
AL - FIQAH
(ISLAMIC JURISPRUDENCE)

VOLUME FOUR
MU'AAMLAAT (AFFAIRS)

(Continued)

PART – IV – TIJARAT
PART – V – 'AARIYAT
PART – VI – 'UQUBAAT
PART – VII – MUKHASAMAAT

BY

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BOOK – I *

BAI'

(SALE)

SALE *

(*Hidayab, Kitab-ul-Buyoo'*)

Note

Literally, Bai' means "bargain", which implies "sale" as well as purchase", and legally it, signifies an exchange of property for property with the mutual consent of the parties. *Shira* signifies purchase. The seller is known as *Bai'ee* ; the purchaser as *Mushtaree* ; the thing sold as *Mab'ee* ; and the price *Saman*. Honest Business (i.e., sale and purchase) is lawful and is permitted by Qur'an and Hadees as well as by the entire Muslim Ummah. The Holy Prophet Muhammad (peace be upon him) has said that, "in the Hereafter the honest business man will be in the company of the Prophets the Truthful ones, and the Martyrs (Tirmizi, Ibne Majah Haakim).

CHAPTER 1

CONTRACT OF SALE

1. Sale is entered into by declaration and acceptance.

Sale is made by declaration and acceptance, one party makes the declaration and the other party make the acceptance.

Thus, if Zaid first says to Umar, "I have sold to you this particular goods of mine for ten Dirhams," and Umar then says, "I have bought that article belonging to you for the said price," the statement of Zaid is the declaration, and the statement of Umar is the acceptance. And if, Umar first says to Zaid, "I have purchased this particular article belonging to you for ten Dirhams," and Zaid then says, "I have sold that article to you for the said price," the statement of Umar in such a case is the declaration and the statement of Zaid is the acceptance.

* Qur'an, Ch. 2 (Baqarah), verse, 275; Ch. 4 (Nisa), verse, 29 & 30, Mishkaat, Kitab-ul- Buyoo ; Ainul Hidayah, Vol III, pp. 01 to 236

2. Expressed in the preterite or in the present tense.

It is necessary that the declaration and acceptance should be expressed in the present or preterite tense because if either is expressed in the imperative or future term the contract will not be complete.

Thus, if the seller says to the purchaser, "Buy this article of mine for ten Dirhams," and the purchaser says, "I have purchased from you the said article for ten Dirhams" or if the seller says, "I have sold this article to you for ten Dirhams," and the purchaser says "I will purchase the said article from you for ten Dirhams;" in none of such cases the sale will be binding.

3. Or by any other words to convey the same meaning.

It may be noted that in the same way in which a sale is established by the words, "I have bought;" or "I have sold"; so also is it also established by other words which may convey the same meaning; as for instances, either party, says "I am contented with this price", or "I have given you this article for a certain price;" or "take this article for a certain price;" because, in sale, regard is to be had to the spirit of the contract, and use of the specific words "bought" and "sold" are not necessary; and therefore sale may also be contracted simply by a Ta'taa or mutual surrender, where the seller gives the article sold to the purchaser, and the purchaser in return gives the price to the seller, without speech on either side.

Some have said that sale by mutual surrender is lawful only in respect of less value; but not in respect of things of high value.

But majority of the jurists have held irrespective of the less or high value, sale by a mutual surrender is lawful in every case, as it establishes the mutual consent of the parties to the contract .

4. Acceptance can be delayed until the breaking up of the meeting; whether the declaration is made personally.

If either of the parties to a contract of sale makes a declaration, the other party is entitled to withhold his acceptance or refusal until the breaking up of the meeting; and this entitlement is known as the “*Khiarul Qubool*” (or the option of acceptance. The reason for this is that if such entitlement is not allowed to one of the parties, it would necessarily follow that the sale would take effect without his acceptance.

It may be noted, in this instance that as the declaration is not of itself enough to complete the contract, of sale the person making the declaration will be entitled to withdraw from it.

5. Or by letter or message.

Same will be the position if the buyer or the seller sends a letter or a message to the other, that the other one has the option of withholding his acceptance or refusal until he leaves the place of meeting where he receives such message or letter.

6. Offer made by the purchaser.

If the purchaser declares that he has purchased of merchandise at a specific price, the seller is not in such a case entitled to consider his acceptance as limited to a part of the merchandise only at a rate which is in proportion to the declaration in respect of the whole.

Similarly, if a seller makes a like declaration, the purchaser is not entitled to consider his purchase in that manner, because this will be a deviation from the terms preferred; and also because the declarer has not consented to it .

7. Unless he object to a particular rate or price to specific parts or portions.

But if, the person who makes the declaration mentions a specific rate, for specific parts of the merchandise, then in such a case the acceptance can be limited.

Thus if a person declares that, "I will sell this heap of grain for ten Dirhams," and the purchaser, declares his acceptance, in such a case he is not entitled to limit his purchase to one-half of the grain for five Dirhams, but, if the seller declares that, "I will sell this grain at the rate of one mound for a Dirham," in such a case the purchaser after declaring his acceptance, is entitled to limit his purchase to any quantity he would like to purchase.

8. If the acceptance is not declared in due time.

If the seller or the purchaser makes a declaration, and one of the parties leave the place before expressing any acceptance, the declaration thus made will be void.

9. Declaration and acceptance absolutely made.

When declaration and acceptance are absolutely made, without any condition, the sale becomes binding, and no party is entitled to retract from it unless there is defect in the goods, or goods have not seen.

10. Where the article and the price are both produced.

If, at the time of making a contract of sale, the good, or the price, or both are present and alluded to in it if the seller declares that, "I have sold this wheat to you for these Dirhams," or the purchaser declare that, "With these Dirhams now present I have purchased such an article belonging to you", in such a case the sale is lawful, even though neither the quantity of wheat nor

the amount of the money is mentioned; because the reference made to them is enough to ascertain the substance of the contract, and does not leave any occasion for any dispute.

11. Mention of money without specifying the sum .

If, at the time of making the contract, of sale the Dirhams or Deenars are not present, so as to be referred to ; in such a case the general mention of them, without specifying their numbers or their quality, is not valid; because delivery of them by the purchaser is necessary.

12. Sale to be entered into against ready money, or with a promised time of payment.

A sale is lawful against ready money or with the promise of payment at a future time as may be fixed by the parties by agreement.

13. Price to be fixed at some known and determinate rate.

A sale, against payment by Dirhams in an absolute manner, as when a person says "I have sold this for ten Dirhams" is lawful ;but all the different species of Dirhams should be of the same value; and in such a case the purchaser will be entitled to make payment of the price in any of the species of Dirham he may like.

But if the species of Dirhams are of different value, the rate will then be according to the rate generally in use ; and if, the species be of different values, and it is not possible to know the one which is of general use, the absolute mention of Dirhams in such a case will make the sale invalid, because the price will then be uncertain, and a dispute will necessarily arise. But, if the parties, to avoid the dispute will by voluntarily fix the rate, the sale will become valid.

14. Grain can be sold for grain of different kinds.

It is lawful to sell the wheat, or grain of any other kind by measures of capacity, or by estimation if it is by way of exchange for a different kind of grain; because the Holy Prophet has said "Sell anything which is in exchange for a different kind, in any manner you like and without regard to the equality;" (Muslim) and also, because the uncertainty in such a case creates no bar to its delivery. But it is not lawful, to sell grain in exchange for the same kind, by conjecture, because this amount to usurious in nature.

15. Goods can be sold by weight or measurement not of any particular standard.

In a sale it is lawful, to use the measure of a particular vessel of which the exact capacity is not ascertainable; or the weight of a particular stone, the exact weight of which is not ascertainable, because the uncertainty in such a case cannot be the cause of any dispute, as either of these can be used and the delivery is immediate, and it is not likely that the vessel or the stone will be lost or destroyed between the measurement and the delivery.

16. Except in a case of Salam Sale.

But a measurement of this kind, is not permissible in Salam Sales, where the price is paid in advance and the goods are delivered afterwards, because in such a case it is likely that the vessel or the stone may be lost or destroyed between measuring of the contract of sale and delivery of the goods.

17. Sale fixing specific price for each specific part or portion of goods.

If a person sells a heap of grain, by saying that, "I have

sold this heap at the rate of one Dirham for every Qafeez," * in such a case, according to Imam Abu Hanifah, the sale takes effect in one Qafeez only; and cannot it extend beyond it, unless the seller also mentions in the same meeting, the sum of the Qafeez.

But Imam Abu Yusuf and Imam Muhammad are of the view that the sale of the whole will be lawful in both cases.

18. Sale mentioning the whole quantity.

If a person declares that, "I have sold my flock of goats at the rate of one Dirham for each," the sale in such a case will be totally unlawful, i.e., it will not extended even to one goat, according to Imam Abu Hanifah; and similarly, the sale is totally unlawful if a person sells cloth at the rate of one Dirham per yard, without mentioning the number of yards; and likewise in any other article, e.g., wood, pots, or the like.

But Imam Abu Yusuf and Imam Muhammad are of the view that, in all such cases, the sale is lawful in respect of the whole quantity.

19. If the quantity agreed for falls short.

If a person purchases a heap of grain for one hundred Dirhams, on the condition that the heap is of one hundred Qafeez; and afterwards it is discovered that it of less than one hundred Qafeez in the quantity, in such a case the purchaser will have the option of taking the available quantity, at a rate proportioned to the conditions of the contract, or reject the contract entirely.

20. If it exceeds.

But if, the heap is afterwards found to be of more than the stipulated quantity; the sale will be lawful in respect of the

* A measure containing about sixty – four pounds weight.

quantity of the one hundred Qafeez, and the excess will continue to be the property of the seller, because the sale has been restricted to a specific quantity; and the excess is therefore not included in the description.

21. If the quantity is capable of specification and falls short.

If a person sells a piece of cloth for ten Dirhams, on the condition that it is of ten yards; or a piece of land for one hundred Dirhams, on the condition that it is of one hundred yards, and afterwards deficiency appears, in it, in such a case the purchaser has the right of cancelling the sale entirely, or of taking the deficient cloth or the land, at the stipulated price.

22. If it exceeds.

But if, the cloth or the land proves larger than the description, in such a case the excess will be the property of the purchaser, and there be no option for the seller.

23. If the quantity expressed relate both to description and to substance.

If a person sells a piece of cloth, saying that, "I have sold this piece of cloth, which is of one hundred yards, at the rate of one Dirham for each yard," and afterwards a deficiency appears in it, in such a case the purchaser is entitled to take it, with a proportional reduction in the price, or dissolve the contract entirely.

But if, the measurement of the cloth exceeds one hundred yards, the purchaser will be entitled to take the whole, at the rate of one Dirhams for each yard, or dissolve the contract entirely.

24. The sale of a particular number of yards of a tenement is void; but not the sale of a share.

If a person purchases ten yards of a tenement measuring one hundred yards, such contract is void, according to Imam Abu Hanifah, even if the buyer knows or does not know the measurement of the entire tenement. But Imam Abu Yusuf and Imam Muhammad are of the view that it is valid.

But if, a person purchases ten shares of a tenement of one hundred shares, it is valid, in the opinion of all the jurists.

25. Purchase of a package of cloth.

If a person purchases a package of cloth, on the condition that there are ten pieces in it, and afterwards it appears that there are nine or eleven pieces in it, the sale is not valid, due to the uncertainty, with regard to the price, in the one case, and to the goods in the other.

26. Unless the seller previously specifies the price of each particular piece.

But if, the seller mentions the price of each piece of cloth, and there be too few, the sale is valid; but the purchaser has is entitled to finish it if he pleases; but, if there be too many, it is not valid, due to of the uncertainty with regard to the goods, as it would not be possible to ascertain the specified ten that were included in the sale.

27. Sale is void, if description of the goods is fallacious.

If a person sells two pieces of cloth, on the condition of that they are of Herat, and one of them afterwards proves to be of Marwa, in such a case the sale is totally invalid, that is, it does not hold good even as regards the true one, even though the seller had mentioned the prices of both; because when the seller joined together both pieces in the contract of sale of Herat pieces, he, had virtually, established a condition that the purchaser should accept a piece of Marwa which was a false condition, the sale is therefore not valid.

28. Purchase of cloth at a price fixed per yard.

If a person purchases a piece of cloth, on the condition that it is of ten yards, at the rate of one Dirham per yard, and it afterwards proves to be of ten yards and a half, or nine yards and a half, in such a case the purchaser, according to Imam Abu Hanifah, is liable to pay ten Dirhams in the first case, and nine in the second case and he will still be entitled to finish the contract if he pleases. Imam Abu Yusuf says that if the purchaser chooses to honour the contract, he will have to pay eleven Dirhams in the first case and ten in the second case. The view of Imam Muhammad is that in such a case if the purchaser chooses to honour the contract, he will have to pay ten and a half Dirhams in the first case, and nine and a half in the second case.

SECTION

THINGS WHICH ARE INCLUDED IN THE SALE SPECIFIC MENTION

1. In the sale of a house the foundation and superstructure are both included.

If a person sells his house the foundation and superstructure are both included in such sale, even though they have been specifically mentioned by the seller.

2. In the sale of land, the trees standing upon it are included.

In a sale of land, the trees standing upon it are included, even though they are not specifically mentioned, because they are joined to it, like the foundation and superstructure in the case of a house.

3. But not the grain.

But in a sale of land, the grain growing on it at the time of sale is not included, unless it is particularly mentioned by the

seller, because it is not joined to the ground, as a fixture, but for the purpose of cutting away from it, like reward of the goods placed upon any land.

4. Nor in the sale of a tree, the fruit then upon it.

If a person sells a tree on which there is the fruit growing, the fruit will belong to the seller, unless the fruit is also specifically included in the sale; because the Holly Prophet (peace be upon him) has said, that "if a person sells a date tree with fruit upon it, the fruit belongs to the seller, unless the purchaser stipulates its delivery to him as a condition of sale." (Bukhari and Muslim). Besides, even though the fruit is, in fact, a part of the tree, but as it is to be plucked and gathered, and not to remain hanging on the tree, it is therefore the same as the grain.

5. Seller to immediately clear the fruit.

It may be noted, that in the sale of a tree with the fruit, or of the land with the grain upon it, the seller should immediately to clear them away, and handover the property to the purchaser, because, in such cases, since the property of the purchaser and the seller are involved together, it is necessary for the seller to take away what belongs to him; like removal property sold by him of his goods from the land sold by him.

6. In the sale of land, the seed sown in it is not included.

If a person sells a land in which seed has been sown, but of which the growth has not been started, in such a case the seed will not be included in the sale.

But if the growth has taken place but not of such a degree as to make the vegetable of any value, in such a case there is difference of opinion among the fruits. Some say that the vegetation will not be included in the sale; which others, are of the view that vegetation will be included.

7. Time-product not included, in the sale of land or trees, even though the rights and appendages are mentioned in the contract.

Grain or fruit are not included in the sale of land, or of a tree, even though the purchaser and seller mention the rights and appendages, as for instance even if the seller says that, "I have sold this land, or this tree, with all its rights and appendages, because grain and fruit do not come under the definition of rights and appendages.

Similarly, if the seller says that, "I have sold this tree, or this land, with every thing small and great of its rights and appendages which I have in it, "even then neither the fruit nor the grain will be included in the contract of sale.

8. Unless all its dependencies are generally mentioned.

But if, he says, in general terms that, "I have sold this tree or this piece of land, with every thing great and small which I have in it," in such a case the grain and the fruit will also be necessarily, had included in the contract of sale.

9. Product cannot be included after it is cut down or gathered.

It may be noted that grain which has been cut down, or fruit which has been plucked, cannot be included in the contract of sale, unless specifically mentioned.

10. Fruit may be sold upon the tree at every stage of growth.

The sale of fruit upon a tree is lawful, whether the strength of the fruit is known or not, that is, whether it has reached or not to such a stage of, the strength which may save it from usual accidents; because fruit is of value, immediately, of its being ripe, or afterward, in case it is in the unripe stage, some

jurists have said that the sale of fruit in a weak state is not valid; the first view is, the most authentic; and the sale of fruit in an absolute manner is valid, the purchaser should immediately take it from the tree, whether this is particularly mentioned as a condition in the sale or otherwise.

11. If the contract involves any improper condition to the sale.

If, the condition of allowing the fruit to remain on the tree is stipulated, the sale will be void, because such a condition is not legal, as it involves the right of property of two parties, which is against the spirits of sale; and every such condition makes the sale invalid. Further, in such a case, it necessarily follows that one deed is inter – related acted with the another, a loan or a lease is involved in the sale, which is not lawful.

Similarly, the sale of grain, with the stipulation to leave it on the seller's land, is not lawful, on account of the same reason.

According to Imam Abu Hanifah and Imam Abu Yusuf, the same rule will also apply where the fruit or corn have fully grown up, as this will also involve the right of property of two parties. Imam Muhammad is, however, of the view that, in such a case, this condition is lawful, because the presence of the whole thing in question; which, in the previous case, the part of the property which has afterwards grown up was not in existence at the time of the making of the contract; and the mention of a condition in respect a nonentity being illegal, the sale is therefore not lawful.

12. Additional growth of fruit purchased on the tree, if allowed to remain upon it, by consent of the seller.

If a person purchases the fruit upon the tree before it has fully grown up, in an absolute manner, that is without mentioning the condition that it will remain upon the tree until it becomes

ripe, and then, with the consent of the seller, allows it to remain on the tree, in such a case the additional growth will become his lawful property.

But if, he acts as such without the consent of the seller, he will then have to give the difference in charity, as it will be the product of the property of another person without his consent.

But if, the sale of the tree has taken place when the fruit had fully grown up, and the purchaser allows it to remain on the tree until it become ripe, he will not have to give anything in charity, because in such a case the change takes place without any increase in the substance.

13. And so also if the purchaser takes a lease of the tree.

If a person, purchases the fruit which has not yet fully grown, up allows it to remain on the tree till it becomes ripe, by taking the tree on lease till that period, in such a case the increase in the substance will be lawful for him, because the lease is void due to want of exact knowledge as of the period of it, and also due to its not needed on account of absolute necessity, since as it was in the power of the leasee to have purchased the tree itself, and as the lease is void, there remains only the consent of the seller, to which regard is necessary.

14. But this rule does not apply to the grain purchased upon the land.

But it is otherwise where a person purchases the grain upon the land, and then also takes a lease of the land until the grain becomes capable of reaping and allows it to remain until that time; because the increase in the substance in such a case will not be lawful for him, as the lease so made is not valid, and an invalid lease is the cause of baseness and abomination.

15. New fruit growing in the interim period is the property of the seller and purchaser.

If a person, without any condition, purchases the fruit upon a tree which has not yet fully grown up, and then, before receiving delivery of it, new fruit grows, in such a case the sale is not valid, due to the impossibility of delivery by the seller, on account of the impossibility of distinguishing between what was the substance of the sale and what was not.

But if new fruit grows after getting the possession by the purchaser, such fruit will equally belong to both of them, because if its mixing up with the property of both. The assertion of the purchaser, however, with regard to the quantity, will be accepted, as the fruit will be in his possession. The sale of artichokes or melons which are growing will also governed with the same rule as that of fruit growing upon trees.

16. Rule in the purchase of the growth sold on a tree.

If a person purchases fruit, artichokes, or melons, and then be also entitled to let them remain on the tree until they become ripe, or until they yield a new crop, to have a lawful right on the property, it would be expedient, to make such conduct legal, to purchase the tree or bed itself, and after gathering the fruit when ripe, to finish the contract of sale in respect of the tree or bed.

If a person sells the fruit, reserving a specific number of Rats of it, the sale is not valid, whether the fruit is the tree or not; because even if the reservation is itself specific and known, yet the remaining is not known.

But it will be otherwise if reservation is made in respect of a particular tree; because in such a can the remainder will be known, as being obvious to the eye.

The author of *Hidayah* says that this view is confirmed by a tradition of Imam Hasan, adopted by Tahavee; but that such a sale is also valid according to the *Zahir Rawayat*, and it is also the view of Imam Shaafe'ee, because it is a rule that whatever can lawfully be sold, separately, can also be lawfully excepted from the contract sale. Thus since the sale of one *Qafeez* out of a heap of grain is lawful, the exception of it is also a lawful.

But it will be otherwise as regard the foetus in the womb, or an animal; because as the separate sale of it is illegal, so also the reservation of it is also illegal.

17. Grain can be sold in the ear, or pulse in the husk.

The sale of wheat in the ear, or of beans in the husk, is lawful; and the same law also applies in respect of rice or rape seed in the husk.

18. Sale of a house includes the fixtures and their appendages.

If a person sells a house, of which the locks are not hanging but fixed, in such a case, the keys of such locks will also be considered as included in the sale; because the locks themselves are included in the house, on account of their being the fixtures; and the sale of a lock also includes the key, even though it is not expressly mentioned, because it is actually a constituent part of it, as a lock without a key is useless.

19. Wages of weighers, tellers, measurers, and money essayers.

The wages of the measurer of the goods, or of the essayer of the money, are to be paid by the seller.

20. Charges of weighing the price.

The charges of weighing the price are to be paid by the purchaser.

21. Barter or exchange.

In a sale of goods for goods, or of money for money, it is necessary that both parties should give the delivery at the same time; because in case of being on a par in point of certainty and uncertainty, there is no necessity for a prior delivery.

CHAPTER 2

OPTIONAL CONDITIONS.

(*Hidayah, Kitab-ul-Buyoo' , Baab Khiyar-ush-shart **)

Note

Literally, Option means “choice” or “choosing”, and legally it signifies a condition where a party to the contract of sale stipulates as a condition that he may have the option, for a period of two or three days, of accepting or annulling the contract if he so please. (see Bukhari, Muslim, Ahmad).

1. Condition of option can be stipulated by either party.

The stipulation of a condition, by the seller as well as by the purchaser, is lawful; and it can be for a period of three days or less; but it cannot be extended beyond three days.

2. But not to exceed beyond the term of three days.

Condition, of option to remain in force for a period of more than three days, is not valid according to Imam Abu Hanifah and Imam Zufar and Imam Shaafe'ee are also of the same view. But Imam Abu Yusuf and Imam Muhammad are of the view that it can be for any length of time.

* Arab ; Khiar-al-Shirt. In contracts of sale there are five different options : These are, 1. Option of acceptance, 2. Optional conditions, 3. Option of determination, 4. Option of inspection, and 5. Option from defect. An option of acceptance is a liberty which either of the parties : in a contract of sale, has of withholding his acceptance, after the tender of the other, until the breaking up of the meeting. An optional condition is where one of the parties stipulates a period of three days before he gives his final assent to the contract. An option of determination is where a person, having purchased one out of two or three homogeneous things, stipulates a period to enable him to fix his choice. Option of inspection, is the power which the purchaser of an unseen thing has of rejecting it after sight. Option from defect is the power which a purchaser has of dissolving the contract on the discovery of a defect on the merchandise. (English translation of Hidayah, by Charles Hamilton)

3. If it is for more than three days.

Although a condition of option for more than three days is not allowed, but if such a condition is stipulated, and the person making this stipulation, before three days, accept of the contract, the sale will be valid, according to Imam Abu Hanifah. But Imam Zufar is of a different view.

4. Payment of the price can be stipulated as the condition.

It is lawful for a person to make a purchase on this condition, that "if within three days he does not pay the price, the sale shall be void."

But if, instead of three days, he mention four days, the sale will not be valid according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad holds that the sale will be valid, even if he stipulates four days or more.

All jurists, however, agree, that even in such a stipulation, if the purchaser pays the price, within third day, the sale will be valid.

5. Seller reserving a condition of option.

If the seller reserves for himself the condition of option, the right of property over the goods will not in such a case shift from him, because completion of the sale will depends upon the mutual consent of the parties, and the condition of option proves that the seller has not absolutely consented to the sale.

further is the purchaser in such a case will not be entitled to use or employ the goods, even though he may have taken the possession of them with the consent of the seller.

But if, after the purchaser had taken possession of the goods, they are lost or destroyed within the period of optional condition, he will become in such a case responsible for the value of the goods.

But if, the goods are lost in the possession of the seller, the sale will be void ; and no payment will be due on the purchaser.

6. Property devolves upon the purchaser.

If the condition of option is stipulated by the purchaser, the right of property over the goods will shift from the seller, because the sale is completed on his part.

But the right of property, even if it shifts from the seller, does not vest in the purchaser, according to Imam Abu Hanifah, while Imam Abu Yusuf and Imam Muhammad are of the view that the purchaser becomes the owner.

7. If the purchaser has the option, and the goods are lost or destroyed in the interim period.

If the goods, where the option lies with the purchaser, are lost or destroyed, during the interim period the purchaser will be responsible for their price.

8. If it lies with the seller.

But it be otherwise where the goods are lost or destroyed in the possession of the purchaser when the option lies with the seller ; because in such a case the purchaser will be responsible only for the value (and not for the price fixed in the contract of sale).

9. Right of option in the purchase of a wife.

If a person purchases his own wife, with an option reserved for himself for three days, in such a case the marriage will subsist during the interval, as the right of property does not take place because of the optional condition; and if he does sexual intercourse with her during that interval, the condition of option will not thereby be finished, because he will still have the right on account of such condition, to finish the sale, as his sexual intercourse with her is the exercise of a right on account of his marriage, and not on account of his right of property.

But if, his wife is a virgin, his sexual intercourse with her will annul the condition of option, and establish the sale, as it is amount to damage to her, and results in the reduction of her value. This is according to Imam Abu Hanifah. But Abu Yusuf and Imam Muhammad are of the view that the husband becomes owners of his wife immediately on the optional purchase, whence the marriage is immediately finished. If, therefore, he does sexual intercourse with her, he is not afterwards entitled to reject her, even if she would not have been a virgin; because the marriage being void, the sexual intercourse was not on account of marriage, but on account of property.

This difference of the views between Imam Abu Hanifah and Imam Abu Yusuf and Imam Muhammad, regarding the property vesting immediately in a conditional purchaser, has given rise to divergent decisions in many cases, as follows :-

10. Optional purchase of a slave related to the purchaser.

If a person makes an optional purchase of a slave related to him within the prohibited degrees, his emancipation, according to Imam Abu Yusuf and Imam Muhammad, will take place immediately; while according to Imam Abu Hanifah, it will not take place until the contract is confirmed.

11. Slave optionally purchased under a vow of emancipation

If, a person makes a vow to emancipate a slave whenever he will become the owner of any, then, according to Imam Abu Yusuf and Imam Muhammad, if he makes a conditional purchase of a slave, his emancipation will take place immediately; while, according to Imam Abu Hanifah, it will not take place till confirmation of the sale.

12. Menstruous female slave.

If, a person makes an optional purchase of a female slave, and she happens to menstruate during the term of option, her courses will be included in the term of abstinence, according to Imam Abu Yusuf and Imam Muhammad (to ascertain whether she is pregnant or not). But according to Imam Abu Hanifah, they are not to be included. And if the purchaser, on account of his option, returns her to the seller, the seller is not bound to observe the prescribed term of abstinence, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that such observance will be binding on him.

13. Pregnant wife.

But if, a person makes an optional purchase of his own wife, and if she, during the period of option, gives birth to a child, she will not be an *Umme-Walad* for the purchaser, according to Imam Abu Hanifah. But according to Imam Abu Yusuf and Imam Muhammad, she will be as such. If also, a person makes an optional purchase of goods, and has, with the consent of the seller, got the possession of it, afterwards gives it in deposit to the seller, and it is lost during the period of option, in such a case according to Imam Abu Hanifah, the trust will be null and void, as the deposit was not the property of the purchaser, and therefore he is of the view that the loss will be of

the seller ; But Imam Abu Yusuf and Imam Muhammad, hold the said deposit to be valid, and therefore they are of the opinion that the loss will be of the purchaser, according to the law of deposits.

14. Optional purchase made by a privileged slave.

But if a privileged slave makes an optimal purchase ; and the seller, during the period of option, exempts him from the payment, in such a case, according to Imam Abu Hanifah, the condition of option will remain in force; while, according to Imam Abu Yusuf and Imam Muhammad, the condition of option will be finished by the exemption of payment.

15. Optional purchase of wine by a Zimnee, who in the interim period embraces the faith.

If, a Zimnee purchases wine from a Zimnee, on the condition of option, and the purchaser, during the period of option, becomes a Muslim, in such a case, according to Imam Abu Yusuf and Imam Muhammad, the condition of option will remain no longer in force; but according to Imam Abu Hanifah, on the contrary, the sale will become void.

16. Possessor of option.

In a sale on a condition of option it is lawful, according to Imam Abu Hanifah and Imam Muhammad, for the party having the right of option to finish the sale during the stipulated period, or to confirm it; which latter he may do without the knowledge of the other. But Imam Abu Yusuf are of the view that the parties having the right of option can finish the sale without the knowledge of the other, and the same is also, is the view of Imam Shaafe'ee.

17. If he annuls it without the other's knowledge.

If the person having the right of option finishes the sale without informing the other party, and such knowledge, also, reaches him during the stipulated period, then, because of his getting such knowledge, the annulment becomes complete. But if, it does not reach him until the expiration of the period of option, then the annulment will be complete, on account of the expiration of the period of option.

18. Right of option in sale does not descend to the heir .

If a person having the right of option in a sale dies, the sale will then be completed, and the right of option will be void, and will not descend to his heirs.

19. Right of option may be referred to a third person.

If a person, in purchasing any goods, stipulates the option of another person, in such a case, if the purchaser or the possessor of the option confirms the sale, it will be valid ; or, if either of them annuls it, it will be void.

20. Selling two slaves, with a condition of option in respect of one of them.

If a person sells two slaves for one thousand Dirhams, stipulating the condition of option in respect of one of them, the case involves four different statements: (a) Where the seller does not object to specific price to each of the slaves, nor specify the one respecting whom the optional condition is to apply and this is not valid; because of the uncertainty both as to substance of the sale as well as the price; (b) Where the seller fixes a particular price upon each of the slaves, and also specifies to which the condition of option will apply; and this is valid; because of the certainty with respect of the substance of the sale as well as the price; (c) Where the seller objects to a particular price to each slave, but does not specify to which of them the

condition of option will apply ; and (d) Where the seller specifies the slave to whom the condition of option will apply, but does not object to a specific price to each of them

In the last two cases the sale will not be valid, because of the uncertainty of the substance of the sale in the one case, and of the price in the other case.

21. Option of determination.

If a person purchases one of two pieces of cloth for ten Dirhams, on the condition of his option for three days to determine which of the pieces he may approve, such sale will be valid. This is known as "Khiyar-at-Ta'ayyun."

22. It applies to a choice out of three, but not out of more.

Similarly, the sale will be valid, where a person purchases, with the option of choosing, one out of three pieces; but it is not be valid in case of option to choose, one out of four pieces.

23. Option of determination can involve a condition of option.

Some jurists have said that, in the case of option of determination, a condition of option is also indispensable; and that is noted in the Jaama'as-Sagheer while some jurists, following the Jaame'al-Kabeer, are of the view that the condition of option is not necessary; and therefore it is inferred that what has been noted in the Jaame'-as-Sagheer is that such a condition often takes place; and that it is not absolutely necessary.

24. Term for making the determination.

It may be noted, that if, in a sale with the option of determination, it should not taken to be necessary to mention a condition of option, the period for determining the choice

should, in such a case, according to Imam Abu Hanifah is to be limited to three days. But according to Imam Abu Yusuf and Imam Muhammad, it can be fixed for any period they may like.

25. Goods referred to the purchaser's choice.

It may also be noted that in the case of option of determination, the substance of the sale will be one piece of cloth, for example, and the other piece will be a deposit in the hands of the purchaser.* If, therefore, one of the pieces is lost or destroyed, the sale will take place in respect of it in exchange for the stipulated price; and the other piece will be as a deposit ; because it is not possible to reject the piece, which is lost or destroyed.

But if, both the pieces are lost, the purchaser in such a case will have to pay half of the price of each, because the determination of purchase being not with respect any of the pieces it follows that sale and trust will operate indefinitely in respect of each of the two pieces.

26. Both pieces can be returned in case of a condition of option.

If, in addition of the option of determination, a condition of option is also made, the purchaser in such a case will be entitled to return both the pieces.

27. Option of determination descends to the heirs .

If a person having an option of determination dies, his heirs will have the right to return one of the goods, because an option of determination descends to the heirs, because of the involvement of his property with that of another; on account of which he is not, in his option of determination, restricted to three days only.

* And consequently (according to the laws of deposit) he is responsible in case of accidents, for one piece only. (Charles Hamilton)

But if, a person recently having the option dies, his heirs will have no option, because a condition of option is not inheritable.

28. Option declared and sale made binding by any act of the purchaser in relation to the goods sold.

If a person purchases a house with a condition of option and the adjoining house is afterwards sold before during the period of option, and the purchaser on account of the condition of option claims the right of *Shuf'ah*, in such a case his consent to the first sale is thereby virtually given, and his right of option will no longer exist ; because his claim of *Shuf'ah* will presuppose him to be confirmed in the adjoining property; otherwise he will have no right to make such a claim; and it will therefore be inferred, that he first gives up his condition of option, and then makes his claim.

It may be noted that the necessity of such explanation arises on account of the view of Imam Abu Hanifah; because by his tenets, a purchaser under a condition of option does not become owner of the goods of sale during the period of option. But Imam Abu Yusuf and Imam Muhammad, are of the view that he will immediately becomes the owner under the condition of option; and therefore this explanation, with regard to their view is not necessary.

29. Option of determination, vesting jointly in two persons.

If two persons purchase a slave on the condition that both purchasers will have the option of rejecting him, and one of them afterwards declares his acceptance, the other person cannot reject him, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that if the other person chooses, he is entitled to reject his share in the slave.

Same disagreement exists in respect of two purchasers in the case of option of inspection or option from defect.

30. If goods purchased under one description proves to be of another description.

If a person purchases a slave on account of his being a scribe, or a baker, and later he proves to be none of these, the purchaser is in such a case entitled to confirm the sale, or reject it, as he may like.

OPTION OF INSPECTION.

(Hidayah, Kitab-ul-Buyoo', Baab Khiyar –ur-Rooyat)

1. Purchaser can reject any goods upon inspection after purchase.

If a person purchases any goods without having first seen it, the sale will be valid, but the purchaser after seeing it will have the option of accepting or rejecting it as he may like.

2. Even if, before seeing it, he had signified his satisfaction.

If a person, after purchasing any goods without seeing it, says, "I am satisfied with it," even then, after seeing of it, he will be entitled to reject it if he so chooses.

3. Seller has no option of inspection after sale.

If a person sells any goods, which he himself has not seen, he will have no option of inspection and retraction after the sale.

4. Option of inspection remains in force.

The right of option of inspection, like a optional condition, is not restricted upto a particular period, but it remains in force until anything repugnant to the nature of it takes place.

It may also be noted that whatever causes the finishing of an optional condition, as for instance, a defect in the goods, or an exercise of the right by the purchaser, also causes the finishing of the option of inspection.

5. Such as would have finished the condition of option.

If, therefore, the exercise of the right is such as cannot, be retracted, as for instance the emancipation of a slave, or making him a Modabbir, or, if it be such as to involve the rights of others, as for instance absolute sale, mortgage, or hire, the option of inspection will be forthwith finished even if the goods have been seen or not; because these acts make the sale binding, and the existence of such option will be incompatible with the obligation of the sale.

But if, the exercise of right is not such which may involve the right of others, as for instant a sale with an optional condition, a sample tender to purchase, or a gift without delivery, the option of inspection will not be finished previous to the actual seeing of the goods sold, because such acts are not stronger than the purchaser's acquiescence; and as the purchaser's express acquiescence to inspecting is not the cause of finishing the option of inspection, it follows that the acts above described do not finish it, a fortiori; while such acts after inspection finish the option of inspection, as they indicate an acquiescence, and an acquiescence after seeing the goods result in the finishing of the option.

6. Option of inspection destroyed.

If a person sees a heap of grain, or the outward appearance of the cloth which is folded up, or the face of a female slave, or the face and posteriors of an animal, and then purchases the same, he will not have the option of inspection.

But in the purchase of goods of which the individuals are not similar, as for instance cloths or animals, the seeing of one will not be enough; and the purchaser should see each individual goods. According to Karakhi ,eggs and walnuts are of this kind of goods.

7. Option of inspection in the purchase of a house.

If a person sees the front of a house, and then purchases it, he will not have the option of inspection, even if he not seen the inside apartments of it. Similar will be the case, if a person sees the back parts of a house, and purchases it or sees the trees of a garden from without and purchases it. But Imam Zufar has said that it is necessary that the purchaser should also see the inside apartments of the house.

8. Inspection by the agent for possession, or the messenger, of the purchaser.

Inspection by an agent appointed by the purchaser to take possession of the goods purchased amount to the inspection by the purchaser himself and as such, after inspection by the agent, the purchaser is not entitled to reject the goods purchased, unless there is a defect in the goods. But inspection, by the messenger of the purchaser does not amount to inspection by the purchaser This is the view of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that an agent and a messenger in effect, are the same, and therefore inspection by any of them is not equal to the inspection by the purchaser, and as such, the purchaser is entitled to reject the goods after inspection in both cases.

9. Inspection by a blind person.

Sale or purchase, by a blind person, is lawful; and, even after the purchase, he has the right of option as having purchased the goods without seeing it; which option may be determined by touching the goods, if it is of such a nature that it can be known by touching, or by smelling if it can be known by the smell; or by the taste, if it can be known by taste; in the like manner as all these modes determine the option of a person who is possessed of the sight.

10. Or in a purchase by description.

The option of a blind person, in respect of purchasing of land, cannot be determined without a description of its qualities of it to him; because a description of the qualities of the land amounts to a sight of the land, as it is in the case of Salam Sales.

It is reported from Imam Abu Yusuf, that if a blind person, purchasing the land, stands on a spot from where, if he was possessed of the sight, he could inspect the whole, and then says that, "I am satisfied with this land which I have purchased," the right of option will be finished ; because the standing on the spot in this manner is like the actual seeing of it; and the likeness is equal to the reality where the reality is unattainable; as in the case of a dumb person, the motion of whose lips is deemed equal to the reading of the Qur'an ; or, as in the case of a bald person, in respect of whom the movement of the razor over his head is deemed equal to actual shaving.

But Imam Hasan is of the view that a blind person should appoint an agent for possession, who should inspect and take possession of the goods on his behalf; and this is according to the view of Imam Abu Hanifah as mention above.

11. Seeing of one of two goods which do not admit of samples.

If a person, after seeing one of the two clothes, purchases both, and then sees the other, he will have the option of rejecting both ; because, as clothes differ essentially from one another, the seeing of one is not the seeing of both; and therefore his right of option still remains in respect of the one he had not seen. He is not entitled, however, to reject that one singly; because in such case an alteration in the sale will take place before the completion of it, because a sale is not complete while an option of inspection remains; and therefore it is that the purchaser can reject the goods, even without an order of the

Qazi, or consent of the seller; and such rejection will amount to dissolution of the sale from the beginning, as if the sale had never taken place.

12. Option finished by the death of the person having it.

If a person who has the option of inspection dies, the option will be finished because ; according to the jurists, it is not a inheritable.

13. Inspection previous to purchase.

If a person, who has once seen any goods, afterwards, at later time purchases it, and the goods, at the time of purchase, is in the same form and description in which he had first seen it, in such a case he will have no further option.

But if the purchaser does not recognize or know it to be the same goods, in such a case he will have an option; because under such circumstances his consent cannot be implied; or if, the nature of the goods is changed, he will have the option; because on account of change in the nature of the goods , it becomes in fact the same as if he had not seen it.

If the purchaser and the seller dispute regarding any recent change in the nature of the goods, the purchaser asserting the change, and the seller denying it, in such a case the statement of the seller, on oath, will be accepted; because the interval between the seeing and the purchase is short, and therefore the possibility is in favour of the statement of the seller, that the change has not taken place till after the purchase.

But if there is a longer period between the seeing and the purchase, in such a case the jurist are of opinion that the assertion of the purchaser should be accepted because, by nature everything decays in course of time, and therefore the possibility is in favour of the purchaser.

But if the parties dispute regarding the time when the goods had been inspected, the seller says that the purchaser had first seen and then purchased the goods, and the purchaser denies it, in such a case the statement of the purchaser, on oath, will be accepted.

14. Option after disposing of a part of the purchased goods .

If a person purchases a bundle of clothes of a Zoota * without seeing the clothes, and then sells or gives away part of them; in such a case he will not have the option of rejecting any of the remaining clothes unless they prove to be defective. Similarly, if he purchases a bundle of clothes of a Zoota, with a the condition of option, and then sells or gives in gift part of the clothes, his right of option will finish.

* A tribe of black Arabs, "Zoot. A tibe of Arabs who formerly inhabited the fenny region lying between Wadis and Basra ; they were defeated and reduced to servitude by Mootasim, the eighth Khalif." (De Herbelot.) (Charles Hamilton)

CHAPTER 4

OPTION ON ACCOUNT OF DEFECT

(Hidayah, Kitab-ul-Buyoo', Baab Khiyar-ul-'Aib)

1. Purchaser discovering defect in the purchased goods.

If a person purchases and takes possession of any goods, and then discovers defect in at the time of saling it, in such a case he will have the option to take it for the full price, or to reject it.

2. Unless he knew the defect beforehand.

But if, the purchaser, at the time of purchasing it, or taking possession of it, knew the defect, and inspite of knowingly, intentionally makes the purchase, or takes possession, he will not have any option at all.

3. Anything which may depreciate the goods.

Anything which may be a cause of reducing the value of the goods according to the merchants is considered to be a defect.

4. Defects incident to children.

A disposition to abscond, or to make urine upon beds, or to commit theft, are treated as defects among the children during their minority, but not after they attain the age of maturity.

Therefore, if any such defect is found in a minor slave, during childhood, while in the hands of the seller, and then appears in him, during childhood while in the hands of the purchaser, the purchaser in such a case will be entitled to return him to the seller, due to the option from defect ; because this defect is the same which existed while the child was in the possession of the seller.

But if, any such defect occurs in him, while the child is in the purchaser's hands, after he attains maturity, the purchaser will not be entitled to return him on account of option from defect.

But the child, here dealt with, should be the one in its perfect senses; because a child not in its perfect senses is not capable of running away or absconding.

5. Lunacy is a perpetual defect.

If an infant slave is lunatic in the hands of the seller and the lunacy recurs while in the hands of the purchaser, during childhood or after attaining maturity, the purchaser will be entitled to return him to the seller; because this lunacy is the same which had existed while the slave was yet in the seller's hands, as being caused by the same cause, i.e., internal malady.

6. Defects which are found in the sale of female slaves, but not of males.

A bad smell, from the breath or armpits, of a female slave, is a defect in respect of female slaves, because generally the purpose is to sleep with them, and such defects will come in the way of accomplishment of that purpose.

But these, are not the defects in respect of the male slaves; because the purpose, in purchasing them, is merely to get their services, and for this these defects do not in the way. But if they are on account of any disease, then they are defects in respect of male slaves also. In fact disease itself is a disease.

Actually and bastardy are defects as regards the female slave, but not as regard the male; because the purpose of it purchasing a female slave is sexual intercourse and birth of children, which is adversely affected by either of the above defects. But the purpose of purchasing a male slave is to get his services, the value of which is not reduced by his committing adultery.

But if, a male slave is in the habit of committing adultery, the jurists are of view that it is a defect because in going after the women he will neglect his slavery towards his master.

7. Infidelity in both male and female slaves.

Infidelity is a defect in both the male as well as the female slave because a Muslim by nature hates the company of an infidel; and also because as, in the compensation for murder, the emancipation of an infidel slave is not enough, therefore the possession of such a slave is not what is desired, as a part of the purpose is thus defeated.

But if a person purchases a slave, on the condition that he is an infidel, and he afterwards proves a Muslim, the purchaser will have no option of finishing the sale, because exemption from infidelity is not a defect.

8. Physical infirmities in a female slave.

Total stoppage of the menses as well as excessive evacuation of them, are defects in respect of a female slave, as they are from internal defects.

It may be noted that the wants of the menses is not a defect until the entire period of maturity is finished, which in females, according to Imam Abu Hanifah is seventeen years; and this knowledge should be had from the information of the slave woman herself. Therefore, if a person purchases a female slave of the age of full maturity, that is, seventeen years of age, and learns from herself that her courses have not started, he will then be entitled to return her to the seller before taking possession; and even after taking possession, if the seller denies the defect, and refuses to confirm it oath. But if the seller denies the defect on oath, the purchaser will not be entitled to return her to the seller.

9. Purchaser entitled to compensation for a defect in an article

If the goods after the sale, gets a defect in the hands of the purchaser, and the purchaser learns that it also had the defect at the time of sale in such a case he will be entitled to get from the seller a compensation for the defect; but he will not be allowed to return it to the seller.

10. Purchaser entitled to compensation for a defect discovered after the goods have been cut up.

If a person purchases cloth, and cuts it up, and then, before sewing it discovers a defect in it, in such a case he will be entitled to a compensation for the defect from the seller.

11. Unless, after cutting, he puts it out of his power.

But if, after cutting the cloth, the purchaser sells it to another person, he will not then be entitled to any compensation for the defect from the seller.

12. If the return is impracticable.

If a person purchases cloth, and, after cutting, it dyes it or sews it; or purchases flour and mixes it up with oil, and then discovers the goods to be defective, in such a case he will be entitled to a compensation for the defect from the seller.

But if the purchaser, in any of such cases, sells the goods, after discovering defect in it, he will be still entitled to a compensation from the seller.

13. Purchasing of cloth for the use of an infant.

If a person purchases cloth, and cuts it out for clothing his infant son, and after having sewn it up discovers a defect in it, he will not be entitled to compensation for the defect from the seller.

But if, the son is adult, the purchaser is entitled to compensation. The reason is that in case of minor ownership passes to him before sewing, while the case of adult, owner passes to him when the clothes is given to him after sewing

14. Purchaser of a slave entitled to compensation.

If a person purchases a slave, and then emancipates him, or the slave dies in his possession, and the purchaser then comes to know that the slave was defective, he will in either case be entitled to compensation from the seller.

15. But not when emancipation was granted for property .

If a person purchases a slave, and then emancipates him in return for property, and then comes to know that he was defective, he will not be entitled to compensation from the seller, because the return will amount to consideration. Imam Abu Hanifah is of the view that the purchaser will in such a case also be entitled to compensation because emancipation, whether it is gratuitously, or against a return causes, the completion of the right of property.

16. Nor after putting him to death .

If a person purchases a slave, and then puts him to death, and then comes to know that he was defective, he will not be entitled to compensation for the defect, according to Imam Abu Hanifah. This is also according to the Zahir-Rawayat.

But Imam Abu Yusuf is of the view that in such a case also the purchaser will be entitled to compensation.

17. Purchaser of food not entitled to compensation for defect after having eaten it.

If a person purchases any article of food, and eats it, in such a case, according to Imam Abu Hanifah, he will not be

entitled to any compensation from the seller. But Imam Abu Yusuf and Imam Muhammad, are of the view, that in such a case also he will be entitled to compensation.

The same difference of opinion is in respect of the case of a person who, purchases clothes, wears them, till they become ragged, and then discovers a defect formerly existing in them,

18. After eating only a part of the food.

If a person purchases any goods of food, and eats part of them, and then discovers defects in them, according to Imam Abu Hanifah, he will not be entitled to return the remaining to the seller, and demand from him compensation for the defect in the food he has eaten.

There are two views of Imam Abu Yusuf and Imam Muhammad in such a case. According to one view, the purchaser can retain the remaining foods, and get from the seller compensation for the defect of the whole: and, according to the other view, he can return the remaining food to the seller and get proportionable compensation for the defect of what he has eaten.

19. Defect in perishable commodities.

If a person purchases eggs, musk, melons, cucumbers, walnuts, or the like, and after opening them discovers them to be of defective; in such a case, if they are totally unfit for use, the purchaser will be entitled to return of total price from the seller, as the sale is not valid, because of the purpose of it is not in reality property. But if in spite of the defect, they are still fit for food, the purchaser will not be entitled to return them to the seller, because the opening of them is an additional defect caused by him. But he will be entitled to compensation for the defect; as by this the damage he would otherwise suffer will be remedied to a great extent.

20. Purchaser selling the goods he has purchased, which is returned to him on account of a defect.

If a person, after purchasing a slave, sells him to another person, and the other person returns the slave to him on discovering a defect in him, and he agrees to receive him back, following the order of Qazi to that effect, proved by the evidence of witnesses, or on the refusal of the first purchaser to confirm his denial on oath, in such a case the first purchaser will be entitled to return the slave to the seller, because, even if it is not lawful for a purchaser, after the sale of the goods on his part, to return it to the seller, still, in such a case, because the second sale has been finished by the Qazi, it will be as if no such sale had ever taken place.

21. Conduct to be observed by the Qazi.

If a person purchases a slave, takes possession of him, and then alleges a defect in him, the Qazi in such a case should not enforce the payment of the price on the part of the purchaser before investigating his allegation, either on account of the statement of the seller, on oath, that the slave had no defect, or by the proof of his allegation by the purchaser by witnesses.

The suspension of the Qazi's decree in respect of the payment of the price is necessary so that such decree may not be rendered vain and useless on account of subsequent proof of the defect; and also, because the tenor of such decree is that the purchaser will pay the price in fulfilment of the claim of the seller, while the purchaser, by alleging a defect, denies the obligation on him to pay the price.

The Qazi should, therefore, first proceed to determine the defect; and if the purchaser says that his witnesses are in Syria, (i.e., too far to be produced in person) he should then exact from the seller his denial on oath. If the seller takes the oath, the Qazi should then decree the payment of the price; because in suspending the price till arrival of the witnesses, damage will

result to the seller; and the immediate payment of it will not in so great a degree damage the purchaser, because after coming of the witnesses from Syria, if he proves his allegation, the price will be repaid to him on his returning the slave to the seller.

But if, the seller refuses to take the oath in support of his denial, the allegation of the purchaser will then established, as refusal of the seller will be an argument in favour of the existence of the defect.

22. Purchaser alleging the existence of defect in the property before he had purchased it.

If a person, after purchasing a slave, alleges that "he had run away from him, and had also run away while in the possession of the seller," and the seller offers to take an oath that "he had never run away from the purchaser, "the Qazi should in such a case refuse to receive his proof until the purchaser first proves by witnesses that "he had run away from the seller," after which the Qazi should tender an oath to the seller to the effect, "by Allah, I have sold the said slave and delivered him to the purchaser, and he never ran away while he belonged to me" (as noted by Imam Muhammad in the *Jaame'*); or to the effect, "by Allah, the purchaser has no right to return to me such slave on account of the defect which he asserts;" or in this manner, "by Allah, such slave never ran away while he belonged to me." He should not, however, tender an oath to him to the effect, "by Allah, I sold the said slave at a period when he had not the said defect;" nor in this manner, "by Allah, I sold the said slave and delivered him to the purchaser at a period when he had not the said defect;" because, in taking such oaths, the meaning of the seller may be, that "even though he formerly had such a defect, yet he had it not at the identical period of sale or delivery;" and thus, without any deviation from truth, he may defraud the purchaser of his right.

If the purchaser is not able to prove, by witnesses, that the slave had run away from him [i.e., the purchaser], the oath, in that case also according to Imam Abu Yusuf and Imam Muhammad should be tendered to the seller.

The modern jurists have differed from the opinion of Imam Abu Hanifah on this point; as some of them say that, according to him, an oath is not to be administered to the seller in such a case.

If a person purchases a female slave, and after getting her from the seller, on finding a defect, in her desires to return her, and the seller say that "he had sold two female slaves to the purchaser of which he has only produced one," and the purchaser asserts that "he had sold only one," in such a case the statement of the purchaser, on oath, will be accepted.

But if, the purchaser and seller agree as regards the sale, but differ as regards the possession (as if both agree that two female slaves had sold, but the seller says that "the purchaser had received both," and the purchaser says that "he had received only one"), in such a case also the statement of the purchaser, on oath, will be accepted.

23. Person purchasing two slaves, one of whom proves to be defective.

If a person purchases two slaves by one contract, and takes possession of one, and then finds the other one to be defective, he will not in such a case be permitted to retain the one he had taken possession of, and to return the other; but he will have the option of retaining or returning both; because, until both are taken possession of, the terms of the contract are not fulfilled; and therefore, if he keeps one and return the other, it would amount to a deviation from the sale previous to its fulfilment, which is not lawful.

But if the defect is found in the slave of which possession has been taken, in such a case there is difference of opinion among the jurists.

Imam Abu Yusuf, is of the view that the purchaser in such a case will be entitled to return the defective slave only.

The more approved accepted view, however, is that he should keep both or return both; because the fulfilment of the sale depends upon a complete possession of the substance of the sale, i.e., the two slaves.

But if, in the case in question, the purchaser has taken possession of both, and then found out a defect in one of them, he will then be entitled to return the defective one singly, Imam Zufar however is of a different view.

24. Purchase goods of weight, or measurement of capacity.

If a person purchases goods estimable by weight, or by measure of capacity as for instance silver or wheat, and he then finds the goods defective in part of it, in such a case, he will be entitled to return the whole to the seller, or to keep the whole; but he is not entitled to return the defective part only, because the unities of goods estimable by weight or by measure of capacity are considered as forming one article if they are all of the same kind.

Some jurists say that this view is based on a supposition of the goods being contained in one vessel; but that, if they are contained in two, the one containing the defective goods can be returned, and the other one may be kept by the purchaser.

25. If a part of such goods proves to be the property of another.

If, after the purchase of goods estimable by weight, or measurement of capacity, a part of them proves to be the property of another person, the purchaser will not be in such a case permitted to return the remaining one to the seller.

But this is to apply where possession has been taken by the purchaser, before a part of the goods is known as the property of another; because if the ownership of the other is known previous to the purchaser takes possession of it, he will, in such a case, be entitled to return the remaining goods as a deviation from the contract of sale takes place before the completion of the sale.

If the goods are not such as are estimable by weight, or measurement of capacity, but cloth, for example, then the purchaser will be entitled to return the remaining to the seller at all events as division and separation of the goods would, in such a case, prove a damage to it.

26. Purchaser applying a remedy to the defective goods, or making use of it.

If a person purchases a female slave, and finds out that she is suffering for ulcer or from some other such disease, and applies a remedy to it; or, if a person purchases an animal, and finds it to be defective, and rides upon it on account of any business of his own, the application of a remedy in the first case, or the act of riding in the other case indicates acquiescence in the defect by the purchaser, and he will therefore not be entitled to return the slave or the animal account of an option from the discovery of a defect.

But it will be otherwise if he has purchased the animal on the condition of option ; because the purpose of such condition is the knowledge, which depends upon experiment and cannot be gained except by trial.

Moreover, if he rides upon the animal, not on account of his own business, but merely with the intention of returning it to the seller, there will be no acquiescence by him in the defect; and so also, if he rides upon the animal with the intention of giving it water or forage ; provided the riding for such purposes is

unavoidable, because of the animal being unruly and ungovernable, if not mounted, or because of the purchaser himself not capable of walking on foot.

27. If a purchased slave suffers amputation for a theft committed with the seller.

If a person purchases and takes possession of a slave, and does not know that he had previously, while he was in the possession of the seller, committed theft, and the theft was proved, and the slave had suffered amputation for it in the seller's hands, the purchaser, in such a case, will be entitled, to return him to the seller, and receive back the entire price. This is according to Imam Abu Hanifah.

But according to Imam Abu Yusuf and Imam Muhammad, the purchaser will still be bound to keep possession of the slave, and to get from the seller the difference between the value while in his perfect state, and that which he bears after his hand was cut off.

28. If he suffers death for a crime committed with the seller.

The same difference of opinion subsists in the case of a slave suffering death while in the possession of the purchaser, because of the crime he had committed while he was in the possession of the seller; Imam Abu Hanifah is of the opinion that the purchaser will be entitled to the return of the entire price. But Imam Abu Yusuf and Imam Muhammad, are of the view that he will be entitled only to the difference between the value of the slave before his blood has become neutral, and that which he bears after it has been neutral.

29. Slave suffering amputation for two thefts.

If a slave first commits theft with the seller, and then, after being sold, also commits theft with the purchaser, and then suffers amputation for both thefts, in such a case, according to

Imam Abu Yusuf and Imam Muhammad, the purchaser will be entitled to the difference of the value of the slave at the time of sale, and after commission of the second theft. But Imam Abu Hanifah, is of the view that the purchaser will be entitled to return him, unless the seller by himself agrees to get him back; but he will be entitled to compensation for one-fourth of his value; and if the seller himself agrees to get him back, in such a case he should return to the purchaser three-fourths of his price; because the hand of a man is esteemed equal to half his person; and as, in this case, the hand is cut off for the commission of two thefts, therefore a deduction of one-fourth should be made on account of the theft committed while in the possession of the purchaser.

30. Slave, after being sold three times, suffering amputation for a theft committed with the first seller.

If a slave sold many times, and delivered to three different persons, then suffers amputation for a theft which he had committed while in the possession of the first seller, and of which the different purchasers had no knowledge at the time of making their respective contracts, in such a case, according to Imam Abu Hanifah, the last purchaser will have a right to return him for a full return of the price to the person from whom he had purchased him; and he will again be entitled to return him, on the same condition, to the person from whom he had purchased him; and similarly the return will have to be made through the different gradations of purchasers to their immediate sellers, until the slave will be returned to the seller in whose hands he had committed the theft; similarly as in the case of claim of right; for the existence, of a cause of amputation is according to Imam Abu Hanifah equal to a claim of right. But Imam Abu Yusuf and Imam Muhammad, are of the view that, the last purchaser will be entitled to compensation from the immediate seller; but he again will not be entitled to any compensation from his immediate seller; similarly as in a case of defect; because the existence of a cause of amputation is according to them equal to a defect.

31. Where the purchaser grants the seller an exemption from defects.

If a person sells a slave, with exemption to himself for all responsibility for his defects, as for instance he says, "I have sold this slave with all his defects, "in such a case, if the purchaser agrees to such condition, and exempts the seller from any responsibility, he will not afterwards be entitled to return him to the seller on account of any defect, even though the condition of the seller had been general, that is, without mentioning the specific defects from the responsibility of which he had exempted himself.

CHAPTER 5

INVALID, VOID AND ABOMINABLE SALES.

(Hidayah, Kitab-ul-Buyoo', Baab-ul-Bai'-al-Faasid)

Note

A sale is invalid where it is lawful with respect of its essence but not with respect of its quality; and, where the subject is not of an appreciable nature; and the terms invalid and null, are often indiscriminately used. An abominable sale is such as is lawful both in its essence and quality, but attended with some circumstance of abomination. (English Translation of Hidayah, by Charles Hamilton).

1. Distinctions between a valid and invalid sale.

A sale for carrion, blood, or the person of a freeman, is void; because none of these goods has the characteristic of sale, namely, an exchange of property for property, as none of these goods is a property with any person. A sale in exchange for wine or pork is invalid; because the characteristic of sale exists in there, as these are taken to be property by some people, i.e. Christians and Jews; but they are not considered as property by the Muslims, and a sale of these goods is, therefore, invalid.

2. Property purchased under a void sale.

In a sale which is void, the purchaser is not entitled to do anything in respect of the substance of the sale, but it remains as a trust in his hands, according to some jurists because, as the contract of sale, in such a case, is not lawful, there remains only the possession of the purchaser with the consent of the seller; and, therefore, if the article is destroyed in the purchaser's hands, in this case, he will not be responsible for it. But some jurists are of the view that the substance of the sale, in such a case, is not a deposit, but that the purchaser will not be responsible for it and therefore, if it is destroyed in the purchaser's hands, he will be answerable because the article is as much in his possession, in

this case, as an article detained in a person's hands with the intention of purchasing it, and for which he is responsible. Some jurists say that Imam Abu Hanifah is of the first view, and Imam Abu Yusuf and Imam Muhammad are of the second view.

3. Article purchased under an invalid sale.

In a case of invalid sale, the purchaser becomes owner of the article upon taking possession of it ; and, therefore he will be responsible for it if it is destroyed lost in his hands.

4. Sale of forbidden things .

The sale of carrion, blood, or the person of a freeman, is void, similarly as a sale in return for those articles is null; because as those articles are not taken as property, they are not saleable.

5. Sale of forbidden things, for money, or by way of bartar.

A sale of wine or pork, if, it is for money, is void; but if for any other article, as cloth, for example, it is invalid, and therefore it is that the seller of pork or wine, for cloth, becomes the owner of such cloth, even though the actual pork or wine do not become the property of the purchaser.

6. Sale of a Mudabbir, an Umm-e-Walad, or a Mukatib.

The sale of an Umm-e-Walad, a Madabbir, or Mukatib, is void ; because an Umm-e-Walad has a claim to freedom, as the Holy Prophet has said, "Her child has set her free" (Ibne Maajah) (that is , her child is a cause of freedom to her); and the cause of freedom, in respect of a Mudabbir, is not the decease of his owner, but it as actually extant in him at present, as the owner is not capable of emancipating him after his death; and a Mukatib, is possessed of his own person as a right established in him, and binding upon his owner, and the owner cannot of

himself break or infringe it. If, therefore, the sale of any of these being valid, that which is established in them will be rendered void; and therefore the sale of them will be void.

7. Purchaser not responsible if they die in his hands.

If, after the sale of an Umm-e-Walad or Mudabbir, and the purchaser having their possession, one or other dies, in such a case, according to Imam Abu Hanifah, the purchaser will not be responsible. But according to the Imam Abu Yusuf and Imam Muhammad, he will be responsible for the values. There is one report that Imam Abu Hanifah also coincided with them on this point).

8. Sale is void of fish in the water.

The sale of fish which is not yet caught is void as it is not in the property. Similarly also, the sale of a fish which the vender has caught but then thrown into a large fountain from which it is not possible to take out without difficulty, is void, because there the delivery is not possible, But will be lawful, if the fountain is so small as the fish may be caught with ease. If fish can itself come into a fountain without the proprietor's having taken any means, by the erection of a dam, or a like, prevent their egress, they are not the property, and the sale of them is therefore void.

9. Sale of a bird in the air,

The sale of a bird in the air, or of the one which after having been caught is again set at liberty, is void; because in the one case it is not property, and in other the delivery is not possible.

10. Sale of a foetus in the womb.

The sale of a foetus in the womb, or of the offspring of the foetus, is void; because the Holy Prophet has prohibited it; and also, because there is a possibility of fraud, on account want of certainty in the case.

11. Sale of milk in the udder.

The sale of milk in the udder is void; because there is possibility of fraud, the udder's may be void of milk, and full of wind; or because there may arise a contention as regard the mode of extracting the milk, or because it may happen that the udder contained more milk at the time of extracting in it than at the time of sale; and hence there may be involved in the sale something which may not be properly the substance of it.

12. Sale of the hair or wool upon an animal.

The sale of wool or hair growing upon an animal is void; because, while on the animal, it is considered to be a constituent part of it; and also, because it cannot be exactly cut away from the animal, i.e., leaving a part of it or taking away part of the skin, as it will not be practicable to take it out.

13. Sale of any article which cannot be separated from its situation without injury.

It is not valid to sell a piece of wood sustaining a weight, as, for example, a pillar or a beam, even though the piece of wood is specified and determinate. Nor is it valid to sell a yard from a piece of cloth which is sewed, even if the parties specify that the yard will be cut off from it or not; because in such a case also delivery without damage to the article is not practicable.

But it will be otherwise where a person agrees to sell ten grams, for example, from an ingot of silver if these can be cut off from the ingot without any damage to it.

It may also be noted that if the seller, before finishing the contract, cuts off the yard of cloth, or takes away and separates the piece of wood, the sale in such a case will be complete, as the cause of its invalidity is finished.

14. Or of which the quality or existence cannot be ascertained.

But it will be otherwise as regards the sale of the kernels of dates, because that continue to be void, even though the stones are afterwards opened and the kernels taken out; since, contrary to the case of the yard of cloth, or the piece of wood, their existence was originally not certain.

It is not valid for a game-catcher to sell "what he may catch at one pull of his net;" because the substance of the sale is not certain; and also because the purchaser may be deceived, as it is possible that no game may be caught.

15. Or the quantity of which can only be judged of by conjecture.

It is not valid to sell dates growing upon a tree in exchange for dates which have been gathered, and which are estimated by conjecture to be equal in estimation to those that are upon the tree.

This kind of sale is known as "Mozabinah" (i.e., without weight or measure), and has been prohibited by the Holy Prophet, as well as the sale known as "Mohaqilah", which is the sale of wheat in the ear, in exchange for equal quantity of wheat, by conjecture.

The law is the same in respect of the sale of grapes on the vine in exchange for raisins.

16. Or where the sale is made by the purchaser touching the goods, & c.

It is not valid to sell goods by way of "Molamisah", "Monazibah", or "Alqa al-Hajar" ; that is, by the touch of the goods, by throwing of the woods; or by casting of a stone; as where, for example, a person having shown his goods to another

person, and mentioned the price, the parties agree between themselves that the sale will be binding, on the purchaser's touching the goods, or the seller's throwing them towards him, or the purchaser's casting a stone at them. These modes of sale were common in the days of ignorance; but were prohibited by the Holy Prophet. (Bukhari and Muslim).

17. Sale of grass a common land.

It is not valid to sell grass growing on a common piece of land, because it is not the property of the seller; as it is declared in the Traditions that "in grass all men are alike sharers", i.e. it is common to all. Nor is it valid to let it out on lease; because, as it is not permitted to farm anything, where the purpose is the destruction of it, even though it is the property of the lessor, it is therefore in a superior degree invalid to let in lease an article of which the property is common to all, where the purpose of the lessee is the destruction of it.

18. Sale of bees (unless in a hive, or with the comb)

The sale of bees is not valid according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad is of the view that it is valid, if the bees be in a place of custody, (i.e. hive or bee house), and not wild (i.e. in the air); and this is also the view of Imam Shaafe'ee.

19. Sale of silkworms.

It is not valid to sell silk worms, according to Imam Abu Hanifah as they are animals of an offensive nature. But Imam Abu Yusuf is of the view that if the silk have appeared, they may then be validly sold, as a dependant and Imam Muhammad is of the view that the sale of them is valid in any case, as it is an animal from which advantage is derived, Imam Abu Hanifah is of view that the sale of their eggs also is not valid. But Imam Abu Yusuf and Imam Muhammad, are of the view that such sale is valid of necessity.

20. Sale of pigeons.

The sale of pigeons, of which the number is known, and the delivery possible lawful, as in such circumstances they constitute property.

21. Sale of an absconded slave.

It is not valid to sell an absconded slave, because the Holy Prophet has prohibited this; and also, because his delivery is not practicable. But if the purchaser admits that "the absconder is in his possession," the sale will be valid.

If the slave has eloped to some other person and the purchaser says to the owner, "sell me your slave who has run away to such person," and the seller agrees, the sale in such a case also is not valid, because of the impossibility of the delivery.

22. Seller afterwards recovering and delivering him to the purchaser.

If a person, who has sold an absconded slave, after the sale recovers him, and delivers him to the purchaser, the sale will nevertheless be not valid, because it was originally void, in the same manner as if it had related to a bird in the air.

It is noted from Imam Abu Hanifah, that the sale in this case is valid, if it was not finished before its delivery.

23. Sale of a woman's milk.

The sale of a woman's milk is not valid, even though it is in a vessel.

Imam Shaafe'ee is of the view that if it is in a vessel, the sale of it is valid, because it is a pure beverage. The argument of our jurists is that, as being part of a human creature, it should to

be respected; and the exposure of it to sale is an act of disrespect. In the *Zahir-Rawayat* there is a distinction between the milk of a female slave and a free woman. It is related, as an opinion of Imam Abu Yusuf, that the sale of the milk of a female slave is valid, because the sale of the slave herself is valid. The answer to this is that the sale of the female slave is legal, because of the slavery, which is a quality of her person; but such quality does not relate to the milk; the one being alive, and the other being dead.

24. Sale of the bristles of a hog.

The sale of the bristles of a hog is not valid, because the animal is essentially a filth, and because the exposure of this article to sale is a degree of respect, which is reprobated and forbidden.

But it is lawful, to apply it to use, such as stitching leather, for example, in the room of a needle, as this is required on account of necessity.

25. Sale of human hair.

The sale of human hair is not valid, in the same manner as is the use of it; because, being a part of the human body, it is necessary to preserve it from the disgrace to which an exposure of it to sale will be caused to it.

Moreover the Holy Prophet has said that, "Allah denounced a curse upon a "Waasilah" and a "Mustausilah" (Bukhari and Muslim). The Waasilah is the woman whose job is to unite the short hair of one woman to the head of another, to make her hair appear long; and the "Mustausilah" is the woman to whose head such hair is united. Besides, as it is allowed to women to increase their hair locks by uniting the wool of a camel, it may be inferred that the use of human hair is not valid.

26. Sale of undressed hides.

The sale of the hides of animals is not valid until they are dressed, because the use of them, until they are dressed, is prohibited by the Holy Prophet (Tirmizi) . It is, however, valid to sell dressed hides.

27. Sale of animal substances.

It is lawful to sell or to use the bones, sinews, wood, horns, or hair, of all animals which are dead, but not those of men and hogs.

The reason is that these articles are pure, and are not carrion. Further the death has no affect on them as it has on the animal, as these articles do not possess life.

It may be noted that Imam Muhammad, considers elephant as a filth, like hog, and therefore holds the sale of it unlawful; but Imam Abu Hanifah and Imam Abu Yusuf, considers it in the nature of a wild animal, and therefore regard the sale of it, or of the bones of it, as lawful.

28. Right cannot be sold, unless it involves property.

If in a house, of which the upper and under stories belong to different persons, the whole, or the upper storey only, falls down, in such a case the owner of the upper storey is not entitled to sell his right i.e. the right of building another upper storey, because this, is only a right, and not property.

29. Anything may be sold which can be precisely ascertained.

If a person gifts away or sells a passage, it is lawful ; but the sale or the gift of a water-course is not lawful.

These cases involve two suppositions: (I) The sale may be absolute right in respect of the passage or water course,

without defining the length or breadth of either, (II) it may be of the right of passing upon the passage, or receiving the water.

As regards the first supposition, the difference between the two cases is that the passage is certain and well known, because the known breadth of it is equal to that of a door way; but in the case of a water course there is an uncertainty because it is not known how much of the land the water will cover.

As regards the second supposition, there are two Traditions with respect to a sale of a right of passage on the lane. According to one Tradition, the sale is lawful; and according to the other the sale is not lawful.

The difference between the sale of a right of passage on the lane and a right of drawing benefit from the water, as inferred from the first Tradition, is that a right of passage admits of precise ascertainment, as it is connected with a known object, i.e., the lane; whereas the right of drawing benefit from the water cannot admit of a precise ascertainment, and this, whether the water is to be conveyed in a trough supported upon a woollen frame, or in a trench cut in the land.

30. Deception with respect to the sex.

If a person sells a slave as a female, who afterwards proves to be a male, in such a case the sale is totally void.

31. Re-sale to the seller for a sum short of the original price, before payment of that price.

If a person purchases a female slave, say, for one thousand Dirhams, on the condition of future or immediate payment and after taking possession of her, sells her to the seller himself, for five hundred Dirhams, before making payment of one thousand Dirhams, the second sale will not be valid.

32. Contract in respect of any other subjects which may be joined to the original in the re-sale.

If a person, after purchasing a female slave for five hundred Dirhams, and taking possession of her, afterwards, before payment of the price, sells her, in conjunction with another person, for five hundred Dirhams to the seller himself, in such a case the sale is valid in respect of the female slave whom he had not previously purchased from that person, but void in respect of the other person.

33. Condition of specific tare.

If a person purchases olive oil, on the condition, that it will be weighed with the vessel in which it is contained, and that a deduction of fifty Ratls will be made on account of the weight of the vessel, such a sale will not be valid; but, if the condition is in general terms, that "of deduction will be made for the weight of the vessel," it will be valid; because the former condition is not necessary for the contract, while the latter is necessary.

34. Dispute relating to the vessel which contained the commodity.

If a person, after purchasing oil in a leathern bag, carries it away with him, and afterwards returns a bag to the seller weighing ten Ratls, and the seller says that "this is not the bag he had carried away with him, as that only weighed five Ratls;" in such a case the statement of the purchaser will be accepted, whether the disagreement is considered as relating to the bag being different; or to the difference it creates in respect of the quantity of oil; because, if the difference is relating the identity of the bag of which the purchaser had taken possession, his assertion will be accepted, as the word of the possessor is to be accepted, whether he is responsible for the article, as in the case of an usurper, or merely a confident, as in the case of a trustee, or if, the difference is relating the quantity of the oil, this resolves itself into a difference in respect of the amount of the price, the seller claiming more, and the purchaser admitting less; the purchaser is therefore the defendant; and the statement of the defendant upon oath, is to be accepted.

35. A Muslim may authorise a Christian to sell or purchase unlawful articles on his account.

If a Muslim desires a Christian to purchase or sell wine or a hog on his account, and the Christian does accordingly, in such a case, according to Imam Abu Hanifah, such sale or purchase is valid ; but the order of a Muslim in this respect is of highest degree abominable, and therefore, he is enjoined, where it is in respect of the sale of those articles, to devote the income derived for them in charity for the poor.

But Imam Abu Yusuf and Imam Muhammad are of the view that the purchase or sale of wine or a hog by a Christian, on account of a Muslim, is not lawful.

The same difference of opinion also exists in respect of the case of a Mohrim appointing an agent for the sale of the game he may have caught, when it was unlawful for him to make such sale.

36. Condition advantageous to either party; or repugnant to the contract; or occasioning contention.

If a person sells a male slave, on the condition that the purchaser will emancipate him, or make him a Mudabbir, or a Mukatib ; or if a person sells a female slave, on the condition that the purchaser will make her an Umm-e-Walad, such sale is not valid; because this sale depends upon a condition ; and such sales have been condemned by the Holy Prophet. (Tabrani)

37. But such sale recovers its validity.

If a person emancipates a slave whom he had purchased on the condition, of emancipating him, then the sale, which, because of such condition, was previously illegal, will become valid, according to Imam Abu Hanifah, and the purchaser will be responsible to the seller for the price. But Imam Abu Yusuf and Imam Muhammad are of the view that the emancipation will not make the sale valid; and that therefore the payment of the value, and not of the price, will be binding on the purchaser.

38. Sale by reservation of advantage to the seller from the article sold.

If a person sells a slave, on the condition that "he (i.e. the slave) will serve him for two months after the sale ; " or a house, on the condition that "he (i.e. the seller) will reside in it for two months after the sale ," or if a person sells any other article, on the condition of the purchaser's lending him one Dirham for example, or making him some present, the sale so depending upon any of these conditions is not valid; firstly, because these conditions are opposed to the nature of a sale, and are attached with an advantage to the seller ; secondly, because the Holy Prophet has prohibited a sale on the condition of a loan; and, thirdly, because, if any diminution is made in the price, on account of the services of the slave, or the residence in the house, it will follow that the contract of rent is included in the contract of sale, or if, on the contrary, no reduction is made in the price on these accounts, it will follow that a deed of loan is included in the sale; and both of these are illegal.

39. Sale by the stipulation of a delay in the delivery of it.

If a person sells goods on the condition of suspending the delivery for one month, the sale is in such a case not valid, because a suspension in respect of the delivery of goods which are available and specific is not a lawful condition. The reason of this is that suspension in point of time is allowed by the law, only for the purpose of ease, and is therefore only applicable to a debt, so that the debtor may have time to collect the sum within the prescribed period and pay it accordingly; but as regards a thing which actually exists such as cloth, for example there is no occasion for such a suspension.

40. Sale by the insertion of an invalid condition.

The sale of a pregnant slave, with a reservation of the foetus in her womb, is not valid ; because it is a general rule that nothing, the sale of which by itself is illegal, can be made an

exception to a contract of sale ; and of this kind is a foetus. The sale, therefore, is not valid, because the condition is not valid.

41. Sale of a condition which implicates the subject of another contract.

If a person purchases cloth, on condition that the seller will sew into a vest on his account, the sale is, in such a case, not valid; as this condition, besides being advantageous to the purchaser, is not a requirement of the contract of sale.

Moreover, this necessarily involves two different contracts; that is of sale and loan, or of sale and hire.

If a person purchases one shoe from another person on the condition that the seller will prepares shoe also on his account, or purchases a pair of shoes on condition that the seller will make also straps for them, for tying them, the sale in either case is not valid.

The author of *Hidayah* says that this is based on analogy; because a more favourable construction will suggest that such sale will be lawful, on account of the fact that it is customary amongst the people.

