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THE HEDAYA

COMMENTARY ON THE ISLAMIC LAWS

Translated by CHARLES HAMILTON

DARUL-ISHAAT
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BY
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OF THE

HEDÀYA;

A

COMMENTARY

ON THE

MUSSULMAN LAWS.

BOOK VII.

OF HOODÓOD, or PUNISHMENTS. *

HOODÓOD is the plural of Hidd; and Hidd in its primitive

Definition of

sence signifies obstruction; whence a porter or gatekeeper is
titled the Hiddíd, or obstructor, from his office of prohibiting people
from entering. In law it expresses the correction appointed and spec-
cified by the law on account of the right of God, and hence the
extension of the term Hidd to retaliation is not approved, since reta-
iliation is due as a right of man, and not as a right of God; and in the

These are here confined solely to subserviency, drunkenness, and slander. The punishments for theft, &c. are treated of under their proper heads.

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same manner, the extension of it to Tazeer (or discretionary chastisement) is not approved, as Tazeer is a species of correction not specified or determined by any fixed rules of law, but committed to the discretion of the Kāzee. The original design in the institution of Hidd is determent, that is, warning people from the commission of offensive actions: and the absolution of the person punished is not the original design of it, as is evident from its being awarded to infidels in the same manner as to Mussulmans.

Chap. I. Of Zinna, or Whoredom.

Chap. II. Of the carnal Conjunction which occasions Punishment, and of that which does not occasion it.

Chap. III. Of Evidence in Adultery and of Retraction therefrom.

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C H A P. I.

Of Zinna, or Whoredom.

Whoredom may be established by proof, or by confession.

Whoredom is established before the Kāzee, in two different modes,—by Proof, and by Confession,—by proof, because that is a demonstration founded on the appearance of facts;—and by confession, because probability is most in favour of the truth in such acknowledgment, especially, where it is to be the occasion of suffering and

* Meaning either adultery or fornication.
ch. I. PUNISHMENTS.

Shame to the person confessing;—and whoredom being an act the nature of which most frequently excludes the possibility of positive proof, it is necessary that circumstantial evidence be admitted as sufficient to establish it, lest the door of correction might be shut.

The manner of giving evidence to whoredom is, by four persons bearing witness against a man and a woman that they have committed whoredom together, because God has commanded in the Koran, saying, "PRODUCE FOUR WITNESSES FROM AMONG YOU AGAINST THEM;" and also, "IF ANY PERSON ADVANCE A CHARGE OF WHOREDOM AGAINST OTHERS OF CHASTE REPUTE, AND CANNOT PRODUCE FOUR WITNESSES IN SUPPORT OF HIS ACCUSATION, LET HIM BE PUNISHED WITH EIGHTY STRIPES:" moreover, the prophet once said to a man who brought before him an accusation against his own wife, "Bring four men who may bear testimony to the truth of your allegation:" and this degree of proof is also required, because it is laudable to conceal and cover infirmity, and the contrary is prohibited; and by requiring no fewer than four witnesses to a charge of whoredom both these ends are obtained.

When witnesses come forward to bear evidence in a case of whoredom, it is necessary that the Kâsee examine them particularly concerning the nature of the offence; that is, that he ask of each witness respectively, "What is whoredom?" and, "in what manner have the parties committed it?" and "where?" and "at what time," and "with whom?"—because the prophet interrogated Mâaz as to the manner of the fact, and the nature of the offence: and also, because examination in all these particulars is a necessary caution, since it is possible that the witnesses, by the term Zinna, may mean something not directly amounting to carnal conjunction, (such as seeing and touching,) Zinna being a phrase occasionally applied to these also:—it is possible, moreover, that the whoredom may have been committed in a foreign country, and therefore that it is not cognizable; or it may have been committed at a distant period, prior to the
PUNISHMENTS.

the charge, which is therefore inadmissible; it may happen too, that the fact may have been committed under an erroneous conception of the parties with respect to its legality, such as would occasion remission of punishment, and such as neither the parties themselves, nor the evidences against them are aware of, (as in a case where a man has connexion with the female slave of his son); it is therefore requisite that the judge examine the evidence minutely with respect to all these particulars, since some circumstance may appear, in the course of such investigation, sufficient to exempt from punishment.

AND when the witnesses shall thus have borne testimony completely, declaring that "they have seen the parties in the very act of carnal conjunction" (describing the same), and the integrity of such evidence is also known to the Kâzee from both an open and a secret purgation, let him then pass sentence of punishment for whoredom, according to such evidence. The apparent probity of the witnesses does not suffice in the present case, but it is necessary that the magistrate ascertain their probity, both by an open and a secret purgation, in such a manner, that (possibly) some circumstance may appear sufficient to prevent the punishment, because the prophet has said "Seek a pretext to prevent punishment according to your ability:" contrary to all other cases, in which the apparent integrity of the witnesses is (according to Haneefą) held sufficient. The mode of open and secret purgation is fully set forth under the head of Evidence.

Mohammed has said, in the Mabsoot, that the Kâzee may imprison the accused, until he make a purgation of the witnesses, because the person against whom the testimony is given stands charged with whoredom upon the evidence of witnesses; and also, because the prophet once ordered a person charged with whoredom to be imprisoned: contrary to a case of debt, since a debtor cannot be imprisoned upon a charge of debt exhibited against him by witnesses, until their probity
probity be fully proved. The nature of this distinction shall be treated of at large in another place.

