without a fraction. As an example of the second case, let us substitute three daughters for five, when the remaining five shares will not be divisible among them without a fraction; and here we must multiply the original extractor by three, when it will be found that the product will divide among them without a fraction.

How the deficiency is to be adjusted.

III. We have now to suppose that the number of shares into which the estate is to be divided exceeds the amount of the shares. When this happens, the excess or surplus is to be returned to the sharers, excepting the husband and wife, the mother, when there are brothers, according to what has been already stated, and a person who has only one cause of inheritance when there is another who has only two causes,—in which case the master of two causes has a preferable right to the

When the number of parts into which an estate is divided exceeds the shares, the surplus is returned to the sharers. Exceptions.

<sup>6</sup> Arab. *Siham*. But from the second example it would appear that it is the number of individuals that is to be multiplied.

Examples  
of the  
return.

return over the master of one. As general examples of the return, take the following cases:—1st. Both parents and one daughter: here, if there are no brothers, the return is in fifths; but if there are brothers, it is in fourths, and the original extractor of the case is to be multiplied by the extractor of the return.<sup>7</sup> 2nd. One parent and two or more daughters: here the surplus reverts by fifths, and the original extractor is to be multiplied by five. 3rd. One brother or sister by the mother only, with a sister by the same father only: when the return is in fourths, according to the most authentic report. 4th. Two brothers or sisters by the same mother only, with a sister by the father: when the return is in fifths, and the original extractor is to be multiplied by five, when it will be found that the product will dispose of the case without a fraction.

## SECTION SECOND.

### *Of Moonasukhat, or Vested Interests.*

When one  
of the  
heirs dies  
before par-  
tition, his  
portion to  
be separ-  
ated from  
the general  
mass;

By this we understand that a man has died, and that before a partition has been made of his estate one of his heirs has died also, so that two partitions are to be made of one original estate. The way to dispose of this case is to arrange the first estate, and take a portion out of it for the second, then if the heirs of the second deceased are the heirs of the first, without any difference in the partition, there is, in fact, but one estate to divide; as, for instance, when the deceased has left three brothers and three sisters, all related on the same side, and one of the brothers dies, then another, after which one of the sisters dies, and then another, leaving one brother and one sister surviving, among whom the property of the original

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<sup>7</sup> From the author's extreme brevity it is difficult to follow him; but this, I believe, is his meaning:—The return being a fifth, its extractor must be 5; and the original extractor (6) multiplied by it becomes 30, which being divisible into fifths, gives 2-5ths, or 12, to the parents, and 3-5ths, or 18, to the daughter.

deceased is to be divided in thirds. But if there is any difference in the right or in the heirs, or in both right and heirs, then it must be considered whether the portion of the deceased heir will divide among his own heirs without a fraction, and if so, nothing further is necessary; as if a person should die leaving a widow, a father, and a daughter, and the widow's share being an eighth is three parts out of twenty-four, but she dies leaving a son and a daughter, when her share is obviously divisible without a fraction.

and if it will divide without a fraction among his own heirs nothing further is necessary.

If the share ascribed to the second deceased cannot be divided among his own heirs without a fraction, the case presents two aspects:—

If it cannot be so divided,

*First.* If there is a common measure of the portion of the second deceased out of the first estate, and of the number of parcels into which the second is to be divided, we multiply a portion of this latter number corresponding to the measure (that is its quotient when divided by the measure) by the whole number of parcels into which the first estate was divided, and the product will arrange both estates. Thus, if the deceased should have left two brothers by the same mother, and also two by the same father, with a husband, and the husband dies leaving a son and two daughters: here the original extractor, which is 6, must be raised to 12, on account of the fraction (as one-sixth, the share of the two brothers by the mother, cannot otherwise be divided among them), and the husband's share being a half of these twelve parts, or 6, is plainly indivisible, without a fraction, into four parts (as required for the distribution of his estate); but there is a common measure of 6 and 4, which is 2, and the part of four corresponding to it, or a half, that is 2, is accordingly to be taken, and the original extractor (12) to be multiplied by it, when the product (24) will be found to satisfy the whole case, and each person who had anything in the first estate will now have that share also multiplied by two.

but there is a common measure between it and the persons entitled, quotient of the latter divided by the measure to be multiplied by the extract. Illustration.

*Second.* When there is no common measure of the portion of the second deceased out of the first estate and the number of parcels into which his own must be divided, then the whole number of the parcels is to be

If there is no common measure, the extractor to



be multiplied by the whole number of persons entitled to the second estate. Illustration.

taken, and the original extractor multiplied by it, and every one who had anything in the first estate is to take his portion multiplied by the same number also. Thus, when the deceased has left a husband, two brothers or sisters by the same mother, and a brother by the same father, and the husband has then died, leaving two sons and a daughter, the original estate being divisible into six parts, three of them, which is the husband's share, cannot be divided without a fraction into five parts; and there is no common measure between three and five, three is accordingly to be multiplied by five, and the product will satisfy both estates.

Similar course to be adopted when two or more heirs die before partition as in the case of one.

When the *moonasukhat* presents more than two estates, that is, when more than one of the heirs has died before partition of the first estate, you are to proceed, with respect to the third in reference to the two first estates, in the same way as you proceeded with one of them in respect of the other. And so on, if we suppose that there has been a fourth death or more.

### SECTION THIRD.

#### *How to Ascertain an Heir's Portion of the Turkah or Deceased's Estate.*

Several methods have been devised for this purpose, of which the following is the simplest:—Set aside for the heir so much of the assets of the estate as may be proportionate to his part in the *Fureezut*, or number into which the whole must be divided to give each heir his portion without a fraction. With this view you may either divide the amount of assets by the *fureezut*, and multiply the quotient, or result of the division, by the number in the *fureezut* allotted to the heir, or you may multiply the assets by the heir's allotment, and divide the product by the *fureezut*, when the result will be the same.<sup>8</sup>

<sup>8</sup> Thus, if the assets are 24 denars, the *fureezut* 12, and the heir's allotment a fourth, or 3-12ths, you either divide 24 by 12, and multiply the quotient (2) by 3; or multiply 24 by 3, and divide the product (72) by 12, when the result is in either case 6 denars, as the heir's allotment.

So far when the assets are a whole number. Now suppose that there is a fraction above the whole number, as for instance so many *deenars* and two-thirds of a *deenaar*. Here you are first to multiply the whole number by the denominator of the fraction, and add its numerator to the product; you are then to proceed with the sum thus obtained in the same way as you have been directed to do in the first instance. When you have thus arrived at the heir's portion, you are to divide the amount by the denominator of the fraction, as by two if the fraction were a half, three if it were a third, and so on. If there is a remainder which does not amount to a *deenaar*, you are to expand the remainder by reducing it to *kerals*, and then to divide the product. If there is a remainder which does not amount to a *kerat*, you are to expand it in like manner by a reduction to *hoobbas*, dividing the product as before, and so on to *aroozz* and *jooza* as far as may be necessary.<sup>9</sup>

To prove the work you are to add all the portions of the different heirs together, and if they make the exact sum of the assets the work is right; if not, there is an error somewhere.

<sup>9</sup> There is some obscurity in this case, but it may be illustrated thus: Taking the assets at 24 and 2 thirds, and substituting for *deenars*, pounds sterling, the subdivisions of which are more familiar, we have first  $24 \times 3 + 2 = 74$ ; then  $74 \times 3 \div 12 = 18$ , with a remainder of 6-12ths, which is the portion of the heir as exhibited in thirds, and being divided by 3 gives 6 and 2 12ths; now reducing 2 12ths of a pound to shillings and pence, we have 6*l.* 3*s.* 4*d.* as the heir's one-fourth share of 24 2-3rds of a pound, or 24*l.* 13*s.* 4*d.*



BOOK VIII.<sup>1</sup>

## INHERITANCE.

## INTRODUCTION.

THE causes which operate in law a title to succession are three, as prescribed by our holy religion : first, *nusub* or consanguinity : that is, the connection of one person with another by any of the ties of blood or descent established by birth ; second, *subub* or affinity : that is, the connection of one of two persons with the other, produced by marriage which is established betwixt them by contract ; and third, *wala*, dominion or patronage :<sup>2</sup> that is, the connection of one with another by manumission, or other legal cause to be hereafter explained, not however produced either by birth or marriage.

Grounds of inheritance, three.

*Of Inheritance by Consanguinity.*

Under the first title are comprehended several classes or series, each of which, in the order here described, enjoys a preference in succession over that which follows it, to the utter exclusion of the latter ; and thus, whilst of the first class a single member, whether male or female, exists, there is no title of inheritance in the second ; and the same of the second with respect to the third.

The right of consanguinity involves three distinct classes of heirs.

<sup>1</sup> This additional book on inheritance is from a manuscript by the late Lieutenant-Colonel John Baillie, who translated the first volume of the *Digest of Imameea Law*, compiled under the superintendance of Sir William Jones, and it is believed, for the reasons mentioned in the Introduction, to be a translation of a further part of that digest.

<sup>2</sup> Included by the *Shuraya* under *Subub*.—*Ante*, p. 261.—ED.

Class first, immediate parents and children how low soever.

Parents inherit with children how low soever, but grandchildren are excluded by children, and great-grandchildren by the former.

Any individual of this class excludes the two following, as grandfathers, brothers, and uncles.

The first class involves two descriptions: the deceased's root, and his offspring.

Of whom neither excludes the other from succession, because proximity of degree can only operate exclusion

In the first class are included by law the father and mother, or immediate parents *only*, of the deceased, without extending to more remote ancestors, and his children, extending to the lowest, as grandchildren, great-grandchildren, and so on, however remote in descent, with this proviso, that of these the nearer always excludes from succession one more remote in degree. Thus the father and mother of a person deceased inherit with his children, his children's children, and his children's children's children, and so on; whereas grandchildren do not inherit with the immediate offspring of the deceased, nor do great grandchildren with the latter; but, on the contrary, each degree of posterity totally excludes that more remote from any title to succession. Further, no member of the two following classes can inherit, whilst any individual, even a female of this series, exists, and however remote in descent such female may be. Thus, a grandfather of the deceased cannot inherit with any one of the immediate parents, nor of the children how low soever; and in like manner a brother of the deceased is completely excluded by the existence of any member of this series; as are also all uncles both paternal and maternal, whom we shall hereafter describe as being placed in the third series of consanguineous heirs.

The first class, as may have been observed, comprehends two descriptions, viz., first, the *root* of the deceased, which is limited in number, as including only the immediate parents, whose place in succession with children cannot be supplied by ancestors more remote; and second, the *branch* or offspring of the deceased, which is unlimited in number and degree, as comprehending children and children's children however remote in descent, observing always the rule of precedence by proximity in degree, and thus supplying the place of each step in event of failure, by the next thereto in descent. It is further to be observed of these two descriptions, that no member, even the nearest one, as a father, for example, of the deceased, can exclude from succession the most remote of the other as a great-grandchild; but, on the contrary, this exclusion by proximity of degree takes effect

only where the heirs are of one and the same description, like a son, for instance, or a daughter of the deceased, who necessarily excludes a grandchild from inheritance.

when the heirs are of one description.

These principles of law are established as well by unanimous consent of most of our doctors as by express traditions of the two holy *Imáms*<sup>3</sup> on whom be peace, reported by *Zuraru* in these words: "Not one of the creation of God can inherit with a child of the deceased, except the immediate parents and the husband, or wife; should there be no immediate children, grandchildren, whether male or female, supply their place in succession: those from a son inheriting the share of a son, and those of a daughter taking her portion of the inheritance; and be these ever so remote in descent, whether two or three generations, or more, still they inherit the portion of immediate offspring, and exclude from succession every description of heirs that a child begotten by the deceased would have excluded if in existence." Further, by a report of *Bookeer* from the *Imám Mohummud Bâkir*, on whom be peace, in these words, "no brother or sister even by the full blood, and no brother or sister by the father's or by the mother's side, can take any part of the inheritance with the father of the deceased." Likewise by a decision of the same *Imám*, quoted by *Aboo Buseer* in the case of a person who died, leaving his father, paternal uncle and grandfather, to this effect: "The succession rests solely with the father, and neither uncle nor grandfather can inherit any part thereof." Also by a tradition of this holy *Imám*, recorded by *Yuzed Kunsay* in these words: "Your son is preferred in succession to your grandson, and your grandson excludes your brother." To the same effect are various other reports generally known, in some of which, however, a species of exception from the foregoing rules in favour of a grandmother, only,<sup>4</sup> although not positively enjoined, would appear strongly recommended, viz. that

Proof by tradition of the foregoing principles.

A grandmother may inherit a sixth with the immediate

<sup>3</sup> Mohummud Bâkir, the fifth Imam, and his son Jáfer Sâdik, or the Just.

<sup>4</sup> According to the *Shuraya* the benefit of the exception extends to the grandfather also.—*Ante*, p. 279.—*ED.*

parents, which is recommended as a gratuity. But not in virtue of a legal title.

she shall receive a sixth part of the inheritance in cases where, from failure of children, the portion of the immediate parent, her child, whether father or mother, is increased; this, however, is to be understood as a gratuitous subsistence, and by no means in virtue of a legal title to succession, from which, as we have already seen, all more remote ancestors are entirely excluded by the existence of an immediate parent.

Class second, remote ancestors and brothers and sisters. Grandfathers exclude great-grandfathers, as do brothers and sisters nephews and nieces, by reason of proximity of degree.

The second class of consanguineous heirs comprehends grandfathers and grandmothers of the deceased, how high soever in degree of ancestry, and brothers and sisters and their children however remote in descent, the nearest always excluding one more removed;—thus, a grandfather's father cannot inherit with a grandfather or grandmother, and even a brother's son has no title with a brother or sister of the deceased; a brother's grandson is excluded by a brother's or by a sister's son; and, in short, the arrangement respecting children and children's children of the deceased, formerly explained, has a similar influence exactly over members of this class; of which, further, no individual can possibly inherit whilst any member, even a female of the first series, exists.

Two separate descriptions;

This second class likewise involves two separate descriptions of heirs: one comprehending all grandfathers and grandmothers of the deceased, how high soever in the line of ancestry, with application of the rule of precedence by proximity, to the nearer first and then the more remote; and the other including all brothers and sisters and their children, how low soever, always observing the same rule.

in each of which the heirs are preferred by proximity, but not in both promiscuously.

To each of these descriptions there belong unlimited degrees of ascent and descent—thus, the degree of grandfathers and grandmothers is nearer to the deceased, and necessarily excludes that of their parents, and the degree in like manner of brothers and sisters nearer than that of their children; but no member of one description, even the nearest in degree, can exclude even the most remote of the other from inheritance, because exclusion by proximity can only take effect amongst heirs that are of one and the same description, in the same manner as a child of the deceased, even

the most remote in descent, is not excluded by the existence of both father and mother, or any one of them. For example, a grandfather of the deceased, however near, inherits with the immediate offspring of a brother or sister, and their children's children how low soever; but does by no means exclude them from succession; and in like manner a brother or sister of the deceased may be associated with a great grandfather or grandmother however remote in ascent. Upon this principle, if a brother dying should leave his brother, his grandfather's grandfather, and a brother's or sister's son, the inheritance would be divided betwixt his brother and grandfather's grandfather, and no part thereof would fall to the nephew who is excluded in this example by a nearer in degree of the same description. Upon the same principle, were the deceased to leave a brother's or sister's son, his grandfather and a grandfather's father, the property would in the case be divided betwixt the two former, and no part whatever thereof could be claimed by the great-grandfather, he being, in this example, excluded by one nearer in degree of the same description of heirs.

Further, whilst any individual, whether male or female, in whatever degree or description of this series, exists, no member of the third or following class can have any title to inheritance.

Any individual of this class excludes all the following.

These principles regarding the second class of heirs by consanguinity are established not only by what has been already stated in treating of the first, and by the general assent of our doctors, but also by a judgment of the *Imam Jâfer Sâdik*, on whom be peace, reported by *Humza Ebn Humrân* in the following words: "I inquired respecting *Kulalut* or distant kindred: he replied, 'These inherit only upon failure of children and parents'"—likewise by a report of *Ismâ'îl Jâfy* in these words:—"I heard the *Imâm Mohammut Bâkir*, on whom be peace, declare, that a grandfather divided the inheritance with brothers of the deceased, (that is, inherits with them,) be their number what it may, even to an hundred thousand." Further by what is related of the *Imâm Jâfer Sâdik*, on whom be peace, by *Abân Ebn Tughlib*, in these words:—"I asked

Traditional proof.



regarding a brother's son and a grandfather; he answered, 'They divide the inheritance by halves.'" Again, by a decision of the same *Imám*, in the case of a person who left his daughter, and a sister by the same father and mother, viz.,—"that the whole property descends to his daughter, and the sister inherits no part thereof." By another, in a case where the deceased had left a daughter's daughter and his brother, to this effect,—“the succession is to the nearest of kin, viz. the grandchild only,” and by a third, when the *Imám* was interrogated respecting an uncle's son, and a grandfather, he replied,—“the whole property goes to the grandfather alone.”

To the same effect are various other authentic traditions generally known, which demonstrate the association of grandfathers with brothers in the right of succession, comprehending as well the most remote as the nearest in degree, with application always of the rule of precedence by proximity in each, as laid down by express traditions, which, whilst they require a preference to the nearest grandfather in exclusion of one more remote, leave the common right of succession in this description with that of brothers perfectly established. Nor does it by any means affect this principle of law whether a brother's son, for example, of the deceased, be in a more remote degree than that of the grandfather in ancestry or otherwise, because proximity of degree can only have effect where the heirs are of one description, that is, in the same relation to the deceased, and by no means where their relation is different, which is indeed clearly proved by the traditional report of *Abán*, formerly quoted, directing an equal distribution of inheritance by halves in the exact example before us of a brother's son and a grandfather.

Class  
third,  
uncles and  
aunts and  
their  
children  
how low  
soever.

Under the third class of consanguineous heirs are comprehended brothers of the deceased's father, brothers of the mother, and the sisters of both; commonly known by the characteristic appellation of paternal and maternal uncles and aunts; and upon failure of these, their children and children's children, and so on, the nearest in descent always excluding one more remote. Thus, the son of a

paternal uncle does not inherit with a paternal uncle or aunt; and in like manner the son of a maternal uncle is excluded by a maternal uncle or aunt.