42. Sale with condition for payment of the price, at unknown time.

If a person purchases any goods on the condition that payment of the price will be on the day of the *Nau Roze* (new year), or on the *Mehrjan*,* or on the fast of the Christians, i.e., Easter or the day of breaking lent amongst the Jews, the sale, with such conditions, is not valid, if both parties are not told with certainty about the times of those occurrences. But such sales will be lawful, if times of those occurrences can be known by both parties themselves.

* This is also termed *Merhgan*. A festival observed by the ancient Persians on the day of the autumnal equinox. (Charles Hamilton)

43. Or the date of the occurrence of which is not certain .

A sale will not be valid where the price is agreed to be paid on the return of the pilgrims, or, on the cutting of the grain, or on the gathering of the grapes, or on the shearing of the sheep, because in these cases the period is not absolutely determinate; contrary to the act of giving bail; because the giving of bail, until the occurrences of any of these periods, is lawful; because a small uncertainty does not make the bail-bond invalid, as it does in the case of a contract of sale.

44. Time of payment fixed by a subsequent agreement.

But if, a sale is made in an absolute manner, and the seller agrees to receive the price at any of the periods mentioned above, it is lawful, because, this condition is not included in the contract of sale and therefore, it becomes a condition with regard to payment of debt, not the price, which has a small degree of uncertainty.

45. Sale on condition of an uncertain time of payment.

If a sale is made, on the condition of payment of the price at any of the periods mentioned above, and afterwards the purchaser as well as the seller jointly, or the purchaser alone, remove the uncertainty, by payment or fixing specific time for payments the sale will then become valid.

But Imam Zufer says that, since the sale is originally invalid, the subsequent removal of the uncertainty cannot make it valid.

46. Sale of a saleable with an unsaleable subject.

If a person offers to sale a freeman and a slave, and sells them both in one contract; or, in the same manner, sells one dead goat, and one goat slain by the prescribed form of Zibha, such sale according to Imam Abu Hanifah, will be totally invalid in

respect of both to the freeman and the slave as in the first case, and the dead, and slain goat as in the second are case this will be whether the seller fixes specific price of each or not.

But Imam Abu Yusuf and Imam Muhammad are of the view that if a specific price is fixed of each, the sale will be valid in respect of the slave as well as the slain goat.

47. If the unsaleable article is property.

But if, a person unites in a sale, an absolute slave and a Modabbir, or a slave that is his property, and another that is not, his property the sale is in either case will be lawful, in respect of the absolute slave, or the slave which is his absolute property, in consideration for a proportion from the whole price settled. This is, according to Imam Abu Hanifah and Imam Abu Yusuf and Imam Muhammad. But Imam Zufar is of the view that the sale will not be lawful in either case, in respect of either subject of the contract.

Section (1)

INVALID SALES.

(Hidayah, Kitab-ul-Buyoo', Fasl Fee Ehkaamehi)

1. Responsibility of a purchaser, in an invalid sale, if the goods are destroyed in his hands.

When the purchaser, in an invalid sale, takes possession of the goods, with the consent of the seller, then if, both the goods and the price are property, the purchaser will become owner of the goods sold, and will remain responsible, not for the price, but for the value of the goods, if the goods are destroyed in his possession.

2. Value to be paid in money, or in a similar, according to the nature of the article.

The view that the purchaser "will remain responsible, not for the price, but for the value of the goods," applies to such goods only which are to be compensated by money ; because in respect of the goods which are to be compensable by similars, the purchaser, will be responsible for a similar; because the thing which is a similar in appearance as well as in effect is a more equitable compensation than that which is similar in effect only.

3. Any party may finish the contract before possession.

In an invalid sale, any of the parties, before the possession can annul the contract, so that its invalidity may be finish.

The law will be also the same even after the possession if the invalidity is in the body of the contract.

But if, the invalidity is caused on account of an invalid condition, the person making the condition will be allowed to finish it, but not the other party.

4. Purchaser under an invalid sale.

If the purchaser, in an invalid sale, takes possession of the goods, and then sells it, in such a case the second sale will be valid, as the first purchaser, having become owner on account of possession, is fully entitled to sell the goods; and, when he does so, the right of returning the goods to the first seller is finished.

5. Purchaser of lawful goods for an unlawful goods.

If a person purchases and takes possession of a slave, for wine, or a hog, and then emancipates him, sells him, or gives him in gift, all these acts are lawful, because the purchaser, on account of possession has become owner ; and he is responsible to the seller for the value of the slave. In the case of

emancipation, as the property immediately finishes, the slave becomes destroyed, and therefore arises the responsibility of the purchaser for the value. In the case of sale or gift, the responsibility arises from the right of returning him to the seller being finished as a result of these deeds.

It may be noted that to make a slave a Mukatib, is equal to sale, and therefore finishes the right of returning him to the seller. The redemption of the pledge, however, or the inability of the Mukatib to perform his covenant, will restore the right, because the bar to its operation will be finished.

6. Seller cannot resume the goods before return of the purchase money.

In an invalid sale, the seller is not entitled to take back the goods from the purchaser, before he first return the purchase-money; because the goods, being in consideration of the purchase-money, are kept in the nature of a pledge until it is returned.

If the seller dies, then the purchaser will have a prior claim to the substance of sale; that is, he will be allowed to take payment of the price from the sale of the goods, giving the remainder, if there is any to the other claimants; because, as he has a right in the goods superior to any other person, during the lifetime of the seller, he consequently will have the right preferably to the seller's heirs or creditors after his death; in the same manner as the holder of a pawn has.

It may be noted, that if the price was paid in Dirhams, the purchaser will have a right to get from the seller the identical Dirhams he had paid him; as the purchase money : in the case of an invalid sale, remains in the hands of the seller in the nature of an usurpation. But if, the identical Dirhams are not in his possession, then the purchaser is entitled to an equivalent of the Dirhams.

7. Immoveable property in which change is made by a purchaser under an invalid contract.

If a person purchases a house through an invalid sale, and then makes it a mosque, he will be in such a case responsible, according to Imam Abu Hanifah for the value of house. This is also noted by Imam Abu Yusuf in the *Jaame'as-Sagheer*, as the opinion of Imam Abu Hanifah ; but he later entertained doubts regarding it.

But Imam Abu Yusuf and Imam Muhammad are of the view that the house should be restored to its original state, and then returned to the seller.

The same difference of opinion exists, if the purchaser plants trees in the court-yard of the house.

8. Profit acquired by the purchaser upon the goods under an invalid contract.

If a person purchases a female slave, example, by an invalid sale, and takes possession of her, and the seller receives the purchase money, and the purchaser then sells her, to another person at a profit, in that case it is binding on the purchaser to give in charity the profit so acquired.

But if the first seller acquires a profit upon, or by means of, the purchase money, he will not be required to give such profit in charity.

9. Profit acquired upon any goods in which no right of property exists.

If, a usurper acquires profit upon the property he has usurped, there is no difference whatever, that is, from whichever source the profit has been obtained, it is unlawful and should be given in charity.

Section (2)**ABOMINABLE SALES AND PURCHASES.**
*(Hidayah, Kitab-ul-Buyoo', Fasl Fee Ma Yukrahu)***1. To enhance the price by fictitious offer of a high price.**

The Holy Prophet has prohibited the practice of Najish, (Bukhari and Muslim) i.e., the enhancement of the price of goods, by making an offer for them, without having the intention to purchase them, but merely to incite others to the offer of a higher price.

The Holy Prophet has also prohibited the purchase of a thing which has already been purchased for by another person; (Bukhari and Muslim). But this prohibition implies a presumption that both parties had before come to a mutual agreement; because otherwise there is no illegality in the subsequent purchase.

2. To anticipate or forestall the market.

The Holy Prophet has also prohibited the anticipation of the market, (Bukhari and Muslim) as where people meet the caravan, at a distance from the city, with a view of purchasing the grain brought by the merchants, in order to sell it to the people of the city at an enhanced price.

But this prohibition, also implies the presumption that the forestallers deceive the coming merchants regarding the price of grain in the city; otherwise there will be no impropriety in this practice.

3. To enhance the price of grain, in towns, by a citizen selling for the farmer.

The Holy Prophet has also prohibited a citizen from selling for a countryman; (Bukhari and Muslim) as where, for

instance, a countryman brings grain or other goods into a city and one of the citizens takes care of it, and acts as his agent, so that he may sell it at a high price to the people of the city.

Some jurists have also given a different explanation of this prohibition, and have understand it to allude to a citizen selling anything at a high price to a countryman; but in the Fathul Qadeer the former is mentioned as the most authentic explanation.

It may be noted, that this prohibition implies the presumption that scarcity of grain prevails in the city, otherwise such practice is not improper.

4. To buy or sell on a Friday.

It is abominable to buy or sell on a Friday, after the Mu'azzin (crier) makes the call for the prayer, because Allah has said, in the Qur'an, "*when ye are called to prayer, on the day of the assembly, hasten to the commemoration of Allah, and leave merchandising.*" (Ch. 62 (Jumu'ah), verse, 9)

Moreover, if at such time purchases and sales were allowed, an absolute duty i.e., attendance at the prayers, would necessarily be omitted.

It may be noted, that although such purchases and sales are abominable, still they are not invalid; because the invalidity, in such case, exists with respect merely to extraneous and additional matters, and not as regards the essential of the contract nor as regards the impurities of any condition necessary for its obligation.

5. Merchandise may be set up for sale to the highest bidder.

A sale to the highest bidder is not abominable. Thus, if a merchant, for example after showing his goods to a purchase, receives from him an offer tender for them but, before he had expressed his agreement, receives a higher offer from another

person, in that case it is not abominable in him to sell them to the latter, because the Holy Prophet sold a cup and a sheet to a higher bidder (Abu Daud, Tirmizi, Nisai, Ibne Maajah), and also, because sales of this kind are for the interest of the poor.

6. To separate two infant slaves, related within the prohibited degrees, by a sale of one of them.

It is abominable for a person, who possesses two infant slaves, who are related to each other within the prohibited degrees, to separate them from each other, and the same rule also applies where one of them is an infant and the other one is an adult.

This view is based on a declaration of the Holy Prophet, "whosoever causes separation between a mother and her children, will himself, on the day of judgment, be separated from his friends by Allah". (Tirmizi, Haakim, Ahmad)

It may be noted that the cause of the prohibition, in such a case, is the relation which prohibits marriage between such slaves, and not relationship in general, on account of this reason any distant relation, such as a step mother, or the one prohibited by fosterage, or by relationship with the fosterer, are not included; nor the son of the uncle; nor any one that is not related within the prohibited degree, nor are a husband and a wife included in this prohibition, inspite of the fact that they are both infants, and they can as a result be separated.

7. Unless in the pursuance of an indispensable duty, or in cases of unavoidable necessity.

But it is lawful, to separate two infant slaves related to each other, if it is with a view to fulfil a necessary duty, as where one of them commits a crime, and is therefore handed over by the way of compensation for such crime, to the avenger of the offence.

Similarly , one of the two slaves may be sold, for payment of the debt incurred by him during the purchase and sale, on account of his being a privileged slave; or, due to the destruction of the property of another ; in either of such cases that particular slave may be sold alone, to discharge the debt, even though this will cause separation between them.

Similarly, it is also lawful to return one of the two slaves to the seller of them, in case he proves to be defective.

The judgment, in all these cases, is based on the principle, that the purpose of the Holy Prophet in this prohibition was to prevent an damage to the infants without loss to their owner, which, purpose if the prohibition were also applied to these cases, would necessarily be defeated.

8. Such sale is nevertheless valid.

It may be noted, that if a person separates one infant slave from another slave, or an infant slave from an adult slave, by selling one of them, such sale will be valid ; yet still the act of separation will be abominable.

It is noted, from Imam Abu Yusuf, that such a sale is unlawful only where the relation of paternity, such as mother and son, exists between the parties; but that in all other cases it is lawful. But another report, from Imam Abu Yusuf, is that such sales are unlawful in all cases where the separation is abominable.

9. Adult slaves may be separated.

But it is not abominable to separate two slaves who are adult, inspite of the fact that they are related within the prohibited degrees; because this case does not fall under the rule before mentioned; and there is an authentic Tradition of the Holy Prophet that he caused separation between Maria and Sireen, the two female slaves who were sisters. (Behaqi and Bazaar).

CHAPTER 6

THE DISSOLUTION OF SALES.

(*Hidayah, Kitab-ul-Buyoo', Baab-ul-Aqaalah*)

Note

Literally "Aqaalah" means "to cancel", but legally it signifies the canceling or dissolution of a sale.

1. Sale may be dissolved against consideration of anything equal in the price.

The dissolution of a sale is lawful, if it is for anything which is equal to the original price, because the Holy Prophet has said "whosoever makes an Aqaalah with one who has repented of his transaction, will receive an Aqaalah of his sins from Allah, on the Day of Judgment;" and also, because, as the contract of sale involves the rights of both i.e., the buyer and the seller, they are therefore entitled to dissolve such contract, to suit their own purposes.

2. But not for anything greater or less.

But if, a greater or less sum than the original price is the condition of dissolution, such condition will be void, and the dissolution will hold good ; and the seller will have to return to the purchaser a sum equal to the original price.

According to Imam Abu Hanifah a dissolution is breaking off of the contract in respect of both the parties, but a sale *de novo* in respect of others. If, therefore, the breaking off be impracticable, the dissolution will be void.

But according to Imam Abu Yusuf, it is a sale *de novo*; but if a new sale may from any cause be impeccable, then it should be considered as a breaking off, and in case of that also being impracticable, the dissolution then will become void.

The view of Imam Muhammad is that it is a breaking off; and failing this, due to impracticability, a sale *de novo*; and in case of that also being impracticable, it will be void.

3. Dissolution, against consideration of anything equal of a different kind.

If a dissolution is agreed upon, stipulating, in lieu of the original price, an equal thing of a different kind, it is a breaking off, according to Imam Abu Hanifah, for the original price; and the stipulation of a different kind is nugatory. But Imam Abu Yusuf and Imam Muhammad hold this dissolution as a sale, basing their view on their ideas of the nature of dissolution, as already explained.

4. Sale of a female slave cannot be finished after she has given birth to a child.

If a dissolution of sale takes place in respect of a female slave who has given birth to a child while she was in the possession of the purchaser, it is void, according to Imam Abu Hanifah, because a dissolution is a breaking off, and the birth of the child is preventive of the dissolution, as this is a supervenient addition of a separate thing; and such addition after possession implies a dissolution of the transaction. But such dissolution, is taken as a sale by Imam Abu Yusuf and Imam Muhammad.

5. Sale may be dissolved before the delivery and possession of the goods.

The dissolution of a sale before taking possession of the goods sold, whether moveable or immovable, is a breaking off, according to Imam Abu Hanifah. But according to Imam Abu Yusuf, it is a breaking off as regards the moveable property only, because a sale of moveable property, before taking possession of it, is not lawful, and hence a dissolution in respect of moveable property, before the possession of it, cannot be considered as a sale, and is therefore a breaking off. A

dissolution in respect of immoveable property, on the other hand, before taking the possession of it, is a sale according to Imam Abu Yusuf, as he is of the view that the sale of immoveable property, before its possession, is lawful.

The loss or destruction of the goods is a bar to the legality of a dissolution, but not the destruction of the price; because a dissolution is the breaking off of the sale; and the breaking off of a sale rests upon the existence of the sale; and this again relates to the goods and not to the price.

6. Barter may be dissolved, after destruction of one of the goods.

In cases of *Muqa'izah*, or a sale of goods for goods, a dissolution agreed upon after the destruction of one of the two goods is lawful ; because each of them comes under the definition of goods of the sale; and applying this term, therefore, to the one that remains, it will follow that the dissolution is lawful, because of the existence of the goods of the sale.

CHAPTER 7

SALE OF PROFIT AND SALE OF FRIENDSHIP.

(*Hidayah, Kitab-ul-Buyoo', Baab-ul-Murabihat Wa Tawleyat*)

Note

Murabihat and Tawleyat

Murabihat, is a sale with profit, i.e. the sale of anything for the price at which it had been purchased by the seller, with addition of a sum by way of profit. Tawleyat, or a friendly sale, i.e. a sale without profit. In other words a sale where one person sells anything to another person for the same price at which he had himself purchased it. According to the jurists, both these kinds of sale are lawful.

1. The price and the profit.

Profitable and friendly sales are valid only where the price of the goods is of similar description, such as Dirhams and Deenars, because, if the price settled is of an article of which the unities are different, such as a slave, it will follow that the purchaser will become owner of the goods for a price of which the value is not known, and this will make the sale illegal.

But if, the purchaser (under Murabihat or Tawleyat) has, in the mean time, taken possession of the price, as for example, the price is a slave, and that similar slave is then the property of the purchaser, in such a case sale of friendship is lawful; and also a sale of profit, if the profit is settled in money, or in articles which are estimable by weight, or measurement of capacity, described and ascertained; because the purchaser will be such a case be enabled to deliver the thing which he has made obligatory upon himself.

But it is not lawful, in a sale of this kind, to settle a profit proportionate to part of the price, such as a profit of one Dirham

upon ten, two upon twenty, and so forth, because the particular value of the price i.e. the slave, not being known, this could not be practicable; it is necessary, therefore, to settle a general profit upon the whole price.

2. Intervening expenses which enhance the value of the goods.

It is lawful for the seller, i.e. the party who first purchased the article, and then agrees to transfer it by *Tawleyat* or a *Murabihat*, in a profitable or friendly sale, to add to the "*Raas-ul-Maal*" (capital sum) i.e. the prime cost or original price of the article, the wages of the bleacher, the dyer, or the figurer (of cloths), the spinner (of cotton or wool), or the porter (of wheat, and so forth) because it is a custom amongst merchants to add such expenses to the capital sum; and also, because whatever is the cause of an increase either to the substance of the thing purchased, or to the value of it, is an addition to the capital.

It is necessary that the seller, in making such addition, should say, "this article has cost me so much," and not, "I have purchased this at such a rate," because the latter statement will be false.

It may be noted that the carrying of the goats from city to city is equal to the carrying of wheat; but neither the wages of the shepherd, nor the rent of the house in which the goods are kept, are to be added, because no increase in respect of either to the substance or the value arises from them; neither are the wages of a teacher of the *Qur'an*, or the like, to be added, because the increase of value received by instruction is acquired through the wisdom and ability naturally existing in the scholar, which last is the immediate cause of an increase of value; the charge, therefore, is to be placed to the head of the wisdom, or natural ability, which is the immediate cause and not to the teaching, which is not an immediately cause.

3. Over-statement of the price.

But if, in a sale with the profit, the purchaser comes to know that the seller had committed a fraud in telling the price of the goods, in such a case, according to Imam Abu Hanifah, the purchaser is entitled to adhere to or finish the sale, as he may like.

4. Fraud (in Tawleyat).

And such a fraud is committed in a sale of friendship, the purchaser is entitled to deduct the amount of the fraud from the price.

But Imam Abu Yusuf is of the view that a deduction proportionate to the fraud is to be made in either case; but that, in the sale of friendship, the deduction is to be made from the price; and in a sale with the profit, from both the price as well as the profit.

Imam Muhammad holds that in both cases the purchaser is entitled to adhering to or finishing the sale as he may likes.

5. Profit in a Murabihat sale.

If a person purchases cloth for example, and afterwards sells it to another person by Murabihat, and then repurchases it from that other person at the price for which he had originally purchased it, in such a case, if he again wants, to sell it by Murabihat, it is necessary that should deduct from the price fixed in the last sale calculating that at the rate of price in the first sale the sums of the profit he got in the intermediate sale; but if after such deduction nothing remains, he will not be allowed to sell it by Murabihat. This is according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that he will be entitled to sell it with the addition of the profit bases on the last sale.

6. Murabihat transacted by a privileged slave with his owner.

If a privileged slave, who is involved in debt, purchases cloth for ten Dirhams, and then sells it to his master for fifteen Dirhams, and the master wants to sell the said cloth by way of Murabihat, he should fix his profit upon ten Dirhams.

Similarly, if a master purchases cloth for ten Dirhams, and sells it to his privileged slave for fifteen Dirhams, the slave will not be entitled to sell of it at a profit upon more than ten Dirhams.

The reason is that, in both the above mentioned cases, there is a illegality in the sale; because the property of the slave was in fact be the property of his master, therefore the master, in the first case, actually purchases his own property; and in the second case, he virtually sells his own property to himself.

7. Murabihat sale between the manager of a stock and the owner of it.

If a person gives to another person ten Dirhams, by way of Muzaribat, with the stipulation that the profit gained from them will be equally divided between them and the, manager who will, purchase cloth with the said money, and then sell it to his constituent for fifteen Dirhams, and his constituent then wants to sell it with profit, he will not be entitled to fix the price at more than twelve and a half Dirhams.

8. Goods may be disposed of by Murabihat.

If a person purchases a female slave, and afterwards, she without any violence, but merely due to a natural cause, loses one of her eyes ; or if she, being a women,(i.e., not a virgin) he commits sexual intercourse with her, without any harm accruing to her, in either case it is lawful for him to sell of her by Murabihat, without explaining either of these event ; because

neither on account of blindness nor sexual intercourse then remains nothing to him for which a deduction could be made from the price; because no part of the price is against the quality of the article and therefore if the quality is destroyed before possession by the purchaser, no deduction from the price will on that account be allowed and similarly, no part of the price will be against the use of a woman's person.

It is noted, from Imam Abu Yusuf, that in the first case the slave should not be sold by way of *Murabihat*, without explanation as regards the blindness, any more than where blindness is caused by violence; and this view has also been adopted by imam *Shaafe'ee*.

9. If the defect is caused by, or compensated to the seller.

It may be noted, that if the purchaser himself had caused the blindness, or if it had been caused by another person from whom the purchaser had or had not received an *amercement*, he will not in any of these cases be entitled to sell the slave by *Murabihat*, without giving an explanation regarding the blindness; because here the purchaser or the another person did with design or intention cause damage to the eye; and it is therefore necessary that a proportionable deduction should be made due to a defect so caused.

The same rule will also apply where a purchaser has committed sexual intercourse with a female slave who is a virgin because virginity, is merely a tender membrane, and is a part of the slave, and this the purchaser has damaged.

10. If the goods are damaged by an accident not caused by the seller.

If a cloth purchased by a person is burnt by fire, or damaged by vermin, in such a case it will be lawful for the purchaser to sell it by *Murabihat* without explaining either of these facts; but if the cloth is torn in the folding and opening of

it, it will not be lawful for the purchaser to sell it in such a way without explaining the same to the party, because the damage, in such a case, is caused by his own act.

11. Mis-statement of a prompt payment instead of a delayed payment.

If a person, who has purchased a slave for example for one thousand Dirhams which is payable at a future period, afterwards sells him for one thousand Dirhams which is payable forthwith, with a profit of one hundred Dirhams without explaining to the other one the respite of payment he himself has got, in such a case the other one, if he afterwards comes to know this fact will be entitled to abide by or finish the sale at his pleasure.

12. Or of friendship.

If a person, who has purchased a slave for example for one thousand Dirhams which is payable at a future date, afterwards sell him to another person, by a Tawleyat, for one thousand Dirhams which is payable forthwith, without telling about the respite of payment, in such a case the other person, on coming to know of this fact will be entitled to abide by or finish the sale, as he pleases; because an abstinence from a fraud of this kind is equally enjoined in friendly as well as in profitable sales.

But if, in such a case the purchaser, after destroying the slave, comes to know of the suspension of payment that had been granted to the seller, it will be incumbent upon him to make prompt payment according to the agreement; nor will he be entitled to make any deduction from the price on account of suspension of the payment.

According to an opinion of Imam Abu Yusuf, the purchaser in such a case will have to pay the value to the seller,

and to receive from him the whole of the price, similarly as in a case where a creditor, after receiving payment of the debt due to him in a bad specie, comes to know this fact after expending them; in which case he has a right to return to the debtor a similar number of the specie he had received, and to demand from him a similar number of good specie.

Some jurists are of the view that an appraisalment should be made of the value in the case of prompt payment, and also in the case of a delayed payment; and that the difference should be given by the seller to the purchaser.

All that has been said above is based on the supposition that suspension of the payment is included in the sale ; because if without such condition, it happens that the payment is made at a delayed period as is common amongst merchants, there subsists, in such a case, a difference of views upon this point, whether, under these facts, in a subsequent sale of profit or of friendship, it will be incumbent upon him to make known this fact.

Some jurists are of the view that such information is binding upon him. Hence an established custom is equal to a condition.

Some other jurists say that he is under no need of giving such information as it is evident that, as no condition was made, the sale was therefore for immediate payment.

13. Sale of friendship.

If a person sells of a thing to another person by a sale of friendship, saying that "he sells it to him at the same price at which it had stood him in," and the purchaser is not told that price, the sale is not valid, due to the uncertainty regarding the price.

But if, the seller afterwards tells the purchaser about the price, at the same meeting, the sale will become valid ; but it will

still remain for the purchaser to abide by or withdraw from the sale as he will please, because the acquiescence he had previously made was not fully established, due to his ignorance of the price and after the getting knowledge of it he has an option, similarly as in the case of an option of inspection.

But if, the parties separate, then neither the invalidity will become fixed; nor will it be removed by any knowledge which the purchaser may afterwards get of the price.

Same will be the case where a person sells cloth for the value which is written upon it, but which the purchaser does not know because such sale is not valid, and may be otherwise by the explanation of the seller, before the breaking up of the meeting.

Section

MOVABLE PROPERTY.

(Hidayah, Kitab-ul-Buyoo', Fasl Min Ishtara Shai'an Mimma Yanqul)

1. Re-sale of moveable property.

It is not lawful for a person to sell moveable property, which he has purchased, until he gets possession of the same; because the Holy Prophet has prohibited the sale of a thing before the possession of it on the part of the seller ; (Nisai, Ahmad, Ibne Hibban, Tabrani, Dara Qutni, Behaqi, Ibne Maajah) and also, because there is unfairness in it, because if the goods are lost or destroyed before the possession, the first sale will become void, and the property will revert to the former owner, in which case it will necessarily appear that the person in question has sold the property of another person without his consent.

2. Re-sale of land. ('Arabic 'Aqaar)

The sale of land; before to possession, is lawful, according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad says that it is not lawful.

3. Re-sale of goods of weight, and measurement of capacity.

If a person purchases the goods estimable by a measure of capacity, such as wheat, or goods of weight, such as butter, as if he says, "I have been purchased this wheat, on condition of its being equal to ten bushels," or "this butter, on condition of its weighing ten mans," and if, after measuring or weighing these goods accordingly, he takes them and sells them to another person, on the same condition of measure or weight, in such a case it will not be lawful for that other person to sell or use these goods, until he has himself measured or weighed them because the Holy Prophet has prohibited the sale of wheat until it is measured both by the buyer and the seller, and also, because there is possibility of these goods exceeding the specified quantity; in which case the excess, being the property of the seller, will not be lawful for the purchaser, and an abstinence in the case of this possibility is necessary.

But will be otherwise where the sale is made by conjecture, without measurement; because the excess, in such a case, will be the right of the purchaser, and it will also be otherwise in the sale of cloth by yards, for there similar to the excess will be the right of the purchaser; because yards, as has been already explained, are a description of the cloth, and not a quantity, as in the case of goods of weight or measure of capacity.

It may also be noted that the measurement of the cloth by the seller, before the sale, is not valid, although it is done in the presence of the purchaser, because the measurement by both the seller and purchaser is necessary, and these terms are not applicable to the parties until after the sale takes place.

Similarly, the measurement made by the seller after the sale is not valid, unless it is in the presence of the purchaser, because the object of measurement is delivery, and delivery without the presence of the purchaser is not practicable.

4. Goods should be weighed or measured in the purchaser's presence.

If the seller only measures the goods, after the sale, in the presence of the purchaser, a question has arisen, whether this is sufficient? Or, whether it is not necessary that the purchaser should also measure it? Some jurists have said that the measurement of it by the seller only, is not sufficient, according to the plain sense of the Tradition already quoted. The more approved view, however, is that it is sufficient, as by the measurement of the seller the quantity is ascertained, and delivery completely established. The Tradition before quoted alludes to the junction of two contracts; as where, for example, a person after purchasing has, measured, and taken possession of a goods afterwards sells it to another, in which case it is necessary that the second purchaser himself should measure it; and the measurement of the first purchaser, who stands in the relation of seller to him, is not sufficient, as will hereafter be more fully explained in the chapter of Salam Sales.

5. Re-sale of goods of tale or longitudinal measurement.

According to an opinion of Imam Abu Yusuf and Imam Muhammad, the goods of tale are analogous to those of longitudinal measurement; i.e., if a person purchases and receives the goods of this kind on the condition of their amounting to a particular number, afterwards sells them to another person, on the same condition, there is, in such a case, no obligation on the other person to enumerate them himself, because such goods are not susceptible of usury.

It is also related, from Imam Abu Hanifah, that goods of tale are similar to those of weight, because in regard to them the receipt of any excess beyond the settled number is not lawful to the purchaser, goods of tale are, therefore, similar to goods of weight.

6. Seller may dispose of the price of his goods without having taken possession of it.

Any act of the seller as regards the price of the goods, before the actual possession of it, such as gift, sale, hire, or bequest, is lawful, whether the price is settled in money or goods; because the cause of legality, i.e., right of property, is established in the seller, and the act has no unfairness, such as has been shown to exist in the case of selling moveable property prior to the receipt of it, because the price, if mentioned in Dirhams and Deenars, is indeterminate, and is, therefore, not capable of being destroyed; and if it consists of anything else, still the sale is not invalidated by a destruction, as the value remains due from the seller.

But it will be otherwise in respect of the goods purchased, as the sale of that before possession of it induces fraud, as was before explained.

7. Parties entitled to make any subsequent addition or abatement.

It is lawful for the purchaser to make an increase in the price in favour of the seller, and for the seller to make an increase in the goods in favour of the purchaser, and it is also lawful for the seller to make abatement from the price in favour to the purchaser, and this increase or abatement is incorporated in the original sale. And, in the first case, the seller will have the right to the original price, together with the increase superadded to it; and, in the second case, the purchaser will have the right to the original goods with the increase superadded.

Imam Shaafe'ee and Imam Zufar are both of the view that such increase is a mere act of favour, and, therefore, cannot be incorporated in the original sale.

Nor can an abatement from the price, by the seller, be incorporated in the original sale; but it should rather be considered as an act of favour.

8. Price cannot be increased.

Any increase of the price, after the destruction of the goods in the possession of the purchaser, is not valid, according to the Zahir Rawayat.

9. Prompt payment may be commuted for a delayed payment.

If a person, after selling anything on condition of prompt payment, afterwards agrees to receive the price at a future fixed date, it is lawful, because the price is solely the right of the seller; and since it is in his power, if he chooses to forego it altogether, he is also entitled, for the convenience of the purchaser, to agree to take a future payment instead of a prompt payment.

But if the period agreed is to be not certain, and the uncertainty is very great, as if he stipulates payment when the wind blows), it is not lawful. If the period, on the other hand, is only in a lesser degree uncertain, as if he stipulates the payment at the cutting of the corn, or the threshing of it, it is lawful, similarly as in the case of bail.

10. In all debts except those incurred by a loan.

Every debt immediately due can be delayed, in its payment, to a future date, by the creditor, on the principles laid down in the previous case, excepting a loan, delay in the repayment of which is not approved by the jurists.

CHAPTER 8

RIBAA (USURY) *.

(Hidayah, Kitab-ul-Buyoo', Baab-ur-Ribaa)

Note

Literally, "Ribaa," means "increase" and legally it, signifies an excess, according to the legal measurement or weight in one of two similar goods of weight or measurement of capacity, against each other in a contract of exchange, and in which such an excess is settled as a necessary condition on one of the parties, without any return, for it,. As such the sale, of two loads of barley, for example for one load of wheat does not amount to usury, because these goods are not similar, and, the sale of ten yards of Herat cloth for five yards of Heart also cloth does not amount to usury, because, even though these goods are similar, still they are not to be estimated by weight or measurement of capacity.

1. Usury caused by rate united with species.

Usury is illegal; and, according to our jurists, it is caused by Rate, united with kinds.

Imam Shaafe'ee is of the view that usury is only in the goods of esculent kind, or in money. It is necessary, in order to create illegality, that the goods should be similar; but equality in weight or measurement of capacity annihilates the usury.

It may be noted that superiority or inferiority in the quality of the goods does not establish usury; and therefore it is lawful to sell a quantity of the better kind of any goods for an equal quantity of an inferior kind.

* Quran, Ch.2 (Baqarah), verses 275 to 278. Ch.3 (Aale Imran) verses 130-131, Ch.4 (Nisa), verses 160-161, Mishkaat, Kitab Buyoo, Baab-ur-Ribaa

2. Sale of the goods in exchange for an unequal quantity of the same goods.

The sale, at an unequal rate, of the goods of weight or measurement of capacity, for similar goods, involves usury, according to our jurists, even though the goods are not esculent, such as loam or iron, because they are of the view that the cause of usury exists, in the goods of weight and measurement of capacity, even though they are not esculent. Imam Shaafe'ee holds that such a sale is legal, according to his tenets in respect of usury. Supposing, however, the equality of the rate, such sale is legal in the opinion of all the jurists, it may be noted that loam is an article of measurement by capacity, and iron is an article of weight.

3. Where quantities cannot be ascertained by any known standard of measurement.

The sale of anything not measured according to the legal standard, at an unequal rate, is legal. Thus it is legal to sell one handful of wheat for two handfuls; or two handfuls for four; and also one apple for two apples; because, in such a case, the measurement not made according to a legal standard, it will follow that a superiority of measurement, which is necessary to establish usury) has not, according to the rules of measurement, taken place.

Imam Shaafe'ee is of the view that such a sale is illegal; because the goods, in this case are esculent, which, according to his tenets is the cause of usury; and also because the equality which destroys usury is not present in this case.

It may be noted that whatever is less than half of a *Saa* is considered equal to an handful, as the law has fixed no standard of measure below that quantity.

4. Inequality of quantity, or delaying the payment.

Where the quality of weighing or measuring by capacity,

and similarity of kinds, as the causes of usury both are present, the condition of inequality, or of delaying the payment to a future date, both amount to usury.

Thus it will be usury to sell either one measure of wheat for two measures, or one measure of wheat for one measure to be delivered at a future time.

But if, neither of these circumstances exist, as in the sale of wheat for money, it will be lawful to stipulate a superiority of rate, or the payment at a future time.

But if, one of these circumstances only exist as in the sale of wheat for barley, or the sale of one slave for another, then a superiority in the rate may legally be stipulated, but not delay in the payment.

Thus one measure of wheat can lawfully be sold for two measures of barley, or one slave for two slaves; but it is not lawful to sell one measure of wheat for one measure of barley to be delivered at a future date; nor one slave for another, to be delivered at a future date.

Imam Shaafe'ee is of the view that similarity of the kinds alone does not make illegal the delay in the delivery; because where, an immediate delivery is against a future delivery, there is only a semblance of a superiority of rate, based on the preference given to immediate payment. Thus if a superiority of rate, in reality, does not prevent the legality of the sale, as in the case of one slave for two slaves, it will follow that the semblance only of a superiority does not prevent such legality.

According to our jurists, wherever similarity of the kinds, or the quality of weight or measurement exists, the goods are, of that kind in which usury exists; and, accordingly, a similarity of usury exists in them, which is against the legality of the sale in the same manner as actual usury. This plea is based on the saying of the holy prophet that goods of different kinds can be sold in any manner the parties like, if the bargain is from hand to hand."(Muslim)

Here a question arises that since similarly of the kinds, or the quality of weight or measurement singly prevents the legality of delay in delivery, it will follow that a contract of Salam Sale stipulating a sale of saffron for Dirhams or Deenars, will not be valid, as both are goods of weight; although such a sale is valid.

The answer is that the contract is valid, in spite of the fact that saffron and Deenars are both goods of weight, because they are not same in the quality of the weight, as saffron is weighable by Mans, and is an article of sale only, it is, therefore, definite by description; while Dirhams and Deenars are weighable by stones, and an only price and not article of sale; and therefore do not become definite by description in similarity if a person sells saffron to another person for one hundred Dirhams, on prompt payment, the other person can lawfully use the said Dirhams in purchasing or in any other way without reweighing them; but if a person sells saffron, on the condition of its being two Mans, the purchaser will not afterwards be entitled to sell it or dispose it of by any other means without reweighing it; as holds with regards to all goods of weight or measurement of capacity. Now it being thus proved that the weight of saffron and other goods is different from the weight of Dirhams and Deenars, in appearance, substance, and effect, it will follow that they are not united in any events with regards to the quality of the weight; and as a result, that the similarity of usury, in this case, is merely an apprehension, which is not of any consideration.

5. Goods ordered by the Holy Prophet to be goods of measurement, or articles of weight.

Every thing in which the excess has been declared as usury by the Holy Prophet on account of measurement of capacity such as wheat, barley, dates, and salt will always be considered as usurious, even though the people give up this mode of estimation and similarly, everything in which the excess has been declared as usury by the Holy Prophet on account of weight, will be considered as usurious such as, gold or silver, because

the custom of the people, which regulates the mode of measurement, is inferior to the declaration of the Holy Prophet; and the superior cannot be subordinate to inferior.

Thus if, a person sells wheat for an equal quantity, by weight, or gold for an equal quantity, on account of measurement of capacity, none of these sales will be lawful, according to Imam Abu Hanifah and Imam Muhammad, even though these methods of weighing wheat and measuring gold become extinct by custom of the people.

Imam Abu Yusuf is of the view that in all things the general practice or custom of the people should prevail, even though it is oppose to the ordinance of the Holy Prophet; because the ordinance of the Holy Prophet was based on general usage and practice, of his own time. Therefore, the general customs of the prophet are to be followed; and since customs are liable to change, they should be followed, rather than the ordinance.

6. Goods referred to any known standard of weight.

Goods referred to Rats is considered as goods of weight. This is according to the explanation given by the author of Hidayah that whatever is sold by the Auqiyah (i.e. measure by capacity) should be considered as goods of weight; because an Auqiyah is a fixed standard of weight opposed to all other measures of capacity, because none else is a standards of weight,. Since everything sold by the Auqiyah comes under the description of goods of weight, therefore if this thing is sold by measurement of any other vessel which is not of a fixed standard of weight, in opposition to a similar vessel, such sale will be illegal, because of the possibility of a disparity of weight, inspite of the equality in measurement of capacity; because this, in fact, is the same as if one person sells one goods of weight for another of the same kind and adjusts the quantity by conjecture.

7. Sarf Sale.

It may be noted that a Sarf Sale means the sale of price for price; and price implies Dirhams and Deenars. In this kind of sale it is a necessary condition that the interchange of ownerships should take place in the same meeting, because the Holy Prophet has ordered the sale of silver for silver, from hand to hand (Muslim) as will be explained in dealing with Salam Sale ; but in every other goods, if it is of that kind in which usury takes place, such as wheat for wheat, the interchange upon the spot is not a condition, the only requirement is that the goods should be specific.

Imam Shaafe'ee is of the view that in the sale of wheat for wheat mutual possession is a necessary condition, because of the ordinance of the Holy Prophet, "Sell it from hand to hand;" and also because, if one party takes possession , and not the other, it will follow that usury has taken place as prompt payment is superior to delayed payment.

Our jurists are of the view that wheat, as being a determinate object of sale, does not, like cloth, need possession, as the purpose of the contract is to get power over the goods, which is fully established by its being determinate. But It is otherwise as regard the Sarf Sales, because there the possession is made a condition in order that the price and object of the Sale may be made determinate which can only be effected by means of possession.

As regards the ordinance of the Holy Prophet, ordering the sale from hand to hand, 'Ubadah Bin Saamit has explained it to mean the sale of one determinate thing for another determinate thing.

Further, on the postponement of the possession, no loss is likely to result, in the opinion of the people; contrary to where a prompt and delayed payment is stipulated; because the latter in the opinion of the people is detriment.

8. Similar may be sold for each other, without inducing usury.

The sale of one egg for two eggs, from hand to hand, is legal; and the same is in respect of dates and walnuts; because these goods are neither subject to measurement of capacity nor weight, with regard to which only usury relates.

But Imam Shaafe'ee, differs from our jurists; in this case, because usury, according to him, relates to goods of esculent kind, and these are of that kind.

9. Usury cannot take place in respect of Faloos.

The sale of one specific Faloos, (a copper coin) for two other specific Faloos, is legal, according to Imam Abu Hanifah.

But Imam Muhammad is of the view that it is illegal; because, as the fitness to constitute price is established in Faloos, with the consent of the people, it cannot be finished by any agreement of a seller and purchaser, and as the fitness to constitute price still exists the Faloos cannot be made determinate by means of a condition to that effect in the contract. The case, therefore, will be the same as if a person should sell one underminate Faloos for two underminate Faloos; or, as if a person sells one Dirham for two Dirhams.

The agreement of Imam Abu Hanifah and Imam Abu Yusuf is that this fitness to constitute price in Faloos cannot exist with relation to a buyer and seller, unless by their mutual agreement to that effect; and, therefore, where they agree to the contrary, the fitness to represent price is, in respect of them, void; nor can the general consent of others, to admit Faloos as a representative of price, operate as an argument in respect of them, as in this matter others have no power over them. Therefore it follows that, as the fitness to constitute price is, in respect of them, void, the Faloos may be identified by their specification.

Objection. Upon the fitness to constitute price being given up by the agreement of the parties, the Faloos will therefore, revert to their primary nature, i.e., weight, because the Faloos was originally a weight. It will, therefore, follow that the sale of one Faloos for two Faloos is not valid even though the fitness to constitute price is given up by the agreement of the contracting parties.

Reply. The Faloos do not revert to their original nature, because, by the agreement of the people, they are considered as goods of tale, and this agreement is in force. Therefore they are in the same predicament as are walnuts or other goods of tale, and the unequal sale of them is therefore, in the same manner lawful. But it is otherwise in respect of Dirhams and Deenars, because these naturally constitute price. It is also otherwise in respect of the sale of one indeterminate Faloos for two indeterminate Faloos; because this, in fact, is a condition of delayed payment and delayed delivery, a kind of sale, which has been forbidden by the Holy Prophet. It is also otherwise where the condition of one of the parties relates to indeterminate Faloos, because this is equal to a postponement of the payment, and such postponement is made illegal by similarity alone.

10. Flour or food cannot be sold for wheat.

The sale of wheat for the flour or food of wheat is illegal, because wheat, and the food and flour of it, are all of one kind. Moreover, it is not possible to ascertain the equality between those goods by measurement, as flour and food are of a close and compact kind, and wheat is not. Therefore even this kind of sale is illegal even one measure of the one for one measure of the other.

11. Sale of flour for flour.

The sale of flour for flour is valid, if their quantities are equal by measurement, because the condition of legality, i.e. equality), is present in this case.

12. Sale of flour for food.

The sale of flour for food (*Saweeq*) is illegal, according to Imam Abu Hanifah, in any kind, i.e. neither at an equal, nor at an unequal rate; because as it is not lawful to sell flour for parched wheat, or food for raw wheat, so also it is not lawful to sell either of those goods for the other, because of their similarity.

But according to Imam Abu Yusuf and Imam Muhammad, such a sale is valid; because flour and food are of different kinds, as the object of each is different. The object of flour is bread and the object of food is a culinary preparation, by mixing it up with water or oil. The answer to this, however, is that the original object of both is the same, i.e., food; which is not changed in its nature by the modification of it, as raw wheat and parched wheat are considered as of the same kinds, and similarly wheat changed by vermin and wheat that is whole and preserved, even though, in respect of specific objects, these kinds are different.

13. Sale of flesh for a living animal.

The sale of flesh for a living animal is valid, according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad is of the view that the sale of flesh for a living animal of the same kind is not valid, unless the quantity of the dead flesh is more than that of the living flesh, so that the excess may be opposed to the other parts of the living animal, independent of flesh; and the remaining part of the slain flesh remain opposed in an equal degree to the living flesh; because otherwise usury will take place, as, if the quantities of flesh are exactly equal, it will follow that the other parts of the living animal has nothing opposed to them; or if, the quantities of flesh are equal, a deduction is made from the dead flesh, in opposition to the other parts of the living animal, it will create an inequality in the sale of flesh for flesh. Such a sale will, therefore, resemble a sale of sesame seed for sesame, which will be illegal.

The reasoning of Imam Abu Hanifah and Imam Abu Yusuf in support of their view is, that this case is in fact the sale of the goods of weight for what is not the goods of weight; as it is not common to weigh living animals, it is in fact not practicable to know their weight as they are not at all times of equal weight, an animal may be lighter when hungry, and heavier when filled with food. But it is otherwise with oil-seeds, as by weighing these may at once be known the quantity of oil contained in them when separated from the dregs or refuse.

14. Sale of fresh dates for dried dates.

The sale of fresh dates for dried dates is valid, according to Imam Abu Hanifah, But Imam Abu Yusuf and Imam Muhammad are of a different view, because of a Tradition, in which it is mentioned that a person enquired from the Holy Prophet regarding the legality of such a sale, and the Holy Prophet, desired to know whether fresh dates do not diminish in drying ? , and when that person answered in the affirmative, the Holy Prophet declared that, such being the case, the sale of fresh dates for dry dates is not valid (Tirmizi, Abu Daud, Nisai Ibne Maajah).

The reasoning of Imam Abu Hanifah in support of his view are twofold; Firstly, the word Tamar used for dry dates, is also used for fresh dates, because there is a Tradition that a person brought some fresh dates from Khaybar to the Holy Prophet, and the Holy Prophet, inquired whether all the Tamar of Khaybar were of that kind? (Bukhari and Muslim) and as fresh and dry dates are on account of the fact are held to be of the same kind, it follows that the sale of the one for the other, on the condition of equality in the rate, is lawful, as the Holy Prophet has said, "sell Tamars for Tamars, at an equal rate" Secondly, if it is not admitted that fresh dates also come under the definition of Tamar, still the sale is lawful, because of another saying of the Holy Prophet that, "When two things are of different kinds, then they may be sold in whatever manner the parties like,(Muslim).

As regards to the Tradition quoted by Imam Abu Yusuf and Imam Muhammad, it is based only on the authority of Zaid Ibne Abbas, who is considered weak among the Traditionists.

It may be noted that the same disagreement exists in respect of the sale of dried and fresh grapes, based on the same reasoning as mentioned above. Some jurists have said that the sale of dried grapes for fresh grape is illegal, according to all our jurists, on the analogy which exists between this case and that of parched and raw wheat, the sale of which for each other is universally declared to be not valid.

The sale of fresh dates for fresh dates, at an equal rate on account of measurement of capacity, is lawful, in the opinion of all our jurists.

15. Sale of manufactured goods of an article for similar article.

The sale of olives for oil of olives is not lawful, except when the actual oil is greater in quantity than the oil contained within the olives, in which case the excess opposed to the dregs that will remain after the expression of the oil prevents the usury.

The same law applies in respect of the sale of walnuts for the oil of walnuts, of sesame seeds for the oil of sesame, of milk for butter, or of the juice of the grape or dates for grapes or dates. As regards to the sale of cotton for the thread of it there is difference of opinion. The sale of cotton, however, for calico is universally accepted as valid.

16. Sale of one kind of flesh for another kind of flesh.

It is valid to sell one kind of flesh, in any manner, for another kind of flesh, such as the flesh of a cow for the flesh of a camel or a goat.

It may be noted that the flesh of a cow and the flesh of a buffalo are of the same kind, as is also the flesh of a sheep and the flesh of a goat.

17. Sale of the milk of one kind of animal for an unequal quantity of milk of another kind of animal.

The milk of a cow and the milk of a goat are of different kinds, and may therefore be legally sold for each other at unequal rates.

It is noted from Imam Shaafe'ee, that these are of the same kind, because the benefit to be derived from each is the same. But our jurists say that the flesh of these animals is of a different kind, as it is not lawful for a person, on whom the gift of a cow in alms is ordered, to substitute a goat for a cow if it proves defective; the milk of these animals, therefore, differs in kinds in the same manner as their flesh.

It may be noted that the vinegar of dates is of a different kind from the vinegar of grapes, because of the difference of their originals. Similarly, the wool of a sheep is of a different kind from the wool of a goat, because they are of different purposes.

18. Sale of bread for flour at an unequal weight.

It is lawful to sell the bread of wheat for wheat or the flour of wheat, at an unequal weight, because bread is considered as an article of tale or of weight, and therefore it is of a different kind from wheat or flour, which are to be measured by capacity.

It is noted from of Imam Abu Hanifah, that such sale is utterly illegal; but decrees are passed according to the first view, and this, whether the delivery of either the wheat or the bread is agreed to be given at a future time. According to Imam Abu Hanifah, the borrowing of bread is utterly illegal, i.e., whether it

is considered as goods of tale or weight, because there is great difference in respect of cakes of bread; as regards themselves, or the workmanship of the baker.

But according to Imam Muhammad, it is perfectly legal; i.e., whether the bread is considered as goods of tale or weight; and according to Imam Abu Yusuf, it is lawful if considered as goods of weight; but not if considered as goods of tale, because of the difference of the unities.

19. Usury cannot be between a master and his slave.

There is no usury between a master and his slave, because all that is in the possession of the slave is the property of the master, so that there can be no sale between them, and, therefore, there is no possibility of usury between them.

20. Unless the slave is an insolvent Mazoon.

This view is based on upon a supposition the slave is privileged and free from debt; because in the case of a privileged slave, who is insolvent, usury, may take place between him and his master, according to Imam Abu Hanifah, because according to his tenets, the possessions of such slave are not the property of the master; and according to Imam Abu Yusuf and Imam Muhammad, because although, according to their tenets, the possessions of such slave are the property of his master, still as the claims of the creditors are connected with them, the slave stands in the same relation to his master as a stranger, and therefore usury may exist in their dealings.

21. Nor between a Muslim and an infidel in a hostile country.

There case be no usury between a Muslim and a hostile infidel in a hostile country.

This is contrary to the view of Imam Abu Yusuf and Imam Shaafe'ee, who conceive an analogy between this case and the case of a protected alien within the Muslim country.

The reasoning of our jurists on this point are twofold. Firstly, the Holy Prophet has said, "There is no usury between a Muslim and a hostile infidel, in a foreign land." (Behaqi) Secondly, the property of a hostile infidel is free to the Muslims, it follows that it is lawful to take it by whatever manner it may be possible, if no deceit is used.

22. Usury may take place between a protected alien and a Muslim.

But it is otherwise as regards to a protected alien, as his property is not of a neutral nature, but sacred, because of the protection that has been granted to him.

CHAPTER 9

RIGHTS AND APPENDAGES.

(Hidayah, Kitab-ul-Buyoo', Baab-ul-Huqooq)

Note

The rights of a sale are the things which are necessary for the use of the substance of the sale, such as, in the purchase of a house, the right of passage through the road that leads to it; or, in the purchase of a well, the right of getting water from it.

Appendages are those things from which an advantage is to be derived, but in a subordinate degree, such as cook-room, or a drain.

1. Difference of rights in a purchase, in respect of a Manzil, a Daar, and a Bait.

If a person purchases a Manzil above which there is another Manzil, he will not be entitled to the upper Manzil, unless he has purchased the Manzil "with all its rights, and all its appendages;" or "with everything great or small upon it, in it, or of it."

But if a person purchases a Bait above which there is another Bait, with all its rights, still then he will not be entitled to the upper Bait.

But if a person purchases a Daar, that is a Sarai, with its enclosure, he will be entitled to the upper storeys and the offices, because the term Daar signifies a place within an enclosure, which is considered as the original subject, and of which the upper storey is a necessary part.

Bait, however, signifies merely a place of residence ; and as the upper storey of a house is of this description as well as the

under, it cannot be included in the purchase of a Bait, unless by an express condition, as a thing cannot be a dependant of its fellow.

A Manzil, is greater than a Bait, and smaller than a Daar, because even though it includes everything necessary for a residential place, still it does not have a place for cattle. A Manzil, therefore is in one respect similar to a Daar, and in another respect it is similar to a Bait; and, Therefore, from its similarity to a Daar, the upper house will be included on account of its being a subordinate part, whenever a mention of the rights is made; and, on account of its similarity to a Bait, the upper house will not be included in the sale, unless a mention of the rights is specifically made.

Some jurists have said that, as it is common in the present ages, the upper storey is also included in all the above cases; because a Bait, which means a house in the Persian language, necessarily includes the upper storey also.

2. Porch over a road connected with a house.

A porch over a road, of which the beams on one end are upon a Daar, or a house, which is the substance of a sale, and on the other end upon the opposite house, or upon a pillar, will not be taken to be included in the sale of the house, unless a mention of rights is made in the sale; because the porch covering the road is held to be of the same description as a road.

But Imam Abu Yusuf and Imam Muhammad are of the view that if the porch forms the entrance into the house, it will then, be virtually included in the sale.

3. Avenue not included in the purchase of a room of a house, nor wells or drains in the purchase of lands.

If a person purchases a room in a house or residential place, he will not be entitled to the use of the road, unless he

has stipulated it in the rights and appendages, or the great and small thing belonging to it.

Similarly, in the sale of land, a well or drain is not included, unless by a specification made in the rights or appendages; because they are not considered as a part of the land; but as a dependant on it.

But it will be otherwise in respect of a lease, because that virtually includes the well and road without any specification, because the purpose of a lease is the usufruct, which cannot be achieved except by the use of the road and well; and it is not custom amongst the farmers to give on rent a road or a well, and the purpose of a sale may be achieved even without including the road or well, as it is customary, amongst purchasers, to sell and trade with the subjects of their purchase, and to sell them to other, from which advantage is derived from the bargain, without the road or other appendage specifically included therein.

CHAPTER 10

CLAIM OF RIGHTS

(Hidayah, Kitab-ul-Buyoo', Baab-ul-Istehqaaq)

1. Female slave claimed after Delivery of a child in the purchaser's possession.

If a female slave, after sale, gives birth to a child in the purchaser's possession, and another person thereafter proves, by witnesses, that she was his property, and that she was not the property of the seller, such person will be entitled to the female slave, as well as her child.

But if the purchaser himself acknowledges the claim, then, in such a case, the claimant will be entitled to the female only, unless he also particularly includes the child in his claim, in which case the acknowledgment of the purchaser will entitle him to the female slave as well as her child.

2. Person selling a person as a slave, who afterwards proves to be free.

If a person purchases a slave, and the slave thereafter proves, by witnesses, to be a free man, inspite of this fact if at the time of sale, he had himself said to the purchaser, "purchase me, because I am a slave," and the seller was present, or was absent but his address is known, the purchaser will be entitled to get back the price from him; but if the seller was absent, and his address is unknown, the purchaser in such a case, will be entitled to get the price from the slave, who will be entitled to recover the same from the seller whenever it will be possible for him.

But if, a person accepts a slave in mortgage, on account of the slave saying to him, "accept me in mortgage, because I am a slave," and thereafter he proves to be free, the mortgagor will not be in such a case entitled to take payment from the slave of the sum due to him, whether the mortgagor or is absent or present, but he should in any case seek it from the mortgagor.

Imam Abu Yusuf of the view that the same rule also applies to the case of sale, that is, that the purchaser is not entitled, under any circumstances, to get the price from the slave.

3. Claim to an immovable property after composition in respect of it.

If a person makes an indefinite claim of a right in a house, and then settles his claim with the possessor of the house for one hundred Dirhams, and a third person thereafter proves his right to the whole house excepting the place of a cubit, for example, in such a case the possessor of the house will have no right to get back anything from the person with whom he had made the composition; because that person, on account of his indefinite claim without mentioning the extent of it, will now be lawfully entitled to declare it to be the place excepted by the third person.

But if, a person, after claiming the whole house, compounds with the possessor for one hundred Dirhams, and another person thereafter makes a claim of a part of the house, in such a case the possessor of the house will be entitled to get back part of the sum he had paid by way of composition in, proportion to the amount of the second claim.

It may be noted that a composition of an undefined right for defined property is valid, because the finishing of undefined right cannot be the cause of any dispute.

Section**SALE OF THE PROPERTY OF ANOTHER WITHOUT HIS
CONSENT.**

(Hidayah, Kitab-ul-Buyoo', Fasl Fee Bai'ul Fazooli)

1. Sale without authority.

If a person sells the property of another person without his authority, the sale is complete, but it will be with the owner to confirm or dissolve the sale as he may like.

It may be noted that it is necessary that the owner should give his consent regarding the property of the sale, and the buyer and seller should be present; because, as his consent is relating the sale; it is necessary, that, when he gives the consent the sale should be existing ; and the existence of the sale depends on the existence of the parties, and the property of the sale.

2. If assented to.

When the owner of the property, in a Fazoolee sale, gives his consent to the sale, the price will become his property, and will remain in the hands of the Fazoolee seller as a deposit, as if he was an agent for sale; because the consent is equal to a previous appointment of agency.

3. Liberty to dissolve the contract.

The Fazoolee, or the person who sells the property of another without authority, is entitled to dissolve the sale even without the consent of the owner.

But it will be otherwise in the case of a marriage contract entered into by a Fazoolee, because it cannot be dissolved without the consent of the person on whose account has entered into the contract.

4. If the owner dies, and the property is not specified.

If a person, after giving his consent to a Fazoolee sale, dies, and it is not known whether the property of the sale was present or not, when he gave his assent, in such a case according to one opinion of Imam Abu Yusuf, also adopted by Imam Muhammad, the sale is valid, because of the possibility of the existence of the property of the sale at the period of consent. But Imam Abu Yusuf, it is said, afterwards changed his opinion, and declared this sale to be invalid, because of the doubt as regards the existence of the property of the sale, which, according to his opinion, finishes its legality.

5. Emancipation, by the real owner of a slave usurped and sold by the usurper.

If a person usurps a slave, and sells him to another person and, the other person emancipates him, the real owner, thereafter confirms the sale, in such a case the emancipation, according to Imam Abu Hanifah and Imam Abu Yusuf, is valid, upon a favourable construction.

But Imam Muhammad is of the view that it is not valid.

6. Fine incurred for maiming a slave sold under a usurpation.

If a person purchases a slave from the usurper of him, and the slave is maimed by any person while in the possession of the purchaser, and the purchaser recovers the fine of trespass from the maimer, and the real owner then gives his consent to the sale, in such a case the fine will be the property of the purchaser.

7. Resale of a slave purchased from a usurper.

If a person purchases a usurped slave, and sells him to another person and the owner thereafter gives his consent to the first sale, in such a case the second sale is not valid ; because the

right of property then created in the first purchaser will finish the suspended right of property of the second purchase, and also, because there will be unfairness in it, as it will be possible that the owner may not give his consent to the sale.

But if, after the sale of the slave by the purchaser, the slave either dies or is killed, and the owner thereafter gives his consent to the sale, such consent will not valid; because the existence of the property of the sale is necessary for the consent, and that does not exist in either case.

8. Goods purchased through the medium of an unauthorized person.

If a person sells a slave, who is the property of another, person and the purchaser proves by witnesses that the seller had admitted that he had sold him without the consent of the owner ; or, that the owner had declared that he had not given his consent to the sale, and the purchaser wants to return the slave, the evidence produced by him will not be accepted.

But if, the seller declares before the court that he had made the sale without the authority of the owner, the sale in such a case will become void, if the purchaser wants to dissolve it.

9. Sale of immoveable property by an unauthorized person.

If a person sells a house of another person, without his permission; and gives delivery of it to the purchaser, and then declares that he had sold it without the permission of the owner, then, according to Imam Abu Hanifah, and the last opinion of Imam Abu Yusuf, the seller will not be responsible.

The first view of Imam Abu Yusuf, in this connection, was that the seller will be responsible, and this view had also been adopted by Imam Muhammad. This case is one of the cases of usurpation of immoveable properties, regarding which there is a difference of opinion, as will be explained in detail under the head of Usurpations.

CHAPTER 11

SALAM SALE *

(Hidayah, Kitab-ul-Buyoo', Baab-us-Salam)

Note

Literally, "salam" means a contract involving immediate payment of the return for a distant delivery. (Qaduri). It is also known as "Salaf", and legally also it signifies contract of sale, against immediate payment of the price, and agreement for a delay in the delivery of the goods sold.

In the salam sale, the goods are known as "Musallam Feeh, the price is known as "Raasal-Maal", the seller is known as, "Musallam Ilaih", and the purchaser is known as "Rabb-us-Salam"

1. Salam Sale is valid.

Salam sale is permitted and made legal by verses 282, of ch-2 (Baqarah) of the Qur'an, and also by an express Tradition of the Holy Prophet prohibiting the sale anything what is not in his possession, but permitting a Salam Sale. (Bukhari and Muslim).

It may be noted that Salam Sale is against analogy, because it is a sale of a none-existent things. It is in fact a sale in which the goods for which the price is paid in advance is not present. But analogy, in Salam, is given up because of the Holy Qur'an and Tradition of the Holy Prophet, permitting it.

* Qur'an, Ch.2 (Baqarah), verses 282; Mishkaat, Kitabul Buyoo; Baab-us-Salame Wa Rehne,

2. Goods of weight and measurement of capacity.

Salam Sale, of the goods of weight, or measurement of capacity, is valid; because the Holy Prophet has said; "Whosoever enters into a Salam Sale with you, let him stipulate a fixed weight and measurement and a fixed time of delivery," (Bukhari and Muslim)

Dirhams and Deenars, are not included in the definition of goods of weight, because both these represent the price, and in a Salam Sale it is necessary that the goods of it should not be representative of the price. Therefore if a person makes a Salam Sale, agreeing for prompt payment of ten yards of cloth to the seller for ten Dirhams agreed to be delivered to him by the seller at a future date, the Salam Sale thus made will not be valid.

Some jurist are of the view that this sale is totally void which some others say that even though; taking it to be a Salam Sale, it is certainly not valid, still it is not void, as it may be executed to comply with the views of the parties as far as possible, by treating it simply as a sale of cloth for a price payable at a future date; more particularly as, in all contracts, the spirit is what is to be complied with.

The former view is however, better, because, even though sales may lawfully be made valid in every possible degree, as regards the things concerned which the parties may have contracted, still as, in the above case, the things contracted are Dirhams and Deenars, which on account of express prohibition are not capable to be made the goods of a Salam Sale and therefore the contract regarding them cannot in any degree be made valid.

3. Measurement by length and tale.

Salam Sale in respect of goods of measurement by length, such as cloth, or the like, is valid, because it is possible to describe them exactly by the number of yards, with respect to the length and breadth, and the quality and workmanship of it.

Quality meaning the fineness or coarseness, and workmanship meaning the looseness or closeness of the texture. The description of these particulars, is necessary, so that ignorance may be avoided and therefore it is essential to the validity of the contract of Salam Sale.

Similarly, a Salam Sale is valid in respect of all goods of tale, which are not essentially different in their unities, such as eggs and walnuts; because, in all goods of tale between the unities of which the difference is negligible, the rate is ascertainable, the quality is definable, and the delivery to the purchaser is practicable. The contract of Salam, therefore; in respect of such goods is valid; In the goods of this type, also, the great and the small are treated as the same, because the people do not give any importance to the difference between them.

But it is otherwise in respect of melons and pomegranates, because the difference in them is given importance.

It may be noted that where there is difference in the individuals of any kind of the goods, it may be known whether the difference is of any importance of account the effect it may have on the price. Thus goods of which the individuals of the same kind have a different price are taken as different; and where the price is the same in respect of the individuals, they are taken as similar.

It is noted from Imam Abu Hanifah, that ostrich eggs are not similar, as they are of different prices.

It may be noted that in the same manner as a Salam sale is valid in respect of similars of tale according to number, so also it is valid in respect of them according to the measurement of capacity.

But Imam Zufar is of the view that it is not valid according to the measurement of capacity, as that does not apply

to the goods of tale; and it is also a tenet of his, that a Salam Sale in respect of the goods of tale is not valid because of the difference between the individuals of the kind.

Our doctors say, that quantity is sometimes known by the number and sometimes by the measurement of capacity; and that similars of the same kind considered as goods of tale only because of the consent and practice of the people, they may for the same reason be subjected to the measurement of capacity by consent of the parties.

Similarly, Salam Sale is valid in respect of Faloos. Some jurists are of the view that this is the view of Imam Abu Hanifah and Imam Abu Yusuf; but Imam Muhammad holds a different view, as, according to his tenet, Faloos are representatives of price.

4. Not lawful in respect of animals.

Salam Sale in respect of animals is not valid.

But Imam Shaafe'ee thinks it to be valid, as the goods may be known by description of the genus, the age, the kinds, and the quality; after which only a negligible difference can take place, as in the case of cloth.

Our jurists, however, say that after such descriptions the difference can still be great in respect of various qualities and hidden facts, which may result in a dispute; in opposition to the case of cloth, because, as it is the result of workmanship of man, there will rarely be any material difference in two pieces of the same kind. Further, it is noted that the Holy Prophet prohibited the Salam Sale of animals (Haakim, Dara Qutni), and this prohibition applies to every kind of the animals, even to the sparrows.

5. Sale of the parts of animals, or skins, firewood or hay.

Salam Sale is not valid in respect of the parts of an animal, as for instance, the head, or the feet, because they are not similars of tale, nor is there any measure to ascertain their size. Similarly also, a Salam Sale is not valid in respect of skins; according to bundles, or hay according to packages, except where the quantity is ascertained by mentioning the length of the string by which they are tied; because then only the Salam Sale in respect of them can be valid, down the mode of binding does not create the difference.

6. Nor unless the goods are in existence until the time of delivery.

Salam Sale is not valid, unless the goods are in continuously in existence, from the making of the contract, until the time of its delivery.

Therefore the sale will not valid if the goods were not in existence at the time of making the contract, but exists at the time fixed for its delivery; or *vice versa* ; or if, they existed at the time of making the contract, and also exist at the time of delivery, but were non-existent at some time during the intervening period.

Imam Shaafe'ee is of the view that the existence at the time of delivery is sufficient whether the goods have been in substance before or not; because in this case the seller is capable of delivery at the time on which delivery is required.

Our jurists, however, say that, firstly, a saying of the Holy Prophet, "ye shall not sell fruit by way of Salam until their ripeness be apparent,"(Bukhari), which evidently shows that the capability of delivery from the making of the contract is necessary, and Secondly, the capability of delivery is depends on the goods being fit for taken their possession by the purchaser, and, therefore, it is necessary that goods should be in continuous existence from the making of the contract upto the time of delivery.

If, at the agreed time of delivery, the goods of the Salam are lost or destroyed, the purchaser in such a case will be entitled to dissolve the contract, and get back the price from the seller, or of waiting until the goods of the sale are recovered.

This is similar to the case of absconding of a slave after the sale of him but before the delivery, in which case also the purchaser is entitled to dissolve the contract or wait until the slave is recovered.

7. Salam Sale of perishable goods in a state of preservation, or in situations where they are usually had.

Salam Sale is valid in respect of dried and salted fish, if it is according to a standard weight, and the kinds are known; because in such a case the goods of the sale are of a known kind, the quality is defined, and the delivery is possible, as such fish is always fit for taking possession of it.

But this kind, of sale is not permitted according to tale, as the individuals amongst the fish are not similar ; nor is it permitted in respect of the fresh fish, unless at such a specific time of the year as makes the getting of them sure, in which case a Salam sale in respect of them, according to a fixed weight, is valid, if the kinds are described.

This is because the fresh fish is not always to be acquired, as it is sometimes withheld, in the winter season, on account of freezing the water. But in a city where fresh fish are always procurable, a Salam Sale in respect of them is perfectly valid if it is according to weight and not by tale.

It noted from Imam Abu Hanifah, that it is not valid to make a Salam Sale in respect of the flesh of fish of so large as to cause their flesh to be cut in the same manner as that of oxen or goats, because, it is illegal in respect of all other animals, therefore it is likewise so in respect of fish, of which the flesh is equal to that of any other animal.

8. Not lawful in respect of flesh or meat.

Salam Sale of flesh is totally illegal according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that it is valid in respect of the flesh of quadrupeds, if notification is made of the flesh of known and definite part, such as the haunch, and that a description is given of the qualities, such as fatness or leanness.

9. Time of delivery should be specified.

Salam Sale will not be valid unless the time for the delivery of the goods is fixed. But Imam Shaafe'ee is of the view that it will be valid in either case, that is whether the time of delivery is fixed or not.

It may be noted that the shortest period that can be fixed for delivery, in a Salam Sale, is one month. Some jurists hold it as of three days; and some as of half a day. The first opinion is however, authentic; and decrees are passed accordingly.

10. Private measurements not to be used.

The condition of a private measure of capacity or of length is not valid in a Salam Sale, because of the uncertainty, on account of the possibility of the change occurring between making of the contract and the delivery.

It is also necessary that the instrument of measurement should be of a substance not liable change, but that it should be of a fixed nature, such as a large cup. Leathern bags, however, in which water is contained, are permitted for this purpose, according to Imam Abu Yusuf, because of the general practice of the people.

11. Not lawful under a restriction of the goods being the produce of a particular place.

Salam Sale, in respect of the grain of a particular village, or the fruit of a particular garden, is not lawful; because if any accident happen to particular places, the delivery becomes impossible. Such condition has moreover been prohibited by the Holy Prophet. Such is, however, lawful, according to some jurists if it is to describe the quality, as where such a condition is made for the grain of Khashmaraan in Bokhara, or of Basaakhi in Farghana.

12. Genus may be specified, and quality, quantity, time of delivery, rate and place of delivery, be stated,

Salam Sale will not be lawful, according to Imam Abu Hanifah, except on seven conditions; (a) Genus of the goods should be mentioned, such as wheat or barley; (b) Kind of it should be fixed, such as wheat of a soil watered by canal, or other artificial mode, or wheat of a soil watered by rain; (c) Quality of it should be fixed, such as best or worst; (d) Quantity of it should be fixed according weight, or measurement of capacity; (e) Time of delivery should be fixed, according to the Traditions; (f) Rate of the advance payment should be fixed, if it is definable by the rate, as where it is an article of weight, or measurement of capacity, or of tale; and (g) Place of delivery should be fixed, if the goods on account of its weight, need portorage.

Imam Abu Yusuf and Imam Muhammad are of the view, that if the amount to be paid in advance is present, and shown, there is then no need of mentioning the rate; and also, that there is no need of mentioning the place of delivery, as the delivery should be made in the place where the contract is made.

Thus there is difference of opinion as regards these two conditions between Imam Abu Hanifah and the two disciples Imam Abu Yusuf and Imam Muhammad.

As, according to Imam Abu Hanifah, mentioning of the rate of the price is a necessary condition to Salam Sale, it follows that, agreeably to his tenets a Salam sale will not be lawful where the goods, of different kinds such as wheat and barley are against any particular sum one hundred Dirhams, for example, without a separate price specified against each of the kinds, because the amount being here against generally to both, the particular price of each will remain unknown.

Similarly, it will not be lawful where, the price is of different kinds such as Dirhams and Deenar, a description is given of the quantity of one of these kinds and not of the other; because in such a case the Salam sale will not be lawful in the degree to which an unknown quantity is against it; and therefore, it will also be invalid in respect of the degree in which it is against a known quantity, as one contract relates to both.

But according to Imam Abu Yusuf and Imam Muhammad both these modes of Salam sale are lawful, as in their view the exhibition of the price without any description of the rate is valid.

It may be noted that, similarly as Imam Abu Hanifah and the two disciples Imam Abu Yusuf and Imam Muhammad disagree in respect of the mentioning of the place of delivery in a Salam Sale, so also they disagree in respect of the mentioning of a place for the payment of the price, where it is stipulated at a future time, the mentioning of a place for the payment of rent, and also, the mentioning of a place for the payment of a sum due from a partner in a division of stock.

13. Place of delivery.

If the goods for which the price is paid in advance is such as does not require expense of portorage, such as musk, camphire, saffron, or small pearls, there is no need, according to all our jurists, for fixing the place of delivery; because the difference

of place causes no difference of price; and in such a case the delivery is to be made where the contract of sale is made.

14. City to be mentioned.

If, the goods requiring portorage, only a city is to be fixed for the delivery, and there is then no need of mentioning the street or lane, because a city inspite of having many parts, is taken as one place.

Some jurists say, that this view is based on supposition that the city is not big ; but that, if it is of a Farasang length (about 18,000 feet), then mentioning of particular part of it is also necessary.

15. Price to be received at the meeting.

Salam Sale will not be valid unless the seller gets the price in the meeting, before separation from the purchaser; because if the price is in money, it will then follow that one debt is against to another debt; which practice is prohibited by the Holy Prophet; or, if the price is in goods, it will not be valid, because Salam sale is "a prompt receipt of something in lieu of something to be given," which will not be proved if there is no prompt payment of the price.

16. Debt due to the seller from the purchaser taken part of the price.

If a person purchases a Kur* of wheat, by Salam sale, for two hundred Dirhams, and, the seller is indebted to him by one hundred Dirhams, and therefore the purchaser pays immediately to the seller one hundred Dirhams, and makes the debt of one hundred Dirhams as the balance, in such a case the sale will not be valid to the extent of the debt of one hundred Dirhams, because a present delivery is not made of them; but it will be valid to the extent of the amount of the one hundred Dirhams

* A day Babylonish measure of 7,1000 lib (See Richardson's Dictionary).

paid immediately because of the fulfilment of the conditions of legality in respect of that proportion, and because it will be not affected by the invalidity of the balance, as this invalidity will supervenient, the sale to be valid originally; and therefore, if the purchaser in this case, pay immediately one hundred Dirhams against the debt before finishing of the meeting, the sale will becomes valid; but as, in the present case, the purchaser does not pay off his debt, but merely makes a clearance of his debt for ready payment of one hundred Dirhams, and the parties separate from the meeting, the sale is therefore will be invalid to that extent.

17. Cannot be disposed of by the seller.

It is not lawful for the seller to use, or, by deed, to dispose of the price paid in advance, in Salam Sale, as if he sell it, before his delivery of it, because in such a case the delivery of the price, which is a necessary condition in a Salam Sale will be defeated.

18. Nor can the purchaser do any act in respect of the goods.

Similarly, it is not lawful for the purchaser, in a Salam Sale, to do any act in respect of the goods, before getting them; because an act in respect of the goods before the possession is not lawful.

Similarly, it is not lawful for the purchaser, before possession, to make another person a sharer in the goods, or to dispose of them at prime cost.

19. In dissolution of Salam Sale the goods should not be applied to purchasing anything from the seller.

If both parties dissolve a contract of Salam Sale, the purchaser is not, in such a case, entitled to take or purchase any

thing from the seller for the goods he has given in advance, until he first gets it back complete by; because the Holy Prophet has said, "where you dissolve a contract of sale upon which an advance payment has been made, take not from him to whom you have paid the advance anything except that which you have given in advance to him;" and also, because, as the amount paid in advance, in this case, resembles and is like unto the subject of the sale, it follows that any act in respect of it, before possession, is not valid.

In this case however, Imam Zufar has a different view, because, according to him, any act regarding the price, before possession, is lawful.

20. Goods subsequently purchased, and delivered in fulfillment of a Salam Sale.

If a person sells a Kur of wheat by a Salam Sale, and then, when the time of delivery arrives, purchases the wheat from another person, and then asks the purchaser to get it from that other person in fulfillment of his claim upon him; and the purchaser takes possession of it, still he will not be considered to have made possession of the goods of the Salam Sale, and therefore, if the wheat is lost or destroyed while in his possession, the seller will be responsible for it.

21. Unless the purchaser get it for the seller, and then makes possession of it on his own account.

But, if the seller asks the purchaser to get it first on his (i.e., the seller's) account, and then on his own account, and the purchaser first measures it out and get it on account of the seller, and then measures it out and get it on his own account, the goods of the Salam Sale will in that case be delivered, and the purchaser will become completely having delivered of the same.

22. Second not necessary.

If a person is indebted to another person for a Kur of wheat, not in Salam Sale, but on account of a loan, purchases a Kur of wheat from another person, and then wants his creditor to get the same from the other, for the what he had borrowed, and the creditor, after measuring the same, takes possession of it, such possession is valid, and a re-payment of the loan is proved; because a loan of indefinite property [Qarz] is equal to a loan of a particular property [Aariyat], and therefore the Kur of wheat so measured and received by the lender may be said to be his actual right, because of which the transaction is not considered as joining of two contracts in respect of one goods, and it is therefore not necessary to measure the wheat again.

23. If the seller measures the goods for the purchaser in his absence.

If a person, after purchasing a Kur of wheat by a Salam Sale, orders the seller to measure it and put it into the purchaser's sack, and the seller, after measuring it, puts it into the sack at a time when the purchase is not present, in such a case a delivery of the goods will not be held to have taken place and if the wheat in that situation is destroyed, the loss will fall entirely on the seller; because the purchaser, in a Salam Sale, does not become owner of the goods, for which he has made the payment in advance, until actual possession.