The confession which establishes whoredom is made by a person of sound mind and mature age acknowledging himself (or herself) guilty of whoredom four times, at four different appearances, in the presence of the Kāzee, he [the Kāzee] declining to receive the confession, and sending the person away the first, second, and third time. The maturity and sanity of the person confessing are conditions, because the declaration of an infant or an idiot is not worthy of any credit, or because the acknowledgment of such is not sufficient to induce a sentence of punishment. The condition of the confession being made four times at four different appearances is agreeable to our doctors. According to Shafei, a single confession, in a case of whoredom, is sufficient, because he considers the law to be the same here as in all other cases, the confession or acknowledgment of any circumstance being the means of disclosing or discovering that which is so confessed or acknowledged; and a single confession is fully adequate to this purpose, a repetition being of no manner of use, since the disclosure or discovery is not in any degree increased or amplified by it: contrary to plurality of witnesses, as the abundance of witnesses is a means of removing all doubt with respect to their veracity, and of affording fuller satisfaction to the mind; whereas, by the repetition of the declaration of a single person, (as in case of confession,) no such additional satisfaction is obtained. The arguments of our doctors in opposition to what is here advanced by Shafei are twofold: first, The case of Mi'az, on whom the prophet would not decree any punishment until he should have made confession of his offence four different times at four different appearances, where it is to be concluded that if a single confession had sufficed, and it had been proper to proceed to punishment upon the force of it alone, the prophet would not have delayed to inflict it until the confession should be four times repeated as above;—secondly, as in evidence to whoredom four witnesses.
punishments are requisite, so also in the confession thereof four repetitions are requisite, and for the same reason, namely, that it is laudable to conceal infirmity; and this condition of the repetition of confession has a tendency to conceal infirmity. The reasons for establishing four appearances of the person confessing as a condition are twofold:—first, the tradition of Mān, as already related;—secondly, a plurality of confessions is made a condition, and that cannot be obtained without a plurality of appearances on the part of the confessor, since one effect of an unity of place or appearance is to render the separate declaration of the same thing as one declaration; and hence four confessions, in a single appearance *, amount only to a single confession; and as confession relates only to the person confessing, the unity, or otherwise, of his appearance, is regarded, and not that of the Kāzī’s assembly: and this appearance is made four separate times, by the Kāzī repelling the person’s first confession, and saying to him “Thou art mad!” and such other words, the person, upon the Kāzī thus repelling his confession, going forth, so as to be out of the Kāzī’s sight, and returning again, and repeating his confession;—and so on to the fourth time. This is recorded from Āboo Haneefa, on the authority of the conduct of the prophet in the instance of Mān, whom he thus sent out of his sight three different times.

* The term Majlis, which, for the sake of perspicuity, is in this place translated appearance, literally signifies a seat or place of sitting; and it may admit of various explanations, according to the circumstances under which it is applied, or the person to whom it relates. When it is mentioned as the Majlis of the Kāzī, it means the public assembly or court of that magistrate: when it applies solely to the parties who come to make any declaration before the Kāzī, it may be rendered the appearance of that party in court. It also frequently refers to a private company, and sometimes merely to the posture of the party (as in the case of divorce left at the option of the wife.) In short, to define the true and precise application of the term Majlis in the present case regard must be had to the Musullam-ulagees, it being customary for the Kāzī to admit people to deliver the substance of their testimony in a sitting posture, and hence every time the party arises and again resumes his seat may be rendered a new appearance of that party in court.

when
When confession shall have been made in this manner four different times, the Kösee must then proceed to examine the person so confessing; asking him ‘What is whoredom?—and, ‘where, and in what manner, and with whom—have you committed this whoredom?’—All which duly observed, the person confessing becomes then properly obnoxious to punishment, as the proof is complete. The advantages attending the examination of the confessing person have been already explained under the head of witnesses bearing evidence to whoredom: but it is to be observed that although it be directed there that the Kösee examine the witnesses with respect to the time of the perpetration of the fact, yet it is not requisite to put a similar question to a person who confesses, because that delay which would impeach the credibility of a witness does not in any respect impugn the credibility of a person who makes a voluntary confession: Some, however, have said that if the Kösee interrogate such a person with respect to the time of the fact, it is lawful, since it is possible that it may have been committed during Infancy.

If the person confessing should deny the fact, and retract from his confession, either before or during the infliction of punishment, his retraction must be credited, and he must forthwith be released. Shafei and Ibn Lailee have said that retraction after confession is not to be credited, but that the punishment must be inflicted, since as it has been already incurred by the confession, it cannot be done away in consequence of denial; as in a case, where whoredom is established against a person upon the testimony of witnesses;—or as in a case of retaliation, or of punishment for slander;—that is to say, when retaliation or punishment for slander are once established upon the confession of the offender, they do not drop in consequence of his subsequent denial of the fact; and so in this case likewise. The argument of our doctors is that denial after confession is an intimation, which (like the confession) may be either false or true; and there is no person to disprove such denial; and hence, from the inconsistency between.
between the confession and the denial, a doubt arises concerning the confession; and punishment drops in consequence of any doubt: contrary to intimations which involve the rights of individuals, (such as retaliation, and punishment for slander,) as the claimant of the right, in those cases, is the disprover of the person who has confessed, when he afterwards denies, which is not the case in any matter involving merely a right of the law.

It is laudable in the Kitâb, or Imám, before whom confession of whoredom may be made, to instruct the person confessing to deny it, by saying to him “Perhaps you have only kissed or touched her,” because the prophet spoke to to Múáz;—and Mohammed, in the Mabsûf, adds that the judge may also examine the confessing person with respect to such circumstances as, if made to appear, would tend to his entire exculpation, such as, “whether the fact confessed may not have been committed in marriage,” or “under an erroneous misconception of its legality.”

SECTION.

Of the Manner of Punishment, and the Infliction thereof.

When a person is fully convicted of whoredom, if he be married let him undergo the punishment of Rajim, that is, lapidation, or stoning to death, because the prophet condemned Múáz to be thus stoned to death, who was married; and he has also declared, “It is unlawful to spill the blood of a Mussulman, excepting only for three causes, namely Apostacy, Whoredom after marriage, and Murder”—and in this all the companions likewise unite.
It is necessary, when a whoremonger is to be stoned to death, that he should be carried to some barren place, void of houses or cultivation; and it is requisite that the stoning be executed,—first by the witnesses, and after them by the Imám or Köse, and after those by the rest of the by-standers, because it is so recorded from Alé, and also, because in the circumstance of the execution being begun by the witnesses there is a precaution, since a person may be very bold in delivering his evidence against a criminal, but afterwards, when directed himself to commence the infliction of that punishment which is a consequence of it, may from compunction retract his testimony; thus causing the witnesses to begin the punishment may be a means of entirely preventing it. Shafeé has said that the witnesses beginning the punishment is not a requisite, in a case of lapidation, any more than in a case of scourging. To this our doctors reply that reasoning upon a case of lapidation from a case of scourging is supposing an analogy between things which are essentially different, because all persons are not acquainted with the proper method of inflicting flagellation, and hence, if a witness thus ignorant were to attempt it, it might prove fatal to the sufferer, and he would die where death is not his due: contrary to a case of lapidation, as that is of a destructive nature, and what every person is equally capable of executing, wherefore if the witnesses shrink back from the commence-ment of lapidation, the punishment drops, because their reluctance argues their retraction. In the same manner punishment is remitted when the witnesses happen to die or to disappear, as in this case, the condition, namely, the commencement of it by the witnesses, is defeated. This is when the whoredom is establisht upon the testi-mony of witnesses: but when it is establisht upon the confession of the offender, it is then requisite that the lapidation be executed, first by the Imám or the Köse, and after them by the rest of the multitude, because it is so recorded from Alé; moreover, the prophet threw a small stone like a bean at Ghamdeea who had confessed whoredom. What is said upon this subject is taken from the Zahir-Rawayet.
The corpse of a person executed by lapidation for whoredom is entitled to the usual ablutions, and to all other funeral ceremonies, because of the declaration of the prophet with respect to Māaz, "Do by the body as ye do by those of other believers;"—and also, because the offender thus put to death is slain in vindication of the laws of God, wherefore ablation is not refused, as in the case of one put to death by a sentence of retaliation: moreover, the prophet allowed the prayers for the dead to Ghameeda, after lapidation.