This class, it may be observed, involves only one general description of heirs, because their title to succession is derived from one general relation to the deceased, viz. that of brotherhood or sisterhood to his parents, for brothers and sisters we have already seen to be included in one description of the second series; and consequently all persons connected by this tie must also be considered in one and the same description, which, however, like the former unlimited, possesses numberless degrees of proximity and distance that are necessarily referred to in settling the succession. Thus, a paternal uncle or aunt is obviously nearer in degree to the deceased than the son of a paternal or maternal uncle, and an uncle or aunt by the mother's side, nearer than the son of a paternal or maternal uncle or aunt. It follows, therefore, that with a maternal uncle only of the deceased, or with a single maternal aunt, not one of their children, nor the children of a paternal uncle or aunt, can have any title to inheritance; and by the same rule, if a paternal uncle or aunt of the deceased exist no part of the succession can go to their children, or to those of a maternal uncle or aunt. In short, the rule of preference in succession by proximity of degree has an uniform influence over this description of heirs, their children and children's children *ad infinitum*, with one only exception, which the general assent of all our doctors has ratified and confirmed, viz. that the son of a paternal full uncle<sup>5</sup> excludes a paternal half uncle only of the deceased, and takes the whole inheritance preferably to the latter, although nearer in degree, if the succession should be limited to these two; and it is in virtue of this exception that, had the Prophet of God, on whom and his posterity be blessing and peace, left no issue at the period of his dissolution, his whole succession must by law have devolved on the

All forming one general description.

Without distinction betwixt paternal and maternal, but each excludes the descendants of the other as well as their own.

With one exception in favour of the son of a full uncle who excludes a half-uncle from inheritance.

<sup>5</sup> That is, the son of an uncle who was full brother to the deceased's father by the same father and mother.

Commander of the Faithful *Aly*, on whom be the blessing of God, in preference and complete exclusion of *Abbass*; for *Aboo Tálib* was the full brother of *Abdoolla*, both by father's and mother's side, and consequently his son, the Commander of the Faithful, although more remote in degree, must have excluded *Abbass*, half uncle of the Prophet, as being brother to *Abdoolla* by the father's side only.

Proof by traditions of the general rule.

The general principles of law first described regarding this third class of consanguineous heirs are established in part by the reports and traditions formerly quoted, and further by a judgment of the *Imám Jafer Sadik*, recorded by *Aboo Buseer*, in the case of a person who dying had left an aunt by the father's side, and also a maternal aunt, to this effect:—"Two-thirds of the succession to the deceased's paternal aunt, and one-third to his aunt by the mother's side." Likewise by a tradition of the same *Imám* quoted by *Aboo Buseer* in these words:—"A maternal uncle and aunt may inherit the whole property of a person deceased, if there be none other nearer in degree, as Almighty God hath declared 'Relatives by blood are preferred in succession some of them to others.'" Further by a decision of the *Imám Mohummud Bákir*, on whom be peace, recorded by *Hoossein Ebn Hakum*, in the case of a person who dying had left two maternal uncles and his master, by whom he was emancipated, upon which the *Imám* decreed, applying the sacred text "Relatives by blood are preferred," "that the property is between the two uncles." Also by a report of *Ebn Mohürez* to this effect, "that he put the case of a paternal uncle's son and maternal aunt to the *Imám Jafer Sadik*, on whom be peace, and was answered, 'The property goes all to the aunt.'" Likewise the case of a paternal uncle's son with a maternal uncle, which was decided "The whole inheritance to the uncle." Further, the case of a paternal uncle's son with the son of a maternal aunt, which was answered in the words of the *Korán*, "To the male the share of two females." And, lastly, by the same *Imám*, in the case of a paternal uncle and aunt, in confirmation of the foregoing principles, we have the following decision: "To

the uncle two-thirds of the inheritance and one-third to the aunt."

To the same effect are many other authentic traditions generally known, and with respect to the particular exception above described, in addition to the unanimous assent of all our doctors, it is established by an express tradition of the *Imám Jáfer Sadik*, on whom be peace, recorded by *Hooscin Ebn Amáru* in these words. "The *Imam*, on whom be peace, put this question to me: 'Who is preferred in succession to a person deceased, the son of a paternal full uncle, or his paternal uncle by the same father only?' I replied that I had heard a tradition from the Commander of the Faithful to this effect: 'The sons of paternal full uncles are preferred to kinsmen by the father's side only.' He observed, 'You have explained it in a clear and obvious manner. Verily, *Abdoolla*, father to the Prophet of God, was full brother of *Aboo Talib* by the same father and mother, whence the Commander of the Faithful, as son of *Aboo Talib*, had no issue of the Prophet remained, would have excluded *Abbass*, his uncle by the same father only, from inheritance.'"

And hereupon a question has arisen whether the exception is by law restricted to the particular instance before us without application to any other, or may be also legally extended to all similar cases. The most common and prevalent doctrine has restricted its influence to this particular case alone, and the author of the *Shuraya* has expressly declared that if with these two persons, viz. the son of a paternal full uncle and a paternal uncle of the half blood, any other heir, even a maternal uncle, should exist, the decision of law would be completely altered, and the title of the uncle's son entirely cut off.

Upon failure of the various degrees already mentioned of this third class, viz. paternal and maternal uncles and aunts and their children, however remote in descent, the inheritance of a person deceased falls by law to the paternal and maternal uncles and aunts of his father and mother, and after them to their children's children how low soever, observing always the rule of precedence by proximity and

Proof of •  
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This  
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On failure  
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descendants, who form the second step of this series; after whom are the great-grand-uncles and aunts, forming the third step of this series; upon failure of whom the great-grand-father's uncles and aunts succeed, forming the fourth step.

arrangement conformable thereto, already so often described. These may be denominated the second step of this third series of consanguineous heirs, and if of them no individual should exist, the inheritance reverts to paternal and maternal uncles and aunts of the deceased's grandfather and grandmother, after whom to their children and children's children, how low soever, observing the rule of precedence by proximity as above. These form the third step of this series; and upon entire failure of them the uncles and aunts of a great-grandfather and grandmother succeed to the deceased; after whom their children and children's children, and so on. These latter constitute the fourth step of the series; and, upon the same principle, we may suppose a further progression, *ad infinitum*, which principle of law is fully established by the preference expressed in the sacred text to "*relations by blood*," and by the universal maxim of inheritance which places "every *zoo ruhūm*, or distant kinsman, in the exact situation of that person nearer to the deceased, through whom his relation is derived."

Full relations, whether male or female, exclude those by the father's side from inheritance if in the same degree, as brothers and sisters,

This leads us to describe the following three general rules respecting succession, to which it is particularly necessary that attention should be paid. The first of these is that every person related to the deceased by both sides, viz. the father's and mother's, in any degree of consanguinity, excludes from inheritance a person in the same degree by the father's side only, and this whether a male or female, the latter being deprived of every title to succession. Thus, a brother, for example, or a sister of the deceased by the same father and mother, excludes a brother or sister being in the same degree by the same father only. The same principle likewise applies to paternal uncles and aunts of the deceased, and also to maternal uncles and aunts, provided they are in one and the same degree of propinquity. Thus the son of a brother by the same father and mother does not exclude a brother by the same father only, because those degrees of relationship are different; whereas the son of this latter, as in the same degree, would be entirely excluded by the former.

A paternal uncle, again, related by both sides, meaning thereby a brother of the deceased's father, by the same father and mother, does not exclude a brother of the deceased by the same father only, nor even the son of such brother; but certainly excludes an uncle by the same father only. Further, the son of a *full* paternal uncle does not exclude an uncle, whether paternal or maternal, by the father's side only, except in the particular case formerly quoted, on which all our doctors are agreed; but would, of necessity, exclude the son of such uncle, as being in the same degree. If, for example, therefore, a person dying should leave a brother by the same father only, and a sister by the same father and mother, the brother could in this case take no part of the inheritance, which would descend entirely to the sister; and this rule universally applies not only to all brothers and sisters with regard to each other, and to their children in like manner, but also to all paternal uncles and aunts with respect to each other, and to their descendants; and likewise to all maternal uncles and aunts, and to their children, how low soever.

It does not, however, we observe, apply to paternal uncles and aunts, with regard to those on the mother's side, promiscuously, although these are all, as already observed, included in one description of the same class or series. Their general relation to the deceased, it is true, as derived through one medium, viz. *brotherhood* with his father and mother, would appear to require the general application of this rule without distinction to them all, in the same manner as it applies to all those related by *brotherhood* with the deceased himself; for of the latter a full brother excludes entirely a sister by the same father only, and *vice versa*, as has already been stated. This objection, however, is removed when we consider that the relation of paternal and maternal uncles and aunts being derived through the father and mother, or roots of the deceased, betwixt whom, though equal in degree, no exclusion can take place, their shares or ranks in succession being separate and distinct, it follows that these uncles and aunts, related through them respectively, must

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have likewise separate and distinct ranks in succession ; and hence the rule of exclusion cannot operate promiscuously, notwithstanding their equality in degree. It is therefore established by unanimous assent that a paternal uncle or aunt of the deceased, being of the full blood in manner above alluded to, does not exclude from inheritance a maternal uncle or aunt of the half-blood only, but certainly excludes another paternal uncle or aunt of this latter description. In like manner, a maternal uncle or aunt, who is full brother or sister to the mother of the deceased, does not exclude a paternal uncle or aunt of the half-blood only, but would certainly exclude another maternal uncle or aunt who bore only this imperfect relation.

For example, if a person dying should leave a paternal half-uncle and a maternal full aunt, no exclusion here taking place, the former would inherit two-thirds of the property, and one-third thereof would descend to the latter. Again, if he should leave a maternal half-uncle and a paternal full aunt, the division of inheritance would be guided by the same rule, viz. to the former one-third, as deriving his title from the mother, and two-thirds to the latter ; for it is reported by *Aboo Ayoob*, from the *Imám Jafer Sâdik*, on' whom be peace, to be written in the book of *Aly*, on whom be blessing and peace, " That a paternal aunt is by law in the exact situation of a father ; a maternal aunt in that of a mother ; and, in general, every distant kinsman in the situation of that relation more near through whom his title is derived."

Proof by traditions.

The principle of exclusion by double tie or full blood relationship is established by the following tradition of the *Imám Jafer Sadik*, recorded by *Yuzeed Kunasy* in these words :—“ Your full brother by the same father and mother is preferred to your half-brother by the same father only ; and also the son of your full brother is preferred to the son of your half-brother only ; your paternal uncle, the full brother of your father, to your paternal uncle his brother by the same father only ; and the son of such paternal full uncle to the children of a paternal half-

uncle only." Likewise, by a tradition of the Commander of the Faithful, quoted by *Iarus* in these words: "Surely kinsmen by the same father and mother shall inherit in preference to kinsmen by the same father only."

The second general rule regarding inheritance to be described is, "That every person related to the deceased by both sides, viz. the father's and mother's in any degree of consanguinity, excludes a person having the same relation by the mother's side only from all title to the residue or surplus of an estate after distribution of the shares, but not from his appointed share of inheritance, provided they are both in the same degree;" for a paternal uncle having this full relation does not exclude a sister of the deceased by the same mother only, either from her residuary title or her appointed share, by reason of their disparity in degree. As an example of this general rule, if we suppose the case of two sisters of a person deceased, one his full sister by both parents, and the other his half sister by the mother only, the appointed share of the former being a half, and of the latter a sixth as one, or a third in the event of plurality, which leave a surplus of a third in the first case, and a sixth of the estate in the latter, this surplus or *residuum* would go exclusively to the full sister, in addition to her share, and no part thereof to the other. Again, if we suppose two brothers of the deceased, one by the same father and mother, and the second by the same mother only, the latter, as one in this case, receives only a sixth, or a third, in the event of plurality, viz. his appointed share of inheritance, and all the residue thereof goes to the full brother. The rule is exactly the same with respect to children of brothers and sisters, and to paternal and maternal uncles and aunts and their descendants in the order so often adverted to.

Full kinsmen exclude those by the mother only from the residue.

Such, at least, is the most common and prevalent doctrine amongst our lawyers, of whom many have asserted its confirmation by general assent, seeing that the deficiency or loss by defalcation of an estate, howsoever occasioned, must invariably affect the relation by both sides; and consequently the surplus or *residuum* after the distribution of the



appointed shares should in justice be applied to compensate their loss. For example, if we suppose, together with a full sister and one by the mother only, a husband also, or a widow of the deceased, to exist, the full sister can only receive what remains of the estate after distribution of the appointed shares to the other two; and thus, as the husband, for example, is entitled to one-half of the whole property, and the sister, by the mother's side, to a sixth, there remains only a third for the full sister, who consequently, in this example, suffers a deficiency of one-sixth in her appointed share of succession. There is, besides, an express tradition of the Commander of the Faithful, upon whom be peace, in confirmation of this rule recorded by *Aboo Omar al Abdy*, in these words:—“Brothers or sisters by the mother can never inherit more than a *third*, nor can their share be less than a *sixth*.”

As do also those related by the father's side.

It is further to be remarked that a person related by the father's side only supplies the place of a *full* kinsman upon failure of the latter in all cases, and therefore excludes those related by the mother's side from all residuary title, in like manner as the former. This is agreeable to the doctrine of *Sudook* and most of our lawyers, because the full kinsman and he by the father's side only, on failure of the former, suffering alike the loss or deficiency, they ought in justice to have a similar exclusive title to the *residuum* or surplus. Besides, there is a positive judgment to this effect of the *Imám Mohummud Bákir*, on whom be peace, quoted by *Mohummud Ebn Mooslim*, in these words:—“I inquired respecting the son of a sister by the father's side, with the son of a sister by the same mother only. He replied, ‘To the latter a *sixth*, and all that remains to the former.’”

A person having two relations does not exclude him having one, but receives a twofold

The third general maxim alluded to is, “That every person having two different relations to the deceased of a nature whereof one impedes not the other, does not exclude a person having only one relation, provided it be in the same degree; but the former receives two portions of inheritance in virtue of his double title, and the latter has only one portion in virtue of his single relation.”

This principle is ratified by unanimous assent without any difference of opinion, because exclusion from inheritance is founded by law on the disparity of degrees in propinquity and distance, and by no means on the unity or plurality of relationship.

If, therefore, a person deceased should leave one maternal uncle, and a paternal uncle who is also uncle by the mother's side, the maternal uncle would receive first a third of the inheritance, the paternal uncle as such alone would inherit two-thirds; and further, in virtue of his relation by the mother's side, would be entitled to half the portion first allotted to the maternal uncle; in reality the latter's portion would be only one-sixth of the estate, and five-sixths thereof would go to the former, in the same manner as if the deceased had left one paternal uncle and two uncles by the mother's side, because each of the sides by which the first is related founds equally a title to succession, as is clearly proved by the absolute terms in which the various traditional documents to this effect are conveyed.

To illustrate the possibility of these two relations being combined in one person, let us suppose that *Zuyd*, for example, marries *Tulha*, who is half-sister to his half-brother, either by the father's or mother's side, but in such manner as that no relation subsists between the spouses: that *Zuyd* has a son by a former wife, and *Tulha* has had a daughter by a former husband; these two intermarry, and have a son named *Omur*; *Zuyd* also has a son by his wife *Tulha*, whom we shall call *Bukur*. Now this *Bukur* is consequently paternal uncle to *Omur*, being the half-brother of his father, whilst he is also maternal uncle, being half-brother by the mother's side of his mother.

But a more simple and obvious example occurs in supposing any person whom we shall name *Zuyd* to have a half-brother by the father's side, and a half-sister by the mother's, and these two to intermarry, in which event *Zuyd* is manifestly both paternal and maternal uncle to all the offspring of that marriage.

*Of Inheritance by Affinity.***Marriage.**

A husband and wife universally receive a fixed share of inheritance, from which no heir can exclude them: the former a half or a fourth, and the latter a fourth or an eighth.

The second cause which operates in law a title to succession is affinity or marriage, by virtue of which a surviving husband and wife enjoy respectively a definite and fixed share of the deceased spouse's inheritance, nor can either be excluded from that share by any heir whatsoever; but, on the contrary, they are associated and inherit with every class and description of heirs, whether by consanguinity or patronage, and this by unanimous assent, agreeable to the word of Almighty God: "And for you is the half of what your wives shall leave if they have no issue; but if they have issue, then ye shall have a fourth part of what they leave after the legacies they may bequeath and payment of their debts. They also shall inherit the fourth of what ye shall leave in case ye have no issue; but if ye have issue, then they shall receive an eighth part of your inheritance, after the legacies ye may bequeath and payment of your debts." Further, there is a tradition of the *Inám Mohummud Bâkir*, upon whom be peace, quoted by *Aboo Miázâ* in these words: "Verily, Almighty God hath included a husband and wife amongst every description of heirs, and their shares of inheritance can, therefore, never be less than a fourth and an eighth of the property." Another tradition of the same *Inám* is reported by *Mohummud Ebn Mooslim* in these words: "A husband can never receive less than a half, if there be no issue, nor can the share of a wife be less than a fourth, if there be no issue; but if there should be issue, the husband in this case takes a fourth, and the share of a widow in this event is an eighth of the property." To the same effect are many other authentic documents.

Thus, a husband and wife have each their appointed shares of inheritance in every possible situation, and the remainder of the estate, only after payment of these, descends to the other heirs, whether by consanguinity or patronage, if such exist; if otherwise, as where a wife may die leaving no heir of any description, save her husband, and the succession is thus limited to him and

the *Imám* or public treasury, the husband in this event takes not only his appointed share, viz., a half, but has also a residuary title to the remainder. Such, at least, is the most common and prevalent doctrine, which, further, the two *Shaikhs*,<sup>6</sup> as well as *Sayd Moortuza*, have declared to be incontestable, by reason of an authentic tradition related by *Aboo Buseer* in these words: "I was present with the *Imám Jáfer Sídik* when he assembled the people to prayer, and was informed of a woman's decease, who had left her husband, and no other heir. He replied, 'The property goes all to her husband.'" And another decision of the same *Imám*, in the case of a woman who left her husband, and no other relations known, viz., "The succession is for the husband entirely;" as well as several other authentic documents to a similar effect.

A husband has also a residuary title in preference to the public treasury.

It is otherwise in the case of a husband's decease leaving no heirs of any description save his widow, for she receives only her appointed share, viz. a fourth part of his property, and the remaining three-fourths go to the *Imám* or public treasury, as a widow has no residuary title in any situation whatsoever, according to the most prevalent opinion, and to a positive judgment of the *Imám Mohummud Bakir*, on whom be peace, quoted by *Mohummud Ebu Mooslim*, in the instance of a man who died leaving only his widow, to this effect: "She receives only a fourth part, and the residue goes to the *Imám*." To the same purport are several other authentic documents; and the distinction between a surviving husband and a widow is further expressly confirmed by *Allamee* in his *Tuhreer*, by the Martyr in his *Loomaa*, and likewise by the *Shaikh*.<sup>7</sup>

A widow has no residuary title.

It is a prevalent opinion amongst all our doctors, that marriage contracted in sickness or upon deathbed does not found a title to inheritance in the widow; that deathbed divorce, on the other hand, does not operate her exclusion; and, further, that temporary marriage, or contracts

<sup>6</sup> *Shaikh Aboo Jáfer Toosy* and *Shaikh Moofeed*.