24. If it is measured by the seller for his own sake at the purchaser's wish.

If a person purchases wheat, and asks the seller to measure it and put it into his own bags, and the seller does so, the purchaser is not in possession of the bags as he borrowed the bags of the seller without taking possession of the bags, and therefore he does not become possessed of the wheat which is the bags.

The above case is in fact the same as if the purchaser had asked the seller to measure the wheat and place it in a corner of his own house, which is exclusively in the possession of the seller, the purchaser cannot therefore be possessed of anything in it.

25. Delivery of definite goods in the same parcel with an indefinite goods.

If an indefinite and a definite thing is joined together, by a person as for example, after purchasing a Kur of wheat, he also makes a Salam Sale for another Kur of the wheat the former of which is definite and the latter indefinite and then asks the seller to measure both into his own bag, in such a case, if the seller first measures the definite wheat into the bag, and then the indefinite wheat, the purchaser will be possessed of both the measures of wheat; of the definite wheat because his direction to the seller in respect of it was correct, as it was his property; and of the indefinite wheat because, upon the seller measuring it, and putting it in the bag, it will become included in the property of the purchaser, and on account of this inclusion the purchaser will become possessed of it.

But if, in the above case the seller first measures the indefinite wheat, and places it in the purchaser's bag, and then the definite wheat, the purchaser will not become possessed of either, because his directions to measure the indefinite wheat was not correct, and therefore the ownership of it remained with the seller, as before; and after mixing up the definite wheat with his own property, he will destroy and finish the right of ownership of the other.

This is based on the view of Imam Abu Hanifah, according to whom the including of the property of another with one's own finishes the right of ownership of that other, and on this principle he holds the sale in respect of the definite wheat as dissolved.

But Imam Abu Yusuf and Imam Muhammad are of the view that the purchaser has the right of dissolving the sale or sharing with the seller in the mixed property; because, according to them, the including of the property of another with one's own does not always destroy the right of ownership of that other.

26. If the sale is dissolved, and the article advanced as price persists before restitution.

If a person purchases a Kur of wheat by a Salam sale, gives a female slave as the price paid in advance, and after the seller takes possession of the slave, the parties dissolve the sale, and the slave then dies while yet in the possession of the seller, in such a case the seller will be responsible for her value on the day of possession.

And if, the dissolution is made after the death of the female slave, it will be valid, and the seller in the same manner will remain responsible for her value at the time of possession.

27. Dissolution of sale rendered invalid.

If a person, after purchasing a slave, agrees with the seller to dissolve the sale, and the slave thereafter dies in his possession, the dissolution will not be valid; or, if the slave dies first, and the parties then agree to dissolve the sale even then the dissolution will not be valid; because, the slave is the subject of the sale, and his death as a results finishes the sale, the dissolution will therefore be invalid from the beginning in the second case, and will become invalid in the end in the first case, as the subject no longer exists.

But it will be otherwise in the case of Bai'al-Muqa'yezah or barter; because a dissolution in such a case is valid after the decay or destruction of one of the goods; as either of them is capable of becoming the subject of the sale, the existing one will, therefore be considered as such.

28. Dispute in respect of the value of the subject.

If a person enters into a Salam sale of a Kur of wheat, at the rate of ten Dirhams and the seller thereafter says that "he had agreed for wheat of an inferior kind," and the purchaser denies it, and says that, "the sale of wheat was made in an absolute manner, and therefore, the sale is not valid," in such a case the assertion of the seller, on oath should be accepted, as he pleads the validity of the sale, on account of the declaration of a condition of it; and the assertion of the purchaser, inspite of his denial of validity of the sale, is not accepted, because it tends to destroy his own right, as it is a custom, in Salam Sales, that the goods for which advance payment made are superior to the sum paid in advance.

But if a *vice versa* disagreement takes place between the parties, the jurists say that according to the view of Imam Abu Hanifah, the assertion of the purchaser should be accepted, as he claims the validity of the sale,

But according to Imam Abu Yusuf and Imam Muhammad, the assertion of the seller should be accepted in both cases, as he is the defendant in both, inspite of the fact that, in the latter case, he denies the validity of the sale.

29. If the seller denies the fixing of a time of delivery.

If there is disagreement between the parties to a Salam Sale, by the seller saying that a time of delivery was not fixed in the contract, and the purchaser says that it was fixed, the assertion of the purchaser should be accepted, because fixing of the times for delivery is the right of the seller, and his denial is therefore wilful loss to himself.

But if, the seller says that the time was not fixed, and the purchaser denies this, in such a case, according to Imam Abu Yusuf and Imam Muhammad, the assertion of the purchaser should be accepted, because he denies the right which the seller

claims from him, although, at the same time, he denies the validity of the sale ; in the same manner as holds in respect of the owner of the goods in a contract of Muzaribat.

30. Salam Sales of price goods.

If a person enters into a Salam Sale in respect of cloth, mentioning its length, breadth, and quality of fineness or coarseness, such a sale is valid, because it is a Salam Sale in respect of a known thing, and of which the delivery is possible. If the goods of the sale is a piece of silken cloth, it is also necessary that the weight of it should also be settled, because it is also an object in such a case.

31. Salam Sale in shells, or jewels; and in small pearls sold by weight.

Salam Sale of jewels or marine shells is not valid, because the unities of these differ in their values.

32. In bricks.

There is no objection to the sale of bricks, whether they are wet or dry, if a description of the mould in which they are formed is given, because bricks, in their unities, are similar, particularly where their mould is described.

33. Goods of which the quality, and quantity can be described.

Everything of which it is possible to give the description of the quality, and the quantity, is a fit subject of Salam Sale, as it cannot be the cause of any dispute. But Salam Sale is not lawful in respect of those things which are not capable to be defined by description of quality or quantity; because the subject of a Salam Sale is in fact a debt due by the seller, and if its quality is not known there necessarily exists a degree of uncertainty, which may give rise to a dispute.

34. Goods which are particularly defined.

There is nothing wrong in a Salam Sale of pots or vessels for boiling water, or of boots, or the like, if these goods are particularly defined, because the conditions necessary for the validity of a Salam Sale are present in it.

But if the goods are not defined, the sale will be totally unlawful because, the subject of the sale in such a case is undefined debt.

It is also valid to bespeak any of these goods from the workman without fixing the time of delivery. Thus if a person asks a shoe-maker to make shoes for him, of a particular size and quality, such agreement is valid, on a favourable construction, based on the usage and practice of the people, even though it is not lawful on account of, as it is the sale of a non existent thing, which is prohibited.

35. Goods bespoke from the manufacturer in a Salam Sale.

It may be noted that an agreement for workmanship is a sale and not merely a promise. This is approved. Moreover the subject of the sale, in such a case, even though in reality not existing, is yet taken, in effect, as an entity; and the thing upon which the agreement rests is taken as a substance that is, as shoes, for example, and not as the work of a worker in an abstract manner; and therefore, if the worker brings the shoes that made by another, or shoes which he had himself made before the agreement and the person who had bespoke them approves of them, the agreement will be legally fulfilled.

Further, the goods that are bespoke are not specified for the person who bespoke them until he approve them; and therefore, if the workman sells them to another before he had shown them to this person, it will be lawful. All this is approved.

36. May be rejected.

The person who bespeaks goods of a workman is entitled to take or reject them, because of he had purchased the goods which he had not seen. But the workman, has no such right, because the person who bespoke them may, if he may like take them from him by force. This is noted from Imam Muhammad, in the *Mabsoot*, and is the most authentic view.

It is noted as a view of Imam Abu Hanifah, that the workman also has the right, because it is impossible for him to prepare the goods bespoke without as loss as in order to make the shoes for example it was necessary to purchase the hides, and instruments to cut them, and this is not free from loss.

It is also noted, as an opinion of Imam Abu Yusuf, that neither party will have such a right; because the workman, as he is the seller, will not be entitled to this right, in the same manner as, in a sale of unseen goods, the seller has no such right; and as regard the person who bespeaks the goods, if such a right was given to him, it will be a loss to the seller, as if he rejects the goods, other persons may not choose to purchase them for the value; as where, for example, a commander of high rank bespeaks goods, and the workman accordingly prepares them in a style suitable to his rank and he afterwards rejects them; in which case the common rank of people will not be able to purchase them for their value.

37. Agreement with a workman to prepare goods which it is not customary to bespeak.

An agreement with a workman to prepare the goods is not lawful in respect of such goods in which it is not customary among the people to bespeak, as cloth, for example, because the bespeaking of goods is in itself unlawful, and is, therefore, allowed by the law only so far as it is allowed by the custom of the people, which is taken as a necessary condition of its legality.

It is also necessary, in bespeaking the goods allowed by the custom of the people, to mention their quality, in order to enable the workman to prepare them accordingly; and unless such mention is made the agreement will be unlawful.

Section

MISCELLANEOUS CASES.

(Hidayah, Kitab-ul-Buyoo', Fasl Fee Masaa'lbul Mansoorah)

1. To sell dogs or hawks.

It is lawful to sell a dog or a hawk, whether trained or untrained. It is, however, noted from Imam Abu Yusuf, that the sale of a dog which bites is not lawful.

Imam Shaafe'ee is of the view that the sale of a dog is totally illegal; because the Holy Prophet has declared "the wages of adultery, and the price of a dog, are among the prohibited things;" (Bukhari, Muslim, Dara Qutni, Ibne Hibban) and also, because a dog is actual filth, and, therefore, deserves abhorrence; which the legality of sale makes the subject of it as respectful; and is, therefore, incompatible with the nature of a dog.

The reasoning of our jurists, in this respect, is twofold, viz.; firstly, the Holy Prophet has prohibited the sale of dogs, except those trained for hunting or for watching, secondly, dogs are also a kind of property, because they are capable of providing profit through hunting and watching; and as a property, they are, therefore, fit for sale; in opposition to the case of noxious animals, such as snakes or scorpions, which are not capable of providing any profit.

As regards the Tradition quoted by Imam Shaafe'ee, it is of early period of Islam, during which the Holy Prophet had prohibited everyone from using the price of a dog, in order to save the people from a fondness for dogs, as it was then a custom

to keep dogs of breed, and to make them sleep on the same beds. But when this custom fell into disuse, and the people abstained from a fondness for dogs, the Holy Prophet permitted the sale of dogs also.

As regards the assertion of Imam Shaafe'ee that dogs are an actual filth, it is not admitted; but even admit if it is admitted, still it follows that the eating, and not the selling, of dog is unlawful.

2. To sell wine or pork.

The sale of wine or pork is not lawful, because, as the Holy Prophet has prohibited the eating of pork and drinking of wine, so also has he prohibited the sale of them, or using the price of them (Bukhari and Muslim) and also, because these are not substantial property for the Muslims.

3. Rules for the Zimmees in sale.

Zimmees, in purchase and sale, are the same as Muslims because the Holy Prophet has said "Have regard for the Zimmees, because they are entitled to the same rights, and are subject to the same rules with Muslims," and also because, being under the same necessities, in the dealing of their concerns, as Muslims, they are in the need of the same immunities. They are therefore the same as Muslims, in respect of purchase and sale, except, however, in the sale of wine and pork, which is lawful to them, because the sale of wine, by them, is considered as the same as the crude juice of the grapes by the Muslims ; and the sale of pork by them is considered as equal to the flesh of a goat by the Muslims ; because these things are lawful in their religion, and we are commanded to allow them to follow their own tenets. Moreover, Hazrat Umar ordered his officials to allow the Zimmees to sell wine, and take from them one-tenth part of the price; which is a proof that the sale of wine is lawful among them.

4. Person inciting another person to sell his property by offering an additional amount over and above the price.

If a person says to another person, "sell your slave to a particular person for one thousand Dirhams, on the condition that I will be responsible to you for five hundred Dirhams, of the price, in addition to the one thousand Dirhams," and the said person does so, it will be valid and he will be entitled to one thousand Dirhams from the purchaser, and to five hundred Dirhams from the surety. But if he simply says "I will be responsible for five hundred Dirhams," without using the words "of the price," the seller will, in that case, be entitled only to the one thousand Dirhams from the purchaser, and will have no claim against the surety.

5. Female be contracted in marriage by the purchaser.

If a person, after purchasing a female slave, contracts her in marriage to another person before taking her in possession, and that other person commits sexual intercourse with her, such marriage will be lawful, as it has been contracted on account of the authority of the owner; and it also proves the possession of the purchaser.

But if, the husband does not commit sexual intercourse with her, the marriage will not, in such a case, prove the possession according to a favourable construction of the law. Analogy, however, suggests that the purchaser becomes possessed of the slave on contracting the marriage because, as a result of it the right of ownership over the slave is made virtually defective, it would therefore follow that the possession becomes proved as a result of the contract, in the same manner as in the case of an actual defect caused by any act of a purchase.

6. Purchaser disappearing.

If a person, after purchasing a slave, absents himself without taking possession, or paying the price, and the seller proves by witnesses that he had sold the slave to the absentee,

in such a case, if his address is known and ascertained, the slave cannot be re-sold on account of the exigencies of the seller, because these may be otherwise answered, and such sale will finish the right of the first purchaser.

But if the absentee's address be not known, the slave can be resold, and the debt of the purchaser to the seller may be paid by means of the price; because the seller has proved, by witnesses, that the slave is the property of the purchaser, and that he has a claim upon him; and therefore, when the address of the purchaser is not known, it is necessary for the court to direct the slave to be sold for the satisfaction of the seller; which could not otherwise be possible; in the same manner as where a pawnier dies before releasing his pledge, in which case it may be sold for discharging of his debt to the pawn holder.

But it will be otherwise where the purchaser disappears after taking the possession, because, in such a case the slave cannot be sold to satisfy the right of the seller, as his right is not specifically connected with the slave, as he, in such a case, stands in the same position with the other creditors.

It may be noted that, in case the slave is sold on account of the claim of the seller if anything remains after discharging his claim by means of the price, the seller should keep such remainder for the purchaser, to whom it is due as an exchange for his property; but if the price does not suffice to satisfy his claim, he will in such a case be entitled to get the balance, from the purchaser.

7. One of two purchasers disappearing.

If there are two purchasers, and only one of them disappears, the one of them who is present will be liable to pay the whole price of the slave, and to take possession of him; and if, in such a case, the other purchaser afterward appears, he will not be entitled to receive his share until he pays to his partner the

price of it. This is the view of Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf has said that, if the present purchaser pays the whole of the price, still he will only be entitled to take possession of his own share, and that, as the payment of the debt of the absentee was a gratuitous act in his favour, he will not be entitled to get it from him, since he has paid it without his authority.

8. Gold and silver indefinitely mentioned in the offer of a price.

If a person purchases a female slave for one thousand misqals of gold and silver, saying that, "I purchase this slave for one thousand misqals of gold and silver," in such a case it will be necessary for him to pay five hundred misqals of gold, and five hundred misqals of silver; because the reference of the misqals in respect of gold and silver are in equal degree applicable to each, an equal proportion in the payment is of as such necessary.

But if, the purchaser says that, "I have purchased this slave for one thousand of gold and silver, in such a case he should pay five hundred misqals of gold, and five hundred Dirhams of silver, of the septemal weight ; because the terms one thousand are referred to the gold and silver in a general manner, it is, therefore, taken to apply to the weight in common use in respect of each in particular.

9. Receipt of bad money instead of good money.

If a person is indebted to another person in the sum of ten Dirhams of a good kind and pays him ten Dirhams of bad kind, and the other person is ignorant of this fact and receives them, and expends them, or loses them, in such a case the debt will be fully discharged, and the creditor will not be entitled to any compensation for the difference of the kind of Dirhams. This is according to Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf is of the view, that in such a case the creditor

will be entitled to return to the debtor the Dirhams of the kind he has received and to demand from him ten Dirhams of a good kind, to which he has a right.

10. Goods of a neutral nature do not become property.

If a bird lays the eggs in the land of any person, the right of ownership over the eggs does not, on account of laying the eggs, vest in the owner of the land. The eggs will be of the person who will first get them.

same law also applies in respect of the eggs which a bird lays upon any land.

similarly, if a deer sleeps for a night in a field, it does not by that act become the property of the owner of that field; but remains free for whoever catches it.

BOOK – II *

BAI' – AS – SARF

(SARF SALE)

SARF SALE *

(*Hidayah, Kitab-us-Sarf*)

Note

Literally "Sarf" means changing, converting or removing. But legally "Bai-as-Sarf, like Bai-as-Salam" is also a kind of Sale in which the articles opposed to each other both represent the price, by nature as gold and silver, or by affairs or by weight or measurement, or by mutual agreement as Dinar, Dirham or Floss. But unlike the Salam in "Sarf" there is no question of credit in it i.e., the dealing is hand to hand.

This kind of sale is known as "Sarf" because in this kind of sale it is necessary to remove, the articles opposed to each other in exchange from the hands of one party into the hands of the other party.

"Sarf" also means superiority ; and in this kind of sale superiority is the only purpose; that is, a superiority of quality, fashion, or workmanship ; because gold or silver are in respect of their substance, of no use and therefore this are only desirable on account of such superiority.

1. Goods sold should be exactly equal in weight; but may differ in quality.

The sale of gold for gold, or silver for silver, is allowed only when they are exactly equal in weight ; although one may be superior in quality to the other ; or the one may be bullion, and the other may be wrought ; because the Holy Prophet has said that, "sell gold for gold, from hand to hand, at an equal rate according to weight (Muslim); because any inequality in weight is usury"(Muslim). And he has also said that, "the goodness and badness of quality is the same".

* 'Ainul Hidayah, Vol. III, pp. 236 to 261

2. Exchange must take place upon the spot.

Mutual possession is an indispensable requirement of the Sarf Sale ; that is, it is incumbent that each of the parties, before their leaving the meeting, should takes possession of the goods respectively given in the sale.

Further, the possession of one of the parties is an indispensable requirement, so that the contract should not prove to be the sale of a debt for a debt ; and as the possession of one of the parties is necessary, it follows that, in order to create an equality the possession of the other is also necessary, otherwise usury will be induced.

Moreover, in a sale of this kind, neither of the goods has a priority in respect of the other ; and therefore a mutual possession is necessary, whether both the goods are of a specific kind , or one of them specific and the other not specific.

Further, even though a silver vessel is specific, still there exists a doubt in respect of its specification, because as silver is considered in its kind as a respective of price ; and, in a case of this kind, a doubt is a sufficient cause for the necessity of possession, because a doubt, in matter relating to usury is equal to reality.

It may be noted that mutual possession means, that both parties should take possession before their separation. Therefore, if the parties go aside together, or sleep in the place of meeting, or become unconscious , the Sarf Sale will not thereby be made invalid.

3. Gold may be sold for silver, at an unequal rate if the sale takes place at the spot.

The sale of gold for silver at an unequal rate, is allowed because these goods are of a different kind. But still in such a case, mutual possession is necessary, because the Holy Prophet

has said, "the sale of gold for silver is usury unless it is from hand to hand"(Saha Sittah) . If, therefore, the parties separate before both, or one of them takes the possession, the sale is not valid ; and therefore it is not lawful to make an optional condition, or an optional time, because such conditions prevent mutual possession, which is a necessary condition.

But if, a Sarf Sale be made with an optional condition, and the condition is afterwards finished before the separation of the parties, the Sarf Sale will in such a case be valid, because of removal of invalidity before its complete establishment.

4. No act to be done with relation to the return until it is received.

Any act in respect of the return in a Sarf Sale, before the possession of it is not valid.

Therefore, if a person, after selling a Deenar for ten Dirhams, before the possession of them, purchases cloth for them, in such a case the sale of the cloth will not be valid, on the principle, that the possession of the ten Dirhams was absolutely necessary ; as otherwise the Sarf Sale would involve usury.

5. Gold can be sold for silver, by conjecture ; but not gold for gold, nor silver for silver.

The sale of gold for silver, by conjecture,(i.e. by unspecific estimate), is valid because equality, in such a sale, is not required.

But it will not be valid, to sell gold for gold, silver for silver, by conjecture, because in such a sale there is a doubt of usury.

6. Sale of goods having gold or silver upon it .

If a person sells for two thousand Misqals of silver, a female slave whose actual value is one thousand Misqals, and on

her neck there is a collar of silver equal to one thousand Misqals of silver, and the purchaser makes prompt payment of one thousand Misqals of silver, and then the parties leave the meeting, such payment will be treated as the price of the collar, because the possession of so much of the price of the whole was a necessary condition, as the sale in the proportion was Sarf Sale ; and therefore it is proper to conclude that the seller paid the exact amount of which he knew that the possession was absolutely necessary.

But if, the parties separate without mutual possession, the sale will be void in respect of the silver collar because of it was in that respect a Sarf Sale, to the validity of which mutual possession is necessary.

7. In the sale of a vessel, if the parties separate before payment of the full price, the sale will be valid only to the extent of payment.

If a person, after selling to another person a silver vessel, receives the payment in part, and then both parties separate, in such a case, the sale will be void as regards the amount remaining to be paid, but will be valid to the extent of the amount received; and the parties will have both the share in the ownership of the vessel ; because this sale is Sarf, or pure, as regards the whole of the subject, and, therefore, valid in to the extent in which the conditions of a pure sale have been observed, and invalid to the extent in which they have been omitted.

8. If it is found to be in part the property of another.

If a person sells a silver vessel which afterwards proves to be in part the property of another, in such a case the purchaser will be entitled to retain a right of property in the remaining part of the vessel, or to cancel the bargain totally; because partnership in a vessel is equal to a blemish in it.

9. But this does not apply in respect of an ingot.

If a person sells an ingot of silver, and part of it afterwards proves to be the property of another, the purchaser will in that case, be forced to take the remaining part at a proportionate price; and he will not be entitled to any option, in this case, because the division of an ingot of silver will not in any way cause any damage to it.

10. Where the goods, on each side, consists of two kinds of money.

The sale of two Dirhams and one Deenar, for two Deenars and one Dirham, is valid ; because in such a case the Dirhams are taken as opposed to the Deenars ; and as they are of a different kind the inequality in the proportion is therefore admitted.

11. And so also where the goods, on one side consists of a number of coins of one kind, and, on the other, of an equal number, of the other kinds.

A sale of eleven Dirhams for ten Dirhams and one Deenar, is valid ; and in such a case ten Dirhams are to be taken as opposed to ten Dirhams and the remaining Dirham is to be taken as one Deenar ; because in a sale of Dirhams for Dirhams equality is necessary and it is therefore reasonable to think that such was the intention of the parties ; and as regards the remaining part of the sale, i.e., the opposition of the Dirham to one Deenar, equality is not required as they are not homogeneous.

12. Deficiency of value, on one side, in the weight may be made up by the addition of any other goods of proportionate value.

If, in the sale of gold for gold, or silver for silver, the goods, on one side are inferior in the weight to the other, and

there is joined to the inferior goods something equal in value to the deficiency arising on account of difference of weight, in such a case the sale will be valid, and not abominable.

But even if, the value of the thing so joined is not equal to the difference, still the sale will be valid, through abominable.

But if, the additional thing is of no value such as dust, the sale will not be valid, because in such a case will be usurious, because nothing will be opposed to the difference of the weight.

13. Debt commuted in a Sarf Sale.

If a person, who is indebted to another person for ten Dirhams, sells to his creditor one Deenar for ten Dirhams, and after deliver of the Deenar to him, the parties then commute the ten Dirhams which they reciprocally owe to each other, it will be lawful. But this case, depends upon the supposition that the sale of the Deenar relate to ten Dirhams in an absolute manner, and not to the debt.

14. One pure and two base Dirhams sold for two base and one pure.

The sale of one pure Dirham and two base Dirhams for two pure Dirhams and one base Dirham, is valid.

But in that case base Dirham is to be understood, as the one which is generally extant amongst the merchants, but is rejected at the public treasury.

The reason for the legality, in this case, is that an equality according to weight is present, and therefore the equality of purity is of not material.

15. Description of, and rules respecting the base coins.

Dirhams in which silver is predominant are considered

as silver, and Deenars in which gold is predominant are considered as gold ; and a difference in the proportion in respect of them in a sale is therefore not lawful, in the same manner as in the case of pure Dirhams or Deenars. Therefore it is not lawful to sell base money for pure money, or base money for base money, unless of equality in the weight.

Similarly, also, it is not lawful to borrow base money except according to weight ; because Dirhams and Deenars, in common, are not free from mixture of base metal ; because gold and silver do not admit the impression well without a mixture of it, and it is natural in them.

But if, in Dirhams and Deenars, the base metal is predominate, they will not be in effect, Dirhams and Deenars, because the law adverts to the predominancy.

As regards the mone in which the base metal is predominant, it may be noted, that if it is current by weight, purchase, sale, and loans are transacted in it by weight.

But if, it is current by tale, all matters are transacted in it by tale. And if both modes prevail, it is in such a case permitted to follow either ; because custom is decisive in respect of matters of this kind, if they are not otherwise determined by the Law.

It may also be noted, that money of this kind, while it is in use, is represents the price, and is, therefore, not capable to be made determinate ; but if it should not be in use, it is considered as other goods or articles of merchandize, and is, therefore, capable to be mode determinate.

If Dirhams are adulterated to such an extent as to be current with some, but not with others, they are equal to Zeyf of base Dirhams.

16. Sale for base Dirhams is void, if they are not current before the time of payment.

If a person purchases the goods for base Dirhams, and, before the payment of them, they are not generally in use, in such a case the sale, according to Imam Abu Hanifah, will be void. Imam Abu Yusuf say that it will be binding on the purchaser to pay the value which these Dirhams bore on the day of sale. But Imam Muhammad says, that it will be binding on him to pay the value which they bore on the last day of their currency.

17. Rules in respect of copper coins.

A sale for Faloos is valid, because they are taken to be durable property. Therefore, if the Faloos are in currency, the sale is lawful, even though they may not be specified, because Faloos due to the custom, represent the price and therefore, they do not require specification.

But if, they are not in currency, in such a case they also require particular specification, like all other goods of merchandize.

If a person purchases the goods for Faloos, which at that time is in currency, but which before the payment of them are not in use, the sale, in that case will be void, according to Imam Abu Hanifah. The opinion of Imam Abu Yusuf and Imam Muhammad is however contrary to it.

The difference of opinion in this case is similar to that already mentioned in treating the Dirhams in which the alloy is predominant.

If a person borrows Faloos, and their currency thereafter, finishes then, according to Imam Abu Hanifah, the borrower will have to make repayment in similars i.e., articles compensable by equal number of the same description.

It is lawful for a person to purchase anything for the Faloos of half a Dirham, and in such a case he will be required to pay the number of Faloos equal to the price of half a Dirham.

Similarly, it is lawful to purchase any thing for the Faloos of a drink * of silver, or a Qiraat *** of silver.

In all these cases, Imam Zufar is of the view that the sale is not lawful.

If a person, after giving a Dirham to a Sarraf, or money changer, says to him, “give me Faloos for one half of this, and a half Dirham falls short by one grain of silver in exchange for the other half,” in such a case the sale, according to Imam Abu Yusuf and Imam Muhammad, will be valid as regards the one half in exchange for Faloos, but invalid as regards the other.

According to the tenets of Imam Abu Hanifah, however the sale will in this case be totally void.

But if, the word “give” is repeated, by the person saying “give me Faloos for one half, and give me a half Dirham falling short by one grain in exchange for the other half,” the view of Imam Abu Hanifah, in such a case, agrees with that of Imam Abu Yusuf and Imam Muhammad, because here are two separate sales, one valid, and the other invalid.

If the purchaser, without opposing the halves of the Dirham, says ; give me, for this Dirham the Faloos of half a Dirham, and a half Dirham falling short by one grain ; “the sale will be valid in full”.

*** A small silver coin, the sixth part of a Dirham.

**** A Qiraat, the twenty-fourth part of an ounce.

BOOK – III
SHIRAKAT
(PARTNERSHIP)

SHIRAKAT

(PARTNERSHIP)

(*Hidayah, Kitab-ush-Shirkat*)

Note

Literally “Shirkat”, means “partnership” and legally it signifies the joining of two or more stocks, in such a manner, that one of them cannot be distinguished from the other.

Generally, the term “Shirkat”, also applies to agreements of partnership even though there is no actual joining of the stocks.

Legally, however, “Shirkat” signifies the union of two or more persons in any business for caring of profit .

1. Partnership is lawful.

Partnership is lawful, because in the time of the Holy Prophet the people were used to deal with in partnership, and the Holy Prophet allowed them to continue therein.

2. Of two kinds.

Partnership is of two kinds, Shirkat-ul-Milk, i.e. partnership in property, and Shirkat-ul-'Aqd, i.e. partnership by contract.

3. Partnership in Property.

Shirkat-ul-Milk is where two or more persons share in the ownership of any property; and it is of two kinds viz., optional and compulsive. It is optional, where two persons jointly purchase an article ; or where it is given to them as a gift, and they accept it; or where it is left to them, jointly, by a will,

* Mishkaat, Kitabul Buyoo', Bab-ush-Shirkat Wal Wakalate 'Ainul Hidayah, Vol. II, pp 738 to 760

and they accept it or where they both get possession, by conquest, of an article in an enemy's country ; or where they join together their respective shares in such a way that one cannot be distinguished from the other, such as the mixture of wheat with wheat; or where it is difficult to distinguish them, as in a mixture of wheat with barley; and it is compulsive, where the properties of two persons are joined together without their act, in the manner that it becomes difficult or impossible to distinguish between them; or where two persons jointly inherit any property.

In the compulsive partnership, it is not lawful for one partner to do any act in respect of the other's share, without his permission, because each one of them is as a stranger in respect of the other's share.

But it is, lawful for either of the partners to sell his own share to the other partner, in all the cases here mentioned; and he is also entitled to sell his share to others without his partner's consent, except only in case of association or a mixture of property, because in both these cases one partner is not entitled lawfully to sell the share of the other to a third person without his partner's consent. The distinctions in this respect are mentioned in the *Kifayat-al-Muntahi*.

4. Partnership of Contract.

Shirkat-ul-'Aqd, or partnership of contract, is entered into by proposal and acceptance, i.e. by one person saying to the other that, "I have made you my partner in such a property," and the other person reply "I accept;" and it is a condition of the agreement that the concern that in respect of which it is made is of such a nature that it can admit the delegation, so that the acquisition arising from it can be participated in by both the parties, and that thus the effect or design may be created, in other words, that the acquisition can become equally the property of both the partners.

5. Of four kinds .

Partnership of contract is of four kinds, viz.,

- I. Shirkat-ul-Mofawizah, or partnership by reciprocity.
- II. Shirkat-ul-'Enaan, or partnership in business.
- III. Shirkat-ul-Sanaa'e, or partnership in arts.
- IV. Shirkat-ul-Wujooh, or partnership upon personal credit.

Partnership by Reciprocity.

6. Description .

Shirkat-ul-Mofawizah, or partnership by reciprocity, is where two persons who are equals of each other, in respect of property privileges, and religious persussion, enter into a contract of Partnership ; because this kind of partnership is a universal partnership in all dealings, where each partner reciprocally does the business of the partnership to the other, without any limitation or restriction ; because the term Mofawizah, in its literal meaning, means equality.

7. It requires equality in respect of capital.

It is, therefore, necessary that a perfect equality should exist throughout, in the property, that is, in the partnership capital, such as Dirhams and Deenars. However, in it no importance is given to an excess in anything beyond the partnership capital, such as for instance the goods or effects, lands, or debts.

8. Of privileges.

Similarly, it is necessary that an equality should exists in respect of privileges; i.e. right of taking action, because, if either partner is endowed with privileges not vested in the other, there will not be a perfect equality.

9. Similarity of religion and of sect.

Similarly also, equality is necessary in respect of religion as well as of sect.

10. The term reciprocity should also be mentioned in the contract.

A contract of reciprocity will not be complete unless the term "reciprocity", is expressly mentioned in it, by the parties declaring "we are partners, in a partnership by reciprocity," because otherwise the conditions of it will not be known.

But if, in entering into a contract of reciprocity, the parties declare all the conditions of it, the contract will be lawful, even though the term "reciprocity" is not particularly mentioned in it, because regard is to be given to the sense, and not to the word.

11. It is lawful between free adults, Muslims as well as Zimmees.

A contract of reciprocity is lawful between the adults who are free, whether they are both Muslims, or both Zimees, as, in either case, equality exists between the parties. If one of them, also is a Scriptural Zimnee (i.e. Jew or Christian) and the other a Pagan, the contract will be lawful, because infidelity is one general description in respect of faith, and hence equality as regards religion exists in such a case.

12. It is not lawful between a slave and a freeman or an infant and an adult.

A contract of reciprocity is not lawful between a slave and a freeman, or between an infant and an adult ; because equality does not exist in such cases.

13. Or a Muslim and an infidel.

A contract of reciprocity is not lawful between a Muslim and an infidel according to Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf says that it is lawful.

14. Nor between two slaves, two infants, or two Mukatibs.

A contract of reciprocity is not valid between two slaves, two infants, or two *Mukatibs*, because a contract of reciprocity is based upon each party as being the surety for the other, and the bail of such persons is not valid.

It may, however, be noted that in all cases in which a contract of reciprocity proves to be invalid due to the non-availability of any of its conditions, and those conditions are not required in 'Enaan, or partnership in business, the contract of reciprocity will become a contract of partnership in business because of the existence of all other conditions required in such a contract.

15. It implies both agency and bail.

A contract of reciprocity implies the qualifications both of agency and bail.

16. Purchase made by either partner.

All that is purchased by any of the partners under a contract of reciprocity is to be participated by all the partners, except the food and clothing purchased by any partner for himself and his family.

17. Debt incurred by either partner .

If any debt is incurred by any of the two partners in reciprocity, for a thing in which partnership exists, the other partners will also be responsible for the same, so that equality may be created between them.

Among the things in which partnership holds are sale, purchase, and receipt of hire or wages ; and among the things in which partnership does not hold are marriage and divorce against compensation, composition for blood wilfully shed, and composition for a subsistence, and offences against the person.

18. Bail for property, engaged in by either partner.

If a partner in reciprocity becomes surety a third person, in respect of property to a stranger, it will be blinding upon the other partners also, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that it is not blinding upon the other partner.

19. Unless it is without consent of the person bailed.

All that is here said is based upon a supposition of the bail in respect of property having been contracted with the consent of the person bailed.

But if it has been entered into without his consent, it will not be binding upon the other partners, according to the *Rawayat-us-Saheeh* of Imam Abu Hanifah, because in a bail, so contracted, the property of mutual obligation or exchange does not exist in its continuity.

It may also, be noted that security for usurped property, or security for damages, are on the same basis as bail for property, as these are retributive in nature in their principle.

20. Accession of property to any of the partners by gift or inheritance

If a property (Arabic : *Maal*) is such that partnership in it is lawful, comes to one of the partners in reciprocity, by inheritance ; or, if any person gives him such property as a gift, and he takes possession of it, the contract of reciprocity will be void, and the partnership will become a *Shirkat-ul-'Enaan*, because equality of property, such as is capable of constituting capital stock, is a condition necessary to a contract of reciprocity throughout, and this is not present in the present case, as the other partner is not a sharer in the property so acquired by gift or by inheritance, no principle of partnership appears in it in respect of him.

The partnership by reciprocity will, however, be changed into a Shirkat-ul-'Enaan, or partnership in business, as the case involves such a partnership, equality is not necessary in it, while in reciprocity, equality is necessary, and, therefore, reciprocity will not continue.

21. Unless the property is not capable of continuing stock.

If one of the partners in reciprocity inherits goods or effects, (Arabic : Rakht or Mata' as opposed to Maal) these will be his sole property ; but the contract of reciprocity will not become void, and the same rule will also apply if one of them inherits land; because, as these are not capable of constituting the capital, equality in respect of them is not a condition.

Section (1)

ON BASIS OF CASH ONLY

(Hidayah, Kitab-ush-Shirkat, Fasl Laa Yan'iqud Shirkat Illa Bid Dirham Wad Deenar Wal Fuloos-un-Naafiqah)

Partnership by reciprocity cannot entered into except in Dirhams, Deenars, or Faloos. (Arabic; Faloos-un-Naafiqah, i.e. Copper coins of fluctuating value).

1. Copper coins are considered as the cash.

Faloos-un-Naafiqah, or copper coins, of fluctuating value connected with Dirhams and Deenars are also current in the same manner as gold and silver coins.

2. In gold or silver bullion, where that is in currency.

It may be noted, that if gold or silver bullion, by general usage, is current for value (Arabic, Saman) then, in such a case, partnership by reciprocity will be lawful in it.

3. In homogenous stocks, after admixture .

Where the property of both the partners is equal, and they stipulate a larger profit to one of them, and a smaller profit to the other ; in such a case, according to Imam Abu Yusuf, each of them will receive in proportion to his property, and the one in whose favour the larger profit has been stipulated will not on that account be entitled to receive any excess ; but, according to Imam Muhammad, each one of them will receive according to the stipulation.

4. It cannot be contracted in respect of heterogeneous stocks.

If the stocks, of the respective parties, is of two different kinds, such as barley and wheat, or olives and pepper, and the owners unite them, and then enter into partnership, it will not be lawful according to all our jurists.

5. Partnership by right of property-manner of entering into .

Where two persons want to enter into partnership in goods and effects, each should sell one half of his goods for one half of the goods of the other, so that a *Shirkat-ul-Milk*, or partnership by right of property, may be created between them ; and then they may enter into partnership by compact.

Partnership by Business.

6. Description.

Shirkat-ul-'Enaan, or partnership in business is entered into by each party respectively becoming the agent of the other, but not his bail.

This kind of partnership is where two persons become partners in any business, such as in clothes or wheat, or where they become partners in all matters of commerce indifferently.

7. It does not involve mutual bail, but it is mutual agency.

There should be no mention of the bail in, their agreement, as bail is not a condition in a partnership of this kind ; but it is necessary that each partner is to act as agent for the other partner as, without this the partnership in property, is not possible ; as acts done for another are performed either on account of some avowed authority, or of agency ; and if no authority exists, agency is to be constituted so that each partner may act for the other partner, so that the property may be held in partnership between them.

8. It allows inequality in stock.

If the stock of one of the partners is more than that of the other, it will be lawful, because there can be such equality, and the terms in which such a partnership is entered into do not require equality.

9. And also disproportionate profit.

In the partnership in business, it is lawful that the stock of each partner is equal, and even then the profit may be shared inequality, that is, it may be agreed that the profit to one partner will be more than the profit to the other partner.

10. A person can engage only a part of his property.

It is lawful for either of the parties to a partnership in business, to engage in it only a part of his property, and not the whole, because equality in the stocks is not necessary in it, as the term 'Enaan does not require it.

11. The Stock should be such as is lawful in reciprocal partnership.

Partnership in business will not be valid except in the property which is lawful in partnership by reciprocity.

12. The respective stocks may be heterogeneous.

It is lawful for two persons to enter into a partnership in business, where the stock of one party consists of Dirhams, and that of the other party of Deenars, or where on one side there are white Dirhams, and on the other there are black Dirhams.

13. Debts to be claimed from the partner who incurs them.

Where one of two partners in business purchases anything, the demand for its price lies against him, and not against the other partner, because, the, contract of partnership in business comprehends agency, are not bail.

14. And such partner, after making the payment, can take from the other his proportion.

And after making the payment, the purchaser will have the right to take from the other partner his proportion of the price, if he has paid the price out of his own property, and not out of the partnership stock, because he is the other's agent in respect of his share.

But if it is not known whether he has paid the price out of the partnership stock, or out of his own property, except from the statement of the purchaser himself, in such a case, it will be necessary for him to produce evidence of it; because the purchaser in such a case claims property against his partner; and the partner opposes his claim; and the statement of a defendant, upon oath, is to be accepted.

15. The contract is finished by the loss of the entire capital; or of the stock of either partner.

If the whole partnership stock, or the stock of any of the partners in particular, is destroyed before any purchase is made, the contract of partnership will be finished; because, in a contract of partnership, the subject of the contract is property, and, therefore, if the subject is destroyed, the contract will be dissolved, in the same manner as in sale.

16. And the loss will be of the partner to whom such stock belonged.

The contract will be void, because its continuity will be useless; and, to whomsoever the destroyed property belonged, the loss will be only his, and not of the other, whether it is destroyed in his own hands, or in the hands of his partner.

17. Unless it destroyed after admixture .

But it will be is otherwise where the stock is destroyed after admixture ; because in that case the loss will be of the partnership stock generally, because, as the property of each can no longer be distinguished, the loss therefore will affect both.

18. A purchase made by one partner, where the stock of the other afterwards destroys will be shared by both ; and the partnership will continue.

If one of the partners makes a purchase with his own stock, and the stock of the other afterwards is destroyed before he has made any purchase with it, in such a case the thing purchased by the first partner is in partnership between the two, according to the stipulation, because, as partnership existed between them at the time of the purchase, the goods purchased will become a subject of partnership between them at that time ; and the effect will not be altered by the destruction of the other's property after purchase.

It may be noted that in the case under consideration, the purchaser is to take from his partner his proportion of the price, of the goods purchased, because he purchased a moiety of it by agency, and paid the price out of his own stock, as was before mentioned. What is now said proceeds upon a supposition of the purchase made by one partner has been affected before the destruction of the other's stock.

19. But if it is destroyed before the other's purchase, that will continue between them under a partnership by right of property.

But if, the stock of one partner is first destroyed and the other partner then makes the purchase with his own stock; and it has been specifically agreed, in the contract, that each is to act as an agent for the other, in such a case whatever the purchaser has purchased will be divided between the two, according to their previous stipulation ; because, although the contract of partnership is finished still the agency, which was expressly mentioned in it will continue in force ; the purchase will therefore be shared by both, on account of the agency ; the connection will continue as partnership by right of property ; and the purchaser will accordingly be entitled to take from his partner his proportion of the price.

20. Unless there is no mention of mutual agency in the contract ;

But if, the partnership only is mentioned in the contract, and nothing is said in it regarding each partner acting as an agent for the other the goods purchased by one partner will pertain solely to him ; because, if the article was to be shared between the two, it could be so only on account of the mutual agency implied in the contract ; but, since that is finished, the power of agency implied in it is also finished.

But it will be otherwise where the parties have specifically mentioned a mutual power of agency ; because in such a case the agency will not be finished by the finishing of the partnership, as agency is here a especial type of contract, and is not merely implied in it.

21. Partnership without admixture of stocks.

Partnership is legal, even though the parties have no mixed stocks.

22. Particular sum of profit for either partner .

Contract of partnership, which specifies a particular sum out of the profit for one of the partners, is not lawful, as this condition is a means to destroy partnership, because it will be possible that no more profit will be acquired, than the sum so specified.

23. Either partner may give his stock, as a Baza'at .

Each one of the partners, in a contract either of reciprocal partnership or of partnership in actual stock, is entitled to give his stock as a Baza'at ; because it is customary so to do in contracts of partnership ; and also, because either partner is entitled to hire any person to work for earning the profit ; and as the earning of profit without any return is less objectionable than hiring with the same view, he is therefore authorized to adopt the other mode *a fortiori*.

24. Or lodge it as a deposit.

Similarly, either of partners is also entitled to lodge this capital as a deposit, as this is customary, and sometimes necessary, among the business men.

25. Or entrust it to a manager, as Muzaribat.

Each one of the partner is also entitled to give his capital by way of Muzaribat, because, as Muzaribat is subordinate to partnership either by reciprocity or in business, therefore a contract of partnership implies Muzaribat.

26. Either partner may also appoint an agent for himself.

Either of the partners, by reciprocity, or in business, is entitled to appoint a person as his agent to work for him, because the appointment of an agent for the purchase and sale is a dependency of business; and contracts of partnership are entered into for the purpose of business.

But it will be otherwise in respect of an agent for purchase, because he is not entitled to appoint another person as his agent, to make the purchase for him, because the appointment of an agent for purchase is a specific contract, the purpose of which is to get some specified and existent good, and a thing cannot be the dependant of its similar.

27. Each partner holds the stock as a trust.

The possession of each of the partners, by reciprocity or in business, over the partnership stock, is the possession of a trust, because each of them possesses the property with the consent of the owner, for this reason, that he is to give something for it, as where a person takes possession of a thing with a view to purchase it, the stock is therefore is a deposit in his hands.

Partnership in Arts.

28. Description .

Shirkat-us-Sana'e, or partnership in arts, which is also known as "Shirkat-ul-Taqabbal", or "partnership by mutual agreement," signifies where two tailors, or two dyers, for example, become partners, by agreeing to work and to share their earnings in partnership, and is valid.

29. It is not necessary that the parties both follow the same trade or reside in the same place.

Unity of trade and of residence are not necessary in Partnership in Arts.

30. It allows inequality of profit.

It may be noted that if, in this case, the partners agree to do equal labour, and to divide the comings from it in three lots, that is, two for one and one for other it will be valid, upon a favourable construction.

31. The work agreed by either partner is binding upon the other ; and either will be entitled to call upon the employer for payment.

In a partnership in arts, the work while any partner agrees to do is binding upon him, and also upon the other partner, and the employer is entitled to require the performance of it from either ; one of them is also entitled to demand payment from the employer for the work done.

The employer thus paying either, is discharged of all demands.

This is clear where the partnership in arts is of a reciprocal nature, i.e. where both partners are upon an equality in respect of the particulars in which equality is required in a contract of reciprocity ; and where the partnership in question is not of a reciprocal nature, but is of a partnership in business, the same is admitted, on a favourable construction.

Partnership upon Credit.

32. Description .

Shirkat-ul-Wujooh, or partnership upon credit, is where two persons, not possessing any property, become partners by agreeing to purchase goods jointly, upon their personal credit, i.e. without immediate payment of the price, and to sell them on their joint account. This kind of partnership is known as “Wujooh”, because no person can purchase the goods upon credit except the one possessed of personal status (Wajahat) among the people.

33. It may include reciprocity.

Partnership upon credit may lawfully be a partnership by reciprocity ; because each partner may become both bail and agent for the other partner.

Therefore, if two persons, capable of bail, purchase any goods, on the condition that it will be held by them in equal shares, using the term "by reciprocity" into their agreement, it will be a partnership of reciprocity.

But if, they enter into the agreement merely in general terms, it will be a *Shirkat-ul-'Enaan*, or partnership in business, because, when it is thus generally made, it will be conducted in the manner of partnership in business.

34. Each partner is agent for the other.

In partnership upon credit, each partner is agent of the other, in respect of the goods he purchases; because any act which effects another is not lawful, unless it is done account of agency or on account of authority, (Arabic: *Wakalat*) and as authority does not exist in the present case, agency is proved.

35. Profit of each partner should be in proportion to his share in the adventure.

If the partners agree that the goods they purchase will be held by them in equal shares, and that the profit also will be equally divided, it will be lawful; but it will not be lawful, in such a case, to agree for an excess of profit to one of them.

But if, they agree that the goods they purchase will be held by them in three lots, and that the profit also will be divided into three lots, i.e. two lots for one and one lot for the other, it will be lawful.

Section (2)

INVALID PARTNERSHIP

(Hidayah, Kitab-us-Shirkat-ul-Faasidah)

1. Partnership not lawful in goods of a neutral nature.

Partnership is not lawful in wood, grass, or game. If, therefore, two persons enter into partnership in respect of such goods, and thereafter, collect the wood, or the grass, or kill the game in hunting, the wood or the grass so collected, or the game

so killed, by any of them, will belong to him solely, and not to the other partner.

The same rule applies in cases where two persons enter into partnership in respect of any other goods of a neutral nature, such as fruit collected from the trees of the forest, which are common property.

2. Unless they are taken possession of jointly.

But if, both partners take it jointly, it will be equally in partnership between them, as they will both be equally entitled to it.

But if one of them only engages himself in taking it, the other doing nothing, it will belong wholly to the one who engage himself.

But if, one is the chief, and the other only his assistant, as where the one plucks the fruit, and the other one collects it, or, where the one both plucks and gathers it, and the other one carries it away, in such a case the assistant will receive the wages in proportion to his labour. This is according to Imam Muhammad.

Imam Abu Yusuf says that this rule applies only where the wages do not exceed half the value of the goods in question ; but that, if the wages exceed this, one half of the value only will be paid to the assistant, because, as he had agreed to accept one half of the goods specified, his right fails in respect of any larger proportion.

3. Nor in this case, where the means of acquiring them are different.

If one person possesses a mule, and another person purchase a Mashack (or leather bucket, which is used in drawing water) and they enter into partnership in drawing water, by agreeing that whatever will be acquired thereby will be in partnership between them, such partnership will not be valid, the

whole acquisition will go to the person who actually draws the water ; and if this is the owner of the mule, he will owe the other the proper hire for the bucket ; or, if it is the owner of the bucket, he will owe the other a proper hire for the mule.

4. The profit to each partner should be in proportion to the stock.

In all cases of unlawful partnership, the profit will be in proportion to the stock ; any stipulation, therefore, of an excess of profit to either partner will be void.

Accordingly, if the stock is between the partners in equal shares, and they agree to their profit being in three lots, such agreement will be void, and the profit will be equally divided.

5. Death or apostasy of either party .

If, one of the partners dies, or becomes apostate, and is united to a foreign country, the contract of partnership will be finished.

6. Whether the survivor is aware of that event or not.

It may be noted that the surviving partner, is aware of the decease of his fellow, or not it will make no difference whatever in respect of the dissolution of the partnership ; because as, in this case, the survivor is as a result discharged from the agency by the death of his partner, it is not necessary that he should be informed of that event.

But it will be otherwise where one of the partners breaks the contract of partnership, because the result of such a breach depends upon the knowledge of the other partner, as the breach is a planned dissolution of the partnership.

Section (3)

PAYMENT OF ZAKAT

*(Hidayah, Kitab-us-Shirkat-ul-Fasl Le Yudiz Zakaat)***1. No partner can pay Zakat upon his partner's property without his permission.**

It is not lawful for any of the partners to pay the Zakat upon the property of his partner without his permission, as payment of the Zakat is not part of the business.

2. Mutual permission to pay Zakat.

If each of the partners gives a permission to the other partner to pay the Zakat upon his share, and each partner first pays the Zakat upon his own share in the stock, and then pays Zakat upon his partner's share, in such a case he who last paid the Zakat will be responsible, whether he is aware of the other having already paid it or not. This is according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that he will not be responsible where he is not aware of it.

But this proceeds upon a supposition that each partner has paid the Zakat upon their respective shares in the stock successively, and not altogether ; because where they have paid it altogether, each will be responsible for the other's proportion of it.

Similar difference of opinion is also where any indifferent person directs another to pay Zakat upon his property, and the other pays the Zakat upon his property after the person who has directed him had already paid it ; because, according to Imam Abu Hanifah, the person acting under such direction will be responsible, whether he pays the Zakat with a knowledge of it or not.

But Imam Abu Yusuf and Imam Muhammad, are of the view that he will not be responsible unless he pays it, having a knowledge of it, as he has acted by direction, and therefore cannot be held responsible.

Section (4)

PURCHASE OF FEMALE SLAVE

(Hidayah, Kitab-us-Shirkat-ul-Fasl Fee Bai'til Mamlook)

1. A female slave, purchased under partnership of reciprocity, becomes the property of that partner who with permission of the other has sexual intercourse with her.

If one of the partners by reciprocity permits the other partner to purchase a female slave with the partnership stock, and to have sexual intercourse with her, and the other one acts accordingly, in such a case the slave will belong to the purchaser, and he will not be responsible for anything. This is according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that the other partner will be entitled to take half of the price of the slave.

2. The seller may take the price from either.

It may be noted that, in this case, the seller of the slave will be entitled to take the price from either of the partners, according to all our jurists, because this price is a debt incurred by an act of business.

Moreover a partnership of reciprocity, implies bail ; and therefore the price of the slave is in this respect like the price of food or clothing.

BOOK – IV

MUZARIBAT

(PARTNERSHIP IN THE PROFIT OF STOCK
AND LABOUR)

MUZARIBAT *

PARTNERSHIP IN THE PROFITS OF STOCK AND LABOUR

Note

“Zarb Fil’ Ard” means to travel in the land. From the word, “Zarb” is derived Muzaribat, which literally means to travel in the land for the purpose of business.

Legally, “Muzaribat” signifies a contract of partnership, between the owner of the stock and the manager to do business with the stock, on the condition to share the profit arising out of the business in agreed shares between them. The owner is known as the Raabbul Maal, the stock is known as the “Raasul Maal” ; and the manager is known as the “Muzarib”, The owner gets the profit on account of his stock and manager on account of his labour.

Participation in the profit is necessary for the contract. Muzaribat, because a contract of Muzaribat, cannot be created without participation in the profit ; because if the entire profit is to go to the owner of the stock, then it will be taken as Baza’at ; or, if the entire profit is to go to the manager, it will taken as a loan.

CHAPTER 1

CONTRACT OF MUZARIBAT

1. Contracts of Muzaribat are lawful.

Contracts of Muzaribat are permitted by the Law due to necessity ; as many people have property but they are skilled in employing it ; On the hand there are persons who possess that skill but have no property, Therefore there is a necessity for permitting contracts of Muzaribat so that the interests of the rich and poor, and of the skilful and the unskillful

* Aimul’ Hidayah, Vol.III, pp. 618 to 651

may be reconciled. Moreover, people entered into such contracts in the presence of the Holy Prophet, who did not prohibit them, rather confirmed the same, and many of the Companions also entered into such contracts.

2. The stock is a trust in the hands of the manager.

Whatever is handed over by the owner of the stock to the manager is as a trust, because the manager gets possession of it at the desire of the owner, and not with a view to purchase nor to pawn.

The manager is also an agent for the owner as regard the employment of the stock, as he acts in that respect by the orders of the owner.

Therefore, when any profit is gained, the owner and the manager are joint sharers in it, because it comes jointly from the stock of the one, and the labour of the other.

3. If the contract is of an invalid nature.

When the contract of Muzaribat is unlawful : it in fact accounts to an invalid wages, because, as the manager acts for the owner, in respect of his stock, the profit stipulated for him is similar to wages for his labour.

The invalid contract of Muzaribat, therefore, is in fact the construction of an invalid wages; and, as such is the case, the manager will be entitled only to proper wages of his labour.

4. Manager opposing the owner.

If the manager opposes the owner, he will then be a usurper, as he wilfully transgresses in respect of the property of another.

5. Muzaribat is valid only in such stock in which partnership is valid.

Contracts of Muzaribat are valid only in respect of such stock in which contracts of partnership are valid ; i.e., Dirhams and Deenars according to Imam Abu Hanifah and also current Faloos according to Imam Abu Yusuf and Imam Muhammad.

Therefore if an owner of stock hands over this goods or effects to another ; and asks him “to sell them, and then to act as Muzarib in respect of the price”, the contract of Muzaribat will in such a case be valid, because it is not referred to the goods or effects, but to the price of them, and this is in respect of which a contract of Muzaribat is valid.

As regards his referring the contract to a price at a future time, it is also lawful in a contracts of Muzaribat.

Similarly, also, if the owner says, “receive the debt due to me by a particular person, and act as my manager in respect of it,” the contract of Muzaribat will be lawful.

But it will be otherwise, where the owner of the stock says, “act as Muzarib in respect of the debt due by you”, because this is not lawful according to Imam Abu Hanifah as well as Imam Abu Yusuf and Imam Muhammad.

6. It requires that the profit is unspecific.

It is one of the conditions of a contract of Muzaribat, that the profit of the owner and the manager should be unspecific; that is to say ; that none of them should be entitled to a specific number of Dirhams ; because if the condition of a specific number of Dirhams is made in respect of one or other of the parties, the partnership between them in respect of the profit will cease to exist, as it is possible that the whole profit may not exceed the specified number, and it is necessary that both of them should be the partners in the profit.

If, therefore, ten Dirhams for example are fixed for one of the parties, the manager will in such a case be entitled to the wages appropriate to his labour ; because the contract of Muzaribat will become invalid, as it is possible that the whole profit acquired may not exceed the amount fixed, in which case there will exist no partnership in respect of it.

The manager is, in such a case, be entitled to proper wages, because his object in his labour was to get a return, and he will be disentitled to receive such return due to the invalidity of the contract. It is therefore, necessary that he should be paid proper wages.

As regard the profit which in such a case is acquired, it will go to the owner, as income of his property. This is the law which applies in all cases of invalid contracts of Muzaribat.

7. And not subject to any uncertainty.

Another requirement of the contracts of Muzaribat, is that there should be no condition creating any uncertainty in respect of the profit ; because such a condition will invalidate the contract, on account of destruction of the purpose of it.

Any other invalid condition, however, excepts this, or such as is opposed to the nature of the contract, do not invalidate the contract, but of itself will finish, as in the case of condition of loss to the manager where it is stipulated that "whatever profit is gained will be shared by the owner and the manager, according to their agreement ; but that if any loss results, it will fall entirely on the manager". The contract of Muzaribat, therefore, will not be invalidated by the conditions of this nature, but the condition itself will be invalid; because, as the condition is merely redundant, and is neither causing of a dissolution of the partnership, nor of uncertainty in respect of the profit, the contract of Muzaribat will not thereby be made Invalid ; as an agency does not become invalid on account of invalidity of its conditions.

8. The stock completely handed over to the manager.

Another requirement, of Muzaribat, is that the owner should hand over the stock to the manager, and retain no possession of it, because it is in the manager's hands in the nature of a trust, and should, therefore, be in his exclusive possession, and in the no respect in possession of the owner.

9. Condition of management by the owner invalidates the contract.

A condition of management by the owner of the stock invalidates the contract of Muzaribat ; because where such a condition exists, the stock can never be exclusively possessed by the manager, and therefore he cannot be fully competent to act in respect of it, and thus the purpose of the contract i.e. sharing the profit, cannot be achieved.

Similarly, also, if one of the Muzaribat partners, or one of the 'Enaan partner, hands over the stock to any person in the way of a Muzaribat, and stipulates that the other partner will also engage himself in the management of it, such contract of Muzaribat will be void, because the other partner is also a owner of the stock, even though he is not a party to the Muzaribat contract.

10. And so also, a condition of management by the contracting party, who is not the owner.

If the contractor of a Muzaribat contract is not the owner of the stock, and stipulates that he also will join with the Mozarib, or manager, in the management of the stock, such contract will not be valid, where the contractor is a person who (like a privileged slave) is not lawfully competent to undertake the management of stock, in the way of Muzaribat.

11. Unless he is competent to undertake it.

But if the party is competent to receive the stock, and act as a manager, then the contract will not be invalid ; as where, for

example, a father, or a guardian, hands over the property of his infant ward to any person, to manage in the way of Muzaribat, stipulating that he himself, for a certain share of the profit, will join in the management of the stock ; in which case the contract will be valid ; because, such a person is himself entitled to undertake the management of the infant's property, by way of Muzaribat, and therefore he is equally entitled to join in the management of it by way of Muzaribat, with others.

12. The manager is entitled to deal act with the stock according to his own discretion.

As contracts of Muzaribat are absolute, i.e. they are not restricted to time, place, or other circumstances, it is, therefore, lawful for the manager to purchase or sell, or to eat of, or travel with, the stock ; or to lodge it, either as a Baza'at or as a trust.

13. But he cannot entrust it to another as Muzaribat without the owner's consent.

It is not lawful for a manager to hand over the stock to another, person, by the way of Muzaribat, except with the consent of the owner, or unless he empowers him to act according to his own judgment and discretion.

14. Nor lend it to another, although his powers are discretionary.

It is not lawful for a manager to give on loan to any one out of the Muzaribat stock, even though the owner has said to him "act according to your own discretion."

15. Manager cannot deviate from any restriction given in the contract.

If a person hands over his property to another person by way of Muzaribat, and restricts his management of it to a particular city or to as particular articles, it will not be lawful for the manager to deviate such restriction.

Nor it will be lawful for the manager under such circumstances to hand over the stock by way of Baza'at to another person, to be carried by him from that particular city.

16. Upon violating the restriction, the manager will become responsible for it.

If the owner restricts the management of the stock to a particular city, and the manager still carries it to another city ; and there purchases something with it, he will become in such a case responsible for the stock ; and whatever he has purchased with it will become his property, as well as the profit which arising from it ; because in such a case he will be a usurper, as he has assumed the power in respect of the property of another without consent of that person.

But if, the manager, after taking the stock out of the particular city, does not purchase anything with it until he has returned to the city to which the owner had restricted his power of action, he will not be responsible, and the stock will resume its former status of Muzaribat, on account of its remaining in the possession of the manager, under the original contract.

Similarly, also, if the manager, after purchasing something with part of the stock in the other city, departs from it with the remaining part of the stock, and again returns without purchasing anything with it, in such a case both the purchases, i.e. which was at first made, and the part which was afterwards brought back, will be considered as the Muzaribat.

17. Restriction to any particular part of a city not valid.

If a person hand over his stock to another person by way of Muzaribat, on the condition of his making a purchase with the said stock in the market place of a particular city, the condition will not be valid; because a city, inspite of the distinction of its parts, is yet like one city and such a restriction, therefore, is not valid.

18. Unless stipulated under exception of any other place.

But if, he expressly limits the purchase to the market place, by saying, "purchase with this stock in the market-place and nowhere else," a purchase made out of the market-place is in such a case will be unlawful, because the owner in this case has expressly declared that "he will not make a purchase out of the market-place," and the owner is authorized to lay down such restriction.

The restriction, here referred to should be understood in the owner saying to the manager, "I hand over this stock to you on the condition that you act with it in such a manner" , "that you purchase cotton with it," for example ; or, on the condition that, "you employ it in such a place ;" and so also, from his saying, "take this stock and employ it in Koofa;" or, "take this stock on the condition of half the profit arising from it in Koofa".

But if, however, the owner simply says "employ this stock in Koofa," the manager will then be entitled to employ it in Koofa or out of Koofa.

19. Manager restricted, in his dealings, to particular persons.

If the owner says to the manager, "take this stock, on the condition that you may purchase and sell with it with a particular person," such restriction will be valid, as based on the particular credit in business of the person to whom it relates.

But it will be otherwise where he says "take this stock on the condition that you should purchase with it from the people of Koofa," or "sell it to them" ; or, "take this stock for a Sarf-Sale, on the condition that you should purchase with it from Sarraaf [bankers]", or "sell it to them," because if the manager, in the former case sells the stock in the city of Koofa, to a person who is not a resident of that city, or in the latter case, sells it to someone who is not a Sarraaf, his act will be lawful.

20. Contract restricted to a particular time.

If the proprietor restricts the Muzaribat, to a particular time, the contract will be void after expiration of that time.

21. Nothing to be purchased, by the manager, which is not a property.

A manager is not entitled to purchase, with the stock, a slave, who will become free by being transferred to the owner, whether on account of relationship, or for any other reason as if the owner had already vowed to emancipate him; and so also the purchase of all such things as are not the property, on account of possession, such as wine or carrion, is not implied in a Muzaribat contract. But it will be otherwise in respect of the purchase of a thing under an invalid sale ; because this is implied in a Muzaribat contract, as the manager is lawfully entitled to sell those things again after possession ; and therefore the profit, which is the purpose of the contract, can in such a case be obtained. Therefore, if a manager purchases a slave who will become free in respect of the owner of the stock, such purchase will not be included in the Muzaribat stock, but will be considered to have been made for the manager himself; because the bargain, is valid in respect of the purchaser, it will, therefore, be effectual in respect of him, as in the case of an agent for purchase who opposes his principal.

22. Manager cannot purchase a slave who is free in respect of himself.

It is not lawful for a manager to purchase a slave who is free in respect of the manager himself, where a profit has been gained upon the stock ; because the slave of the manager, i.e. in the profit will in such a case become emancipated from the whole stock, and therefore the share of the property will be valid, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that it will become emancipated.

23. Manager purchasing a female slave, and begetting a child upon her.

If a person gives one thousand Dirhams to be managed, in consideration of a share in the profit, by way of Muzaribat, and the manager purchases, for, these one thousand Dirhams, a female slave of the value of these thousand Dirhams, has sexual intercourse with her, and she produces a child also valued at one thousand Dirhams, and the manager claims the child, and the value of the child afterwards increases to fifteen hundred Dirhams, in such a case the owner of the stock will be entitled to claim emancipatory labour from the slave (i.e. the manager's child) to the amount of one thousand two hundred and fifty Dirhams ; or to emancipate him ; but the manager will not owe any surety to the owner for his share, even though he is rich.

CHAPTER 2

MANAGER ENTERING INTO A CONTRACT OF MUZARIBAT WITH ANOTHER

(Hidayah, Kitab-ul-Muzarabah, Baab-ul-Muzarib Yuzarib)

1. Manager giving the stock in his hand to a secondary manager.

If a manager gives the stock in his hands, to another person, by way of Muzaribat, without permission of the owner of the stock, in such a case the first or the principal manager will not be responsible for the stock either on account of so giving the stocks to the other, or on account of the other's employment of the same, until such time as profit will be acquired thereon ; but whenever profit will be gained, then the principal manager will become responsible to the owner of the stock. This according to Imam Hasan, is an opinion of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that the principal manager will become responsible, immediately upon the action of the secondary manager, whether profit has been gained or not ; and this is according to the Zahir Rawayat.

Imam Zufar however says, that the principal manager will be responsible for the giving of the stock to the other, whether that other may act upon it or not, and there is also an opinion of Imam Abu Yusuf to the same effect.

2. Manager entrusting the stock to a secondary manager, with the permission of the owner.

If a person gives the stock to another person by way of Muzaribat, on the condition of one-half profit, and also with the permission to him to give it to another person by way of Muzaribat, and the manager, gives it to another person by way of Muzaribat, on the condition of one-third profit ; and the

secondary manager employs the said stock, and gains the profit upon it, in such a case, if the owner had said to the first manager, "whatever profit Allah the Almighty may grant upon it, will be between you and me in an equal degree," then one-half of the whole profit will be due to the owner, one third to the secondary manager, and one-sixth to the principal manager.

But if, in this case, the has said, "whatever profit, Allah the Almighty gives to you, will be between you and me in an equal share;" then the secondary manager will be entitled to one third and the balance will be divided in equal shares between the owner and the principle manager.

But it will be otherwise in the previous case, because there the owner had stipulated for himself one half of the total profit ; therefore there is a clear difference between the two cases.

If the owner of the stock says to the manager, "I give this stock to you so that whatever profit accrues to you from it, will be equally divided between us ;" and at the same time also gives him permission to get it managed by Muzaribat, and if, the manager gives it to another manager with an agreement of one-half the profit to him, in such a case one half of the profit will go to the secondary manager, and the other half will be divided equally between the owner and the principal manager.

If an owner gives stock to any person by way of Muzaribat, upon the condition that, of whatever profit accrues thereon, one half will come to him ; or that, one half of the increase, above the capital amount, will be divided equally between him and the manager, and at the same time permits the manager to give the stock by way of Muzaribat, to another person, and the manager gives it to another person by way of Muzaribat, with an agreement of one half of the profit to him, in such a case the owner will be entitled to one half of the profit, and the secondary manager to the other half, and nothing whatever will be due to the principal manager, because the stock-holder has conditioned for himself one-half of the

property in an absolute manner, one half therefore will go to him ; and as the principal manager has agreed to give on-half which is the share that could be due to him to the secondary manager, the same will therefore go to him ; and therefore he himself will not be entitled to anything.

Section

PROPORTION OF PROFIT TO THE SLAVE

(Hidayah, Kitab-ul-Muzaribah, Fasl Shartul Muzarib Le 'Abdil Rabbul Maal)

1. Contract may before a proportion of the profit to the slave of the owner.

If a manager agrees to give one third of the profit to the owner of the stock, one third to the slave of the owner on condition of assistance in the labour, and the remaining one-third to himself, it will be lawful, even if the slave is indebted or not.

The rule laid down here is based on a supposition that the master, and not the slave, has entered into the contract of Muzaribat.

2. If a slave enters into such contract for his master.

If a privileged slave enters into a contract of Muzaribat with a stranger agreeing, that his master will act with the manager in the management of the stock, the contract will not be valid, provided the slave is free from debt.

But if, the slave is insolvent, the contract will be valid as in such a case the master will be in the same relation as a stranger, according to Imam Abu Hanifah.

CHAPTER 3

DISMISSAL OF MANAGER ; AND THE DIVISION OF THE PROPERTY

(Hidayah, Kitab-ul-Muzaribah, Fasl Fil 'Azl Wal Qismat)

1. Contract dissolved by the death of either party.

If either the owner of the stock or the manager dies, the contract, will be finished.

2. Apostacy of the owner.

If the owner of the stock becomes an apostate, and is united to a foreign country, the contract of Muzaribat will be finished.

But if, he is not united to a foreign country, the dealing of his manager will remain suspended till he again becomes a Muslim. But if he dies during apostacy, his dealings will become valid, according to Imam Abu Hanifah because his manager's dealings with the stock, is the same as his own dealing, as the manager acts on his own account ; and as according to Imam Abu Hanifah, the acts of an apostate are suspended, so, similarly the acts of his manager are suspended.

3. If the manager apostatize.

If the Manager becomes apostate, the contract will still continue to exist in its original state, because the actions of a person are suspended, only on account of a suspension of his right of property ; but the apostate in question has no right of property in the Muzaribat – stock, as that belongs solely to the owner of the stock ; and as the owners right of the property is not suspended, the contract will also continue in force.

4. All acts of the manager are valid, until he is duly informed of his dismissal.

If the owner of the stock dismisses the manager, and he is not informed of his dismissal until after he has conducted the purchase and sale, then such dealing will be valid.

5. Manager, after information of his dismissal, may still change what is in his hands into money.

If the owner of the stock dismisses the manager, and he is informed of dismissal, he may still sell such of the Muzaribat-stock as consist of chattels and effects, because his dismissal from the agency will not prevent the sale of goods of that kind, as he will have a right to the profit, which cannot be obtained otherwise than by a division ; and this will be affected only by turning the subject of the stock into kinds.

On account of this necessity, therefore, he will be entitled to sell such stock ; but after the sale, it will not be lawful for him to make any purchase whatever with the price he get for them because there will be no necessity for his so doing, and the sale will be admitted only due to necessity.

6. But if it has been already converted into money, he cannot have dealing, with it.

If the owner of a stock, which consisted of Dirhams or Deenars, dismisses the manager at a time when it has been reduced to specie, and the manager is informed thereof, in such a case he will no longer be entitled to act with regard to it, as there will exist no further necessity for his so doing.

7. Unless this money is different from the original stock.

The author of the *Hidayah* says that this law is based on the supposition that the stock is changed into the same kind with the original stock ; but that, if it is changed into the kind of a different denomination as if the stock was originally of Deenars, it is now changed into Dirhams, or vice versa, the manager will by the law be allowed entitled to selling it for the same kind as the original stock.

It may be noticed that all the rules here laid down in respect of the dismissal of a manager are also applicable to the case of the death of the owner of the stock. Thus, if the owner dies, the manager will be entitled to sell the *Muzaribat*-stock, where it consists of goods and effects ; but he will not entitled after-wards to purchase anything whatever with the price so obtained.

But if, the stock is changed into Dirhams or Deenars, he will not be entitled to act in respect of it, if the money into which it is changed correspond with the kind of the original stock ; but if it is different from the kind of the original stock he will be entitled to change it, by sale, into the same kind with the original.

8. If, on dissolution of the contract, the stock consists of debt.

If the owner and the manager dissolve the contract, and the stock at that time consists of debts due from any other person in such a case, where any profit is acquired, the *Qazi* should force the manager to possess of these debts himself ; as he is held to be equal to a hireling, and his profit to be like the wages.

But if no profit is acquired, it will not be necessary for the manager to receive payment of these debts ; as he is only a voluntary agent, and no force can be used for the fulfilment of voluntary dealings.

But the manager, in such a case will be instructed to appoint the owner as agent for himself to receipt these debts ; because as the right of the contract appertains to the contractor, it is necessary that he should thus appoint the owner his agent, to avoid the loss of his right.

Imam Muhammad, in the *Jaame' -us-Sagheer*, has said that “the manager should be instructed to make a transfer of his claim upon the debtors to the owner.”

It may be noticed that this is the rule in all cases of agency.

9. All lost that is upon the stock is to be placed against the profit.

All that is lost or destroyed, of the Muzaribat stock, should be placed in the account of the profit, and not of the original stock, because the profit is a dependant, and therefore it is most appropriate to refer the loss to it.

If more than the profit is lost, the responsibility will not be of the manager, as he is merely a trustee.

10. If the profit is divided before restoration of the capital and any accident then result to the stock.

If the stockholder and the manager divide the profit between them, and continue the contract as before, and the whole or part of the stock is lost, the manager should, in such a case, return the profit to the owner so that he may receive back his capital.

11. Manager not responsible for the deficiency.

When the owner has received back the whole capital, and any excess remains, then such excess should be divided between him and the manager, as a profit ; but if there is a deficiency, nothing will be due from the manager, as he is only a trustee.

12. Profit received by the manager upon first Muzaribat is not returnable upon loss of stock of second Muzaribat .

If the manager and the owner, have divided and taken the profit, and finished the contract of Muzaribat, again enter into another contract of Muzaribat, and the stock is then lost, in such a case the profit they had receives upon the first Muzaribat will not be returned to the owner , because that Muzaribat was finished, and the second Muzaribat is a new contract ; and the loss of the stock of the second Muzaribat cannot affect the first contract at all.

CHAPTER 4

ACTS WILL MAY LAWFULLY BE PERFORMED BY A
MANAGER

(Hidayah, Kitab-ul-Muzaribah, Fasl Feema Yaf' alohul Muzarib)

1. Manager can sell the stock either against prompt payment, or on credit.

It is lawful for a manager to sell the stock against prompt payment or on credit because these acts are of the nature of business, and, as such, are included in an absolute contract.

The period of credit should, however not be extended beyond what is customary among the merchants such, for example, as a period of ten years ; because he is only permitted to act according to the common practice, and custom of merchants. Therefore it is that he can lawfully purchase a quadruped for conveyance ; but he can only take on hire a boat ; as this is the custom practice among the merchants.

According to the Rawayat-e-Mashoor, a manager is entitled to allow trading to slave whom he has purchased with the stock, as this is in allowed in the business.

2. Or entrust a slave with the management of it. or, after selling it for ready money may grant a suspension of payment.

If a manager sells part of the stock against prompt payment, and then grants a suspension in the payment, it will be lawful according to all our jurists.

3. Or allow the purchaser to transfer the payment upon another person.

If a manager sells something to Zaid on credit, and Zaid, with the consent of the manager, transfers the payment of the

price upon Umar, this will be lawful, whether Umar is rich or poor, because transfer of debts is customary amongst the merchants.

4. Acts of manager are as authorised by the contract.

The acts of a Muzarib, or a manager, are of three kinds :

(1) Such as he is competent to perform on account of the absolute contract of Muzaribat ; including all acts partaking to the nature of Muzaribat, or of its dependences; such, for example, as agency for purchase or sale, because of the necessity for these acts ; and also pawn, as this is of the nature of a discharge or satisfaction ; and similarly deposit, hire, entrusting in the manner of Baza'at, and also travelling with the stock,.

5. Or on account of general and discretionary power vested in him by the owner.

(2) Such deeds as he is not competent to perform on account of the absolute contract, but on account of a general power granted to him by the owner to act according to his own judgment and discretion, including all such acts as may have a possible connection with the contract of Muzaribat ; and which are accordingly taken to be connected with it, when there exists any need for their being so ; such as the giving of the stock to another in the way of Muzaribat, or of partnership, or the mixing of it with the manager's own stock, or with the stock of another person.

6. Or such as he is not empowered to do in either way.

(3) Such deeds as the manager is not empowered to do on account of the absolute contract, or from the discretionary power granted to him by the owner, which are neither in the nature of business, nor have any possible connection with the contract, but such as he may perform in case of an express power from the owner of the stock. These are termed *Istidanut* , (i.e. contracting debts on behalf of one's own self, or for another), such as where

a manager purchases something for Dirhams and Deenars, after investing the whole capital in the purchase of goods and effects, in which case the transaction relates entirely to the manager, and he will be entitled to all the profit as well as subject to the loss or debts that may result from it ; or, where a manager invests, in purchasing goods, more than the amount of the capital, in which case what is tantamount against the stock will be considered as belonging to the Muzaribat ; and the profit, loss, or debts resulting from the excess will relate solely to the manager ; or, where the stock consists of Dirhams and Deenars, and the manager purchases something for the articles of weight, measurement of capacity, or of sale ; because, in such a case, as the manager makes the purchase with something else than the stock, it will be considered as an "Istidanat", and will operate entirely in respect of the manager ; that is to say the profit, loss, and debts arising from it, will relate entirely to him, and not the owner of the stock ; the reason of which is, that "Istidanat" is a transaction in respect of the property other than the capital ; and as the agency is confined to the capital, the manager is not at all competent to do such transaction. Moreover, the property, in such a case, exceeds the amount of that which was the subject of the contract, to which the owner has not consented; and even though, in such excess of property, there is advantage ; still is it not free from the risk of loss, and of its producing debts.