If the person convicted of whoredom be free, but unmarried, the punishment with respect to him is one hundred stripes, according to what is said in the Koran, "THE WHORE AND WHOREMONGER SHALL YE SCOURGE WITH AN HUNDRED STRIPES;"—for although this text be cancelled with respect to married persons, yet in regard to all other than those who are married the law must be executed in conformity to it.

Observe, that the hundred stripes inflicted by the decree of the magistrate must be administered with a rod which has no knots upon it; and that the stripes must be applied with moderation, that is to say, neither with severity, nor yet with too much lenity; because Alee, when he was about to inflict correction, used to smooth off from the rod any knots which might happen to be upon it; and as too much severity on the one hand tends to destruction, so on the other hand too much lenity is inadequate to the design of correction. And when punishment is to be inflicted, on any person, it is necessary that he be stripped naked; that is to say, that all the clothes be taken off, except the girdle;—because Alee directed so in this matter; and also, because the punishment is in this way administered with the greatest effect: but as the removal of the girdle from the body would expose nakedness, it is therefore to be left.

It is requisite that the hundred stripes be given, not all upon the
the same part or member* of the person upon whom punishment is inflicted, but upon different parts, as it might otherwise be attended with danger to life; and none of the stripes must be inflicted on the face, the head, or the privies, because the prophet once said to an executioner, "In inflicting the punishment take care not to strike the face, the head, or the privities;" and also, because the first of those is the seat of expression and likewise of beauty; and the second is the central seat of the senses; and the third is a part which cannot be wounded without danger to life; and it is to be apprehended that in the first and second instance the appearance and the faculties might sustain material injury, and the injuring of those is a species of destruction to the man; and that in the last life might be endangered: it is unlawful therefore to strike on any of those parts, the design of correction being amendment and not destruction. Aboo Yousef has said that one or two strokes may be given on the head, as Aboo Bibr once said to an executioner, "Strike on the head, because there the devil resides:" in reply to this, however, we remark that Aboo Bibr gave this direction with respect to an infidel alien, who had been used to seduce believers from the faith, and whose life of course had been forfeited.

When a man is to be scourged for whoredom he is to receive his punishment in a standing posture, because Alee has said, "Correction is to be inflicted upon men standing, and upon women sitting;" and also, because the proper infliction of punishment depends upon it's being open and publick, which is best effected by its being received in a standing posture; but yet as a woman is nakedness†, in thus administering the correction to her there might be an apprehension of the exposure of nakedness. It is to be observed that in administering p-

* In the original, Alee, a limb, which would make this species of correction more properly to apply to the body.

† "A woman is nakedness," that is to say, every part of a woman's person is equally indecent to be seen.
PUNISHMENTS.

Concerning the meaning of the term Mid there are various opinions:—some say that it signifies laying a person on his face upon the ground, and stretching out his limbs;—some, that it signifies the executioner drawing the rod over his own head; others, that it signifies the executioner drawing back the rod, after giving the blow; but the correction must not be inflicted in the way of Mid, according to any of these acceptations, as it is more than what is due.

If a person convicted of whoredom be a slave, male or female, the punishment of such is fifty stripes, because the Almighty has said [in the Koran] speaking of female slaves ‘‘they shall be subject to half the punishment of free married people’’—and the term slave in the text extends to males as well as to females. Moreover, as bondage occasions the participation of only half the blessings of life, it also occasions the suffering of only half the punishments, because an offence increases in magnitude in proportion to the magnitude of blessings under the enjoyment of which it is committed.

The punishment of whoredom is the same with respect to both sexes, as all the texts which occur in the sacred writings upon this subject extend equally to both; but yet a woman is not to be stripped, neither is her veil to be taken off, but only her robe, or other outward garment, as the removal of any other part of her dress would be offensive to modesty; but as the robe or outward garment would prevent the effect of the correction, and the removal of such is not indecent, she is to be stripped of these.

A woman is to receive her punishment in a sitting posture, according to the direction of Alce before recited, and also, because in this a regard is shewn to decency, which it is incumbent to preserve; and

* Literally length; it admits of various applications.
for the same reason, where a woman is to be stoned, a hole or exca-
vation should be dug to receive her, as deep as her waist, because
the prophet ordered such a hole to be dug for Ghambéea before-men-
tioned, and Alee also ordered a hole to be dug for Shoordha Hamdeéanne:
it is however immaterial whether a hole be dug or not, because the
prophet did not issue any particular ordinance respecting this; and
the nakedness of a woman is sufficiently covered by her garments; but
yet it is laudable to dig a hole for her, as decency is thus most effec-
tually preserved. There is no manner of necessity to dig a hole for a
man, because the prophet did not so, in the case of Midas. And ob-
serve it is not lawful to bind a person in order to execute punishment
upon him in this case, unless it appear that it cannot otherwise be
inflicted.

A master cannot inflict correction upon his male or female slave
[for whoredom] but by permission of the Kázeé.—Sbafée has said that
it belongs to a master to inflict correction upon his slave, in this as well
as in any other case, because a man’s authority over his slaves is gene-
ral and absolute, even preferably to that of the Kázeé, as a master is
empowered to perform acts with respect to his slaves in which the
Kázeé is not empowered; this, therefore, is the same as Taazeer, or
discretionary correction; that is to say, the master is at liberty to-in-
flict stated punishment for whoredom upon his slaves in the same
manner as discretionary correction. The arguments of our doctors
are twofold;—First, the prophet has declared that there are four
things committed to magistrates, and that one of those is Hidd, or
stated punishment, which is here treated of;—Secondly, Hidd, or
stated punishment, is a right of God, as the design of it is to purify
the world from sin; and as it is a right of God, hence it cannot be
done away by the act of any individual, wherefore this right is to be
exact by the prince, as the deputy of the law, or by the Kázeé, as
the deputy of the prince: contrary to Taazeer, or discretionary cor-
rection,
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Rection, because that is a right of the individual, whence it is that infants are subject to Tazeer, although they be not liable to Hidd.