<sup>7</sup> *Aboo Jáfer Toosy*.

of *Mootâ*, by no means establish a title to succession in either of the parties. To illustrate these principles of law, the following three sections are requisite:—

## SECTION FIRST.

Deathbed contracts of marriage if not consummated found no title to inheritance.

If a sick man contract marriage with a woman, whether his distemper be dangerous or otherwise, and die of that distemper, without intervenient recovery or convalescence, previous also to consummation of his nuptials, such contract of marriage is thereby null, or in other words, is not considered to be established in law, until consummation, or recovery of the husband from that disease with which he was afflicted at the time. It follows that in this case there can be no title of inheritance between the parties, no dower even incumbent on the husband, and that the woman is not bound to observe an *Idlut* or term of probation. This law of annulment of contracts entered into by parties legally qualified to contract, without divorce or voluntary dissolution, may certainly at first sight appear irreconcilable, but all objection and doubt is removed necessarily by a reference to those authentic proofs of their nullity, already detailed in the book of marriage.<sup>8</sup>

If the husband consummates or recovers, and afterwards dies, the right of inheritance is established

If, on the other hand, the contracting party should die of any other complaint, or of that same distemper after intervenient recovery, or after consummation of his marriage, the contract is, in this case, valid and binding, consequently the right of succession fully established beyond the possibility of doubt by reason of the absolute and comprehensive sense of the sacred text already quoted, and the particular traditions establishing, in this case, the validity of contract which were formerly referred to in treating of marriage.<sup>9</sup>

If the wife should die

If, again, the woman should die previous to consum-

<sup>8</sup> This Book, which was probably added to the Digest compiled under the superintendence of Sir William Jones, by the translator, was never published, and has not been found among his papers which have come to my hands.—Ed.

<sup>9</sup> See last note.

mation of the marriage with a man who was sick at the period of contract, and notwithstanding survives her, his right of inheritance is liable to difficulty and doubt, arising, on the one hand, from the validity of contract, which, if allowed, gives room for the application of the sacred text; and, on the other, from a consideration that its validity is suspended upon recovery, or consummation of the husband, neither of which is in this case established. The first suggestion, however, appears the stronger, as, from the husband's survival, in whose prior death alone, without consummation or recovery, the objection to validity of contract could in such cases occur, there appears full ground for the application of the sacred text regarding inheritance by marriage.

Upon this principle, further, if a woman on her deathbed, or whilst afflicted with any distemper, should contract herself in marriage to a man in health at the time, but who dies without consummation, and she thus survives him, the contract is perfectly valid according to the best authority, and the right of inheritance fully established, which doctrine both *Alláma* and the Martyr have approved. The various arguments and further examples connected with this subject may be found at large in the "Book of Marriage."

the husband inherits.

As also when she contracts herself in sickness and survives, her right of succession is established.

## SECTION SECOND.

If a husband divorce his wife upon deathbed or whilst afflicted by any distemper, of which, without intervenient recovery, he afterwards dies, such divorce has no operation in law to deprive the widow of her right of succession, unless a full year shall have elapsed from the date thereof until his death, or that she herself in the meantime have married another. If, on the contrary, the husband survive a full year from the date of divorce, or recover of that distemper, and afterwards die within the year; or the widow herself has during his illness taken another husband: in each and all of these cases, she has no title whatever to inherit any part of his property.

Deathbed divorce does not cut off the right of succession unless a year shall elapse.

This principle is established by various authentic Proof.

traditions generally known, of which one is reported by *Aboo Abass* from the *Imám Jáfer Sádik*, on whom be peace, in the following words:—

“If a man divorce his wife whilst in sickness, she is still considered as having a right to inherit whilst he continues in that sickness, even after her *Iddut* has elapsed, should he not recover therefrom.” The reporter thus proceeds: “I inquired what if his distemper should be prolonged? He replied, ‘She inherits although it should last for a year;’” or, as this answer has been conveyed by another reporter, “She inherits if he should die of that distemper during the influence of which he divorced her without intervenient convalescence.” A further judgment of the same *Imám* is recorded by *Abdool Rahman Ebn Hujjaj* upon the question of deathbed divorce to the following effect: “Should the husband die of that disease and the woman have continued single, she enjoys her share of his succession; but should she marry another person, as this clearly demonstrates her satisfaction at what he has done, she can have no claim to inheritance.” This decision is reported by *Sumáa* in a manner somewhat differing from the above, viz.: “She inherits as long as she continues in her *Iddut* (*i.e.* does not marry another), and if he has divorced her with an intention to injure her by depriving her of this title, she inherits although he should survive a full year; but if beyond this time even a single day, she has no longer, in any event, a claim to inheritance.” In another report it is expressed that the following question was particularly put to the *Imám*:—“What is the longest term of sickness during which the right of a divorced wife to inherit may be preserved?” and this answer is also recorded: “that the husband shall continue ill thereof until he dies, and that within a year.”

Another tradition of the *Imám Jáfer Sádik*, on whom be peace, as recorded by *Yoonas Ebn Yakoob* in these words:—“I inquired of him the cause why a wife when divorced by her husband in sickness with the intention to injure her should, notwithstanding, enjoy her portion of inheritance, whilst the husband, should he survive her

after divorce, has no title whatsoever to her succession." He replied,—“That intention to injure is itself the manifest cause; for as the husband, conceiving himself to be on deathbed, thus attempts to deprive his wife of her inheritance, the right is protected and secured by law as a punishment for his unjust attempt.”

In consequence of this report a question of some difficulty has arisen, viz. whether the right of a wife in these cases of divorce depends upon the suspicion of intended injury by the husband; or whether it is a consequence of deathbed divorce alone, even although the suspicion be obviated. A majority of our lawyers have adopted the latter opinion, founded on the absolute and general sense of most traditions upon this subject; but the *Sheikh*, in his *Estulisâr*, has expressed a decided preference of the former doctrine, on account of the particular cause assigned in some traditions as above, from which it may be obviously inferred that if the suspicion of injury be removed, as where a wife solicits her own divorce, she can have no title to inheritance. This opinion is further strengthened and confirmed by a report of *Mohammed Ebn Rasem* from the *Imâm Jâfer Sâlik*, on whom be peace, in the following words:—“No woman who solicits and obtains her own divorce, whether by *khoola* or paying a compensation, by *mabaraat* or mutual release, or in any other mode, at her own request, from her husband in sickness, can inherit his property if he dies, because all connection and mutual regard betwixt them is thereby dissolved.” And doubtless such transactions as these have an obvious effect to remove all suspicion or reproach against the divorcer, whose act, on the contrary, under such circumstances, can only be considered as proceeding upon the wife’s consent and acquiescence in the surrender of her rights; consequently the general sense of those traditions alluded to, must be restricted by this latter, nor are they by any means difficult to be reconciled.

Distinction betwixt divorce with an intention to injure, and that by mutual consent.

At the same time the obvious meaning of all traditions recorded upon this subject must lead us to consider deathbed divorce as improper and highly unbecoming in a hus-



band, from its tendency to injure as depriving his wife of her right of inheritance, although such act of divorce is valid in law, and entitles the woman to marry again after lapse of her *iddut*. Should she avail herself of this privilege, and should the husband's illness be prolonged above a year, or should he recover for a period and die of a new distemper, in all and each of these cases there is no right of inheritance betwixt them; whereas in every other case a wife divorced upon deathbed takes her share of the husband's succession, provided she observe the appointed *iddut*, or term of probation and abstinence after his death.

A husband has no claim to inherit from a wife irreversibly divorced.

All that has been hitherto observed proceeds, however, solely on a supposition of the husband's death after irreversible divorce of his wife. If, on the other hand, the wife should die after the divorce, there is no difficulty whatever in pronouncing the husband's total and universal want of title to her succession, provided the divorce was irreversible, in the same manner; as our doctors have agreed that reversible divorce, should the wife die before expiration of her *iddut*, does not debar her husband from inheritance, because a woman repudiated by a reversible divorce is still, in law, considered a wife, as long as she continues in her *iddut*; and, consequently, the right of inheritance continues established betwixt them, whether he or she dies first; which principle is further confirmed by an authentic tradition of the *Imám Mohummud Bákir*, on whom be peace, quoted by *Zurara*, in these words:—"If a man divorces his wife they are still the heirs of each other, so long as she continues in her *iddut*; but should he repudiate her by three divorces, he can never after return, and there is no longer inheritance betwixt them."

But a reversible divorce does not preclude his right of succession.

### SECTION THIRD.

Temporary marriage, or *Mootá*, founds no title of inheritance.

There is no right of inheritance betwixt persons connected in temporary marriage, or under a contract of *mootá*, according to the most general and prevalent opinion, because the name of a *wife* does not in reality apply to a woman contracted in *mootá*, for of these a man may lawfully

possess more than *four* at a time, agreeable to a report of *Aboo Buseer* from the *Imám Jáfer Sádik*, on whom be peace, in the words:—"I inquired respecting women contracted in *mootá*, whether their number was restricted to four. He replied, 'No! nor to *seventy*;' " whereas of wives it is universally agreed that their number cannot exceed four. Since then it appears that these women are not in reality wives, it follows that they cannot be included in the law of marriage, nor comprehended in the sense and intention of the sacred text already quoted. Besides, we have an express tradition of the *Imám Jáfer Sádik*, on whom be peace, to this effect, quoted by *Sáeed Ebn Yuhar*, in the words:—"I inquired regarding a woman who contracts herself in *mootá* without stipulating the right of inheritance. He replied, 'There is no such title betwixt them, whether it be stipulated or not.'" To the same effect are various other authentic traditions generally known, of which one is quoted by *Foozeyl Ebn Yusár*, from the *Imám Jáfer Sádik*, on whom be peace, in these words:—"I asked respecting a woman contracted in *mootá*. He replied, 'She is one of your female slaves.'" Another tradition of the same *Imám* is in these words:—"Connection<sup>10</sup> with women is of three sorts: one establishing the right of inheritance, which is that by permanent marriage; one that does not establish this title, viz. *mootá*; and, thirdly, *milk ool yemeen*, or property."

*Of Inheritance by Dominion or Patronage.*

The third cause described in the opening of this book as founding in law a title to succession was *Wula*, a term of various application, but signifying in this place the connection of one of two persons with the other, produced first by emancipation from slavery; second, by responsibility for crimes, observing, however, this order in succession; and thirdly, upon failure of these two descriptions, bestowing a title of succession upon the *Imám* or public treasury at his disposal, who is by law the heir of every person

*Wula*, or patronage.

Of three descriptions, each inheriting in order upon failure of the preceding.

<sup>10</sup> Literally, "Pudenda Mulierum."

deceased having no heir besides, and thus may be considered in the third class or degree of succession by *Wala*.

But neither  
with blood  
relations.

It is scarcely necessary to remark that no right of inheritance can be founded on this title except upon entire and absolute failure of all connections by blood; and that whilst of the latter any individual, however remote, exists, no matter if an enfranchised slave, no patron or surety for offences can claim any right of succession, nor can this right by any means devolve on the *Imám*. This principle is established by unanimous assent, both on account of the sacred text, "Relations by blood are preferred," &c., and of a tradition reported by *Jáber Ansary* from the *Imám Mohamnud Bákir*, on whom be peace, to this effect, "The Commander of the Faithful *Aly* uniformly bestowed the inheritance of persons deceased upon their blood relations in preference of manumitters and patrons." Also of a tradition quoted by *Mohamnud Ebn Keys* from the same *Imám*, in these words: "The Commander of the Faithful, on whom be blessing and peace, was appealed to in the case of a maternal aunt who disputed with the master of a freedman deceased regarding his succession, upon which, pronouncing aloud the words of the sacred text" (above quoted), "he adjudged the whole inheritance to the aunt, excluding the manumittor entirely," to which effect there are many other authentic traditions generally known.

Under this third title of inheritance there are three classes of heirs to be considered; and, first,

#### *Of the Wala of Manumission.*

The manumittor is heir to his freedman, but not the freedman to his manumittor.

The inheritance of a freedman or enfranchised slave is particularly ordained by law to descend to his manumittor, or the person who had set him free, but by no means that of the latter to the former according to the most prevalent opinion, on which the *Sheikh* has even denied the possibility of doubt by reason of various authentic traditions, particularly that recorded by *Hulby* and *Mohamnud Ebn Mooslim* from the *Imám Jáfer Sádik*, on whom be peace, in these words: "The Prophet of

God hath declared that the '*Wula* of a slave belongs to the person who emancipates him ;' " and another of still more obvious effect recorded from the Prophet in these words: " Verily *Wula* is to him *only* who emancipates." Because the restrictive sense of the word *only* applied in this tradition clearly proves the exclusion of him who has not emancipated or the person set free. Further, it is recorded by *Sabil Ebn Dinar* as part of a discourse upon rights and duties by the fourth *Imam*,<sup>11</sup> on whom be peace, that he thus expressed himself, " But with regard to your slave whom you have benevolently set free, know that Almighty God will render his ransom a medium of your approach to Himself, and of your salvation from the fire of hell, that your reward in this life is his inheritance should he have no relation by blood, as a compensation for your loss of property, and heaven in the life to come."

Besides, a title to inheritance can only be established by a legal cause in law, and there is obviously no cause in law why a person already benefited by obtaining his freedom should be heir to his benefactor, whence a manifest distinction occurs betwixt the right of inheritance by blood and marriage where the parties are reciprocally heirs to one another, and that by *Wula* when the title is limited to the benefactor alone.

In cases, however, of mutual *Wula* betwixt two parties, mutual or reciprocal succession may necessarily be established by reason of the existence of a legal cause, viz. manumission on both sides; and thus if a freedman should purchase the father of his emancipator and set him free, such freedman might necessarily inherit from the father of his benefactor, in the same manner as the latter would be heirs to the freedman.

In order to establish the right of inheritance by emancipation, certain conditions are imposed by law. Of these, the first is that it should be a voluntary and gratuitous act, not urged by necessity or legal obligation of any sort. Thus, if a person emancipate his slave through necessity,

Case of  
reciprocal  
*Wula*.

The eman-  
cipation  
must be  
voluntary.

<sup>11</sup> *Zeyn ool Abedeen*, surnamed *Sujjad*.

as an atonement for a crime, performance of a vow, and the like, or if a slave become free, *sui juris*, as where maimed by his master, infected by a pestilential disease, or by relation to his master within the prohibited degrees, all these modes of emancipation constitute the slave what is termed in law a *Sâceba*, and by no means establish the right of *Wula* in the master; but on the contrary, of such freedmen the *Imâm* is sole heir, should they have no patron or surety for their offences, in which event the patron's right of inheritance is preferred.

Tradi-  
tional  
proof of  
this condi-  
tion.

This principle is demonstrated by several authentic traditions, of which one is reported by *Ebn Rubab* in the following words:—"I asked the *Imâm Mohummud Bâkir*, on whom be peace, respecting *Sâcebas*; he replied, 'Observe in the *Korân* wherever the freeing of a slave is enjoined, and every such slave is in law a *Sâceba* over whom there is no *Wula* (*i. e.* no right of inheritance,) to any person save God, and whatsoever appertaineth to God belongs of necessity to the Prophet, after whom to the *Imâm*, who is therefore liable for the fines or offences of such slave, and consequently takes the inheritance.'" To the same effect is a report of *Omar Ebn Aly Alwas*, from the same *Imam*, on whom be peace; but the general law expressed in both these, as well as in many other similar traditions, for vesting succession in the *Imam*, must obviously be limited to such cases where no individual has taken upon himself responsibility for the slave's fines or offences, which restriction is indeed fully established by several other documents.

The above condition is further supported by a tradition of the *Imâm Jâfer Sâdik*, on whom be peace, quoted by *Hashemy* in these words:—"I put the case of an emancipated slave, inquiring the extent of his freedom and whether he could nominate whom he pleased, his *patron* or *heir*? The *Imâm* replied that if emancipated gratuitously and voluntarily for the sake of God, the emancipator is still his patron and heir; but if created a *Sâceba* he is entirely at his own disposal, and may constitute whom he pleases his heir;" that is, in other words, if a master should

voluntarily, with a pious intention, liberate his slave, he is the patron and heir of that freedman, unless at the period of emancipation he should disavow and renounce all future responsibility for his fines or offences; in which case any other person taking upon himself this responsibility is the heir, as will hereafter appear; but should the manumitter continue responsible he is still the heir of his freedman.

To the same effect is a tradition of the *Imám Mohummad Bákir*, recorded by *Aboo Buseer* in these words:—"The Commander of the Faithful, on whom be blessing and peace, passed judgment in the instance of a person who had maimed his slave, that such slave is thereby absolutely free, his former master has no authority over him whatsoever, and he is *Sáeaba*, may go where he pleases, and may constitute whom he pleases his patron, such person becoming liable for his fines or offences, and eventually inheriting his property under this latter title, not by the right of manumission."

This doctrine is further confirmed by the obvious sense of his saying, on whom be the blessing of God, *Wula* is for him who emancipates, because hence it is evident that the act of the manumitter establishes this title, and consequently the slave's emancipation *sui juris*, or by a necessity of law, cannot possibly found a claim thereto.

The *second* condition required to establish inheritance by emancipation is: "That the manumitter shall not have qualified his act with a renunciation of all future responsibility for the freedman's fines or offences;" because should he declare himself absolved of these he can have no further claim of *Wula* whatsoever against the freedman by unanimous assent of all our doctors; but, on the contrary, who ever becomes responsible is the heir; and of course the succession is vested in the *Imám*, as is demonstrated by the report of *Hashemy* above quoted, and by another of *Aboo Raaba* from the *Imám Jafer Sádik*, on whom be peace, in these words:—"Being asked regarding a *Sáeaba* or absolute freedman," he replied, "As where a man emancipates his slave, saying, Go wherever you please, I have nothing to do with your inheritance, nor am I here-

Emancipation must not be qualified by renunciation of future patronage or liability for fines.

after liable for your offences ; and calling two witnesses to witness his renunciation.”

Renunciation as a bar to inheritance does not require that witnesses be adduced.

To the same effect there are also other authentic documents, and hereupon a question of some importance has arisen amongst our doctors, viz. “Whether or not it is necessary, in order to do away the right of *wala* in a master by renunciation of responsibility, that he shall have called evidences to witness his release ?” The opinion of the *Sheikh*, as well as of *Sadook* and of *Askafy*, would lead us to consider this evidence as indispensable to the validity of the master’s renunciation, as is the case in declarations of divorce, and which is doubtless also apparently intended by the sense of the foregoing and other similar traditions ; yet it is by far the more general opinion that adducing of evidence is required merely to establish the master’s release where alleged in disputes with third parties, and by no means to the validity thereof, as doing away the right of inheritance. . This latter would appear also the best supported doctrine ; for the intention of those traditions in directing evidence is that, since the establishment of release from responsibility before a judge necessarily depends upon proof by the claimant, it is proper that the master should be prepared by having called witnesses at the time, lest he be afterwards subjected for the consequence ; but not by any means that the validity of his renunciation as a personal bar to inheritance is suspended upon this form ; and to this effect we have many documents on traditional record.