But, if the owner of the stock gives his consent to the "Istidanat", then the thing which the manager may have purchased will be participated between him and the owner, in the manner of a *Shirkat-ul-Wujooh*, or partnership upon personal credit, which signifies, where two persons are partners without either stock or labour, and purchase something upon credit, to be paid for at a future time, and sell it again.

Of the third kinds of the acts in Muzaribat is also the taking of "Suftajah", which is a kind of "Istidanat", and the giving of "Suftajah", which resembles a loan means the delivery of property to another person by way of loan, and not by way of trust, so that the other person may give it to some friend of his, and the purpose of it is to avoid the dangers of the road.

Similarly, also emancipation, either against property, or without property, and contracts of "Kitabat", are of the third kind of acts in Muzaribat, as are not being of the nature of business; and the same is also as regards the gifts, loans, and charities, which are only gratuitous acts.

7. Manager not allowed to contract male and female slaves (forming a part of the stock) in marriage to each other.

Manager is not allowed, according to Imam Abu Hanifah and Imam Muhammad, to contract in marriage male and female slaves which are of the stock of the contract.

But Imam Abu Yusuf, is of the view that he is entitled to contract in marriage a female slave but not a male slave.

8. Any part of the stock given by the manager of the owner in the manner of a Baza'at, continues to be part of the Muzaribat stock.

If the manager gives any part of the Muzaribat stock to the owner as a Baza'at, and he makes purchase and sale with it, it will continue to belong to the Muzaribat stock, as before.

But Imam Zufar says that the Muzaribat will be finished.

9. Manager not entitled to maintenance, unless he travels with the stock .

If the manager does the business in his own city, his maintenance will not be upon the stock. But if, he travels with the stock, his provisions and clothing will be furnished to him out of the stock ; and it will also be lawful for him to purchase or hire a quadruped to carry him from place to place at the expense of the stock.

It may be that if, on the manager's return to his own city, any food or clothing remains in his hands, he will be liable to return them into the Muzaribat stock, as his right to them will no longer remain, because of his return into his own city.

10. To a distance beyond a day's journey from the usual place of his abode.

If a manager goes out of his place of residence to a distance short of what constitutes a journey, his maintenance will not be due from the stock ; because where he goes only to a short distance, as going in the morning, and returning by the evening, and passing the night at home with his family, he will be as any other merchant of the place.

But if, he goes to such a distance from where he is not able to return home the same evening, his maintenance will be due from the stock, as he will be absent on account of the business of the Muzaribat.

Nafaqah or subsistence, means such things as are necessary for our daily requirements, such as food, drink, and clothing; and among these things, also, is the wages of a washerman, and other servants, and the maintenance of a quadruped for riding ; and oil for anointing, where that is commonly used, as in Mecca.

But the manager should not to expend any of those things of subsistence beyond what is customary ; and that, if he exceeds in his expenses what is customary among the merchants, he will himself be responsible for the excess.

Medicine used by a manager, will be at his own cost, according to the Zahir Rawayat. It is noted from Imam Abu Hanifah, that medicine is included in the subsistence ; because this is taken for the preservation of health ; and as it is impossible for him to engage himself in commercial dealing unless he is healthy , it therefore is also part of his subsistence.

11. To be paid from the profit, and not from the stock.

When a profit is gained, the owner will first takes the entire capital stock, and then the remainder will be divided

between both the parties according to the agreement ; the subsistence of the manager, therefore, will be taken from the profit, and not from the capital even though the manager has spent out of the capital for his subsistence.

12. Expenses incurred in the sale of the stock to be paid it from the stock.

If the manager sells the goods and the effects in the way of business, he should charge the expenses incurred in these goods and effects such as portorage and brokerage to the account of the capital stock ; but he will not charge the capital with what he expends for his subsistence.

13. Expenses incurred upon goods purchased which do not substantially add to the stock, are voluntary on the part of the manager.

If a manager has in his hands one thousand Dirhams, and spends them all out in the purchase of cloth, and spends one hundred Dirhams from his own pocket in bleaching and portorage, and the owner of the stock had desired him to act according to his own discretion, in such a case the manager will be taking to have acted voluntarily.

But if, the manager, in this case spends one hundred Dirhams from his own pocket in dyeing the cloth red, he will be a partner in the excess caused by the dyeing, because the colour is a substantial property existing in the cloth ; therefore, when the cloth will be sold, the manager will receive his share in respect of the colour and also his owner of the cloth as undyed, according to the contract of Muzaribat.

Section (1)

Loss of Stock

(Hidayah, Kitabu-ul-Muzaribah, Fasl-e-Aakhir)

1. Loss of the stock after a profit acquired, and a debt incurred, upon it.

If a manager, who has thousand Dirhams in his hands, under an agreement of one half of the profit, purchases linen, for example to the amount of one thousand Dirhams, and sells the same for two thousand Dirhams, and again purchases a slave for two thousand, and does not pay the price of either article, that is, of the cloth, or of the slave, until such time as these two thousand Dirhams are lost in his hands, in such a case the owner of the stock will have to remain satisfied to the amount of fifteen hundred Dirhams, and the manager to the amount of five hundred, and one-fourth of the slave will be of the manager, and three-fourths of the Muzaribat stock.

2. Sale by the employer to the manager.

If the manager is in possession of one thousand Dirhams, and the owner of the stock purchases a slave for five hundred Dirhams, and sells him to the manager in return for the capital stock, namely, one thousand Dirhams the manager will be considered as selling the slave by a Muzaribat sale at the rate of five hundred Dirhams; because such a sale is valid.

3. Or by the manager to the employer.

If a manager is in possession of the stock of one thousand Dirhams, and he purchases a slave for one thousand, and sells him to his employer for twelve hundred Dirham, he will be considered as selling him, by a Muzaribat sale, for eleven hundred, as the contract in question will be considered, in respect of one half of the profit, which is the owner's share, as non-existent.

4. Slave purchased by the manager who afterwards committing murder .

If a manager is in possession of one thousand Dirhams, under a condition of one-half of the profit, and with these one thousand Dirhams purchases a slave at two thousand, Dirhams, and the slave accidentally kills a person, three-fourths of the atonement will rest upon the owner of the stock and one-fourth will rest upon the manager.

Section (2)

DISPUTES BETWEEN THE OWNER OF THE STOCK AND THE MANAGER

(Hidayah, Kitab-ul-Muzaribat, Fasl Fil Ikhtilaaf)

1. In disputes regarding the acquisition of profit upon the existing stock, the assertion of the manager should be accepted.

If the manager has two thousand Dirhams in his hands, and says to the owner of the stock, "you give me one thousand Dirhams have accrued as profit," and the owner replies, "I had given you two thousand Dirhams," the assertion of the manager will be accepted.

2. But in disputes regarding the proportions of profit, that of the owner.

If the parties dispute, not only regarding the amount of the stock, but also regarding the proportions of the profit, the manager affirming it to be in equal shares, and the owner asserting it to be in three lots, i.e., two for himself and one for the manager, the assertion of the owner will be accepted.

But if any of them produces evidence, his declaration will be accepted as evidence is the positive proof.

3. As also in disputes regarding the nature of the agreement under which the stock was given to the manager.

If a person who has one thousand Dirhams in his hand, says "such a person gave me these by way of Muzaribat, under a condition of half of the profit," and the other person says, "I gave him the one thousand Dirhams as Baza'at," the statement of the owner will be accepted.

If a person, who has in his hands one thousand Dirhams, belonging to another persons, says that "these one thousand Dirhams had been lost to him by that other," and the other says that "he had given them to him by way of Baza'at, deposit, or Muzaribat," the assertion of the owner will be accepted on the one hand, or if evidence is produced by the other person, then on the other his assertion will be accepted.

4. If the owner asserts a restriction, the denial of the manager will be accepted.

If the owner of the stock makes an allegation, against the manager, of restriction to a particular mode of business, for example, that "he had directed him to trade in cloth and in no other goods," the assertion of the manager, upon oath, will be accepted.

5. But if each alleges a different restriction, the allegation of the owner will be accepted.

If the owner alleges a restriction to any particular mode of business, and the manager alleges a restriction to another particular mode, of business, in that case the assertion of the owner will be accepted, or the evidence if produced by the manager.

6. In disputes regarding restriction regarding the time, the evidence which proves the latest date will be accepted.

If the owner as well as the manager make different allegations in respect of the restrictions as regards the time, and both produce evidence the owner, on his part, asserting that "he gave to the manager one thousand Dirhams, by way of Muzaribat, for the purpose of purchasing wheat in the month of Ramzan" and produce evidence in support of his allegation, and the manager says, that "the owner gave him one thousand Dirhams for the purpose of purchasing wheat in the month of Shawwal" and produce evidence in support of his allegation, the evidence which proves the latest date will be accepted ; because the condition last made supercedes condition first made.

PART – V
'AARIYAT
(LOAN)

SYNOPSIS

Book – I – 'Aariyat

Book – II – Hawalah

BOOK – I *

'AARIYAT

(LOAN)

'AARIYAT *

LOAN

*(Hidayah, Kitab-ul-'Aariyat)***Note**

“‘Aariyat”, according to the jurists, is an investiture with the use of a thing without any return.

The person who gives the loan is known as the “Mo’yeer”, or the lender ; the person who takes the loan who known as the “Musta’yeer”, or the borrower ; and that which is given is known as the, “‘Aariyat,” or the loan.

1. Forms under which loan is given.

Loan is made valid by the lender saying that “I have given you this as a loan, as in it the purpose is expressly mentioned ; or, by his saying, that is “I have given you to eat of this earth”, because such expression is used to mean a loan metaphorically ; because, since it is not possible to eat the earth itself, the meaning , implied in it is “to eat of the produce of it.”

2. Lender may resume it at his pleasure.

The lender is entitled to resume the loan at his pleasure ; because the Holy Prophet has said, “Munha ** is liable to be recalled, and a loan must be returned to the lender” (Abu Daud, Tirmizi, Ibne Hayyan, Tabrani) and also, because the produce,

* Qur’an, Ch. 2 (Baqarah), verse, 280 ; Mishkaat, Kitab-ul- Buyoo, Baabul Ghusabul wal ‘Aariyat ; Ainul Hudyah, vol iii pp. 666 to 697

“Munha” is a kind of loan, where a person lends another a goat, a cow, or a she-camel, for example, that he may use their milk.

or use of the thing lent, becomes property, particle by particle, merely according to its being brought into being ; therefore, as regards such part of the produce as has not yet been brought into being, there is merely an investiture, but no possession; retraction in respect of such part is therefore valid.

3. Borrower not responsible for the loss of it.

Loan is a trust. Therefore, if it is lost in the hands of the borrower, without any wrong done by him, he will not be answerable for it, whether the loss occurs at the time of his using it, or otherwise.

4. Borrower cannot let it out.

Borrower is not entitled to let out a loan, Therefore, if he lets it out, and it is then lost, in such a case, he will be responsible for it.

5. If borrower lets it out .

It may be noted that, in case of letting out the loan, the borrower will become responsible for it immediately upon the delivery to the lessee.

The lender, in such a case, will be entitled to take compensation, if he pleases, from the lessee, because of his taking the property of another without his consent.

But if, he takes compensation for it the borrower, he will not then, be entitled to indemnification from the lessee.

If the lender takes the compensation from the lessee, the lessee, in such a case, will be entitled to indemnification from the borrower, who is the lessor, if the lessee did not know that the lease was a loan, as in such a case he will suffer an

imposition. But it will be otherwise where he takes the lease knowing it to be a loan, as there he will not suffer any imposition.

6. Borrower may lend it to another person.

Borrower is entitled to lend the thing borrowed, if it is of such a kind as may not make it subject to be differently affected by different uses.

7. Loan of money, etc. against loan of specific property.

The loan of Dirhams and Deenars, and of goods to be estimated by measurement of capacity, or by weight, or by tale, is taken a Qarz.

8. Land borrowed for the purpose of building or plantations.

If a person borrows the land, to build upon it, for planting trees in it, it is valid.

But in such a case the lender will be entitled to take back the land ; and as he will be entitled to get it back in the state in which he lent it, he will, therefore, be empowered to force the borrower to remove his houses or trees from it.

But no period for the loan was fixed, then no compensation will be due from the lender for the loss he may cause to the borrower on account of removal of his buildings or trees, as no deceit was caused on the borrower, but rather he deceived himself, in relying upon a contract which was absolute and was not subject to with any condition.

But if, a period was fixed for the loan, and it is taken back before the expiration of that period, the resumption will be valid, as a lender is entitled to resume a loan whenever he pleases ; but it will be abominable in this case, as involving a breach of contract, and the lender will, therefore, be responsible

to the borrower for the loss covered to him on account of the removal of his trees and houses, because he deceived the borrower in fixing a period which was supposed to be adhered to. The borrower, therefore, will be entitled to a compensation from the lender, for the damage caused to him, and the same is the view of Qadooree in his book.

Hakim Shaheed is of the view that the borrower will be entitled to take from the lender the value of the trees and the houses, in which case they will become property of the lender, or to take compensation for his loss, in which case, he will be entitled to carry away the trees and the houses.

Jurists says that if the removal of the trees and the houses are dangerous for the land the land, the choice of the alternative will be of the owner of the land, as he is the principal, and the borrower the secondary, and preference is always to be given to the principal.

9. Resuming the land borrowed for the purpose of tillage.

If a person borrows the land for cultivation of the grain, the lender will not be entitled to the loan until the gathering of the grain, even if a period is fixed or not.

But it will be otherwise in respect of trees ; because, as the period of their existence is not certain, their remaining will be an injury to the lender.

10. Charges for the returning of a loan.

The charges of returning the loan will be paid by the borrower.

11. Restoring an animal borrowed .

if a person, who has borrowed a quadruped from another person, restores it in the stable of the owner, and it is thereafter lost, in such a case he will not be responsible for it.

12. Restoring a slave.

If a person borrows a slave, and thereafter returns him to the house of his master without formally delivering him, personally, to the master himself, he will not in such a case be responsible for him.

13. It is enough return the loan by a slave or servant .

If the borrower sends the quadruped he had borrowed to the owner of it, by his own slave or his servant, and it is lost in the way, in such a case he will not be responsible for it.

14. Or by the slave or servant of the lender .

If a borrower sends back the horse or other animal he had borrowed to the owner, by the slave or the servant of the owner, and it is lost or destroyed on the way, he will not be responsible for it.

15. If it is returned through a stranger .

If a borrower sends the quadruped to the owner through a stranger, he will be, in such a case, responsible for it, and will have to make good the value of it in the event of its loss.

16. Terms in which a contract of loan in respect of land should be expressed.

If a person lends the land to another person, so that he may cultivate it, the borrower should include, in the contract of loan, the words, "you have given me to eat of this land." This is according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad say that the term "Aariyat" or loan should be written.

BOOK – II
HAWALAH
(TRANSFER OF DEBTS)

HAWALAH *

(TRANSFER OF DEBTS)

(*Hidayah, Kitab-ul-Hawalah*)

Note

Literally, "Hawalah", sense, means "removal". It is derived from "Tahool", which implies the removal of anything from one place to another place. It signifies

Legally, it signifies the transfer of a debt, for security and corroboration, by the debtor, to another person. The debtor who transfers the debt is known as "Moheel", to whom the debt is transferred is known as "Mohtaal 'Alaih", and the creditor is known as "Mohtaal Lahu."

1. Transfer of debt .

The transfer of debt is valid; and the person to whom the debt is transferred undertakes to fulfil the obligation arising of the debt transferred to him, and this as a bail ;

The transfer, however, is restricted to the debt only, because it means an ideal transfer, and an ideal transfer, in law, applies to the debt, and not to the substance, which needs a sensible transfer.

2. Consent of creditor and transferee .

A contract of transfer is validated by consent of the creditor as well as the transferee. Consent of creditor is necessary because the debt is due to him; and consent of the transferee is necessary, because the obligation of the debt because his liability. Consent of the debtor is not necessary, because it is for his benefit ;

* * Ainul Hidayah, Vol.III, pp. 327 to 335

3. Debtor is exempted .

When a contract of transfer is finalised, the “Moheel”, i.e. the debtor, is exempted from the obligation of the debt, because of the consent of the “Mohtaal ’Alaih”, i.e. the transferee. But Imam Zufar says that he is not exempted ;

4. No claim upon the debtor .

The creditor is not entitled to make any claim against the debtor except where his right on the transferee is finished and he is notable to obtain it, in which case the debt reverts to the debtor);

The loss of the debt, according to Imam Abu Hanifah, is established by two events, viz., (1) where the transferee denies, on oath, the existense of the contract of transfer, and the creditor is not able to produce witnesses to prove it, or (2) where the transferee dies poor. Imam Abu Yusuf and Imam Muhammad add one more events i.e., decision of the “Haakim”, i.e. court of law in respect of the poverty of the transferee during his life time;

5. Transferee’s claim upon the transferor .

If the transferee demands from the transferor the amount of what he has paid on account of the transfer made to him, and the transferor says that, “he had made such transfer to him, for a debt of the same amount which he owed him,” and it is denied by the transferee, in such a case the affirmation of the transferor will not be accepted admissible, and he will be bound to pay the demand of the transferee, because the demand is established, and the assertion of the claim by the transferor is denied by the transferee, which denial is to be accepted ;

6. Transfer of a deposit with another person .

If a person, who has deposited, say, one thousand Dirhams with another person, afterwards make transfers it (as if he desires his creditors to receive payment of his debt, from the

deposit placed by him with such a person), such transfer is valid;

But if, the deposit is lost, the transferee, who is actually the trustee, in such a case, will be released from the liability of the transfer, because the transfer was restricted to the deposit, and the transferee was no more liable than the payment of the debt from the amount of the actual deposit ;

But will be otherwise in respect of a transfer restricted to usurped property ; because if a person makes a transfer to the usurper, on account of specific property usurped by him, and the said property is afterwards lost, the transfer so made will not become void; But it will be incumbent on the usurper to pay the creditor a similar, or the value, of it ;

7. Transfer of what is due from transferee .

Transfer of the debt should be restricted upto the debt due from the transferee to the transferor, and in such a case the law is that the transferor, after making the transfer, will have no right to make any claim, against the transferee, for the debt which has been transferred, because the right of the creditor will now be connected with it ;

But it will be otherwise in respect of an absolute transfer, i.e., where a person simply says to his creditor, “I have transferred the debt, which I owe you, to such and such a person”, without mention of any debt being due to him, or of any property of his which is in possession of that person, on account of deposit or usurpation ; because in such a case the right of the creditor will not relate to the property of the transferor, but will rest entirely the transferee ; and hence if the transferor will receive the payment of the debt due to him from the transferee, still the transfer will not become void;

8. Loan of money as “Suftajah” (i.e. Hundi)

“Suftajah” is abominable, or disapproved, although it is not absolutely illegal. It signifies the giving of anything as a loan in such a manner as to save the lender from the danger of the

for example, where a person gives something as a loan, instead of a deposit, to a merchant, so that he may forward it to his friend at a distance. The abomination in such a case is because of the profit attached to it, on account of saving the lender from the danger of the road, and the Holy Prophet has prohibited the getting of profit upon the loan.

PART – VI**'UQUBAAT****(PUNISHMENTS)**

{ Hudood (Zina, Sharaab, Qazf), Hudood (Saraqah), Kafalat, Ashrabah, Janayaat (Qisaas), Diyaat (Fines), Ma'aaqil }

SYNOPSIS

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Section – The manner of punishment, and the infliction thereof

Chapter – 2 – Sexual intercourse, which occasions punishment and that which does not occasion it

Chapter – 3 – Evidence in “Zina”, and retraction therefrom

Chapter – 4 – Hudood-ush-Sharaab, or punishment for drinking wine

Chapter – 5 – Hadd-il-Qazf, or punishment for alander

Chapter – 6 – Ta’zeer or discretionary punishment.

Book – II – Hudood (B) Saraqah

Chapter – 1 – Introductory

Chapter – 2 – Thefts which occasion amputation, and thefts which do not occasion it

Chapter – 3 – Hirz, or Custody ; and of taking away property thence

Chapter – 4 – Manner of cutting off the limb of a thief, and of the execution thereof

Chapter – 5 – Acts of a thief in respect of the property stolen

Chapter – 6 – Qat’e al-Tareeq, or Highway Robbery

Book – III – Kafalat

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Section – Zamaan (Guarantee)

Chapter – 2 – Bail in which two persons are concerned

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Book – IV – Ashrabah

Section – Boiling the juice of grapes

Book – V – Janayaat (Qisaas)

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Section – Murder in Self-defence

Chapter – 3 – Retaliation in matters short of life

Section – (1) Composition

Section – (2) Acts of crime

Chapter – 4 – Evidence in cases of murder

Chapter – 5 – Circumstances under which murder takes place

Book – VI – Diyaat (Fines)

Chapter – 1 – Introductory

Section – (1) Fines for offences not affecting life

Section – (2) Shajjah or wounds and cuts from the crown of the head to the chin

Section – (3) Fine in respect of members other than the head

Section – (4) Embryos in the wombs

Chapter – 2 – Nuisances place in the highways

Section – Buildings which are in danger of falling

Chapter – 3 – Offences committed by or upon animals

Chapter – 4 – Omitted

Chapter – 5 – Omitted

Chapter – 6 – Qasaamat or the administration of oath

Book – VII – Ma'aaqil

BOOK – I

Hudood

(PRESCRIBED PUNISHMENTS)

(A)

ZINA, SHARAAB, QAZF,

(Fornication Adultery, Drinking of Wine, Slander)

HUDOOD *

(PRESCRIBED PUNISHMENT)

(Hidayah, Kitab-ul-Hudood)

Note

“Hudood” is the plural of “Hadd”, which, in its literally sense, means “obstruction”, because its real purpose is to obstruct the people from the committing the offences. In this very sense the inflictor of “Hadd” is known as “Haddaad”, or obstructor, as from his act he prohibits people from offences.

Legally, it aims at correction provided by the law on account of the “Right of Allah”, and therefore the term “Hadd” does not apply to “Qisaas” i.e. retaliation which is due as a “Right of Man”, and not as a “Right of Allah”; and similarly this term does not apply to “Ta’zeer” i.e. discretionary chastisement, as “Ta’zeer” is a correction which is not provided by any fixed Rule of law, but depends upon to the discretion of the Qazi.

The not purpose, as stated above, in the inflection of “Hadd” is to , warn the people from the commission of offences, and that is the reason that it is awarded to the infidels also as to the Muslims.

CHAPTER 1

ZINA OR (Fornication / Adultery) *

1. Establishment .

Zina or “Zina” is to be proved before the Qazi by (a) evidence, or (b) confession ; Circumstantial evidence can also be accepted as sufficient to prove it ;

* Qur’an, Ch. 4 (Nisa), verses 15-25 ; Ch.17 (Bani Israil), verses 23-32; Ch.23, (Mo’minoos), verses 5-7; Ch 24 (Noor), verses 3-5, 26, 33; Ch.70 (Ma’arij), verses 29-31; Mishkaat, Kitabul Hudood , ‘Ainul Hidayah, Vol. II, pp. 524 to 581.

2. Evidence.

To prove it by evidence, four witnesses are necessary, to dispose on oath against the man and the woman that they have committed "Zina" together ;

Manner of proving.

The witnesses should be specifically examined in respect of all the circumstances of the case , and the nature of the offence, i.e., the Qazi should ask of each witness respectively, "what is "Zina"?", and "in what manner the parties have committed it ?", and "where?", and "at what time?", and "with whom?";

3. Punishment .

When the witnesses give evidence completely, saying that, "they have seen the parties in the very act of sexual intercourse" describing the same, and the truth of such evidence is also known from both an open and a secret purgation, then the Qazi should pass sentence of punishment for "Zina", according to such evidence.

The apparent demeanor of the witness will not be enough in this case, but it will be necessary that the Qazi should ascertain their demeanor, both by an open and a secret purgation, in such a manner, that any fact may come to light which may be sufficient to avoid the punishment ;

4. Confession .

The confession which proves "Zina" should be made by a person of sound mind and of mature age, acknowledging himself or herself, to be guilty of "Zina" four times, at four different appearances, in the presence of the Qazi, and the Qazi should to receive the confession, and the person back, the first, the second, and the third time ;

Examination by the Qazi . When confession has been made in this manner four different times, the Qazi should then examine the person so confessing, asking him, “what is “Zina”?”, and “where, and in what manner, and with whom, have you committed “Zina”?”;

It may also be noted that while the Qazi examines the witnesses regarding the “time” of the commission of the offence, he is not to examine the person, confessing the offence, regarding its “time”. But some jurist are of the view that such examination is void, because it is just possible that at the time of committing the offence the person may be a minor ;

Retraction. If a person after confessing the offence denies, and retracts from his confession, before or during the infliction of punishment, his retraction will be accepted, and he will be forthwith released ;

Instruction. It is laudable for the Qazi, or Imam, before whom confession of “Zina” made, to instruct the person confessing to deny it, by saying to him, “perhaps you have only kissed or touched her”, because the Holy Prophet spoke so to Maa’iz ; (Bukhari and Muslim) and Imam Muhammad, in the “Mabsoot”, adds that the Qazi should also examine the confessing person regarding such fact as, if made to appear, will tend to his entire exemption, such as, “whether the fact confessed may not have been committed in marriage”, or “under on account misconception of its legality ?”

Section

MANNER OF PUNISHMENT, AND ITS INFLICTION (*Fasl Fee Kaifiyatil Hadd wa Aqaamatoha*)

1. Married person.

When a person is fully convicted of “Zina”, if he is married, he will suffice the punishment of “Rajm”, i.e., lapidation, or stoning to death;

Definition of "married". The state of marriage necessary to inflict the punishment of "Rajm" requires that the convict should be of (a) sound mind, (b) adult, (c) Muslim, (d) free, and (e) who has consummated in a lawful marriage with his wife at a time when she was also sane, free, adult, and a Muslimah. This is according to Imam Abu Hanifah and Imam Abu Yusuf. But according to Imam Muhammad and Imam Shaafe'ee, the only requirement is that he should be free, Muslim, and one who has consummated in a lawful marriage with his wife of the same description ;

Mode of executing lapidation. It is necessary, when a convict is to be stoned to death, that he should be taken to a barren place, having no houses or cultivation ; and it is necessary that the stoning should be executed – first by the witnesses, and then the Imam or the Qazi, and then by the rest of the people;

But this will be when the "Zina" is proved upon the evidence of the witnesses ; but when it is based upon confession of the convict, it will be then necessary that the stoning should be executed first by the Imam or the Qazi, and then by the rest of the people ;

Dead body of the offender . The dead body of the person executed by stoning will be given the usual bath, funeral prayer, and other rites after death.

2. Unmarried person .

If the person convicted of "Zina" is free, but unmarried, the punishment in respect of him is one hundred stripes ;

Mode of executing scourging . The hundred stripes to be inflicted by the order of the Qazi should be inflicted with a lash having no knots upon it, and that the stripes should be struck in moderation, i.e., neither to sever it nor too light ;

And when punishment is to be inflicted on any man, all his clothes should be taken off except the trouser ;

Not upon one part only . It is necessary that the hundred stripes should be struck not all upon one and the same part or member of the body, but upon different parts ; and none of the stripes should be struck on the face, the head, or the private parts ;

Man standing and woman sitting . When convict is to be scourged for “Zina” the man should be punished standing, and the woman should be punished sitting ;

Not in the form of “Madd”. The punishment should not be in the form of “Madd”. As regards “Madd”, some jurist say that, “it means laying a person on his face upon the ground, and stretching out his limbs” ; some say that, “it means the executor’s drawing the lash over his own head”; and some say that, “it means the executors drawing back the lash, after giving the blow” ; but the correction should not be inflicted in the form of “Madd”, according to any of these acceptations, as it is more than what is due ;

3. Slave .

If the person convicted of “Zina” is be a slave, male or female, the punishment will be of fifty stripes only ;

Cannot be punished but by authority . A master cannot inflict punishment upon his male or female slave for “Zina” except with the permission of the Qazi ;

4. Woman.

The punishment of “Zina” is the same in respect of both sexes, but still a woman will not be stripped, and her veil will not be taken off, except her robe, or other outer garment, as the removal of any other part of her dress will be against her modesty ;

4 A. Modesty should be maintained. Woman should be punished in a sitting position ; and she is to be stoned, a hole or excavation should be dug for her as deep as her waist ;

Note : (a) No hole should be dug for the man ;

(b) It is not lawful to bind a person to punish him or her, unless that the punishment cannot otherwise be inflicted ;

4 B. During pregnancy. If a pregnant woman is convicted of "Zina" upon evidence, she should be confined in prison until she delivers, the child, so that she may be abscond. But if a pregnant woman is convicted upon her own confession, in such a case she is not to be confined, as her denial after confession is to be accepted and her punishment is to be finished ;

Further, in the case of punishment by stoning, the execution of it upon a pregnant woman is to be delayed until her "delivery", and in case of the punishment of scourging, it is to be delayed until she recovers from her "labour", because it is a kind of sickness, and therefore punishment is to be delayed until she fully recovers her health ;

5. Stoning and Scourging .

It is not lawful to give the punishments of stoning and scourging at one and the same time to any person ;

6. Scourging and Banishment .

If a woman guilty of "Zina" is adult, in her punishment of scourging and banishment cannot be joined together ;

7. Stoning not suspended on account of illness .

If a sick man, is the one whose punishment is stoning, commits "Zina", he can be stoned , because his death is due, and is therefore the punishment is not to be suspended on account of his illness ;

8. Scourging suspended on account of illness.

But if a sick man is the one whose punishment is scourging, the execution of it should be suspended until his recovery, so that his life may not be put to the danger of life ;

For the same reason a limb of a sick thief should not be cut off until he be in a proper health of body to endure the amputation without risk of life.

CHAPTER 2

SEXUAL INTERCOURSE WHICH CAUSES PUNISHMENT,
AND THAT DOES NOT CAUSE IT.

*(Hidayah, Kitab-ul-Hudood, Baab-ul-Wati Allazi Yujibul Hadd
Wallazi Laa Yujibohu)*

Note

Sexual Intercourse

The sexual intercourse which causes punishment of "Zina" signifies the sexual intercourse of a man with a woman to which he is not lawfully entitled, either by way of right of marriage or of bondage, and in whom he even has no erroneous property,

Note : The definition of "Zina" is with respect to a man ; as regards the "Zina" of a woman, it simply signifies her unlawfully allowing a man to have intercourse with her.

Note

Erroneous sexual Intercourse.

Error in sexual intercourse may be of two kinds, i.e, (1) error in respect of the "act", which is known as "Shubha Fil Fe'l", or "Shubha – Ishtibah", or error of misconception ; as, for example, sexual intercourse in a dark night with a woman thinking her to be his own wife ; and (2) error in respect of the "subject", which is knowing as "Shubha Fil Mahl", or "Shubha Hukmiyah", or error by effect, or "Shubha – Milk", or erroneous property, as, for example, sexual intercourse by a man with his own divorced wife, divorced by irrevocable divorce, during her 'Iddat, thinking her to be lawful, or with the slave-girl of his own son.

Note : Parentage is created in the case of error in respect of the "subject", but not in the case of error in respect of the "act";

1. Error in respect of the “act”

Error in respect of the “act” exists in eight different cases, namely, with :

- (1) the female slave of a man’s mother,
- (2) the female slave of his father,
- (3) the female slave of his wife,
- (4) the wife divorced by three divorces, who is in her ’Iddat,
- (5) the wife completely divorced by “Khula” and she is in her ’Iddat,
- (6) the Umm-e-Walad, who is in her ’Iddat after emancipation in respect of her master,
- (7) the female slave of a master, in respect of his male slave,
- (8) the female slave, given as a pledge, in respect of the receiver of such pledge, according to Rawayat Saheeh in treating of punishment ; and it may be noted that a borrower, in this respect, stands in the same predicament as the receiver of a pledge.

Note : In any of these cases there will be no punishment, if the person having sexual intercourse declares, that “I thought that this woman was lawful to me”; but if he acknowledges that he knew that the woman was not lawful to him, he will be punished.

2. Error in respect of the “subject”.

Error in respect of the “subject” exists in six different cases, namely, with :

- (1) the female slave of a man’s son, (or grandson),
- (2) the wife completely divorced by an implied divorce,
- (3) the female slave sold, in respect of the seller, before the delivery of her to the purchaser,

- (4) the female slave "Mamhoora, i.e., a slave stipulated to be given in dower to a wife, in respect of the husband, before possession of her given by the wife,
- (5) the female slave held in partnership, in respect of any of the partners,
- (6) the female slave given in pledge, in respect of the receiver of such pledge, according to the book of Pawn.

Note : In all these cases a man who has sexual intercourse will not be punished, even if he confesses his knowing of such being unlawful to him.

3. Contract of Marriage.

According to Imam Abu Hanifah, a contract of marriage is a sufficient ground of error, even though the illegality of such marriage is universally allowed, and the man entering into such contract is sensible of this illegality.

But jurists are of the view that a contract of marriage is not admitted as legal ground of error, if the man is sensible of the illegality.

The effect of this difference of opinion view in a case where a man marries a woman related to him within the prohibited degrees.

4. Female Slave of brother or uncle.

If a man has sexual intercourse with the female slave of his brother, or his uncle, he will be punished, even if he says that he thought her lawful to him ;

The same law applies to regards the female slaves of all relations within the prohibited degrees, except those who are related to the man within the paternal degree such as father or son

5. Woman married by mistake.

If a man enters into a contract of marriage with a woman, and another woman is sent to him, and his female relations declare her to be the woman married to him by such contract, and he commits sexual intercourse with that woman, he will not be liable to punishment, but still, as once decreed by Hazrat 'Ali, he will have to pay the dower to her, and she will have to observe the 'Iddat ;

6. Unlawful marriage.

If a man marries a woman with whom it is not lawful for him to marry, and then also has sexual intercourse with her, he will not be liable punishment of "Hadd"; but if he is at that time aware of the illegality, he will be punished by Ta'zeer i.e., discretionary punishment. This is according to Imam Abu Hanifah. But Imam Abu Yusuf, Imam Muhammad and Imam Shaafe'ee are of the view that he will be liable to punishment by "Hadd", if he has married the woman, being aware of the illegality.

7. Acts of lasciviousness.

If a man commits any act of lasciviousness i.e. lustful, with a strange woman, such as "Takhfeez" (*penem fricens inter femora*), he will be corrected by Ta'zeer, i.e., discretionary punishment;

8. Sodomy with a strange woman .

If a man commits sodomy with a strange woman, there is no prescribed punishment for it, but he will be liable be punished by Ta'zeer. This is according to Imam Abu Hanifah. The Jaame'-as-Sagheer directs an aggravation of the punishment and says that the offender should be kept in confinement till repentance. Imam Abu Yusuf and Imam Muhammad are of the view that the punishment for it is same as that for "Zina". Imam

Shaafe'ee says that both the parties, married or unmarried, should be put to death ;

Note : On sodomy, see Tirmizi, Ibne Maajah.

9. Bestiality.

If a man commits bestiality i.e., sexual intercourse with an animal, he is not punishable to "Hadd", as this act does not amount to "Zina", but he will be punished by Ta'zeer i.e., discretionary punishment ; and the animal, if it is not of an eatable kind, will be slain and burnt. But if it is of the eatable kind, then, according to Imam Abu Hanifah, it will be eaten, and not burnt. But Imam Abu Yusuf is of the view that in either case it will be burnt, and the offender will remain liable to pay its value to the owner of it, if any ; (see Tirmizi, Abu Daud, Ibne Maajah).

10. "Zina" committed in foreign country.

If a Muslim is guilty of "Zina" in a foreign territory, or the territory of the rebels, and then comes back to the Muslim territory , punishment will not be inflicted upon him ;

11. Punishment in a camp.

The person who officially has the authority to inflict the punishment of "Hadd", e.g. the Caliph or the Governor) when he carries forth his troops upon an expedition, is entitled to inflict the punishment of "Hadd" upon any person who is found guilty of "Zina" within his camp, as the offender is under his immediate authority ; but chiefs or commanders of an inferior degree are not entitled to inflict the punishment of Hadd upon persons guilty of "Zina" in their camps, because they have no such authority ; but they may inflict the Ta'zeer.

12. Infidels and Aliens .

If an alien comes into a Muslim territory, under a protection, and there commits "Zina" with a Zimmiyah, or female infidel subject, or if a Zimmi, or male infidel subject, commits "Zina" with a female alien, punishment will be inflicted upon the infidel subject, according to Imam Abu Hanifah, but not upon the alien. Same is also the view of Imam Muhammad in respect of an infidel subject, where he is guilty of "Zina" with a female alien ; but if an alien be is guilty of "Zina" with a female infidel subject in such a case he is of the view that neither will be punished. Imam Abu Yusuf says that all will be punished ;

13. Minor or Idiot .

If a minor boy or an idiot commits "Zina" with a woman who is adult and of sound mind, and she gives her consent to it, in such a case there will be no punishment, to the minor boy, nor to the idiot, nor to the woman. But Imam Zufar and Imam Shaafe'ee are of the view that the woman will be punished, and one tradition of Imam Yusuf also supports the view.

But if a man, who is adult and of sound mind, commits "Zina" with a minor or idiot girl, he will be liable to punish according to all jurists.

14. Compulsion .

If a sovereign prince forces a man to commit "Zina", the man will not be liable to punishment. But if any other person forces a man to commit "Zina", the man will be liable to punishment.

15. One party confessing "Zina" and the other pleading marriage .

If a man makes the confession four times, at four different times before the Qazi, that, "he has committed "Zina"

with such a woman”, and the woman says that, “he had married her” ; or, if a woman makes the confession of “Zina”, as such, and the man says that he had married her, in either case neither of them to punishment will be liable, but the dower of the woman will become due on the man ;

16. “Zina” with female slave of another, who dies in consequence of it .

If a man commits “Zina” with the female slave of another, to such an extent that she dies in consequence of it, the man will be liable to two punishments – one, the punishment for “Zina” ; and the other, the payment of the value of the slave to her master ;

Slave-girl becoming. If a man commits “Zina” with the female slave of another, to such an extent that she becomes blind, he will be liable to pay the price of the said slave to her owner, and there will be no punishment, because the slave, by the man thus becoming responsible for her value, will become his property, and she is still actually present.

CHAPTER 3

EVIDENCE IN "ZINA", AND RETRACTION FROM IT

*(Hidayah, Kitab-ul-Hudood, Baab-ush-Shahadat 'Ala az-Zina
War Ruju' 'Anhaa)*

1. Delay in giving evidence .

If witnesses give evidence at a later time after the alleged offence, where there was no obstruction, such as their distance from the Imam (Qazi), their testimony will not be accepting, except in the case of slander ;

It is reported in Jaame'-as-Sagheer that, "if witnesses give evidence against any person, in respect of theft, or wine-drinking, or "Zina", after much time has elapsed, such evidence will not be received ; but still the person accused of theft will be responsible for the value of the goods alleged to have been stolen."

2. Delay after decree of the Qazi .

"Taqadam", or distance of time, as it prohibits the admission of evidence in the first instance, so it also prohibits according to the jurist, the infliction of the punishment after the decree of the Qazi. If, therefore, the convicted person absconds, after suffering a part of his punishment, and after a long time which amounts to "Taqadam", is caught and brought back, the remainder of the punishment cannot then be inflicted upon him, because the infliction of the whole punishment is included in the decree of the Qazi, and a part of it stands in the same predicament with the whole ; and as the Qazi, on account of distance of time, could not decree punishment, so also, in the same conditions, he cannot order the infliction of the remaining punishment ;

3. Limit of the delay .

There are many views of the jurists in respect of the limit of the "Taqadam", or the distance of time. In the *Jaame' us-Sagheer*, Imam Muhammad gives the limit of it as six months and the same is given by Tahavi. Imam Abu Hanifah does not fix any limit, but leaves it to the discretion of the Qazi. One view of Imam Muhammad is that it is one month, as any time less than it falls within the description of 'Ajl, and one view of Imam Abu Hanifah and Imam Abu Yusuf is also to the same effect, and this is also the approved view where the witnesses are not at the distance of a month's journey from the Qazi ; but where the distance is of a month's journey between them, their testimony will be accepted.

The limit of "Taqadam" in respect of the punishment of wine-drinking is also the same, according to Imam Muhammad ; while according to Imam Abu Hanifah and Imam Abu Yusuf, the limit of it is upto to the finishing of the smell of the liquor ;

4. Evidence against one of the parties .

If witnesses give evidence against a man that he has committed "Zina" with a particular woman, and the woman is not present still the punishment should be inflicted on the man. But if the witnesses give evidence against a man that he has committed theft, and the owner of the stolen property is not present, the hand of the accused will not be cut off ;

But if the witnesses give evidence against a man that, "he has committed "Zina" with a woman whom they do not know" punishment will not be inflicted upon the man, because it is just possible that the woman may be his wife or slave. But if a man makes confession that, "he has committed "Zina" with a woman whom he does not know", punishment will be inflicted upon him, because if the woman was his wife or slave, she could not be unknown to him ;

5. Contradiction in evidence in respect of the “consent”.

If two witnesses give evidence against a man that, “he has committed “Zina” with such a woman, and forced her thereto”; and two other witnesses also give the same evidence, but with the variation that, “she had consented to it”, in such a case, according to Imam Abu Hanifah and Imam Zufar, punishment will drop from both ; while Imam Abu Yusuf and Imam Muhammad say that the man alone will be punished ;

6. Contradiction in evidence in respect of the “place”.

If two witnesses give evidence against a man that, “he has committed “Zina” with such a woman in Kufah”, and two other witness say that, “he had committed “Zina” with that woman at Basra”, punishment will drop from both ; and the witnesses also will not be punished for slander ;

But if witnesses contradict merely in respect of the spots of the act in one and the same room, punishment will be inflicted

7. Agreement respecting “time” and contradiction respecting “place”

If four witnesses give evidence against a man that, “he has committed “Zina” with such a woman at sunrise in Nakhla”^{*} and four other witnesses give evidence against the same man that, “he has committed “Zina” with such a woman at Hind”,^{**} none of the parties will be punished ; and the witnesses also will not be punished for slander ;

8. Woman proved to be virgin .

If four witnesses give evidence against a woman that, “she has committed “Zina” with such a man”, and upon examination by the woman appointed for that purpose it is

^{*} A place near Kufah.

^{**} A place near Kufah.

proved that the accused woman is a virgin, none of the parties will be punished ; and the witnesses also will not be punished for slander ;

9. Incompetent witnesses .

If four witnesses give evidence against a man that, "he has committed "Zina" with such a woman", and it happens that these witnesses are blind, or have previously been punished for slander, or that one of them is a slave, or has previously been punished for slander, in such a case all the witnesses are will be punished for slander ; but the accused will not be punished for "Zina";

10. Evidence of Faasiq (Transgressors) .

The evidence of "Fassiq" transgressor is not to be accepted for the punishment for of "Zina" to the accused persons nor for the punishment of slander to the accusers ;

11. Witnesses defective in "number".

If less than four persons give evidence of "Zina", punishment for slander will be applicable to them ;

If four persons give evidence against a man that, "he has been guilty of "Zina"", and the Qazi inflicts punishment for "Zina" upon the parties, and it then appears that one of the witnesses was a slave, or has previously been punished for slander, punishment will be due upon all the witnesses as the witnesses fall short of the required number of "four".

But, in such a case no fine of damage will be due on account of such flagellation, either from the witnesses or from the public treasury ; but if as a result of the evidence the person accused has been stoned to death on account a sentence of stoning, the Diyat or blood-wit will be due from the public treasury. This is the view of Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that the fine of the loss will also be due from the public treasury in the former case ;

12. Primary and Secondary Evidence .

If four witnesses give evidence in respect of the evidence given by four other witnesses, against a man, that he has committed "Zina", punishment will not be inflicted upon the person so accused, because evidence in support of evidence creates a doubt ; and in such a case there will be no necessity for considering the secondary witnesses in the light of the primary witnesses ;

And if the four primary witnesses afterwards come and bear testimony of themselves to the "Zina", in the place where the secondary witnesses had before given evidence, here also no punishment will be inflicted on the accused, because their testimony has already been rejected in one shape, is a result of the rejection of the secondary witnesses in respect of the same fact, as the secondary witnesses are the substitutes of the primary witnesses, from the circumstance of those having directed them, and thrown the matter upon them ;

But here punishment of slander will not be inflicted on either the primary or the secondary witnesses, because both are competent in respect of number, although punishment of "Zina" be not inflicted, on account of doubt, which such as suffices in bar of punishment for "Zina", but is not sufficient to subject the witnesses to punishment for slander ;

13. One of the witnesses retracting .

If four witnesses give evidence against a man, that he has committed "Zina", and he suffers stoning, and one of the witnesses thereafter retracts, punishment for slander will be inflicted upon him, and he will also be responsible for one-fourth of the blood-wit ;

But if he retracts "before stoning", and "after the passing of the sentence by the Qazi", then all the witnesses will be liable to be punished for slander, and the punishment of the accused

will be finished. This is the view of Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad is of the view that in such a case, the punishment for slander will be inflicted upon the retracting witness alone ; but if the retraction is “before passing of the sentence by the Qazi”, then punishment of slander will be inflicted upon all the witnesses. Imam Zufar says that even in such a case the punishment of slander will be inflicted upon the retracting witness only ;

14. One or two of five witnesses retract .

If five witnesses give evidence of “Zina”, and one of them retracts after stoning, no punishment will be given to the retracting witness, because, four witnesses will still remain, and therefore the evidence will also remains complete. But if, thereafter, one more witness retracts, punishment of slander will then be due upon both retractors, and each one of them will also be responsible for one-fourth of the blood-wit ;

15. Justified witnesses prove to be defective .

If four witnesses give evidence of “Zina” against a man, and these witnesses are justified by “Tazkiyah”, by same other witnesses who bear testimony regarding the competency, of the witnesses who are giving evidence in any case, the former known as the “Muzakki” or purgators. and the accused suffers stoning, and then after it appears that those witnesses were idolaters, or slaves on account of the purgators retracting their evidence of justification, and declaring them to be slaves, or idolaters), in such a case the blood-wit will be due from the purgators, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that in such a case the blood-wit will be due from the public treasury ;

16. Blood-wit due from the slayer of the accused .

If four witnesses give evidence of “Zina” against a man, and the Qazi sentences him to stoning to death, and any person

slays him, in a way other than stoning, and it afterwards comes out that the above witnesses were not competent, in such a case the blood-wit will be due from the slayer ; and the blood-wit thus becoming due will be a charge upon the estate of the slayer, and will not be due from his tribe, because this will be a wilful homicide, for which the tribe will not be responsible and this fine will be discharged within three years after perpetration of the fact, as a due on account of homicide ;

But if no person in this way slays the accused, and he suffers stoning on account of the sentence of the Qazi, and then after it comes out that the witnesses were not competent, the blood-wit will be due from the public treasury, so also, it will be due from the same, where any other person implies the punishment under the authority of the Qazi.

17. Evidence obtained unlawfully .

If witnesses give evidence of “Zina” against a man, declaring that, “they come to know it of it by wilfully looking into the person’s private apartment at the time of the act”, still the evidence will be accepted, and will not be rejected on account of the unlawful manner in which its knowledge was obtained ;

18. Accused’s plea of celibacy .

If four witnesses give evidence of “Zina” against a man, and the accused pleads that, “he is not a married man”, and it happens that he has a wife who has given birth to a child from him, he will be stoned ; and if his wife has not given birth to child from him, but if one man and two women, as witnesses, give evidence of the marriage of the accused, stoning will be executed upon him ;

CHAPTER 4

HADD-USH-SHARAAB, OR PUNISHMENT FOR
DRINKING OF WINE **(Hidayah, Kitab-ut-Hudood, Baab-ush-Sharaab)*

Note

If a Muslim drinks the wine, and he is caught while his breath is still smelling of the wine, or he is brought before the Qazi while he is still intoxicated, and witnesses give evidence that "he has drunk the wine", punishment for drinking wine will be given to him ; and similarly, he will be liable to punishment when he makes the confession that he has drunk the wine while his breath still has the smell of wine; because the offence of drinking the wine is proved against him, and "Taqadam", or distance of time, is not then as the smell of wine still subsists ;

1. No punishment after smell finishes .

If a man makes confession that he has drunk the wine, after the smell has finished, or witnesses give evidence against a man that, "he has drunk wine," after the smell has finished, no punishment will be given to him according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad says that punishment will be given ;

But if witnesses catch hold of a drinker of wine at a time when he is intoxicated, or while he still has the smell of the wine, and bring him to the city where the is a Qazi is present and in the meantime the smell finishes, before they arrive at the seat of justice, still the punishment of drinking the wine will be given to him according to all jurists ;

* Mishkaat, Kitabul Hudood, Baabul Haddil Sharb, Wa Baabo 'Bayanil Khamre Wa Wa'eeda Shaaribehaa.

2. Punishment on drinking "Nabeez"

If a person is intoxicated by drinking the "Nabeez", punishment will be given to him ;

3. Smell alone is not enough.

If the smell of wine is coming from a person, or he vomits wine, still if witnesses have not actually seen him drinking the wine, punishment will not be given to him ;

4. Nor intoxication .

Punishment for drinking the wine will not be due on account of intoxication alone, unless it is known that the person has been intoxicated by voluntary drinking of wine, or of "Nabeez" ;

5. During intoxication .

Punishment will not be given to a drinker of wine, while he is intoxicated, nor until his intoxication has ceased, so that the purpose of it may be achieved ;

6. The punishment .

(a) Free – The punishment for a free person, for drinking the wine or other liquor, is eighty stripes, to be inflicted according to the same rules as in case of "Zina";

(b) Slave – If the drinker of wine is a slave, male or female, the punishment is forty stripes ;

7. Confession can be retracted .

If a person makes confession of drinking the wine, or any other intoxicating liquor, and then after retracts from such confession, punishment will not be inflicted upon given to him ;

8. Proof of offence :

Drinking of the wine is proved by the evidence of two witnesses ; or confession made once only.

9. Extent of intoxication required .

The extent of intoxication which causes the punishment is this that the person intoxicated should not be able to distinguish what is said to him in any manner, nor to distinguish between a man and a woman. This is according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that he should not be able to speak clearly and distinctly ;

10. Confession of any offence during intoxication .

If a person, during the state of intoxication, makes confession of any act which causes punishment, such as "Zina", no punishment will be given to him for it.

But in case of a confession of slander, punishment will be given to him ;

11. Apostacy during intoxication .

If a man, during intoxication, becomes apostate, his wife will not thereby be divorced from him, because infidelity depends upon the belief of a person, and it cannot be exactly known during intoxication.

CHAPTER 5

HADD-IL-QAZF, OR PUNISHMENT FOR SLANDER *

(Hidayah, Kitab-ut-Hudood, Baab Hadd-il-Qazf)

Note

Literally “Qazf”, sense, simply means “accusation”. But legally “Qazf”, signifies the making of a false charge of “Zina” against a married man or woman ; the person making the false charge is known as the “Qaazif”, or slanderer, and the man or woman against the false charge is made is known as the “Maqzoof”, or slandered.

1. Punishment should be ordered by Qazi .

If any person makes a false charge of “Zina” against a man or a woman who is married and does not bring the required number of witnesses, in such a case, if the accused request to the Qazi to pass sentence of punishment for slander against that person, the Qazi will be bound to order the punishment ;

2. The punishment .

(a) **Free** – If the slanderer is free, the punishment for slander is eighty stripes ;

Conditions – the conditions upon which this punishment will be given are : (1) the accused should make request for it ; and (2) the accused should be a married person ;

Inflicting of stripes – the stripes should be inflicted on different parts of the body as in “Zina”, but the person should not be made naked only the outer garment or robe, or clothes stuffed or quilted should be removed ; and the stripes should not be taken off with severity ;

* Qur’an Ch. 24 (Noor), verses 4 and 5 ; Mishkaat ; Kitabul Hudood.

(b) **Slaves** – If the accused is a slave, the punishment for slander is forty stripes ;

Section – Ta'zeer

3. Fine .

Fine can also be imposed by way of Taz'eer the offence. This is according to Imam Abu Yusuf. Many other persons oppose this.

4. Slandering a slave or an infidel .

If a person falsely accuses of “Zina” a male or a female slave, an Umm-e-Walad, or an infidel, he will be punished by Ta'zeer, as “Hadd” does not apply to such a persons.

5. Accusing a Muslim .

If any person falsely accuses a Muslim of any offence other than “Zina” e.g., by calling him a reprobate, or a villain, or an infidel, or a thief, punishment by Ta'zeer will be given to him.

Note : where the aggrieved person is a slave, or so forth, the punishment is to be given in its extremity ; but in the case of abuse of a Muslim, the punishment will depend upon the discretion of the Qazi.

6. Calling a Muslim an ass, or a hog .

If a person calls a Muslim, an ass, or a hog, no punishment will be due unless the person called as such is of a dignified rank, such as a prince or a man of learning.

7. The punishment .

Stripes – The punishment of Ta'zeer consists of three to thirty-nine stripes, according to Imam Abu Hanifah and Imam

Muhammad. But Imam Abu Yusuf says that the maximum number of stripes is seventy-five , and according to his another opinion, it is seventy-nine, and the same is also the opinion of Imam Zufar.

Imprisonment – If the Qazi deems fit, he may unite scourging with imprisonment in the punishment.

8. Infliction of blows or stripes .

Severe most blows or stripes may be used in the punishment by Ta'zeer, because there is already leniency in the number of the stripes. Next to the Ta'zeer, the severe most blows or stripes is in case of punishment by "Hadd" for "Zina"; and next to it the severe most blows or stripes are in the punishment for drinking the wine; and next to it the severe most blows or stripes are in the punishment for slander ;

If person dies – If the person dies on account of the punishment, there will be no due no fine at all.

CHAPTER 6

TA'ZEER OR DISCRETIONARY PUNISHMENT *

(Hidayah, Kitab-ut-Hudood, Fasl Fit Ta'zeer)

DEFINITION

Literally "Ta'zeer", means "prohibition", and also "instruction". But legally it signifies "an infliction not prescribed by the law, as the right of Allah, or of the individual", but has been left on the discretion of the Qazi.

1. Ta'zeer is allowed by the law .

Ta'zeer is allowed by the law. It is based on the authority of Qur'an, where Allah allowed the husbands to punish their wives, for the purpose of correction and amendment ; (Ch. 4 Nisa, verses 34 – 35) and the same also occurs in the Traditions. It is noted that the Holy Prophet punished a person who had called another as perjured ; and all the Companions also agree to this. Reason and Analogy also support that punishment should be given inflicted for acts of offensive nature, so that people may not be habituated in such acts.

2. Of four orders or degrees .

In the "Fatawaa-a-Shaafe'ee", it is said that there are four degrees of Ta'zeer, viz., (1) in respect of the most noble of the people e.g., princes and men of learning it is mere admonition ; (2) in respect of the nobles e.g., commanders of armies and chiefs of districts it is admonition or Jirr, i.e. by taking the offender to the door and exposing him to scorn ; (3) in respect of the middle people e.g., the merchants and shopkeepers it is Jirr, (as above), and also by imprisonment ; and (4) in respect of the lowest people, it is Jirr (as above), imprisonment, and also blows.

* Mishkaat, Kitabul Hudood, Babut Ta'zeer.

As regards the “Mohsin” or “Mohsinah” (i.e. married man or woman) of the slandered person he or she should be free, of sound mind, adult, and Muslim, and also of a chaste in ;

4. Cases which constitute slander .

If a person denies the parentage of another person, saying that, “you are not the son of your known father”, while his mother is married ; or, in the heat of passions says that, “you are not the son of such person”, while the person mentioned is actually his father, the person making such accusation will be liable to be punished for slander ;

5. Claim of punishment for slandering a deceased .

If a person calls another as the, “Child of Zina”, while his mother is already dead, and she was a married woman, in such a case, if the son requests for punishing the person said for slander, the punishment should be inflicted accordingly, because the person has slandered a married woman after her death ;

It may be noted that the right to request for punishment for slander, on behalf of a deceased person, belongs only to the one whose parentage is challenged by the accusation, and this is the child or the parent ; and although the child is an infidel, still infidelity will not prevent a claim of right, unless where the accusation is against the infidel child himself ;

6. Slave cannot request for punishment against his master ; nor a son upon his father .

A slave cannot request for punishment for slander against his master, where the master has slandered his mother, who was a married woman ; nor does it belong to a son to request for punishment for slander against his father, where the father has slandered his mother, who was a married woman ;

But if the mother has another son by another father, that son may request for punishment for slander, on behalf of his mother, against the aforesaid father ;

7. Death of the slandered party .

If any person accuses another of "Zina", and the person so slandered dies, punishment for slander will not be due; and, similarly, if the slandered person dies after the infliction of a part of the punishment upon the slanderer, the remaining part of the punishment will be finished ;

8. Retraction from confession .

If a person makes confession of slander, and then tracts from such confession, his retraction will not be accepted;

9. Words of abuse .

A word of abuse does not amount to slander. If a man calls an Arab a Nabatian ; or, if one says to an Arab, "you are not an Arab" ; or, "O son of rain", or, "the son of his paternal relations", this will not be slander at all.

10. Equivocal accusation .

If a person being, in anger, says to another person, "Zina'at Fil Jabal", and says that he thereby meant, "you climbed up the hill", still punishment for slander will be given to him, according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad is of the view that punishment will not be due.

Similarly, if the words used are, "Zina'at 'Alal Jabal", according to some jurists, punishment for a slander will not be due; while according to some, punishment for slander will be due;

11. Mutual recrimination .

If one persons says to another person that, “you are a “Zaani” (Adulteror), and the other answers, “Nay, but you”, they both will be liable to punishment for slander ;

12. Recrimination between husband and wife .

If a man says to his wife, “you are adulteress”, and she answers, “Nay, but you”, punishment for slander will be due against the woman ; and there will be no La’aan in this case ;

13. First admission, and then denial, of a child .

If a man first admits a child born of his wife, and then denies it, in such a case La’aan will be incumbent ; but if he first denies and then admits, in such a case, punishment of slander will be due against him ;

The parentage of the child will, however be established in such a man, in both cases ;

But if a man says to his wife that, “this is neither my child nor yours”, in such a case, neither La’aan will be incumbent not punishment for slander will be due ;

14. Accusation of a woman having children destitute of father .

If a man accuses of “Zina” a woman who has children, the father of whom is not known, or if he so accuses a woman who has made La’aan, in respect of any of her children having been denied by her husband, whether such children is living or not, in more of these cases will punishment for slander be due, because the signs of “Zina”, namely the children, are found in the woman but if a man accuses of “Zina” a woman who has made La’aan in respect of an accusation of adultery made against her by her

husband, and not on account of his denial of her children, in such a case punishment of slander will be due upon the accuser, as here no signs of "Zina" are found in the woman ;

15. Accusation against a person having unlawful commerce with woman.

If a man has unlawful relation with a woman, in whom he has no right of sexual intercourse, punishment for slander will not be due upon his accuser ;

Under certain restrictions – It may be noted, as a rule, that punishment for slander does not become due by the accusation of any person guilty of such a sexual relation as is in its own nature unlawful, because the term "Zina" signifies a sexual relation of this description ; but where a person has such a sexual relation as is unlawful on some other account, punishment for slander will become due by the accusation of him, as the sexual relation of this nature does not amount of to "Zina".

16. Slandering a deceased Mukatib .

If a person accuses a deceased Mukatib, who has left the goods sufficient to pay his ransom, still punishment for slander will not be due upon the accuser, because here is a doubt in respect of perfect freedom of the Mukhatib. The Companions however differ in their view upon this point,

17. Muslim convert before conversion .

If a person accuses a Muslim convert, who, while still a pagan, had married his mother, punishment for slander will be due upon the accuser, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that it will not be due ;

18. Infidel slandering a Muslim .

If an infidel, living under protection in a Muslim State, accuses a Muslim, punishment for slander will be given to him ;

19. Evidence of person punished for slander .

If punishment for slander is given to a Muslim, his evidence cannot then be received, even if he repents ;

Similarly if an infidel suffers punishment for slander, his evidence will become inadmissible, not only in respect of Muslims, but also in respect of Zimmes. But if this infidel is afterwards converted to the faith, his evidence will then become admissible in respect of both, i.e. Muslims as well as Zimmes ;

20. Infidel accepting the faith during the punishment .

If a single stroke is inflicted on an infidel on account of slander, and he then embraces the faith, and the remaining punishment is then inflicted, in such a case his evidence will become admissible ;

21. Single punishment .

If a man commits “Zina” at many times, or repeatedly drinks wine, and the punishment for either is then given to him, the single punishment, in either case will be considered as punishment for all repetitions of the offence ; and so also, if a person is repeatedly guilty of slander, and punishment for slander is then once given to him ;

BOOK – II *

Hudood

(PRESCRIBED PUNISHMENTS)

(B)

SARAQAH

(THEFT OR LARCINY)

SARAQAH (THEFT OR LARCENY)

CHAPTER 1

SARAQAH

Note

Literally, "Saraqah" means "secretly taking away another's property", but legally it signifies "taking away another's property in a secret manner, when it is in custody, i.e., when it is in security from the hands of other people ; and when its value is not less than ten Dirhams, and it is a undoubted by the property of some person other than the one who takes it away.

(a) Custody : Custody is (1) custody by place, i.e., the place as is generally used for keeping the property, as a house, or a shop, or (2) custody by personal guard, i.e., personal watch over the property.

(b) Secrecy : Saraqah (larceny), includes the beginning and end of the act transaction, when the theft is committed in the day-time ; but the beginning only, when the theft is committed during the night, when the thief secretly breaks into the house, and then takes away the property by open violence. This is because thefts are generally committed during the night, by the thief forcibly carrying away the property, as at that time the owner is not able to get any assistance. If, therefore, the circumstance of the thief's secretly breaking into the place of custody, or house of the owner was not sufficient to establish a charge of theft, punishment with in many cases be prevented : contrary to where the theft is committed during the day-time ; because as the owner can then get the assistance, thefts are never attempted by open violence, at the season ; and therefore, in the establishment of a theft committed during the day-time, the secretly taking away includes both the beginning and the end of the acts.

* Qur'an, Ch. 5 (Maa'idah), verses 38 and 39, Mishkaat, Kitabul Hudood, Baabo Qat'is Saraqahe. 'Ainul Hidayah, Vol. II, pp. 581 to 624

(c) **Kinds** : The “Saraqah-e-Kubra” (greater kind of larceny) is the “highway robbery” which is secretly taking away with respect to the Imam, whose duty is to guard the highways by means of his officials and the “Saraqah-e-Sughra” (inferior kind of larceny) is with respect to the owner, or his substitute.

1. Value of theft to cause the punishment .

If an adult, of sound mind, steals out of undoubted custody ten Dirhams, or the property of the value of ten Dirhams, the law awards the amputation of his hand, Allah has said in the Qur’an “If a man or woman steals, cut off their hands,” (Ch. 5, verse 38), but regard is to be had to the condition of the intellect, and the age ; because independent of these criminality cannot be established, and amputation is the result of criminality.

It is also necessary that the property stolen is of importance, and not of trifling or insignificant value.

2. Freeman and slave .

The slave and the freeman, in respect of amputation, are upon an equal, as in the Qur’anic text relating to it no distinction is made between them. The hand of a slave, therefore, is to be cut off in the same manner as that of a freeman, so that the property of the people may be preserved.

3. Punishment becomes due upon a single confession .

Amputation is to be inflicted upon a single confession, according to Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf is in the view that the hand of a thief is not to be cut off upon a single confession, nor until the confession is repeated twice : and it is also noted from Imam Abu Yusuf that the confession should be made twice at two separate sittings [of the Qazi.

4. Evidence of two witnesses .

Amputation is to be inflicted upon the evidence of two witnesses, because, by the evidence of two witnesses the theft is proved, and fully established, as in all matters of right. But it is necessary for the court to examine the witnesses in respect of the manner of the theft, and also the time and place, because the greater caution, as was mentioned in treating of "Zina". The thief must also be held in confinement, on doubt, until the witnesses are fully examined.

5. All persons involved in one theft.

If a party of persons commits the theft, and each one of them receives ten Dirhams, the hand of each will be cut off ; but if they get less than ten Dirhams each, they will not be liable to amputation, because the occasion for it is stealing to the amount which constitutes larceny, i.e., ten Dirhams. Moreover, amputation is to be inflicted upon each on account of his offence. Therefore regard is to be in respect of each, to the completeness of the standard amount of theft, which is ten Dirhams.

CHAPTER 2

THEFTS WHICH CAUSE AMPUTATION, AND THEFTS
WHICH DO NOT CAUSE IT

*(Hidayah, Kitab-us-Saraqah, Baab Maa Yaqta' Feeh Wa Maa
Laa Yaqta)*

1. Things of trifling nature .

Amputation does not become due on account of theft of a trifling nature, and the use of which is allowed among the Muslims, such as wood, bamboos, grass, fish, fowls, and garden stuff ; because Hazrat Aa'isha has said that in the days of the Holy Prophet this punishment was not given for such petty thefts(Bukhari and Muslims).

2. Things which quickly decay .

Amputation does not become due by such theft of which things as quickly spoil decay, such as milk, flesh-meat, or fruit ; because of the Holy Prophet has said that "the hand shall not be cut off for stealing dates, palm-fruits, or victuals."(Tirmizi , Abu Daud , Nisai , Deneerimi, Ibne Maajah).

By the word victuals, mentioned in the above Tradition, is meant such things as soon spoil, or decay such as victuals cooked for eating, and everything of this description, such as flesh and fruits ; but not grain, because, if a person steals wheat, for example or sugar, all jurists agree that his hand will be cut off.

3. Fruit upon the tree or grain upon the stalk .

Amputation does not becomes due by stealing fruit whilst upon the tree, or grain which has not been reaped, because these are not being considered as in custody.

4. Fermented liquor .

The hand of a thief will not be cut for stealing any fermented liquor, because he may say that his intention in taking it, was, “to spill it ;” and also because some fermented liquors are not lawful property, such as wine for example, and as regards others there is a doubt, as to their being the property.

5. Musical instruments .

The hand will not to be cut off for stealing a guittar or tabor, because these are merely for amusements.

6. Qur’an .

Amputation will not become due by stealing a Qur’an even though it is ornamented. This is the Zahir Rawayat.

7. Door of mosque .

There will be no amputation for stealing the door of a mosque, because this is not an object of custody.

8. Crucifix or chess-board .

Amputation will not because due by stealing a crucifix, even if is of gold, nor by stealing a chess board or chess pieces of gold, because as it is in the thief’s power to excuse himself, by saying, “I took them with a view to break and destroy them, as things prohibited.”

But it will be otherwise in respect to coin bearing the impression of an idol, by the theft of which amputation becomes due; because money is not the object of worship, so that it may be destroyed, and thus leave it in the thief’s power to excuse himself.

But Imam Abu Yusuf, is reported to be of the view that if a crucifix is stolen out of a Christian place of worship, amputation was not be due; but if it is stolen from a house, the hand of the thief will be cut off, because in such a situation it is will be a lawful property, and the object of custody.

9. Free – born infant.

The hand of a thief will not to be cut off for stealing a free-born infant, even there is ornaments upon it ; because a free person is not a property, and the ornament are only appendages ; and also, because the thief can say that “he took it up when it was crying, with a view to please it, or to deliver it to the nurse.”

But Imam Abu Yusuf is of the view that the hand of the thief will be cut off where the value of the ornaments upon the infants amounts to then Dirhams.

It may be noticed that this difference of opinion is only in respect of the child who not capable of walking or speaking, because such a child is not in it’s own power or custody.

10. Adult Slave.

Amputation will not be due in account of stealing an adult slave, because such act does not come under the definition of theft, as it is usurpation, or fraud.

11. Infant Slave .

Amputation will be due for stealing an infant slave, as description of theft is applicable to such offence. But if such infant slave is such as can describe himself, amputation will not be due , because an infant of such description is the same as an adult, as both are equally in their own custody.

But Imam Abu Yusuf is of the view that amputation will not be inflicted for stealing a slave, even if he is an infant destitute of judgment, and is not able to speak.

12. Book :

The hand of a thief will not be cut off for stealing a book, whatever maybe its Subject, because in stealing the book the object of the theft can only be its contents, and that is not the property. But still it may be noticed that the hand will be cut off for stealing a book of accounts, because there the contents are not the object of the theft, but the paper and other materials of which the book is composed, and that amount of appreciable property.

13. Cur dog .

The hand of a thief will not be cut off for stealing the cur-dog, because such an animal is in it's nature a "Mubah-al-Asl"(common property), and not an object of attachment.

14. Drum, tabor, pipe, psaltery .

The hand of a thief will not be cut off for stealing a drum, tabor, pipe or psaltery.

15. Flute .

The hand of a thief will be cut off for stealing a flute made of Siman (a kind of hard wood), ivory, ebony, or box, such as is known, in the Hindustinee dialect, a Sakoon, or Sawdn, as such is an object of custody, and is held in estimation, and is not of a common species.

16. Thing fet with precious stones :

The hand of a thief will be cut off for stealing a ring set with an emerald, a ruby, or a chrysolite, as such are rare articles, and are not taken as of an indifferent nature among Muslims ; nor are they undesirable .Such articles, therefore, are the same as silver or gold.

17. Wooden Utensils .

The hand of a thief will be cut off for stealing utensils made of wood, such as a platter or a door when not fixed in a wall, or a trunk, (even if hand is not to be cut off for stealing a piece of timber), because these articles asquire an intrinsic value on account of their fashion, and are, therefore, objects of custody ; as apposed to matts, because in these the workmanship does not exceed the value of the material of which they are made, and therefore, matts are spread in places where they are not in custody . The jurists, however, agree that amputation will be due for stealing the Baghdad matts, as in them the value of the workmanship is more them that of the article.

It may be noticed, that by stealing a door, or other article of timber not fixed in the wall of a house, amputation will be due where such door or other article is so light as one man, can carry it away.

18. Breach of trust or open rapine .

A breach of trust, by a trustee secreting any property given in his charge, does not cause amputation ; as a deposit is not in custody of the owner. Simarlarly, the hand of a plunderer, or of one who snatches away anything, will not be cut off as the act of such is not theft, because they carry away the property openly, and not in a secret manner ; and the Holy Prophet has said, "the hand of a "plunderer, or a snatcher away of property, or a breaker " of a trust, will not be cut off."(Ahmad, Abu Daud, Tirmizi , Nisai , Ibne Maajah, Ibne Hibban. Also see Muslim).

19. Stealing from the dead .

The hand of a Nibaash or plunderer of the dead, will not be cut off. This is the view of Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf and Imam Shaafe'ee are of the view that amputation will be due upon a Nibaash.

20. Stealing from public treasury .

There will be no amputation for stealing from the public treasury, because everything in it is the common property of all the Muslims, and in it the thief also, as a member of the community, has a share.

21. Property in which the thief has a share .

If a person steals from the property in which he is a co-owner, amputation will not be inflicted.

22. Creditor stealing from his debtor .

If a creditor steals from the property of his debtor, to the amount of his debt, amputation will not, be due, because this does not amount to theft, but it is only an exertion of his right; and a deferred debt is the same as an und deferred, debt in respect of this rule.

The same rule will apply where a person steals any thing which is originally his own property.

But if a creditor steals from his debtor anything of his goods or effects, amputation will be inflicted, upon him, because a creditor is not entitled to take his right out of the debtor's goods or effects except by selling them, with the debtor's consent, and satisfying his debt out of their price.

It is however noticed as an opinion of Imam Abu Yusuf that here also amputation will not be due, because many of the jurists hold that a creditor is entitled to seize the goods of his debtor for the purpose of obtaining his right, or by way of pledge. But to this our jurists say, that as this opinion is not supported by any authority, taking the goods for satisfaction, or by way of pledge, will not be accepted without a plea but, if, the creditor has a plea, by saying "I took these goods of my debtor only as a pledge to secure of my right," or, "as satisfaction for

my right," in such a case punishment will be remitted, because he appears to have acted under a conception based upon the opposite opinion of Imam Abu Yusuf, as above mentioned.

23. Amputation not to be inflicted twice .

If a person steals any good, and suffers amputation of his hand for it, and after returning the property stolen to the owner, again steals the same goods, without any change in it in the interim, period, his foot will not be cut off for such repeated theft.

But if the goods is changed from it's former state , as if a person steals thread, and suffers amputation, and returns the thread to the owner, and the thread is then woven into cloth, and the thief them steals the cloth,) the thief's foot will be cut off, because the thing stolen has been changed into cloth by weaving.

CHAPTER 3

HIRZ (CUSTODY) AND OF TAKING AWAY OF THE PROPERTY FROM THERE

(Hidayah, Kitab-us-Saraqah, Fasl Fil Hirz Wal Akhaza Minho)

1. Stealing from father, mother, child .

If a person steals anything from the property of his father, mother, or son, his hand will not be cut off ; because everyone of them those is at liberty, by a mutual right of use , to take and use the property of the other ; and also, because the goods of each of them is taken, on account of mutual right, as within the custody of the other.

2. From relations within prohibited degrees .

Similarly, if a person steals from the property of his relation within the prohibited degrees, his hand will not be cut off, because of the second of the above mentioned reason, as opposed to the case of persons who are merely friends, because if one of them steals from the other, his hand will be cut off, as his act of theft, will finish their friendship.

3. From stranger in a prohibited relation's house , or from prohibited relation in a stranger's house.

If a person steals, out of the house of his relation within the prohibited degrees, the goods of a stranger, his hand will not be cut off, but if he steals, the goods of a prohibited relative out of the stranger's house, his hand will be cut off ; because in the former case the theft is not a violation of custody while in the latter case it is so.

4. From foster mother .

If a person steals from the property of his foster-mother, his hand will be cut off. This is Zahir Rawayat. But from Imam Abu Yusuf says that his hand will not be cut off.

5. From husband or wife, master or his wife, mistress or her husband .

If, a husband or a wife, steals from the property of either, or a slave from the property of his master, or of his master's wife, or of his mistress's husband, in either of these cases amputation will not be due, because in all of them the thief is, by custom, at liberty to enter the house or apartment of the owner.

Moreover, if in the case of a husband and wife, either steals, any thing from a place of custody belonging exclusively to the other, then also the hand of the thief will not be cut off.

6. Master stealing from his Mukatib .

If a master steals from the property of his Mukatib, his hand will not be cut off, because a master has a right in his Mukatib's property. Similarly, the hand of a thief will not be cut off who steals any thing out of public plunder, because in such a case he has a share. This case, with its reasoning, is taken from Hazart Ali.

7. Various cases of custody .

(a) If a person steals things out of a place which amounts to constitutes custody, such as a house, or from a place which does not amounts to custody, while the owner is near and has them within his guard, his hand will be cut, because he has stolen property from one of the two kinds of custody.

(b) If a person steals property out of a bath, or from a house which the owner allows all men generally to enter, his hand will not be cut off, because general access is allowed to a bath by custom, and to a house by specific permission.

The same rule applies to shop or Caravan Sarai, because the master allows the people to enter a shop or Caravan Sarai. But still, if a person steals, anything from there during the night, his hand will be cut off, as those places are for the protection of property, and people are allowed to enter them in the day time only.

(c) If a person steals goods out of a mosque, and the owner is near those goods, the hand of the thief will be cut off, as they are under custody by personal guard ; but if a person steals goods out of a bath or house, the owner of which allows people to enter it, and the proprietor of the goods be near them, the thief's hand will not be cut off. The difference between a mosque, and the bath or house now mentioned, is that a mosque is not erected with a view for security of the property, and, therefore, custody is in that case regarded as constituted by personal guard, and not by means of the place ; as opposed to the house or bath, as these are for the purpose of security, and therefore custody is not regarded as depending upon personal guard.

8. Guest stealing from his host .

If a guest steals the property of his host, his hand will not cut off, as the house of the host is not a place of custody in respect of the guest, because the guest is allowed to enter it, and also, because a guest is as an inhabitant of the house of his host ; the act of the guest, therefore, is treachery, or breach of trust only, but not theft.

9. Stealing in a Sarai .

If a person steals any thing in a Sarai, and does not carry it entirely out of such Sarai, his hand will not be cut off.

But if, the Sarai be contains a number of independent habitations, the occupiers of which have no common use of the area or square, excepting merely as a passage, and a person steals any thing out of one of these habitations, and carries it away into the area, his hand will be cut off.