The state of marriage necessary to induce lapidation, requires that the whoremonger be of sound understanding and mature age, and a Mussulman, free, and who has consummated in a lawful marriage with a woman at a time when she also is sane, free, adult, and a Mussulman. This is the definition of Hanefia and Aboo Yoosaf. According to Mohammed and Shafi it the state of marriage in question requires simply that the whoremonger be free, and a Mussulman, and one who has consummated in a lawful marriage with a woman of the same description. It is to be considered, however, that sanity of intellect and maturity of age are conditional to the receiving of punishment, since without these men are incapable of reading or understanding the ordinances of the law: and the other requisites, besides these two, are made conditions in order that the sin may appear in its greatest magnitude, from the consideration of the magnitude of those blessings under which it is committed, as ingratitude for the blessings of Providence is greatest, and most atrocious, when those blessings are enjoyed in the highest degree; now the particulars aforesaid, namely, the Mussulman faith, and freedom, and the enjoyment of a woman in a lawful marriage, are among the greatest blessings of life, wherefore lapidation on account of whoredom is ordained in cases where all these circumstances exist; and hence lapidation is enjoined when these conditions exist: contrary to the superiority derived from the other gifts of nature or of fortune, such as family, learning, capacity, beauty, and wealth, which are not conditions, because the law has no regard to those circumstances, and also, because those which have been stated are alone sufficient to constitute the magnitude of the sin of whoredom, so as to subject the offender to lapidation, since, by virtue of freedom a man is enabled to contract himself in a lawful marriage, and by virtue of a lawful marriage he is enabled lawfully to indulge his
his carnal appetite, and by such indulgence to allay his passions; and
by virtue of being a Mussulman, he is enabled to marry a Mussime,
which fixes and confirms the belief of the prohibition of whoredom to
him; all these things, therefore, particularly forbid and inhibit a man
from the commission of whoredom; and a sin is great in proportion
to the force of the inhibitions under which it is committed.—The
sect of Shafei differ from our doctors with respect to that part of the
proposition which affirms that the profession of the Mussulman faith
is a requisite condition: and there is also a record from Aboo Yoeaf
to the same effect. Their argument is, that in the time of the prophet
a Jew committed whoredom with a Jewess, and the prophet ordered
them both to be stoned:—but to this our doctors reply that the pro-
phet passed that sentence in conformity to the Tawreet, or Jewish
law, which has since been superseded by the Mussulman law; and
the declaration of the prophet, “Whoever is not a true believer
shall not be regarded as married,” is a confirmation of this. The
consummation now mentioned as a condition is understood in the
conjunction having taken place so far as to require the prescribed ab-
lutions; and as it is a condition essential to such a marriage as induces
laidation, that the woman, at the time of consummation, be of the
same description with the man, in the points of sanity, maturity, free-
dom, and profession of the faith, it follows that if a man were to con-
summate with a wife who is an idiot, an infant, a slave, or an infidel,
he is not considered as married in this sense, since on account of these
circumstances the advantages of the matrimonial enjoyment are in-
complete; because a man has a natural aversion to consummate with
a lunatick woman; and he can have but little gratification with one
under age, where desire is not reciprocal; and in the same manner,
he has not a strong desire to consummate with a slave, as in that case
his children are slave-born; and so also, the enjoyment of a wife who is
an infidel affords the less satisfaction, because of the difference of reli-

*Arab. Methfe; that is, married, under the circumstances requisite to induce laidation.
gious principles; in all these cases, therefore, the advantage of the carnal enjoyment is defective, whence the husband of such woman does not, by consummation, become a Mahrā'ī, or married man, in that sense which induces lapidation.—And the rule is the same where the husband is an idiot, an infant, a slave, or an infidel, and his wife sane, adult, and a Muslīma.—Alībūr Toosaf has said that where the wife is an infidel, her husband, being a Muslīman, by consummating his marriage with her, becomes as a married man; but in reply to this, besides what has been above advanced, it is to be remarked that the prophet has declared, "A Muslīman is not rendered a married man by connexion with a Christian, nor is a freeman rendered married by connexion with a wife who is a slave; nor a slave by connexion with a wife who is free."

It is not lawful to unite the punishments of stoning and scourging in the same person, because the prophet has left no precedent of the kind; and also, because if they were to be united, the scourging would be useless, since the design of correction is a warning from vice, and this warning is effected by lapidation in respect only to others than the person so punished; for a warning cannot be effected, with respect to the person punished, after his destruction.

If a woman guilty of whoredom be of mature age, in her punishment scourging and banishment cannot be united. According to Shafe‘ī these two may be united with respect to her by way of punishment,—that is banishment may also be included in her punishment,—because the prophet has declared "If a man, being unmarried, commit whoredom with a woman who is of age, the punishment of such is one hundred and forty stripes; and he shall be excluded from the city for the space of one year, as by his banishment the door is shut against whoredom, because in an unsettled situation a man meets with few female companions to tempt him to commit it." The arguments of our doctors are twofold;—first, God has declared "The Whore and the Whoremonger
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"WHOREMONGER SHALL YE SCORCE WITH AN HUNDRED " STRIPES," FROM WHICH IT IS EVIDENT THAT THE SOLE PUNISHMENT OF SUCH IS ONE HUNDRED STRIPES, FOR IF IT WERE MORE, IT WOULD BE THERE MENTIONED, AND ONE HUNDRED STRIPES ALONE WOULD NOT HAVE BEEN DECLARED SUFFICIENT:—SECONDLY, HER BANISHMENT IS OPENING THE WAY TO THE FURTHER COMMISSION OF HER CRIME, BECAUSE PEOPLE ARE UNDER LESS RESTRAINT WHEN REMOVED FROM THE EYE OF THEIR FRIENDS AND RELATIONS, AS THOSE ARE THE PERSONS Whose CENSURES THEY ARE MOST IN DREAD OF:—MOREOVER, IN AN UNSETTLED SITUATION, AND AMONG STRANGERS, THE NECESSARIES Of LIFE ARE WITH DIFFICULTY PROCURED, WHENCE SHE MIGHT BE INDUCED VOLUNTARILY TO PROSTITUTE HERSELF FOR A SUPPLY, WHICH OF ALL KINDS OF WHOREDOM IS THE MOST ABOMINABLE; AND THE SAYING OF ALEE THAT "BANISHMENT IS A MEANS OF SEDUCTION," IS FOUNDED ON THIS SECOND REASON.—