The freedman must have no blood relations qualified to inherit.

*Thirdly.* It is an obvious indispensable condition of inheritance by manumission that the freedman shall leave no consanguineous heirs, because these have a necessary preference in law over every description of claimants by *wala*, as has already been particularly detailed from express traditions. With respect, on the other hand, to the existence or failure of relations by affinity, this is no condition by unanimous assent ; for these may be associated and inherit with heirs of every description, as has already been observed in treating of inheritance by marriage. Thus, if an emancipated slave should leave either a husband or a

wife, these take their appointed share of the estate, and the remainder goes to the manumitters.

The *fourth* condition required by law to establish the title of succession by emancipation, is, "That none of the parents of the freedman or freedwoman shall have been originally a free subject; because if, one of the parents was originally free, the children are by law dependants upon that one in original freedom, and consequently there can be no emancipation of them, nor any right of *wula* in the emancipator of their other parent. This principle would appear to be established by the unanimous assent of all our doctors, although certainly contradicted by a tradition to be hereafter quoted as on record by *Ayees Ebu Kasim*, and to which, therefore, we now refer."

If any of the parents were originally free, there is no title of *Wula*.

If, however, all those conditions required in *wula* should exist, the manumitter, whether male or female, one or more, invariably succeed to the property of their emancipated slaves, and this without any dispute or difference of opinion by reason of the various traditions already quoted, and many others to a similar effect. Upon failure, again, of the immediate manumitter, the settlement of succession admits of more difficulty, and has given rise to a variety of opinions. The *Sheikh*, in his *Nehayut*, and others who follow his doctrines, have declared that the inheritance in this case descends to the male children of the manumitter, but not to the females; and on failure of those, to his *asbat*, or those paternal male relations who are his *akilas*, *i.e.* liable for the payment of all fines that may be imposed upon him by law for offences committed through error or misadventure. These are his brothers by the same father and mother and by the same father only, paternal grandfathers and paternal uncles and their sons, both full uncles and those by the same father only. This, however, upon the supposition that the manumitter was a man. Where, on the other hand, a woman emancipates her slave, his inheritance, should she die before him, goes to her *asbat*, or paternal male kindred above mentioned, in preference and exclusion of all her children, whether male or female, who have no portion whatever.



This doctrine of the *Sheikh's* is the best and most approved of all the various opinions recorded on the subject, and is confirmed by many authentic traditions generally known. Of these, one is reported by *Booreyd Ajaly*, in the following words, from the *Imám Jáfer Sádik*, on whom be peace: "I stated the case of a person who had resolved to emancipate a slave, but dying before he could execute his intention, directed by will that his son should perform it. The son accordingly purchases a slave, and sets him free, in name of his deceased parent. Should this freedman die leaving property, who is his heir? The *Imám* replied, 'If the emancipation resolved on by the father was voluntary, so as to establish the right of *Wula*, and he directed the son to perform it in his name, the inheritance of such freedman descends in common to all the male children of the deceased, and this particular son, who has purchased and emancipated by the father's command, is merely as one of the others, although the purchase may have been made with his own exclusive property.'"

Another decision particularly in point is quoted by *Mohummud Ebn Keys*, of the *Imám Mohummud Bákir*, on whom be peace, in the instance of a man who had emancipated his slave, stipulating the right of *Wula*, and died leaving no children, except females, after which the freedman dying possessed of property, a dispute arose between the daughters and paternal male relatives of the manumitter respecting the succession, and the *Imám* adjudged the whole inheritance to the latter or *akelas*, who were responsible for his fines. A second tradition from the same *Imám* is quoted in the following words:—"The Commander of the Faithful, upon whom be peace, was appealed to, in the instance of a woman deceased, who had emancipated her slave, stipulating *Wula*, and left a son, who claimed the freedman's succession; he adjudged, however, the whole inheritance to her *ásbát* or paternal kindred and *akelas*, in preference and exclusion of her children."

The immediate pa-

It is further a common and established maxim amongst

our doctors that the father and mother of a manumittor must be associated with his male children in the right of succession to his freedman, and also upon failure of his immediate male offspring that their children supply their places, observing always the rule of precedence by proximity in degree, already so often described in treating of consanguinity. Thus, if a manumittor should leave his father and mother and also male children, each of the parents enjoy their appointed share of the freedman's succession, as do also the sons their regular portion, in the same manner as under a consanguineous title, being all in the same class and degree; and if only one parent or one son of the manumittor exist, such individual takes the whole property of his freedman. With respect, further, to grandchildren upon failure of immediate sons, each of these takes the share allotted to him through whom their relation is derived, without distinction of male or female; for amongst the lower descendants this distinction is not observed, their first ancestor from the manumittor being a male.

rents of a manumittor are associated in the right of *Wula* with his male children, upon failure of whom their descendants supply the place.

And amongst the latter, males and females are without distinction included.

Brothers, again, of a manumittor do not inherit with his sons, or with their descendants, how low soever in degree, nor do paternal uncles with brothers; and, in general, the same arrangement is here to be observed respecting succession to the right of *Wula*, and precedence therein by proximity, as formerly detailed for inheritance by blood. Thus, if a manumittor leave his father and one son, the former takes a sixth part of the freedman's succession, and all the remainder goes to the son. If, in the room of a father, we substitute in this example the manumittor's grandfather, the whole property of the freedman would descend to the son; and, further, if we suppose a brother and grandfather of the manumittor to exist, the property would be divided equally betwixt them. Also, if we suppose a brother's son and a grandfather to remain, each of these would inherit half the freedman's property, neither excluding the other as being of separate descriptions in one series or class, whereas, in the case of a grandfather and paternal uncle, the former

All these exclude the *Asbat*, who inherit also according to proximity in class and degree.

would take all the succession, excluding the latter entirely by reason of his precedence in class, as has already been proved by many authentic reports and traditional documents.

Sisters and grand-mothers have no right of *Wula*, nor have any maternal relations a claim thereto.

As a necessary consequence of this settlement of succession to emancipated slaves in the *àsbat* or paternal male kindred above mentioned, who are *akelus* of the manumittor, after failure of his male offspring and their descendants, however low, which has been established by express traditions, it follows that sisters and grandmothers, whether by the father's or mother's side, have no title whatsoever of inheritance by *Wula*, in the same manner as all relations by the mother's side only are totally excluded from the benefit of this title, like brothers and sisters of the manumittor by the same mother only, his maternal uncles and aunts, and grandfathers and grandmothers by the mother's side, because neither of all these are considered *àsbat* in law, nor do they bear any responsibility for crimes or offences, as will appear from a reference to the book of *Decât* on fines.

A title to succession by *Wula*, like all other ground of inheritance, is incapable of transfer in property.

It has never been disputed by any of our doctors that *Wula* is a legal ground of inheritance; but whether it is to be considered as actual property in the person who possesses this title, capable of transfer and the other uses to which property may be applied, is a question that has admitted of opposite solutions. A majority, however, have decided in the negative, as being the radical condition of all legal claims, to oppose or obviate which no traditional authority or other just cause can be alleged; and besides to demonstrate that *Wula* is not property we have the saying of him, on whom be blessing and peace: "The relationship of *Wula* is like that of consanguinity, which can neither be sold nor given away."

Since, therefore, the right of inheritance by blood is not considered property in law, and neither admits of sale, donation, reservation in sale, or any of the other modes of transfer, so also the title of *Wula*, which is expressly as above declared to resemble it. Further, to prove the invalidity of its reservation in sale, we have an express

tradition recorded by *Ayees Ebn Rasem* from the *Imám Jáfer Sádik*, on whom be peace, in these words: “*Aysha* reported to the Prophet, on whom be blessing and peace, that the family of *Booreyra* had sold a female slave, reserving by stipulation the right of *Wula* to themselves in event of manumission by the purchaser. He replied, ‘*Wula* belongs to the emancipator,’ and annulled their stipulation.”

It is to be observed that, in the same manner as a manumittor and his heirs above specified succeed to the property of his enfranchised slave upon failure of consanguineous relations to that slave, so also they inherit the property of his children, should these latter leave no consanguineous heirs. Thus, if a man dies leaving no consanguineous heir, his property goes to his manumittor; if not himself an enfranchised slave, his inheritance is for the manumittor of his father; if his father was not emancipated, the succession is with his grandfather’s manumittor, and so on; as is expressed in a tradition of the *Imám Jáfer Sádik* on whom be peace, quoted by *Ayees Ebn Rasim* in these words: “I inquired respecting a person who had purchased a slave, having children by a free woman, and afterwards set him free: he replied, ‘The *Wula* of these children belongs to his manumittor.’”

Manumittors and their heirs inherit from the children of their freedmen.

If a man dies who was not himself emancipated, but his father the enfranchised slave of one person, and his mother emancipated by another, it is the common and prevalent opinion that the right of succession in this case is vested in the father’s manumittor, in preference and exclusion of the mother’s, because parentage is stronger and more noble on the father’s side than on the mother’s; and consequently that side must be preferred in law. True, in cases where the father is still a slave, and the mother only has been emancipated, the right of *Wula* must belong to her manumittor of necessity from failure of the father’s; which necessity, however, being the sole cause of its establishment, should the father be afterwards set free and the cause thereof thus obviated, the title reverts to his master, in whom it is permanently established. This is termed in law *Jurr-ool-*

The father’s manumittor is preferred to the mother’s in *Wula* of their offspring.

*wula*, i.e. shifting or transferring the right of inheritance by emancipation, first established in the mother's manumittor from necessity by failure of the father's, to its radical possessor upon the removal of the cause.

It is, however, to be observed that this transfer can only take place in those instances where the necessity may be obviated previous to the child's death: for after decease and possession of the inheritance by the mother's manumittor, there can be no transfer to the father's master in consequence of his subsequent emancipation, by reason of the prior title on the mother's side, which cannot be done away after possession, as all our doctors have agreed.

Case of a mother emancipated whilst both father and grandfather are slaves. If the grandfather is first set free *Wula* shifts from the mother's master to his.

If of the child above mentioned the mother had only been emancipated, whilst both father and grandfather were slaves, consequently the right of *Wula* from necessity established in the mother's manumittor, and we suppose the grandfather now to be set free previous to the father, a question of some importance upon this example may arise, viz. "whether the right of *Wula* would here shift and be transferred from the mother's master to the grandfather's?" The *Sheikh* has expressly decided in the affirmative, considering the grandfather invariably in the place of a father, i.e., on the strongest side of parentage, and consequently that by the same rule which transfers *Wula* from the mother's manumittor to the father's, this title must also be shifted to the grandfather's should he be first set free, which decision is further confirmed by *Allama Hilly* and several others. The author of the *Shuraya*,<sup>12</sup> however, would appear to have entertained doubts as to this decision, founded upon the objection stated by many to a grandfather being considered in reality the same as a father during the existence of the latter even in slavery, who, as obviously nearer in degree, although himself debarred from succession by slavery, ought nevertheless to impede the establishment of this title in one more remote.

If the father be

Considering, however, the doctrine of the *Sheikh* as

<sup>12</sup> *Abool Kasim*, surnamed *Mohukkik*.

established, and deciding the example above, if we suppose the father's subsequent emancipation after transfer of *Wula* to the grandfather's master from the mother's, this title must now again be shifted to the father's manumittor, for its establishment in the grandfather's proceeding evidently upon necessity, on the slavery of the father, which is now obviated and removed, the title must revert to its radical possessor by the same rule already described for transfer from the mother's to the father's manumittor, and this species is termed in law *Jurr-ool-jurr*, or transfer of a transfer, the right being first shifted to the grandfather's master from the mother's and then again from him transferred to the emancipator of the father. According to the other doctrine, if we suppose the father's emancipation as above, the *Wula* would at once be transferred from the mother's master to his; and hence it appears that this latter species of *Jurr* cannot at all be established if we admit the force of the objection stated against the title of the grandfather's manumittor. If, on the other hand, the father should die a slave, and, admitting the force of the above objection, should the right of *Wula*, or should it not, now at all events, be shifted to the grandfather's manumittor from the mother's, in virtue of his previous emancipation? This question still admits of a doubt on the one hand, because the only objection to its former transfer being the father's existence in slavery, which is now obviated by his death, there appears strong ground for renewing the claim of the grandfather's manumittor, and shifting the *Wula* from the mother's; whilst on the other hand, as this transfer did not immediately follow the grandfather's emancipation, but, on the contrary, the right was established in the person of the mother's master, there does not appear sufficient cause now to annul it.

Upon the whole, seeing the various difficulties and disadvantages which would occur from the admission of this latter doctrine, and the obvious facility of decision in all cases by following the opinion of the *Sheikh* and others in support of the first and second species of transfer,

subsequently emancipated, a second transfer of *Wula* must take place.

we may safely consider his opinion as a fixed and established rule of law. Further, it appears proper here to remark that if any one of the parents of such person, not himself emancipated, was originally or independently free, there can be no title of *Wula* over him to any person whatever, as has indeed already been hinted at in delineating the conditions of this right, because a child is by law a dependant of the noblest of his parents, or the parent who is originally free. If, therefore, such person should leave no consanguineous heir, his inheritance must go to the *Imám*, or to the surety for his fines by contract in preference, should any person have taken this responsibility, but can by no means be claimed under the *Wula* of emancipation by the manumitter of the other parent. This doctrine has never been apparently contradicted by any of our doctors, although the foregoing tradition, quoted by *Ayees*, has an apparent tendency to controvert it.

If the owner and manumitter of a child and of his parents should be different and distinct persons, each has separately the *Wula* of his own immediate freedman, that of the child resting with his manumitter, and that of the parents entirely with theirs. Thus, if the child were to die without consanguineous heirs, his inheritance goes to his own manumitter alone, and by no means to the emancipator of his parents, because the obvious intention of his saying, upon whom be peace, "*Wula* is for him who emancipates," confers this title upon the immediate and actual emancipator of the slave, who must therefore necessarily be preferred to the benefactor of his parents. Upon failure of him the title descends to his male children and their descendants, after whom to his *Asbat*, but can never be transferred from him to the manumitter of the freedman's parents, because the authority of law for shifting this right is expressly and particularly limited to its transfer from a weaker to a stronger claimant, and by no means from a stronger to a weaker. The *Wula*, therefore, of an actual manumitter over his freedman can never evidently be shifted from him to any other person, by reason of the weakness of all other claims in comparison

If any one of the parents was originally free, there is no *Wula* by emancipation of the other.

If the parent and child are emancipated by distinct owners, each has separately the *Wula* of his own freedman.

The *Wula* of a child's emancipator can never be

to his, and the inheritance of such freedman, upon failure of him and his heirs above mentioned, must invariably go to the *Imám*. transferred to the parent's master.

This fixed principle of law preventing transfer from a stronger to a weaker has a necessary tendency further to prevent the shifting of *Wula* from a father's emancipator to the master of a mother; and hence if a person's father be emancipated whilst his mother is a slave, and the father's manumittor dying should leave no male children or *Asbat*, the mother's subsequent emancipation cannot shift the title of *Wula* to her master for the exact reason already described. It is otherwise when a female slave being emancipated afterwards conceives and bears a child to a husband in slavery, for here the *Wula* of such child must evidently belong to the mother's manumittor, by reason of the father's bondage, and consequent incapacity of his master, whilst the mother's manumittor has a right of property in the child, whose freedom, depending in this case upon that of the mother, is an effect of his bounty, and consequently he alone can be entitled to the *Wula*. Nor from the father's master to the mother's.

To conclude, the arrangement of law with respect to inheritance by the *Wula* of manumission may be thus computed in a few words. Upon failure of the immediate manumittor of a freedman, his children and *Asbat*, the inheritance goes to the manumittor's manumittor if he had any, after whom to his children and *Asbat*. Should there be no *Wula* by immediate emancipation, the inheritance goes to the father's manumittor, after whom to his children and *Asbat*, and on failure of those to the manumittor of the father's manumittor, after whom to his children and *Asbat*, in the same manner and by the same rule which applies to immediate emancipation. Lastly, upon failure of all right of *Wula* by manumission on the father's side: that is, where neither the deceased, his father, grandfather, or other male ancestor has been emancipated, then the inheritance must go to the mother's manumittor and his *Asbat*, on failure of whom to her manumittor's manumittor and his *Asbat*. After these to the manumittor of the maternal grandfather, and so on: observing the foregoing



arrangement and the rule of precedence in each class to the nearest, as already so often described.

*Of Wala by responsibility for offences.*

The patron by contract is heir to his client.

The second class of heirs by *Wala* comprehends such persons as undertake by contract with a person who has no heir either by blood or manumission, the responsibility for all crimes and offences to be by him committed through error or inadvertency, and thereby requiring expiation by fine. That this species of responsibility is one of the causes which operate in law a title to succession, all our doctors are agreed, by reason of a tradition of the *Imám Jâfer Sâdik*, on whom be peace, quoted by *Husham Ebn Salim* in these words:—"If one person becomes bound for another by *Muwâlat*, or contract of amity and patronage, he has a title to his inheritance, and is responsible for his fines." Another judgment of the same *Imám* to a similar effect is recorded in the case of a person who had embraced the faith and entered into a contract of clientage with a believer, viz., "If that believer has become responsible for his fines and offences he is his patron and heir." And to the same purport are many other authentic traditional documents.

Upon failure of all blood relations and claims in virtue of manumission.

But a contract of clientage, should any of these exist, is totally null.

Whilst its validity is totally independent

The right of inheritance, however, upon this title cannot of necessity be established except upon entire and absolute failure of all heirs by consanguinity, and also by manumission, in whatsoever class or degree, whereas its establishment does by no means depend upon the existence or failure of heirs by affinity or marriage. Thus, if a person who enters into an engagement of clientage have a single consanguineous heir, however remote, if his emancipator, or any other person capable of claiming under this title should exist, the contract is totally invalid, and founds no title to succession whatsoever, as is clearly demonstrated both by the sacred text respecting blood relations formerly quoted, and by the various traditions introduced regarding inheritance by manumission. If, on the other hand, the party contracting should have a husband or wife, these take respectively their highest appointed shares of

the property, but do by no means affect the validity of the contract, in virtue whereof the remainder of the client's estate goes to his patron who became responsible.

of the title  
by mar-  
riage.