10. Case of Burglary .

(a) If a thief breaks through the wall of a house, and enters in it, and takes away the property, and delivers it to an accomplice standing at the entrance of the hole, amputation will not be due for either of the parties, because the thief who entered the house did not carry out the property ; and that property, before his coming out, fell into the possession of another, which possession is regarded ; and the other thief has not committed any violation of custody, as he did not enter into the place of custody ; and therefore the full import of theft is not applicable to the act of either of them.

But Imam Abu Yusuf says that if the thief who goes within the house puts his hand through the hole, and the thief without thus takes the property from him, the hand of the former will be cut off. But if he who remains without puts his hand through the hole into the house, and thus takes the property from him who is within, each of them will be will be purchased with amputation.

But if the thief within throws the property out, through the hole, into the highway, and then comes forth, and takes it away, his hand will not be cut off.

Imam Zufar is also of the view that his hand will not be cut off.

Where, however, the thief comes out of the house, and goes away without carrying away the property , he as the destroyer of that property, and not a thief.

If the thief loads the property upon an ass or any other animal, and, leading the animal, takes away the property out of the house, his hand will be cut off.

(b) If a party, or band of robbers, enters the place of custody of any person, and some of them take away the property whilst the others stand by, in such a case all of them will be punishable with amputation.

(c) If a person makes a hole in the wall of a house, and extends his hand through, it and thus takes any thing out, still his hand will not be cut off. This is the Zahir Rawayat.

But Imam Abu Yusuf is often view that his hand will be struck off.

11. Theft committed upon the person .

If a person keeps his money in his sleeve, and ties a knot upon it, keeping the knot on the outside, and a cutpurse tears off the part of the sleeve containing the money, and takes it away, he will not be punishable with amputation.

But if, a person keeps his money in his sleeve, and ties a knot upon it ,keeping the knot inside the sleeve, and a cutpurse carries it away by putting his hand under the sleeve, and, tearing off the part containing the money, so taking it away, his hand will be cut off, because here , he puts his hand inside the place of custody, i.e. the sleeve, while, in the former case, he took away the money from outside.

But if, he does not tear away the part containing the money, but opens or unties the knot, and then takes away the money, the rule will be reversed. In the first of these cases his hand will be cut off, but not in the second.

12. Stealing out of a string of camels or camel's load .

If a person steals one out of the line of many camels, or steals a load from one of the camels, his hand will not be cut off, because as regards the camel or the load there is a doubt whether they are in custody or not.

But if, there is a person looking after the load, the jurists say that in such a case the hand of the thief will be cut off. If, also, the thief breaks open the package, and takes away its contents, his hand will be cut off, because in such a case the package will amount to custody.

13. Theft from custody of the person .

If a person steals a bag or a package, having the goods, from a place which does not amount to, custody, such as the high-way, while the owner of the goods is watching or sleeping near them, his hand will be cut off, because those goods are in custody on account of the guard of their owner, as regard is given to the customary mode of watching things, and the owner of the bag sitting near or sleeping upon it is considered as the guard of it by custom ; and his sleeping near it is also, from custom, considered as guarding it. This is the approved view.

SECTION

MANNER OF CUTTING OFF THE HAND OF A THIEF, AND
OF THE EXECUTION THEREOF

*(Hidayah, Kitab-us-Saraqah, Fasl Fil Kaifiyat-il-Qat'e Wa
Isbaatehi)*

1. For the first offence .

The right hand of a thief should be cut off at the joint of the wrist, and the stump afterwards cauterised.

Amputation has been ordained by the text of the Holy Qur'an; itself (Ch 5, verse 38) and ,as reported by Hazrat Abdullah Ibne Mas'ud, it is the right hand which is to be cut off (Tirmizi).The amputation should to be performed at the wrist, because the word yed, in the Holy Qur'an, means the whole arm up to the shoulder, and as the wrist joint is inclosed in it, that is certified, wherefore in that sense the text is followed .Moreover, it is reported in "Naqle Saheeh" that the Holy Prophet, ordered the hand of a thief to be cut off at the wrist.

The cautery is to be applied to the stump ; because of a precept of the Holy Prophet, "cut off the hand of a "thief, and cauterise the part" (Haakim and Darru Qutni, on the authority of Hazrat Abu Hurairah); and also, because, if the cautery is not applied, the amputation may prove dangerous for the life , and punishment is to be given as a warning and determent, but not for the loss of life.

2. For the second offence .

If the thief who has thus been deprived of his hand , again commits the theft, his left foot will be cut off.

3. For the third time .

And if, he again commits the of theft, a third time, he is not to suffer any further mutilation, but should be imprisoned, and held in confinement, until he repents.

As regards the time sufficient to effect and confirm such repentance there are various opinions. Some jurists says that this is to be left to the judgment of the Imam or Qazi. Some say, that the imprisonment should be for one year ; and some say, that it should be until death ; whilst some, maintain that he should be held until such time as repentance becomes apparent from his conversation and behaviour.

What is said above is based on a favourable construction of the law, and our modern jurists say that Ta'zeer, or discretionary correction, should also be inflicted.

4. In case of defect in the hand or the foot .

If the left hand or right foot of a thief is paralysed, or has been lost by accident, his right hand or left foot should not be cut off.

Similarly, the right hand of a thief should not be cut off where the thumb or any two fingers of the left hand are lost or are useless. But if only one finger of the left hand is useless or lost, the right hand can be cut off.

5. Executioner cutting off left hand instead of right hand .

If the Qazi orders the executioner to cut off the right hand of any thief, and the executioner wilfully cuts off his left hand, no punishment will be due against the executioner, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that where the act of the executioner is intentional, he will be responsible for the hand, but where it is by mistake, he will incur no retribution.

Imam Zufar, however, says that in the case of mistake also the executor shall be responsible, and this is according to analogy.

6. Presence of injured party is necessary .

A decree of amputation cannot be passed against a thief, unless the person from whom the property was stolen is present, and demands prosecution for the theft, because demands for prosecution is necessary for the proof of theft ; and in respect of this rule, it does not matters whether the theft is proved by confession or by evidence.

It may be noted, according to our jurists, a sentence of amputation cannot be executed unless the person robbed is present, because, as regards the punishment, its execution supplements the decree of the Qazi.

7. Theft of trust, deposit, or so forth.

If a person steals a deposit from the trustee, or usurped the property from the usurper, or the property is usuriously acquired from the usurer, as when a person take twenty Dirhams instead of ten Dirhams, and take possession of the same, and another steal, from him twenty Dirhams, including the ten so acquired, these are entitled to prosecute the thief and to get order for amputation of his hand. Similarly in the cases of trust or of usurpation, the owner of the deposit, or of the property usurped, is entitled to prosecute the thief, and to get order for amputation of his hand.

But Imam Zufar and Imam Shaafe'ee say that the thief's hand is not to be cut off on the demand of the usurper or the trustee.

The same difference of opinion is where a person steals property form an hirer, or borrower, or Mozarib, or a holder of Bazdt stock, or a person having possession of property with a view to purchase, or the holder of a pawn, or from any person in whose hands property is, and in whom the charge of it is vested, even though he is not the actual owner, such as the trustee of a

charitable property, or a father, or executor. In all such cases the hand of the thief will also be cut off at the demand of the owner of the stolen property.

But in the case of a pawn the thief's hand will not be cut off at the demand of the pawner, unless the property stolen is with the thief after payment of the pawnholder's debt, because the pawner has no right to the property or claim upon it until the debt be paid.

8. Thief stealing from a thief .

If the hand of a thief is cut off for stealing any property, and another thief steals property from him, neither the first thief nor the owner are entitled to prosecute the second thief ; because the property is not appreciable in respect to the first thief, because if it was destroyed in his hands he was not responsible and it is not protected in respect of the owner, because if it was destroyed in the hands of the first thief, he could not make him responsible. The second theft, therefore, is not punishable with amputation.

But, the second thief steals the property before suffering amputation by the first thief, or after the remission of the punishment on account of some doubt, his hand will be cut off at the demand of the first thief ; because, in this case the property is appreciable in respect of the first thief, as it would be unappreciable in respect of him only as a result of amputation ; but here as he has not suffered amputation, he is, therefore, in this case, the same as a usurper.

9. Restoration of property before punishment .

If a thief returns the property stolen to the owner, before the latter has demanded any prosecution against him, and the owner then brings his complaint before the person in authority, in this case, then, according to the Zahir Rawayat, the hand of the thief will not be cut off.

But Imam Abu Yusuf has said that his hand will be cut off, on account of the analogy between this and a case where the thief returns the property to the owner, after the accusation.

But it will be otherwise where the thief returns the property after accusation and the production of evidence, because in such a case his hand will be cut off, because the prosecution has arrived at its completion, and is therefore accounted still to remain, though the thief has returned the goods at the time of inflicting of the amputation.

10. Gift of property by the owner to thief after sentence .

If the Qazi decrees amputation, and the owner of the property stolen then takes it, and gives it as gift of it to the thief, his hand will not be cut off ; and similarly, if he sells it to the thief.

But Imam Zufar and Imam Shaafe'ee are of the view that the thief will be liable to amputation, and the same view is in one case, noted from Imam Abu Yusuf.

11. Depreciation of the property .

If the value of the property stolen, by depreciation, is reduced to within the standard of theft i.e., ten Dirhams, after the decree and before its execution, amputation will not be executed.

But Imam Muhammad says that amputation will be inflicted. Imam Zufar and Imam Shaafe'ee are also of the same view.

12. The thief claiming ownership in the property .

If, after the witnesses give evidence of the theft, the thief pleads that the goods alleged to have been stolen also his own property, his hand will not be cut off even though he produces no evidence in support of his plea.

13. One of two thieves claiming ownership in the property .

If two persons confess the theft, and one of them afterwards pleads that the property belongs to him, amputation will not be inflicted upon either of them, because the retraction is admitted and approved in respect of the person retracting, and this gives rise to a doubt in respect of the other thief also, as the theft, in this case, is proved upon the evidence of both jointly, and therefore the act of both is one act.

14. If one of the two thieves abscond .

If two persons jointly commit a theft, and one of them absconds, and two witnesses give evidence in respect of the theft, as committed by both, against the one who is present, his hand will be cut off, according to the most recent opinion of Imam Abu Hanifah. Imam Abu Yusuf and Imam Muhammad are of the same view.

15. Confession of theft by a slave .

If a Mahjoor slave makes confession that "he has stolen ten Dirhams," and also produces them, his hand will be cut off, and the property stolen will be returned to the person who has been robbed of it. This is according to of Imam Abu Hanifah.

But Imam Abu Yusuf says, that his hand will be cut off, but the ten Dirhams will belong to his master.

But Imam Muhammad, is of the view says that his hand will not be cut off, and the ten Dirhams will belong to his master.

All this is based on the supposition that the master denies the allegation of his slave.

But if the slave confesses that "he had stolen certain property, which does not exist, but is lost," his hand will be cut off, according to all our jurists.

Moreover if the slave is a Mazoon, his hand will be cut off, whether the property stolen is existing or not.

But Imam Zufar says that the hand of a Mazoon will not be cut off in any of such cases.

16. Stolen property lost or expended .

If, after execution of amputation upon a thief, the actual property stolen yet remains in his possession, it should be returned to the owner, as it still remains within his ownership. But if the property is not with the thief, he will not be responsible for it, whether it has been consumed or lost. This is the view of Imam Abu Yusuf and Imam Abu Hanifah, and such is also the rule of the Rawayat Mashhoor. Imam Hasan has noted from Imam Abu Hanifah, that satisfaction is due where the property has been consumed or expended.

17. One punishment for all previous same offences ; and responsibility of the thief for stolen properties .

If a person is repeatedly guilty of theft, and suffers amputation for any particular theft, such amputation will suffice in respect of all the thefts : and there will also be no responsibility for the property stolen in any of them, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that the thief will be responsible for the property stolen in every theft except the one for which he has suffered amputation. But this is where only one of the several owners is present.

But if all of them are present, and the thief suffers amputation at the demand of all, in such a case he will not be responsible for anything to any one of them, according to the agreed opinion of all the jurists.

The same difference of opinion is in a case where a thief repeatedly steals property from one and the same person, and

that person demand prosecution upon one of the thefts, and the thief suffers amputation for it ; then according to Imam Abu Hanifah, the thief will not be responsible for the property stolen in any of the other cases. But according to Imam Abu Yusuf and Imam Muhammad, he will be responsible.

CHAPTER 4

ACTS OF A THIEF IN RESPECT OF THE STOLEN PROPERTY

*(Hidayah, Kitab-us-Saraqah, Baab Maa Yuhdis al-Saariq Fis
Saraqah)*

1. Thief tearing cloth before carrying out of custody .

If a thief steals a piece of cloth, and tears it in two, in the house of the owner of the cloth, and then takes it out of the house, and carries it away, and the value of the cloth, after being torn away, is of ten Dirhams, the hand of the thief will be cut off.

But Imam Abu Yusuf say that his hand will not be cut off.

2. Killing an animal and then stealing it .

If a thief catches a goat, and slaughter it within the house of the owner, and then conveys it forth, his hand will not be cut off ; because in such a case the theft is, in the end, a theft of flesh meat ; and the hand is not cut off for stealing flesh meat.

3. Thief converting gold or silver in coins .

If a person steals gold or silver, to such an amount which may cause amputation, and then changes the same into Dirhams, or Deenars, his hand will be cut off, and the Dirhams or Deenars will be given to the person who has been robbed. This is the view of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that the person who has been robbed will not be entitled to take the Dirhams or Deenars.

4. Thief dying the stolen cloth .

If a person steals cloth, and then dyes it red, and afterwards suffers amputation for the theft, the cloth will not be taken back from him ; nor will the value be taken from him by way of satisfaction. This is the view of Imam Abu Hanifah and Imam Abu Yusuf.

But Imam Muhammad is of the view that the red cloth will be taken from him, and he will be paid for the expense of dying.

CHAPTER 5

HIGHWAY ROBBERY *

(Hidayah, Kitab-us-Saraqah, Baab Qat'e-al-Tareeq)

1. Conditions.

There are six conditions which govern highway robbery, viz., (1) the robbers are so powerful that the wayfarers are not able to face them ; and then robbery should be by weapons, sticks or stones ; (2) the place of robbery should be at a long from the city ; (3) the robbery should be in Darul Islam ; (4) the goods they rob should be of the value punishment for theft ; (5) the robbers should be strangers to the person robbed ; and (6) they are caught before they repent, because of they are caught after repentance, punishment of Hadd will not be applicable to them.

2. The punishment .

Qur'an says, "the only punishment of those who wage war against Allah and His Messenger, and strive to make mischief in the land, is that they should be put to death, or crucified, or their hands and their feet should be cut off on opposite sides, or they should be imprisoned." (Ch. 4 Maa'idah, verse, 33)

According to Hazrat Ibne Abbas, the angel Gabriel explained this verse to the Holy Prophet that (a) the one who commits murder, but do not rob the property is to be put to death (b) the one who commits murder and also robs the property is to be crucified ; (c) the one who robs the property, but do not commit murder, his right hand and left foot is to be cut off ; and (d) the one who neither commits murder nor robs the property, but merely threatens, he is to be removed from the earth, which, according to Imam Shaafe'ee and Imam Ahmad, means exile, and according to Imam Abu Hanifah, imprisonment. (Also see Abu Daud).

3. If caught before committing the offence .

If a gang, or an individual, able to overpower the opponent go out with the intention to commit robbery, and they all, or he is caught before murdering anybody, or robbing the goods of anybody, the Imam will put them, or him, into the prison till they, or he, repent.

4. If they commit the offence .

If they rob the goods of anybody, and the goods robbed are of the value of ten Dirhams or more for each, when divided among them, then the right hands and left feet of all of them will be cut off, and they commit the murder, but do not rob any goods, they all will be put to death for retaliation and if they commit murder and also rob the goods, the Imam will have the option to either (a) cut off their right hands and left feet and (also) put them to death or crucify them, or (b) only put them to death or (c) only crucify them.

But Imam Muhammad is of the view that the Imam can only put them to death or crucify them ; but he cannot cut off their hands and feet,

Imam Abu Hanifah and Imam Abu Yusuf however say that putting to death or crucifying after cutting off the hands and feet is only one punishment.

Note : (a) the goods robbed should be of a Muslim or a Zimmi. If the goods are of anybody else, the Hadd will not be inflicted.

(b) In the imposition the punishment of the Hadd in such a case, the heirs of the murdered ones have no right to forgive the accused.

5. Manner of crucifying .

According to Qadooree and Karakhi, the accused should be hanged and then his stomach should be pierced with a spear, and then left to die ; and therefore he should be kept on hanging for three days.

6. Ransom for the robbed goods.

If the accused is put to death as punishment of Hadd, no ransom for the robbed goods will be obligatory on him.

7. If (even) one commits the murder .

If (even) one member of the gang of robbers commits the murder, all members of the gang will be liable to be put to death, as the punishment or “Muhaaribah”, and “Muhaaribah” is that in which some fight and some help them, and if the fighters are repelled, they take refuge among their helpers.

8. If robber causes wounds only .

If a robber does not murder nor robs the goods, but only causes wounds to anybody, then in case of the wounds which are subject to retaliation, the retaliation ; and in case of wounds which are not subject to retaliation, the compensation, will be taken. The right of retaliation or compensation, in such cases will vest in the heirs of the wounded person.

9. If robber robs the goods and also causes the wounds .

If a robber robs the goods of anybody, and then also causes the wounds to him, then his right hand and left foot will be cut off, and no compensation for the wounds will be taken from him.

10. If robber is caught after repentance .

If a robber is caught after repentance, and he has committed intentional murder, then the heirs of the murdered person will have the right to get the robber put to death in retaliation, or forgive him.

Note : (a) Repentance also implies return of the robbed goods, if any.

(b) If robber destroys the goods, or they are lost, then the robber will be liable to pay ransom for it.

11. If a minor, lunatic, or near relative of the robbed person is among the gang .

If among the gang of robbers there is a minor, or a lunatic, or a near relative (Zu-Rehm) of the robbed person, then the punishment of Hadd will not be given to any members of the gang. This is according to Imam Abu Hanifah and Imam Zufar. But Imam Abu Yusuf is of the view that if the major and sane members of the gang commit the robbery, they will be liable to be punished by Hadd, and the minor and lunatics will be exempted from punishment.

Note : (a) If Hadd is not applicable, the heirs of the robbed person will have the right to retaliation from the robbers or forgive them.

(b) If some members of a caravan commit robbery upon other members of it, the Hadd of robbery will not to be inflicted.

12. Robbery in the city or between two nearing cities .

If robbery is committed in a city, or between two cities only one mile away from each other, during the day or night, then, according to Istehsaan, it will be not robbery; but according to Qiyas, it is robbery and this is also the view of Imam Shaafe'ee.

But Imam Abu Yusuf is of the view that punishment of cutting of the hand and foot will be given when robbery is committed out of the city, even if it is near the city. Another view of Imam Abu Yusuf however is that if robbery is committed by weapons in the day, or by weapons or sticks in the night, this will be robbery. Decisions are given on the view of Imam Abu Yusuf.

13. If a person is strangled to death .

If a person is strangled to death by anybody, then, according to Imam Abu Hanifah, the "deeyat" ransom of the murdered one will be on the " 'Aaqilah " tribe of the accused.

If the accused is guilty of causing strangulation in the city several times, then he will be put to death.

BOOK – III *

KAFALAT

(BAIL OR SECURITY)

KAFALAT

(BAIL OR SECURITY)
(*Hidayah, Kitab-ul-Kafalat*)

NOTE

Literally, "Kafalat", means to "join" and legally, it signifies the joining of one person to another in respect of any claim. In other words to become the surety for another person in respect of his liability is known as "Kafalat". The person who becomes surety for any other in respect of his person or any claim due against him is known as the "Kafeel", or the surety ; the claim itself in favour of which surety is given, whether in respect of person or property, is known as the "Makfool Beh" ; the creditor is known as the "Makfool Lahu" , or the creditor ; and the person for whom surety is given known as the "Makfool 'Anho", or the debtor. In the case of surety for the person, however, the terms "Makfool Beh" and "Makfool 'Anho" relate to the same thing. "Kafalat" also has the sanction of the Holy Qur'an (vide Ch. 3. Aale Imran, Verse 37).

CHAPTER 1

SECURITY

1. Kinds of SECURITY .

Security is of two kinds, viz., (1) security for the person which is known as "Haazir Zaaminee" ; and (2) Security for property which is known as "Maal Zaaminee".

2. Security for the person .

(a) Security for the person is valid ; and on account of it the security (i.e. "Kafeel") becomes bound to produce the debtor (i.e. "Makfool 'Anho") for whom he has stood surety.

* Qur'an, Ch. 3 (Aale Imran) verse 39, Abu Daud, Tirmizi, Ahmad, 'Aainul Hidayah, Vol. III, pp. 261 to 326.

(b) **Forms of Security** – Security for the person is constituted, where a person says, “I am a security for the person of such a man,” or, “for his neck”, or, “for his soul”, or, “for his body”, or, “for his face”, or, “for his head”, as all these really mean the “whole of the person”. Similar is the case as regards the words, “for half of such a man,” or, “for one third”, or, “for a part”, of such a man. Similarly, if a man says, “I am responsible for such a man”, or, “this is upon me”, or, “this is towards me”, all these words also constitute a valid security ;

(c) **Responsibility** – The surety becomes bond to produce the debtor for whom he has stood security, at the appointed time ; and in case of failure, he becomes liable for imprisonment ;

(d) **Disappearance** – If the debtor disappears, the security will be given time to search for him ; and the contract will be fulfilled by producing the debtor ; but if he fails to produce the debtor, the Qazi will put him into prison ;

(e) **Death of the debtor** – If, in the case of security for the person, the debtor dies, the surety will then be released from his responsibility.

(f) **Death of the security** – The death of the security will finish the contract of security. But it will be otherwise in the case of security for the property, because, if the security for property dies, the responsibility will not finish, as it will have to be discharged by means of his property, to the extent of the amount he has made himself liable ;

(g) **Death of the creditor** – If the creditor dies, his executors, or his heirs, will be entitled to claim the fulfilment from the security ; because heirs and executors are the representatives of the dead one.

(h) **Release of the security** – If, in the case of security for the person, even if the security has not stipulated his release

from the security on production of the person, he will be released on such production. Similarly, the security will become exempted from his obligation on production of the person, without the acceptance of the claimant (creditor) required as a condition, in the same way as in payment of a debt ;

(i) **Debtor presenting himself** – If the debtor of himself presents his person, even then, the security will be released from the responsibility of the security ;

(j) **Production by a messenger** – It will also be lawful if the agent or messenger of the security produces the debtor ;

(k) **Suspension of the claim** : If a person becomes security for the appearance of another person, on this condition that, if he does not produce him within a specified time, he shall then be responsible for the claim upon him, and if he fails to produce him, he will then be bound to pay the claim, because in such a case a security for property will be suspended on the condition of non-producing the person of the debtor within a fixed time. Therefore, when the condition is not fulfilled, the security will become responsible for the claim ; and he will not be released from the security for the person ; because security for the person and security for the property are not incompatible;

(l) **Death of debtor during suspension of the claim** – If a person is security for the production of another person on a fixed time, on account of a condition of payment of the claim upon the other himself, then, in case of failure, and the debtor dies before the fixed time, he will be in such a case security for the property ; because here the condition on which he had undertaken the responsibility clearly takes place ;

(m) **Security for person in the case of claim for property** – If a person claims, say, one hundred Dinaars from another person, with or without explanation of their quality, and a third person becomes security for the person of the debtor, on the condition

that, "if he does not produce him tomorrow, he shall be responsible for the hundred Dinaars", and he fails to deliver him on the morrow, in such a case, according to Imam Abu Hanifah and Imam Abu Yusuf, he will be liable to pay for the hundred Dineers. But Imam Muhammad says that if the quality of the Dinaars is not explained before the appearance of the security, the claimant will have no right afterwards to explain their quality and demand them from the surety ;

(n) **Security for the person in case of punishment** – Security for the person will not be lawful in case of punishment and retaliation, according to Imam Abu Hanifah ; meaning there by that the Qazi has no power to get it by force ;

(o) **If offered by the accused** – But if, the person upon whom punishment or retaliation is claimed, himself gives the security, it will be admissible ;

(p) **Pledge or security for any tribute** – It is also valid to take a pledge, or accept a security, for the payment of any fixed tribute, because tribute is also a debt of which the payment is demanded, and it can be satisfied by the pledge or the security, and, therefore, the object of these contracts will be satisfied ;

(q) **Security from two persons** – If security for any person is first taken from one person and then from another person, the security in such a case will be valid in both of them ;

3. Security for the property .

Security for property is valid, whether the extent of the property is known or not known if it is based on a lawful debt, meaning thereby that a debt which cannot be finished except by payment or exemption ; as opposed to a claim of person which is a debt due by a "Mukatib" to his master, because it can possibly become void without payment or exemption, due to inability of the "Mukatib" to pay it ;

(a) **Extent known or not known** – Property is known in its extent where, for example, the security says to the creditor, “I am security for such a person who owes you one thousand Dirhams” ;

(b) **Extent not known**– Property is not known in its extent where a person says, “I am security for the debt which such a person owes to you”, or, “I am security in this sale for whatever claim can hereafter be made on the goods of it”, such a security is known as “Kafalat-bid-Dark”, or security for accidents, i.e., for whatever may happen ;

Moreover, security is also valid in respect of an unintentional wound on the head which is known as “Shajjatah”, even though there is in it great uncertainty, because it is possible that death may occur, which will induce retaliation ; and it is also possible that a recovery may take place in which case only a fine of property will be required ;

4. Demand from security or debtor .

The creditor will be entitled to demand the payment from the debtor or from the security ; because security does not imply exemption of the debtor from the liability, unless it is put as a condition of the security, in which case the contract of security will be a contract of the liability of the security alone ;

5. Or from both .

The creditor will also be entitled to call upon both, i.e. the security as well as the debtor, to pay the amount of security to him. But it will, otherwise where the owner demands the compensation for his property from one of the two usurpers (i.e. the original usurper, or the one who has usurped from him), because he is not entitled then to demand it from the other ;

6. Security may be suspended .

The suspension of security upon condition is valid. This if

a person says to another person, "if you sell your goods to Zaid, the price will be upon me", or, "if anything is due to you from such a person, that will be upon me". In all such cases the security is valid.

But it is however, necessary that the condition on which it is suspended should be such as is generally adapted in the contract of security, either by depending upon the liability of the right, as if the security says, "if the goods of the sale are not claimed by another person, I myself will be responsible for the price", or, by depending upon the possibility of the exaction of a debt as if he says, "upon Zaid, i.e. the debtor, arriving", or, by depending upon the impossibility of the exaction of a debt as if he says, "upon the person, i.e. the debtor, disappearing". It may be noted that suspension upon a condition which is not certain, e.g., falling of rain, or blowing of the wind, will not be valid.

7. Security in an unlimited manner.

If the security says to the creditor, "I am security for the debt to you by such a person", and it is afterwards proved by witnesses that the debt amounts to one thousand Dirhams, the security will be liable for that sum. But if the amount of the debt is not proved by witnesses, the word of the security in respect of the amount which he admits will be accepted; and in such a case the admission of a greater amount by the debtor will not be accepted against the surety ;

8. Security with or without consent of the debtor .

It is lawful to become security , with or without the consent of the debtor. But if security is given without the consent of the debtor, the security, after satisfying the debt to the creditor, cannot claim it from the debtor .

But the security will have a right to repayment, from the debtor, of the sum which he may have paid on his account on account of the responsibility he undertook by his consent.

9. Reimbursement .

But the security will not be entitled to claim reimbursement until he has actually satisfied the claim due upon the debtor. But, if the creditor importunes the security in pursuit of his claim, then the security can also in the same manner importune the debtor and if the security is imprisoned by the creditor, the surety will in the same manner be entitled to imprison the debtor also.

10. Exemption by the creditor .

If the creditor remits the debt to the debtor or gets the payment, from him, the security will be released from the liability. But if he exempts the security, the debtor thereby will not become exempted from his debt .The same applies to a suspension of the claim, and, therefore, if the creditor allows a respite to the debtor, or suspends his claim upon him for a long period, such respite or suspension will also operate in favour of the security .But if it is granted to the security, it will not operate in favour of the debtor.

11. Compounding of the debt .

If a surety compounds the debt of the debtor with the claimant(creditor), it will release both the security as well as the debtor ;

In such a case the surety will be entitled to get the actual amount compounded with the creditor, from the debtor, if it is in terms of money, if he had become security at the desire of the debtor. But if the compounding is not in terms of money, but any merchandise of goods, then the security will be entitled to get the full amount mentioned in the security bond, from the debtor ;

But if the security compounds for an exemption for himself only, it will not release the debtor, because such exemption is merely for the security for the claim upon him. And if the security was with the consent of the debtor, then the security will be entitled to get from him the amount he has

actually paid to the creditor out of the amount of debt ; and the liability for payment of the balance of the debt to the creditor will remain upon the debtor ;

12. Security's right .

The security's right against the debtor depends upon the conditions of his exemption or discharge. Thus, if the creditor says to the security, "you are discharged from the claim by me", the security will be entitled to receive the amount in question from the debtor if he had become security on the desire of the debtor. But if he merely says, "I have discharged you", the security will not be entitled to anything from the debtor. If he says, "you are discharged", then according to Imam Muhammad, it is the same as saying, "I have discharged you" ; while according to Imam Abu Yusuf , it is similar to the saying, "you are discharged from the claim by me" ;

13. Discharge from security.

An discharge from security cannot be suspended upon a condition. It is not lawful because such a discharge, as well as that of other description, involves an endowment with the right of property, and suspension of discharge with the right of property is not valid ;

14. Security in case of punishment or "Qisaas" (retaliation) .

Security is not valid in respect of any right of which the fulfilment is not practicable by means of security, as in cases of punishment or "Qisaas" (retaliation). But security for the persons of the accused under the sentence of such punishments is valid ;

15. Security for price, but not for goods .

A person can lawfully become security, for the purchaser, for the payment of the price, because price is a debt ; but it is not valid to become security, for anybody for the goods.

16. Security for performance of work by animal or slave .

If a person takes on hire a specific animal of one for carrying the burden, and another becomes surety for the animal carrying the burden, it will not be valid because the animal is the property of another ; but if the animal is not specific, then surety may be valid because in such a case the surety may supply his own animal for the work. Similarly, in case of getting a slave on hire for service, surety given for his doing the service will not be valid, because the slave is not the property of the surety, and, therefore, he has no power to enforce him to do what he has undertaken ;

17. Consent of the creditor .

A contract of security cannot be valid unless it is made with the consent of the creditor. This is the view of Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf is of the view that a contract of security can be valid, if, having been made without the knowledge of the creditor, it gets his consent after it is notified to him. This disagreement relates to both the security for the person as well as the security for the property ;

18. Except where the debtor is dying .

But Contract of security will be valid, even without the consent of the creditor, only in one case, namely, where a dying person says to his heirs, “you be security for whatever debts I may owe”, and the heirs become security accordingly, in the absence of the creditors ;

19. Gratuitous Security .

If a debtor dies without leaving any property, and another becomes security to his creditors, such security is not valid, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that it is valid ;

20. Debtor paying to the surety before the surety paying to the creditor.

If a person, on the desire of a debtor, becomes his security for, say, one thousand Dirhams which he owes, and the debtor gives to the surety one thousand Dirhams by way of payment prior to the surety pays to the creditor, the debtor will not be in such a case entitled to take back the money he has paid to the security ; because the surety in such a case becomes the owner of it, and if he earns any profit out of it, during the period of its receipt by him and its payment to the creditor, he will not be required to give it by way of charity.

It will be otherwise where the debtor gives the amount to the security, and says to him, "take this amount and give it to the creditor", because in such a case the security will similarly be a trustee, and will have no right of ownership in the amount ; and, therefore, the debtor will be entitled to take it back from the security ;

21. Delivery of the substance by debtor to security .

If security is given say, for a "Kur" of wheat, and the debtor gives a "Kur" of wheat to the security, and the security sells it and earns profit out of it, in such a case the profit so earned is, in the eye of law, the right of the security, and it will not be incumbent on him to give it to charity, on the same principle as explained above with respect to the money ;

22. Surety discharged by an " 'Ainah " Sale (i.e. Sale on Credit) .

If a person becomes security, on the desire of the debtor, for a debt, say, of one thousand Dirhams, and the debtor afterwards desires him first to purchase on his account silk of the value of one thousand five hundred Dirhams, in the manner of an " 'Ainah" sale, and then to resell it, and discharge the debt by the price, and the surety does accordingly, the purchase so made will

be considered as on his own account, and not on account of the debtor, and he will have, of consequence, to bear the loss, if any, arising from the “Ainah” sale ;

23. Evidence against the contract of security .

If a person becomes security for another person, for “whatever may be proved to be due from him”, or for “whatever the Qazi may decree against him”, and the debtor then after disappears, and the creditor offers to prove, by evidence, against the security, that the amount due to him is, say, one thousand Dirhams, such evidence will not be accepted;

24. Order against security as well as debtor .

If a creditor prefers a claim before the Qazi to this effect, “that an absentee (debtor) owes him one thousand Dirhams, and that a particular person present is, on the desire of the absentee (debtor), the security for the same”, and proves his claim by evidence, in such a case the Qazi should pass an order against both the debtor and the security. But, if the security had been given without the desire of the debtor, the Qazi should in such a case pass the order against the security only ; and in such a case the evidence produced by the creditor will be accepted, because the security is absolute and unqualified, contrary to the case cited above ;

25. Kafeel-bid-Dark .

If a person sells a house, and another person becomes “Kafeel-bid-Dark”, i.e. security for “what may happen”, on his behalf, the security thus given will amount to a direct declaration that the house is the property of the seller. If, therefore, the security thereafter prefers a claim of right to the house, such claim will not be admissible ;

But an attestation, of a contract of sale does not amount to “Kafeel-bid-Dark”;

Section

ZAMAAN (GUARANTEE)

(Hidayah, Kitab-ul-Kafalat, Fasl Fil Zamaan)

1. Guarantee of agents to their employers .

If an agent sells the cloth of his principle, and makes himself responsible for the payment of the price to his principle; or, if a "Muzarib" sells the goods of his employer, and makes himself responsible for the payment of the price, the responsibility, in either case, is void.

2. Guarantee of partners .

If two partners in a slave sell him by one contract, and each of them become security for the other, on behalf of the buyer, for payment of the share of the price due to the other, such security is void ; because there is co-partnership in the price, and therefore eventually each one is security for himself and is not allowed ;

But it will be otherwise where two partners in a slave sell their shares by different contracts ; as their security for each other, for the prices respectively due, will be valid ; because in this case there is no co- partnership in the price, and whatever is owing to each belongs solely to him ;

3. Guarantee for land-tax, etc.,

If a person becomes surety for another person ,for the tax due from him, or for a "Nawayib" or the tax levied upon him for his "Qismat", all such sureties are valid ;

But if "Nawayib" is wrongly imposed, there is difference of opinion among the modern jurists.

As regards the "Qismat", there is difference of opinion with reference to its meaning. Some say that it is the same as "Nawayib", while others are of the view that it is the same as "Zauzifa-ar-Raatibah" that is fixed imposts which are charged at

stated periods such as once in a month, or once in every two or three months. Now "Nawayib" means casual charges by the sovereign, which have no fixed or stated periods. The law, however, is as above explained, regarding both. If, therefore, the charging is right, then the security for it will be lawful according to all jurists ; but if it is wrong, then there is a disagreement with regard to the validity of the surety ;

4. Suspended debt and suspended security .

If a debtor says to the creditor that, "I owe you a debt of one hundred Dirhams, payable a month hence i.e. suspended for one month", and the creditor says that the debt is immediately due, his assertion, as the creditor, will be accepted. But if surety declares to creditor that, "I am surety to you, for the debtor, for a debt of one hundred Dirhams, payable a month a hence i.e. suspended for a month", and the creditor asserts that the amount is due immediately, the declaration of the surety is to be credited ;

5. Security against accident, in the sale of a slave .

If a person purchases a female slave, and another person declares her to be the property of the seller i.e. be surety against accident, and she thereafter proves to be the property of some other person, the purchaser will not be entitled to "exact claim the price from the surety" until the Qazi passes a order against the seller for the "return" of the price, because, according to the Zahir Rawayat, the sale will not become void immediately on the proof of the subject of it as the property of another, but continues until the Qazi passes a order in favour of the purchaser, directing the seller to return the price. An opinion of Imam Abu Yusuf, however, is that the sale will becomes void immediately on proof of the subject as the property of another ;

But it will be otherwise if the slave is proved to be free, and the Qazi passes a order to that effect, because in such a case the sale will become void immediately on the issuing of such

order, as freedom is not capable of sale, and the purchaser, therefore, will become entitled to get back the purchase money from the security or the seller, without waiting for the order of the Qazi ;

6. Security for fulfillment of the bargain .

If a person purchases a slave, and another person becomes security for the fulfilment of the bargain, known as "Zaamin ba 'Ohdah, such security will be void, because the word " 'Ohdah" (fulfilment) is very wide and implies a variety of meanings, and therefore its specific application is doubtful, and as such it cannot be acted upon ;

But it will be different in respect of the term "Dark", because although it means "whatever may happen", still the custom has restricted its application to only "a security against any future claim", and therefore it is valid ;

7. Security for surrender of the goods.

If a person sells the goods, and another person becomes the surety to the purchaser for the release or surrender of these goods, by the seller to the purchaser, such security, according to Imam Abu Hanifah, is not valid, because the security is not competent to take the goods from the seller and give it to the purchaser. But Imam Abu Yusuf and Imam Muhammad are of the view that it is valid, because in their opinion it is equal to a security against accident ;

CHAPTER 2

SECURITY IN WHICH TWO PERSONS ARE INVOLVED

(Hidayah, Kitab-ul-Kafalat, Baab Kafalat-ur-Rajulain)

1. Two joint debtors, being also surety for each other .

If two persons are jointly indebted in equal shares, and each is surety for the other, in such a case, if any of them pays a part, he will have no right to any claim on the other, unless the payment so made is more than a half of the debt, in which case he will have the right to get the excess amount from the other ;

2. Two sureties for a third person, being also sureties for each other .

If two persons are sureties for a property on behalf of another person, in this way, that each surety, is also is responsible for the other surety, in such a case, whatever any surety pays in virtue of the surety, whether the amount more or less he will be entitled to get the half of it from the other surety ;

3. Dissolution of a reciprocity partnership .

If two partners by reciprocity dissolve their partnership and be separate, while some of their debts still remain unpaid, the creditors will have, in such a case, the right to claim the whole amount of the debts from any of them they like, because each of such partners is surety for the other. Further, none of the partners will have the right to claim from the other partner whatever he may have paid to the creditors, unless such payment is more than the half, in which case he will be entitled to claim the excess from the other partner ;

4. Two “Mukatibs”, being also sureties for each other .

If a master makes two of his slaves as “Mukatibs”, by one contract, for, say, one thousand Dirhams, and each of them also becomes surety for the other, in such a case, whatever of the whole amount agreed to be paid to the master, is paid by any of them, the payer will be entitled to get the half of it from the other.

If the master, in such a case, emancipates one of the slaves before getting any payment on account of his "Kitabat", in that case, he will become free, and will also be exempted from payment of the half of the consideration of "Kitabat", but half of the consideration of "Kitabat" will still remain due on the other ;

But the master will be entitled to get the half remaining due upon the slave from him as being the debtor, or from the freed one as being the surety ; and if he gets it from the freed one, the freed one will be entitled to get it from the slave ;

CHAPTER 3

SECURITY BY FREEMEN FOR THE SLAVES AND BY SLAVES FOR THE FREEMEN

(Hidayah, Kitab-ul-Kafalat, Baab Kafalat-ul-'Abd wa 'Anho)

1. Surety for a slave .

If a person becomes surety for a slave, for something not claimable from the slave until he gets freedom, without mentioning whether the thing is claimable immediately, or hereafter, in such a case it will be taken as immediately due, that is, claimable immediately from the surety ;

And the surety, on satisfying the claim due upon the slave, will not be entitled to demand it from the slave until he gets freedom ; because the creditor has no right to claim it until that event ; and the surety will stand in the place of the creditor ;

2. Surety in respect of person is released if slave dies .

If a person makes a claim on an unprivileged slave, and another person becomes surety for his person, and the slave thereafter dies, the surety will in such a case be released from his obligation.

Note : the rule will be the same where the slave is emancipated.

3. Surety in respect of property not released if slave dies .

If a person claims a right of property in a slave, and another person becomes surety for delivery of his possessor, and the slave then dies, and the creditor proves his right by witnesses, the surety in such a case will be responsible for the price ;

4. Surety by slave for his master, and by master for his slave.

If a slave, who is not indebted is a surety for property on behalf of his master, or any other person, and he thereafter is

made free, and then pays the amount for which he was surety ; or, if a master is a surety for property on behalf of his slave, whether he is indebted or not, and , after emancipating him, pays the amount for which he was surety, in neither of these cases will either of the parties be entitled to take anything form the other. But Imam Zufar says that in both such cases the parties will have a right to take from the other what he may have paid ;

5. Consideration of “Kitabat” and security .

Security for the consideration of “Kitabat”, whether the surety is a slave or a freeman, is not valid ; nor a consideration in lieu of emancipatory labour can be a subject of security, because, according to Imam Abu Hanifah, it is similar to the consideration for “Kitabat”.

BOOK – IV *

ASHRABAH

(PROHIBITED LIQUORS)

ASHRABAH *

PROHIBITED LIQUORS

*(Hidayah, Kitab-ul-Ashrabah)*Note

“Ashrabah” is the plural of “Sharaab”, which literally means “everything which is drunk”, but legally it signifies everything of which the drinking is “Haraam”, i.e., prohibited by the Islamic “Shari’ah”.

Kinds prohibited liquors .

There are Four kinds of prohibited liquors as follows:-

(a) “**Khamr**” - The first of the liquors is known as “Khamr”, which, according to Imam Abu Hanifah means the crude juice of the grape, which, after fermentation, becomes spirituous, first gathers foam and then settles, and then possesses the intoxication quality. But According to Imam Abu Yusuf and Imam Muhammad, the juice becomes “Khamr” upon its fermentation, and is spirituous without the condition of its gathering foam; because whenever the juice of grapes becomes spirituous, it is to be known as “Khamr”, and its illegality is established.

The argument of Imam Abu Hanifah in support of his view is that fermentation is the process by which the liquor becomes spirituous, and, it becomes completed when it gathers the foams and settles, because by that means the dregs are separated from the finer elements, and the provisions of the law relating to “Khamr”, such as punishment for drinking it, the holding him an infidel who shall deem it lawful, and the prohibition against selling it, all have a reference to the completion.

* Qur’an, Ch. 2 (Baqarah), verse 219, Ch. 4 (Nisa), verse 43, Ch. 5 (Maa’idah), verse 90-91, Mishkat, Kitabul Hudood, Babo Haddil Khamre, wa Bayanil Khamre wa wa’eede Shaaribiha, ‘Aainul Hidayah, Vol. IV, pp. 426 to 428.

Some of the jurists are of the view that it is declared unlawful to drink after it become spirituous purely on accounts of caution.

Some other, jurists say that the term "Khamr" is applicable to whatever is of an intoxicating quality ; because it is mentioned in the Tradition, that "whatever inebriates is "Khamr" ; (Muslim, Ahmad, Ibne Hibbaan) and that "Khamr is produced from two trees, namely, the vine and the date" (Muslim). The term "Khamr", moreover, is derived form "Mokhamirah", signifying, stupefaction, or deprivation of sense, which is a consequence of drinking any intoxicating liquor.

But Imam Abu Hanifah says that the term "Khamr", according to the agreed opinion of all lexicographers, is used only in the sense mentioned above and therefore as regards the liquors of other kinds other terms are used. Further the illegality of "Khamr" is indubitable, and therefore, if every intoxicating liquor were "Khamr", all such would also be indubitably illegal, although this is not the case as there is a doubt regarding them.

In answer, to the views of some of the jurists as mentioned above, it is to be noted that the first above mentioned Tradition is not perfectly authentic Yehya Ibne Mayeen has disputed it ; and as regards to the second Tradition quoted above, the intention of it was merely to explain the law or, in other words, to show that all liquors extracted from any of the two trees mentioned in it, being of an intoxicating quality, are unlawful as well as "Khamr".

1. Unlawful in any quantity .

"Khamr" is totally illegal, whether it is used in small or great quantity, and the illegality of it does not consist in drinking it to the extent to produce intoxication.

Some of the people however reject the absolute illegality of "Khamr", and say that its effects only make it illegal; because the

result of it is, that it creates hindrance in the worship of Allah ; and as this evil is caused only by intoxication, therefore where this does not take place it is not illegal.

This, however, is a gross infidelity and indirect contradiction to the Qur'an. Allah has there declared such liquor a filth, i.e., a thing which is illegal in its own nature. Besides, the Holy Prophet has ordered "Khamr" as illegal, according to many Traditions ; (Bukhari, Muslim, Abu Daud, Tirmizi, Ibne Maajah, Ahmad) and all the jurist also are unanimously of this opinion.

It may, however, be noted that although "Khamr" is illegal, even is such a small quantity as is not sufficient to intoxicate, yet the same law does not apply in respect of other things of intoxicating nature ; because a little of them, if not sufficient to intoxicate, is not forbidden. But Imam Shaafe'ee, is of the view that these are also illegal, in any quantity.

2. Filth in an extreme .

"Khamr" is a filth in its extremity in the same manner as urine ; because the illegality of it is indisputably proved, as has been already shown, and, therefore, whoever holds "Khamr" to be lawful is an infidel, because he thereby rejects incontestable proof.

3. Cannot be a property with a Muslim .

"Khamr" is not a valuable property with the Muslims. If, therefore, it is destroyed or usurped by any person, it will create no responsibility. The sale of it is also unlawful ; because Allah in declaring it a filth manifested a detestation of it ; although, if it had been a property of value, some respect would have been shown to it.

Moreover, it is noted in the Traditions, that "he who prohibited the drinking of it ; has also likewise prohibit both the sale of it and the use or enjoyment of the price of it."

4. Price cannot be used in the discharge of his debt.

If a Muslim is indebted to another, and wishes to discharge the debt with the price of "Khamr", in such a case both the payment and receipt with the illegal because such price is produced from an unlawful sale, and is considered as usurpation or a trust in the Muslim's hands, according to the different views of the jurists on this point ; similarly as in the case of the sale of carrion.

But if, the debtor is a Zimnee, it will be lawful for his Muslim creditor to get such payment ; as the sale of "Khamr" is legal amongst the Zimnees.

5. Or used by him .

It is not lawful to use the "Khamr", even as a medicine, or in any other way ; because the use of filth is prohibited ; and also, because abstinence from it is ordered, and this rule could not be observed in case of its use being allowed.

6. Drinking of it in any quantity .

Whoever drinks the "Khamr" is punishable, even if he is not intoxicated ; because it is said, in the Traditions, "let him who drinks the "Khamr" be whipped ; and if he drinks it again, let him be again in the same way punished." All the Companions of the Holy Prophet agreed upon this point ; and the number of stripes prescribed is eighty, as has already been shown in dealing with punishments.

7. Unless it is boiled .

If a person boils the "Khamr" until two-thirds of it evaporate, still it cannot thereby ,be made lawful. But if a person drinks of it after such process, he will not be liable to punishment, unless he is intoxicated.

8. Converted into vinegar .

It is lawful to make the vinegar of the “Khamr”, Imam Shaafe’ee, however is of the opposite view.

(b) “**Baazaq**” – The second kind of prohibited liquor is the juice of grapes boiled until a quantity less than two-thirds evaporate, which is known as “Baazaq”. It is also known “Munassaf” ; but that is only where exactly one half of it evaporates in boiling. This kind of liquor is illegal, according to all our jurist. According to Imam Abu Yusuf and Imam Muhammad, it is illegal when it only ferments and becomes spirituous ; and according to Imam Abu Hanifah, it is illegal when it foams and settles. Auzaa’ee, however, says that “Munassaf is lawful (and many of the tribe of Mo’tazalah* have supported this view); because it is a good liquor, or, in other words, is pleasing to the palate and also, because it is not “Khamr”. Our jurists plead that as “Munassaf” is pure, and equally delicious as “Khamr”, a number of the idle and dissolute are consequently tempted to drink it ; and it is therefore prohibited , with a view to prevent that dissipation which it is found to create.

(c) “**Naqi’-ut-Tamar**” – The third kind of illegal liquor is known “Sukr”. It is made by steeping fresh dates in water until they take effect in sweetening it ; when it become unlawful as well as abominable to drink of it. Shareek Ibne Abdullah says that it is “Mubah” (i.e., permissible) as Allah which speaking of His bounty in the Holy Qur’an, says, “And of the fruits of the palms and the grapes you obtain, from them intoxication and goodly provision” (Ch. 16, Nahl, verse 672) which we infer that it is permissible, as bounty cannot apply to anything illegal. But our jurists say there is concurrent opinion of all Companions of the Holy Prophet upon this point ; and as regards the text cited above, it was revealed in the earliest period of Islam, when all kinds of liquors were lawful.

* A particular heretical sect of the Muslims .

(d) "Naqi-uz-Zabeeb" * - The fourth kind of prohibited liquors is "Naqi-uz-Zabeeb", that is, water in which raisins are steeped until it becomes sweet, and is affected in its substance. This kind is, lawful when it simply possesses sweetness; but is prohibited when it ferments and becomes spirituous. Auzaa'ee is however of the opposite view regarding this liquor also.

9. The last three are not so illegal as "Khamr" .

It may be noted that the illegality of the last three liquors, i.e., "Bazzaq" "Munassaf" and the "Naqi" of dates and raisin, is inferior to that of "Khamr". If, therefore, any person holds them as lawful, he will not be deemed to be an infidel. But it is otherwise in the case of "Khamr"; because, in respect of the liquors here mentioned, the illegality is a mere matter of opinion; whereas, as regard the "Khamr", its illegality is undisputed.

10. May be drunk if not intoxicate .

Punishment, is not given for drinking the last three liquors, except to the extent producing intoxication ; whereas the drinking of even one drop of "Khamr" causes punishment. The filth of these three liquors, according to one Tradition, is "Khafefah" (i.e., of a slight degree), and according to another "Ghaleezah" (i.e., of an extreme degree) ; but the filth of "Khamr" is of an extreme degree, according to every Tradition. (''Aainul Hidayah, Vol. IV, p. 434).

11. They may also be sold .

The sale of the last three liquors is lawful, according to Imam Abu Hanifah and a compensation is due from the destroyer of them. But Imam Abu Yusuf and Imam Muhammad, are of the view that, the sale of them is not lawful, and that no compensation is due from the destroyer of them ; as in the case of "Khamr".

* "Naqi" signifies water in which anything is steeped and "Zabeeb" means raisins.

12. But they should not be used .

It is not lawful to use the above mentioned liquors, as they are prohibited. It is said that Imam Abu Yusuf holds the sale of any of these liquors, excepting the “Khamr”, as lawful, if more than one half, and less than two-third, if it has evaporated in the boiling.

Imam Muhammad, in the *Jaame’e-as-Sagheer*, has written that every kind of liquor except those mentioned above is lawful. This view, the jurist say, is written only in the *Jaam’e-as-Sagheer*, and is not found in any other book. It, however, affords an argument that any kind of strong liquor prepared from wheat, barley, honey, or millet, is lawful in the opinion of Imam Abu Hanifah, if not drunk so as to create intoxication ; and he, in fact, is of the view that punishment is not given even in the case of intoxication. If, therefore, a person intoxicated with these liquors divorce’s his wife, it is void, in the same manner as divorce given by a man in his sleep or by one whose faculties are finished by the use of opium, or from having drunk the milk of a mare in a medical composition. It is elsewhere noted, as an opinion of Imam Muhammad, that every kind of strong drink, excepting those above is prohibited ; and if a person drinks them to intoxication he will be punished ; and that a divorce given by him when so intoxicated will be valid ; in the same manner as holds in the case of liquors ; and orders are passed according to this opinion. He has also said, in the *Jaame’-as-Sagheer*, that Imam Abu Yusuf had first declared every kind of wine as unlawful which fermented and became spirituous, and afterwards remained ten days without spoiling ; but that he afterwards adopted the opinion of Imam Abu Hanifah. In other words, he first, according to the adjudication of Imam Muhammad deemed all inebriating liquors unlawful ; but afterwards adopted the view of Imam Abu Hanifah. Imam Abu Yusuf was singular in making it a condition that the liquor should remain ten days without being spoiled. He, however, afterwards receded from this view, and gave into that of Imam Abu Hanifah and Imam Muhammad on this point. In the *Abridgment (of Qadooree)* it is said, that the

steeping of raisins or dried dates, when boiled a little, even so as to become spirituous, may lawfully be drunk in such a quantity as not to intoxicate, provided it is done without wantonness or joy, his is according only to Imam Abu Hanifah and Imam Abu Yusuf ; for Imam Muhammad and Imam Shaafe'ee deem it as unlawful. ('Aainul Hidayah, Vol. IV, p.435)

13. Khalitain (a mixture of dates and raisins) may be drunk .

There is no objection in drinking the Khalitain ; that is, water in which dates have been steeped, mixed with that of raisins, and boiled together until they ferment and become spirituous. This is based on a incident relative to Ibne Ziyaad, which he has related ; "Abdullah, the son of Hazrat Umar gave me some "Sharbat" to drink, I drunk it and became intoxicated to such an extent that I could not reach my own house. I went to him next morning, and informed him of the incident. he told me that he had given me nothing but a drink composed of dates and raisins." This was certainly Khalitain, which had been boiling. It is elsewhere related by Hazrat Umar that it is unlawful in its crude state.

14. Liquors produced from honey or grain are lawful.

Liquor produced by means of honey, wheat, barley, or millet, is lawful, according to Imam Abu Hanifah and Imam Abu Yusuf, even if is not boiled, provided, it is not drunk in a wanton or joyful manner. The plea they adduce is the saying of the Holy Prophet "Khamr is the product of these two trees" meaning the wine and the date ; that is to say, he confined the prohibition to these two trees as his intention was to explain the Law.

It may be noted that many of the jurist have made the boiling of these liquors a condition towards their legality. But others, hold it to be no condition (and such is the view noted in the Mabsoot) ; because these liquors are not of such a nature that a little creates the wish for more, whether they are boiled or are crude. Similarly it is also disputed whether a person who gets drunks any of these liquors is to be punished.

15. Person drinking them to intoxication .

The jurist, have determined other-wise ; because it is said by Imam Muhammad that punishment is to be given to whoever is intoxicated with any of the aforesaid strong liquors ; for this reason, that in the present age they are as much sought for by the dissolute as other liquors were formerly ; nay even more so.

The same law applies in respect of strong drinks extracted from milk. Many have said that any drink made from the milk of a mare is not lawful, in the opinion of Imam Abu Hanifah, because it is derived from the flesh, which according to him is not lawful. The jurists, however, say that it is the better opinion that the milk is not unlawful according to Imam Abu Hanifah ; because although he has pronounced the flesh to be abominable, yet the reason is either because, if it were otherwise, the means of conquest would thereby be destroyed ; or because the horse is a noble animal ; but none of these reasons hold as regards the milk

16. “Musallas” (grape) juice (boiled down to one third).

If the juice of grapes is boiled until two-third of it evaporates (known as Musallas), it becomes lawful according to Imam Abu Hanifah and Imam Abu Yusuf, irrespective of the fact that it is spirituous. But Imam Muhammad, Imam Shaafe’ee, and Imam Malik hold otherwise. This difference of opinion, however, exists only on the supposition that it is used with a view to strengthen the constitution ; because if it is drunk for pleasure or joy they are unanimous in the view that it is unlawful. Imam Muhammad, Imam Shaafe’ee and Imam Malik, in support of their view, have cited a saying of the Holy Prophet, “every intoxicating drink is “Khamr” (Bukhari and Muslim) and whatever in excess produces intoxication is prohibited, even in moderation ;” (Ahmad, Tirmizi and Abu Daud) and in another place. “Any drink of which one cupful creates intoxication, is unlawful in a single drop.” (Tirmizi, Abu Daud and Ibne Majah)

Further every intoxicating liquor tends to derange the senses, and is therefore prohibited in a small as well as large quantity in the same manner as "Khamr". Imam Abu Hanifah and Imam Abu Yusuf, in support of their view, have quoted the saying of the Holy Prophet ; "Khamr is illegal in its very nature" and in another place, "little or much of it is alike illegal ; and intoxication from every other strong drink that is, every kind of liquor besides "Khamr" is prohibited." Now since the Holy Prophet has also laid down intoxication as a condition in respect of the drinks other than "Khamr", we may conclude that their illegality depends upon that condition only. Besides, derangement of the senses takes place only when liquors are used in such quantity as may intoxicate which is allowed to be of no worth. A little, therefore, of any strong drink other than "Khamr" is never illegal, except when, on account of its fineness or purity, a little of it creates a wish of more in which case the law treats every quantity of it in the same light. This, however, is not the case with "Musallas", a little of which, on account of its thickness, does not create a wish for more ; and which, in its substances, is a food. Therefore when used in a moderate quantity it retains its original legality. (i.e., lawful in its nature).

17. General rule regarding it .

If a little water is poured into "Musallas" to make it fine, and it is afterwards boiled for a short time, it is still "Musallas", the addition of water is only to weaken it.

But it will be otherwise where water is mixed with crude juice, and this mixture is then boiled until two-third of it evaporate ; because in such a case the water will purely evaporate altogether, or it will evaporate jointly with the juice ; but in either case it is clear that two-thirds of the pure juice of the grapes or dates will not evaporate, which is necessary to make it a legal drink.

18. Rule regarding the boiling of unpressed grapes .

If grapes are first boiled, and then pressed until their juice is extracted, in such a case a very little more boiling will be sufficient to make the drinking of the liquor lawful, according to one view of Imam Abu Hanifah. But according to his another view, it will not become lawful until two-thirds of it evaporates in boiling ; and this is the better view; because the juice remaining as it is, and, in any manner, not changed by the boiling, it will be similar to the juice not boiled.

19. Or grapes mixed with dates .

If fresh or dried grapes are mixed with dates, and are then boiled, two-thirds of the mixture should evaporate before it becomes lawful ; because although, as regards the dates, a small boiling is often sufficient, but as regards the juice of grapes two-thirds are always necessary to evaporate in boiling. The same rule also applies where the juice of grapes is mixed with the water in which dates have been steeped.

But, dried grapes, are mixed with the water of dates and are boiled a little, and then some dates or dried grapes are put, into it in such a case, if the quantity of the dates thus put into small, and not so much as is generally used to make "Nabeez," it will be lawful.

But it will be otherwise if the quantity is not small , as where a pot of the water of dates or raisins is mixed with the boiled juice.

But still, the person who drinks it will not be liable to be punished, because its illegality is merely on account of caution ; and therefore attempt should be used to avoid the punishment.

20. Liquor not made lawful by boiling .

If "Khamr", or any other spirituous liquor, is boiled until two-third of it evaporates, still it will not be lawful ; because the illegality of it, which is already established, will not be removed by boiling.

21. Rule regarding the use of vessels .

There is no objection to squeezing the juice into pots or vessels of a green colour, or of which the inside has been varnished with oil.

The reason for this is that during the earliest period of Islam, it was common to keep "Khamr" in such vessels ; and, on this account, when "Khamr" was made illegal, the Holy Prophet prohibited the use of such vessels also so, that the greater caution could be observed. But afterwards, the Holy prophet permitted the use of such vessels, seeing that the vessels of themselves should not make any thing unlawful. If, therefore, "Khamr" has been kept in these vessels, it is necessary that they should be washed before they are used. If a vessel is old, it becomes pure by three washings ; but if it is new, it can never be purified, in the opinion of Imam Muhammad ; because then the wine penetrates, and makes a deep impression in it ; as opposed to the case of an old one. Imam Abu Yusuf says that it can be purified by washing it thrice, and drying it after each washing.

Many jurists have said that, in the view of Imam Abu Yusuf, the manner of purifying it is by filling it with water, and then letting it remain for a short time ; and then emptying it and filling it again; and so repeating this process until the water poured out be perfectly pure ; when the vessel is pure.

22. Vinegar made from "Khamr".

When "Khamr" is converted into vinegar, it then becomes lawful, whether it has been made so by putting anything into it such as salt or vinegar, or has become so of itself.

23. Vinegar made of “Khamr”, whether abominable ?

Imam Shaafe’ee is of the view that it is abominable ; and that vinegar made from “Khamr” by means of some mixture is illegal. But as regards the vinegar which becomes as such from “Khamr” of itself, he has given two different opinions.

24. Vessel in which it is so made .

When “Khamr” is changed into vinegar, the vessel in which it is contained becomes pure according to the quantity of the “Khamr”. As regard that part of the vessel which was empty, many jurists have said that it also becomes pure, as it is dependent on the other ; but others have said that, as it is battered over with dried “Khamr”, it will not become pure until it is washed with vinegar, when it is immediately purified.

Similarly, if “Khamr” is poured out of a vessel, and the vessel is then washed with vinegar, it immediately becomes (as the jurists have said) pure.

25. Rules regarding the dregs of “Khamr”.

It is abominable to drink the dregs of “Khamr”, or to use it in combing the hair as some women do ; because the dregs are not entirely void of the particles of “Khamr”, and it is not lawful to use any unlawful thing ; therefore it is also illegal to use it for healing of a wound, or using it for a sore on the back of a quadruped.

It is also not lawful to administer it to an infidel or an infant ; and whosoever does so is responsible for the crime of it.

Similarly, it is also illegal to give it to a quadruped to drink. As regards this point, however, many jurists have said that although it is unlawful to carry “Khamr” to a quadruped, but if the animal, is brought to it, and drink it, there is no objection to it, as in the case of a dog and carrion , that is, carrion should not be

be thrown to a dog ;but if a dog carried to the place carrion is, he may, without any objection may be allowed to eat it.

But it will be allowable to mix the dregs of "Khamr" with vinegar. In such a case, however, it is necessary, that the vinegar should be carried to the place where the dregs are, and should be mixed, there, because otherwise it will be unlawful.

A person who drinks the dregs of "Khamr" without becoming intoxicated is not liable to be punished. Imam Shaafe'ee however, is of a different view ; because in such a case many particles of "Khamr" are necessarily drank likewise. Our jurists, on the contrary, say that as the dregs of "Khamr" are disagreeable to the palate, a little of it does not, create an inclination for more ; and thus, being like other strong drinks, the drinking of a little, unless it causes intoxication, is not punishable.

26. Injection of "Khamr".

An injection of "Khamr" into the anus or penis is not lawful as it will be a benefit derived from an unlawful article. But it is not, however, punishable, because punishment is given only in the case of drinking it.

27. Mixture of it in viands .

If a person puts "Khamr" into soup, it will not be lawful for him to eat the soup, because of its being made impure. But, if he eats it, he will not be liable to punishment, because in such a case the "Khamr" will be as it were boiled.

If a person kneads flour with "Khamr", in such a case it will not be lawful to eat the bread or paste so made, as many of the particles of the "Khamr" will still remain in it.

Section

BOILING THE JUICE OF GRAPES

(Hidayah, Kitabul Ashrabah, Fasl Fee Tabkhu 'Aseer)

Three general principles to be observed upon this subject .

In boiling the juice of grapes three principles care to be observed. Firstly that whatever quantity may run over the pot from on account of boiling, or on account of the foaming of the juice, should not be taken into account, but should be considered as not belonging to it ; and remaining should be boiled until two-third of it evaporate, so that the remaining third may be made lawful. To illustrate this, suppose a person inclined to boil ten cups of juice ; in such a case, if one cup is lost from its boiling over the pot, he should boil the remaining until six cups have evaporated and three cups remain in the pot, when it will become lawful.

Secondly, that if water is first poured into the juice, and the whole is then boiled, and the water, on account of its fineness is soon evaporated, it is necessary that whatever remains after the evaporation of the water should be boiled until two-third of it is evaporated.

But if, the water and juice evaporate together, it will be, in such a case necessary that the mixture should be boiled until two-third of the whole evaporate, so that the remaining one-third may be made lawful ; because here the one-third of the mixture of water and juice which remains will becomes the same as if one- third of the pure juice has remained, water had then been poured into it. To exemplify this ; suppose a person mixes ten cups of juice with twenty cups of water ; in such a case, if the water purely evaporates, the mixture should be boiled until one-ninth of it remains, which is equal to one-third of the pure juice ; whereas, if the juice and water evaporate together, the whole should then be boiled until two-third of it evaporate.

If juice is boiled with the fire at one or several different times before it is intoxicating or prohibited, it will be lawful. If, also the juice, is taken from the fire, continue to boil until two-third of it evaporate, it will be lawful, as in such a case the evaporation is on account of the fire.

Thirdly, in boiling the juice, after part of it has evaporated, and part has been poured out, to know how much more should evaporate, so that the remaining may be made lawful, for this, the following rule should be observed. The quantity which remains after part has been poured out should be multiplied by the one-third of the whole ; and this sum divided by the quantity which remains after part of it only has evaporated, the quotient is the quantity that is lawful. Thus, if a person boils ten cups of juice, and after one cup has evaporated three cups more should be poured out ; then three cups and one-third (one-third of the whole) multiplied into six, the number which remains after the loss of evaporation and pouring out amounts to twenty, and this sum being divided by nine, there remains two cups and two-ninths ; the quantity which will be lawful, when the rest has evaporated.

BOOK – V *

JANAYAAT

(QISAAS)

(OFFENCES AGAINST THE PERSON)

JANAYAAT

(QISAAS)
(OFFENCES AGAINST THE PERSON)

(*Hidayah, Kitab-ul-Janayaat*)

Note

“Janayaat” is the plural of “Janayat”, which, literally means “to commit a sin”, but legally it signifies the prohibited act committed upon the person, which is known as murder, or upon a part of the body, which is known as wounding or maiming.

Murder sometime results in retaliation, sometime in ransom, and sometime disentitles the murderer from inheritance. Further, in case of murder sometimes the State is the complainant, and sometimes the person. (“Aainul Hidayah)

CHAPTER 1

Murder

Kinds of Murder.

The murder of which the law takes cognizance is of five kinds ; (I) Qatl-e-’Amd, or wilful murder ; (II) Shubh-e’ Amd, or like willful murder, (III) Qatl-e-Khata, or murder by mistake; (IV) Qatl Qayem Muqam-e-Khata, or murder of the nature of murder by mistake ; and (V) Qatl Ba Sabab, or murder by an intermediate cause.

Qatl-e-’Amd .

Qatl-e-’Amd, or wilful murder, is where the murderer maliciously kills a person with a weapon, or with anything that serves for a weapon, such as a club, a sharp stone, or fire;

*Qur’an, Ch.2, (Baqarah), verses 178,179,194; Ch.4 (Nisa), verses 92 – 93; Ch.5 (Maa’idah), verses 45; Ch.17 (Bani Israil), verses 33; Mishkat, Kitabul Qisaas; “Aainul Hidayah, Vol. IV pp 613 to 661.

because “ ‘Amd” means intentionally, or wilfully ; and as the intention is some a thing hidden, which cannot be discovered except by inference from something affording an argument of it, and the use of the weapon of murder does afford such argument, it may be concluded, where such a weapon is used by the murderer, that murder was his intention.

(1) Two things are proved.

If a person commits wilful murder, two things are proved, viz., (a) that the murderer is a criminal ; because it is said in the Qur’an, “WHOEVER SLAYS A BELIEVER, HIS PUNISHMENT IS HELL;” (Ch.4, Nisa, verses 93) and the same is repeatedly mentioned in the Traditions ; and all authorities, moreover, concur in this point ; and (b) that the murderer is liable to retaliation ; because the Qur’an says, “IT IS PRESCRIBED FOR YOU TO EXECUTE RETALLIATION UPON MURDERERS,” (Ch.2 Baqarah verses 178). by whom is to be understood persons guilty of wilful murder, as it is said in the Traditions, “wilful murder requires retaliation.” (Sunan-e-Arba’; “Aaimul Hidayah) An offence is, moreover, made complete by the intention, and complete punishment i.e. retaliation is incurred where intension exists, otherwise not.

In fact, retaliation is incurred in a case of wilful murder, except where the heirs of the murdered person forgive or compound the offence, because retaliation is their right.

It may also be noted, that retaliation is the prescribed penalty in such a case ; and the heir are not entitled to commute it against a fine, except with the consent of the murderer.

(2) There is no expiation .

There is no expiation, in a case of wilful murder, according to our jurists.

(3) Murderer excluded from inheritance .

Wilful murder disentitles the murderer from being an heir to the murdered person ; because in the Traditions, it is said, that, "there is no inheritance to the murderer."

Shubh-e-'Amd .

Shubh-e-'Amd, or like willful murderer, according to Imam Abu Hanifah, is where the murderer strikes a man with something which is not a weapon nor equivalent to a weapon.

Imam Abu Yusuf and Imam Muhammad, and also Imam Shaafe'ee, are of the view that if the stroke is given with a large stone, or a club, it amounts to wilful murder. But Shubh-e-'Amd, or like wilful murderer, on the contrary, according to Imam Abu Yusuf and Imam Muhammad, is where a person strikes another with anything of the nature not likely to cause death, such as a small stick.

The argument of Imam Abu Hanifah is a based upon a saying of the Holy Prophet that, "killing with a rod or stick is not murder, but only Shubh-e-'Amd and the "Deyat" (fine) for it is one hundred camels."

(1) Requires expiation as well as Diyat .

Shubh-e-'Amd is sinful, where the murderer strucks intentionally, and kills, although without planning ; and it requires expiation, because of the likeness it bears to murder by mistake. Heavy "Deyat" (fine) is also due from the 'Aaqilaas of the murderer, because of the analogy this offence bears to murder by mistake; because it is a rule that in all cases where the "Deyat"(fine) is due for bloodshed at the first, and not on account of any supervenient or involved matter, it falls due upon the 'Aaqilaas, as it is connected with murder by mistake.

(2) Payment within three years .

On account of Shubh-e-Amd a heavy "Deyat" (fine) is due from the 'Aaqilaas, of the murderer payable within three years ; because it is recorded of Hazart Umar that he thus ordered in such cases.

(3) Excludes the murderer from inheritance .

Shubh-e- 'Amd excludes the murderer from inheriting from the murdered one. This is the proper recompence of bloodshed. The doubt, moreover, which occurs in this kinds of murderer causes a remission of retaliation, but does not prevent an exclusion from inheritance.

Qatl-e-Khata .

The mistake which causes Qatl-e-Khata, or murder by mistake, is of two kinds ; (a) mistake in the intention, and (b) mistake in the act.

Mistake in the act occurs where a person intends a particular act, and another act is thereby caused ; as where, for example, a person shoots an arrow at a spot, and it hits a man.

Mistake in the intention occurs where the mistake occurs, not in the act, but in respect of the target ; as where, for example, a person shoots an arrow at a man, thinking him to be a game ; or at a Muslim, thinking him to be a hostile infidel ; because in such a case the person who shoots intends to hit a particular, but commits the mistake in his intention, because he does not know what that object is.

(1) Requires expiation as well as Diyat .

Murder by mistake requires two things ; expiation, to be performed by emancipating a Muslim slave, or fasting for two months successively, and the payment of a fine from the

'Aaqilaas of the murderer within three years ; because Allah has said, in the Qur'an, WHOEVER KILLS A BELIEVER BY MISTAKE, (the penalty of it is) THE FREEING OF A BELIEVER, AND A FINE TO THE FAMILY (of the murdered ;"), and the fine is payable within three years, because of the decision of Hazrat Umar, as mentioned before.

(2) Criminal in a certain degree .

Murder by mistake does not amount to criminality of the extent of wilful bloodshed. But still, it is not totally exempt from criminality ; because as the murderer did not take the necessary caution, and acted hastily in shooting his arrow, he is also a criminal so far as he neglected the caution. Further, if the act was not criminal, expiation for it would not have been ordered, as expiation is ordered in the atonement for crimes.

(3) Excludes the offender from inheritance .

Murder by mistake results in the exclusion of the murderer from inheriting from the murdered one ; because it is an offence for which exclusion from inheritance is the due recompence.

(4) A blow with an intention to cause a wound only, causing death .

If a person strikes at a specific part of another person, with intention to cause a wound only, and hits another part, and the person struck dies in the result of the wound, retaliation become due ; because this does not amount of murder by mistake as in such a case the bloodshed the result of an intention against a specific part ; and all the parts of the body are a single object.

Qatl Qayem Muqam-e-Khata .

Murder of the fourth kind namely, that which is of the same nature as murder by mistake is where, for example, a person walking in his sleep falls upon another and to kill him by such fall ; and this is also subject to the same rules as murder by mistake.

Qatl Ba Sabab .

Murder on account of a cause is where, for example, a person digs a well, or sets up a stone, in the land which does not belong to him, and another person falls into the well, or over the stone, and dies ; as a result of which a fine becomes due from the 'Aaqilaas; because the digging of the well, or placing the stone, was the cause of the deceased's loss of life ; and as the person who dug the well or set up the stone was guilty of a transgression in doing so this case is also in fact the same as if he had himself thrown the deceased into the well or on the stone. A fine is therefore binding in such a case also.

(1) No expiation nor exclusion from inheritance.

Expiation is not binding in this kind of murder, nor is the guilty person excluded from inheriting to the person killed.

General rule in offences short of life.

Whatever has the likeness of a wilful act, where life is affected, amounts to wilful in anything which is short of life; because the loss of life has a different construction according to the instrument by means of which such loss is caused ; whereas the loss of a limb or member does not have any difference of construction from that incident ; because by blood-shed is understood an act by which the vital principle is extinguished ; and the vital principle is not a matter of a palpable nature, nor can the intention of causing the loss of it be discovered but from the use of some mortal weapon ; where a limb or member is a palpable thing, the instrument used in causing the loss of it does not cause any difference in the construction of the act by which it is lost. Further, if an instrument of *Shubh-e-'Amd* (such as a rod) is used with the intention to kill, the act is murder, whereas if it is used merely

with a view to correction, and causes death, it is only Shubh-e-
'Amd ; but these distinctions are not in any case short of life, as
in the same manner as the loss of a member may be intended by
the use of a weapon, so may it similarly by the use of anything
else ; because as an eye, for example, may be put out by a
weapon, so similarly may it by a small rod ; and, therefore, the
act is equally wilful in either case.

CHAPTER 2

WHAT CAUSES RETALIATION AND WHAT DOES NOT
CAUSE IT

*(Hidayah, Kitab-ul-Janayaat, Baab Maa Yujib-ul-Qisaas Wa
Maa Laa Yujibohu)*

1. Retaliation becomes due.

Retaliation becomes due by the killing of a person whose blood is under absolute protection, (as the Muslims and the Zimmies) where the murderer wilfully kills him.

2. Killing in retaliation.

(a) A freeman is to be put to death for a freeman ; and also for a slave who is the property of another.

(b) A Muslim is not to be put to death for a Musta'min.

(c) A Muslim is not to be put to death for a Musta'min , because the blood of a Musta'min is not in a absolute protection, nor a Zimmie is to be put to death for a Musta'min because of the Tradition of the Holy Prophet (" Aainul Hidayah)

(d) Analogy suggests that a Musta'min should be put to death for a Musta'min as both are upon the same footing. But the benevolence of the law determines that one Musta'min should not be put to death for another ; because here the infidelity which causes enmity exists in respect of the parties ; and as that makes the blood out of protection, there is therefore a doubt in respect of its being protected sufficiently so as to prevent retaliation.

(e) A man is to be put to death for a woman , and an adult for an infant, and a sound person for a blind, infirm, dismembered, lame, or insane.

(f) A father is not to be put to death for his child ; because the Holy Prophet has said, that "retaliation is not to be executed upon the parent for his offspring, "(Tirmizi and Ibne Maajah); and also, because, as the parent is the efficient cause of his child's existence, it is not proper that the child should require or be the cause of his death. On account of this, it is laid down that a son is prohibited from shooting at this father when in the army of an enemy, or to throw a stone at him when suffering the stoning for "Zina". All the ancestors, whatever may be their character or degree, are included in this rule ; and similarly the mother, grandmothers-maternal or paternal, and all other female ancestors, however remote ; because of the argument for retaliation is universal, as noted above.

(g) A master is not to be put to death for his slave, mudabbir or mukatib.

(h) A master is not put to death for his slave, nor for his Modabbir or Mokatib, nor for the slave of his child, because, if retaliation was in those cases, it would be so at the demand either of the master himself, or of his child, the one of which is absurd, and the other is inadmissible.