As to the saying of the prophet quoted by Shafei, it is superseded, as well as the remainder of that saying, "If a siveeb (meaning a man who has consummated a marriage) afterwards commit adultery with a siveeba, their punishment is one hundred stripes and lapidation:"—the way in which this is superseded is explained in its proper place. In short, banishment, with respect to a loose woman, in the way of punishment, is not lawful: but yet if the magistrate should find it advisable, he may banish her for the space of one year, or less, but this banishment is in the way of ta'zeer or discretionary correction, as banishment may in some cases operate as a warning, wherefore it is committed to the kharee or the imam; and what is recorded concerning the companions, of their having banished people, is to be regarded in the way of ta'zeer.

If a sick person, being one whose proper punishment is lapidation, commit whoredom, he is to be stoned, because his destruction is due, and is therefore not to be suspended on account of his illness; but if he be one whose punishment is scourging, the execution of it must be deferred until his recovery, lest life should be endangered, for the same reason as the limb of a sick thief is not cut off until he be in a proper habit of body to endure the amputation without risk of life.

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If a pregnant woman commit whoredom, and her punishment be lapidation, the execution must be delayed until her delivery, for if she were to be stoned whilst pregnant, the child would be destroyed in her womb, and its blood is not to be taken; and if her punishment be scourging, the execution must be deferred until she shall have recovered from her labour, as that is a species of sickness, wherefore a delay must be made until her health be perfectly restored: contrary to a case of sloning, where the punishment need not be delayed until a perfect recovery, since the delay in this case is only with a view to the preservation of the child in her womb, which is separated from her upon the instant of its birth. It is recorded from Hanefa that in sloning also the execution must be delayed until the child become independent of her care, in case there should be no other person to foster it in her stead, because by this delay the child is preserved from destruction; and it is moreover related that when Ghambeda, after her delivery, came before the prophet, that he might execute punishment upon her, he said to her “Go and remain until such time as your child is independent of you.”—AND OBSERVE,—If a pregnant woman be convicted of whoredom upon evidence she must be confined in prison until she be delivered, lest she should abscond; contrary to a case where a pregnant woman is convicted upon her own confession; for in this case she is not to be confined, as her denial after confession must be credited, (for which reason punishment is remitted in case of her denial,) wherefore to imprison her would be useless.

CHAP. II.

Of the Carnal Conjunction which occasions Punishment, and of that which does not occasion it.

The carnal conjunction which occasions punishment is Zina, or Usboredom; and this, both in its primitive sense, and also in its legal acceptance,
acceptation, signifies the carnal conjunction of a man with a woman who is not his property, either by right of marriage or of bondage, and in whom he has no erroneous property, because Zinna is the denomination of an unlawful conjunction of the sexes, and this illegality is universally understood where such conjunction takes place devoid of property, either actual or erroneously supposed. What is here said is the definition of whoredom with respect to a man:—as to the whoredom of a woman, it simply signifies her admitting the man to commit the fact.

Error in carnal conjunction is of two kinds,—the first, error in respect to the act, which is termed Shoobba-Jibtibah, or error of misconception; the second, error in respect to the subject, which is termed Shoobba-Hookme, [error by effect.] or Shaba-Milk [erroneous propriety.]—The first of these distinctions of error is not established, nor understood, but with respect to a man who mistakes an illegal carnal conjunction for legal, because Jibtibah signifies the man having carnal intercourse with a woman, under the supposition of the same being lawful to him, in consequence of his supposing something other than that which is necessary to constitute legality as affording an argument of such legality; it is therefore necessary that this mistake should have operated in his mind in order to establish Jibtibah, or misconception; and hence this species of error is not understood, except in the case of a person who is under such misapprehension.—The second species of error is established, where the argument of the legality of carnal conjunction exists in itself, but yet practice cannot take place upon it, because of some obstacle; and this does not depend upon the apprehension or belief of the person who commits the unlawful act; whence this species of error is regarded in respect to all men, that is to say, men who so conceive, and also those who do not.—And punishment drops in consequence of the existence of either of these two species of error, on account of a well-known tradition.
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In a case of error of the second species, the parentage of the child is established in the man who has had such connexion, if he claim such child; but in a case of error of the first species, the parentage of the child is not to be established in the man, notwithstanding his claim,—because, in a case where the error is of the first species the act of generation is positive unwedded, although punishment be not incurred, on account of a circumstance which has reference to the man committing such act, (namely, that of the illegality of the act being misconceived by him, according to his apprehension of it;) but the act of generation, in a case of error of the second species, is not positive unwedded.

Error in respect to the act exists in eight several situations; namely, with—

I. the female slave of a man's mother;—

II. the female slave of his father; —

III. the female slave of his wife;—

IV. a wife repudiated by three divorces, who is in her Edit;—

V. a wife completely divorced for a compensation, and in her Edit;

VI. an Am-Walid, who is in her Edit after emancipation with respect to her master;

VII. the female slave of a master, with respect to his male slave;

VIII. a female slave, delivered as a pledge, with respect to the receiver of such pledge, (according to the Rawhiet-Sabeel in treating of punishment;)—and it is to be observed, that a borrower, in this point, stands in the same predicament with the receiver of a pledge:—

and there is no punish—

—and in all those situations the person who has carnal conjunction does not incur punishment, provided he declare—‘‘I conceived that
CHAP. II. PUNISHMENTS.

"this woman was lawful to me;"—but if he should acknowledge his consciousness that the woman was unlawful to him, he incurs punishment.

ERROR in respect to the subject exists in six situations; namely, with—

I. the female slave of a man's son;

II. a wife completely repudiated by an implied divorce;

III. a female slave sold, with respect to the seller, before the delivery of her to the purchaser;

IV. a female slave Mamboora,—(that is, a slave stipulated to be given in dower to a wife,)—with respect to the husband, before seizin of her being made by the wife;

V. a female slave held in partnership, with respect to any of the partners;

VI. a female slave delivered in pledge, with respect to the receiver of such pledge, according to the Book of Pawnage;

—and in all those situations a person who has carnal connexion does not incur punishment, even though he should confess his consciousness of such woman being unlawful to him.