This contract, it is further to be observed, does not found a mutual or reciprocal title to inheritance betwixt the parties, but, on the contrary, he who becomes responsible, or the patron, alone enjoys this right over his client, and not the latter by any means over the former. Hence,

This con-  
tract does  
not found  
a mutual  
title of in-  
heritance.

if one person should say to another, "I have contracted with you that you shall be liable for all my fines, surety for my offences, that you shall assist and protect me, and when I die you are my heir," which treaty the other ratifies and accepts, he the *acceptor*, or responsible person, alone is the heir, and by no means the *declarer* or client, unless the responsibility should be mutual, in which case doubtless the advantage or title of succession must be also established in favour of both; as where, for example, one person should say, "I have contracted with you to this effect, that you are my *akila*, or responsible for my fines, and I also become liable for yours; that you afford me your aid and protection, and I shall assist and protect you; that you are my heir, and I also am yours," which mutual engagement the other ratifies and accepts. This principle is established as well by unanimous assent as by the obvious spirit and intent of the foregoing traditions.

Except in  
cases  
where the  
responsi-  
bility is  
mutual.

This contract, being evidently suspended upon mutual consent of the parties and formal expression of that consent, requires, like all other valid contracts, declaration of one, and acceptance of the other party, to be conveyed in the manner laid down for similar transactions in the former books of this digest; but whether it is to be considered in law one of those permanent and binding contracts which cannot after conclusion be annulled by either party without consent of the other, is a question upon which our doctors have disagreed. A majority, however, have decided in the affirmative, by reason of the common and general rule of law: "That contracts and conditions must be adhered to;" whilst the *Sheikh*, in his *Khilaf*, has, on apparently strong grounds, declared it to be dis-

Requires  
declara-  
tion and  
acquies-  
cence.

But may  
be dis-

solved by either party at pleasure so long as both continue in *statu quo ante pactum*. *cretionary*, and that each party therein is at full liberty to dissolve the contract whenever he pleases, so long as the client shall have committed no offence which the patron has expiated by paying the fine; because in this event there can be no doubt that it becomes perpetually binding in regard of the offender, and can never afterwards be by him dissolved to the injury of his patron suffering by responsibility.

Is restricted to the patron alone.

To conclude, this title of inheritance does not descend to the heirs or relations of the patron, but is limited by law to himself alone, conformably to the nature and condition of his contract, as well as to guard, in matters which oppose radical principles of law, against transgressing the bounds of certainty on infallible traditional proof; for since the responsibility for the client's fines or offences cannot extend to the children or relations of his patron, so it necessarily follows that the advantage connected with this responsibility, viz., inheritance at his death, can be enjoyed by the patron himself alone.

#### *Of the Wala of the Imám, or Doctrine of Escheats to the Public Treasury.*

Nature of escheats or the title of the *Imám*.

The last species of *wala*, or legal title to inheritance thereby, is that enjoyed by the *Imám*, in virtue whereof if a person die leaving no heirs by consanguinity, no husband or widow, with the provisions and restrictions already quoted respecting the latter, no emancipator and no surety for fines, the property or inheritance of such person is by law entirely vested in the *Imám*, who is, in other words, the sole heir of every person deceased leaving no individual member of any of the foregoing classes. This principle is established, according to the *Sheikh*, as well by universal assent as by an authentic tradition of the *Imám Mohummud Bákir*, on whom be peace, quoted by *Booreyd Ajaly* in these words:—"If a person should not have engaged in a contract of clientage with any believer previous to his death, the inheritance of such person is vested in the high priest of the Faithful," that is, the *Imám*; to which effect there are many other traditions generally known.

With respect to the application of this fund, during the absence of the *Imám*, the doctrine of *Mohukik* in his *Shuraya*, as well as of most other lawyers, prescribes its partition amongst the poor and indigent of our sect, by reason of the impossibility to deliver it to him upon whom be blessing and peace, and consequently the preferable title of his indigent posterity and followers to enjoy it, in the same manner as they enjoy his *fifth* of spoils taken in battle, of mines, and of the various other subjects with which this right is connected. To this effect we have also a tradition recorded by *Hulby* from the *Imám Jâfer Sâdik*, on whom be peace, in explanation of the sacred text, "They will ask you concerning spoils," &c., which is in these words: "If a person should die who has no heir or *Mowla* (patron) his property is as spoil." Another tradition of the *Imám Mohummad Bakir*, on whom be peace, quoted by *Mohummad Ebn Mooslim*, is in these words: "Whosoever dies leaving no heirs either by relationship, manumission, or responsibility for fines, verily his property is as spoil." And to the same effect there are various other documents, from all which it is evidently deducible that such property belongs to the *Imám*; for since, by the word of the most High, "the division of the spoils belongeth unto God and his Apostle," and whatsoever belongs to God and his Prophet appertains of right to the *Imám*, and these have expressly applied them to their followers, this affords an obvious proof of their being made over to the poor and needy of our sect, as well as also in reality to the rich, for both are alike comprehended in the division of spoils.

The fund is to be applied to the poor of his sect.

*Of Exclusion.*

Exclusion from inheritance is described by the author of the *Shuraya* as being of two sorts, either entire or partial, that is from a part of the share. With respect to the first, the uniform criterion of law is that respect and attention be paid to nearness of blood, upon which principle it follows that a grandchild cannot at all inherit with a child of the deceased, whether male or female, not even a son's son with a daughter, and that whenever an assemblage of

Exclusion entire.

Entire by proximity of blood as of grandchildren by immediate offspring;

children's children occurs, however low in descent, the nearer always exclude those who are more remote. Further, children in whatsoever degree exclude all persons related to the deceased through his parents or one of them, as brothers or sisters and their children, grandfathers and their parents, paternal and maternal uncles and their children; and, in general, no relation can inherit with children of the deceased, except immediate parents and a husband or wife.

**also of brothers, grand-fathers, and uncles, by these.**  
 A brother excludes a nephew, &c.;  
 also an uncle and his descendants, but not a grand-father in any degree of ascent.

Upon failure of parents and children of the deceased, brothers and grandfathers form the second class; of these therefore, upon the same principle, a brother, for example, excludes a brother's son, and if we suppose an assemblage of the members of this class in different degrees of descent, the nearest always excludes one more remote. Further, brothers and sisters of the deceased or their descendants in any degree, exclude all those related through grandfathers, as uncles paternal or maternal and their children, but do not exclude the parents of those grandfathers, for a grandfather in any degree of ascent, however remote, is still considered a grandfather with respect to the other description of this class; whilst, at the same time, if we suppose an assemblage of them in different degrees of ascent, the lowest or nearest to the deceased would always exclude one who is higher or farther removed.

**Uncles exclude grand-uncles;**

Uncles again, whether paternal or maternal, of the deceased, and their children how low soever, exclude entirely all uncles of his father, who, in like manner, and their descendants exclude all uncles of a grandfather.

**Full kinsmen those by father's side only.**

Further, every person related to the deceased by both father's and mother's side excludes entirely from inheritance a person related by the father's side only, provided they are equal in class and degree.

**Any blood relation excludes a manumittor, who excludes a patron, &c.**

Lastly, a blood relation, however remote, excludes entirely a manumittor, a manumittor or his representative excludes a patron by contract or surety for offences, and the latter precludes escheat of his client's effects, or, in other words, prevents the title of the *Imám*.

**Partial exclusion of** Partial exclusion or diminution of shares is of two kinds:

that by a child, and by brothers or sisters. A child or descendant of the deceased, however remote in degree, restricts the share of his immediate parents to *two-sixths* of the inheritance, except in the case where, with one, two, or more daughters, there is only one of the parents remaining. Further, a child of the deceased, whether male or female, restricts also the husband or widow to these lowest appointed shares of inheritance, agreeable to the words of the sacred text formerly quoted. Husbands and wives therefore may be said to take in three cases: first, with a child in any degree of descent, the husband takes a *fourth*, and the widow an *eighth* of the property; second, upon failure of children and children's children how low soever, the husband has in this event a half, and the widow a fourth of the inheritance: but neither of these shares can be diminished by *Aul* or increasing the divisor, because this practice is totally forbidden by our law; thirdly, upon failure of all other heirs whatsoever, whether by consanguinity or patronage, the husband takes not only his highest appointed share, viz. a half of the wife's estate, but receives also the remaining half by *return* in virtue of the residuary title formerly specified. The widow, also, in this case receives first her appointed share, viz. a *fourth* of her husband's estate; but with respect to her residuary title there are three opinions: one confirming her right, another which totally rejects it, and a third admitting her claim during the absence of the *Imám*, but rejecting it, were he present. The most approved doctrine, however, as formerly expressed, denies any title to the return on the part of a widow.

Brothers and sisters, again, of the deceased restrict the share of the mother to one-sixth of the inheritance upon these four conditions:—First, that they consist of two or more males, or of one male and two females, or of four females without a male; second, that they be neither infidels nor slaves, as will immediately at more length appear in treating of the impediments to succession. Whether on the part of a murderer this exclusion can take place, is a question admitting of doubt, but the most

parents by children.

And also of a husband or widow.

Brothers or sisters diminish the mother's share upon four conditions.

prevalent doctrine has decided in the negative. Third, that the father of the deceased shall also be in existence ; and, fourthly, that the brothers or sisters themselves be either of the full blood, that is, by both parents, or by the father's side, as also agreeable to the best founded opinion, that they exist separate from the mother, not in her womb, for a fœtus does not operate this limitation of her share.

But not  
their chil-  
dren.

Further, the children of brothers or sisters do not in any degree affect the share of a mother, nor of hermaphrodites a less number than four, by reason of the possibility that they may all be females.

*Of Impediments to Succession.*

Impedi-  
ments.

Impediments to succession (as described in the *Shuraya*) are three—Infidelity, Murder, and Slavery.

Infidelity.

By infidelity, as impeding succession, is here to be understood every belief or persuasion which excludes its votaries from the title of *Islám*, for no alien, whether hostile or tributary, and no apostate from the Moohummudan faith, can inherit the property of a believer : whereas the latter may be heir either to an original infidel or an apostate ; and hence if an infidel should die leaving several heirs unbelievers, with one who has embraced the faith, the whole inheritance would go by law exclusively to the latter, however remote, even an emancipator or patron by contract, although the former were the nearest relations by blood. If, however, the deceased infidel should leave no heir whatsoever a believer, an infidel would in this case succeed, whereas of an apostate the inheritance devolves on the *Imám* upon failure of Moohummudan claimants ; and this decision is applied in one report to the case of an original infidel, but the report is considered unauthentic.

Conversion  
subsequent  
to the an-  
cestor's  
death re-  
moves the

If a believer leave infidel heirs, they do not inherit his property, which, on the contrary, goes to the *Imám*, upon failure of heirs who are believers. If, however, an infidel should embrace the faith after his ancestor's death, previous to division of the inheritance, this impediment is thereby removed, and the proselyte is associated with all other

heirs who are equal in degree, or preferred to the whole succession if nearer; but after distribution of the estate, or total appropriation thereof to a single heir, his conversion has no effect to remove the impediment except in cases of competition with the *Imám*, to whom, even after the transfer is made, his conversion bestows a preference, according to a tradition reported by *Aboo Buseer*. Some doctors, however, have alleged that conversion only when previous to transfer of the property into the public treasury confers a preferable title on the heir, whereas after this transfer is made he can have no claim whatsoever. Others, again, have disputed his title in both cases, upon the ground that the *Imám* ought properly to be considered in the exact situation of a single heir, to whom, therefore, independent of any transfer, the inheritance belongs upon the ancestor's death, and cannot be wrested from him by subsequent conversion of a nearer heir.

If the husband or widow of a person deceased is a believer, and there be also some other heir who is an infidel, but embraces the faith after the ancestor's death, such proselyte becomes thereby entitled to the residue of the estate, after payment of the appointed share to the former. Such, at least, is the prevalent opinion, liable, however, manifestly, to difficulty and doubt, which arises from the impossibility of distribution in the case of a husband; and if, therefore, we pronounce that the proselyte is associated with a widow only, and not with a husband, it would appear the most just decision; because with the former the *Imám's* title being likewise invalid, distribution is obviously possible,—whereas a husband, in virtue of his reversionary title becoming alone sole proprietor of the estate, there is no room for division, and consequently no claim through subsequent conversion. The case is, in fact, therefore, like that of a daughter professing the faith and the deceased's father an infidel, or a sister believing with an infidel brother, in neither of which, evidently, subsequent conversion could have any effect.

If any one of the parents of an infant child be a believer, Construction  
of law



in favour of an infant should one of the parents be a believer. the construction of the law is in favour also of the infant, and if further any one of the parents, both infidel at its birth, should embrace the faith during its infancy, the rule is exactly the same; but should such infant when arrived at maturity reject the profession of faith and persist in denial, apostasy is thereby established.

Case of infant children of an infidel with more distant relations who are believers. If an infidel dying should leave infant children and a brother's son and sister's son, for example, who are believers, the estate must in this case be divided betwixt these two, two-thirds to the former and one-third to the latter, and they maintain the children of the deceased until maturity by contribution proportionate to their respective shares. If on maturity the children profess the faith, they are still preferred and assume the succession agreeable to a decision reported by *Malek Ebn Ayoon*, but if they avow infidelity the property of the former heirs is established by virtue of the first distribution; and the children are excluded entirely.

~ This decision, however, is by no means free from difficulty, because in the first place children of infidel parents ought naturally to be considered infidels themselves, and secondly at all events the distribution of property previous to their profession of faith would appear to preclude any future title.

Difference of sect is no impediment to succession. Difference of sect or persuasion in *Mohummudism* is no impediment to succession, and thus it is to be observed that all professors of our faith inherit from one another promiscuously, without regard to their particular *tenets*, as on the other hand do also all infidels in general although of even different religions.

Apostates are considered dead in law from the date of their apostasy. The property of an apostate who was by birth or parentage a believer comes under the law of inheritance and is devisable amongst his heirs at the date of his apostasy, which period fixes also the date of divorce from his wife, and commencement of her *Iddut*, which is exactly that appointed for a widow, whether he is immediately put to death or survives in apostasy.

But female apostates are otherwise. It is otherwise with respect to a female apostate, because she is not liable to immediate death, but must be imprisoned and scourged at the appointed times of prayer:

consequently her property cannot be devisable as inheritance until her actual death. Further, with regard to a male apostate not by birth or parentage a believer, but who had himself first embraced the faith, and afterwards apostatized, he also is not subject to immediate death, but must be called to repent, and only on persistence is liable to capital punishment; consequently, his property does not become devisable until his actual decease, either natural, or by the hand of *Justice*, but his wife nevertheless commences her *Iddut* from the date of his apostasy. Should he therefore return to the faith previous to expiration of this *Iddut*, he is entitled to take her back, but if the *Iddut* has once expired the divorce is thereby irreversible, and he has no future claim whatsoever.

By murder as an impediment to succession, it is here to be understood, that a person who slays another wilfully and unjustly is not permitted by law to inherit from the slain, but that a person put to death for a just cause as by retaliation may be inherited from by his slayer. Accidental or unintentional homicide also is no legal bar to succession according to the most prevalent doctrine, although *Shaikh Mofend* has expressed an apparently very proper limitation of this rule, viz., that the slayer can inherit no part of the fine he has paid in expiation. This impediment applies equally to parents and children and to all relations, whether by blood, affinity, or otherwise, and if therefore a person thus wilfully murdered should have no other heir than his murderer, his inheritance must go to the public treasury.

If a person should murder his own father and the paricide has a child, this child may inherit from the grandfather, should he leave no issue of his loins, for the crime of a father is no bar to the succession of his children; but if the heirs of the murderer be infidels, they are all excluded together, and the inheritance goes to the *Imám*, unless they should embrace the faith, in which case both the right of inheritance and retaliation is established. This latter title leads to the following cases:—

*First.* If a murdered person leave no heir but the *Imám*,

PART II.

B B

Murder prevents succession, but not accidental homicide.

Children of a murderer are not debarred from succession on account of their father's crime.

Murder cannot be forgiven.

he may either demand retaliation or may accept the expiatory fine should the murderer tender it, but is not at liberty to forgive altogether.

The fine of blood is heritable as property.

*Second.* The fine of blood is considered by law as property of the person slain, subject therefore to the payment of his debts and legacies, and this whether the murder was wilful, supposing the fine to be accepted, or unintentional, when it follows of course.

By all relations except those by the mother's side.

*Third.* All relations, whether consanguineous, by affinity, or otherwise, may lawfully inherit the *Doeut* or fine of blood, except those connected by the mother's side, with respect to whom there is a diversity of opinion, but the most approved doctrine excludes them. A husband or widow further cannot inherit the right of retaliation for the murder of the deceased spouse, but if commuted by mutual consent for an expiatory fine they enjoy their appointed shares of the amount.

Slavery operates both as to the heir and ancestor.

The third impediment to succession, or slavery, has by law an equal operation both as to the heir and ancestor. If, therefore, a person should die leaving one heir who is free and another in servitude, the inheritance goes all to the former, however remote, in preference and exclusion of the latter, however near in degree, but should such slave have a child who is free, the latter is not debarred from succession by the parent's bondage; and further, in the case of two or more heirs who are free with one a slave at the ancestor's death, but emancipated previous to distribution of the property, he becomes thereby entitled to his portion if equal in degree, or takes the whole succession if nearer than the others. Emancipation, however, subsequent to distribution confers obviously no title to a share of the inheritance, and consequently, upon the same principle formerly described regarding conversion to the faith, should there be only one heir of the deceased besides a slave, so as to obviate the necessity of division; manumission after the ancestor's death is also ineffectual to found a claim of succession.

A slave who is sole heir must

It is however to be observed, if a person deceased should have no heir except a slave, his property must be

applied to the purchase and emancipation of such slave, who, upon being set free, inherits the residue, and the proprietor may be legally compelled to dispose of him. This on the supposition that the deceased's property is adequate to the purchase; should it fall short, some doctors are still of opinion that the heir must be released from bondage to the extent thereof, and perform emancipatory labour for the balance of his price. Others have rejected this doctrine, and adjudged the succession to the *Imám*, which latter decision appears better supported by traditional authority. In like manner, if the deceased shall have left two or more heirs who are slaves, and the shares of all or of any one should fall short of their price, not one is in this case entitled to manumission, but the property must all descend to the *Imám*.

be emancipated from the estate, and inherit the residue.

Further, if an heir is partly emancipated and partly a slave, he receives a part of his appointed portion of inheritance proportioned to the extent of his freedom, and is debarred or excluded in proportion to his bondage. The same is exactly the rule in every situation with respect to ancestors; and female slaves are considered by law in the same predicament with males.

It is established by unanimous assent that parents who are slaves must be emancipated by succession to the property of their free children; and with respect to the converse, or emancipation of children by succession to their free parents, doubts have been suggested, but the affirmative is the best founded opinion. With regard, however, to this necessity in the case of more remote relations, although by some extended even to a husband and wife, and to all other heirs whatsoever, the negative appears far more prevalent and better supported.

Parents of free children, if slaves, must be emancipated from the inheritance, and vice versa, but this rule does not apply to any other more remote heirs.