(i) if one of two partners in a slave kills such a slave, retaliation will not be incurred.

3. Retaliation inherited against a parent drops.

If a person inherits the right of retaliating upon his parent, the retaliation finishes, and is remitted on account of the respect due to paternity.

4. Execution of retaliation .

Retaliation is not to be executed except with some mortal weapon.

5. Retaliation for a Mukatib .

If a person wilfully kills a Mukatib, who has no heir but

his master, and leaves the goods sufficient to discharge his ransom, the master will be entitled to exact retaliation, according to Imam Abu Hanifah and Imam Abu Yusuf.

But Imam Muhammad is of the view that there will be no retaliation in such a case.

If a person wilfully kills a Mukatib, who leaves the goods sufficient to discharge his ransom, and has other heirs besides the master, retaliation will not be incurred on behalf of the master or his heirs, even though both unite in demanding it.

If a person kills a Mukatib, who does not leave the goods sufficient to discharge his ransom, retaliation will be incurred on behalf of the master.

6. Retaliation of a pawned slave .

If a pawned slave is killed while in the possession of the pawnholder, retaliation will not be executed until the pawner and pawnholder jointly in demanding it.

7. Retaliation by to an infant or idiot .

If a person is killed whose heir is an infant or an idiot, it for the father of the infant or the idiot to execute retaliation upon the murderer.

But it will be otherwise, in respect of a brother or uncle, although they are also entitled to contract the infant or the idiot in marriage.

The father of an infant or idiot is also entitled to compound retaliation for a fine, on their behalf, if this is for their benefit. But he is not entitled to remit the retaliation gratuitously, as this will be destructive of their right.

If a person wilfully cuts off the hand of an infant or idiot, the father of such infant or idiot can cut off the hand of the offender, in retaliation, or compound the offence for a fine.

8. Power of guardians appointed by will .

A guardian appointed by will (known as Wasee) is the same as a father, in respect of all the cases mentioned, above except retaliation by slaying ; because he is not entitled to put the murderer to death, as he has no power over his life, and the taking of retaliation is the result of power over life.

From this it may be inferred that the guardian in question is entitled to enter into Compromise for a fine in lieu of life, and also to take retaliation in all cases short of life, i.e. nothing is excepted except actual slaying.

It may also be noted, that an appointed guardian is not entitled to compound life for property ; because as this is an act in respect of life, i.e. an acceptance of a return for life, such Compromise is equal to taking retaliation ; and as the one is not allowed to an appointed guardian, so also the other is not allowed.

9. Murdered person leaving infants, and adults as heirs .

If a person who is murdered, leaves heirs, some of whom are infants, and some adults, according to Imam Abu Hanifah, the adult heirs are entitled to put the murderer to death.

But Imam Abu Yusuf and Imam Muhammad, are of the view that they are not entitled to put the murderer to death until such time as the infant heirs attain majority.

10. Killing by a blow with the iron of a spade, but not with the shaft .

If a person strikes another person with a spade, or shovel, and the person struck dies, and the blow has been given with the iron part of such spade or shovel, the murderer will be liable to be put to death.

But if, the blow has been given with the wooden part, i.e. the handle or shaft, he will be responsible for a fine ; because he has put to death a person of protected blood ; and as retaliation, in such a case is forbidden, the fine will be due so that the blood may not go without penalty.

The author of *Hidayah* says that the murderer, in the former case, is liable to be put to death only when he has struck with the edge of the iron part, as by this alone a wound, which demands retaliation, can be inflicted ; and that if he has struck with the back of the instrument, not with the edge, there is a difference of opinion among our jurists, Imam Abu Yusuf and Imam Muhammad hold that in such a case also he is liable to be put to death, as regard is paid solely to the use of an instrument of murder, which here exists. But Imam Abu Hanifah, is of the view that he will not be liable to be put to death, as retaliation does not become due unless a wound is caused. This last is the better opinion.

11. It is not incurred by drowning any person .

If a person immerses another person, whether an infant or an adult, into a water from where it is impossible for him to escape by swimming, as the sea, for example, retaliation will not become due, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad, say that retaliation will become due.

12. Wounding a person, who dies on account of wound.

If a person wounds another person, so as to disable and make him perpetually bedridden until he dies, retaliation will be due against the person who caused the wound.

13. Mistakenly killing a Muslim in battle .

If an army of Muslims engages an army of infidels, and they mingle together, and a Muslim kills another Muslim, thinking him an infidel, he will not be liable to retaliation, but will be liable to expiation, and pay a fine ; because this is a murder by mistake; in which expiation and fine become due, but not retaliation.

14. Death due to combination of several reasons.

If a person hits himself upon his own head, and another person also hits him upon the same part, and a wild animal tears him, and a snake bites him, and he dies on account of all these causes, the person who struck him will be liable for one third of the fine of blood ; because the acts of the wild animal and snake are of the same nature, and incur no penalty, in this world as well as in the next ; and as the act committed by the deceased upon himself is also of no account in this world, this constitutes another kind ; and as, again, the act of the other person is of account both in this world as well as in the world to come, it therefore constitutes a third kind of murder. Now, the deceased died on account of these three different kinds of acts, he may be said to have died by three acts ; and as the act of the other person was one of these three, he will therefore be responsible for one third of the fine.

Section

MURDER IN SELF-DEFENCE

(Kitabul Janayaat, Fasl)

1. Killing in self-defence .

If any person draws a sword upon a Muslim, he, i.e. the Muslim

is entitled to kill him in self-defence ; because the Holy Prophet has said, "he who draws a sword upon a Muslim renders his blood liable to be shed with impunity ;" and also, because a person who thus draws a sword is a rebel, and guilty of sedition ; and it is lawful to slay such, Allah having said, in the Qur'an, "SLAY THOSE WHO ARE GUILTY OF SEDITION, TO THE END THAT IT MAY BE PREVENTED." (Ch.2, Baqarah, verses 194)

But if the person, who is attacked, is able to depend himself with-out killing the person who attacks, it is not lawful to kill him.

2. Distinctions in such a case .

According to Jaame'-as-Sagheer, if a person strikes at another person with a sword, during the night or day, or lifts a club against another person in the night in a city, or in the day-time in the highway out of the city ; and the person so threatened kills him who thus strikes with the sword, or lifts the club, no punishment will be incurred.

3. Killing an infant or lunatic in self-defence .

If a lunatic draws a sword upon a person, and the person kills him, the fine of blood will be due from his property, and not from his 'Aaqilaas.

Similarly, if an infant draws a sword and makes an attack upon a person; or if an animal attacks any one, and the person so attacked kills the infant, or the animal, a fine will be due on account of the infant, or the value on account of the animal.

4. Killing a person while going away, after attacking another person.

If a person draws a sword upon another person, and strikes him, and then goes away, and the person struck, or any other, afterwards kills this person, he will be liable to retaliation,

But this will be where the striker goes away in such a way as indicates that he will not strike again ; because as, upon his so going away, he no longer continues to be an assailant, and the protection of his blood which had been forfeited by the assault reverts, retaliation will consequently incurred by killing him.

5. Killing of a thief while stealing.

If a person comes in the night to a stranger, and carries away his goods by theft, and the owner of the goods follows and kills him, no punishment will be incurred, because the Holy Prophet has said, "Ye may kill in preservation of your property" (Bukhari and Muslim).

But this will be only where the owner cannot get back his property except by killing the thief.

CHAPTER 3

RETALIATION IN CASES SHORT OF LIFE

(Hidayah, Kitab-ul-Janayaat, Baab-ul-Qisaas, Feema Doon-an-Nafs)

1. For a hand .

If a person wilfully cuts off the hand of another person at the wrist, his hand will be cut off in return, notwithstanding it be larger than the hand of the other ; because in the Holy Qur'an Allah says, "THERE IS RETALIATION IN CASE OF WOUNDS ;" (Ch. 5, Maa'idah, Verse, 45)

2. For a foot, an ear, a nose.

If a person cuts off the foot of another at the ankle, or cuts off the nose or ear of another, person retaliation will be inflicted upon him in return.(ibid).

3. For an eye .

If a person strikes another on the eye, so as to force the member, with its vessels, out of the socket, there will be no retaliation in such a case, because it is impossible to maintain perfect equality in extracting an eye.

But if , the eye remains in its place, but only the faculty of seeing is destroyed, retaliation will be inflicted, as in such a case equality can be maintained by finishing the sight of the offender's corresponding eye with a hot iron.

4. For the teeth .

If a person strikes out the teeth of another, person , the striker will incur retaliation, even though his teeth are larger. The necessity of retaliation, in such a case, is also supported by

the Holy Qur'an, in which Allah has said, "EXACT A TOOTH FOR A TOOTH."(ibid).

5. For fractures .

Retaliation will not be inflicted in the case of breaking any bone except the teeth ; because it is impossible to maintain an equality in cases of fractures.

6. Wounds short of life .

Wounds which do not cause the death are of two kinds ; 'Amd or wilful, and Khata, or by mistake.

7. Retaliation in the wounds short of life .

There will be no retaliation, in the wounds short of life, between a man and a woman, a free person and a slave, or one slave and another slave.

But retaliation for parts of the body is between a Muslim and an infidel, as both are upon an equality in respect of the fines for the wounds in question.

8. Retaliation where a bone is cut through ; or for a stab.

If a person cuts off the hand of another person above the wrist- joint, or gives him a stab in any part, which afterwards heals, there will be no retaliation , because in such a case it is impossible to maintain the equality.

9. If the corresponding member of maimer be defective .

If a person who is paralytic , or has withered hands, cuts off the hand of a sound person, he who is thus dismembered is entitled to cut off the defective hand , and nothing more, or to take the complete fine for his own hand.

If, in such a case, the hand of the offender mortifies and drops off, or is unlawfully cut off, before the person whom he has dismembered, has made his choice of fine or dismemberment as above he will not then be entitled to any thing.

But it will be otherwise where a person who has defective hands, cuts off the hand of another person and then has his own defective hand cut off for theft, or in retaliation ; because in such a case he should pay the fine for a perfect hand, since in such a case, as his hand has been lost in satisfaction of a right, still (as it were) remains, and he opposes the retaliation.

10. Retaliation for the tongue, the penis, the ear, or the lip .

There will be no retaliation for the tongue, or the virile member.

If a part of the nut of a man's penis is cut off, there will be no retaliation, as it will not be possible to take off that exact quantity.

But it will be otherwise in respect of the ear ; because where the whole ear, or a part, is cut off, retaliation will be incurred.

If a man cuts off the whole of another's lip, retaliation will be inflicted upon him, because in such a case observance of equality will be possible. But it will be otherwise where a part only of the lip is cut off, because in that case equality cannot be exactly maintained.

Section (1)

COMPROMISE

(Hidayah, Kitabul Janayaat, Fasl Dar Bayne Masaleha)

1. Retaliation can be commuted for a sum of money .

When the heirs of a murdered person enter into a compromise with the murderer for a particular sum, retaliation will be finished, and the sum agreed for will be due, to whatever

amount; because Allah has said, in the Qur'an, "WHERE THE HEIR OF THE MURDERED PERSON IS OFFERED ANY THING, BY WAY OF COMPROMISE, OUT OF THE PROPERTY OF THE MURDERER, LET HIM TAKE IT;" (Ch.2, Baqarah, verse 178) and also because the Holy Prophet has said, "the heir of the murdered person is entitled to take retaliation, or a fine with the murderer's consent". ('' Aainul Hidayah, Vol. IV , p.638).

2. Payment of the sum agreed .

If the murderer enters into a compromise with the heirs of the murdered person, without any mention of a prompt or delayed payment, the sum agreed upon should be paid down.

3. Share of a slave in a compromising for murder .

If a freeman and a slave jointly murder any person, and the freeman and the slave's master afterwards desires some other person to compromise the matter with the deceased's heirs, on behalf of both the murderers, for one thousand Dirhams, and he compromise it accordingly, then the whole amount will be due, from them, i.e. the master and the other person, in equal proportions.

4. One of several heirs compromising a murder .

If one of the heirs of a murdered person pardons the offence, or enters into a compromise with the murderer , for a sum of money , against to his share , or retaliation, the right of all the heirs to retaliation will cease, and they will get, in either case, their respective shares in the fine of blood.

It may be noticed , that where one of the heirs grants a pardon as above the shares due to the other heirs will be payable within three years.

But Imam Zufar is of the view that payment should be made within two years, in a case where the right of retaliation lies between two persons, and one of them grants a pardon.

5. Compromise in case of murder of two persons .

If a man murders two persons, and the heirs of one of the murdered persons grants a pardon still the right of retaliation will remain on behalf of the heirs of the other murdered person . because in such a case there will be two retaliations, as each murder is a distinct and separate offence.

6. All persons taking part in a murder .

If a number of persons join hands in murdering a man, all of them are liable to be put to death, because it is said that when, on an occasion, seven of the inhabitants of San'aa murdered a man, Hazrat Umar ordered retaliation upon all the seven, saying, "if the whole people of San'aa had assisted in the murder, I would have certainly killed them all."

7. A person guilty of many murders.

If one man murders many persons and the heirs of all the murdered persons appear together, the murderer will be put to death on behalf of all of them and the heirs will not be entitled to anything more.

And if only one of the heirs appears, the murderer will be put to death on behalf of him, and the right of the others will consequently be finished.

8. Death of the murderer .

If a person, who had incurred retaliation, dies the right to retaliation will necessarily cease, (and consequently no fine will also be due), as the subject of it no longer exists.

9. Two persons joining in maiming a person.

If two persons cut off the hand of any person, by both seizing a knife and applying it to the joint, until the hand is

separated, retaliation will not be inflicted on either of them, but they will be responsible for one-half of the fine of blood ; because the compensation for a hand is half the fine for the person ; and they joined hands in depriving the person of his hand, one-half of the fine of blood there-fore, falls upon each.

10. A person maiming two others ;

If a person cuts off the right hands of two others, or the left hands of two, and both appear against him, the right hand of the offender will be cut off in the former case, or his left hand in the latter case and a moiety of the fine of blood will moreover be exacted from him, and divided equally between the parties ; and this is whether the hands were cut off, both at the same time, or one after the other.

11. If only one of the two appears .

If a person cut off the right hands of two others, or the left hands of two, and only one of the parties appears, retaliation will be executed on behalf of this one, and a moiety of the fine blood will be due to the other.

12. A slave confessing a murder .

If a slave confesses a murder, will become retaliation due against him.

But Imam Zufar is of the view that confession of a slave is not valid in such a case.

13. Murder and murder by mistake united .

If a person wilfully shoots an arrow at any person, and the arrow passes through that person, and then hits another, and they both die, retaliation will be due on behalf of the former person, and a fine of blood on behalf of the latter, which will be payable by the 'Aaqilaas of the murderer ; because the first killing is wilful murder ; and the second is only murder by mistake, in the same manner as where a person shoots at a deer, and his arrow hits a person.

Section (2)

ACT OF CRIME

(Hidayah, Kitabul Janayaat, Fasl Dar Fe'ile Jurm)

1. Maiming with murder .

If a man cuts off the hand of another person by mistake, and then kills him wilfully before the healing of his wound, or wilfully cut off his hand, and then kills him by mistake before the healing of his wounds, or, cuts off his hand by mistake, and after his wound is healed kills him by mistake, or, wilfully cut off his hand, and after the wound is healed wilfully kills him, he will be prosecuted for both crimes in all these cases.

In the first of these cases, the offender's property will be subject to a fine for the hand, and he will also suffers retaliation for the murder, in the second case; he will be subject to retaliation for the hand, and also to a fine for the murder ; in the third case, he will be subject to a fine for the hand, and also to a fine for the murder ; and in the fourth case he will suffers retaliation, first for the hand, and then for the murder. ('Aainul Hidayah, Vol. IV, p. 645)

2. Person dying on account of stripes unjustly inflicted .

If a person gives another person one hundred stripes with a stick or rod, and the person so struck recovers from ninety of the stripes, so much so that no mark of them remains, on his body and then dies on account of the last ten stripes, one fine of blood will be due.

The same rule will apply in respect of every wound which heals and leaves no mark, according to Imam Abu Hanifah.

Imam Abu Yusuf is of the view that in such a case a fine will be due in proportion to the pain or trouble suffered.

But Imam Muhammad says, that nothing will be due in such a case except the expences of the physician or surgeon.

3. Person cut by stripes .

If a person strikes another person with one hundred stripes, and thereby causes wounds in his body and the wounds heal, but leave the scars, an award of equity (Arabic *Hukumat-e-'Aadil*), will be is due on account of such scars.

4. Forgiveness by maimed person if he dies thereafter .

If a person cuts off the hand of another, and the person so maimed forgives the offender, and there after dies on account of it, a fine of blood will be due, from the offender's property, if the offence was wilful ; or from the 'Aaqilaas, if it was by mistake.

But if he forgives not only the maiming but also the consequence of it, and thereafter dies on account of the wound, his forgiveness will include both i.e. life as well as maiming ; and then, if the offence was committed by mistake, the forgiveness will be estimated as from one third of the deceased's property ; but if it was committed wilfully, the forgiveness in that such a case will be estimated as from the whole of the property.

5. Woman marrying a man on account of maiming him .

If a woman cuts off the hand of a man, and marries him as a recompence, and he there after dies on account of the wound, the woman will be entitled to her proper dower, and a fine of blood will be due from the 'Aaqilaas if her offence was by mistake, and from her-self if it was wilful.

But if the man marries the woman "in satisfaction of the maiming, and the consequence of it," or "in a satisfaction of the

offence," and he there after dies of the wound, the woman will be entitled to her proper dower if the maiming was wilful.

Moreover, in such a case the retaliation will be totally remitted, and nothing will remain due from the woman for it.

But if the maiming was by mistake, the fine of blood will in such a case be considered as the woman's dower and a proportion of it equal to her proper dower will be remitted from her 'Aaqilaas, and the remaining will be regarded as a bequest to them .

6. Retaliation for maiming does not finish on account of retaliation for the person, in case of the death of the maimed.

If Zaid wilfully cuts off the hand of Khalid, and suffers retaliation for it and Khalid thereafter dies on account of the loss of his hand, Zaid will still be liable to be put to death in retaliation, as he will then be considered to have killed Khalid, who will consequently be entitled to retaliation for the person. The heirs of Khalid, therefore, can put Zaid to death, as the right of Khalid to retaliation for the person will not be done away by the maiming of the offender.

But Imam Abu Yusuf is of the view that upon cutting off the offender's hand, the right to any further retaliation will be finished.

7. An heir executing retaliation for murder, by maiming, without authority.

If the heir of a murdered person cuts off the hand of the murderer and remits any further retaliation, before or after the order of the Qazi, authorizing the same will be liable for a fine for the hand, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad, are of the view, that nothing whatever will be due.

8. If maiming causes death .

If a person is entitled to retaliation upon another person in respect of any part of the body, and cuts off that part accordingly, and the person upon whom retaliation is thus executed dies the person in question will be liable for a fine of blood, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that he will not in any respect be responsible.

CHAPTER 4

EVIDENCE IN CASES OF MURDER

(Hidayah, Kitab-ul-Janayaat, Baab-ush-Sahadat Fil Qatl)

1. Evidence of murder .

If a person is killed, and leaves two sons, of whom the one present, and another one is absent, and he who is present gives evidence of the fact, and the other afterwards appears, in such a case, it will be necessary that he should also give evidence of the fact, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that there will be no occasion for this.

But if, the person was killed by mistake, in such a case, there will be no occasion for the second evidence, according to all our jurists, any more than in the case of proving a debt due to the deceased.

2. Murderer producing evidence to prove the remission of retaliation by the absent heir .

If a murderer produces evidence to prove, against the present heir, that the absent heir has remitted the retaliation, in such a case the present heir will be a litigant, and the evidence produced by the murderer will be accepted and the right of retaliation will cease accordingly. Moreover, the murderer in such a case will not be required to produce his evidence again upon the appearance of the absent heir.

If a slave owned in partnership by two men is murdered, and one of the owners is present, and the other one is absent, and the present owner gives the evidence against the murderer, in such a case, upon the appearance of the absentee, he will also be required to give the evidence.

But if, the murderer gives evidence to prove that the absentee has remitted the retaliation, in such a case the owner present will be the litigant, and the murderer will therefore be under no necessity of again giving the evidence upon the appearance of the absent.

3. Rule in case of two present heirs giving evidence of remission by an absent heir .

If the heirs of the person murdered are three, and two of them give evidence against the third one, that "he has remitted the retaliation," their evidence so given will be void, but the retaliation will be considered as remitted by these two ; because, in giving evidence as above, they admit retaliation to have been remitted, and their admission, so far as it affects themselves, should be accepted. The invalidity of the evidence, in such a case, is because of its being to the advantage of the witnesses, as changing the retaliation into property.

It may be noted that the case here considered may take place in four different ways. First, where the murderer confirms the evidence of the two heirs in question, and the third heir denies it, in which case a fine of blood will be due among the three, in equal shares ; because the murderer, in confirming the evidence of the two heirs, makes an admission of two third of the fine in their favour ; and he at the same time claims that "the right of the third heir has finished, on account of the remission granted by the others," a plea which is opposed by the third heir, and cannot be proved by the evidence of the others, inasmuch as their evidence is void, whence he owes an atonement to this heir like-wise, namely, one third of the fine. Secondly, where both the murderer and the third heir confirm the evidence of the two heirs, in which case two thirds of the fine of blood will go to the two testifying heirs, for the reason already mentioned ; but the third heir will get nothing whatever, as in confirming the evidence of the other two he admits a remission, and will therefore not be entitled to any thing. Thirdly, where the murderer and the third heir both deny the truth of the evidence, in which case the third heir will be entitled to one-third of the

fine of blood, ; but the two testifying heirs will get nothing whatever ; because as they have admitted, against themselves, that retaliation has finished, they should be accepted; but they at the same time claim that the shares of each has been changed into property ; and a claim cannot be admitted unless supported by proof, which in respect of them does not appear, as their evidence does not serve for proof in their own cause. The share of the third heir, on the contrary, will be considered as being changed into property upon the force of their own allegation, as that is sufficient proof in respect of him. Fourthly, where the third heir confirms the evidence of the other two, and the murderer denies it, in which case the murderer will owe one-third of the fine to the third heir ; because, in denying the evidence of the two, he admits that the right of retaliation had finished on account of the remission of those two alone, and that the share of the third will still be due in property. It is to be noted, however, that this heir, on receiving such one-third, should give it over to the other two ; because they claim two-third of the fine of blood for themselves, and the murderer denies their claim in respect of property, but admits a fine to be due to the third heir, as having accepted that the right of retaliation has finished on account of the avowal of the other two heirs, at the same time that the share of the third became changed into property. Whatever, therefore, the murderer admits in respect of the third heir, he i.e., the third heir admits in respect of the other two, in having confirmed their evidence. (‘Aainul Hidayah vol. IV, pp. 655-656).

4. Evidence in respect of a person’s “dying of a wound”.

If witnesses give evidence that “a certain person had wounded another person with a weapon so as to make him bedridden until at length he died,” retaliation will in such a case be incurred by the person who has caused the wound.

5. Disagreement in the evidence of the witnesses

If two witnesses of murder disagree in their evidence as regards the time of the fact, i.e., one says that the murder was

committed on a particular day, and the other says that it was committed on another day, or as regards the place, one says that it was committed in such a place, and the other that says it was committed in another place, or as regards the instrument, i.e., one says that it was committed with a weapon, and the other that it was committed with a stick, their evidence will be totally void.

6. Evidence of a murder, which does not prove the instrument.

If two persons give evidence that "a certain person has killed another person, but it is not known with what instrument," a fine of blood will in such a case be due from the alleged murderer.

It may be noted that in such a case the fine will be due from the murderer, and not from his 'Aaqilaas, because all acts are taken to be wilful, unless they are proved otherwise. Moreover, here the evidence is given of bloodshed unrestrictedly, and therefore there is a doubt in respect of mistake ; and a doubtful fact cannot be proved.

7. Evidence of a murder in which two person are involved.

If two persons, make the confession of killing a particular person, and the heir of the murdered person also says the same, he will be entitled to put them both to death. But, if two persons give evidence of a man's killing a particular person, and two others persons say that some other person had killed that person, and the heir says that they had both killed him, in such a case the evidence of both parties will be void.

CHAPTER 5

CIRCUMSTANCES UNDER WHICH MURDER TAKES
PLACE

(Hidayah, Kitab-ul-Janayaat, Babo Fee E'tibaare Haalehil Qatl)

1. Shooting at a Muslim who, in the interim, becomes an apostate .

If a person shoots an arrow at a Muslim, and the Muslim apostatizes, and the arrow then hits and kills him, the shooter will be liable for a fine of blood, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that the shooter, in such a case will not be liable for the fine.

2. Shooting at an apostate who, in the interim, returns to the faith .

If a person shoots an arrow at an apostate, and the apostate becomes a Muslim, and the arrow then hits and kills him, the shooter will be not liable to any fine, according to all our jurists ; and the same rule will apply, if a person shoots an arrow at a hostile infidel, and the infidel becomes a Muslim and the arrow then hits and kills him.

3. Shooting at a slave who, in the interim, is set free.

If a person shoots an arrow at a slave, and the slave is set free by his master, and the arrow then hits and kills him, the shooter will be liable to the master for the value of the slave, according to Imam Abu Hanifah and Imam Abu Yusuf.

But Imam Muhammad is of the view that in such a case an estimate should be made of the value of the slave before the arrow was shot, and his value afterwards ; and that the shooter will be liable to the master of the slave for the difference.

4. Shooting at a condemned criminal who, in the interim, is acquitted .

If the Qazi pronounces upon any person a sentence of stoning for Zina, and one of the bystanders shoots an arrow at this person, and one of the witnesses then retracts from his evidence, and then the arrow hits him, the shooter will not be liable for anything ; because regard in such a case will be paid to the time of shooting the arrow ; as the blood of the person condemned was at that time in a neutral state.

BOOK – VI

DIYAAT

(FINES)

DIYAAT *

(FINES)

*(Hidayah, Kitab-ud-Diyaat)***Note**

“Diyaat” is the plural of “Diyat”, which means the fine which a person or his community is liable to pay for any offence.

CHAPTER 1**DIYAT MUGHALLIZAH AND KAFFARAH****1. Murder by mistake and Expiation .**

In case of Shubhe 'Amd an heavy (Arabic : Mughallizah) fine become due upon the 'Aaqilaas of the slayer ; and it is binding on the murderer to perform the expiation (Arabic : Kaffarah).

The expiation for Shubhe 'Amd, and also for Qatle Khata, consists in the emancipation of a Muslim slave, provided, he be free from all personal defects ; or, if such a slave is not available in observing the fast for two consecutive months.

It may be noted that distribution of alms does not constitute an expiation for murder, as in the cases of Zihhaar ; because the above two modes of expiation for murder are specifically laid down in the Qur'an (Ch. 4, Nisa, Verse 92) whereas the expiation of Zihhaar as mentioned is to be sufficiently performed by the distribution of alms, as well as by the other two modes.

It is also enough for an expiation, that the murderer emancipates an infant at the breast whose father or mother is a believer, as such infant is a Muslim in effect, and its members such as the hands, feet, eyes, are all apparently perfect ; but it will not be enough to emancipate an embryo which is still in the womb, as its existence, as well as the perfectness of its body, are not known and are uncertain.

* Qur'an Ch. 2 (Baqarah) verse, 178 ; Mishkaat Kitabul Qisaas, Babud Diyaat 'Aainul Hidayah, vol. iv, pp. 661 to 778.

2. Fine for Shubhe 'Amd.

The heavy fine for Shubhe 'Amd consists, according to Imam Abu Hanifah and Imam Abu Yusuf, of one hundred female camels, in their four lots, namely, twenty-five of one year, twenty-five of two years, twenty-five of three years, and twenty-five of four years.

But Imam Muhammad is of the view that it consists of one hundred female camels, in their three lots; namely thirty of three years, thirty of four years, and forty pregnant ones of five years. (Ibne Hibban)

It may be noted, that this heavy fine for Shubhe 'Amd holds only where it is paid in camels ; because if the Qazi orders it to be paid in money, no more than ten thousand Dirhams, or one thousand Deenars, can be imposed in total; because, when it is paid in this mode, the amount has been particularly specified by the lawgiver.

3. Fine for murder by mistake .

In cases of murder by mistake a fine will be binding upon the 'Aaqilaas, and expiation upon the murderer. The fine, in such a case, consists of one hundred camels in their five lots ; twenty females of one year, twenty of two years, twenty of three years, twenty of four years, and twenty males of one year ; because such was the fine ordered by the Holy Prophet in this instance (Ibne Hibban, Nisa, Abu Daud) and also because in this mode the fine is least burdensome, and an alleviation should be granted in a case of mistake, as the person shedding the blood in such a case is excusable.

4. It is not payable in any other mode .

A fine is not payable in any other than the above three modes, namely, in camels, Deenars, or Dirhams.

But Imam Abu Yusuf and Imam Muhammad are of the view that it can be paid not only in these, three modes but also in

two hundred kines, or two in two thousand goats, for also in two hundred suits of clothes.

It is also noted in the *Mabsoot*, under the head of Fines, that "if the avenger of blood compounds the matter for more than two hundred kines, or two hundred suits of clothes, it will not be lawful ; " and as no differences of opinion is there noted on the part of Imam Abu Hanifah, it therefore follows that he has also admitted the payment of a fine in clothes or kines.

5. Fine for a woman .

The fine for a woman, whether for the person or the members, is half the fine for a man.

6. Fine for a Zimmee .

The fine for a Zimmee is the same as for a Muslim .

Section (1)

FINES FOR OFFENCES SHORT OF LIFE (*Hidayah, Kitabul Diyaat, Fasl Feema Doonan Nafs*)

1. Fine for the nose, the tongue, or the virile member ;

For the cartilage of the nose there is a complete fine ; and so likewise for the tongue and the virile member ; because the Holy Prophet has said, "a fine is due for life, and for the nose, and for the tongue." ('A'Aainul Hidayah)

2. Loss of part of nose or tongue .

If the bone of the nose is cut off, together with its cartilage, still a single fine only will be due, and no more, the whole forming is also only one member, in the same manner, if the whole tongue is cut out, a single fine will be due, as desirable faculty namely, speech is thereby lost. A complete fine is

similarly due if a part only of the tongue is cut off, provided the power of speech is totally destroyed, because in such a case the most desirable use of the tongue is lost, notwithstanding the organ of speech still remain intact.

The jurists however say that if the person continues to pronounce some of the letters, the fine will be levied proportionably, and some say that in such a case the fine should be levied in the proportion which the denied letters bear to the rest. The jurists also say that if the person is still able to pronounce most of the letters, the fine should be decided by award of equity (Arabic : *Hukumat-al-'Adl*) ; because the purpose of speech is to communicate ideas, which end is still answered ; but still an impediment is caused in the utterance, which needs an equitable compensation. But if the person is rendered incapable of pronouncing most of the letters, a complete fine will be due, as in such a case it is clear that the purpose and intention of speech is not available.

3. Loss of reason or senses .

If a person hits another person a blow upon his head, and deprive him of his reason, a complete fine will be due, as the person is thereby totally deprived of attending to his temporal as well as eternal affair. Similarly, if a person is by a blow deprived of any of his senses, such as seeing, hearing, smelling, or tasting, a complete fine will be due, as all these are necessary faculties. Moreover, it is related of Hazrat Umar, that he imposed four fines for a single blow, in a case where it had deprived the person of reason, speech, sight, and hearing.

4. Loss of beard or hair .

If a person tears out the beard of another person, preventing its future growth, a complete fine will be due, because the beauty of the face is hereby finished ; and the same fine will be due for tearing out the hair of the head, preventing its future growth on account of the same reason.

5. Fine for the whiskers.

If a person tears out the whiskers of another person, preventing their future growth, an arbitrary atonement will be due.

6. Fine for tearing out the hair of eye-brows .

If a person tears out the hair of another person's eye-brows, a complete fine will be due ; and one-half fine for tearing out the hair of one eye-brow.

7. Fine for any two fellow-parts or fellow-members of the body.

A complete fine will be due for the two eyes, the two hands, the two feet, the two lips, the two ears, and the two testicles ; and for one of either one-half fine will be due ; because the Holy Prophet wrote a letter to Hazrat 'Amr bin Hazam, saying that "for the two eyes a complete fine is due, and one-half fine for one eye." (''Aainul Hidayah).

8. Fine for the breasts or nipples of a woman.

For the two breasts of a woman a complete fine will be due ; and one-half fine for one breast, on account of the reason mentioned before. Similarly for the two nipples, also, of a woman's breasts, a complete fine will be due ; and for one of them one-half fine.

9. Fine for the four eye-lids .

For the four eye-lids a complete fine will be due ; and for any one of them one-fourth of the complete fine.

10. Fine for a toe or a finger .

For each of the fingers or toes one-tenth of the fine will be due ; because the Holy Prophet has said, "ten camels should be paid for a finger."

It may be noted that in this respect all the fingers and toes are alike, as the saying quoted above is unrestrictedly expressed. Further, all the fingers are alike in their original purpose, similarly as the right-hand and the left.

11. Joints of the fingers or toe .

For every finger, or toe, consisting of three joints, one-third of the fine for the whole finger will be due for each joint ; and in every finger of two joints one-half of the fine for the finger ; because as the fine for the two hands is divided among the fingers, so also is the fine for each finger will be divided among its joints.

12. Fine for the teeth .

The fine for each tooth is five camels, that is, one-twentieth of the complete fine, because the Holy Prophet having thus ordered.

But this is where the loss has been caused by mistake ; because, where it is wilful, retaliation will be due in all those cases as has been already mentioned in dealing with the offences against the person.

13. Fine for the loss of the use of a member .

If a person strikes the member of another person, and destroys the use of it, the member itself still remaining, in such a case one-half fine will be due.

14. Fine for the loss of any of the faculties .

If a person strikes another person on the loins, and destroys his power of secreting semen, a complete fine will be due because this amounts to complete loss of one of the faculties.

15. Fine for causing loss of beauty .

If a person strike another person on the back, and thus make him crooked, back-broken, a complete fine will be due, because the beauty of the person is thus completely damaged.

But if, the person recovers his carriage, and does not retain any sign of the injury, nothing whatever will be due.

Section (2)

SHAJJAH, OR WOUNDS AND CUTS FROM THE CROWN
OF THE HEAD UP TO THE CHIN

(Hidayah, Kitab-ul-Diyaat, Fasl Fish Shajjaj)

1. Shajjah wounds .

Shajjah wounds there are of ten kinds; viz., : (1) Haarisah, or a scratch, which does not draw blood ; (2) Daami'ah, or a scratch, such which draws blood, but does not cause it to flow; (3) Daamiyah, or a scratch, which causes the blood to flow ; (4) Baazi'ah, or a cut into the skin ; (5) Mutalaahimah, or a cut into the flesh ; (6) Simhaaq, or a wound causing pericranium ; (7) Mawziha, or a wound which lays bare the bone ; (8) Haashimah, or fracture of the skull ; (9) Munaqilah, or fracture which requires removal a part of the skull ; (10) Aamah, or a wound which extends upto the membrane and encloses the brain. Next follows Daamigha, or a wound which penetrates into the brain ; and which is not included among the others, because a person so wounded cannot possibly remain alive.

2. Infliction .

In the case of wound of a seventh kind [Mawziha] retaliation will be due, if the wound is wilfully given ; because it is said that the Holy Prophet ordered retaliation for such a wound and also, because in such a case, it is practicable to observe

equality in the retaliation, as it is possible to cut the offender's bone with a knife. Retaliation is, therefore, due in this case ; but it is not to be inflicted in any of the other cases above mentioned, as in those cases there is no fixed limit of cutting with a knife ; and further, in all wounds above the seventh kind the bone is fractured; and there is no retaliation for fractures. In wounds short of the seventh kind an award of equity will be due, as these have no fixed limit, and still cannot lawfully be allowed to go away without penalty.

3. Rate of fines for Shajjah .

In the case of a Mawziha wound caused by mistake, one-twentieth of the complete fine will be due. For a Haashimah wound one-tenth of the complete fine will be due ; for a Munaqilah three twentieth ; and for an Aamah one-third ; whether they are caused wilfully or accidentally. One-third of the fine will be also is due for a Jaa'ifah, or stab, that is, a wound extending into the cavity of the trunk, from the breast, the back, the belly, or the ribs, or from the neck into the gullet ; and if it penetrates quite through, from side to side, it will be counted as two stabs, and two third of the fine will accordingly be due for it ; because the Holy Prophet has said, "five camels are due for a Mawziha wound, ten for a Haashimah, fifteen for a Munaqilah, and one-third of the complete fine for an Aamah and a Jaa'ifah", and also, because where the wound extends quite through, it stands, in effect, as two stabs, one on one side, and one on the other ; and as one-third of the fine will be due for each stab, it follows that two thirds will be due in such a case.

4. Compensation for all other wounds .

The ten kinds of wounds here dealt with relate solely to the head and the face, as regards the wounds on the other parts of the body, which are known as Jaraahat, and for Jaraahat which no specific penalties have been fixed, they require an award of equity, where the bone is fractured or laid bare, if a lasting scare or deformity is caused ; because although specific penaties have

wounds of the head or face, still the offence in question cannot lawfully be allowed to go away without penalty ; and also, because the particular fixing of a penalty is on account of the defect caused by a scar, which is a defect only where it occurs upon the head, or on the face.

Section (3)

FINE IN RESPECT OF MEMBERS OTHER THAN THE HEAD

(Hidayah, Kitabul Diyaat, Fasl)

1. Fine for the fingers of either hand .

For the fingers of one hand one-half of the complete fine will be due ; because, as the fine for each finger is one-tenth, as mentioned, before it follows that for five of them the fine will be five tenths.

If, the fingers of one hand is cut off, together with a part of the metacarpus, still one-half fine only will be due ; because the Holy Prophet has said, "for the two hands a fine is due, and half the fine for one hand ;" ('A' Aainul Hidayah)

2. If part of the lower arm is cut off .

If the hand is cut off, together with part of the lower arm, one-half fine will be due for the hand, and an award of equity for the part of the arm, according to Imam Abu Hanifah and Imam Muhammad, and also according to one opinion of Imam Abu Yusuf.

There is, however, another opinion noted from him, that nothing whatever will be due for the leg or arm.

3. Fine for a defective hand .

If a hand having only one finger is cut off, one-tenth of the fine will be due ; or, if it has two fingers then one-fifth ; and so forth ; and nothing will be due for the metacarpus in either case.

4. For a redundant finger .

For a redundant finger that is, one-sixth an award of equity will be due, on account of respect for the man because that man also is a part of the person, although it is neither useful nor ornamental.

The same rule is also apply in respect of a redundant tooth ; and for the same reason.

5. For the eye, yard, or tongue of an infant .

An award of equity will be due for the eye, the yard, or the tongue of an infant who is so young that the perfectness of these members in him cannot be known.

It may be noted that the perfectness of the tongue can be known from speaking, that of the yard by the proper passing of urine, and that of the eye from such signs as serve to manifest that the child sees objects with it. As soon, therefore, as from these tokens the perfectness of the organs in question is known, the same rules will apply in respect of them as in the case of adults.

6. Retaliation for injury upon the head.

If a person, wilfully or by mistake, wounds another person upon his head, and he is deprived of his reason, or loses the whole of his hair, retaliation will not be due upon the striker ; neither in the case of mistake, obviously ; nor in the case of wilful wound, because equality, in such a case, cannot be mentioned in the infliction of the retaliation. A complete fine will therefore be due in either case, and the penalty for the wound will therein be included.

7. Where any of the senses or faculties are destroyed .

If a person wounds another person upon his head, and thereby deprives him of speech, sight, or hearing, the penalty for the wound will be due, together with the complete fine.

But Imam Abu Yusuf is of the view that the penalty for the wound will be included in the fine, in the case of depriving from hearing or speech, but not of sight.

8. A blow on the head, causing the loss of sight .

According to Jaame'-as-Sagheer, an opinion of Imam Abu Hanifah, that if a man wilfully wounds another person upon the head, and thereby puts out both his eyes, retaliation will not be inflicted ; and jurists have, moreover, noted it as his opinion, that in such a case a fine will be due for the eyes, and also the penalty for the wound.

But Imam Abu Yusuf and Imam Muhammad, are of view, that retaliation will be due for the wound, and a fine for the eyes.

9. If a member is destroyed on account of a partial injury.

If a person cuts off the upper joint of another person's finger, and the rest of the finger, or the hand itself, withers in consequence, retaliation will not be due, nor anything except the fine for the joint, and an award of equity for the remaining.

Similarly, if a person breaks off a part of another person's tooth, and the rest of the tooth turns black, retaliation will not be due, but will have to pay the fine for the tooth.

And if, in any of those cases, the injured person demands retaliation, offering to be satisfied with cutting off the correspondent upper joint of the offender's finger, or a part of his tooth, and to remit the remaining, it will not be permitted, as these acts are not the proper subjects of retaliation.

10. Injury to one member causing the loss of another .

If a person cuts off the finger of another person, and as a result the next finger becomes useless, retaliation will not be inflicted for either, according to Imam Abu Hanifah.

But Imam Muhammad and Imam Zufar are of the view that retaliation will be due for the first finger, and a fine for the second.

11. Injury causing additional and unexpected defect .

If part of a tooth is broken off, and the remaining there after falls out, retaliation will not be due ; and similarly, if a person causes another person two wounds upon the head, and the two wounds there after become one, retaliation will not be due.

12. Injury to the teeth .

If a person strikes out another person's tooth, and a second tooth grows in its place, the fine for the first tooth will be remitted, according to Imam Abu Hanifah.

If a person strikes out another person's tooth, and this person keeps the tooth in its place until the gum grows round it, and it remains, after all, unlike to the rest in point of usefulness or beauty, a fine for the tooth will be due from the striker, the growing of the gum round it will not be given any regard, as it is impossible that the vessels and nerve of the tooth be connected with it in the same manner as before.

If a person strikes out another person's tooth, and this person draws a tooth of the striker, in retaliation, and there after gets by growth, a new tooth, he in such a case will owe the striker five hundred Dirhams, as it then will become evident that he had executed the retaliation unjustly.

If a person strikes another person upon the mouth and loosens his teeth, a delay of one year should be observed in order to know the effect. If, therefore, the Qazi fixes one year's delay, and the person who was struck appears before him without his teeth, before the expiration of one year, and the plaintiff and the defendant disagree the former saying that his teeth fell out on account of the blow he had received from the

defendant, and the latter says that they fell out on account of a subsequent blow received from another person the assertion of the plaintiff, upon oath, should be accepted, so that the advantage of fixing a term of delay may be maintained. But it will be other-wise where the parties differ after the expiration of one year ; because in such a case the oath of the striker should be accepted.

If, in the above case, the year of delay fixed by the Qazi expires , and the teeth do not fall out, nothing whatever will be due from the striker. But if the teeth turns back, or decays, a fine for them will be due, from the 'Aaqilaas in a case of mistake, or from the striker in a case of wilful offence; but retaliation will not be due, as equality cannot possibly be maintained in the infliction of it.

13. Wound on the head, which heals, leaving no scar .

If a person wounds another person upon the head, and the wound heals, and hair grow upon the place, of wound ; and no mark of it remains, the fine will be remitted, according to Imam Abu Hanifah.

But Imam Abu Yusuf is of the view that the striker will still owe a fine for the pain of the wound.

And Imam Muhammad, says that the striker will be liable merely for the fee of the doctor and cost of medicine.

14. Stripes which heal without leaving the marks .

If a person causes injury to another person by beating him with one hundred stripes (for example), and the person so injured recovers, a fine will be due for the stripes, provided if they leave a mark ; but if they do not leave a mark, the fine will be remitted.

But Imam Abu Yusuf says that a fine will be due for the pain caused to the wounded person.

And Imam Muhammad, says that the offender should pay the fee of the doctor and cost of medicine.

The fine for stripes will be fixed by observing the proportion which the wounds they cause bear to those for which a fine is fixed. If, therefore, they are in the degree of one-half, then one-half of the fixed fine for a wound will be due ; if, of one-third, then one-third of the fine will be due ; and so forth.

15. Person killing another mistake, after having maiming him .

If a person cut off the hand of another person by mistake, and then, before he has recovered, kills him by mistake, he will owe a complete fine, and the fine for the hand will be remitted.

16. Infliction of retaliation .

If a person wilfully wounds another person, retaliation will not be inflicted until the wounded person has recovered ; because the Holy Prophet has said, "in the case of wounds a delay should be observed for one year". ('Aainul Hidayah).

17. Discharge of the fine for wilful offences, and compromises

In all wilful offences, where retaliation is remitted because of a doubt, a fine will be due upon the property of the offender ; and all compromises for offence, are also, due upon the property of the offender ; because the Holy Prophet has said, "the 'Aaqilaas are not to pay the fine for a wilful offence, nor the fine of a slave, nor a compromises for an offence, nor a fine incurred by confession, nor anything short of the fine for a Mawziha wound." (Behaqi).

It may be noted that in the first of the above cases, where retaliation is remitted because of a doubt the fine will be payable in three years ; because as the offence, in this case, is analogous to Shubhe 'Amd or murder by mistake, because of the doubt, the

same delay, is therefore, granted in the payment of the fine. But in the case of compromises, it will be due upon the instant, as made binding by a specific contract, as the price of the goods in a contract of sale.

18. Father murdering his son .

If a father wilfully murders his son, a fine will be due from his property, which will be payable in three years.

19. Fine incurred on account of Confession.

The fine for any offence proved upon the confession of the offender, will be due upon his property, as his confession is not regarded in respect of his 'Aaqilaas.

20. Wilful murder by an infant or lunatic .

Wilful murder committed by an infant, a lunatic, or a person occasionally insane, i.e. Ma'tooah is the same as murder by mistake, and therefore the fine for it will be due upon the 'Aaqilaas, and similarly every other fine incurred by such persons to the amount of five hundred Dirhams and upwards.

Section (4)

EMBRYOS IN THE WOMB

(Hidayah, Kitabul Diyaat, Fasl Fil Janain)

21. Person striking a woman so as to occasion her miscarriage.

If a man strikes a pregnant woman upon the belly, and causes her to miscarry of either male or female foetus, begotten free, a ghorra being one twentieth of the complete fine for a man, namely, five hundred Dirhams, will be due, upon a favourable construction. Analogy suggests that nothing whatever will be due from the striker in such a case; because the living existence of a foetus is not certain; and mere probability is not

an admissible ground of claim. The reason, however, for a more favourable construction of the law in such a case is, that the Holy Prophet has said, "a Ghorra is due for a foetus ;" (Bukhari and Muslim) and by a Ghorra is understood a male or female slave, of the value of five hundred Dirhams.

'Aaqilaas to pay their part - The 'Aaqilaas of the striker, in the above case, are to pay their part of the fine i.e. the Ghorra.

Note : The Ghorra is payable within a year .

22. If she produces a living child, which afterwards dies .

If a person strikes a woman upon the belly, and she as a result of it gives birth to a living child which afterwards dies, a complete fine will be due upon the striker, as he, by striking the mother, has caused the loss of a living person.

23. If the woman so struck miscarries of a dead foetus, and also dies herself .

If a person strikes a woman on the belly, and she as a result of it miscarries of a dead foetus, and afterwards herself dies, the striker will owe a fine for the murder of the mother, and also a Ghorra for the miscarriage, the Holy Prophet having so decreed in such a case (Bukhari and Muslim).

But if the mother first dies of the blow, after giving birth to a living child which also dies afterwards, the striker will owe a fine on account of the mother, and another fine on account of the child, as he has in this case murdered two persons.

But if the mother dies of the blow, after giving birth to a dead child, a fine will be due for the mother, and nothing whatever will be due for the child.

24. Striker cannot inherit any part of the Ghorra .

The fine or penalty incurred on account of an embryo will go as an inheritance to the embryo's heirs, as compensation for his person. The striker, however, cannot get any share in such inheritance.

25. Miscarriage caused in respect of female slaves .

If a person strikes upon the belly a pregnant female slave, whose pregnancy is due to some other than her master, and she, as a result of it, gives birth to a dead foetus, but herself remains alive, the value of the foetus should be estimated at the same rate as if it was alive. If, therefore, it is a male foetus, one twentieth of the value will be due ; or, if a female, then one-tenth.

If a person strikes a pregnant female slave upon the belly, and her master afterwards emancipates "whatever may be in her womb," and she then gives birth to a living child, which shortly afterwards dies, the value of it, as a living child, will be due, and not the fine, in spite of the fact it died after manumission because the offender will be taken to have killed the child by a blow given to the mother at a time when it was still a slave.

26. Expiation for the loss of an embryo .

Expiation will not be due for an offence committed upon an embryo. But if the striker is desirous of performing expiation, it will be lawful ; because as he has been guilty of a prohibited act, it will, therefore be most laudable that he may perform expiation and intreat forgiveness.

CHAPTER 2

NUISANCES PLACED IN THE HIGHWAY

(Hidayah, Kitab-ul-Diyaa, Baab Maa Yohdisohur Rajul Fit
Tareeq)

1. Constructions raised over, or timbers placed in the highway

If any person constructs a bath, or sets out a water-spout, or erects a wall, or sets out timbers, from his wall to build upon, or sets up a shop or bath, in the public road, every other person, however mean and humble he may be, will be entitled to pull down the same, and remove it.

Similarly will be the case where a stranger erects a building upon a partnership property ; in which case any one of the partners will be entitled to remove such building.

But it will be lawful, for the person in question, in all the above cases, to make use of the bath, fountain, or so forth, where they are in no way troublesome for the people .

But if they are troublesome to the people, the use of them is abominable.

2. They cannot be erected or set up in a closed lane.

It is not lawful for an inhabitant of a lane to shut it up at one end to construct in it a bath, set out a spout, or so forth, without the consent of the other inhabitants, whether it be troublesome for them or not.

Moreover, in a public road, the conversion to particular use is lawful to all men with discrimination, except only in the case where it may prove detrimental to anybody.

3. Person constructing a building, etc., in the highway .

If a person constructs a building in the public highway, as mentioned, before and it falls upon and kills anybody, a fine will be due upon the 'Aaqilaas of the person in question.

The same rule will also apply where the building falls upon and thus kills a man or an animal.

4. Persons who may suffer loss of life due to such Construction.

If a person stumbles over the ruins of such building, and falls upon another person, and they both die, the person who erected it will be responsible for both, and nothing will be due from the one who fell upon the other.

5. Death caused by the fall of a spout .

If a water-spout, which is set out from a house over the public road, falls upon any person, and kills him, it should be ascertained which part of the spout hit the person ; and if it is proved that he was struck by the end attached to the house from which it had projected, no fine will be due from the person who had set it up, because in respect of that part he will not be a transgressor, as he had set it in his own property .But if it is proved that the deceased was hit by the projected end, the person, who had set it up will be responsible, because in respect of that part he is will be a transgressor, as he had caused the spout to project over the road without any necessity.

But if it is proved that the deceased was hit by both ends of the spout, the fixer will be responsible for half of the fine, and the other half will drop ; similarly as where a person is wounded by another person, and also by a lion or tiger, and dies, in which case one-half only of the fine becomes due from the wounder.

But If it cannot be proved which part of the spout hit the deceased, in such a case also half of the fine will be due ; because the incident may have happened in either of the two ways, in one of which the complete fine become due, and in the other nothing becomes due at all ; and therefore, in taking notice of both the circumstances, one-half of the fine will be imposed.

6. Person fixing up a nuisance upon his house .

If a person constructs a balcony which project from his house, and then sells the house, and the balcony afterwards falls upon any person and kills him, or, if a person sets up a piece of timber in the middle of the highway, and afterwards sells it, and gives possession of it to the purchaser, and he [the purchaser] declares him acquitted of all accidents which may happen from it, and leaves it there until it falls and kills a person, the seller will be responsible in both cases, and nothing at all will be due upon the purchaser ; because the act of the seller in constructing the balcony , or setting up the timber is not done away by the sale of his property ; and, as such act causes the responsibility, he will be responsible accordingly, and not the purchaser, who has not done any act to cause the responsibility.

7. Person laying fire in the highway .

If a person lays fire in the highway, and anything is burnt as a result of it, he, as having transgressed, will be responsible for the damage.

But if, after the laying fire in the highway, the wind blows it away to another place, and anything is burnt as a result of it, he will not be responsible, because the wind had carried away the fire, his act was done away.

Some, jurists, however say, that if the fire was laid in the highway at a time when the wind was high, he will be responsible ; because he laid the fire there, inspite of his knowledge of the probable result ; and therefore the act of the wind, in carrying it away, is in effect the same as if he had himself carried it to the place which was burnt.

8. Workmen constructing a nuisance .

If a person hires a workmen to construct a balcony, or a penthouse, and such balcony or penthouse falls upon and kills a man before the workmen had finished it, the responsibility will entirely be upon the workmen.

But if, the balcony or penthouse falls after the work is finished, the owner of the house will be responsible.

9. Person throwing water in the highway .

If a person throws water on the highway, purposely or by performing his ablutions there, and a person or animal dies as a result of it, a fine for the person will be due from the person's 'Aaqilaas, or a compensation for the animal from the person himself.

But it will be otherwise where water is throws in a closed lane by one of the inhabitants, and a person or animal dies as result of it; or where an inhabitant of such a lane sets down anything in the middle of it, and a person or animal falls over the same, and dies.

Jurists whoever says, that what is here laid down applies only in a case where water is throws upon the road in large quantity, such as commonly renders the footing insecure ; but if the water is in a small quantity and not in a quantity which may the possess by, there will be no responsibility.

10. Unless the person who sustained the damage had wilfully passed over such water.

If a person knowingly and wilfully passes over a road on which water has been throws, as above, and dies as a result of falling in it, nothing at all will be due from person who throw the water, as in such a case the deceased has died due to his own willfulness or obstinacy.

Some jurists says that this rule applies only where the water is thrown over a part of the road, because in that such a part will remain unaffected by it ; but, if it spreads over the whole read, the possess by will have no option ; and as they further say, the same distinction will be in respect of timbers, or other nuisances, put on the highway.

11. Person directing water to be thrown on the road .

If a shopkeeper desires a person to throw water on the front of his shop, and another person falls there, and dies as a result of it, the responsibility will be upon the shopkeeper, on a favourable construction and similarly, if a shopkeeper engages on wages a workman to erect a stall or any other edifice in the front of his shop, and after it is complete, a person falls over it and dies.

But it will be otherwise where a person orders another to throw water, or erect an edifice, on the middle of the highway ; because in that case the responsibility will be upon person who obeyed the order, because the order so given is unlawful, as the man who gave the order possess a superior right on the highway.

12. Person digging a well, or placing a stone, in the highway .

If a person digs a well, or places a stone, in the middle of the highway, and a person dies as a result of it a fine will be due from the 'Aaqilaas of the person who placed such nuisance there. But if, an animal thus dies, the compensation for the same will be due from the property of the person in question.

13. Throwing dirt, or digging a hole, in the highway .

The throwing of dirt or earth, on the highway, or the carrying away of earth from there, so as to causes an hollow, will be the same as placing there a stone or log of wood.

But it will be otherwise where a person merely sweeps the road. But if, this person leaves a heap of the sweepings in the road, so as to cause accidents, he will be responsible, as in doing this he is guilty of a transgression.

14. Remover of nuisance to another spot .

If a person places a stone in the highway, and a another person removes the stone to another part of the road, and a person thereby dies, the responsibility will be upon the remover of the stone.

15. Accidents causes by a sewer constructed in the highway by public authority .

According to Jaame'-as-Sagheer, if a person constructs a common sewer in the public highway, by the order or compulsion of the Sultan, he will not be responsible for its consequence.

But it will be otherwise where a person does so without such an order.

16. Person digging a well in his own land .

If a person digs a well in his own land, and another person is killed by falling into it, the digger of the well, will not be responsible, as he has not transgressed. The same rule will also apply where a person digs a well within the precincts of his house, because a man is entitled to do so, for the purpose of domestic convenience.

Some jurists, however say that this rule in respect of a well dug in the precincts of a house will apply only in cases where the owner of the house has a property in such precincts, or possesses a right, by immunity, of digging therein. But that where the precinct is public, or held in partnership as in the case of a court or closed lane, the digger will be responsible, as in digging the well under such circumstances he is guilty of a transgression. This is approved.

17. Person falling into a well and there dying of hunger .

If a person digs a well or a pit in the highway, and another person fall in it, and there dies of hunger, the digger will not be responsible, according to Imam Abu Hanifah, because the deceased has here died of hunger, and not on account of the excavation, as his death cannot be attributed to the latter unless he be killed by the fall, which is not the case in this incident.

18. Workmen engaged to dig a well in another's land .

If a person engages on wages a workmen to dig a well in the land of his neighbour's residence and they dig it accordingly, and a person is killed by falling into it, the responsibility will be upon the employer and not upon the workmen, if they dug the well thinking the place to be within the land of their employer.

The case is, the same as where a person orders another person to slaughter "a particular goat", and he does so accordingly, and afterwards it is proved that the goat beyond to some other person, in which case the compensation will be paid by the person who had given the order.

But it will be otherwise where the workmen dig the well, knowing, at the same time, that the land is not within precincts of the employer ; because in such a case they will be responsible ; because the contract is not valid, as they have not been deceived.

19. Builder of a private bridge, etc.,

If a person constructs a bridge, or lays a plank, in the highway over a stream without authority, and another, person wilfully passes over such bridge or plank, and falls and dies, still the person who has constructed it will not be responsible.

20. Porter is responsible for accidents occasioned by his load.

If a porter is carrying a load upon the highway, and the load falls upon any person and kill him, or falls in the road and

causes a person to stumble and thereby causes his death, the responsibility will be upon the porter. But, if a person is wearing a cloak upon the highway, and it falls upon any person, or upon the road and causing the death, the carrier of the cloak will not be responsible.

21. Stranger hanging up a lamp, or strewing gravel, etc., in a mosque .

If a person hangs up a lamp, or spreads a carpet, or strews gravel in a mosque for any particular tribe or people, and any person dies as a result of it, nothing will be due, if the person who hung up the lamp, or does other acts, is one of that people. But if, a stranger does any of these acts, he will be responsible.

Similarly, if one of the people of a mosque sits in that mosque, and any person dies as a result of it, he will not be responsible, if he is, at the time busy in the prayer. But if he is busy in reading the Qur'an, or teaching, or is waiting for the time of prayer, or sleeping during prayer or at any other time, or conversing, he will be responsible.

22. But none will be responsible for the death of any person caused by his own person .

If a stranger to the people of the mosque is busy in prayer in the mosque, and a person falls upon him, and dies as a result of it, the stranger will no way be responsible ; because a mosque is constructed for the purpose of prayer ; and although the right of public prayer belongs solely to the people of that mosque, but every person is entitled to pray therein.

Section

BUILDINGS WHICH ARE IN THE STATE OF FALLING (*Hidayah, Kitabud Diyaat, Fasl Fil Haa'itil Maa'il*)

1. Owner of a ruinous wall .

If a wall belonging to any person leans towards the public highway and a person request the owner to pull it down, and calls the people to witness his request, and the owner neglects to pull it down until it falls and causes the death of any person or property, the owner will be responsible for the loss caused as such.

2. Person building a crooked wall .

If a person builds a wall in the highway, leaning over from the first, the jurists say that he will be responsible for anything which may be damaged by its falling, independent of the request mentioned, before whom he is guilty of a transgression in the building of it, similar to a person who constructs a balcony or gallery projecting over the highway.

3. Request is proved by the evidence of one man and two women .

The evidence of one man and two women is enough to prove the application above described, because it is not in this necessary, as in cases of murder, that both the witnesses should be males, because the death caused by the falling of a wall does not amount to murder.

4. A Zimnee may make the request as well as a Muslim .

A Muslim and a Zimnee are equal in respect of the request for pulling down the wall, as the entire mankind is partner in the right of passing along. The application is therefore valid, by anybody it be made, whether a man, a woman, a free

man, a Mokatib, a slave if his master gives him permission to litigate it, or an infant with the permission to litigate from his guardian. It is also valid whether made by Sultan or any other ; because as the application affects a right in which all are equally concerned, all are therefore equally entitled to make it.

5. Or the inhabitants of a neighbouring house .

If a wall leans over towards a neighbouring house, the owner of that house will be entitled to ask for its pulling down, or the tenants whether they are hirers or borrowers, because such persons in particular also have the right in such a case.

6. And if those last grant a period of delay or exemption.

If the owner or tenants of the neighboring house grant the owner of the wall a period of delay, or exempt him from the responsibility for any damage which may be caused by it, it will be lawful, and the owner of the wall will not be responsible in case of anything damaged by its fall, because the right of the owner or tenant alone is concerned.

But it will be otherwise where a wall leans over a road, and the Qazi, or the person who made the request for pulling it down, grants a period of delay, or an exemption ; because this will not be valid ; and the owner of the wall therefore will still remain responsible in case of its falling and damages anything ; because in such a case the right of every one is concerned ; and the Qazi, or the person who made the request, is not entitled to annul a right of the public.

7. Person selling a ruinous house, after request .

If, after the request, a person sells a house, the wall of which leans over, and the purchaser takes possession of it, and anything is then damaged by its falling, there will be no responsibility upon either party. The seller will not be responsible, as the offence cannot be proved in him unless it is

proved that he neglected to pull down the wall, being at the same time able to do so ; and in such a case his ability has finished with the sale and the purchaser will not be responsible, because no request has been made to him. But if request is made to the purchaser after the sale, he then he will becomes responsible, as in such a case he is able to complying with the request.

8. Person to whom requisition is to be made .

The request for pulling down a ruinous wall is valid when made it is made to anyone who possesses the power to pull it down; but not when it is made to one who is not possessed of this power, such as a pawnee, a trustee, a borrower, or a renter.

The request in question is therefore valid when it is made to the pawner of a house, as it is in his power to pull down the wall by redeeming his house. It is also valid in respect of a wall belonging to an infant when it is made to the infant's parents or guardians ; and if, after the request, they neglect to pull down the wall, and anything is damaged by the fall of it, the compensation will fall upon the infant's property, because their act is in fact the act of the infant.

Similarly, the request will be valid to a Mukatib, as he may be authorized to pull down a wall ; and also, to a trading slave, whether indebted or not, because of the same reason ; and if, in this last case, the slave neglects to pull down the wall, and any property is damaged by the falling the wall, the compensation for it will be due upon the slave's person ; or, if a man dies, the fine will be due from the master's 'Aaqilaas.

9. Requisition made to one of several coparceners .

If a ruinous wall is held in coparcenery by several heirs, and a person requests one of the heirs, requiring him to pull down the wall, the request will effect that heir in particular ; and accordingly, if anything is afterwards damaged by the falling down of the wall, the heir who was requested will be responsible

in proportion to his share of inheritance ; because it was in his power to have removed the nuisance by referring the matter to the Qazi, and reporting the circumstances to him, and requiring his order to his coparceners, if present ,to pull down the wall, or , if absent his authority to do so himself.

10. After a wall falls .

If a ruinous wall falls, upon a person, after the requests, and he dies, and another person falls over his corpse, and he also dies, the owner of the wall incurs nothing for this second person, because the removal of the corpse was incumbent upon the heirs, and not upon him.

But if the other person, after the falling of the wall, dies by stumbling over a fragment of the ruins, the owner of the wall will be responsible, as it was for him to clear the road of all such fragments, as those were his property, and a request in respect of the wall itself is, as it were, a request in respect of the fragments, the intention of it was to clear the highway.

11. Owner of a ruinous wall .

If a person makes a request in respect of a wall which leans over towards the highway, and it afterwards falls, throwing down a vase or urn, which had stood upon it, and a person thereby dies, the owner of the wall will be responsible, if the vase or urn was his property, as the clearance the road from it was upon him.

But if the vase or urn is the property of some other person, the owner of the wall will not be responsible, as the clearance the road from the vase or urn is upon him to whom it belongs.

CHAPTER 3

OFFENCES COMMITTED BY OR UPON ANIMALS.

(Hidayah, Kitab-ul-Diyaaat, Baab Janayatul Bahimah Wal Janayat
'Alaiha)

1. Rider of an animal .

The rider of an animal will be responsible for anything which the animal may damage by treading it down, or by striking it with his head, or with his fore legs, or with his hind legs. But he will not be responsible for anything which the animal may damage by striking it with his hind feet or his tail .

2. If he stops the animal in the road .

And if he stops the animal in the highway, he will be responsible for any damage caused by a kick of its hind feet, or a stroke of its tail, as it is possible for him to avoid stopping, even though it may not be in his power to guard the animal from kicking, or so forth and, therefore, as he transgresses in so stopping, he will be responsible for any damage caused as a result of it .

3. Injury caused by a large stone thrown up by the animal's hoof .

If an animal's hoof strikes upon and throws up gravel or small pebbles, and a person's eye is put out, or his clothes damaged thereby, the rider will not be responsible. But, if the animal throws up large stone, he will be responsible.

4. Accident caused by its dung or urine .

If an animal, while travelling, discharges its dung on the highway, and any person dies as a result of it, the rider will not be responsible, as it was impossible to guard against it ; and the

same rule will also apply where the animal stands still while discharging its dung or urine, or when the rider stops it for this purpose, as there are many animals which cannot perform these acts while in travelling.

5. Unless stopped on the road unnecessarily .

But if, the rider has stopped the animal for any other purpose, and it discharge its dung or urine, and any person dies as a result of it ,the rider will be responsible, as in so doing he has been guilty of a transgression, as he stopped the animal without any absolute necessity, knowing, at the same time, that this may be injurious to the passers by.

6. Responsibility of the driver or leader of an animal .

The driver of an animal is responsible for any damage it may cause with its fore feet or hind feet. But the leader of an animal is responsible for the damage caused by its fore feet only, and not by its hind feet.

According to Jaame'-as-Sagheer, the driver as well as the leader of an animal are both responsible in all cases in which responsibility lies against the rider ; because as they cause the damage by taking the animal to the place where it is destined, their so doing is therefore subject to the condition of safety, as far as it may be possible, in the same manner as in respect of the rider.

7. Expiation from the rider of an animal .

The rider of an animal will have to perform expiation(Arabian Kaffarah) only where he treads down a person, but not in any other case; and no expiatory act whatever will be required from the leader or driver of an animal.

8. If there is a rider, as well as leader or driver .

If one person rides upon an animal and another person drives or leads it along ; and it treads down a person, some jurists say that no responsibility will fall upon the driver or leader ; because the rider (as has been already explained) will be taken to be the actual perpetrator of the murder, and the driver or leader will be the producer's of the cause ; and the accident will be referred to the actual perpetrator, rather than to the producer's of the cause. This is approved.

9. Two riders driving against and killing each other .

If two persons are riding on two different animals, and both rush with violence against each other, and both of them die, the fine for each will be due from the 'Aaqilaas of the other.

But Imam Shaafe'ee and Imam Zufar are of the view that in such a case 'Aaqilaas of each party will owe one-half fine only, on account of the other, each having died as much as a result of his own act as of that of the other, and therefore one-half of the murder, on each part, is of no account.

10. Driver of an animal will be responsible .

If a person is driving an animal alone, and the animal's saddle, or load, or anything else which is upon it, falls, and kills a person, the driver will be responsible, as he is guilty of transgression, in neglecting to keep the load, or anything else, properly upon the animal, because if it had been properly secured, it could not fallen down.

11. Responsibility in the case of a line of camels .

The person who leads a line of camels will be responsible for anything which they may tread down. If, therefore, the camels treads town a person, the fine for him will be due from the 'Aaqilaas of the leader ; or, if they destroys any property, he will have to pay compensation for it.

If there is a driver of the line, as well as a leader, the responsibility will equally be of both of them ; because, as the leader of one camel is the leader of the all, so the driver of one is the driver of the all, the halter of each is fastened to the one immediately before him.

But this rule, will apply only where the driver is at the end of the whole line; be if he is in the middle, and there lay hold of the halter of one of the camels, he alone will be responsible in respect of such damage as may be caused by the camels which come after him ; because the leader at the head of the all cannot is said to lead those on account of the line is thus interrupted ; but both are equally responsible because any damage caused by the camels before him, since he drives those at the same time that he leads the others.

If a person fastens a camel to a line of camels, with the leader's knowledge, and the camel so fastened treads down a person, the fine for him will be due from the 'Aaqilaas of the leader.

The 'Aaqilaas of the leader will be entitled afterwards to get the amount of the fine from the 'Aaqilaas of the person who had fastened the additional camel to the line.

The jurists say that what is here laid down in respect of the leader 'Aaqilaas to have recourse to the 'Aaqilaas of the fastener, applies only to a case where the additional camel had been fastened to the line at a time when it was going ahead. But where the additional camel had been fastened to the line at a time when it stood still, and the leader afterwards leads it on, and a person is trodden down by, this additional camel, the responsibility will be of the leader's Aaqilaas, who will not be entitled, in such a case, to get the amount from the 'Aaqilaas of the fastener.

12. Damage by hunting dog at anything .

If a person makes his dog slip, and drives it by running after it, and the dog, without stopping, damage anything, the

responsibility for the damage caused by it will be on the person who makes it slip, the act of the dog will be attributed to him because of his driving it ; But, if a person casts off his hawk, and drives her as above, and she, without stopping, damages anything, the person who casts her off will not be responsible for the damage caused by her.

13. Unless driving or encouraging the dog .

But if a person lets slip his dog without driving it by running after it , and it damages anything without stopping, the person who lets him slip will not be responsible for the damage caused by it.

It is noticed as an opinion of Imam Abu Yusuf that, in all those cases, the person who casts off the hawk or lets slip the dog, should be held responsible, out of regard to the safeguard of the property. Imam Muhammad also says, in the *Mabsoot*, that where a person lets slip or casts off any animal upon the highway, and the animal, without stopping, kills a person, the responsibility for the same will be upon the person who casts it off, or lets it slip, whether he has driven it, or not, the movement of the animal will be referred to the person who lets him slip, so long as it continues to move on in a straight line. But it will upon the animal if it turns off to the right or left , because the effect of letting it slip will thus be finished. In other words, the person will no longer be responsible for any damage. The same rule will also apply where the animal stops, and then moves on by itself ; because, if, afterwards, anything is damaged, there will no responsibility of the person for the damage caused by it.

14. When let it slip at the games .

If a person lets his dog slip at game, and the dog damages anything else, without stopping, still the person who let him slip will not be responsible, if he did not drive it by running after it.

But if a person lets his dog slip on the high-way, and the dog damages anything without stopping, compensation will have to be paid by the person who lets it slip.

15. Person casting off his animal on the highway .

If a person casts off, or sets loose, an animal on the highway, and the animal moves straight on, and then, turn to the right or left, and treads down the corn, or anything else, the person who lets it loose will be responsible ; but not if the roads are more than one.

But if an animal breaks loose, and then, move on by itself, and kills a person, or damages any property, by night or day, the owner will not be responsible for it.

16. Compensation for the eye of a goat, and for the eye of an animal used for labour.

If a person puts out one of the eyes of a goat, he must liable to compensate for the defect caused thereby. But for the eye, of an ox, a camel, a dromedary, an ass, or a horse, of whatever, kind, a compensation of one-fourth of the value will have to be paid.

17. Damage by animal having a rider on its back .

If a person is riding upon his animal on the highway, and another person strikes or goads the animal, without the consent of the rider, and it kill's a person by kicking, or treading him down, or running over him, the responsibility will be of the person who so struck or goaded it, and not of the rider. But, if the rider, at the time of the other person striking or goading the animal, had stopped it in the highway, the responsibility will be upon him and the goader in equal shares, because in such a case he has also transgressed, in stopping the animal upon the highway.

But if the animal strikes out at the person who goaded or struck him, as above, and he dies of the kick, his blood will be of no account, as he will be taken to have killed himself.

But if, the animal throws his rider, and kills him, the fine for him will be due from the 'Aaqilaas of the goader or the striker, because he has transgressed in providing the cause of the accident.

If a person is riding or stopping upon his animal on his own land, and another goads or strikes the animal, without the rider's consent, and the animal runs away and treads down a person, the responsibility will be upon the person who so goaded or struck it, and not upon the rider.

But if, a person is riding upon his animal on the highway, or stopping upon it on his own land, and another goads or strikes it as desired, by him and it runs away and treads down a person, neither the rider nor the other person will in any case responsible for it.

But if the rider is moving along the road upon his animal, and another person strikes or goads it as desired by him, and it treads down a person, both of them will be responsible in an equal degree, if the person was trodden down without the animal making any stop, because, in such a case, its movement will be referred to both of them alike.

18. Or being led in hand.

If a person is leading an animal, and another person strikes it, and it breaks away from the leader, and causes any damage without stopping, the person who struck it will be responsible similarly where the animal was driven by any person, instead of being led.

19. Person striking an animal cause mischief .

If the striker, in the cases noted above is a slave, he will be personally responsible for any damage caused by the animal ; if he is an infant, the responsible for property damaged, or for any personal injury short of a Mawziha wound will be upon his property because slaves and infants are also liable to be prosecuted for their acts.

CHAPTER 4 *

OF OFFENCES COMMITTED BY OR UPON SLAVES

*(Hidayah, Kitab-ud-Diyaat, Baab Janayatul Mamlook Wal
Janayat 'Alaihe)*

CHAPTER 5 *

OF OFFENCES COMMITTED UPON USURPED SLAVES
DURING THE USURPATION*(Hidayah, Kitab-ud-Diyaat, Baab Ghasabul 'Abd Wal
Mudabbir, Wal Sabi Wal Janayat Fee Zaalik)*

* Not included in this Compilation because both these chapters deal with Slaves, and Slavery has now been abolished throughout the world. Also see the "Note" on the last page of Volume V of this computation.

CHAPTER 6 *

QASAAMAT, OR THE ADMINISTRATION OF OATHS

(Hidayah, Kitab-ud-Diyaaat, Baab-ul-Qasaamat)

1. Oath upon a person found killed.

Where a person is found killed in any locality and (Arabic : Mohallah) the murderer, is not known and his heir demands a satisfaction for his blood from the inhabitants of the locality, or from any number of them not specifically named, fifty of the inhabitants, selected by the heir, will be put to their oaths, and depose to this effect, "by Allah, I did not kill him, nor do I know his murderer".

2. Fine of blood will then be imposed on them .

Upon the people of the locality swearing, as above, a decree will be passed ordering them to pay the fine for the murdered, and an oath will be given to the heirs.

3. If any one of them refuses to swear .

If, any one of the people of the locality selected to swear, refuses to take the oaths, he will be imprisoned until he takes the oath.

It may be noticed that what is here laid down will apply, not only to where the heir of the murdered lays his claim against the whole of the inhabitants of the locality, but also, to where he advances it against any number of them not specifically named.

A claim laid on the ground of wilful murder is also the same as on murder by mistake.

* Mishkat, Kitabul Diyaat, Bahul Qasumate.

with respect to a case of claim advanced against particular individuals, it will (God willing) be dealt with in its proper place.

4. If the whole number of them is not fifty .

It the inhabitants of the locality are not fifty in number, the oath will be given to them repeatedly, so as to make up the total number of fifty depositions.

It may be noticed , that if there are fifty inhabitants of the locality, the heir cannot insist upon any of them to repeatedly SWORN.

5. Not required of an infant or idiot .

The oath, required in Qasaamat is not binding on an infant, or an idiot.

6. Dead body having no marks of violence upon it .

If a dead body is found without any mark of violence upon it, the oath will not be required, nor any fine will be imposed on the locality.

7. Where only a part of the body is found .

If the whole body of the murdered is be found, or the greater part of it, or the upper half of it, with or without the head, the oath will be given to the people of the locality, and the fine will be imposed on them.

But if the lower half only, of the body, is found, or any part of the trunk short of the half, with or without the head, or the hand, foot, or head alone, nothing will be imposed on them.

8. If body of an infant is found .

If a new-born infant is found in any place, and there is no mark of violence upon it, the people of the place will not be liable to anything, i.e., neither the oath nor the fine.

But if there is mark of violence upon the infant's body, and it seems to have been completely formed, the oath will be given and the fine will be imposed upon the people of the place.

But if it is not completely formed, nothing whatever will be required, even though it has marks of violence.

9. Person found killed upon an animal .

If a person is found killed upon an animal, which another person is driving, the oath will be given to the driver, and his 'Aaqilaas will be responsible for the fine.

The same rule will also apply where the person in question sits upon the animal, holding the body, and another person leads it.

If, also, there are three persons involved with the animal, i.e. one riding, another leading, and the third one driving it, all of them will be sworn, and the fine will be imposed on their 'Aaqilaas.