According to Hanefia, a contract of marriage is a sufficient ground of error, although the illegality of such marriage be universally allowed, and the man entering into such contract be sensible of this illegality. With our other doctors, on the contrary, a contract of marriage is not admitted as a legal ground of error, if the man be sensible of the illegality.—The effect of this difference of opinion appears in a case where a man marries a woman related to him within the prohibited degrees,—as shall be hereafter explained.

If a man pronounce three divorces upon his wife, and afterwards have
PUNISHMENTS. Book VII.

have carnal connexion with her during her Edit, and acknowledge his consciousness of her being unlawful to him, punishment is incurred, because here possession by marriage, which legalizes generation, has been totally annihilated, and hence there can be no error, as the text in the Koran shews that legality is destroyed in this case; and all the doctors coincide in this opinion. But if he were to declare that "he conceived, or supposed, she was still lawful to him," punishment is not incurred, because his apprehension is to be regarded, since the effects of marriage still remain, with respect to the establishment of the parentage of children, and the matrimonial restraint, and alimony; (for if the woman should bear a child, at any period within two years from the date of divorce, the parentage of such child is established in the husband, and she remains under the restraint to which she is subject in marriage, and her alimony also remains incumbent upon her husband;) his apprehension, as above pleaded, is therefore of force to prevent punishment, on account of error by mis-conception. And an Am-Walid, after manumission, and a woman in a state of repudiation by Kboola, or one divorced for a compensation, (who are in their Edit,) stand in the same predicament with a woman repudiated by three divorces, as their illegality is universally admitted, and certain effects of marriage continue during their Edit, as well as in the case of a wife under three divorces.

If a man divorce his wife by implication, saying, "You are "divested," or "you are at your own disposal," and she chuses divorce,—and he afterwards have carnal knowledge of her within the term of her Edit, and should acknowledge that he knows her to be unlawful to him, yet punishment is not incurred; because concerning this case there is a difference among the companions; for Omar holds that the forms above-mentioned are effectual of only a single divorce reversible; and the same in all expressions of divorce by implication: he also holds the rule to be the same, where the husband intends three divorces, as he maintains that here likewise a single divorce reversible only.
only takes place, and that the intention of three divorces is not regarded.

Punishment is not incurred by a man having carnal connexion with the female slave of his son, or of his grandson, although he should acknowledge his consciousness of such female slave being unlawful to him, for in this case the error is by effect, since it proceeds from an argument founded upon the words of the prophet, who said to one with whom he was conversing, "Thou and thine are thy father's;"—and the grandfather is subject to the same rule with the father, as he is also a parent. The parentage also of the child begotten in such carnal conjunction is established in the father aforesaid, who remains responsible to his son for the value of the female slave.

If a person have carnal connexion with the female slave of his father, or his mother, or his wife, and plead his conception that such slave was lawful to him, he does not incur punishment; neither is his accuser liable to punishment:—(but if he should acknowledge his consciousness of the illegality, punishment is to be inflicted upon him, and the same rule obtains where a slave has connexion with the bondmaid of his master,) because between these there is a community of interests in the acquisition of profit; and hence the man who commits the act may in those cases have conceived, with respect to the enjoyment, that this species of usufruct is also lawful to him,—wherefore error by misconception is applicable to him; but nevertheless this is actual whoredom, for which reason punishment is not incurred by the accuser. The law is the same, (according to the Zaahir Rawdhet,) if the female slave, in either of these cases, were to plead her supposing that the act was lawful, without any such plea on the part of the man,—because the carnal conjunction of a man and a woman being one act, it follows that a plea of supposed legality, made by either party, establishes error with respect to both; and hence the punishment of both is abrogated.
If a man have carnal connexion with the bondmaid of his brother, or of his uncle, he incurs punishment, although he should plead that he had conceived her to be lawful to him, because between such relations no community of interest exists. And the law is the same with respect to the female slaves of all other relations within the prohibited degrees, excepting those who are related to the man within the parental degree, (such as his father or his son,) because between him and those prohibited relations no community of interest exists.

If a man engage in a contract of marriage with a woman, and another woman be sent to him, the female relations declaring her to be the woman married to him by such contract, and he have carnal communication with that woman, he does not incur any punishment; but yet he must pay the woman her dower, because Ali once passed a decree to this effect;—and he also subjoined, in his decree, that the woman should observe an Edit:—moreover, the man has proceeded upon apparent proof, namely, the information of the woman’s female relations, with respect to the subject of his error, since men can have no personal knowledge of or acquaintance with their wives prior to the matrimonial engagement; and hence the man in this case is the same as a person acting under a deception. And the accuser of this person does not incur the punishment of slander, because possession by marriage, requisite to legalize generation, is in no respect established. There is an opinion recorded from Aboo Yoosaf, that the accuser is liable to punishment, because the carnal conjunction is to all appearance legal, with respect to the man, according to the information of the woman’s female relations, and of course his accuser becomes liable to punishment, as a decree must be founded upon what is apparent.

* It is almost unnecessary to remark that, from the nature of the Mussulman customs, a man can never be supposed to have seen his wife until after marriage,—the woman being utterly excluded from the sight of all men except her relations within the prohibited degrees.
CHAP. II. PUNISHMENTS.

If a man have carnal connexion with a woman whom he finds in his own bed, punishment is incurred by him, because there can be no error where he paffes any length of time in the company of his wife, and thence his apprehension of this woman being his wife, from the circumstance of his finding her in bed, is not regarded, so as to prevent punishment:—the reason of this is that sometimes a relation of the wife, residing in the house with her, may sleep upon her bed. And the law is the same where the man is blind, because it is always in his power to ask and discover who the woman is; and he may also discover this by the sound of her voice. But yet if he invite the woman to the act, and she consent, signifying that "she is his "wife,"—and he copulate with her, in this case he does not incur punishment, as he is deceived by the woman's declaration and behaviour.