An *Oom-i-wulud*, or female slave who has borne a child to her master, has nevertheless no claim to his inheritance, nor further a *Modubbur*, i. e. a slave to whom freedom has been granted at the proprietor's death, although related in a degree, which founds by law a title to succession if not thus counteracted. The same is the case of a *Makatub* or person who has stipulated to pay a ransom for his liberty,

An *Oom-i-wulud* or *Moodubbur* has no claim to inheritance. Nor a *Makatub*, unless

some part of his ransom has been paid. whether such stipulation was absolute and in general terms, or limited to a particular term of payment, unless some part of the ransom has been paid.

As appendages of, and connected with the impediments to succession already detailed, we describe the four following circumstances:—

*Leaan* impedes the right of succession.

*First. Leaan*, or accusation of adultery upon oath by a husband, as disproving the descent of his nominal offspring, necessarily cuts off their right of succession to his estate. If, however, subsequent thereto he should acknowledge their parentage, such confession removes the impediment as to them, and they inherit their father's property; but he is for ever debarred by a personal objection from claiming any part of their inheritance should he survive them.

The property of absent or missing persons cannot immediately be inherited.

*Second. Absence.* If a person absent from his house or country at so great a distance as not to be known or heard of, should be reported dead, his property cannot come under the laws of inheritance, until his death is fully established, or until such period shall have elapsed as by the death of all his contemporaries to remove the probability of his existence, after which it may be divided amongst the heirs who are then existing, without retrospect to such as may have died previous to the division. Some doctors have prescribed a period of ten years from his absence, and others have disputed the legality of distribution altogether, directing the surrender of his property in trust to the nearest relation in opulent circumstances, but the first doctrine is obviously best founded on reason and justice.

A *fætus* may inherit, if produced alive.

*Third. A fætus* or *embryo* in the womb at the ancestor's death is by law considered an heir upon condition of being brought forth alive; but if produced dead, no portion of inheritance can be claimed in its name. Whereas immediate death, if once seen in existence separate from the womb, does not impede the right of succession. In cases again of miscarriage by violence, the criterion of law is that there be observed in the child that species of motion by which life is proved, or which cannot proceed from a

dead body, but not merely a shaking or contraction<sup>13</sup> of the limbs, which is often observed to take place after death involuntarily.

*Fourth.* Debt. If a person die who is involved in debt to the full amount of what he leaves behind him, his property cannot be transferred to the heirs, but must continue as if in possession of the deceased burthened with payment of his debts. Should these not involve the full amount of his estate, the excess is considered inheritance, and may be immediately transferred to the heirs, leaving a proportion adequate to the debt still attachable by his creditors, as if in possession of the deceased.

Debt of the deceased excludes every claim of inheritance.

Having thus described all the legal causes which operate a title to succession, and the various impediments that prevent in law the operation of those causes, we proceed to consider the situation of claimants under an apparently legal title, but whereof the cause was originally contrary to law.

All our doctors are agreed that such cause cannot in any situation found a valid title to inheritance betwixt believers; and thus if a *Mohummudan* should marry a woman who is forbidden to him, or with whom marriage is unlawful, either radically, that is, from their birth, or by some recent occurrence, such as fosterage, former marriage, or any other cause, there is no right of inheritance betwixt them in virtue of such marriage, whether it proceeded upon an error or otherwise, because it is not established in law, like the right of *Wulu* claimed by a person who emancipates the slave of another without his authority or consent; and of the same nature is the birth or descent of children begotten under such unlawful contract of marriage, except in the case of error, for they cannot inherit from their parents, as will hereafter be more fully explained in treating of children whose mother is divorced for adultery.

Children begotten under an illegal contract of marriage, and their parents, do not inherit each other.

It is otherwise with respect to children produced by

Except in the case of error.

<sup>13</sup> Arab. *Tufulloos*.

erroneous connection of their parents, for these have an undoubted title of inheritance by unanimous assent, although the cause of their birth is certainly illegal as unsupported by valid marriage, and thus, if a man should have carnal connection with a woman through error, supposing her to be his wife, which proves not to have been the case, the offspring of such connection is held in law to be the child of both its parents, if both were alike in error, or of that one alone who was influenced by the mistake, because the laws of descent or establishment of parentage expressly include the case of erroneous connection, and consequently the right of inheritance founded upon descent must be equally established.

Infidels inherit upon grounds that are unlawful according to *Mohum-mudan* faith.

From this principle it would appear as a necessary consequence to follow, that if a man have carnal connection with his own wife, supposing her the wife of another, and wishing to commit adultery, the offspring of this connection is not to be held in law, as of the father, although necessarily the child of his wife, if she did not labour under the mistake but knew him to be her lawful husband. All our doctors are, however, agreed that the parentage of such child is established in this case in the father also, because the mother, being in reality his wife, any doubt or error upon his part can only prove him guilty of a carnal intention, and has no other effect whatsoever in law.

With respect again to *zimmes*, or tributary infidels, the right of succession may be fully established betwixt them upon grounds, whether of descent or marriage, that are prohibited by our law, provided they are authorized in the belief or according to the rites of their own religion, or have proceeded upon doubt or ignorance of the parties that they are forbidden; but if, on the contrary, these grounds are illegal also in their own belief and to their knowledge, we decide upon them according to our law. Such is the opinion of the *Sheikh* as expressed both in his *Nehayut* and *Tuhzeeb*, as well as of many other authors; and, indeed, appears fully supported by what *Sukoony* relates to have been told him by the *Imám Jáfer Sádik*, as a judgment

of *Aly*, upon whom be blessing and peace, viz. that he confirmed the title of a *Mujoosy*,<sup>14</sup> who had married his own mother, to a twofold portion of her inheritance, one as being her son, and the other her husband. This report, if its authenticity or the fidelity of *Sukoony* be questioned, would not only reflect discredit upon the judgment of many of our doctors who have uniformly adopted his authority as the guide of their opinions and decision, but would also appear unjust as to himself, who is reckoned amongst the number of our best and most accurate traditionists. It is, besides, further strengthened by a saying of the Prophet, on whom and his posterity be blessing and peace: "Every nation or tribe professing a particular faith or religion is bound to abide by the laws thereof;" and another quoted by *Sudook* in these words, "Every individual who professes the religion of any nation or tribe, is bound to abide by their laws;" also by a report of *Oobry* to this effect, "I heard the *Imám Jafer Sádik* declare that the Prophet of God, upon whom and his posterity be blessing and peace, expressly prohibited the custom of reviling female slaves as bastards, or unlawfully begotten, because every nation have particular rites and laws regarding the marriage state or connection betwixt the sexes." Further, it is related by *Abdoolah Ebn Imám* that a person having once in the presence of the *Imám Jafer Sádik* reproached a *Mujoosy* for being casually connected with his own mother and sister, the *Imam* rebuked that person severely, observing, "that such was a lawful marriage amongst them according to the tenets of their religion," which tenets did we not apply in our decisions respecting their professions, these various traditions could never have appeared upon record.

And here, as an appendage to the legal causes of succession by birth and affinity, we observe the mutual acknowledgment of two persons with respect to each other of a relationship establishing the right of inheritance, Acknowledgment of parties establishes the right of succession,

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<sup>14</sup> Magician, or worshipper of fire.



without  
any further  
proof.

provided both these persons be of unknown parentage and connections. Thus, if two persons mutually recognize each other by the titles, for example, of father and son, or any other founding claim to succession, who are not known to the contrary, they are by law acknowledged as the heirs of each other, nor can either be called upon to prove the truth of his confession, because the right is confined to themselves, and there is no person to oppose it, as well as by the saying of him, on whom be peace, "Acknowledgments of sane people are valid and binding as to themselves." Further, it is related by *Abdool Ruhman Ebn Hijaj Bijily* that he asked the *Imám Jáfer Sádik*, upon whom be peace, respecting a woman brought prisoner from her own country, and with her an infant child whom she called her son; and a man also a prisoner, who, meeting by accident with his brother, recognized him by that title, and they both knew each other, but neither could adduce any proof of their relation except this mutual acknowledgment. The reporter thus proceeds,—“The *Imám* inquired of me my own opinion of these cases; I observed that the parties could not inherit from each other as having no proof of their relationship from being born in a foreign country. He exclaimed, ‘Almighty God! if a mother has brought with her into captivity a son or a daughter, whom she constantly acknowledges as such, or when a man recognizes his brother, and they both being of sane mind continue to acknowledge the relations, surely they must be considered the lawful heirs of each other.’”

Except  
when the  
parties are  
of known  
parentage  
and con-  
nections.

If, however, the acknowledging parties should be generally known as not related to each other by the tie, whether of blood or affinity, which they allege, such acknowledgment cannot in law be received, as obviously in this case tending to affect the rights of third parties; for the title of succession is established by law in the known heirs of the acknowledger, and his simple confession in favour of another, as tending to exclude these, or at least to introduce a sharer in their rights, cannot be received without proof, although verified by the person in whose favour it is made.

With respect, again, to the case of parents and their infant children reciprocal acknowledgment is not required by law to establish the right of succession, but on the contrary, the simple declaration of the parent, or adoption of the child as his own, is perfectly sufficient to establish inheritance betwixt them, as has already been fully explained in treating of the acknowledgment of parentage, and there is no distinction upon this point betwixt a father and mother, as a majority of our doctors have decided.

Acknowledgment of a parent is sufficient to establish the child's title to succession.

This right of inheritance by mutual acknowledgment, except in the instance of parent and child, is invariably restricted to the acknowledging parties themselves, and does by no means, according to the most prevalent opinion, descend to their heirs, unless the latter should also verify and avow the connection. Thus, if a person declare another to be her brother, who on his part also avows the relation, and they are not known to the contrary, the right of inheritance is thereby established betwixt them as to each other, but does not extend to the other brothers for example of either, nor to any relations besides. It is otherwise with respect to parents and children. If one person acknowledges himself the father of another, who verifies and avows the filial tie, these are not only by law the heirs of each other, but this right also extends to all the heirs or descendants of both. This distinction betwixt the two cases, however, is founded upon a principle whereof the grounds are by no means obvious; and the various objections thereto may be seen at large with their answers in their proper place.

#### *Of the doctrine of Shares and mode of distributing Inheritance.*

Know that every heir whom Almighty God hath named in the *Korán*, and for whom he hath allotted a specific portion of inheritance, is by us denominated *Zoo furz*, or a sharer; in the same manner as we term that portion of inheritance assigned *furz*, or a share; and further, that every heir to whom a specific share has not been allotted in the Book of God is called *Zoo Kyrabut*<sup>15</sup> or a *residuary*.

Distribution of inheritance :

sharers,

and residuaries.

<sup>15</sup> Literally, master of a relationship.

The sharers are nine persons;

Now it often happens that the same heir is in one case a sharer, and in another a residuary. The sharers mentioned in the Book of God are nine persons: a single daughter if there be no son of the deceased; two or more daughters also on failure of a son; a single sister by the same father and mother, or by the same father only, if there be no brother or grandfather; two or more sisters also on failure of a brother and grandfather; a father if there be issue of the deceased; a mother in all situations; a husband and a widow in every situation; and lastly, a relation who is connected with the deceased, by the mother's side only. Of these, the first five are often residuaries also, as where, with a daughter or with two daughters, there is a son; where, with a sister, or two or more sisters, there is a brother, or grandfather; and where, with a father, there is no issue of the deceased. The remaining four, again, can never in any situation be residuaries, except upon entire failure of every heir that is capable of being associated with them, in which case of necessity they take the whole inheritance, first as share and then the *residuum* or return. All heirs of whatsoever class or description besides these nine are denominated *simple residuaries*.

of whom five are sometimes residuaries.

The shares of inheritance are six.

The *Foorooz* or shares are six: two-thirds, a half, one-third, a fourth, a sixth, and an eighth, agreeable to a tradition of the *Imám Mohummud Bakir*, on whom be peace, recorded in these words, "Verily the shares of inheritance do not exceed six;" to which effect there are many other authentic documents. Now the persons entitled to those shares are as follows. Two-thirds are allotted in two cases; first to two or more daughters of the deceased if there be no son, by unanimous assent agreeable to the word of Almighty God: "God hath directed you concerning your children; a male shall have as much as the share of two females; but if there be females only and above two they shall have two-thirds of the inheritance; and if there be but one, she shall have a half." Upon this point the author of the *Rafy*<sup>16</sup> has a passage highly worthy

Two-thirds go to two or more daughters, if there be no son;

<sup>16</sup> A compilation of traditions known also by the title of *Chlenny*, from the birthplace of its author *Mohummud Jukool*.

of question: "Mankind have argued much respecting the right of *two* daughters, and whence it arises that they enjoy by our law two-thirds of the estate, whereas Almighty God hath expressly stipulated that they be above two in number. Some have ascribed this decision to the general assent of the learned independent of any other authority; some have attempted to deduce it from reason upon this principle, that as one daughter has a half, it follows that two-thirds must be the share of every member above one; others again finding no reason, have followed the majority; but in fact not one of them has ever discovered the true cause, which is clearly the Divine Authority in these words, "To a male as much as the share of two females," and may be thus exemplified:—If a person deceased should leave only one daughter and a son, the male has as much as two females, viz. two-thirds, consequently two-thirds is evidently the share allotted to two daughters; which explanation affords sufficient proof of the decision alluded to, and has notwithstanding been omitted by all former writers on the subject." The second case of allotment of two-thirds is to two or more sisters of the deceased by the same father and mother, or by the same father only, upon failure of brothers and grandfathers; and this also by unanimous assent on account of the saying of Almighty God: "If a man die having no issue, and leave a sister, she shall have half of what he shall leave, and he is her heir if she have no issue; but if there be two sisters, they shall have two-thirds of what he shall leave, and if there be brothers and sisters, a male shall have as much as the share of two females." Further, in a tradition of the *Imám Jáfer Sálik*, on whom be peace, quoted by *Bookeyr Ebn Ayoon*, the word sister in this text is explained to mean a sister either by the same father and mother, or by the same father only; to which effect there are also other documents. With respect, again, to the case of more than *two* sisters, in addition to the unanimous assent of all our doctors, it is established by traditional record from the particular occasion on which this portion of the sacred text was revealed, viz. that of a person named *Jabu*, who being ill, and having *seven* sisters,

and to two or more sisters, on failure of a brother or grandfather.

asked the Prophet concerning their share of his inheritance.

A half goes to one daughter, if there be no son ; to one sister, on failure of brothers and grandfather ; and to a husband, if there be no issue.

A half is the share allotted to three different persons : to a single daughter if there be no son of the deceased, according to the sacred text above quoted ; to one sister upon failure of brothers and grandfathers, agreeable to the last passage of the holy book ; and to a husband, if there be no issue, as well by unanimous assent of the learned as by express divine authority. " And ye shall have half of what your wives shall leave, if they have no issue ; but if they have issue, then ye shall have a fourth part," &c.

One-third goes to the mother, if not partially excluded.

A third is allotted in two cases : first to a mother if not partially excluded by children however low, or by brothers or sisters of the deceased, who diminish her share as formerly mentioned, and by unanimous assent according to the saying of Almighty God : " And the parents of the deceased shall have each of them a sixth part of what is left if there be issue ; but if there be no issue, then the mother shall have a *third*, unless there should be brothers or sisters, in which case she shall have a sixth." Further, in a tradition of the *Imám Jáfer Sádik*, on whom be peace, reported by *Aban Ebn Tughlub* in the case of a person deceased who left both his parents, we have this decision : " To his mother a *third* and the residue to his father ; " which decision, however, proceeds clearly on the supposition that there were no children nor brothers of the deceased, because these restrict the share of the mother to a sixth, as has already been mentioned, upon the conditions formerly detailed. Secondly, this share is allotted to relations of the deceased by the mother's side only, if there be more than one in number, whether male or female, or both, agreeable to the saying of Almighty God : " And if a man or woman's property be inherited by a distant relation, and he or she have a brother or sister, each of them shall have a *sixth* part of the estate ; but if there be more than one, they are all equal sharers in a third." Now in a tradition of the *Imám Jáfer Sádik*, upon whom be peace, explanatory of this passage quoted by *Bookeyr Ebn Ayson*, we have these words : " By brothers and sisters are here

And to two or more relations by the mother's side only.

to be understood those by the same mother only with the deceased, for I particularly suggested the case of a woman who left her husband, brothers by the same mother, and brothers by the father also, to which he replied, 'The husband takes a half, or three shares; a third or two fractions go to the brothers and sisters by the mother's side, in which male and female are alike; and the residue to those by the same father, a male having as much thereof as the share of two females.' "

The condition again of plurality in brothers and sisters by the mother's side to their enjoying a *third* is established by unanimous assent; but whether it is also required in the case of more distant maternal relations, as of a grandfather or uncle, is a question that has admitted of contrary solutions.

A fourth is allotted also in two cases: to a husband, if there be issue, whether male or female, of his deceased wife, by unanimous assent, on account of the sacred text formerly quoted; and to a widow, if there be no child of her husband, which is likewise established in the same manner. It is to be observed, however, respecting the latter, that this share is not affected in any degree by supposing one or a plurality of wives; for should there be four, a fourth part only of the deceased husband's property is to be divided equally amongst them; and upon this point all lawyers are agreed, both by reason of the absolute and unqualified sense of the sacred text, and also of a tradition recorded by *Aboo Omar Abdy* from the Commander of the Faithful, on whom be peace, in those words: "The share of a husband can never be more than a half or less than a fourth, and that of widows never more than a fourth or less than an eighth; should they be four, or below that number, they are equal sharers in this portion of inheritance;" to which effect there are many other authentic reports.

A sixth comprehends three cases: It is the share of a father with children of the deceased, agreeable to the sacred text formerly quoted; of a mother, in the case of issue; or of brothers and sisters who occasion her partial

A fourth goes to the husband, if there be issue; and to a widow, if there be no children.

A sixth goes to a father, with issue of the deceased;

to a mother, with issue or brothers; thers.

And to one maternal relation.

exclusion, as already detailed, agreeable also to the sacred text; and, thirdly, it is allotted to a single relation by the mother's side only, upon which, in the case of a brother or sister, all our doctors are agreed, by reason of the foregoing sacred text, and several express traditions generally known; but which, in the case of more remote maternal kindred, as a grandfather or uncle, has admitted a diversity of opinion.

An eighth is the share of a widow with issue.

The last appointed share of inheritance, viz. an eighth, is that of a widow with issue of her deceased husband, by unanimous assent, without distinction also betwixt the case of one and plurality; for should there be four, this share is to be equally divided amongst them, of which rule the undoubted proof has already been stated.

Combinations of shares in one estate.