10. If there is no driver.

If a person is found killed, upon an animal, moving along between two villages, the oath will be given and the fine will be imposed upon the inhabitants of the nearest of those villages.

It may, however be noted, that if both the villages are so near the place that the voice of a man can be heard from it, they both will be equally liable for the oath as well as the fine.

11. Dead body found in a house .

If a person is found dead in any man's residential-house, the oath will be imposed on the owner of the house, as it is in his possession ; and the fine will be imposed on his Aaqilaas, as they are his aiders and coadjutors.

12. The owners of a place are to be sworn in such cases, and not the tenants.

If a person is found dead in any place, the people of which are of two different categories, some of them are the owners, and some are merely residents upon rent or loan, the oath will be given to the former, and not to the latter, according to Imam Abu Hanifah and Imam Muhammad.

But Imam Abu Yusuf says that will be given to all indiscriminately.

13. Oath to all residents and fine on original residents .

If there are two categories of residents in a place, some are original owners, and some are recent owners, and a person is found dead there, the oath will be given to the whole indiscriminately, but the fine will be imposed solely on the original owners, even though he is only a single person.

But Imam Abu Yusuf says that the fine, as well as the oath, both will be imposed on all of them.

If there is none of the original owner having any concern with the place, due to entirely having parted with it by sale or otherwise, the oath as well as fine both will be imposed on the purchasers, or other present possessors, according to all jurists.

14. Person found dead in a house .

If a person is found dead in the house, of any person the oath will be given, not only to the owner of the house, but also to his 'Aaqilaas. But they will be asked to swear if they are present; because if they are absent, the oath will be given to the owner fifty times repeatedly, so as to complete the number of fifty depositions. This is according to Imam Abu Hanifah and Imam Muhammad.

But Imam Abu Yusuf says that the 'Aaqilaas will not be asked to swear at all.

If a person is found dead in a house owned unequally in partnership among three, one-half of it, for example, belongs to Zaid, one-tenth of it to Umar, and the remaining to Bakr, still the oath will be given according to the number of the persons, and not according to the amount or value of their respective shares.

15. Person found dead in a sold house .

If a person purchases a house, and, before he takes possession of it, a person is found dead in it, the fine will be imposed on the 'Aaqilaas of the seller, whether an option to this effect has been stipulated to either party in the sale or not . But if the purchaser first takes possession of the house, and the person is then found dead in it, the fine will be imposed on the purchaser.

But Imam Abu Yusuf and Imam Muhammad are of the view that if there is no option in the sale, the fine will be imposed on the purchaser, and if there is a condition of option, it will be imposed on the 'Aaqilaas of the party to the last owner of the house.

16. If the real owner of the house is not.

If a person is found dead in a house in the possession of any person, and the real owner is not known, the fine will not be imposed on the 'Aaqilaas of the possessor until evidence is adduced to prove his being the owner, in case his 'Aaqilaas dispute, and deny his being the owner, and say that the house is merely a trust in his hands.

17. Person found dead in a carriage of any kind .

If a person is found dead in a ship or boat, the oath and fine will be imposed upon the sailors, boatmen, or other person who may be on board, or are employed in tracking it up the side of a river, whether they are the owners, or otherwise, because the vessel is in their hands. The same rule will also apply in respect of carts, or other carriages This is the view of Imam Abu Yusuf.

But Imam Abu Hanifah and Imam Muhammad, say that it will be imposed on the owners only, and not on those who are merely residents.

18. Person found dead in a mosque .

If a person is found dead in the mosque of a locality of a city, the oath and fine will be imposed on the inhabitants of that locality.

But if a person is found dead in the Jaame' Mosque, or in the highway, or on a bridge, the oath will not be given to any one ; but the fine will be paid from the public treasury.

19. Person found dead in a public market .

If a person is found dead in a market which is the belongs to somebody, the oath and fine, according to Imam Abu Yusuf , will be imposed on the inhabitants of such market. But, according to Imam Abu Hanifah, they will be imposed on the owner.

But if, a person is found dead in a market not belonging to anybody in particular, as where it is situated in common land, the fine will be paid from the public treasury.

20. Person found dead in a prison .

If a person is found dead in a prison, the fine for him, according to Imam Abu Hanifah and Imam Muhammad, will be paid from the public treasury.

But Imam Abu Yusuf says that the oath and fine will be imposed on the prisoners.

21. Person found dead in a desert .

If a person is found dead in a desert, at a distance from any inhabited place, that is, so far as that a man's voice cannot be heard from it, his blood will be of no account ; because, as the place is at such a distance, no neglect can be imputable.

But this is based on the supposition that the desert is not owned by individual. But if it owned by any person in particular, the oath and fine will be imposed upon him and his tribe or family.

And, If the desert is situated between two inhabited places, then the oath as well as the fine will be imposed on the inhabitants of that place which is nearest to the spot.

22. Person dead found floating in a river .

If a person is found dead on a great river, such as, the Euphrates, floating with the stream, his blood will be of no account. Such rivers are not in the hands of anybody, nor are they particularly owned by, any person.

But if a person is found dead on the shore of a great river, and is not floating with the stream, the oath and fine will be imposed upon any village, on the side, within such a distance as a man's voice can be heard from the spot ; and if there are two or more villages within that distance, then, the oath and the fine will be imposed upon the nearest of them.

23. Unless such river is a private property .

If a person is found dead in a small river, which is such as the right of Shuf'ah can extend over it, the oath and the fine will be imposed upon the people who claim a right in such river, as it will be taken to be in their possession. It is also written, in some law books, that the oath will be imposed on the people, and the fine upon their 'Aaqilaas.

24. Heirs impeaching any person who is not an inhabitant of the place .

If the heirs of the dead impeach any one of the people of the place in particular, even then the oath will not be remitted in respect of the others, on a favourable construction of the Law . But if the complaint is against any individual who is not one of the people of the place, those will not be required to swear.

25. Person found dead after a riot .

If a group of persons gather in a place with arms, and then disperse, and thereafter a person is found dead in that place, the oath and the fine will be imposed on the inhabitants of the locality, as the dead is found amongst them, and the rules of that place apply to him and safeguard of it is his responsibility.

But if the heirs of the deceased accuse all the persons who had gathered there, as above, or any one of them in particular, the oath and fine will not be imposed on the inhabitants.

It may be noted, that where the heirs accuse all the people who had gathered there, or any individual of them, they will not be liable to anything until the heirs produce evidence to proof their accusation.

26. Person found put to death in a camp .

If a person is found death in a camp, pitched on the land which does not belong to any body in particular, and the body is found in a tent, the oath and fine will be imposed on the owners of the tent. But if is not found in a tent, they will be imposed on the owners of the tent nearest to the spot.

But if, the land in which the camp is pitched is the property of any body, then the oath and fine will be imposed on him.

27. Body found after a fight.

If a group of Muslims and of infidels gather with arms for the purpose of fighting, and a person is afterwards found dead among them, his blood will be of no account, nor will be the oath or the fine be imposed on any.

But if, they gather for any other purpose, and not for the purpose of fighting, the same rules will apply as are set forth in

the preceding case ; that is, if the group is found in a tent, the oath and fine will be imposed on the owners of the tent. But if it is not found in a tent, then they will be imposed on the owners of the tent nearest to the spot, if the camp was pitched on the land not belonging to any person ; but if otherwise, the owner of the land will be responsible.

28. Form of the oath, in accusing an individual .

If a person, is required to take the oath, and he says that "the deceased was murdered by such a person," then he should be asked to depose on oath that, "by Allah, I did not kill the deceased, nor do I know his murderer, except the such one."

29. Evidence of the inhabitants of the place.

If two inhabitants of a place (in which a person is found dead) give the evidence against a person who does not belong to that place that "he murdered the deceased," still their evidence will not be accepted, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad say, that it should be accepted.

30. Evidence of the inhabitants of the place against another inhabitant .

If the heirs of the dead accuse any individual of a place, and two inhabitants of the place offer to give the evidence in support of such accusation, it will not be admitted ; because in such a case they are themselves immediately under prosecution, and want to free themselves from it, and therefore their evidence is doubtful.

It is noted from Imam Abu Yusuf that in such a case those two should be asked to depose on oath that, "by Allah, I did not kill him," without adding more ; because in offering to give the evidence as above, they have already declared that they know the murderer.

31. Person dying of a wound received in any place .

If a man is wounded among any tribe, or in any place, and it is not known as to who had struck him, and he is carried to his own house, or to any place out of that place, and there dies of his wound ; in such a case, if he has continued bedridden until the time of his death, the oath and fine will be imposed on the people of the said place, or tribe, according to Imam Abu Hanifah.

But Imam Abu Yusuf say that no oath or the fine will be imposed in this case.

32. Person found wounded and dying in the hands of the finder.

If a man finds a person wounded, but still finds a little life in him, and carries him on his back to his own house, and the wounded person dies there after a day or two, or while he is carrying him these, he will not be responsible in the opinion of Imam Abu Yusuf. But on account of an analogy in the opinion of Imam Abu Hanifah, he will be responsible, as the deceased is thus found in his hands.

33. Person found dead in his own house .

If a person is found put to dead in his own house, the fine for him be imposed on his 'Aaqilaas, on behalf of his heirs, according to Imam Abu Hanifah.

But Imam Abu Yusuf, Imam Muhammad, and Imam Zufar are of the view that nothing at all be due in such a case.

34. One of two residents in a house found put to death therein

If two person reside in one house, and one of them is found dead therein, Imam Abu Yusuf is of the view that the fine for him will be imposed on the other.

But Imam Muhammad, says that the other will not be liable for to any thing.

35. Person found dead in a village belonging to a woman .

If a person is found dead in a village belonging to a woman, the oath, according to Imam Abu Hanifah and Imam Muhammad, will be given to the woman fifty times repeatedly, and the fine will be imposed upon her 'Aaqilaas, that is, her nearest paternal relations.

But Imam Abu Yusuf says that the oath also will be imposed upon her 'Aaqilaas.

36. Person found dead in the lands belonging to anybody.

If a person is found dead in the land belonging to anybody, which is and situated near a village, and the owner of it is not an inhabitant of the village, he will be responsible, as the rules of that place apply to him and safe guard of it is his responsibility.

BOOK – VII

MA'AAQIL

(THE LEVYING OF FINES)

MA'AAQIL *

(THE LEVYING OF FINES)

(Hidayah, Kitab-ul-Ma'aaqil)

Note

The word "Ma'aaqil" is the plural of Ma'qilah, which means a Diyat, or fine of blood ; the 'Aaqilaas are those who are to pay the fine, which is known as 'Aql which means "restraint", because it restrains the people from shedding the blood.

1. Fine of bloodshed is due from 'Aaqilaas .

The fine for "Shubhe 'Amd" (manslaughter), "Qatle Khata" (murder by mistake), or by an intermediate cause, and in short for every kind of bloodshed by which fine becomes due, is taken from the 'Aaqilaas of the murderer, as has already been explained ; because it is noted that Haml Ibne Maalik had two wives, one of whom killed the other one ; and the Holy Prophet ordered the 'Aaqilaas of the woman who killed the other to pay a fine to the heirs of the killed one ; and also, because the life of man is sacred, and therefore it is not to be taken without penalty. Moreover, a person who kills another person by mistake is excusable, and similarly, the person who commits "Shubhe 'Amd", in consideration of the instrument ; and therefore is not liable to punishment, but is rather entitled to an alleviation ; and as, if the whole fine were levied on him, it might prove utterly ruinous, which would amount to punishment, his 'Aaqilaas are therefore associated with him in the payment of it, in order that punishment may be avoided, and the penalty alleviated to him. The reason for involving the 'Aaqilaas, in particular, is that the murderer is taken to have committed his offence by means of the strength of his aiders and associates ; and, as those are his 'Aaqilaas, they, therefore, as it were, are guilty of the offence in remitting their vigilance ; and, having been thus deficient in their duty, they alone are associated in the fine, and not others.

* 'Aainul Hidayah, Vol. IV, pp. 778 to 793.

2. The 'Aaqilaas .

The 'Aaqilaas of a man are all those who are registered (as a soldier) * with him, if he is also a registered person ; and the fine is paid or deducted from the pay or allowance they receive from the Imam in the course of three years.

3. Deduction to be from the pay becoming due after the order of the Qazi .

If, after the Qazi passes an order for the fine, the Sultan does not pay the salary to enrolled for three years, and then gives them three years pay at once, the whole fine will be deducted, if the pay is on account of the years subsequent to the order of fine given by the Qazi.

But if, after the Qazi gives the order for the fine, the Sultan pays the arrears of previous years, nothing will be deducted from it.

4. Regulation as regards the times of payment .

Where a complete fine is incurred, (as in the case of murder by mistake) one-third of it will be due in the first year, one-third in the second year, and the remaining one-third in the third year. But where, a one-third only of the fine is incurred, (as in the case of a simple wound) or less, (as in cutting a finger), will be due within the year ; and anything beyond that to the amount of two-thirds (as in the case of two wounds), will be due in the second year ; and whatever is incurred from two-third to anything short of the complete fine (as in the case of three wounds) will be due in the third year.

5. Payment in three years .

Any fine payable by the 'Aaqilaas, i.e., the tribe or the family of the murderer, or from the estate of the murderer, as

* in the Dewan or Public Records, and known as Ehle Dewan ('Aainul Hidayah, Vol. IV, p.780).

where a father wilfully murders his son will be payable from the property of the 'Aaqilaas, or of the murderer in three years.

6. Where a many persons are involved in murder by mistake.

If ten persons kill one person by mistake, one-tenth of the fine will be due from the 'Aaqilaas of each, respectively, which will be payable in three years.

It may be noted that the three years will be counted from the date of the Qazi's order.

7. The 'Aaqilaas of a person not enrolled.

The 'Aaqilaas of any person, not enrolled or registered, will be his tribe or family, descended from one father.

The whole fine will be divided among the 'Aaqilaas of the offender, which will be payable within three years ; and will not be levied upon any individual at the rate exceeding four Dirhams at one and the same time.

8. Next nearest according to their degree .

If the family is not equal in discharge the fine, those who are the nearest in affinity should be joined with them, according to their degree of relationship ; i.e. first the brothers ; then their children ; then their uncles ; and then their children.

As regards the father, grandfather, sons, and grandsons, some jurists are of the view that they are included, while some other say that they are not include

The same rule will also apply in respect of registered or enrolled persons. In other words, if the enrolled 'Aaqilaas are very few, so that the share of each comes to more than four Dirhams, such registered tribe will be joined with them as in the

nearest to the registered tribe of the murderer in respect of aid, at the time when the accident took place ; and, if that tribe is also not sufficient, the next nearest tribe ; and so of the rest will be joined. The judgment as to which of the tribe is nearest to the tribe of the murderer will be left to be decided by the Qazi.

9. Fine to be levied upon the allowances also as upon the pay

If the 'Aaqilaas are such as receive allowances, the fine will be levied upon their allowances, within three years, at the rate of one third every year ; as respect of them allowances will stand in the place of pay, both are paid from the public treasury. Attention, however, should be given to the time and manner of the allowances being paid. If allowances occur annually, the one-third of the fine will be taken from its first occurrence after the Qazi's order of the fine ; if half yearly, then one-sixth should be taken ; or, if monthly, then it should be taken monthly, at such a rate as may amount to one-third of the whole in the year.

But if, the allowances is monthly, and the pay is annual, the fine should be taken from the pay, and not from the allowances, as from the former it can be more easily deducted than from the latter, because of it is more considerable of the two.

It may be noted that Public Maintenance, is of three kinds ; allowances [Rizk], gratuity [Kafayat,] and pay ['Ata ;] by the first of which is understood the allowance appointed from the public treasury for the supply of immediate necessities, by the second, any extraordinary allowance granted on particular occasions, and by the third, the annual pension or stipend fixed according to the rank and service.

10. Payment of his part of fine by the murderer .

The murderer, in paying the fine, will be upon the same footing with his 'Aaqilaas, and will have to pay his proportion in the same manner as any other individual.

11. Liability of women and infants .

Fine will not be imposed on woman or infants, (as 'Aaqilaas), who receive the allowances from the State.

In conformity, with this rule, if the murderer is a woman, or an infant, no part of the fine will be due upon them.

It may be noted that this is at variance with the rule before laid down in dealing with Qasaamat, or the giving of oath in cases of supposed bloodshed, where a dead body is found in the house of a woman ; because in that case our modern jurists have included the woman with her 'Aaqilaas in the payment of the fine. That, however, is a particular exception from the general rule.

12. Liability of the citizen of a place for a person of another place .

The citizen of a particular city will not be liable to pay the fine for the citizen of another city, where the citizens of each are registered separately.

13. Liability of the residents of a city for a resident in the suburbs or vicinity .

All the residents of a city will be liable to pay the fine for a residents of the suburbs or vicinity.

14. Regard should be paid to registration rather than to residence .

If a person is resident in one city, but has been enrolled in another city, his 'Aaqilaas will be those with whom he has been enrolled, and they will be liable to pay his fines, and not his townsmen, as the former are his coadjutors, and not the latter.

It may be noted that, next in order after the aid by register, regard should be had to aid by family and relationship ; and this will be a ground upon which are built a number of cases.

15. Liability of the residents of a city for an unregistered resident from the village .

If an resident of a city commits an offence, which is liable to fine and he has no pay appointed to him in the public register, and the residents of the village are more nearly related to him than those of the city, still his fine will be paid by the enrolled residents of the city.

16. But not unless he has become a resident there .

If a resident of the village comes into a city, but has no residence there, the enrolled citizens will not be liable for a fine incurred by him.

Similarly, the resident of the village will not be liable for the fine incurred by a citizen who may happen to come among them.

17. Liability of the Zimmees among themselves .

If a Zimmee kills any person, the fine will be due upon his 'Aaqilaas, standing in the same relation to him as Muslim 'Aaqilaas, if he possesses known 'Aaqilaas, who are accustomed to pay fines for each other.

Zimmees are the coadjutors of each other ; and therefore the 'Aaqilaas of a Zimmee are liable to pay the fine which becomes due against him.

But if, he has no known 'Aaqilaas, then the fine will be payable from his property, within three years from the date of the Qazi's order, similarly it is payable in respect of a Muslims.

18. Liability of Muslims and infidels for each other .

An infidel will not be liable for the fine incurred by a Muslim, nor a Muslim will be liable for the fine incurred by an

infidel ; because Muslims and infidels are not to be considered as the coadjutors of each other. Infidels, will therefore, pay the fines incurred by infidels, and this, will be inspite of any difference of the sect.

The jurists have, however, said that where any most important difference exists between the sects, such as between the Jews and the Christians, they will not be liable for the fines incurred by each other.

19. Change of 'Aaqilaas .

If a resident of Kufa, who has his pay payable to him in Kufa, kills a person, and he is after that incident, registered and has his pay payable to him in Basra, and the matter is referred to the Qazi, he should impose the fine upon the 'Aaqilaas who are of Basra.

But Imam Zufar says that he should impose it upon the 'Aaqilaas who are of Kufa ; and the same is also the opinion of Imam Abu Yusuf ; because as the offence, which is the cause of the fine, was committed when the people of Kufa were the offender's 'Aaqilaas, it will therefore be due from them, and not from the people of Basra.

The auther of Hidayah says that the fine will be due only as a result of the Qazi's order, and therefore it will fall upon those who are the 'Aaqilaas at the time of passing the order.

The offender's proportion, will however, be taken from his pay at Basra ; because his share will be deducted from his pay, which he will then receives at Basra.

20. Examples and rules to be followed in this case.

Accordingly, if the residence of the murderer is at Kufa, and he has no pay to be payable to him, and he takes up his residence at Basra before the Qazi's order of fine has been issued, the Qazi should in such a case order it to be paid by the people of Basra. But, if he had taken up his residence in that place after the order having issued, the order will not revert.

Similarly, if a resident of the village commits the murder, and the sovereign afterwards fixes his pay to be paid in any particular register previous to the Qazi's order of fine, the Qazi's should order the fine to be paid by those with whom he is registered. But, if the registration took place after the order passed by the Qazi against his 'Aaqilaas of the village, the order will not revert.

This is contrary to where one of the resident of the village, for whom no pay has been fixed, commits the murder by mistake; and the Qazi issues an order for the fine, to be paid from their property in three years ; and thereafter the sovereign takes them into his army and fixes their pay ; because in such a case they are to pay the fine out of their pay, inspite of the order for payment of it out of their property ; because here the order will not, in fact, be finished as their pay is also their property, and the payment of fine from it will be more easy than from their other properties.

21. The 'Aaqilaas of a freedman, or client .

The 'Aaqilaas of an emancipated slave are his emancipator and the family and kindred of his emancipator, as they are to be taken as his aiders and assistants ; and similarly, the 'Aaqilaas of a client under a contract of *Mawalaat* are his patron, and the kindred of his patron, as those are his assistants. (Abu Daud, Nisai, Tirmizi, 'Aainul Hidayah)

22. Liability of the 'Aaqilaas where the fine is short of one-twentieth .

Any fine short of one-twentieth of the Diyat, or complete fine, will not be due from the 'Aaqilaas ; but one-twentieth, or any proportion above that, will fall upon them ; because Hazrat Ibne Abbas has noted a saying of the Holy Prophet that, "'Aaqilaas are not to pay a fine for wilful murder, nor any thing incurred by the offence of a slave, or on account of a Compromise, by confession of the offender, or in short anything

less than the penalty for a wound;” and the penalty for a wound is one-twentieth of the Diyat, or complete fine. (Ibne Hibban ‘Aainul Hidayah, vol. IV, p. 789)

What is here laid down applies solely to the fine for offences short of life ; because where life is involved, the ‘Aaqilaas are bound to pay the fine, inspite of its falling short of one-twentieth of the complete fine ; as where, for example, a person kills a slave, whose value is less than one-twentieth of the complete fine ; in which case the murderer’s ‘Aaqilaas will be liable for the value, as it is the fine for a slave.

23. Diyat short of one-twentieth .

If, by any offence not involving life, a fine is incurred short of one-twentieth, it will be due from the property of the offender.

24. Cases in which the ‘Aaqilaas are not liable to pay the fine.

‘Aaqilaas are not liable to pay anything incurred by the offence of a slave, or on account of a Compromise, or by the confession of the offender, because a slave does not come within the definition of a coadjutor, nor does he receive aid from any one ; and confession or Compromise cannot be accepted in proof against the ‘Aaqilaas, unless, however, they verify his confession in which case they will be liable for the fine, as they here admit the allegation of the avengers of the offence, and such admission is a proof against them.

If a person confesses the murder, by mistake and the avengers of the offence do not make application to the Qazi until after two years, the Qazi should then award the fine to be paid in three years from the date of his order.

If the murderer and the avenger of offence coincide, and agree that “such a Qazi, of such a place, has ordered, upon the evidence of the witnesses, a fine against the ‘Aaqilaas of the

murderer residing in Kufa, and the 'Aaqilaas deny it, they will not liable for any thing, nor the murderer himself will be liable for any thing ; unless, however he is registered and has his pay to be payable to him in the same register with the 'Aaqilaas.

25. Murder of a slave .

If a person accidentally kills a slave, the fine, namely, the value of the slave, will be due from the 'Aaqilaas of the murderer.

26. Offence upon any part or member of a slave .

If a freeman commits an offence upon any part or member of a slave, the fine for such offence will not fall upon the 'Aaqilaas.

27. If there are no 'Aaqilaas.

Our jurists say that, in a case where the murderer has no 'Aaqilaas, the fine is due from the public treasury.

28. 'Aaqilaas of the child born of a woman divorced by La'an.

The child of a woman divorced by La'an has, for his 'Aaqilaas, his maternal kindred, as his descent is established from his mother, not from his father.

But if, however, his maternal 'Aaqilaas have paid the fine, and his father afterwards claims or acknowledges him, as his child his maternal 'Aaqilaas will be entitled to take, from his paternal 'Aaqilaas, in three years from the date of the Qazi passing an order of reimbursement in their favour, whatever they may have so paid.

Similarly, if a Mukatib dies, leaving property sufficient to discharge his ransom, and a son, a freeman, by being born of

his wife who was free, and the son does not discharge the ransom until at length he happens to kill a person by mistake, and his maternal kindred pay the fine, and he then discharges the ransom, the maternal kindred will in that case be entitled to recover from the father's tribe whatever they may have so paid.

And similarly also, if a man instigates a boy to kill any person, and he kills the person accordingly, and his 'Aaqilaas pay the fine, they will afterwards be entitled to recover the same from the 'Aaqilaas of the instigator, upon the instigation being prove by evidence; or, if the instigation is proved, not evidence, but by the confession of the instigator, they will recover it from his property.

It may be noted, that the boy's 'Aaqilaas, in that case will take their reimbursement from the instigator, or from his 'Aaqilaas, in three years from the time of the Qazi's passing the order in their favour, this indulgence in point of time will be allowed, in the payment of fines, so that distress may be avoided.

29. Some Basic cases, which serve as examples for determining the imposition of fine upon 'Aaqilaas .

The author of Hidayah says that here Imam Muhammad, has noted same basic case which serve as examples for determining the imposition of fine upon the Aaqilaas, which are (I) Where the condition of the murderer is changed, and his Walaa is transferred to others by some supervenient occurrence, such as manumission, in which case his offence will not be transferred from his former 'Aaqilaas, whether the Qazi issues the order, or not. For example, the male slave of some person marries the female slave of some other person ; and her master emancipates her ; and within six months thereafter she gives birth to a child ; and this child commits the *Shubhe 'Amd* (manslaughter), and the fine falls upon the 'Aaqilaas of the mother ; and the male slave's master afterwards emancipates him, as a result of which the Walaa of the child belong to him, in which case the fine

incurred by the child's offence will still rest upon the mother's 'Aaqilaas, and will not fall upon the father's 'Aaqilaas, whether the Qazi has issued his order of fine for the offence or not ; (2) Where some unforeseen circumstance occurs, such as a claim laid to a child born of a woman divorced by La'an ; in which case the matter will be transferred from the 'Aaqilaas on the one side to the 'Aaqilaas on the other, as has been explained in the examples before stated ; (3) Where the condition of the offender is not altered, but his 'Aaqilaas are changed, in this way that his registry was at Kufa, and was, after his offence, transferred to Basra, in which case regard should be paid to the order of the Qazi ; in other words, if he has decreed the fine against the former 'Aaqilaas, and the 'Aaqilaas are then changed, the matter will not fall upon the latter 'Aaqilaas ; but if the 'Aaqilaas are changed previous to the Qazi's order of fine against the first 'Aaqilaas, he should in that case decree it against the latter 'Aaqilaas ; (4) Where the 'Aaqilaas still are the same, but obtain an increase, by there having been among them an infant, who in the interim attains to majority, or by some of them dying, and others of the nearest tribe being conjoined in the fine ; in which case the additional 'Aaqilaas will be associated with the original 'Aaqilaas in the payment of the fine, whether the Qazi has ordered a fine against the 'Aaqilaas, or not, exception only in respect of such part as may already have been paid by the former 'Aaqilaas. Whoever pays due attention to these four basic examples, as grounds of proceeding in this particular, will be enabled to form a judgment, and determine upon almost every case which can occur. ('Aainul Hidayah, Vol. IV, p.793).

PART VII
MUKHASAMAAT
(CIVIL LITIGATION)

SYNOPSIS

Book – I – Da'waa

Chapter – 1 – Da'waa

Chapter – 2 – Oath

Section – Manner of swearing, and asking for oath

Chapter – 3 – Swearing of both the plaintiff and the defendant

Section – Persons not liable to claims

Chapter – 4 – Things claimed by two plaintiffs

Section – Disputes relating to possession

Chapter – 5 – Claim of parentage

Book – II – Iqraar

Chapter – 1 – Acknowledgment

Section – Embryo, thing not produced, or debt

Chapter – 2 – Exception ; and what is taken equal to exception

Chapter – 3 – Acknowledgment by sick person.

Section – Acknowledgment of parentage

Book – III – Sulh

Chapter – 1 – Compromise

Section – Compromise of claims

Chapter – 2 – Voluntary Compromise and Appointment of Agent for it.

Chapter – 3 – Compromise of debt.

Section – 1- Joint Debt.

Section – 2- Takhaarij.

BOOK – I

DA'WAA

(CLAIMS)

CHAPTER 1

DA'WAA * (*Hidayah, Kitabul Da'waa*)

Note

Plaintiff and Defendant

1. According to Qaduri "Mudda'ee", or plaintiff, is the person who, if he voluntarily relinquishes his claim, he cannot be forced to prosecute it ; and "Mudda'aa 'Alaih, or defendant, is the person who, if he wishes to avoid the litigation, he cannot be forced to defend it.

Some have said that plaintiff, in respect of anything is the person who, from his being dispossessed of it, , has no right to it but by the proof through evidence, and defendant is the person who has a plea of right to it from his possession of it.

Imam Muhammad, in the Mabsoot, has said that defendant is a person who denies. This may be correct ; but it requires a skill and knowledge of the law to distinguish the denier in a suit; as the reality and not the appearance is sufficient and it frequently happens that a person is in appearance the plaintiff while in reality he is the defendant. Thus a trustee, when he says to the owner of the deposit, "I have restored to you your deposit," appears to be plaintiff, so far as he pleads the return of the deposit ; but in reality he is the defendant, as he denies the responsibility ; and hence his assertion, corroborated by an oath, is to accepted ('A' Aainul Hidayah, Vol III, p.488).

2. Plaintiff should explain his claim .

No claim will be admissible unless the plaintiff explains the nature and quantity of the things which is the object of it.

*Qur'an, Ch. 2 (Baqarah) verses, 140,282,283 ; Ch. 4 (Nisa) verse 135 ; Ch. 5 (Maa'idaah) verse, 3 ; Ch. 6 (An'aam) verse, 152 ; Ch. 25 (Furqan) verse, 72 ; Ch. 65 (Talaq) verse, 2 ; Ch. 70 (Ma'arij) verse, 19, 33 ; Mishkaat, Kitabul Hudood, Baabul 'Aqziyahte Wash Shahaate ; 'Aainul Hidayah, Vol. III, p.427 to 559.

3. Moveable property to be produced .

If, therefore, the thing still exists, and is in the possession of the defendant, he will be required to produce it in the court of the Qazi, so that the plaintiff may pointedly refer to it in the explanation of his claim.

Similarly, the production of it will be necessary at the time of evidence, or of the giving of an oath to the defendant.

4. Defendant to appear to answer the claim .

When the claim of the plaintiff is of a valid nature, the appearance of the defendant will be necessary. This practice has been followed by Qazi in all ages. Moreover, it is binding on the defendant to give reply to the claim, when he is present, in order that the object of his presence may be answered.

5. Defendant to produce the property of the claim .

It will also be necessary for the defendant to produce the property of the claim. Similarly, it will also be necessary for the defendant, in case of his denial, to take an oath.

6. Or the value of it should be specified.

If the property of the claim is not present, a bare explanation of its quality will not be sufficient ; because it will be indispensable in such a case that the value should be specified, so that the property of the claim may be fully known.

7. If the property consists of land .

If the claim relates to land, or other immoveable property, it will be necessary that the plaintiff should defines its boundaries, and say that "the land is in possession of the defendant, and I claim it from him".

It will be necessary for the plaintiff to define the four boundaries, and to specify the owners of each, also adding a description of their family, upto at least as far back as the grandfather.

But if the owner of the boundary is a person of notoriety, the simple mention of him will be sufficient. If, also, only three of the boundaries are defined, it will be sufficient.

8. Claim for debt requires only the claim .

If the claim relates to a debt, it will be sufficient for the plaintiff to say, "I claim it." Because, as the person on whom the claim is made is himself present, there will remain only the claim of it ; and this it is necessary on the plaintiff to make, because it is his right, and also, because, until he himself claims it, the Qazi will take no notice of it.

9. Description of the nature and amount .

But it will be, necessary that he should explain whether it consists of Dirhams or Deenars, and whether it is gold or silver, as such explanation as may define the debt.

10. Process to be followed by the Qazi .

What has now been laid down is an explanation of the validity of claims. It may be noted that where the claim of a plaintiff is valid, the Qazi should interrogate the defendant, and ask him "whether the claim is true or not ?" If he admits the truth of it, then the Qazi should pass a decree, based upon his admission, because admission does in itself produces the effect ; the Qazi should, therefore, order the defendant to give up the possession of the property concerning which he has made the admission, and to deliver it to the plaintiff.

But if, the defendant denies the truth of the claim, the Qazi should require the plaintiff to produce the evidence, because the Holy Prophet in a case where a defendant objected to the

claim, said first to the plaintiff ; “have you evidence ?” and on his answering in the negative, he then said, “it belongs to you to demand an oath from the defendant.” (Bukhari and Muslim) Now it appears from this Tradition, that the right of demanding an oath from the defendant rests upon the defect of evidence on the part of the plaintiff ; and therefore it is necessary first to demand the evidence of the plaintiff, and, on his showing his inability to produce it, to demand an oath from the defendant.

If, therefore, the plaintiff produces evidence to prove his claim, the Qazi should pass a decree in his favour, as in that case there cannot be any suspicion of falsify. But if, he is unable to produce that evidence, and demands the defendant to be put to his oath, in case the Qazi because of the Tradition above quoted, should give an oath to him. The demand of the plaintiff, however, is necessity to the exaction of the oath, as it is his right.

CHAPTER 2

OATH *

(Hidayah, Kitab-ud-Da'waa, Baab-ul-Yameen)

1. Oath not required of the defendant when plaintiff's witnesses are within call .

If a plaintiff declares that "his witnesses are present in the city, but are not in the court of the Qazi," and even then demand an oath from the defendant, in such a case, according to Imam Abu Hanifah, the defendant should not be required to take the oath. But Imam Abu Yusuf says that an oath should, in such a case, be taken from the defendant.

The view of Imam Muhammad, as noted by Khassaaf, coincides with that of Imam Abu Yusuf. But according, to Tahavee, it coincides with that of Imam Abu Hanifah.

2. Oath not to be taken from the plaintiff .

Oath cannot be taken from the plaintiff because of the saying recorded in the Traditions of the Holy Prophet, "evidence is incumbent on the Plaintiff, and oath is on the Defendant (Tirmizi); from which it is evident that oath is not, in any form necessary on the plaintiff, otherwise the necessity of it would not have been restricted to the respondent or defendant.

3. Evidence produced on the part of the plaintiff .

If both the actual possessor, of the property, and the plaintiff, produce the evidence in support of their absolute right of property, in such a case the evidence of the person in possession of the property should be rejected and that of the plaintiff should be accepted.

*Qur'an, Ch.2 (Baqarah), verses 224-225; Ch.5 (Maa'idah) verse 89 ; Ch.9 (Taubah), verse 12; Ch.63 (Munafiqoon), verse 2; Ch.58 (Mujadilah), verses 14-19; Ch.66 (Tehreem), verse 2; Mishkat, Kitabul Da'waa, Baabul Aimaane Wan Nuzoor.

4. Defendant refusing to take the oath.

If the defendant refuses to take the oath in a case where it is incumbent upon him, the Qazi should then pass a decree against him because of his refusal, and should order him to deliver the property of the claim to the plaintiff.

5. Qazi should ask the defendant three times.

It is incumbent for the Qazi to ask the defendant, by three times repeating to him, "I ask you to take the oath ; which if you take it is well ; if not, I will pass a order in favour of the claiment." This three times repetition is required for certainty of the refusal to take an oath, as there is disagreement in regard of the validity of passing a decree upon it. The necessity of the repetition has been noted by Khassaaf, by way of caution, and to cut off the defendant from any further preference.

It is no doubt, an established rule, that if a order is passed on one refusal only, it will be valid ; and this is the approved principle. But it will be most laudable to ask for the oath three times and get refusal three times and then pass a decree against the defendant.

6. Refusal to swear is of two kinds .

Refusal to take an oath is of two kinds : (1) real i.e., where the defendant expressly says, "I will not take an oath" and; (2) virtual, i.e., where he remains silent. The effect in the latter case will be the same as in the former, if it is known that the person refusing is neither deaf nor dumb. This is the approved principle.

7. Claims in which oath cannot be taken from the defendant .

If a man claims marriage with a woman, or a woman with a man, and the defendant, in either case denies the claim, then, according to Imam Abu Hanifah, it will not be necessary to take the oath.

The law will be the same, according to Imam Abu Hanifah, in respect of a claim of reversal, after divorce, or of rescindment in a case of Eila, or a claim of servitude, or a claim of offspring, or claim of lineage, Walaa, punishment, and La'aan.

But Imam Abu Yusuf and Imam Muhammad are of the view that is necessary to take an oath from the defendant in all these cases, except in the cases of punishment, or the La'aan. (Fatawaa-e-Quzi Khan)

8. Thief refusing to swear .

An oath should be taken from a thief ; and if he refuses to take it, he will be liable for the property, but will not make himself liable to the penalty of amputation.

9. Claim based on divorce before consummation .

If a wife advances a claim against her husband, by saying that he had divorced her previous to consummation, an oath should be given to the husband ; and if he refuses to take it, he will responsible for her half dower.

Similarly, oaths are accepted in cases of marriage, where the wife claims her dower, as this claim relating property, which stands proved by a refusal to take the oath, though the marriage is not thereby proved.

Similarly also, oaths are given in claims of parentage, where the claim relates to some right, such as inheritance or maintenance, as where a disabled person claims that he is the brother of another person, and that his maintenance is incumbent upon that other person, who denies the same).

In cases of invalid retractions from gifts as where, a person wants to retract his gift, the grantee says, that he is his brother, and that, on account of such relation, he has no right to retract, and the granter denies the same, the oath will be given to the defendant, as the dispute between them relates to the right in property.

10. Cases of consanguinity .

Oath is not to be given, according to Imam Abu Yusuf and Imam Muhammad, in simple case of consanguinity, unless where the relation is of such a nature which are to be proved by the acknowledgment of the defendant ; as where a person, for example says, that another person is his father, or his son, or a woman says that a certain person is her father, or a man or woman claims a right of *Walaa*, or a man or woman claims marriage, in which cases, if the defendant acknowledges the relationship, the *Walaa*, or the marriage, they will be proved accordingly ; and if the defendant refuses to take the oath, this according to Imam Abu Yusuf and Imam Muhammad will also amount to acknowledgment.

But it will be otherwise where a woman says that a certain person is her son, because in such a case the relationship depends on another, and, therefore, as the acknowledgment of the defendant can have no effect, so also his refusal to take an oath will have no effect.

11. Case of a claim of retaliation .

If a person claims a right of retaliation upon another person, and the defendant denies it, in such a case in the opinion of all our jurists an oath should be given to him. If he refuses to take it, and the retaliation relates to the member of the body, he will have in such a case to suffer the retaliation ; but if it relates to murder, he will be imprisoned until he either confesses or takes an oath of exculpation.

This is according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that in either case a fine will be imposed on him.

12. Where plaintiff's witness are within call .

If a plaintiff says that his witnesses are in the city, the defendant should, in such a case, be ordered to give the bail, for

his appearance within three days, so that he may not abscond ; and thus the right of the plaintiff be destroyed ; and it is lawful thus to take the bail for his appearance.

The period of three days, as above mentioned, is noted from Imam Abu Hanifah, and that period is approved.

In taking the bail according to the Zahir Rawayat there is no difference between an unknown person and the one who is well known ; nor between the claim of a large or of a small amount.

13. If the witnesses are not within call.

The declaration of the plaintiff however that "his witnesses are in the city," is indispensable for taking of the bail for appearance ; and therefore, if the plaintiff says, "I have no witnesses," or, "my witnesses are absent from the city," the bail will not, in such a case, be required from the defendant.

Section

MANNER OF SWEARING AND ASKING FOR OATH *(Hidayah, Kitabud Da'waa, Fasl Fee Kaifiyatil Yameen Wal Istikhlaaf)*

1. Oath to be taken in the Name of Allah .

An oath will not be worthy of credit unless it is taken in the Name of Allah, because the Holy Prophet has said "whoever takes an oath, let him take it in the Name of Allah ; otherwise let him omit the oath entirely" (Bukhari and Muslim) "and also, because he has declared "who-ever takes an oath otherwise than in the Name of Allah is most certainly an Associator." (Tirmizi and Ahmad).

2. Qazi to dictate the terms of it .

It is necessary for the Qazi to ask the swearer to corroborate his oath by reciting the attributes of Allah. Thus he should direct him, for example, to say that, " I swear by Allah

than whom there is no other righteous god, Who is acquainted with that which is the hidden and the apparent, and that neither by me, nor on my behalf, is the amount due to so and so which he claims, nor any part of it.”

The Qazi is authorised to add or diminish from this oath as he pleases ; but he should not so far extend his caution as to repeat the oath, because it is not necessary to swear more than once.

If a person swears “by Allah, by the Merciful, by the Most Merciful,” it will be considered as three oaths ; but if the two last particles of swearing are omitted, it will then be only one.

It may be noted that the Qazi has the option of adding the corroboration to the oath, or of omitting it, and simply asking the defendant to swear “by Allah.” Some jurists have said that it is improper to prescribe the corroboration to such as are known to be virtuous, but that to all other jurists it is necessary. Other jurists, again, have said that the corroboration is necessary in claims of a great amount, but not where the amount is small.

3. Swearing by divorce or emancipation .

A defendant should not swear by divorce or emancipation as if he says, “if the claim preferred against me is just, my wife is divorced,” or “my slave is emancipated” : because of the Tradition before quoted.

Some jurists have, however, said that, in our times, if the plaintiff importunately require, it, the Qazi may then give to the defendant an oath by divorce or emancipation ; as in this age there are many men who scruple not to swear by the Name of Allah, but who are, nevertheless, averse from an oath by emancipation or divorce

4. Jews to swear by the Pentateuch, and Christians by the Gospel .

The Qazi should give the oath to a Jew, by asking him to say,

“I swear by Allah Who revealed the Torat to Moses;” and to a Christian, by asking him to say, “I swear by Allah Who sent down the Injeel of Jesus ;” because the Holy Prophet, upon a certain occasion, gave the oath to a Jew religious scholar, namely, Ibne Suriya A’awar, by saying to him, “I ask you to swear by Allah Who has sent down the Torat to Moses, that such is the law with regard to Zina in your book ;” (Muslim and Abu Daud) and also, because the Jews believe in the divine mission of Moses, and the Christians in the divine mission of Jesus Christ. In the giving of the oaths to them, therefore, it is necessary to corroborate them, by specific reference to the Books which have been received through their respective Prophets. ‘Aainul Hidayah, Vol. III, p.503.

5. Pagans to swear by Allah .

The Qazi should give the oath to a Majoose by asking him to say, “I swear by Allah Who created fire.” This is noted, by Imam Muhammad, in the Mabsoot ; but it is related to Imam Abu Hanifah, in the Nawadir, that he never gave the oath except in the Name of Allah. Khaasaaf, moreover, say that Imam Abu Hanifah never gave the oath to any excepting Christians and Jews, otherwise than in the Name of Allah, because in joining the fire with the Name of Allah, respect is shown to it to which it is not entitled ; contrary to the Torat and Injeel, because these are the Books of Allah, and therefore are entitled to respect. This principle has been adopted by many of our modern jurists.

An oath cannot be given to an idolater except in the Name of Allah, because all infidels believe in Allah, as is evident from this statement of the Qur’an, “IF YOU ASK THEM i.e., the infidel WHO HAS CREATED THE HEAVENS AND THE EARTH, VERILY THEY WILL ANSWER, ALLH THE ALMIGHTY, THE KNOWING .” (Ch. 43, Zukhruf, verse 9)

6. Oath not to be administered in an infidel place of worship.

An oath should not be given to infidels in their place of worship, because the Qazi is prohibited from entering such a place.

7. Oath of Muslims .

It is not necessary, in giving the oath to Muslims, to join it by the time or the place, such as by giving it on a Friday, or in the mosque, because the purpose of an oath is respect to Him in whose Name it is taken, and this does not depend upon any particular time or place.

Further, if the joining of the oaths to Muslims, by the time and the place, is necessary, it will cause inconvenience to the Qazi, because if necessary he will be under obligation of attending at the particular time and place ; and the law does not allow inconvenience, more particularly where the fulfilment of right, or the execution of justice, does not depend upon it.

8. Defendant's oath relating to cause ; and relating to object.

If a person says that he has purchased a slave from another person for one-thousand Dirhams, and the seller denies the fact ; in such a case the seller should be asked to swear, in this manner, "I swear by Allah that there does not absolutely at present exist any contract of sale between me and the plaintiff ; " and not in this manner, "I swear by Allah that I have not sold, &c.", because it often happens that sale is made, and then after an Aqaalah, or dissolution of the contract, takes place.

In cases of usurpation it will be necessary that the defendant swears, in the presence of the plaintiff, in this manner, "there is no part of that which you say that I have usurped from you, due by me", and not "I have not usurped, &c.", because a usurpation is always finished by the owner selling or making a gift of the thing to the usurper.

In cases of marriage it is necessary that the defendant should swear to this effect, "no marriage does at this time exist between me and the plaintiff ; " because a marriage is sometimes dissolved by Khula."

In cases of divorce the husband should swear "this woman is not at present finally separated from me, by the divorce which

she pleads” ; and not, in an absolute manner, that “he has not divorced her” ; because a new marriage sometimes takes place after a *Talaq-e-Bain*.

Thus, in all these cases, the Qazi should give the oath to the defendant in respect of the object of the case, and not in respect of the cause of it ; because, if he gives the oath in respect of the cause, it may be detrimental to the defendant.

This view is conformable to the opinion of Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf is of the view that, in all these cases, the Qazi should give the oath to the defendant in respect of the cause except where the defendant particularly requests the contrary.

Some jurists have said that the Qazi should be guided by the denial of the defendant ; i.e., if the defendant denies the cause, the oath should relate to the cause ; and, if he denies the object the oath should relate to the object.

But if, the cause is of such a nature as cannot be removed or finished by some other cause, in such a case the defendant's oath, according to all our jurists should relate to the cause. This is the view of Imam Abu Hanifah and Imam Muhammad.

9. Defendant's oath in case of inheritance .

If a person acquires a right in a slave by inheritance, and another person claim's a right in the said slave, in such a case the oath of the defendant should relate to his knowledge ; that is, he should be required to swear that he does not know that the slave in question is the property of the plaintiff ; because as he is not acquainted with the acts of the person from whom the inheritance has descended, he cannot absolutely swear that the slave is not the property of the plaintiff .But, if he has acquired the slave by a gift or purchase, he can swear positively in respect of his right of property, as purchase and gift are both causes of a right of property.

10. Defendant making Compromise with the plaintiff .

If a person prefers a claim against another, person and the defendant denies it, but then gives the plaintiff ten Dirhams, as an expiation for his oath, or as a Compromise for it, such expiation or Compromise will be valid ; because it has been so related by Hazrat Umar ; and the plaintiff cannot there after demand an oath from the defendant, as he has himself finished this right.

CHAPTER 3

SWEARING OF BOTH THE PLAINTIFF AND THE DEFENDANT

(Hidayah, Kitabul Da'waa, Babut Tahalif)

1. Seller and purchaser are mutually to swear .

If a seller and purchaser disagree, the purchaser says that the price of the goods was one hundred Dirhams and the seller, says that it was more, or, if the seller acknowledges the goods sold to be so much, and the purchaser says that it was more, in such a case, if either of them give evidence in support of his statement, the Qazi should pass a decree in his favour ; because proof is stronger than simple statement.

But if, both of them give the evidence in support of their respective statements, then the evidence of the party that proves the more price or the more goods should be accepted; because the object of the evidence is proof ; and in respect of the excess, there is no opposition of evidence.

If the seller and purchaser disagree in respect of both i.e., the price as well as the goods, then the evidence of the seller in respect of the price will be preferable ; and the evidence of the purchaser will be preferable in respect of the goods.

But if, both the parties have no evidence, then the Qazi should say to the purchaser, "if you agree to the price claimed by the seller, it is well ; if not, I will dissolve the contract ;" and to the seller, "if you are ready to accept the quantity of goods claimed by the purchaser, it is well ; if not I will dissolve the contract."

If, inspite of this, they do not agree, the Qazi should then make each of them swear to his denial of the claim of the other.

2. Formula of the oaths of a seller and purchaser.

The formula of the oaths, in a disagreement between the buyer and the seller, is this. The seller should swear "by Allah, I have not sold the thing in question for one thousand Dirhams;" and the purchaser, should swear "by Allah, I have not purchased it for two thousand Dirhams. Imam Muhammad, in the Ziyadaat has said, "that, the seller should swear by Allah, I have not sold it for one thousand Dirhams, but for two thousand ; and let the purchaser should swear, by Allah, I have not purchased it for two thousand Dirhams, but for one thousand." In other words, the negation and affirmation should be coupled together for the greater caution.

The most authentic principle, however, is that an oath of negation will be sufficient ; because oaths proceed upon denial, as appears from the Tradition relating to Qasaamat ; because it is related that the Holy Prophet desired the people of Qasaamat to swear that "by Allah we had not committed the murder, and did not know the murderer."(A' Aainul Hidayah; Vol.III, p.511).

3. Where both parties swear .

If the seller and purchaser, in a case of disagreement, both take the oath, the Qazi should in such a case dissolve the sale. This is the adjudication of Imam Muhammad ; and it evinces that the sale is not of itself dissolved by the mutual swearing of the parties ; because, as the plea of neither party is proved, a sale continues of an undefined nature ; and hence the Qazi should dissolve it as well to terminate their contention, as because where the price is not proved, a sale remains without a return ; and as this is an invalid sale should therefore be dissolved, as it is indispensably necessary that all invalid sales should be dissolved.

4. Seller or purchaser declining to swear .

If, in a case of disagreement between a purchaser and a seller, one of the two refuses to take the oath, the claim of the

other will in that cases stand proved against him ; because by such refusal the party impliedly concedes to the claim of the other person in respect of the thing claimed by him ; because as his plea is thus rendered incapable of controverting the plea of the other, person, it will follow that he accepts that plea.

5. Disagreement in respect of something not essential to the contract .

If the parties disagree in respect of the period fixed for the payment of the price, or in respect of the option of determination, or in respect of a partial payment of the price, in none of these cases will the parties be given the oath, because the disagreement, in such a case, relates to something not within the scope of the contract.

But it will be otherwise where the disagreement relates to the nation of the price such as whether it consists of Dirhams of Bukhara or of Baghdad, or in respect of the genus of it such as whether it consists of Dirhams or of Deenars, because such a disagreement is the same as if it related to the amount of the price, in which case oaths will be given, for this reason, that the genus and nature of the price are not separable from the substance of it ; because the price is a debt due by the purchaser ; and a debt is only known and ascertained by description of its genus and nature.

But the period fixed for the payment of the price, , is not of this nature, as it is not a kind of it, from which it is that the price remains extant and firm after the promised time of its payment has expired.

6. Dispute respecting superadded stipulation .

If a disagreement is between a seller and a purchaser in respect of the condition of option, or the period of payment, the assertion of the respondent, supported by the oath, will be accepted ; because optional conditions, and extensions of the

period of payment, are accidents in a sale ; and as regards the accidents, the statement of the respondent should be accepted in preference to that of that of the plaintiff.

7. Goods lost in the hands of the purchaser .

If, after the loss of the goods of a sale, in the hands of the purchaser, a disagreement arises between the purchaser and the seller, in respect of the amount of the price, the parties, in such a case according to Imam Abu Hanifah and Imam Abu Yusuf , will, not be given the oaths , ; but the statement of the purchaser will be accepted.

Imam Muhammad says that, in such a case, the parties should both be sworn, and thereafter the sale should be dissolved, in return for the value of the goods of it which had been lost which means that the purchaser should pay the value of the goods to the seller, who should return to the purchaser the price of them.

8. Dispute relating to the price of two slaves, where one of them dies .

If a person purchases two slaves by one contract, and one of them afterwards dies, and a dispute arises between the parties in respect of the amount of the price, the seller says that it was two thousand Dirhams, and the purchaser says that it was one thousand, Dirham in such a case according to Imam Abu Hanifah the parties should not be given the oath; but the statement of the purchaser should be accepted.

This, opinion however, is based on the supposition of the seller as unwilling to receive the price of the living slave only, and to give up the price of the slave that is dead.

It is said in the *Jaame'as-Sagheer* that, according to Imam Abu Hanifah, the statement of the purchaser should be accepted unless the seller is willing to accept the price of the living slave only.

But Imam Abu Yusuf says that both parties should be given the oath in regard of the living slave ; that the sale, so far as it relates to him, should be dissolved ; that the statement of the purchaser should be accepted in respect of the dead slave ; and that, therefore, the purchaser will be responsible for the proportion of the dead slave, and not for the whole price.

And Imam Muhammad, says that both parties should be given the oath with regard to both the slaves ; and that there after the purchaser should return the living slave and the value of the dead one.

But if, the seller is willing to give up his right in respect of the deceased slave, and to consider him as having never existed, both parties should, in such a case, be given the oath as to their denial of the claim of the other, in respect of the whole price of both the slaves ; because the whole of the price will then be opposed to the living slave, from the concession of the seller to take the living slave only in for the whole price, and to consider the dead slave as excluded from the contract.

9. Mode of giving the oath in such a case .

The mode of giving the oath to the parties, in the case according to Imam Muhammad is the same as in the case of non-existence of the goods of the sale. If, therefore, both parties take the oath, and differ in their statements, and if one or both of them require the dissolution of the contract, the Qazi should, in such a case, dissolve it, and order the purchaser to return the living slave, and the value of the dead one ; and in fixing the value of the dead slave, the purchaser's statement should be accepted.

There is, however, difference of opinion among our modern commentators, in their exposition of the principle laid down by Imam Abu Yusuf in respect of the mode of giving the oath to the parties, in such a case. The most approved mode is, to give the oath to the purchaser that "he had not purchased those two slaves for the price claimed by the seller ;" and in case of his

refusal to take the oath, to confirm the claim of the seller . But if he takes the oath accordingly, an oath should then be taken from the seller, that "he did not sell these two slaves for the price alleged by the purchaser ; " and if he refuses to take the oath, the claim of the purchaser should be confirmed ; but if he takes the oath accordingly, the sale, so far as it relates to the living slave should be dissolved, and the purchaser will be responsible for the price of the living slave.

In fixing the respective prices of the two slaves, regard should be had to the value they had on the day in which the purchaser took possession of them. If the parties disagree as to the value the dead slave bore on the day of delivery, the statement of the seller is to be accepted in preference to that of the purchaser. But if any either of the parties produces the evidence, it should be admitted in preference to the other's statement; and if both produce the evidence, that of the seller should be accepted.

If the parties disagree in respect of the value of the dead slave, the statement of the seller should be accepted, as he is the defendant or respondent, because both parties admit that a price is due, and the purchaser, proceeding on his assertion of the inferior value of the slave that is dead, pleads that he has only a small sum to pay, which the seller, asserting the superior value of the dead slave, denies.

If both parties produce the evidence, then evidence of the seller should be accepted, as it proves the greater value of the dead slave.

10. Disagreement in respect of the price .

If a person purchases a female slave, and takes possession of her, and the parties there after agree to dissolve the sale, but disagree in respect of the price, in such a case they should both be given the oath; and, after taking the oath by both, of them the original sale will revert, and the dissolution will become void.

11. Where the price has been paid in advance .

If a person sells a Kur of wheat, by a Salam contract, for ten Dirhams, and the parties there after agree to a dissolution of the contract of Salam, but disagree in respect of the price in such a case the assertion of the seller who has received the advance will be accepted; and Salam contract will not revert, and the dissolution will still remain in force.

But a contract of actual sale will, revert under such circumstance ; and this case plainly shows that there is a difference between contracts of sale and contracts of Salam.

12. Disagreement between husband and wife in respect of the dower .

If a husband and wife disagree in respect of the dower- the husband says that it was one thousand Dirhams, and the wife says that it was two thousand Dirham in such a case the party that brings evidence will be credited, as this will establish the plea of that party upon proof ; and if both bring the evidence, then the evidence produced by the woman will be preferred, as it proves the greater amount. This is where the woman's "Mihr-e-Misl", or proper dower, falls short of what she claims.

But if none of the parties produce the evidence, they will be given the oath according to Imam Abu Hanifah ; but the contract will not be dissolved ; because the only effect of taking the oath in such a case, is that it finishes the bargain in respect of the dower, similarly as if no bargain had ever existed ; but this does not engender any doubt in respect of the marriage itself, as the dower is not an essential but merely a dependant of the marriage.

But if, the woman's proper dower, and the sum admitted by the husband, are equal, or if her proper dower falls short of what he admits, the Qazi should, in such a case, pass a decree in favour of the husband, as apparent circumstances are on his side.

If the wife's proper dower is equal to what she claims, or if it exceeds her claim, the Qazi should, in such a case, pass a decree in favour of her claim.

If the proper dower is greater than what is admitted by the husband, and less than what is claimed by the wife, the Qazi should, in such a case, grant the proper dower to the wife ; because, after the oaths of both parties, nothing is established greater or less than the proper dower, which is, therefore, the least.

In the option of Imam Abu Hanifah and Imam Muhammad, the oath should first be given to the husband, so that the advantage arising from his refusal to take the oath may be quickly obtained ; because, as it is his business first to advance the dower, he should be given the oath first.

If a husband and wife disagree in respect of the dower, the husband says that he had agreed to give a particular male slave, and the wife says that he had assigned a particular female slave in such a case the rule will be the same as in that immediately preceding ; that is, if the woman's proper dower is equal to, or greater than, the value of the male slave, the Qazi should decide in favour of the husband ; but if it is equal to, or greater than, the value of the female slave, the Qazi should decide in favour of the wife.

13. Dispute between lessor and lessee .

If a lessor and lessee, before enjoyment of the object of the contract that is, before the usufruct of it, disagree in respect of the amount of the rent, or the period of the lease, they should in such a case be both given the oath ; and, after swearing, the contract should be dissolved, and each party should return to the other whatever he may have received.

The reason of this is that the swearing of both parties, in respect of the sale, in case of a disagreement before the purchaser's possession of the goods, is conformable to analogy

as has been already demonstrated. Now a lease prior to the enjoyment of the usufruct is similar to a sale prior to possession of the goods and such is the case here considered.

If, therefore the parties disagree in respect of the amount of the rent, the oath should first be given to the lessee as he denies the obligation of the rent

But if, they disagree in respect of the period of the lease, the oath should first be given to the lessor.

If either of them refuses to take the oath, the claim of the other will thereby be established.

If one of them produces the evidence, his claim will be established. But if both bring the evidence, the evidence of the lessor should be preferred, in case of the disagreement relating to the quantity of rent ; and that of the lessee, in case of its relating to the period of the lease. If they disagree in both points, the evidence of each of them will in that case, be accepted in the excess which it may prove.

14. Same dispute after delivery of the property .

If a lessor and lessee disagree, after getting the benefit of the lease, the parties will not be given the oath , but the assertion of the lessee will be accepted according to all our jurists following the view of Imam Abu Hanifah and Imam Abu Yusuf.

But if, the lessor and lessee dispute after the receipt of part of the benefit of the lease, they must be given the oath, and the contract dissolved with regard to what remains.

15. Dispute concerning ransom .

If a master and his Mukatib disagree in respect of the amount of the ransom, according to Imam Abu Hanifah, they should not be given the oath. But Imam Abu Yusuf and Imam

Muhammad are of the view that they should be given the oath, and that the contract of Kitabat should be there after dissolved, and the same is also the opinion of Imam Shaafe'ee.

16. Dispute between husband and wife in respect of furniture.

If a husband and wife disagree in respect any article of the furniture, and each claim a right in it, in such a case, if the furniture in question is particularly adapted to the use of men, it will be given to the husband ; and if particularly adapted for the use of women, it will be given to the wife.

But if, the article is of such a nature that it is common to the service of both, such as a pot, or other vessel, it should, in such a case be adjudged to the husband. This rule, indeed, does not hold good where the article in dispute is peculiarly adapted to the service of women, because, although such articles also are in the possession of the husband, yet the probability of their being the property of the wife, from the particular nature of them, is stronger than the argument derived on basis of possession ; and, therefore will supersede it.

But this is based upon a supposition of the actual existence of the marriage ; or of a separation between the parties, in which case the law will exactly be the same.

17. Dispute between survivor and heirs of a deceased spouse.

But if, one of the spouses dies, and the heirs of the deceased enter into a dispute with the survivor relating to the family goods, in such a case the goods in question will be adjudged in favour of the survivor, whether they are of nature adapted to the service of a man or woman ; as possession is clearly proved in favour of the living party. This is according to Imam Abu Hanifah.

But Imam Abu Yusuf is of the view that everything which partakes of the nature of paraphernalia, whether it is reserved for

the use of a man, or woman, should be adjudged in favour of the wife; and that all the rest should be adjudged in favour of the husband upon his taking the oath in respect of the property ; as every woman is supposed to have brought a paraphernalia along with her, there is also the possibility that the particular articles may have been included in it; and this possibility will finish the argument in favour of the husband on account of possession. But in respect of the rest of the family goods, the husband's claim on account of possession will hold good.

But Imam Muhammad says that whatever is only fit for the use of a man should be adjudged in favour of the husband ; and that whatever is only fit for women should be adjudged in favour of the wife, and that whatever is of common use for both, should be adjudged in favour of the husband or his heirs for the reason given by Imam Abu Hanifah.

18. If one of the spouses is a slave .

If, in the case in question, one of the spouses is a slave, and the dispute relating to property arises during the life of both, it should be adjudged in favour of the party who is free ; because the possession of a free person is in a superior degree valid ; but in case of the death of either, it should be adjudged in favour of the living party, as the possession of the deceased no longer, exists and the possession of the living remains unopposed. This is according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that a privileged slave and a Mukatib are equal to freemen in this respect as their possession is valid in disputed cases.

Section

PERSONS NOT LIABLE TO CLAIMS

(Hidayah, Kitabul Da'waa, Fasl Fee Maa Yakuno Khasman)

1. Person not liable to a claim .

If a defendant says that "a person who is absent had deposited with him the article in dispute" or "had pledged it to him," or that "he himself had usurped it from a particular absent person," and brings witnesses to prove his allegation, in such a case no right for a suit or dispute exists between him and the plaintiff ; and so also, if he says that "a person who is absent had let the out said thing to him in lease," and produces evidence in proof of it ;

Ibne Shabramah says that the defendant will not be exempted from the suit as a result of proving, by witnesses, the deposit, the pledge, the usurpation, or the lease.

But Ibne Abi Lailaa is of the view that the defendant will be exempted from the plea immediately upon his assertion.

The last noted view of Imam Abu Yusuf is that if the defendant is virtuous, and not noted for fraud, the rule will be as above laid down. But if, he is known for fraud, he, in such a case, will not exempted from the claim, even on producing evidence in support of his allegation ; because a fraudulent person sometimes gives property that he has usurped to a traveller, for example, so that the traveller may afterwards, in the presence of witnesses, resign it to him in trust ; and this he does with a view to defraud the original owner of his right. Where the defendant, therefore, is subject to a suspicion of such frauds as these, the Qazi should not accept his evidence.

2. His witnesses giving defective evidence.

If the defendant's witnesses say, "a person whom we do not know did give this article to him in trust," in such a case the defendant will not be released from the suit.

If, again, the witnesses say, "we know the face of the man in question, but we do not know his name and family," in such a case the same rule will apply, according to Imam Muhammad. But according to Imam Abu Hanifah, the defendant in such a case will be released from the claim, as having proved that the thing in question came to him from another in trust ; as the witnesses know the face of the man, contrary to the preceding case, the defendant's possession will, therefore, be longer a subject of litigation.

3. He is liable .

If a defendant pleads that he had purchased the article in dispute from a person who is absent, he will in such a case be a party, and liable to answer to the claim of the plaintiff ; because in declaring that he was given possession of the thing by virtue of a right of property, he has acknowledged himself to be subject to the suit of the plaintiff.

4. Plaintiff suing him on a plea of theft, or usurpation .

If, in a suit, the plaintiff says to the defendant "you have usurped this thing from me," or "you have stolen this thing from me," in, such a case, the defendant will not be released from the claim although he produces witnesses in proof of the article in question having been committed to him by an absent person in trust.

But it will be different where the plaintiff claims absolutely his right of property ; because in such a case the defendant cannot be subjected to the claim otherwise than from his possession of the thing ; from which it is that an absolute claim of property in an article is not admitted against any except

the actual possessor of the article. But a plea for the act, of acquisition, such as usurpation, and so forth, lies against any other person.

5. Plaintiff suing upon a plea of theft, without naming the thief .

If, in a suit, the plaintiff says to the defendant, who is in possession of the thing in dispute, that "this thing which is in your possession is my property, and has been taken from me by theft," and the defendant says that "a person who is absent had deposited this thing with me ;" and brings evidence to prove his assertion, still he will not be released from the claim. This is the option of Imam Abu Hanifah and Imam Abu Yusuf, and it is based upon a favourable construction of the law.

But Imam Muhammad says the defendant, in such a case, is exempted from the claim as the plaintiff has not made the claim of theft against him, but against an unknown person.

6. Plaintiff suing him on a plea of purchase .

If the plaintiff says to the defendant, that "I have purchased this thing from a certain person," and the defendant replies, "that person gave the thing to me in trust", in such a case the defendant will be exempted from the claim without the necessity of producing evidence ; because both the plaintiff and the defendant agree that the thing is, originally, the property of another man ; and therefore the tenure of the person having the possession of it is not a matter of dispute between them.

But if, the plaintiff says, that "a certain person had appointed him an agent for possession of the said thing," and produces evidence in proof of this, he will be entitled to prosecute his suit against the possessor, as he has established, by witnesses, a superior right to the possession of the article in question.

CHAPTER 4

THINGS CLAIMED BY TWO PLAINTIFFS

(Hidayah, Kitab-ud-Da'waa, Baab Maa Yuda'iyat-ur-Rajulaan)

1. Claim laid to a thing which is indivisible.

If two persons separately claim the ownership of an article which is in the possession of another person, and each brings evidence in support of his claim, the Qazi should, in such a case, adjudged the article to be the joint property of both in an equal shares.

2. If it is to a wife .

If two men, severally, claim marriage with one woman, and each adduces evidence in support of his claim, the Qazi should not in such a case, pass a decree upon these evidences ; because, as the subject of dispute does not admit of divided property, it is therefore impracticable to adjudge one-half to each. He should therefore have recourse to the declaration of the wife, and adjudge her in marriage to that man whose claim is verified by her.

3. If the witnesses give the dates .

This, however, is based upon a supposition of the witnesses not mentioning any date. But if they give the dates of the marriage, the evidence of that party which gives the most ancient date should be preferred.

But if, previous to the producing of evidence by either party, the woman makes an acknowledgment in favour of one of the plaintiffs, she is to be judged to be the wife of the acknowledged ; but if the other party afterwards produces the evidence in support of his claim, the Qazi should adjudge her to be his wife, because evidence is stronger than acknowledgment.

4. A Decree adjudging a wife to a single claimant .

If only one man claims marriage with a woman, and she denies it, and he produces evidence in support of his claim, and the Qazi has passed a decree in his favour, then another person appears and claims his marriage with the same woman, in such a case the Qazi should not reverse his decree ; because, after the decree is passed on good grounds, it cannot be changed by a case equal to it. In fact the next case is of inferior force.

But if, the witnesses of the second plaintiff prove the date of the marriage to have been prior to that mentioned by the witnesses of the first plaintiff, the evidence produced by the second plaintiff will in such a case be preferred, as the error of the first witnesses has been made apparent by it.

And the law will be the same in a case where a husband and wife live together, but their marriage is notorious, and another person claims marriage with the woman, and produces the evidence in support of his plea ; because in such a case his evidence will not be accepted unless it proves a marriage prior to that of the husband with whom the wife is living.

5. Two claimants of a slave on a plea of purchase .

If two persons severally claim a right of ownership in a slave who is in the possession of another person, as if each were to assert that he had purchased him from that other person, and each produces the evidence in support of his claim, in such a case, as the Qazi should adjudge him to be the joint property of both, they are severally entitled to take the half of the slave at half of the price or give up the bargain.

But if, in the case in question, after the Qazi has adjudged the half to each, one of the parties rejects it, the other will not be entitled to take the whole, because that half was adjudged to the other on account of the evidence he had produced, and on his rejecting it the sale will become, in that half, as null and void.

But it will be otherwise if one of the parties intimates his rejection of the half before the adjudication by the Qazi, because in that case he will be entitled to take the whole.

6. If they mention and prove the dates .

It may be noted that if, in the case in question, the two plaintiffs mention the dates of their purchase, the sale should be adjudged in favour of the prior purchaser.

If one of the parties mentions the date, and not the other, the sale should in such a case be adjudged in favour of the one who mentions the date.

If none of the parties give the date, and one of them is in possession of the thing, the claim of the possessor will be preferable.

The same rule will apply when one of the plaintiffs is in possession of the thing and the witnesses of the other give the date of his purchase.

But it may be noted that if the witnesses expressly prove his purchase to have been prior to that of the purchase by the one in possession, the sale should in such a case be adjudged in his favour, because sure knowledge of prior purchase proves a positive right, while possession shows only an implied right.

7. One party pleading purchase, and the other gift and possession.

If two persons claim a particular article, one on account of purchase and the other on account of gift and possession, and each produces the evidence in support of his claim, without, however, mentioning the dates, in such a case the evidence of purchase should be given the preference.

If the claim of the one is based on purchase, and that of the other upon charity and possession, and all the other circumstances are also the same as above stated, the same rule will apply.

But if the claim of the one is based on gift and possession, and that of the other on charity and possession, the Qazi should in such a case decree the thing to be, in an equal share, the joint property of both ; bearing their claims are equal, and neither of them has preference over the other.

8. Claim on plea of purchase, and claim on plea of marriage.

If two persons claim the same thing—one of them on account of purchase, and the other being a woman on account of the possessor's having married her, and it is settled that the article as her dower, in such a case both plaintiffs stand upon an equal footing ; because the claim of each in point of strength is equal, since a contract of purchase, and of marriage, are both contracts of exchange, and both equally create a right of property. This is according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad says that the plea of purchase should be preferred, and that the husband should be made responsible to the woman for the value of the article in dispute ; as by this means a preference is given to the plea of purchase, while at the same time the claims of both are thus satisfied.

9. Plea of pawning and possession and plea of gift and possession .

If one of two plaintiffs claim pawning and possession ; and the other claim gift and possession, and each produces the evidence in support of his claim, in such a case the claim of pawning should be preferred.

This is based upon a favourable construction. But Analogy suggests that the claim of gift should be preferred, because gifts creates a right of property while pawning does not.

The reason for a more favourable construction in such a case is that possession on account of pawnage creates responsibility, which is not the case in respect of possession on account of gift ; and a contract which creates responsibility is stronger than one which does not create it.

But it will be different where the gift is given in exchange for some other thing ; because such a gift is basically a sale ; and sale is stronger than pawnage.

10. Two claims equally supported .

If two persons claim an absolute right of property in the same article, which is in the possession of a third person, and each are gives the date of commencement of his right, it should in such a case be adjudged in favour of the one who proves the oldest date

11. Two pleas of purchase against one person .

If two persons make the claim of purchase against another person who does not possess the article in dispute, and each produces the evidence of his purchase, giving different dates, the person who proves the prior date should be preferred, as he proves his right at a time when he had no opponent.

12. Against two different persons .

If two person make a claim of purchase, the one brings the evidence in proof of his purchasing the article in dispute from Zaid, and the other brings the evidence in proof of his purchasing it from Umar, and the witnesses of each also give the dates of these purchases, in such a case both plaintiffs are on a footing of equality, as each of them has proved the right of property of his respective seller, and hence the case is the same as if the two sellers were themselves present and claimed their respective rights. Each plaintiff, therefore, will be entitled to take the half of the thing at half of the price, or give up his purchase entirely.

If the witnesses of one of the parties give a fixed time of payment, and the witnesses of the other, do not give the date, still the Qazi should adjudge one half to each ; because a knowledge of the length of credit does not imply priority in point of purchase ; and it is even possible that the other's right of property may have been of prior date, as the case supposes two different sellers. But it will be other-wise where there is only one seller, as in such a case both parties are agreed in the derivation of their right of property from one and the same seller.

13. One only giving the evidence of a date .

But if, one of the plaintiffs proves a date of purchase, and not the other, a decree should be passed in favour of the claimant whose date of purchase is known, unless the purchase of the other is proved to have preceded his.

14. Four creditors pleading a right in a thing .

If one plaintiff claims a right in an article as having purchased it from Zaid; a second on account of a gift of it to him by Umar, a third, from inheritance from his father ; and a fourth, as having been bestowed upon him in charity by a particular person, and each of the four claimants produce the evidence in support of his claim, in such a case the Qazi should adjudge the article among them, in four equal shares ; because each of them pleads his right, as derived from a different person, and the case is, therefore, the same as if these four different persons had themselves appeared in court, and each proved his absolute right of property.

15. Evidence of possession should be preferred .

If a plaintiff gives the evidence to prove his right of property in a thing from a particular times, and the possessor of the thing brings the evidence to prove his right from a prior period, the evidence of the possessor should be preferred. This is according to Imam Abu Hanifah and Imam Abu Yusuf, and it appears also, from one instance, to be the opinion of Imam Muhammad.

According to another instance, however, Imam Muhammad is of the view that the evidence of the possessor should not be preferred.

16. Evidence of plaintiff to be preferred .

If a plaintiff and possessor, respectively, bring the evidence to prove each his right of property, in an absolute manner, that is, without explaining the instrument or cause of it, and the witnesses of one of the parties declare the date of his right, and not those of the other, in such a case, according to Imam Abu Hanifah and Imam Muhammad the evidence of the plaintiff should be preferred. But Imam Abu Yusuf says that the evidence of the claimant of known date should be preferred, and this, according to one instance, is also the opinion of Imam Abu Hanifah.

17. If the subject is immoveable property .

A similar disagreement subsists in respect of a contested house in the possession of two plaintiffs ; because, according to Imam Abu Hanifah and Imam Muhammad, the house should be left in their possession , as before, and no regard, whatever should be paid to the evidence on either part. But, according to Imam Abu Yusuf, a decree should be passed in favour of him who proves a date.

Supposing, however, the house is in the possession of a third person ; and all the other circumstances to be the same, in such a case, according to Imam Abu Hanifah, both the claimants are upon an equal footing. But according to Imam Abu Yusuf the evidence on the part of him who proves the date should be preferred, and Imam Muhammad, on the other hand, says that the evidence on the part of him who does not show any date should be preferred because he claims a prior right of property, on the ground that when a person claim property in an absolute manner, without giving any date, and proved his claim, he will be entitled to more than one who gives a date ; as it is in a case of claim of acquisition by labour.

18. Claims relating to animals based upon generation .

If a plaintiff and possessor both produce the evidence to prove a generation, and each produces the evidence to prove that "such a camel, for example, is the offspring of a particular camel, which had give birth to it while it was in his possession," in such a case the claim of the possessor should be preferred ; because, as the evidence is given upon a point which derives no additional proof from actual possession, it therefore follows that the plaintiff and the possessor both are upon equality in respect of their plea and the evidence; and the evidence on the part of the possessor afterwards acquires a superiority on account of his possession. The Qazi should, therefore, adjudge the camel in his favour. This is approved.

But Eisa bin Ayaan is of a contrary view, because he says that as both evidences are in opposition to each other, they should both be rejected, and the camel should be left, as it was, in the hands of the possessor ; but that it should not be decreed in his favour by the Qazi.

If, in a suit in respect of a horse, the plaintiff says that he had purchased it from Zaid, and that it was the offspring of a horse of Zaid, and the possessor says that he had purchased it from Umar, and that it was the offspring of a horse of Umar, and each brings the evidence in proof of the horse having been produced from a claim in the possession of the seller, it will be the same as if each had given the evidence in proof of the horse having been produced in his own possession.

But if, one of the parties brings the evidence in proof of his right of property, and the other in proof of the contrary, in such a case the claim of the party proving the generation of the horse will be preferred, whether he is the possessor or not ; because, as the evidence given by him proves his right of property *ab initio*, it therefore follows that the right cannot afterwards be in the other, unless by a derivation of it from him.

Similarly also, if, where none of the parties has possession of the horse, one proves that it was produced in his possession, and the other proves his right of property, a decree should be passed in favour of the one who proves the generation of the horse.

It may be noted that if the Qazi passes a order in favour of the person who proves the off spring of the horse from the one which was in his possession, and another person then proves, by evidence, the generation of it to have been from his property, the Qazi should, in such a case, pass a decree in favour of that third person, unless the person in possession again brings the evidences to proof the generation, in opposition to that person.