If a man marry a woman whom it is not lawful for him to marry, and afterwards have carnal connexion with her, he does not incur punishment, according to Haneesa; but if he be at the time aware of illegality, he is to be corrected by a Taxeer, or discretionary correction. The two disciples and Sbafei have said that he is liable to punishment, when he marries the woman, being aware of the illegality, because, as the contract has not been executed in regard to its proper subject, it is of course void; for here the woman is not a proper subject of marriage, because the proper subject of marriage, or of any other deed, is a thing which is a proper subject of the effect of such deed; now one of the effects of marriage is the legalizing of generation; but as the woman is among those who are prohibited to the man, the contract of marriage with her is consequently nugatory, in the same manner as a contract of marriage between man and man. The argument of Haneesa is that the contract has taken place in regard to its proper subject, as the woman is a proper subject of marriage, because the proper subject of any deed is a thing which admits of the ends intended being obtained from it; now the end of marriage is
the procreation of children, and to this every daughter of Adam is competent; the case therefore admits of the contract being engaged in with respect to all its effects, and of all its effects being obtained from it; but on account of the prohibition in the sacred text, the legalization of generation is not obtained; and such being the case error is occasioned, as error is a thing which is the appearance of a proof, and not the substance of one; and as, in the present case, the man has perpetrated an offence for which the stated punishment, or Hidd, is not appointed, Tazeer, or discretionary correction, must be inflicted.

If a man commit any act of lasciviousness with a strange woman such as Takhsir*, he is to be corrected by Tazeer, since such acts are illegal and forbidden by the word of God: but a stated punishment is not appointed for them; Tazeer must therefore be inflicted upon that person.

* Penem fricens inter femora.
property of whoredom, as that is defined to be "an act of lust com-
mitted in that which is the object of the passion, completely, and
under such circumstances as to be purely unlawful, and where the
design is the injection of Semen." Haneefa, on the other hand,
arues that this conjunction is not actual whoredom, because the com-
panions of the prophet have disagreed concerning their decrees upon
it, for some of them have said that offenders of this kind should be
burnt, some, that they should be buried alive, others, that they
should be cast headlong from some high place, such as the top of a
bung, and then be stoned to death,—and so forth: moreover, the
conjunction in question has not the property of whoredom, as it
is not the means of producing offspring, so as (like whoredom) to
occasion any default in birth or confusion in genealogy;—besides,
this species of carnal intercourse is of less frequent occurrence than
whoredom, because the desire for it exists only on the part of the
active and not of the passive, whereas in whoredom the desire exists
equally on both sides. As to the tradition cited by Sheiti, it probably
relates to a case where an extraordinary and exemplary punishment is
requisite; or where the perpetrator inculcates and inflicts upon the law-
fulness of the act.

If a man commit beshiality he does not incur Hidd, or stated pu-
nishment, as this act has not the properties of whoredom, for whore-
dom is a heinous offence, as being a complete act of lust, to which
men feel a natural propensity: but this definition does not apply to
copulation with beasts, which is abhorred by an undepraved mind,
(whence it is not held incumbent to cover or conceal the genitals of
brutes;) and men can have no reason for desiring carnal connexion
with brutes, but from the most vitiated appetite, and the utmost de-
pravity of sentiment:—Hidd therefore is not incurred by this person;
but he is to be punished by a discretionary correction, for the reasons
already specified. It is recorded, also, that the beast should be slain any
burnt: this, however, is only where the animal is not of an eatable
species; but if it be of the eatable species it is to be eaten, (according

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to
to Aboe Haneefu,) and not burnt. Aboe Yoosaf holds that it should be consumed with fire in both cases, the perpetrator (where it belongs to another person) remaining responsible to the owner for the value; but yet the burning of it is not absolutely incumbent; nor is it to be burnt for any other reason than as, by this means, all recollection of so vile a fact may be obliterated, and the perpetrator shielded from the disgrace which would attach to him in case of the animal remaining alive.

If a Mussulman be guilty of whoredom in a foreign country, or in the territory of the rebels, and afterwards return into a Mussulman state, punishment is not to be inflicted upon him, on the plea that a man, in embracing the Mussulman faith, binds himself to all the obligations thereof, wherever he may be. The arguments of our doctors on this occasion are twofold;—first, the prophet has said “punishment is not to be inflicted in a foreign land;”—secondly, the design of the institution of punishment is that it may operate as a prevention or warning; now the Mussulman magistrate has no authority in a foreign country, wherefore if punishment were inflicted upon a person committing whoredom in a foreign country, yet the institution would be useless; for the use of the institution is that punishment may be executed; and as the magistrate has no authority in a foreign country, the execution is impossible; whence it appears that the commission of whoredom in a foreign country does not occasion punishment there; and if this person should afterwards come from the foreign territory into a Mussulman state, punishment cannot be executed upon him, because as his whoredom did not occasion punishment at the time of its being committed, it will not afterwards occasion it.

The person to whom the authority of inflicting punishment officially appertains, (such as the Khalif, for the time being, or the governor of Egypt,) when he carries forth his troops upon an expedition, is at liberty to inflict punishment upon any person who may be guilty
guilty of whoredom within his camp, since the perpetrator of the offence is under his immediate authority; but chiefs or commanders of an inferior degree are not at liberty to inflict punishment upon persons guilty of whoredom within their camp, because they are not invested with authority to inflict punishment.

If an alien come into a Mussulman state under a protection, and there commit whoredom with a Zimmee, or female infidel subject,—or if a Zimmee or male infidel subject so commit whoredom with a female alien, punishment is to be inflicted upon the infidel subject, (according to Hanefia) but not upon the alien. This also is the opinion of Mohammed with respect to an infidel subject, where he is guilty of whoredom with a female alien; but if an alien be guilty of whoredom with a female infidel subject, in this case he holds that there is no punishment for either party. There is also an opinion recorded from Aboo Yosaf to this effect; but he afterwards delivered another opinion, that punishment is incurred by all the parties concerned, both by the alien, and the female infidel subject,—and also by the male infidel subject; and the female alien,—for he argues that an alien under protection, during the time that he continues in a Mussulman territory, subjects himself to all the ordinances of the temporal law, in the same manner as an infidel subject does for life, whence it is that punishment for slander may be inflicted on an alien under protection, and that he may also be put to death in retaliation: contrary to punishment for drinking wine, as in his belief the use of wine is allowable. The argument of Hanefia and Mohammed is that a protected alien does not come into a Mussulman state as a resident, but is only brought there occasionally, from some particular motive, such as commerce, and the like, and therefore is not to be considered as