Of these shares some are of a nature capable of being combined with others in one estate, and there are some which do not admit of this combination. Of the first class are two-thirds with one-third, as, in the case of two sisters by the same father and mother, or by the same father only, with two or more brothers or sisters by the mother's side; also with a sixth, as two daughters with any one of the parents, or two full sisters with a brother by the same mother only; likewise with a fourth, as two sisters with a widow; and with an eighth, as in the case of two daughters with a widow of the deceased. Further, a half is capable of being combined with a half, as in the case of a husband with a full sister, or one by the father's side; also with a third, as a husband with a mother, or with brothers and sisters by the mother's side; likewise with a sixth, as in the case of a full sister, or one by the father's side with a sister by the same mother only; further, with a fourth, as a full sister with a widow, or a daughter with a husband of the deceased; and, lastly, with an eighth, as in the case of a daughter and a widow. Again, a third may be combined with the following shares: a half and two-thirds, of both which examples have been given; and with a fourth, as in the case of a widow with brothers or sisters by the mother only. A fourth may also be combined with two-thirds, with a half, and with one-third, of

all which examples have preceded; and, lastly, with a sixth, in the case of a widow, with any one relation by the mother's side only. Further, a sixth admits of combination with two-thirds, with a half, and with a fourth, as formerly exhibited; with a sixth, as in the case of both parents should there be issue of the deceased; and, lastly, with an eighth, as in the case of a child with the widow and both parents, or any one of them. To conclude, an eighth may be combined with two-thirds, with a half, and with a sixth, of all which examples have been already offered.

Those shares of inheritance, on the other hand, which do not admit of combination, and can never be allotted from one and the same estate, are as follows.—Two-thirds with two-thirds and with a half; one-third cannot be combined with a third, nor with a sixth, nor with an eighth; one-eighth can never be allotted with an eighth, nor with a fourth: and, lastly, two-fourths can never be assigned from the same estate. This incapacity of combination in some of the eight foregoing cases, and the various grounds thereof, will be evident from a retrospect to the shares and persons entitled to them with the established conditions on which they are allotted; but a further cause of incapacity in some will hereafter be made manifest when we come to describe the nullity, according to our law, of the doctrine of *Aul*, a prevailing system amongst all doctors of the opposite sect.

And here it is proper to describe certain general rules to which strict attention is indispensable. The first of these is, "That a father of the deceased, upon failure of issue, is not a specific sharer in the estate, but has by law merely a residuary title to all that remains after distribution of the other shares." Thus, if a person deceased should leave, for example, a father, a mother, and a husband, the mother, in this case, takes a third, if not partially excluded by brothers or sisters; the husband also enjoys his appointed share, viz., a half, and the remaining sixth is all that would go to the father; whereas, if we substitute a widow in room of the husband, a *residuum* of

A father, upon failure of issue, is a residuary.



five-twelfths, after payment of her share and the mother's, would in this example be inherited by the father. By the same rule, if the father and mother only of a person deceased should remain, the former would receive two-thirds of the estate, and the latter one-third, if not partially excluded by brothers or sisters, whereas if these existed, the mother's share being consequently reduced to a sixth, the father would enjoy five-sixths of the estate in virtue of his residuary title.

This doctrine admits of no difference of opinion, by reason of an authentic report thereupon in the collection of *Mohammed Ebn Mooslim*, to this effect:—"The *Imám Mohammed Bákir*, on whom be peace, showed me a book of inheritance dictated by the Prophet of God, and in the handwriting of *Aly*, which contained the case of a woman deceased, leaving her husband and both parents, whose estate was thus distributed: to her husband, a half, or three fractions out of six; to the mother, a third, or two-sixths; and one-sixth, or the '*residuum*', to the father." Again, in a report of *Ismail Jafy*, the following decision is quoted from the *Imám Jáfer Sádik*, on whom be peace:—"If a man dying should leave his widow and both parents, a fourth of his estate goes to the widow, one-third thereof to his mother, and his father inherits the residuum." Further, in a report of *Aban Ebn Tughlub*, from the same *Imam*, we have the case of a person dying who left only her father and mother, thus divided:—"To the mother, a third part, or her appointed share, and all the *residuum* to the father;" to which effect there are various other authentic documents, all of them, however, obviously proceeding on the supposition of failure of brothers and sisters, who necessarily limit the mother's share to a sixth, as has already so often been mentioned.

Daughters  
made resi-  
duaries by  
a son.

The second general rule to be observed is, "that in distribution of inheritance to children of the deceased, if amongst them there should be a son, the male has always a portion equal to that of two females, by unanimous assent; which affords another example of a sharer becoming a residuary, like that of a father under the foregoing general

rule. This principle is established not only by the sacred authority formerly quoted, but also by several authentic traditions generally known. In one of these which is reported by *Ahwul* we have the following words: "The son of *Aboo Auja* having expressed his ignorance and doubt of the cause why a female, the weakest and most helpless of the two, should enjoy only half the portion of inheritance bestowed upon a male, some of our companions stated this matter to the *Imám Jáfer Sádik*, on whom be peace; he replied, a female is excused from the performance of many duties imposed by law upon a male, such as service in the Holy Wars, maintenance or support of relations, and payment of expiatory fines, and for this reason her share of inheritance has been justly limited to half the portion of a male."

This principle equally applies to sisters in distribution with a brother or grandfather, for they also become residuaries like daughters with a son, unless they are by the mother's side only, and this by unanimous assent; on account not only of the sacred text formerly quoted, but also of various traditional authorities to be hereafter adduced, if it please God. Also sisters by a brother.

The third general rule to be described is, "that the portion of every person related to the deceased through one of his parents, whether related also through the other or not, provided such person be not himself a specific sharer, is exactly the portion of that parent, or in other words is the portion of that person from whom the title or relation to the deceased, by however many intermediate steps, is derived, whether such mean of consanguinity was a specific sharer or not." Thus, the children of a daughter or of two daughters supply the place in succession of their mother's, taking either a half or two-thirds of their grandfather's estate, and also the surplus or return should there be any, in the same manner as their mothers, if existing, would have done. Again, the children of a son supply the place of their father from whom their title is derived, and enjoy his portion of the inheritance. And if we suppose an assemblage of the children of sons and daughters, each class take Every remote heir, if not himself a sharer, takes his portion of his mean of consanguinity to the deceased.

the portion of inheritance which their own root or immediate ancestor would have enjoyed if in existence. For example, if a person deceased should leave a son's son and children of a daughter, the former would receive two-thirds, and one-third only would go to the daughter's children. Upon the same principle, should there be children of a son's son, and a daughter's daughter, the former would have two-thirds of the estate and one-third goes to the daughter; and if we substitute in the room of children a single daughter of the son's son, the case is exactly the same, as such daughter being a descendant in the male line would still receive two-thirds or the portion of her root. Further, if we suppose the deceased to leave children of his daughter's son, and a daughter of his son's daughter, the former as descended from a female would inherit amongst them only one-third of his estate, whilst the daughter would receive two-thirds thereof. If, on the other hand, a person should leave children of the son of one daughter, and the daughter's daughter of another, here, as all are descended from a female root, the former would receive one-half of the estate amongst them, and the other half would go to the latter singly, their portions being in this case composed both of shares, and the return. In short, each individual or class of descendants receives the portion of his or their own immediate ancestors or root, in the same manner as that ancestor takes the portion of his root, and so on, to the deceased.

Example in grandchildren.  
Great grandchildren.

Brother's and sister's children.  
Grand-fathers and grand-mothers.  
Uncles and aunts.

The children also of a brother or sister, whether by the father's or mother's side, receive exactly that portion of inheritance which their parent, such brother or sister, would have enjoyed, upon the same principle and by the same rule with grandchildren and great-grandchildren, whether their ancestor was a sharer or residuary. Further, the share of a maternal grandfather is exactly that of a mother, as is also that of a maternal grandmother, a paternal grandfather's that of a father, and likewise a paternal grandmother's. A paternal uncle also receives the portion of a father through whom he is related, as does also a paternal aunt; a maternal uncle has that of a mother through

whom his title is derived, and likewise a maternal aunt. The children, again, of uncles, whether paternal or maternal, inherit the portions of their parents; and in general every branch as representing its root in succession receives by law the portion of inheritance assigned to that root, without any distinction whatsoever except this, that in the secondary distribution betwixt relations by both parents or by the father's side, attention must be always paid to sex, the male having a portion adequate to two females; whereas amongst relations by the mother's side only, in the distribution of their ancestor's portion males and females are perfectly alike, there being no preference to one over the other. Thus, the children of brothers or sisters by the same father and mother only, the same father only, paternal grandfathers and grandmothers, paternal full uncles and aunts, paternal half uncles and aunts if by the father's side, and their children, divide the portions of inheritance enjoyed by them, to a male as much as the share of two females; whereas the children of brothers and sisters by the mother's side, maternal grandfathers and grandmothers, paternal half uncles and aunts if by the mother's side only, maternal uncles and aunts of every description and their children, divide their portions of inheritance as derived through the female line equally without distinction or preference of sex whatsoever. This rule is universally prevalent amongst our doctors, and has by some been further extended in its application to the children or descendants of daughters, amongst whom, in their opinion, as equally in the female line, no distinction of sex can be observed. This opinion is, however, now generally abandoned, and we may therefore lay it down as a fixed maxim, that amongst the children of daughters as of sons, the distribution is to a male double the portion of a female, notwithstanding their relation through the mother, considering them as in the place of immediate offspring, to whom the application of the sacred text is therefore indispensable.

And their children. •

In the secondary distribution attention is paid to sex, relations in the male line, or of full blood, sharing a male double the portion of a female, and those in the female line all equally.

The traditional documents which establish the foregoing general rule are contained first in a report of *Abou Ayoob*, from the *Imam Jafer Sadik*, on whom be peace, to

the following effect:—"It is written in the book of *Aly*, on whom be peace, that a paternal aunt supplies the place of a father in succession, a maternal aunt that of a mother, the children of paternal uncles, in the situation of paternal uncles, and in general every remote kinsman in the place of that nearer relation through whom his title is derived, unless some heir nearer to the deceased should exist, who necessarily excludes him altogether." Further, in a report of *Soliman Ebn Khalid*, from the *Imám Jáfer Sádik*, on whom be peace, "in these words:—"The Commander of the Faithful, *Aly*, on whom be peace, always considered a paternal aunt in the situation of a father as to inheritance, a maternal aunt in that of a mother, a brother's son as a brother, and every relation not personally entitled to a share in the situation of that heir through whom his title was derived." Again, in a decision of the *Imám Mohummud Bákir*, on whom be peace, quoted by *Aboo Buseer*, to this effect:—"That being asked respecting the case of a husband and grandfather, he adjudged an equal division betwixt them of the deceased's property." And, lastly, in a judgment of the *Imám Jáfer Sádik*, on whom be peace, reported by *Sulma Ebn Mahurez*, upon the case of a paternal uncle and aunt, viz., "Two-thirds to the uncle, and one-third to the aunt," the reporter thus proceeds:—"I inquired respecting a paternal uncle's son with the son of a maternal aunt. He replied, 'To the male double the share of the female.'" And to the same effect are various other authorities.

All relations by the full blood, or by the father's side, are residuaries, when combined with those by the mother's only.  
Example in brothers and sisters.

The fourth general rule to be observed is, "That whenever an assemblage occurs of relations by both parents or by the father's side with relations by the mother only, the latter, if one, takes a sixth part of the estate, or a third in the event of plurality, to be divided equally, without distinction of male or female, and all the *residuum* goes to the former, divisible to a male double the portion of a female." Thus, if we suppose a brother by the same father and a sister by the mother only to exist, the latter receives her appointed share, viz., one-sixth of the deceased's estate, and the *residuum*, or five-sixths, go to

the brother. If, again, brothers and sisters by the father are combined with brothers and sisters by the mother, the latter receive a third part of the estate, to be divided equally amongst them without distinction of sex; and two-thirds thereof go the former, divisible to a male double the portion of a female. Further, if we suppose children of a brother by the mother's side only, with the son of a sister of the same father, the former would receive only a sixth part of the estate as the appointed share of their father, to be divided equally amongst them, and the remaining five-sixths would go all to the sister's son. The same is invariably the rule with respect to all other shares of inheritance, attention being paid in their primary allotment to the third or preceding general rule. Thus, if there be children of paternal uncles or aunts of different descriptions assembled as the heirs of a person deceased, those descended from one paternal half uncle or aunt by the same brother only with his father receive a sixth part as the portion of their ancestor, or a third if descended from two or more, which is divisible equally amongst them, to a female the same as a male, and all the *residuum* goes to the children of those half uncles and aunts who were brothers or sisters by the father's side to the deceased's father, divisible amongst them to a male double the portion of a female. Again, should there be children of maternal uncles and aunts of different descriptions, those connected by the mother's side receive as above a sixth part if descended from one ancestor, or a third if from two or more, and those by the father's side take all the *residuum*; but here the secondary distribution to both classes is made without distinction of sex, a female receiving in each the same portion with a male, because all are alike related to the deceased through the medium of a female, his mother.

Lastly, we shall suppose an assemblage of the children of paternal uncles of different descriptions with the children of maternal uncles also varying in description; and here the primary distribution would be, as formerly mentioned: one-third of the estate to the latter class, and the

Paternal  
aunts, and  
uncles, and  
their chil-  
dren.

Maternal  
uncles and  
aunts, and  
their chil-  
dren.

Children  
of paternal  
and mater-  
nal uncles  
promiscu-  
ously.

*residuum*, or two-thirds, to the former. Secondly, the third assigned to the children of maternal uncles would be thus distributed:—To those whose ancestor was related only by the mother's side, a sixth part thereof if one, or a third in case of plurality, and the residuum to the full maternal uncle's descendants, or those of one related by the father's side; but the final distribution as to both these classes would be without distinction of sex, to a male the same portion with a female. With respect, again, to the two-thirds first allotted to the paternal uncle's descendants, the secondary distribution would be to those of a half uncle by the mother's side, a sixth, or a third in case of plurality, divisible equally amongst them without distinction of sex; and to those of full uncles, or of half uncles by the father's side, all the remainder, divisible amongst them to a male double the portion of a female.

This rule of inheritance is universally prevalent amongst our doctors, and is established not only by several traditions already quoted, but also by a report of *Bookeyr Ebn Ayoon* from the *Imám Jafer Sádik*, on whom be peace, in these words: "I inquired concerning the estate of a woman deceased who had left her husband, some brothers and sisters by the same mother, and also brothers and sisters by her father. He replied, 'The husband takes one-half of her inheritance or three fractions, one-third goes to her brothers and sisters by the mother, which is to be equally divided amongst them, to a male the same as to a female, and the residuum or one-sixth goes to the brothers and sisters by the father's side, a male having double the portion of a female, for verily the appointed shares of an inheritance cannot be diminished by *Aul* (or increasing the number of fractions), and a husband's share cannot be less than a half in this case, nor that of brothers and sisters by the mother less than a third, agreeable to the saying of Almighty God: If there be more than one they are equal shares in a third, and if only one, he or she has a sixth part, &c.'" Further, by a tradition of the *Imám Mohummud Bákir*, on whom be peace, recorded by

*Bookeyr* in these words: "A person having asked the *Imám* concerning the inheritance of a woman deceased, who had left her husband, two brothers by the same mother, and a sister by her father, he replied, 'The husband takes a half or three fractions, a third or two go to her brothers by the mother, and the residuum or one-sixth goes to her sister by the father.'" Again, it is recorded by *Mohummud Ebn Mooslin* that he put the following case to the *Imám Mohummud Bákir*, on whom be peace: "A person deceased leaves the son of a sister by his father, and a son of his sister by the mother; how is his estate to be divided? The *Imám* decreed to the latter a sixth part, or his mother's appointed share, and all that remains to the former," to which effect there are also other traditions.

The last general rule to be described is, "that when-  
 ever grandfathers and grandmothers, both paternal and  
 maternal, are assembled with half brothers and sisters by  
 the father's and by the mother's side, or with their children,  
 a maternal grandfather and grandmother are by law on an  
 equal footing in succession with a brother and sister by  
 the same mother only, and a paternal grandfather and  
 grandmother equal to a full brother and sister or to those  
 by the father's side; but should these ancestors stand  
 single in succession, that is, upon failure of brothers and  
 sisters and their children, then they are considered in the  
 situation of immediate parents, or of a father and mother  
 respectively.

Paternal  
 grand-  
 fathers  
 rank  
 equally in  
 succession  
 with full  
 brothers,  
 or those by  
 the father,  
 and mater-  
 nal grand-  
 fathers  
 with  
 brothers  
 by the  
 mother's  
 side only.  
 But on  
 failure of  
 brothers  
 and sisters  
 their rank  
 is that of  
 immediate  
 parents.

This principle is established by a tradition of the *Imám Jafer Sádik*, on whom be peace, quoted by *F'oozeyl Ebn Yesar*, in these words: "Verily a grandfather is associated in succession with brothers, his portion is equal to one of theirs and neither more nor less. Further, by an authentic report of *Aboo Buseer* from the same *Imám*, in these words: "I stated the case of a person who died leaving six brothers and a grandfather; he replied, 'The grandfather is as one of the brothers.'" By another decision in the case of a brother's son and a grandfather, to this effect: "The property is to be divided equally



betwixt them ;” and by another in the instance of a sister’s daughters with a grandfather, to this effect : “ To the sister’s daughters one-third, and the remainder to the grandfather,” which last decision obviously proceeds on the supposition that both sister and grandfather were related by the same side, whence the distinction of male and female would have bestowed a double portion on the latter.

A single heir of any description takes the whole inheritance.

If a sharer, under two distinct titles.

And if a simple residuary, under this title alone.

Except a widow, who is always restricted to her share.

If there should be only one heir of a person deceased, such individual takes the whole property to himself, whatever the nature of his title may be, consanguineous, emancipatory, or of patronage, in whatsoever class or description he may be placed, and if, even the lowest or most remote member of that class, without any distinction whatsoever, and this by unanimous assent. The only distinction that can occur is this : that where such individual or sole heir happens to be of the class of *sharers*, he inherits under two separate titles ; first, his own appointed share and then the *return* as a *residuary*. Where, on the other hand, he is not a sharer, his simple residuary title alone embraces the whole property at once, whether founded upon emancipation, patronage, or any other ground whatsoever. Thus, if we suppose a sister by the mother’s side to be the sole heiress of a person deceased, she receives first her appointed share, viz., a sixth part of the estate, and then the remainder as a residuary. If, again, a brother by the father should be sole heir, he inherits the whole property at once as a residuary, having no specific share allotted to him ; and upon these two examples all other classes and degrees may be conceived without repetition. In the case of a husband, the principle is exactly the same, according to the most prevalent doctrine, but with regard to a widow, her residuary title in any case is most generally denied, and the grounds of its rejection have already at great length been detailed.