19. Or to other property based upon a right equal to generation .

The same rule will apply in respect of materials for making cloth, where they have undergone only one operation, such as spinning).

Thus, if a plaintiff and a person in possession, respectively, say that "the yarn in dispute is his property, and he has spun it him-self," and each brings the evidence in support of his claim, in such a case, the Qazi should pass a decree in favour of the person in possession, as in a case of claim based upon generation ; and the same rule will apply to every case relating to property which is simple and not complicated, such, which for example, as the extracting of milk from an animal, the making of cheese, or of felts, the sheering of wool, and so on.

But if, the cause of right of property is of a complicated nature, such as the wearing of cloth, the planting of trees, or the sowing of wheat, and a dispute arises between a plaintiff and the person in possession of any of the these articles, the Qazi should pass a decree in favour of the plaintiff, and not in favour of the person in possession, and so also, if a plaintiff and the person in possession, respectively, give the evidence in proof of his absolute right of property, without explaining the cause.

If the cause is doubtful, that is, if it is unknown whether complicated or simple, then skilful persons should be consulted and if it appears doubtful to them also, the Qazi should in such a case, decree in favour of that plaintiff who is not in possession; because the original principle is to pass the order in conformity with the evidence given by the plaintiff ; and although an exception is established in cases of claim based upon generation, because of a Tradition of the Holy Prophet, who, upon a certain occasion, decided, in such a case, in favour of the person in possession, still ; in a case where the cause is doubtful, and where of course, it cannot be known whether the article is comprehended within the exception, recourse should be had to the original principle of the law.

20. Possessor of an article, proving its purchase from the claimant .

If a plaintiff gives the evidence in support of his absolute right of property in an article, and the person in possession gives the evidence to prove that he has purchased the article from the plaintiff, the evidence of the person in possession should be preferred.

21. If each party proves a purchase from the other .

If a plaintiff gives the evidence to prove that he has purchased the article in dispute from the person in possession, and the person in possession, on the other hand, gives the evidence in proof that he has purchased it for the plaintiff, and no party proves the date of his purchase, in such a case the evidence of both will fall to the ground, and the thing in dispute will be left in the hands of the possessor.

22. If each party proves payment of the price .

If, in such a case the witnesses of each party give the evidence of the payment of the price, one thousand Dirhams, for example, in such a case according to Imam Abu Hanifah and Imam Abu Yusuf a Mokasa, or mutual liquidation, will take place in respect of both the prices, if the prices are equal either as

regard a prompt payment, or as regards a payment at a limited period, because in such a case, the possession of each party induces responsibility.

But if no evidence is given of the payment of the price, in such a case also, according to Imam Muhammad, a mutual liquidation will take place, because the price will be due from each party to the other respectively, if the witnesses of each separately prove to the sale, and also the possession of the article sold.

And here, in the opinion of all our jurists, the evidence of both parties will fall to the ground ; even according to Imam Muhammad, a conformity to the evidence of both is impracticable in such a case ; because both the sales are valid, as being both made after possession. Moreover, no date is mentioned, nor does any argument of a date exist by which a preference could be given to the one claim rather than to the other. They are therefore of equal force, and no superiority is assigned to the one over the other ; and the evidence of both parties therefore is of no force.

But it will be otherwise in the preceding case, because, as no mention is there made of the possession of either party, a conformity of the evidence of both is practicable, as has been already explained.

23. Disputes relating to land .

If the property in dispute is the land, and the witnesses of both parties gives the dates of purchase, without making any mention of the possession of either party, in such a case, where the date of the plaintiff's purchase to prior to that of the person in possession the Qazi according to Imam Abu Hanifah and Imam Abu Yusuf should pass a decree in favour of the person in possession and the dispute will be settled as if the plaintiff had first purchased the land, and then sold it to the person in possession prior to his own possession of it, which in their opinion is lawful.

But Imam Muhammad, says, that the Qazi should pass a decree in favour of the plaintiff; because, as according to him, the sale of land prior to the possession of it is not lawful; the land should necessarily remain with the plaintiff.

But if, the witnesses of both parties give evidence also of the possession, in such a case the Qazi should pass a decree in favour of the person in possession, according to all our jurists; because both sales are, in such a case universally admitted as valid.

This, however, is based upon a supposition of the date of the plaintiff's purchase being prior to that of the person in possession; because if the date proved by the person in possession is prior to that proved by the plaintiff, the Qazi should pass a decree in favour of the plaintiff, whether the witnesses may or may not have mentioned the possession; and the matter is adjusted as if the person in possession had first purchased the thing from the plaintiff, and after getting the possession of it, had sold it to the plaintiff, without as yet delivering it to him; or as if, having delivered it, it had reverted to him again on account of some other reason.

24. Production of witnesses .

If one of the two plaintiffs produces two, and the other plaintiff produces four witnesses, still they will be on an equal footing; because, as the evidence of each two of the four witnesses is a complete cause, or ground of decision, it therefore follows that the evidence of four witnesses will amounts merely to two causes; and a multiplicity of causes is no argument of superiority, as it is in the strength of the case, and not in the number, that a superiority would lie.

25. Claim made by two persons to a house .

If a house in possession of any person is claimed by two other persons-one of them claims his right to the whole, and the other to the half, of it and each brings the evidence to proof his

claim, in such a case the Qazi should adjudge three-fourth of it to the claimant of the whole, and one-fourth of it the claimant of the half, according to Imam Abu Hanifah.

But if Imam Abu Yusuf and Imam Muhammad say that the house should be divided between the claimant in three equal shares, two should go to the plaintiff for the whole, and one should go to the plaintiff for the half.

But if, the house in dispute is in the possession of the parties, the whole of the house in such a case should go to the claimant of the whole.

26. Claims based upon generation .

If two persons claim an animal, and each gives evidence to prove its production, at the same time also giving the date, in such a case the animal should be adjudged in favour of the claimant whose witnesses give a date apparently according to the age of the animal ; because, as possibility is an argument in his favour, he is therefore entitled to preference.

But if, the age of the animal is doubtful, and does not agree with the date on one side or the other, it should then be adjudged in favour of both in an equal degree, and the specification of the dates should be set aside ; and the case should be considered as if no dates had been specified.

But if, both the dates are repugnant to the apparent age of the animal, the evidence of each party will be nugatory and such also is reported from Haakim, because the falsity of the evidence on both sides will in such a case be manifest. The animal will therefore left with the person who is in possession of it.

27. One party pleading a trust, and the other usurpation .

If two persons raise a plea against a third person who is in possession of a slave the one says that "the possessor has

usurped the said slave from him," and the other says, that "he has committed the said slave to him in trust:" in such a case the Qazi should pass a decree for half of the slave in favour of each, as their claims are equally strong.

Section

DISPUTES RELATING TO POSSESSION

(*Hidayah, Kitabud Da'waa, Fasl Fil Tanaza' Bill Aaidi*)

1. Possession of an animal to be ascertained from its use

If two persons dispute in respect of possession of an animal-one of them is mounted upon it, and the other is holding the bridle of it, in such a case the claim of the rider will be the strongest, as his act of riding upon it is an act on account of right of ownership.

Similarly, if one of them is riding on the saddle, and the other is on the croup, the claim of the person who is seated upon the saddle will be preferable.

But it will be otherwise, if they are mounted upon an animal without a saddle ; because in such a case the ownership of the animal will be divided between them, as both are, in respect of the act of riding, upon an equal footing.

If two persons dispute in respect of camel-the one having has a burden of his own property, upon it, and the other has in his hand the "Mohr" or rope that guides it, the right of the person who has the burden upon it will be preferable, as the camel is employed in his service.

2. Right of one using a thing, and one holding it .

If two persons dispute in respect of an under garment, the one is wearing it, and the other is holding the sleeve of it, the claim of the wearer will be preferable, as his act is clear.

If two persons dispute in respect of a carpet-the one is seated upon it, and the other is holding it with his hand, the Qazi should not pass a decree in favour of any one of them.

If two person dispute in respect of a piece of cloth-the one has the great part of it in his hand, and the other merely holds the border of it, in such a case the cloth will be equally divided between them, because the greater part held by the one than the other does not give a superiority of claim, as it goes only to furnish an argument or proof .

3. Right of possession over a foundling (i.e., strayed child) .

If a foundling (boy) is in the possession of any person and is capable of explaining his own condition and declares that "he is free", his assertion should be accepted, as he is his own master.

But if, he declares himself to be the slave of some other person than the person who is in possession, he will be adjudged to be the property of the possessor, because, in declaring himself a slave, he admits that he is not his own master.

If, also, the boy is not capable of explaining his own condition, he will be adjudged to be the property of the person in possession of him, because not being his own master he is to be considered in the same light as clothes or any similar article ; and if, after attaining the age of majority, he claims his freedom, his statement will not be accepted, because his slavery during his childhood has become apparent, and nothing that becomes apparent can afterwards be set aside except upon proof.

4. Dispute in respect of the compound of a Serai .

If ten rooms of a Serai are in the possession of one person, and one room is in the possession of another person, and they dispute regarding the compound of the Serai, in such a case the claim of both should be adjudged as equal as both have an equal right to the use of it, and to pass through it.

5. Decree in respect of a claim to the land .

If two persons claim a piece of land-each one respectively, claims it to be "in his possession," the Qazi in such a case should not pass a decree in favour of the possession of either of them, until evidence is produced.

If, either of the parties brings the evidence in support of his claim, the land should be adjudged to be in his possession ; because of the proof, and also because possession is a right which is the object of desire, similar to other rights.

And if both parties brings the evidence, in support of their claims, the land should in such a case be adjudged to be jointly in possession of both.

But if, one of the claimant has raised the bricks upon the land, or has built upon it, or dug a well or a ditch in it, in all these cases the possession should be adjudged in his favour on account of these acts.

CHAPTER 5

CLAIM OF PARENTAGE

(Hidayah, Kitab-ud-Da'waa, Baab Da'waa-un-Nasab)

1. Claim by the seller of a female slave to a child born of her.

If a person sells a female slave, and she thereafter gives birth to a child, and the seller claims it, in such a case, if the birth takes place in less than six months from the sale, the child will be adjudged in favour of the seller, and the mother will be his Umm-e-Walad. This is according to a favourable construction of the law. In the opinion of Imam Zufar and Imam Shaafe'ee the claim will be null, and this is according to analogy.

2. If the purchaser makes the same claim.

But if, the purchaser, either at the same time with, or after, the claim of the seller, claims the parentage of the child, in such a case, also, the claim of the seller will be preferred, because of its having existed prior to that of the purchaser, as being referred to the period of conception.

3. If the birth happens to be after six months .

But if, the child is born say, two years after the sale, the seller's claim of parentage will not in such a case be valid ; because the conception, in such case could not possibly have taken place during his possession of the slave, and this is the only idea under which a decision could be passed in his favour ; his claim, therefore, cannot be admitted unless it be confirmed by the purchaser ; in which case the parentage of the child will be established in the seller, as on a supposition of marriage ; for this reason, however, the child will not be free, nor will the sale be annulled, as it is evident that the conception did not take place while the slave was in the seller's possession. The child's

freedom, therefore, will be un-established, as well as the eventual freedom of the mother, i.e. her becoming the Umm-e-Walad.

But even if, the child is born after more than six months, and less than two years from the date of the sale, the claim of parentage by the seller will be not accepted unless it is verified by the purchaser ; as, in such a case also, it will not be absolutely certain that the conception had taken place during the seller's right of ownership. Therefore, there will not be proof, and hence there will be the necessity of verification by the purchaser.

If, the purchaser verifies the claim of the seller, the parentage will be established in him, and the sale will be annulled, and the child will be free, and the mother will become an Umm-e-Walad, in the same manner as in the first case, because the seller and the purchaser are both agreed that the conception had taken place during the right of ownership of the seller.

4. Mother becomes Umm-e-Walad if child is living at the time of claim .

If the child, born in less than six months from the sale, dies, and the seller thereafter claims his parentage, the mother will not in such a case become his Umme-e-Walad.

But if, the mother dies, where the child was born in less than six months from the sale, and the seller claims his parentage, in such a case the parentage of the child will be established in the seller, and he will be entitled to take the child; because the child will be the principal in respect of the establishment of the parentage and will not, therefore, be affected by the death of the mother.

But in this case, the seller, according to Imam Abu Hanifah, should return the whole of the price, because it is apparent that he sold his Umm-e-Walad, and Imam Abu Hanifah is of the view that the ownership involved in an Umm-e-Walad is

not of an appreciable nature in sales and usurpations, and that therefore the purchaser will not be responsible for it in the present case.

But in the opinion of Imam Abu Yusuf and Imam Muhammad, he should only return the child, because, according to them, the ownership involved in an Umm-e-Walad is of an appreciable nature, and, therefore, creates responsibility in a purchaser.

5. Claim made by the seller after the mother has been emancipated .

According to Jaame'-as-Sahgheer, if a female slave, is pregnant and, is sold by her master, and thereafter gives birth to a child, and the seller claims the child after she had been emancipated by the purchaser, in such a case the child will be considered as the child of the seller, and he should return to the purchaser a part of the price equal to its value. This also accords with the opinion of Imam Abu Yusuf and Imam Muhammad. But Imam Abu Hanifah says that the seller should return the whole of the price, as in the case of the mother's death ; and this is approved.

But if, the purchaser has emancipated the child only, in such a case, the claim of the seller will be void.

6. Claim made by the original seller after a second sale .

If a person sells a slave, who was born of a female slave, who was his property at the time of the birth, and the purchaser thereafter sells him to another person, and the first seller then claims him, in such a case the slave in question will be child, and the sale will be void; because sale is capable of annulment, which the right of this person to claim the parentage of the slave is not capable of it, the sale will, therefore, be annulled.

Similarly, if the buyer, after the purchase of the mother and son, makes a Mukatib of the former, or pledges him, or lets him out on wages, or, if he makes a Mukatibah of the mother, or pledges her, or gives her in marriage to some person, and the seller thereafter claims the child, in any of these cases his claim should be accepted ; and all the several contracts mentioned will be annulled, as they are all subject to annulment.

But will be otherwise where the purchaser emancipates or makes a Mudabbir of the child, as has been already explained ; and it will also be otherwise where the purchaser first claims him as his child and then the seller, because the parentage, after having been established in the purchaser, cannot again be established in the seller, as it is a right which is not capable of annulment, and hence the case is the same as if the purchaser had emancipated him.

7. Claim established in respect of one twin .

If a female slave gives birth to a twins, and the owner claims the parentage of one of them, in such a case the establishment of parentage in him, in respect of one of them, necessarily involves the same in respect of the other also.

8. Claim of the child after admission in favour of another person .

If a person is in possession of a boy and declares the boy to be the son of a certain absent slave, and then declares him to be his son, in such a case the parentage in his favour will not be established even though the absent slave were to deny the boy to be his son. This is according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that in case of denial of the slave, the parentage of the man in possession will be established.

Similar disagreement also exists where the person in possession declares that the boy in his possession is the son of a particular person, and born of his wife, and then himself claims the parentage of him.

9. Claim of parentage by a Christian against claim of bondage by a Muslim .

If a boy is in the possession of two men, of whom one is a Muslim and the other a Christian, and the Christian says that "he is his son," and the Muslim says that "he is his slave," he should in such a case be decreed to be the son of the Christian and free.

10. Claim of parentage by a married woman .

If a married woman claims parentage, saying that "this boy in my arms is my son," her claim will not be valid unless the birth is proved by the evidence of one woman ; because the claim so made relates to another, and is therefore not to be accepted unless supported by evidence. But as regards the case of a father, as his claim of parentage relates purely to himself it may be noted that the evidence of the midwife alone will be sufficient in respect of the birth as the object of the evidence is merely to know that the child in question is the identical child which the said woman had brought forth ; while parentage, on the other hand, is proved on the ground of the mother of the child being the wife of the husband. Moreover it is recorded that the Holy Prophet accepted the evidence of a midwife, in a case of birth. ('' *Aainul Hidayah*, vol. III, p. 557)

11. And if she is in 'Iddat then one man and two woman .

But if, the woman in question is in her 'Iddat from an irrevocable divorce, the evidence of the midwife alone will not be sufficient in respect of the birth. But evidence of two men or one man and two women, will be necessary. This is the principle according to the opinion of Imam Abu Hanifah.

But if the woman is neither married, nor in her 'Iddat from divorce, in such a case jurists say that the parentage of the child will be established by herself ; and her own assertion on this point will be admitted ; as in such a case, it will not operate upon, or effect, any other person.

But if, she is married, and says, "this is my son, begotten by this my husband," and the husband verifies the same, there is in such a case no occasion for any witness to prove the birth, as the admission of the husband will renders it unnecessary.

12. If her husband verifies her claim .

If the boy is in the joint possession of the wife and her husband, and the husband says "this boy is my son, begotten not on this woman but on another," and the woman says, "this is my son, begotten by another husband," in such a case the boy will be decreed to be their son, because of the possibility of the thing based upon their joint possession of the boy, and their connection with each other as husband and wife. Further, the assertion of each has the tendency to destroy the right of the other, and therefore the assertion of neither should be accepted.

13. Begetting a child upon a female slave under an erroneous possession .

If a person purchases a female slave, and begets a child upon her, and claims it, after its birth, as his child, and afterwards it appears that the slave had not been the property of the seller, in such a case the purchaser should give, to the rightful master of the slave, the value which the child may bear at the time of dispute ; and the child will be free.

BOOK – II *

IQRAAR

(ACKNOWLEDGMENT)

IQRAAR *

(ACKNOWLEDGMENT)

(Hidayah, Kitab-ul-Iqrar)

Note

Literally "Iqrar" means admission but legally, "Iqrar" signifies, the acknowledgment of the right of another person upon one's own self.

The person who makes such acknowledgment is known as the "Muqir" ; the person in whose favour the acknowledgment is made is known as the "Muqir Lahu" ; and the thing which is the subject of the acknowledgment is known as "Muqir Beh"

CHAPTER 1

ACKNOWLEDGMENT

1. Acknowledgment by competent person.

When a person who is adult and is of sound mind, makes an acknowledgment of a right, such acknowledgment is binding upon him, whether the subject of it is known or not known.

2. But not upon any other person .

It may be noted that acknowledgment is a defective proof, and therefore, it is binding only upon the person who makes the acknowledger, and not upon any another person, as over him or her he has no power.

3. Points which determine the competency .

(a) **Freedom** – Freedom is a necessary qualification in an acknowledger, so that his acknowledgment may be valid, in respect of property and the like ; because although a privileged

* 'Aainul Hidayah, Vol. III, pp. 559 to 591.

slave is also, virtually, the same as a free-man in respect of acknowledgment, but the acknowledgment of an inhibited slave is not valid in respect of property, but merely in respect of punishment or retaliation.

(b) **Sanity of mind, age of majority** – Sanity of mind, and age of majority, are also necessary conditions in acknowledgment, because the acknowledgment of an infant or an idiot is not valid, because neither the infant nor the idiot has any power to accept an obligation upon himself.

4. Acknowledgment in ignorance of the subject .

Ignorance, in respect of the subject, does not finished the validity of acknowledgment, because sometimes happens that an unknown right is also due.

5. Ignorance of the person in whose favour acknowledgment is made .

But it will be otherwise where the person in whose favour the acknowledgment is made is not known. In fact this is not valid ; because right or claim cannot rest in a person who is not known at all.

6. Acknowledgment generally made .

If a person says, "I owe a thing to a certain person," it is also necessary for him to mention that it is valuable.

Similarly, if a person says, "I have usurped a thing from a certain person," it is also necessary for him to say that it is valuable and to the usurping of it there exist some bar and prevention.

7. If more is claimed than the acknowledger mentions.

If a person makes an acknowledgment in respect of a thing which is unknown, or a right which is unknown, and defines it as

something valuable, and the person in whose favour the acknowledgment is made claims more than what is defined by the acknowledger, in such a case the statement of the acknowledger, supported by an oath, should be accepted.

8. Acknowledgment in general term “property” .

If a person says, “ property is due by me to a certain person,” he should also explain the amount ; and his explanation should be accepted, whether it is great or small, as great or small are similar in their application to property.

But if, he mentions less than one Dirham, it should not be specified, as in common usage, anything short of one Dirham is not considered as property.

9. If made of a great property .

But if he says “a great property is due by me ;” then, if he also gives its value as less than two hundred Dirhams, it cannot be accepted according to Imam Abu Yusuf and Imam Muhammad and also according to one report from Imam Abu Hanifah, because, where he declares the property in question, as great his valuation of it short of two hundred Dirhams is not to be accepted ; because, if it is otherwise, his declaration of great will be idle and nugatory as the smallest sum which can properly be said to be great is that which constitutes a “Nisaab” in Zakat, namely, two hundred Dirhams ; as it is the possession of this sum which makes a person wealthy.

But there is also another opinion ascribed to Imam Abu Hanifah that the explanation, if it is less than ten Dirhams which is the “Nisaab fixed for theft, should not be accepted; because ten Dirhams are what may properly be said to be a great property, for which it is that, for the theft of that quantity the hand of man which is otherwise sacred is cut off.

But if he says that, "I owe great property of Deenars," then the amount due is fixed at twenty Misqaals. In the case of camels it is twenty five ; because the smallest "Nisaab" of camels upon which one camel is due in Zakaat, is twenty-five. In all properties not subject to Zakat, the declaration is required to the amount of a "Nisaab" in respect of the value. Thus if the acknowledger gives the value of a "Nisaab", his acknowledgment is to be accepted; but if it is of less, it should be rejected. If the acknowledger says that, "I owe large properties," their smallest value that can in such a case, be accepted is three "Nisaabs", of that kind of property to which the acknowledgment relates ; because the word properties is plural, and the smallest degree of plurality is three.

10. Acknowledgment in respect of many Dirhams .

If a person says that, "I owe many Dirhams," his declaration is not to be accepted if the amount is short of ten Dirhams, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad say that it is not to be accepted if the amount is short of two hundred.

11. Or of Dirhams generally .

If the acknowledger says that, "I owe Dirhams," he is supposed to mean three, as that is the least number of plurality. But if he himself declares a larger number, it should be accepted, as the word Dirhams may be applied to any number. The weight of the Dirhams should be estimated on account of what is customary.

Section

(EMBROY, THING NOT PRODUCED OR DEBT)

(Hidayah, Kitabul Iqraar, Fasl Le Hamale Fulanate wa Min Shartil Khiyaar)

1. Acknowledgment in favour of an embryo .

If a person says that, "I am bound, for one thousand Dirhams, in respect of the conception in the womb of a certain woman ; and then adds that "the said sum is due on account of a

bequest of a particular person,” or that “it is the right of the conception on account of inheritance from its parent,” the acknowledgment so made will be valid, in as much as it relates in these cases to a cause which is fit and adequate to the establishment of a right to property in a conception.

2. Provided the birth takes place within a possible period .

If, therefore, the woman thereafter gives birth to a living child within such a period as proves the conception to have existed in the womb at the time of the acknowledgment, the acknowledger will be bound in respect of the child for one thousand Dirhams.

3. If the embryo proves still born .

But if, the woman gives birth to a dead child, the acknowledgment in such a case will relate to the testator or the inheritee, and the amount of it will accordingly be divided amongst their heirs ; because the acknowledgment was in reality in favour of the testator, or the inheritee, and was to vest in the child only on condition of its being born alive, which did not take place. If the woman two living children, then the thing acknowledged should be divided equally between them.

4. Acknowledgment ascribed to an impossible cause .

If a person says that, “I am bound to the conception of certain woman for one thousand Dirhams, being the price of an article I purchased from the said conception,” or “being money borrowed from it,” no obligation will rest upon the acknowledger, as he declared it to arise from a cause which could not have happened as a conception is not capable of lending or selling.

5. If made without any cause .

If a person acknowledges his being bound to a conception, without mentioning the cause, such acknowledgment (according to Imam Abu Yusuf) is not valid. But Imam Muhammad says that it is valid.

6. Acknowledgment in respect of a thing existing but not produced .

If a person acknowledges the conception of a female slave, or the offspring of a goat, to be due to another, such acknowledgment will be binding ; as it would have been valid if he had bequeathed either of these, and his intention in it is therefore taken to be such.

7. Acknowledgment of a debt under a condition of opinion .

If a person makes acknowledgment that "he owes another person one thousand Dirhams upon an optional condition" as if he says that "the said amount is due by me, or from me, but I have an option of three days", the condition of option is in such a case void, as optional conditions are instituted with a view to annulment, whereas an acknowledgment is a notification or avowal, which is binding the acknowledgment, therefore, is in such a case binding, and is not rendered void by the nullity of the condition.

CHAPTER 2

EXCEPTION ; AND WHAT IS TAKEN EQUIVAL TO EXCEPTION.

(Hidayah, Kitab-ul-Iqrar, Baab-ul-Istasnaa Maa Fee Ma'naaho)

1. Exception of a part or the whole of a thing .

If a person makes an acknowledgment of a thing in favour of another, person with an exception of any part of the thing so acknowledged, such exception will be valid ; and the acknowledger will be binding as regards the remainder, whether the exception is in respect of a great a small ; part provided, it is immediately mentioned along with the acknowledgment.

But if he makes exception of the whole of the thing acknowledged, the acknowledgment will in such a case be binding, and the exception will be void; because this will in fact be a retraction, and not an exception ; because exception supposes the remainder of a part after the deduction something from the whole ; while after the deduction of the whole there will be no remainder .It will therefore be a retractation, and void.

2. Exception must be homogeneous with the acknowledgment.

If a person says, that "I am bound to a certain person for one hundred Dirhams, with the exception of one Deenar" or of one Qafeez of wheat , then, according to Imam Abu Yusuf and Imam Muhammad, he will be bound for one hundred Dirhams, with the exception of one Deenar, or of one Qafeez of wheat.

But if, he says, that "I owe one hundred Dirhams, with the exception of one piece of cloth" the exception so made not be valid. But Imam Muhammad says that the exception will be invalid in both cases. Imam Shaafe'ee, on the other hand, is of the view that in both cases it will be valid.

3. Reservation of the Will of Allah .

If a person makes an acknowledgment, with the proviso that "if it please Allah," he will not then be liable for any thing ; because according to Imam Abu Yusuf, a reservation of the Pleasure of Allah is either an annulment of the acknowledgment, or a suspension of it ; and the acknowledgment will be void because of supposition ; or, because, as Imam Muhammad argues, it is equal to an acknowledgment suspended upon a condition which is void, since acknowledgment is an avowal, which cannot be made conditional.

4. Acknowledgment in respect a house and exception of the foundation .

If a person makes an acknowledgment of a house in favour of another, person and excepts the foundation, both the house and the foundation will be the right of the person in whose favour the acknowledgment is made.

5. Exception in respects of the compound of a house .

If a person says, that "the foundation of this house belongs to me, and the "Sehan" , i.e. the compound to a particular person", then the person in whose favour the acknowledgment is made will be entitled to the compound, and the foundation will be the property of the acknowledger. It is, in fact, same as if the acknowledger had declared that "all the land free of the building is the property of such a person." But it will be otherwise if, instead of "Sehan" he uses the word "Arz" (earth), because in that case the foundation as well as the house will become the property of the person in whose favour the acknowledgment is made.

6. Reservation of non-delivery of the goods.

If a person acknowledges a debt of one thousand Dirhams to another, person as the price of a slave which he had purchased from that person, but which he had not received from

him, in such a case, if the slave is specific, as if he had said, that “as the price of this slave”, the person in whose favour the acknowledgment is made should be asked to deliver up the slave and receive one thousand Dirhams, on forfeiting his claim.

7. Disagreement in respect of the goods.

But, if in such a case, the person in whose favour the acknowledgment is made further declares that “he had sold another slave to the acknowledger,” both parties should be given the oath; because they are both defendants, as they reciprocally deny the assertions of each other; and upon each taking the oath, the obligation involved in the acknowledgment will be annulled, and the slave will remain with the person in whose favour the acknowledgment was made.

8. If the article is not specific.

What is here laid down is based on a supposition that the slave is specific; because if a person acknowledges a debt of one thousand Dirhams, due to another person for a slave that he had purchased from him, without specifically mentioning the slave, the acknowledger will in such a case be responsible for one thousand Dirhams; and his assertion, that “he had not received the slave,” will not be accepted, according to Imam Abu Hanifah, whether he makes such assertion along with his acknowledgment, or makes it separately; because such assertion will amount to retraction of his acknowledgment.

But Imam Abu Yusuf and Imam Muhammad say that if the person in whose favour the acknowledgment is made confirms the acknowledger’s assertion, by declaring the debt of one thousand Dirhams to be due for the price of a slave, the acknowledger’s declaration of his not having received the slave will in such a case be accepted; nor will any thing whatever be due from him, whether such declaration has been made along the acknowledgment, or not. But if the person in whose favour the acknowledgment is made contradicts the acknowledger, in

respect of the debt being for the price of a slave, and asserts it to be due for some other goods, then the acknowledger's declaration of his not having received the slave will not be accepted, as it is made along with the acknowledgment.

9. Reservation of non-receipt of the good acknowledged .

If a person acknowledges the purchase of goods from another, person and at the same time also declares that "he has not yet received it", his assertion should in such a case be accepted, accordingly to all our jurists ; because he has merely acknowledged a contract of sale ; and an acknowledgment of sale is not an acknowledgment of receipt, as a receipt does not necessarily follow a sale.

But it will be otherwise where a person acknowledges the obligation of the price of the goods purchased ; because in such a case his assertion of non-receipt will not be accepted, as payment of the price is not binding until after the receipt of the goods.

10. Illegitimate reservation of the cause of obligation .

If a Muslim declares that "he owes such a person one thousand Dirhams, on account of wine or pork," he will be bound for one thousand Dirhams ; and his explanation for the cause will not be accepted, according to Imam Abu Hanifah, whether it is made along with the acknowledgment, or not.

But Imam Abu Yusuf and Imam Muhammad say that if the explanation is made along with the acknowledgment, nothing will be due from the acknowledger.

11. Exception in respect of the equality of money acknowledged to be due .

If a person declares that "one thousand Dirhams are due from him to such a person, as the price of certain goods," or "on

account of a loan;” and then says that the said one thousand Dirhams are Zayoof, or Binhirja, or Satooqah, or Arzeez*, and the person in whose favour the acknowledgment is made claims them as Jiyaad (i.e. pure) in such a case, according to Imam Abu Hanifah, the acknowledger will be responsible for Jiyaad Dirhams, whether his latter assertion is made along with his prior declaration, or not. But Imam Abu Yusuf and Imam Muhammad are the view that the latter assertion of the acknowledger will be accepted, in case only if it is made along with the former, and not otherwise.

The same difference of opinion is where a person declares that “he owes another person one thousand Dirhams” and further says that “they are Zayoof,” or that “another person has lent him one thousand Dirhams, and that they are Zayoof,” or , that “he owes another person one thousand Dirhams on account of certain goods, and that they are Zayoof,”

12. Exception in respect of the kinds and not in the quality .

But the case will be different where a person acknowledges that he is indebted to another person for a “Kur” of wheat, as the price of a slave, but the wheat is of coarse kind ; because coarsness, in relation of wheat, is not a quality but it is a kind, and an absolute contract does not necessarily require that the wheat should be other than coarse.

13. Exception in respect of the quality .

If a person acknowledges that he owes another person one thousand Zayoof Dirhams, but without mentioning whether on account of sale or loan, some jurists say that this assertion in respect of the quality of the Dirhams will be accepted, according to all our scholars. But other jurists , say that, according to Imam

* Zayoof Dirhams are not accepted at the public treasury, but are extant amongst the merchants ; the Binhirja are still worse, and are not extant even amongst the merchants ; and the Satooqah and Arzeez are the worst of all, as they are the mixture of base metal.

Abu Hanifah, it is not to be accepted, because as the acknowledgment is absolute, it may relate to legal contracts or to acts of violence, such as usurpation or destruction, which are not legal ; and the former view is to be adopted, as acknowledgment is rather to be attributed to a lawful and not to an unlawful cause.

14. If it is mentioned as usurpation or trust .

If a person acknowledges that he has usurped one thousand Dirhams from another person, or he has received them in trust ; and then also asserts that the said Dirhams were Zayoof or Binhirja ; in such a case his assertion will be accepted, whether it is made along with or separate from the acknowledgment.

According to Imam Abu Yusuf, in case of an acknowledgment of usurpation, the acknowledger's assertion of the Dirhams being Zayoof should not be accepted if it is made separately from the acknowledgment.

15. Acknowledgment in respect of deposit or usurpation of Satooqah Dirhams .

If a person acknowledges that he has usurp one thousand Dirhams, or received in trust, and asserts that they were Satooqah, in such a case his assertion should be accepted, if is made along with the acknowledgment ; but not otherwise ; because even though Satooqah is not in reality a kind of Dirhams, still it is customary to use that word for them figuratively. The mention of this word, therefore, is a modification, and should therefore be made along with the acknowledgment.

16. Exception of a part from the whole .

If a person declares that, "he owes such a person one thousand Dirhams, on account of certain goods," or that "he has borrowed one thousand Dirhams," or that "he has received one

thousand Dirhams in trust,” or that “he owes one thousand Zayoof Dirhams,” or that he has usurped one thousand Dirhams,” and he then excepts a specific number of Dirhams from the obligation, in none of these cases will his assertion be accepted, if it is made separately from the acknowledgment. But if it is made along with the acknowledgment it will be accepted, as the assertion is in such a case an exception, and an exception is valid when it is made along with the acknowledgment..

But it will be otherwise if he asserts the Dirhams as Zayoof, as such a reservation not valid, since Zayoof relates to quantity ; and such expression applies solely to quantity, and not to quality, and exception is not accepted in respect of any matter but what is precisely expressed.

17. Unless this arises from some unavoidable circumstances.

It may be noted, that if the exception is not made along with the acknowledgment on account of some necessity such as by cough, or shortness of breath, it will then be considered as made along with the acknowledgment because the interruption was unavoidable.

18. Acknowledgment of usurpation .

If a person acknowledges the usurpation of cloth, and then produces damaged cloth, it should nevertheless be accepted, as usurpation is not restricted to perfect things only.

19. Where property is lost and one claim it as a trust and the other as usurpation .

If Zaid says to Umar, “I took from you one thousand Dirhams by way of trust, and they are lost,” and Umar says, “no ; you took them by way of usurpation ;” in such a case Zaid will be responsible for the loss.

But Zaid says, "you gave me one thousand Dirhams, by way of trust, and they are lost," and Umar says, "no ; you took them by way of usurpation ;" in such a case Zaid will not be responsible for the loss.

20. If one asserts a trust and the other a loan .

If a person says to another person that, "I have received one thousand Dirhams from you by way of trust," and the other replies, "no ; you have taken them by way of loan," in such a case the assertion of the acknowledger, notwithstanding his use of the word "received", should be accepted.

21. Acknowledgment of the receipt of money with reservation of it as being the property of the acknowledger .

If a person says that, "this sum of one thousand Dirhams, which is my property, was in trust with such a person, and as such I have taken it from him," and the other person denies this, and claims the said sum to be his own property ; he will in such a case be entitled to take it from the acknowledger ; because the acknowledger confesses that he took the sum in question from him on the claim of its being his own property, which the other denies and hence his assertion, as defendant, should be accepted.

22. Acknowledgment of the receipt of property with reservation to the same effect .

If a person says that he had taken on hire an animal of carriage for another person who, after riding upon him, had returned it to him ; or, that he had taken on hire a garment to another person, who, after wearing it, had returned it to him ; and the other denies this, and say that the said animal or garment is his own property, in such a case, according to Imam Abu Hanifah, the assertion of the acknowledger should be accepted, upon a favourable construction. But Imam Abu Yusuf and Imam Muhammad say that the assertion of the other party should be accepted ; and this is according to analogy. It may be noted that the same difference of opinion also appears where, instead of

taking a hire on the acknowledger says that he had lent his horse to the other person to ride on, or his house to reside in ; or, had given his garment to another to mend, or hire ; and had then taken back the article, and the other person claiming it to be his property.

If a person says that, "I have received from such a person his acquittance of one thousand Dirhams which he owed me," or, "I lent such a person one thousand Dirhams, and have received back the same," and the other person denies the previous existence of the debt, our jurists are, in such a case, unanimously of the opinion that the assertion of the person in whose favour the acknowledgment is made should be accepted.

23. Dispute in respect of immovable property .

If a person acknowledges that another person has cultivated a particular piece of land, or built a particular house, or planted grapes in a particular orchard and the said land, house, or orchard, is in the possession of the acknowledger, and the person in whose favour he acknowledges claims the property of these things, and the acknowledger, on the contrary, claims them to be his own property, and that the other person, in the cultivation, building, or planting, had only acted by his permission, as his assistant, or as a person engaged by him on wages, in such a case the assertion of the acknowledger should be accepted, according to all our jurists.

CHAPTER 3

ACKNOWLEDGMENT BY SICK PERSONS

(Hidayah, Kitab-ul-Iqrar, Baab Iqrar-ul-Mareez)

1. Debts acknowledged on deathbed.

If a person, in his last illness, acknowledges a debt, as due to another person, and he also owes other debts which had taken during health, or debts which he had taken during his sickness of which the causes are known such as the purchase or the loss of property, and of which may be proved by the means other than through his acknowledgment, or he is indebted to his wife married during his sickness, for her "Mehr-e-Misl" or proper dower, all these debts so taken during health or sickness will have preference on other debts which he so acknowledges during his sickness, and of which the cause is not known.

2. Dying person's acknowledgment in respect of anything in his hand.

If a sick person makes an acknowledgment in favour of any person, of something he has in his hand, such acknowledgment will not be valid, because of the injury it may cause to the creditors, whose right are connected with that thing.

3. Partial discharge of debts .

A sick person is not entitled to discharge the debts of part of his creditors, because such partial discharge may destroy the right of other creditors ; and in this respect the creditors of health and of sickness are all equal excepting, however, where the sick person returns something he may have borrowed during his sickness, or pays the price of something he may have purchased during his sickness ; and the obligation can be proved by witnesses.

4. Debt acknowledged upon a death-bed .

If, after the discharge of the preferable debts, there still remains some property of the sick man's estate, such property should be applied to the discharge of the debts acknowledged during his sickness ; because such acknowledgements were valid, and were suspended merely on account of regard for the rights of the creditors, and therefore they resume their validity when the bar to their operation is removed.

5. Discharged previous to the distribution of the inheritance.

The acknowledgments of debt, by a sick person who does not owe any debts of health, are valid, as they cause no injury to others. In such a case, also, the said debts are preferable to the claims of the heirs ; because Hazrat 'Umar has said, "whenever a sick person acknowledges the debts, they should be taken as obligatory, and discharged from his assets." Further, the discharge of his debts is a matter of necessity ; and the right of the heirs is connected with his estate on the condition of its being free from liabilities. It is for this reason that the discharge of the funeral expenses also precedes the right of the heirs, as that is also a matter of necessity.

6. Acknowledgment in favour of an heir .

If a sick person makes an acknowledgment in favour of any of his heirs, it will not be valid, unless it is confirmed by the other heirs.

7. Acknowledgment in favour of part of his heirs .

If a sick man makes an acknowledgment in favour of part of his heirs, and the other heirs confirm the same, such acknowledgment will be valid , because of the removal of the obstacle, namely, the connection of the right of the other heirs with his property, which they themselves give up.

8. Acknowledgment of a dying person in favour of a stranger.

If a sick person makes an acknowledgment in favour of a stranger, it will be valid, even though it is in respect of the whole of his property, because Hazrat 'Umar has said that, "the acknowledgment of debt by a sick person is valid ; and the debt is due from the whole of his estate.

9. Subsequent acknowledgment of the stranger as his son.

If a sick person makes an acknowledgment in favour of a stranger, and then says that "he is his son", the parentage will be established accordingly, and the acknowledgment will be void. But if a sick person makes an acknowledgment in favour of a strange woman, and then marries her, the acknowledgment will not become void.

10. Acknowledgment in favour of a known wife .

If a sick person divorces his wife by three divorces, and then makes an acknowledgment of debt due to her, and then dies, before the expiry of her Iddat she will in such a case be entitled to whichever of the two claims namely, her share in the inheritance, or the amount of the debt acknowledged, may be the smallest.

Section

ACKNOWLEDGMENT OF PARENTAGE

(Hidayah, Kitabul Iqrar, Fasl Min Iqrar Be Ghulame)

1. Acknowledgment of parentage relating to infants .

If a person acknowledges the parentage of a child who is able to give an account of himself, saying, "this is my son," and the ages of the parties be such as to admit of the one as the child of the other, and the parentage of the child is not well known to any person, and the child himself confirms the acknowledgment, his parentage will be established in the acknowledger, even-though the acknowledger is sick .

2. Acknowledgment relating to parents, children, and patrons .

If a person acknowledges his parents or his son as if he says that “a certain man is his father,” or, that “a certain woman is his mother,” or, that “a certain person is his son,” and the ages of the parties admit of these relation ; or, if a person acknowledges a particular woman to be his wife, or a particular person to be his “Mawla” that is either his emancipator, or his freedman ; in all these cases the acknowledgment will be valid, and will affect only himself, and not any other person.

Similarly, if a women acknowledges her parents, or her husband, or her “Mawla,” it will be valid, for the same reason. A woman’s acknowledgment of a son, however, will not be valid, as such acknowledgment affects her husband, in whom the parentage is established ; her acknowledgment of a son, therefore, will not be valid, unless the husband confirms her statement as the right belongs to him, or, that it is confirmed by the birth proved by the evidence of one midwife, which is sufficient in this respect.

3. If confirmed by the parties .

It may be noted that in all these cases the confirmation of the party concerning whom the acknowledgment is made is necessary, excepting in the acknowledgment in respect of a child, who is too young to be able to give any account of himself.

It may also be noted that the confirmation in respect of parentage is valid, even though it is made after the death of the acknowledger, because the relation of parentage continuous inspite of death.

Similarly, the confirmation by a wife after the death of her husband, is valid ; because the ‘Iddat is one of the result of marriage ; and that subsists even after the death of husband, and therefore it may be said that the marriage itself subsists in one

aspect. Therefore the confirmation by the wife, after the death of her husband, is valid, so also in the opinion of Imam Abu Yusuf and Imam Muhammad, the confirmation by the husband is valid, after the death of the wife ; because the right of inheritance, which is one of the results of marriage, subsists even after the death of the wife ; and as such the marriage itself subsists, in one aspect ; and for this reason his confirmation is valid.

But according to Imam Abu Hanifah, the confirmation by the husband is not valid, because the marriage ends on the death of the wife ; and for this reason it is not lawful for a husband to wash the body of his wife after her death.

4. Acknowledgment of a dying person in respect of an uncle or brother .

If a person acknowledges an uncle or a brother, such acknowledgment will not be accepted, so far as it is to create the parentage, because it will be operating upon the person other than the acknowledger. If, therefore, the acknowledger has a known heir, whether near or remote, the whole of his inheritance will go to him, and not to the person in whose favour the acknowledgment is made, as the parentage which has not been established on the part of the acknowledger, no obstacle can due to it arise in respect of the inheritance of a known heir.

But if the acknowledger has no other heir, then the person in whose favour he makes the acknowledgment will in such a case be clearly entitled to the inheritance, as every person has full power over his estate when he has no heirs. For this reason it is that a person may bequeath the whole of his property in legacy, if he has no heirs. The person in whose favour the acknowledgment is made will, therefore, in such a case be entitled to the whole of the property, even though the parentage is not proved.

5. Acknowledgment of a brother by the heir .

If a person dies, and his son acknowledges another man to be his brother, the parentage of the person in whose favour the acknowledgment is made will not be established, but he will be entitled to a share in the inheritance with the acknowledger.

6. Acknowledgment, by a co-heir, of the partial payment of a debt due to the person from whom the inheritance descends.

If a person, to whom a debt is due by another person of say one hundred Dirhams, dies leaving two sons, and one of them acknowledges that his father had received payment of fifty Dirhams of the said debt, in such a case the acknowledger will not be entitled to any thing ; and the other son will be entitled to the remaining fifty Dirhams.

BOOK – III *

SULH

(COMPROMISE)

SULH *

(COMPROMISE)

(Hidayah, Kitab-us-Sulh)

Note

Literally "Sulh", means compromise, but legally it signifies a contract by which disputes are prevented and set aside. Compromise depends upon declaration and acceptance ; and it relates to the property, which should, also be defined, provided there is the necessity of possession, otherwise not. Thus if a person claims a right in a house belonging to another, person and that other persons also claims a right in a shop belonging to that person, and they come to a compromise, by giving up their respective rights in favour of each other, such compromise will be valid, even though they have not explained the extent of their right ; and ignorance in respect of a claim which will be annulled is not a cause of compromises.

CHAPTER 1**COMPROMISE****1. Kinds of Compromise.**

Compromise is of three kinds (a) Compromise with Acknowledgment, as where the defendant acknowledges the right of the plaintiff, and then also compounds it for some other thing ; (b) Compromise under Silence, as where the defendant neither acknowledges nor denies the claim ; and (c) Compromise after Denial. All these kinds of compromise are valid. Allah says in the Holy Qur'an, "COMPROMISE IS BETTER;" (Ch.4, Nisa, verse 128) ; and the Holy Prophet has said, "every Compromise is valid, amongst the Muslims except that which makes lawful what is unlawful, or makes unlawful that which is lawful." (Bukhari, Tirmizi, Abu Daud, Ibne Hibban, Hakim)

* Quran, Ch.4 (Nisa), verses 114 and 128; Ch.49 (Hujuraat), 'Aainul Hidayah, Vol. III, pp 591 to 618

2. Compromise by acknowledgement .

If a compromise is made after acknowledgment, all the elements of sale will take place, in it, if it is a compromise of property for property ; because it will then correspond, in its nature, with the sale, which is an exchange of property for property by mutual consent of the parties ; and therefore if it is in respect of land, it will also involve the right of *Shuf'ah* ; and also, the consideration will be returnable in case of a defect ; and the conditions of inspection and of option will also exist in respect of it.

3. It is made invalid by ignorance of the thing to be given in compromise.

This kind of compromise, therefore, is made invalid by an ignorance of the consideration for the compromise, as such ignorance may be a cause of dispute. But the ignorance of the subject of the compromise cannot be the cause of any dispute , as that merely ceases, in consequence of the compromise, and therefore there is no occasion for taking possession of it. Moreover, it is a condition that the defendant should be competent to buy the amount of consideration in question.

4. Compromise by concession of benefit.

But if compromise is a condition of benefit in lieu of property, then the laws and rules of hire will apply to it ; because the qualification of hire namely, an endowment with benefit in exchange for property will exist in it.

5. Period of profit should be mentioned.

And as, in the case of contracts, regard given to the spirit of the agreement, it is also necessary that the period of right to the benefit should also be fixed. The compromise is also made void by the death of any of the parties during that period, because a compromise of this nature is a kind of hire, which becomes void on the death of any of the parties to it during its period.

6. Compromise after denial .

Compromise after denial, by the defendant, is equal to atonement for the oath, and after silence, it is merely a removal of strife ; but it is not a mutual exchange, in respect of him, in either case.

But as regards the plaintiff, it is of in the nature of a mutual exchange ; because the plaintiff accepts the compromise in lieu of a property which in his belief was his right ; and one contract may lawfully have different interpretations with regard to the two parties, as the dissolution of sale due to annulment of the contract in respect of the seller and purchaser ; but in respect of there it will be, a new sale.

The reason of compromise after denial by the defendant, being an atonement for the oath ; and it being after silence a mere removal of strife, is obvious; because silence implies two suppositions, namely, acknowledgment or denial, and therefore, in respect of the compromise in question being a contract of exchange, there is a doubt ; and, as a result of this doubt it cannot be held to be an exchange in respect of the defendant.

7. Concession of a house by a compromise.

If a person claims a house from another ; person and the other person, denies the claim, or remains silent, but then compromises the matter with the claimant for a certain amount, in such a case the right of *Shuf'ah* will not operate in respect of that house.

8. Giving a house in compromise.

But it will be otherwise where a house is given in compromise, as where, for example, a person claims a property from another, person, and the other, person after denying the right, or remaining silent, compromises the claim by giving up a house; because in such a case the right of *Shuf'ah* will take place, as the plaintiff receives the house in exchange for his property.

9. Part of the thing given in compromise must be restored .

If a person claims a particular thing from another person, and the other person, after acknowledging the claim, compromises it with the plaintiff for something else ; and it is then proved that the thing claimed was in part the property of another person, in such a case the defendant will be entitled to take back from the plaintiff a part of the thing given in compromise, proportionate to that part of the thing claimed, which afterwards proved the property of another, because the compromise in such a case is, like the sale, a contract of exchange in respect of both parties ; and such is the law in the sale, when a part of a thing sold proves to be the property of another person.

10. Compromise after denial or silence, and the thing proving as the property of another person .

If a person claims a thing from another person, and the other person, denies it, or remains silent, and then compromises with the plaintiff for some other thing, and it is afterwards proved that the thing claimed is the property of another person and not of the plaintiff, in such a case the plaintiff should prefer his demand against the person who claims the right, and return to the defendant whatever he has received from him on account of compromise.

11. Part of it proving to be the property of another .

But if, a part, only, of the thing claimed, is proved to be the property of another person, the plaintiff should in such a case return to the defendant a proportionate part of the thing given in compromise and make a demand for the same from the person who possesses the right ; because the intent of the defendant does not imply that proportion.

12. Thing given in compromise which after the acknowledgment proves to be the property of another person

If the thing given in compromise is proved to be the property of another person, the plaintiff will in such a case be entitled to receive from the defendant the whole amount of the compromise if, it is after the acknowledgment as this kind of compromise is equal to the safe. If, also, the right of another person is proved in respect of the compromise, the plaintiff will be entitled to a proportionate part of it, due to the same reason.

13. If this happens in compromise after silence or denial .

If in the case of compromise, after silence or denial, it is proved that the whole or a part of the thing given in compromise is the property of another person, the plaintiff should prefer a claim against the defendant for the thing in dispute between them, either wholly, or in part, as the case may be.

But it will be otherwise in the case of sale after denial ; as where, for example, a person lays a claim to a house, and the person against whom the claim is made denies his right, but afterwards compromise the matter by means of a slave, using, however, the word "sold" instead of "compromise," as if he says, "I have sold this slave for the said house ;" because in such a case, if the house is afterwards proved to be the property of another person, the plaintiff, instead of claiming, will be entitled actually to take the house from the defendant.

14. Compromise for an undefined part of a thing .

If a person claims a right in a house, without specifying the extent of it such as one-third, one-fourth, or the like, and the defendant, on account of this uncertainty, gives him something by way of compromise for his claim, and the right of another person afterwards proved in respect of a part of the house, the plaintiff will not in such a case be obliged to return to the defendant any part of the thing received in compromise as it is possible that the right may be in respect of some other part of the house, and not to that part which the plaintiff had claimed.

But it will be different when the whole of the house is proved to be the property of another person because in such a case the whole of the thing given in compromise will have to be returned to the defendant ; as it will otherwise necessarily follow that the defendant had received nothing in exchange for the thing he gave in compromises ; and this will not be lawful ; as has been already explained under the head of sale.

15. Compromise in consideration of a part of the subject .

If a person claims a house, and the defendant compromises the claim for a part of the house, compromise will not be lawful, because what the plaintiff receives is already his actual right, and the rest of his claim will remains unsatisfied.

But there are two ways to make this compromise as lawful. The one is, that the plaintiff should add one Dirham to the share of the house; in which case the Dirham will be considered as equivalent to the remaining part of the claim ; and the second is, that the plaintiff should exempt the defendant from the remaining part of the claim.

Section

COMPROMISE OF CLAIMS *(Hidayah, Kitabus Sulh, Fasl)*

1. Claims of property .

Compromises are lawful in claims of property ; because a compromise as already explained is of the nature of a sale. It therefore follows that whatever can be lawfully sold can also be lawfully compromise.

2. Claims of benefit.

Similarly compromise are also lawful in claims of benefit ; as for example, where a person makes a claim, against

the heirs of a deceased person in respect of benefit, of or right to reside in, a particular house, on account of the bequest of the deceased ; in such a case, if the heirs, who have denied or acknowledged the claim, compromise it with the plaintiff for something else, such compromise will be valid.

3. Compromise in murder .

Compromises are lawful in the case of wilful, as well as erroneous, murder. They are lawful in the former case, because Allah has said, "IF A PORTION OF THE PROPERTY OF THE MURDERER, BEING A BELIEVER, BE OFFERED BY WAY OF COMPROMISE, TO THE REPRESENTATIVE OF THE MURDERER, LET HIM ACCEPT THE SAME," (Qur'an Ch. 2, Baqarah verse, 178), which verse according to Hazrat Ibne Abbas has been revealed on the subject of Compromise for wilful murder. ('Aainul Hidayah)

4. If for an unlawful article .

But if, Compromise of wine or pork is stipulated for wilful murder, nothing whatever will be due ; because none of these articles is a valuable property.

5. Compromise in respect of punishment .

Compromise for the claim of Hadd, or stated punishment, will not be lawful. Thus if a person apprehends another person in the act of "Zina", or of stealing the goods of another person, or of drinking wine, or while in the state of intoxication ; and, intends to take the offender before the Qazi, and accepts something to enable him to escape, such compromise will not be valid ; because punishment by Hadd a right of Allah, and it is not lawful to accept a compromise for the right of another.

6. Claim of parentage .

Similarly, it is not lawful to compromise with a woman for a claim of parentage. For example, a divorced woman, who

has given birth to a child, says to the man who has divorced, her that "this is your child," and he denies it, but compromise with the woman for withdrawing her claim ; because such compromise is not valid, as the claim of parentage was not her right, but it was the right of the child ; and acceptance of the consideration for the right of another is not valid.

7. For construction on the highway .

Similarly if a person construct a bath room, or a place for sitting in, on the high way, and another person asks him to put it down and he compromise with him to withdraw his claim, such compromise is not valid, because, the high way is the right of the community, and therefore no individual is singly entitled to make a compromise for it.

It may be noted that the punishment mentioned on this occasion also involves the punishment for slander, because in such punishment the right of Allah has the preference.

8. Claim of marriage .

If a person claims marriage with a woman, and she denies the same, but compromise with the man in respect of his claim, the compromise will be valid.

Similarly, if a woman claims marriage with a man, it will be lawful for him to compromise in respect of her claim.

9. Claim of bondage .

If a person claims another person as his slave, and the other person compromise with him in respect of his claim, by giving him some property, such compromise will be valid, as it is in respect of the plaintiff, an emancipation against for property.

10. Right of Walaa in the claimant .

It may be noted that in such a case no right of Walaa over the defendant vests in the plaintiff, because of the denial of the former. But if, the plaintiff proves by witness that the defendant was his slave, such evidence will be accepted, and the right of Walaa will then vests in him.

11. Compromise by privileged slave .

If a Mazoon, or a privileged slave, wilfully kills a person, he will not of himself be entitled to compromise in respect of the murder ; but if his slave commits murder, he will then be lawfully entitled to compromise for it.

12. Compromise for property usurped .

If a person usurps cloth from a Jew, of which the value is less than one hundred Dirhams, and who has lost or destroyed the same, and he compromise the matter with the Jew by agreeing to pay him one hundred Dirhams previous to any judicial decree upon the subject, in such a case the compromise will be lawful, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that the compromise, in the case, will not be lawful to the extent to which it exceeds the appraised value of the cloth.

13. Compromise for a share in partnership slave .

If a man who is rich emancipates a slave which is owned equally in partnership between himself and another person, and compromise with the other person for a sum exceeding the half value of the share, such compromise will not be valid, according to all our jurists.

CHAPTER 2

VOLUNTARY COMPROMISE ; AND APPOINTMENT OF AGENTS FOR IT

(Hidayah, Kitab-us-Sulh, Baab-ut-Tabarro' Bis Sulh Wat Taukeel Behi)

1. Agent for Compromise in a case of murder or debt .

If a person appoints another person his agent for compromise, and the agent accordingly enters into a compromise on his behalf, the agent will not be responsible for the thing to be given in compromise unless, in the contract of Agency he stipulates it is as a condition that "he himself will be responsible for it".

But this is where the compromise is on account of wilful murder, or some claim of the nature of a debt, as in either of these cases the compromise is a mere annulment ; and as the agent, in either of these cases, is merely a messenger, he will, therefore, not be subject to any responsibility, any more than an agent for marriage ; unless he himself makes himself responsible, in which case he will be answerable, because of his contract of security, but not on account of his contract of compromise.

2. Agent for Compromise of property for property .

But where, the compromise is of property for property, it will be equal to a sale, and the rights of it will belong to the agent. In such a case, therefore, the claim for the article to be given in compromise will lie against the agent, not against the Principal.

3. Fazoolee Compromise .

Fazoolee compromises, that is, such as are concluded by a stranger, on behalf of the defendant, without his permission, are of four kinds as follows:-

(a) Of a debt by property, for which the person who compromises is responsible)

Where a person compromises for a claim of debt by property, and makes himself responsible for the property ; in such a case the compromise will be incomplete, because the defendant gets nothing from it, but is merely exempted from a debt, and in this respect a stranger and the party that is the defendant are considered to be the same.

(b) Of anything for a specific property to be immediately delivered by the person who compromises.

Where the person who compromises says that, "I have compromised for these one-thousand Dirhams of my own," or, "this slave of my own;" in such a case the compromise will be valid ; and it will be incumbent on the person who compromises to hand over the article stipulated to the plaintiff ; because in referring the compromise to his own property, he makes obligatory upon himself the delivery of it ; on account of which the compromise so made is valid.

(c) Of anything for unspecified property, which the person who compromises delivers.

Where the person who compromises says, that "I have compromised for one thousand Dirhams," and immediately gives one thousand Dirhams to the plaintiff, in such a case the compromise will be valid ; because on the delivery of one thousand Dirhams the plaintiff will get his object, and the contract of compromise will thereby be completely fulfilled.

(d) Of anything for unspecified property, which the person who compromises does not deliver.

Where the person who compromises says, "I have compromised for one thousand Dirhams," but does not give them ; in such a case the compromise will remain suspended on the consent of the defendant. If he gives his consent to, it, he will become responsible for the sum stipulated or, if he does not give his consent to it, the compromise will be annulled (A'Aainul Hidayah, Vol.III, P.603).

4. Fazoolee Compromising for a specific article, without referring it to his property .

The author of the Hidayah says that a fifth kind of compromise may also be added to the preceding four kinds ; as, for example, where a Fazoolee says, "I have "compromised for this one thousand Dirhams", or "for this slave," without referring these to his own property ; which sort of compromise will also be valid, because, in specifying the thing to be delivered to the plaintiff, the person who compromise does, as it is, put it as a condition that the said thing will become the right of the plaintiff.

But if, the slave afterwards is proved to be the property of another person ; or, if it becomes known that he was free, or a Mukatib or Mudabbir ; or, if the plaintiff returns him, on account of a defect, to the person who compromise, in none of these cases will the plain-tiff be entitled to take anything from the person who compromise, as he actually engaged for nothing more than the delivery of a specific article. If, therefore, that article remains a safe for the plaintiff, the contract will be valid. But if otherwise, he will not be entitled to take anything from the person who compromise, but he will have to prefer his claim against the defendant.

But it will be otherwise where the person who compromises stipulates some Dirhams, and makes himself liable

for the same, and they afterwards prove the right of another person, or of bad quality, and the plaintiff returns them ; because in such a case the plaintiff will be entitled to take an equal number of good Dirhams from the person who has compromised, because he has made himself a principal in respect of security ; and, accordingly, if the person who has compromised refuses to comply, he should forced to give the delivery. ('Aainul Hidayah, vol. III, p. 604).

CHAPTER 3

COMPROMISES OF DEBT

(Hidayah, Kitab-us-Sulh, Baab-us-Sulh Fid Dain)

1. Debt becoming due on account of contract made upon credit .

If the thing to be given in compromise is of the same nature with the debt which is to be compromised for, and which is due to the plaintiff under an “ ’Aaqd-al-Muda’inah”, or contract made upon credit, the compromise will not in such a case be taken as an exchange, but the plaintiff will be considered as taking a part of his right, and giving up the balance. An “ ’Aaqd-al-Muda’inah”, or contract made upon credit, is where a person purchases the goods of another person, say for one thousand goods Dirhams, and then the parties separate, without the seller receiving the price, of a time of payment being agreed upon ; in which case, if the purchaser compromises the said one thousand for five hundred good Dirhams, or five hundred bad Dirhams, and the seller agrees to the same, such compromise will be valid ; and it is thus constructed, that the seller agrees to accept a part of his right, and to give up the balance; not that he accepts the five hundred Dirhams in exchange for one thousand Dirhams.

2. Compromise of debt becoming due on account of any act which subjects to responsibility .

The restriction to debts due “in consequence of a contract made upon credit” as here set forth, is for this reason, that it is originally required that the debt is incurred on account of a contract according to Law.

3. Compromise of debt by a forbearance for the same sum.

If, in the case above mentioned, the compromise is of one thousand Dirhams payable at a future date, for one thousand

Dirhams immediately payable, it will be valid ; because the construction then given to it is that the plaintiff had agreed to postpone his claim, and not that he had entered into an exchange as a future date, is not lawful.

4. Further payment stipulated in money of a different denomination .

But if one thousand Dirhams are compromised for one proportionable number of Deenars, payable after the expiration of a month, for example, it will be unlawful ; because it is impossible to consider it merely as a delay of the claim ; as the claim related to Dirhams, not to Deenars ; nor is it possible to construe it into a sale, because a sale of Dirhams, for Deenars payable at a future date, is unlawful. The compromise, therefore, in such a case is not valid.

5. Compromise of future debt by immediate part payment .

If a person has a debt of one thousand Dirhams, payable at a future date, due to him by another person on account of a contract upon credit, and compromises the same for five hundred Dirhams payable immediately, such compromise will not be valid; because ready money is better than future payment ; and ready money not being his right, the compromise, therefore, takes place in a thing which is not his right, and therefore it is impossible to consider the compromise as a dereliction of part of the claim ; it should, therefore be necessarily considered as an exchange in this way, that the debtor gives up his right, namely, the delay of payment, in return for the five hundred remitted; those five hundred, there-fore, are in exchange for the forbearance ; and the acceptance of anything in consideration of forbearance will not be valid.

6. Compromise of debt of bad money for good money .

If a person has a debt owing to him by another person, on account of a contract upon credit, of one thousand bad

Dirhams ; and compromises it for five hundred good Dirhams, it will not be valid ; because pure Dirhams are not the right in respect of their quality and it therefore, cannot be taken as a concession. It will, therefore, be taken as an exchange of one thousand for five hundred, superior in respect of quality, and what is usurious, as quality is not regarded in transactions of exchange.

7. Compromises of debt of good money for bad money .

But it will be otherwise where a person compromises a debt of one thousand good Dirhams for five hundred bad Dirhams, because that amounts to a concession relating both to number and quality. It will also be otherwise, where a person compromises a debt due to him of one thousand bad Dirhams for one thousand good Dirhams ; because this will be an exchange of the like for the like ; and in that no regard will be paid to quality. It will, however, be a condition, in such a case, that the plaintiff will take possession of the thing given in Compromise upon the spot, as this will be a Sarf Sale.

8. Compromise of debt in money of two denominations .

If a person has a debt of one thousand Dirhams and one hundred Deenars owing to him by another, person on account of a contract upon credit ; and compromises it for one hundred Dirhams, ready money, or payable at the end of one month for instance, such Compromise will be lawful, as it is possible, in such a case, to give validity to the contract of Compromise, by supposing that the creditor gives up the whole of the debt owing to him except one hundred Dirhams, payable immediately, or as in the second case, within a month. It therefore will not be regarded in the light of an exchange ; because if it is so considered, the contract will not be valid, as it will be usurious. Moreover, in compromise a concession is always understood ; and as, in

the present case, concession is the prevalent idea, the matter should therefore, be regarded as a concession rather than as an exchange.

9. Proposal from creditor to grant complete discharge on payment of one-half of the debt within a limited time .

If a person having a debt due to him of one thousand Dirhams, payable at a future date, says to the debtor, “pay me five hundred Dirhams tomorrow, upon this condition, that you will be exempted from the balance of the debt ;” and the debtor acts accordingly, he will then be exempted from the balance.

But, if in such a case, the debtor does not pay the five hundred Dirhams on the morrow, he will remain liable, according to Imam Abu Hanifah and Imam Muhammad, for the one thousand Dirhams. But Imam Abu Yusuf says that one thousand Dirhams will be immediately exempted, and that the claim to them will not afterwards be revived because, in his opinion the exemption here is absolute, i.e. it is not suspended upon the condition of payment on the morrow.

10. It implies three different interpretations as follows.

(a) Where the proposal has no condition at all.

(b) Where the creditor says, that “I have compromised with you the one thousand Dirhams for five hundred Dirhams ; which you should pay me tomorrow, and then you will be exempted from the balance. But if you do not pay them tomorrow, then one thousand Dirhams will remain due by you as before”. In such a case, according to all our jurists, if the payment is made on the next day, the exemption will hold good ; but if not, it will be void.

(c) Where the creditor says, that “I have exempted you from the payment of five hundred Dirhams out of one thousand, Dirhams on this condition that you give me five hundred Dirhams tomorrow.”

In such a case the debtor will be exempted from the payment of the five hundred Dirhams ; whether he pays the five hundred Dirhams on the next day or not, because the exemption is here primarily stated.

11. Acknowledgment for a Compromise .

If a person says to another, person that, "I will not acknowledge your right of property until you first fix a future date for the delivery, and promise me an indulgence in the payment," or, "until you first remit to me the whole, or a part of the property," and the person so addressed acts accordingly, his thus fixing a date, or remitting a part or the whole of the property will be lawful, because he does this of his own accord, and not by compulsion.

12. If the condition is publicly proposed .

But this is where the acknowledger addresses the other person, as above, secretly. But where, he addresses him publicly, he will become liable for the whole of the subject of acknowledgment upon the instant.

Section (1)

JOINT DEBT

(Hidayah, Kitab-us-Sulh, Fasl Fid Dainil Mushtrak)

1. One of two partners compromising his share of a debt due to them jointly.

If there is a debt due to two persons, jointly, from a third, person and one of the two compromises with the debtor his share of the debt for a piece of cloth, the fellow-creditor will have the choice to demand the other half of the debt, which is his due, from the debtor, or to take the half of the cloth from his partner who has compromised; unless, however the partner who has compromised

pays him one-fourth of the whole debt ; because, in such a case, he will not be entitled to take the half of the cloth.

In short, in all cases of the nature here mentioned, it is a rule that whatever, in a partnership debt, one of the partners receives a part of it, the other partner is entitled to an equal share in the part so received.

2. One of the two partners receives payment of his share in a debt due to them jointly, and pays the other partner his proportion of what he has received.

If one of the two partners, in a debt receives, from the debtor, the one-half of his share of the debt, the other partner will then be entitled to participate in the one-half so received, or to look to the debtor for his full share, for the reasons given in the preceding example. If, therefore, he participates with the partner who has compromised, both partners will in such a case be entitled jointly to take from the debtor the balance remaining due, because after sharing equally in what has been received, they are both also entitled to share equally in the balance remaining due.

3. If the other partner chooses to receive payment of his part solely from the debtor, and the property is lost or the debtor becomes insolvent .

But if the other partner chooses to demand his share in full from the debtor, instead of equal participation in the part received by his other partner, and that part of the debt which has been received remains safe, and that which remains due is lost, or destroyed, by the debtor's dying insolvent, or by his denial of the debt upon oath, he will in such a case be still entitled to a participation with his other partner in what has been received by him.

But if one of the joint creditors instead of receiving his share of the debt ;adjusts it against a debt which he had previously taken from the debtor, then, the other sharer, in the case of loss or

destruction of that portion of the debt due to himself, will not be entitled to any participation with him as he will, in such a case, be held to have paid a debt, and not to have received the payment against his share in joint debt.

The law will also be the same, where one of the creditors exempts the debtor from his share of the debt, because exemption amounts to destruction or annulment, and not a receipt.

4. Release from a part of his share by one partner .

If one of the two partners in a debt releases the debtor from a part of his share in the debt, say, one-half, the remaining part of the debt will, in such a case, will remain due to the two creditors in the proportion of their respective rights. As, for example, if the debt due to them is of twenty Dirhams, and one of them afterwards releases the debtor from one-half of his share, the remaining debt will then be of fifteen Dirhams, of which five Dirhams will be due to the exempting partner, and ten Dirhams to the other partner.

5. One of the two partners agrees extends the payment .

If one of the two partners extends the time of payment of his share, it will be valid, according to Imam Abu Yusuf. But according to Imam Abu Hanifah and Imam Muhammad, this will not be valid.

6. One of the two partners receives his share by usurping anything from the debtor ; or by losing or destroying anything belonging to him ; or, by accepting a lease in Compromise ; or, by burning a piece of his cloth .

If one of the two partners usurps any article from the debtor, or purchases anything from him by an invalid contract, and loses or destroys the same, these acts are to be taken as equal to a receipt of his debt. So also if one of the two partners accepts a

lease from the debtor in lieu of his debt, he will in such a case be held to have received his debt. If one of the two partners burns a piece of cloth belonging to the debtor of equal value with his share of the debt, it will also amount to a receipt, according to Imam Muhammad, but not according to Imam Abu Yusuf.

Some jurists have said that this difference is based on the supposition that he has thrown fire on the cloth, without first having the hold of it ; because if he has first laid hold of the cloth and then burned it, all our jurists are of the view that he has received his share, because he will be taken first to have usurped the cloth, and then to have burnt it.

7. One of the two partners marry the debtor, who is a female, and settles his share of the debt as her dower ; or, by compromising with it for an offence .

If a debtor is a female, and one of the two partners in the debt marries her, and settles his share of the debt as her dower, this, according to the Zahir Rawayat, will be an annulment, and so also if he compromises with his share, for a wilful offence.

It may be noted, that if one of the partners in a debt marries the woman who is their debtor, without settling his share of the debt as her dower, in such a case the other sharer will have a claim upon him, as in such he will be held to have made commutation with his wife of his claim for hers.

But it will be otherwise where he settles his share of the debt as her dower ; because then he will be held to have annulled, and not to have commuted his right, and on this account the other sharer will have no further claim against him.

It is a well established rule that where a receipt has been made, by one partner, the other partner, in case of the loss or destruction of his right by the debtor's dying insolvent, or otherwise, is entitled to participate with the receiving partner ; but he has no such right in the case of an annulment .

8. One of the partners compromising his share of the debt by a purchase .

If one of the two partners in a debt purchases something from the debtor, such as cloth, against his share of the debt from the debtor, in which case all the effects take place, as described in the preceding example, where the partner requires payment from the debtor, or to take an equivalent from the purchaser of one-fourth part of the debt.

9. One of the two partner in a Salam sale compromises for his share .

If two persons contract a Salam sale, that is pay in advance the price of the goods to be delivered at a future date, and one of them afterwards compromises his share of the goods for his share of the amount paid in advance, it will not be lawful, according to Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf says that will be lawful .

Section (2)

TAKHAARIJ

(Hidayah, Kitab-us-Sulh, Fasl Fit Takhareej)

Note

“Takhaarj”, is the plural of, “Takhreej” which literally means “to exclude” but legally it, signifies a compromise made by some heirs with other heirs, for their share of the inheritance, in consideration of some specific thing to exclude them from inheritance.

1. Heir Compromising with a co-heir for his share of inheritance by anything equal to it,

If the estate of a person, consisting of land, or of goods etc, is to be shared by several heirs ; and the heirs compromise

with one amongst themselves for his share of the inheritance, by giving him some specific thing, such compromise will be lawful, whether the thing given is more or less than his right.

2. By one precious metal where inheritance is in another precious metal .

Similarly, if the inheritance consists of silver, and gold is given to one of the heirs by way of compromise, or, it consists of gold, and by way of compromise, silver, it will be valid, whether the thing given is inferior or superior.

But it will be necessary, that the articles of the compromise are mutually interchanged and taken possession of, by the parties at the place where the agreement of compromise has been made.

But if the heir, in whose possession the balance of the estate remains, denies the possession, then former possession will suffice, because it is a possession of responsibility, as it is in the nature of usurpation, and can, therefore, be for a possession of compromise.

But if, he acknowledges the possession, then it will be necessary that a new possession should be given.

3. Compromising of inheritance of bullion and goods by gold or silver.

If the estate consists of gold, silver, goods, etc., and the heirs compromise the share of one amongst themselves for silver or for gold, it will in such a case be necessary that the gold or silver given in compromise is somewhat more than his share of the gold or silver by inheritance, so that, after opposing an exact equality of the two similar kinds to each other, there may remain some excess to oppose as a compromise for his share of the other articles, to the end that the allegations of usury should be avoided.

In such a case, also, it will also be necessary that possession is taken, at the meeting of the thing opposed to his share of the gold or the silver, because the compromise to the extent is taken in the nature of a Sarf Sale. But if, in such a case, the compromise is made for goods and effects, it will be lawful, absolutely, that is, whether possession is taken by the parties at the meeting, or not, and whether the thing given in compromise is inferior or superior to the share in the inheritance.

4. Compromise of inheritance for money by money.

If the estate consists of Dirhams and Deenars, and the compromise also consists of Dirhams and Deenars, it will be lawful, irrespective of the amount being given in compromise is more or less than the share of inheritance compromised for, because each kind is compared with its opposite, in the same manner as in the sale. It is, however, necessary that possession is taken at the meeting, because the compromise in question is of the kind of a Sarf Sale.

5. Compromise of inheritance for a debt .

If there is a debt due to the deceased, and it is included in the compromise, by the compromising heir giving up his share of it, and agreeing that it will go entirely to the other heirs, such compromise will be void.

6. Heir agreeing to release the debtor from his share in the debt.

But if, the compromise is made on the condition that the compromising heir will release the debtor from his share of the debt, and that the others will not claim it, the compromise will be valid, as it will either be an annulment of the debt, or a remittance of it to the debtor. This is one way of legalizing the compromise.

7. Other heirs paying him that share gratuitously .

Another way of legalizing the compromise is that, the heirs pay, in a gratuitous manner, to the compromising heir, the share of the debt which is due to him, and then make a compromise with him for his share of the collected part of the estate. In both these ways, indeed, an injury will result to the other heirs ; in the latter way, evidently, as there they pay his demand, out of their right, without any return ; and in the former way, because it will be possible that they may not at all receive the debt, nor any part of it, from the property of the debtor.

8. Lending it to him, to transfer to the debtor .

The best way, therefore, is that the heirs lend to the compromising heir the amount of his share of the debt, and then compromise with him for his share of the collected estate ; and that he then transfer the said loan to the debtor, so that the other heirs may lawfully receive from the debtor the share of the debt which is due to him.

9. Compromise of an inheritance where the particulars of the estate are not known .

If there is no debt due to the estate of the deceased, and it is not known of what, kinds the articles of the estate consists, and one of the heirs compromise his share for articles of weight, or measurement of capacity, some jurists have said that this compromise is not lawful, because of the semblance it has to usury. Others jurists, however, say that it is lawful, as the semblance to usury is doubtful in this case; because, in the first place, it is possible that the articles may consist of articles of weight and of measurement of capacity, and it is also possible that they may not ; and, in the next place, if they do consist of such articles, it is possible that the quantity of the compromise may be unequal to his right, and it is also possible that it may be equal to it. The semblance to usury is, therefore, doubtful; and regard is to be had to an actual semblance only, not to a doubtful semblance.

10. Compromise of the same where the particulars are known in part only .

If the estate consists of something else than articles of weight or measurement of capacity, but of which the particular substances are not known, and one of the heirs compromises his share for articles of weight or measurement of capacity, some jurists have said that this is not lawful ; because the compromise, in this case, is in the nature of a sale, or an exchange of property for property ; and this is not lawful when one of the articles opposed in exchange is uncertain. The most approved opinion, however, is that it is lawful ; as the uncertainty here cannot be productive of strife, as the thing for which the compromise is made, and which is the subject of the uncertainty, is in the hands of the rest of the heirs.

11. Inheritance of an insolvent estate .

If the estate is completely overwhelmed with debt, neither compromise nor division of it amongst the heirs will be lawful ; because the heirs are not, in such a case, owners of the property, as inheritance takes place only in respect of such property as is un-encumbered with some essential requisite of the deceased ; and the payment of the debts of the deceased is one of his essential necessity.

Even if ; the estate is not completely overwhelmed with debt, it will not even then be proper to enter into any compromise until the debts are discharged.

Jurists, however, have said that if, in such a case, a compromise or a division is made, prior to the discharge of the debts, it will be valid, Karakhi, in dealing with partition , says that it will not be valid according to a favourable construction of the law ; but that it will be valid upon the principle of analogy.