As establishing the general principle in addition to unanimous assent, we have the following traditional documents :—First, a report of *Sulma Ebn Mohuruz*, from

the *Imám Jáfer Sádik*, on whom be peace, to this effect : “ I reported the death of a man who had bequeathed to me all his property by will, having at the same time a daughter. The *Imám* inquired if there were any witnesses to the will, and upon my answering in the negative, directed me to surrender all the property to the daughter as hers of right.” Secondly, by a report of *Abdoolla Ebn Sinán* from the same *Imám*, in these words : “ I inquired concerning a person deceased who had left a brother by his mother and no other heir besides. He replied, ‘ The property goes all to that brother.’ ” Further, in the commentary of *Aly Ebn Ibrahim*, a tradition is quoted from *Bookeyr Ebn Ayoon* of the *Imám Mohummud Bákir*, on whom be peace, to this effect : “ If a man die leaving an only sister, she takes first her appointed share, viz. one-half of his inheritance, agreeable to the sacred text, in the same manner as a daughter would have done if in existence, and the remaining half also reverts to her should there be no other nearer heir, in virtue of a residuary title.” If instead of this sister there be a brother of the deceased, he inherits the whole property under one general title, agreeable to the saying of Almighty God,—“ And he is sole heir if there be no issue.” Again, should there be two sisters, these receive first two-thirds of the estate as their appointed share in the Book of God, and the remaining third reverts to them as residuaries.” To the same effect are various other documents.

If there be more than one heir of a person deceased, some of whom do not exclude the others from inheritance, then attention must be paid to their titles and lines of descent, and if amongst them no specific sharer should appear, the property must be divided according to their own respective portions ; as where, for example, a person leaves children, male and female, in which case each of the former has double the portion of one of the latter ; and where also he leaves brothers and sisters all by the same father and mother, or by the same father only, in which case the same rule is observed, and so on.

If, again, amongst these heirs, neither of whom

Case of a plurality of heirs who are all residuaries.

If some are sharers

and some residuaries, the former are preferred to their full shares.

excludes any other, some sharers and some residuaries are observed, the former are preferred to their appointed shares in the first place, and the remainder of the estate goes to the residuaries; as where, for example, a woman leaves both her parents, her husband, and children, both male and female, in which case the parents take a third part of her estate betwixt them, her husband takes a fourth, and the remaining five-twelfths go to her children, of whom a male has the portion of two females; and when, also, a woman leaves her husband, a paternal and a maternal uncle, in which case the husband takes a half, his appointed share, her maternal uncle, being also a sharer, receives his third, and the residue, or one-sixth only, goes to the paternal uncle. Again, the case is exactly the same where, with her husband, a woman leaves children of her paternal and of a maternal uncle, for here, also, the husband takes his half, the maternal uncle's children, in right of their father, a third, and the remaining sixth part goes to the children and the paternal uncle. Upon these three examples all similar cases may be conceived, without the trouble of repetition; and this preference of law to sharers over residuaries is established not only by many traditions already quoted, but also by a report of *Akba Ebn Busheer* from the *Imám Mohummud Bakir*, on whom be peace, in the case of a woman who died leaving her husband and both her parents, upon which this decision was pronounced: "To the husband one-half of her estate, a third thereof to the mother, and the residue, or one-sixth, to her father." Again, in the case of a woman who left her husband, her father and mother, a decision of the *Imám Jáfer Sádik*, on whom be peace, is recorded by *Aboo Buseer*, to this effect: "The distribution of her estate is into six equal portions, three of which, or one-half of the whole inheritance, is the share of her husband; a third, or two portions, go to the mother; and the residue, or one-sixth, to her father;" to which effect there are various other traditional documents. Now it has already been stated, as written in the book of *Aly*, on whom be peace, that a paternal aunt of the deceased is exactly in the situation of a father, and

a maternal aunt in that of a mother, as to inheritance. It follows, [therefore, of necessity that a paternal uncle or aunt, and an uncle or aunt by the mother's side, if combined with a husband or widow, form a case exactly similar to that of a father and mother of the deceased, when combined with a husband or widow, without any difference or distinction whatsoever.

If all the heirs of a person deceased should be specific sharers in the estate, without any individual amongst them who claims under a simple residuary title, this case admits of three different suppositions—first, that the estate is capable of embracing and discharging all the appointed sharers without surplus or deficiency of any fraction whatsoever; second, that it falls short of all the shares; and third, that, after payment of them all, a surplus of some fraction remains. Under the first supposition no difficulty whatever occurs; for each individual must, in this case, receive his full appointed share by unanimous assent, as when, for example, a person deceased may have left two daughters, his father, and mother, in which case, the former have two-thirds of the estate, or four fractions produced by a *divisor* of six, and each of the latter one of these fractions, thus involving the whole of the deceased's property. In like manner, when he may have two sisters by the father's side, and brothers or sisters by the mother's, as two-thirds go in this case to the former, and one-third is the share of the latter, likewise involving the whole of the property; or where, for example, a woman may leave her husband and one sister by the father's side, each of these taking a half of her property; and all similar cases in which the divisions have been already established, both by divine and traditional authority.

Under the second supposition, again, viz., when the property falls short in distribution of all the appointed shares, and which can only happen when a husband or widow interferes, all our doctors are agreed that the loss or deficiency must invariably fall upon daughters or sisters of the deceased by both parents, or, by the father's side; in other words, there are only four of the appointed shares

Case when all the heirs are specific sharers, and their appointed shares exhaust the estate without a fraction.

If the estate falls short of the appointed shares, the loss must invariably affect daughters or sisters

by the fall of inheritance which can be affected by any deficiency of blood or by arising in the distribution, viz., the share of one daughter the father. and of two or more daughters, the share of one sister and of two or more sisters, either by both parents, or by the father only. Thus, if a woman leave her husband and two sisters, either by the same father and mother, or the same father only, the husband is entitled to a half, and the sisters to two-thirds; consequently, the regular divisor of these shares is six, whereas their appointed portions amount to one fraction more than this division would admit of.

Again, if we suppose with a husband of the deceased one sister by the father's side, and a sister by the mother's, both the husband and first sister being entitled to a half, and the latter's share being a sixth, here also a deficiency of one-sixth would occur. Further, if we suppose with the husband as above, two daughters and both parents of the deceased, here the divisor being necessarily twelve, of which three, viz., a fourth, is the husband's share, eight, or two-thirds, that of the daughters, and each of the parents take a sixth, or two fractions, it follows that a deficiency of three-twelfths would arise in the distribution. Lastly, if with the husband there should be one daughter and both parents of the deceased, here also a deficiency of one-twelfth would arise, because the daughter's share is a half, or six fractions produced by a divisor of twelve, the husband is entitled to a fourth, or three, and each of the parents to a sixth, or two parts, in this division; all which making thirteen, exceed the estate by a twelfth. Let us now apply the loss or deficiency in each of these four examples agreeably to the principle laid down, and affecting the shares therein mentioned, which must invariably guide the distribution in all similar cases. In the first example, therefore, the two sisters receive only the half which remains after the husband's share, instead of two-thirds, thus suffering the loss of a sixth. In the second, the sister by the father's side submits also to the loss of a sixth from her appointed share, receiving only two parts instead of three. The two daughters again, in

the third example, suffer a deficiency of three-twelfths in their share, receiving only the five which remain after payment of the husband's share and that of both parents. Lastly, in the fourth example, the single daughter by the same side loses one-twelfth part of the inheritance, receiving only five parts instead of six under a division by twelve.

This principle is established by the unanimous assent of all our doctors, to whom God be gracious, following the express conditions of our *Holy Imáms*, upon whom be the blessing of God, in such a manner as to render its belief and practice one of the essentials of our religion: whilst the uniform doctrines of the vulgar sect have instituted and supported the practice of *aúl*; that is, increasing the divisor, or number of shares, and thereby proportionally diminishing the value of all in cases of defalcation in the estate. By application of this practice to the four examples we have given, the division in the first would be by seven instead of six. Of these seven parts the husband would receive three, and four would go to the two sisters. In the second example, also, the husband would receive three parts out of seven, the sister by the father's side likewise three, and one-seventh part would go to the sister by the mother. In the third example, again, the divisor being increased to fifteen, the husband would receive three of these parts, the two daughters eight, and to each of the parents two-fifteenths parts of the inheritance would go by application of this practice. Lastly, in the fourth example, the distribution would take place into thirteen parts instead of twelve, whereof the husband would receive three, six would go to the one daughter, and each of the parents receive two. And a similar increase of divisors may be conceived in all other similar cases.

But can never be rendered general by increasing the divisor or number of shares.

From our pure and holy *Imáms*, however, upon whom be the peace and blessing of God, there are innumerable traditions recorded and generally known, which expressly annul and prohibit this practice, and in which they not only in the strongest terms deny its legality, but also prove, in the most satisfactory manner the perverseness of those doctors of the vulgar sect who recommended it and

*Aúl* is unlawful.

applied it. In one tradition, reported by *Aboo Murium Ansary* from the *Imám Mohummud Bákir*, on whom be peace, there are the following words:—"Verily He who knows the number of the sands of *Aaluj* (i.e., Almighty God) knows also that the appointed shares of inheritance cannot be increased above six." Now *Aaluj* is a place in Arabia, famed for the extent of its sands, and the meaning of his expression, on whom be peace, "the shares cannot be increased above six," is obviously this, that although for the convenience of distribution the number of fractions are necessarily increased under a fixed rule, still the six radical shares of inheritance must be preserved, viz., two-thirds, a half, one-third, a quarter, a sixth, and an eighth. To which effect there is another express tradition recorded by *Bookeyr* from the *Imám Jáfer Sádik*, on whom be peace, in these words:—"The radical shares of inheritance can only be six; they can neither be increased above the number, nor can they be altered by *qul*; and after this radical division, the property must be allotted to the several sharers who are mentioned in the Book of God." Again, in a report of *Hussamy* from the same *Imám*, on whom be peace, we have these words:—"Ebn Abbas was wont to declare that He who could number the sands in the desert of *Aaluj*, knew that the radical shares of inheritance cannot be increased above six;" and to the same effect are various other authentic documents generally known.

If a surplus should remain after distribution of all the shares it reverts to the consanguineous sharers, in proportion to their original allotment.

Under the third and last supposition regarding an estate to be distributed, viz., that a surplus thereof shall remain after payment of all the shares, we observe that this surplus reverts by our law to the consanguineous sharers in proportion to their respective shares, and is divisible amongst them either by fourths or by fifths; for the *return*, or reversion, admits of no other distribution. Thus, if there be one daughter and the mother of a person deceased, the latter takes first her appointed share, or a sixth part of the property, the regular divisor being six: the daughter has her moiety, or three parts, produced by this division; and the remaining two-sixths are divided betwixt them by fourths in the return, one-fourth to the

mother and three to the daughter, corresponding, this latter division, obviously to their original shares of the inheritance. If, again, with a daughter there be both father and mother of the deceased, each of the latter taking first a sixth part of the property, and the daughter her half or three-sixths thereof, the surplus in this case of one-sixth returns to all proportionally, and is, therefore, divided into five parts, one-fifth thereof to each of the parents, and the remaining three to the daughter. But a more simple and easy method of distribution, in examples of this nature, occurs by a primary arrangement of their shares, in cases where the return is by fourth parts into four, and where by fifteenths into five; and thus in the first example the mother would at once receive a fourth part of the estate, and three-fourths go to the daughter. Hence in every case where the surplus or return is divisible by fourths, a primary arrangement of the whole estate into four parts must obviously answer all the purposes of distribution; and in like manner where by fifths, an arrangement into five will produce the true shares without any fraction. This simple and summary method would appear to be alluded to in a traditional report of *Sulman Ebn Moharuz*; but another authentic report of *Mohummud Ebn Moostim* affords equal support to both the modes defined, viz., the common and prevalent one, which comprehends, first, the distribution of the appointed shares, and then division of the surplus or return by fourths or by fifths, and also this simple and summary method of arranging the whole property at once into four parts or into five.

It is to be observed that there is no return of any part of the surplus to a husband; nor to a widow, whilst any consanguineous relation exists; nor to the mother, except on failure of brothers and sisters, who exclude her, as has already been mentioned, although they do not themselves inherit, nor to any relation by the mother's side only whilst a relation by both parents or by the father exists, as shall be hereafter at more length explained; and upon these maxims all our doctors are agreed, although opposed

There is no return to a husband or widow, whilst any consanguineous relation exists; nor to a mother, if there be brothers or sisters;



nor any residuary title in the *asbat*, or paternal male kindred, whilst a consanguineous sharer exists.

by those of the vulgar sect, who here introduce their doctrine of *asbat*, following their pretended *Imáms*, who lead them to hell fire by supporting a false residuary title, which would confer the surplus or reversion of an estate after payment of the appointed shares upon the male relations of the deceased's father; and under this title, if we suppose the mother and a daughter of any person deceased to exist, the surplus of two-sixths of the estate would devolve on his brother by the father's side or on his paternal uncle's.

The fallacy, however, of this principle has ever been considered a fundamental and necessary part of our legal creed, as established by the authentic traditions of our pure and holy *Imáms*, upon whom be the blessing of God. In one of these reported by *Hoosim Zudád* are the following words:—"I was directed to ask the *Imám Jáfer Sádik*, on whom be peace, to whom doth the property of a person deceased of right appertain? to his own nearest relation or to his *Asbat*? He replied:—"Verily it belongs to the nearest relation, and as to the *Asbat* or more distant male kindred, 'Dust in their jaws.'" But in reality the sacred text of the *Korán* regarding relations by blood sufficiently demonstrates the fallacy of the residuary title as expressed in the commentary of *Ayashy*, from *Zuraru*, who quotes the words of the *Imám Mohommud Bákir*, on whom be peace:—"Of relations by blood, some are preferred to others in the Book of God; that is, some are preferred to others in inheritance, because the nearest in blood to the deceased is necessarily preferred, and excludes all more remote. Now (adds the holy *Imám*), who is nearest to the deceased, and who ought to have a preference—his mother or his brothers? Is not the mother nearer than any brother or sister?" Again, in the authentic collection of *Mohommud Ebn Moosim*, we have the following details:—"The *Imám Mohommud Bákir*, on whom be peace, showed me a chapter on inheritance in the handwriting of *Aly*, and dictated by the Prophet of God, on whom and his posterity be blessing and peace. In it I observed the case of a man who died leaving a

daughter and his mother thus decided:—To the daughter a half, or three fractions, out of six, and to the mother, as her share, a sixth, or one fraction; but, for simplicity, the property to be at once divided into four equal parts, of which three to the daughter, and one-fourth to the mother. Again, I observed therein the case of a man who had left his father and a daughter thus decided:—The daughter's share is a half, or three portions out of six, and the father's a sixth, or one portion: but the property here also, in order to simplify the return, to be divided into four parts, of which three to the daughter, and one-fourth to the father. Further, I found the case of a person leaving both parents and a daughter thus decided:—To the daughter, as her share, a half, or three-sixths, and to each of the parents a sixth, or one portion; but to include, to reversion, the whole property at once divided into fifths, of which three to the daughter, and two to both the parents." Further, in a report of *Sulma Eln Mohuruz*, from the *Imám Jâfer Sâdik*, on whom be peace, we have the following decisions:—“In the case of a daughter and the father, he decreed, first, to the daughter a half, and to the father a sixth part, and then of the surplus, or remaining two sixths, three-fourths to the daughter, and one-fourth to the father, by return. In reality, the decision was the same as if the whole property had been first divided into four equal parts, whereof three went to the former, and one-fourth to the latter, for these have surely a better title to the surplus than a paternal uncle, or a brother, or any more remote male relations, because Almighty God hath appointed shares for them in his sacred word, and to them, therefore, the surplus must revert, in proportion to these shares.” Again, in a tradition reported by *Zurara* from both these *Imáms*, on whom be peace, the following words are contained:—“If a person deceased leave his mother or father, his wife and a daughter, the distribution of his inheritance is into twenty-four equal parts: to the widow an eighth of the whole, or three of these portions; to the parent, whether father or mother, a sixth of the whole, or four of these parts; and to his daughter a half, or twelve parts. Now,

the surplus, or five remaining fractions, are returned to the daughter and parent in proportion to their original shares ; but no part of them whatsoever reverts to the wife. If, again, he should leave both parents, his wife, and a daughter, here also the division is into twenty-four, whereof eight go to the parents, four to each ; three to the widow, or one-eighth of the whole ; and twelve, or a half, to the daughter ; but the surplus, or one twenty-fourth part, which remains, is in this case to be divided amongst the daughter and both parents, in proportion to their original shares, and no part whatever thereof reverts to the widow. Further, if a woman deceased should leave her father, her husband, and one daughter, the distribution of her estate is, in this case, into twelve, of which two parts, or a sixth, goes to the father ; three, or a fourth, to her husband ; and six, or a half, to the daughter ; the surplus, or remaining sixth, reverting to the father and daughter, in proportion to their original shares ; but no part thereof whatsoever going to her husband. To this effect there are many other authentic reports generally known.

All that has here preceded respecting the return to consanguineous heirs in general must, however, be particularly understood as applying only to those cases where relations by both parents or by the father are not combined with relations by the mother only. In other words, as applying only to a case where all the heirs are either of the first series of relations by consanguinity, or of the second with this proviso, that they be all either related by both parents or by the father, or all related by the mother's side only. If, therefore, on the contrary, in the second class of consanguineous heirs there should be some related by both parents and some by the mother's side only, the prevalent opinion in this case is, that the surplus or return must be conferred on the former, to the entire exclusion of the latter. And this doctrine may, indeed, be considered as established by unanimous assent. Thus, if a person leave a brother or sister by the same father and mother, with a brother or sister by the same mother only, the latter receives but a sixth part of the estate, and all

Maternal relations are excluded from the return by those of the full blood or by the father.

the remainder goes to the relation by both parents, whether a specific sharer or not, by reason of his uniting two causes of relationship to the deceased, viz. the paternal and maternal side, in consequence of which he enjoys a natural preference in succession over the relation by the one side only; and, further, because the loss or deficiency, should there be any, as where a husband or widow of the deceased interferes, must invariably fall on the relation by both sides, as already explained, whence obvious justice would necessarily dictate his superior title to the surplus or return, when these do not interfere, to make up for his loss in the other event; and this doctrine is particularly supported by a tradition of the *Imám Moḥammad Bâkir*, on whom be peace, recorded by *Mohammad Ebn Mooslim* in these words:—"I inquired concerning the son of a sister by the father's side with the son of a sister by the same mother only. He replied, 'To the latter a sixth part of the estate, and all that remains to the former.'" Now, it is evident that, if the relation by the father's side were not expressly preferred, the surplus or residue, in this example, after distribution of a half and a sixth, would necessarily have been divided betwixt the sons of both sisters by fourths, in proportion to their specific shares; whereas this decision clearly demonstrates the exclusive preference to one. And if this preference is expressly conferred on a relation by the father's side, it must belong to one by both parents *a fortiori*.<sup>17</sup>

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<sup>17</sup> The manuscript from which the preceding has been taken concludes with several sections which are contained in Chapter V. of Book VII. and being all from the same authority need not to be repeated. There is also a section on Hieroglyphites which has been omitted as of no practical utility.



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BY THE **·S̄A·M·E·** AUTHOR.

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