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* Meaning Hidd, which being a right of the law, is a thing of too much importance to be committed to inferior persons: but every person who acts as a commander or master is entitled to inflict Tawer, or discretionary correction.
one of the inhabitants of a Mussulman country; (whence it is that he is at liberty to return into the foreign country, and also that if a Mussulman or an infidel subject, were to murder a protected alien, no retaliation would be exacted of them;) now a protected alien subjects himself to such of the ordinances of the law only as he himself derives an advantage from; and those are all such as respect the rights of individuals; for where he is desirous of obtaining justice for himself from others, he also subjects himself to justice being exacted on him in behalf of others; and retaliation* and punishment for slander are among the rights of individuals, but punishment for whoredom is a right of the law. The argument of Mohammed is that in whoredom the man is the principal, and the woman only the accessary, according to what was before stated; now the prevention of punishment in respect to the principal occasions the prevention of it in respect to the accessary, but the prevention of punishment with respect to the accessary does not occasion the prevention of it with respect to the principal; as in a case, therefore, where a protected alien commits whoredom with a female infidel subject, there is no punishment for the alien, so neither is there any for the infidel subject; but where an infidel subject commits whoredom with a female protected alien, punishment is to be inflicted on the subject, but not upon the alien; and the remission of punishment in respect to the alien does not occasion its remission with respect to the infidel subject, because the woman is only an accessary.—Correspondent to this is the case of a man committing whoredom with a girl who is an infant, or with a woman who is insane, where punishment is inflicted upon the man, but not upon the infant or the lunatick; whereas, if a woman admit a boy or an idiot to commit whoredom with her, neither of the parties is liable to punishment. The argument of Hanefia is that the act of the protected alien is whoredom, because he is equally with Mussulman called to the ob-

* This is an apparent contradiction, as it is said above that there is no retaliation for the murder of an alien: it is to be considered, however, that although a Mussulman, or an infidel subject, be not liable to retaliation for the murder of an alien, yet the alien would be so for the murder of a Mussulman, or an infidel subject.
PUNISHMENTS.

Servance of certain commands and prohibitions, on account of the torments and chastisements of a future state, (according to the Moon-bab-Sabeeb,) although he be not called to the religious observances of the Law; but the woman’s admitting him to commit the fact is the occasion of punishment to her:—contrary to the case of the boy or the idiot, for they are not called, nor under any constraint. A difference similar to this obtains in the case of a man, who being possessed, or under the influence of magick, commits adultery with a woman not under such influence; that is to say, according to Hanesfa, punishment is inflicted; but according to Mohammed it is not inflicted on either of the parties.

If a boy or an idiot commit whoredom with a woman who is of mature age and sound judgment, she consenting thereto, in this case there is no punishment, neither to the boy, to the idiot, nor to the woman;—Ziffer and Shafei maintain that in this case the woman incurs punishment; and there is also one tradition of Aboo Yousaf to the same effect. But if a man who is of mature age and sound judgment commit whoredom with a girl who is an idiot or an infant, capable of copulation, in such case punishment is incurred by the man alone, according to all the doctors. The argument of Ziffer is that a plea on the part of the woman does not occasion the remission of punishment with respect to the man; and in the same manner, a plea on the part of the man does not occasion punishment to be remitted with respect to the woman; because each party is responsible only for their own act. The argument of our doctors is that the act of whoredom proceeds from the man, the woman being no more than merely the subject of it, and hence it is that the man is denounced by the active term in copulation or whoredom and the woman by the passive.

* [In the original] "The man is denounced the Watto, or Zameer, and the woman the Mawrmeen, or Mawmeeen. The two first are the active participles meaning the copulator and the whearemger; the two second are these terms expressed in the feminine participle-passive. It is not easy to convey the full force and meaning of such passages in any translation.

Objection.
PUNISHMENTS.  Book VII.

Objection.—The woman is also termed Zāneea*, as appears in the Koran.

Reply.—The woman is termed Zāneea by a metonymical figure, which sometimes uses the active participle for the passive; or it may on this occasion be employed because the woman is the primary cause of the act of whoredom, by her admitting the man to the commission of it. Punishment, with respect to a woman, therefore, depends upon the circumstance of her admitting a man to commit the act of whoredom with her; but the act of a boy is not whoredom, as whoredom is an act proceeding from a person who has been called upon to refrain from it, and the perpetrator of which is an offender, by his commission of it; and as the act of a boy is not of this nature, it follows that punishment is not incurred by his act.

If a sovereign prince should compel a man to commit whoredom, there is no punishment incurred by that man.—Abū Haneefa had held a prior opinion, that the man is liable to punishment, (and such is the doctrine of Ziffir)—because a man cannot commit the act of whoredom unless the virile member be properly distended, which distention is a token of desire on his part;—compulsion, therefore, cannot be proved with respect to him. The reason for the more recent opinion is that the means of compulsion, (namely, the power of the sovereign,) exists both actually and apparently; and the distention of the virile member is no certain proof of desire, since it sometimes occurs independent of any operation of the mind, as in sleep, for instance; this circumstance, therefore, is of no weight in competition with a fact which admits of actual proof, namely, the compulsion. But if any other person than the sovereign should compel a man to commit whoredom, the man thereby incurs punishment according to Haneefa. The two disciples have said that no punishment is incurred in this case, because the compulsion which is the obstruction to the punish-

* The fem. act, part. from Ziama.
ment in the former cases may also proceed from others than the sovereign: but Hanefia argues that this species of compulsion cannot be supposed to proceed from any except the sovereign;—because no other person is possessed of the means of such compulsion, since the sovereign is enabled to repel it in all inferior persons, as the sovereign authority is instituted by the law for the purpose of repelling tyranny;—and also, because all others stand in awe of the sovereign, and hence no such compulsion can proceed from them. It is to be remarked that the learned in the law impute this difference of opinion between Hanefia and the two disciples to the difference of the times in which they lived,—for in the time of Hanefia others than the sovereign were not possessed of any power which it was not in the sovereign’s power to repel; but in the time of the two disciples every petty ruler possessed a power independant of the sovereign, and hence the compulsion of others than the sovereign afforded (in those times) a ground of doubt sufficient to prevent punishment.

If a man make a confession four times, at four different appearances, [before the Kazee] “that he has committed whoredom with such a woman,” and the woman should thereupon declare, “that he had married her,”—Or, if a woman should thus make confession that “such a man had committed whoredom with her,” and the man should plead that “he had been already married to her,”—in this case no punishment falls upon either party, because the plea of marriage is possibly true, and therefore occasions a demur; but the man owes the woman a dower, since the enjoyment of the woman’s person cannot be admitted gratuitously, as a woman’s person is an object of respect.

If a man commit whoredom with the female slave of another, to such a degree as that the said female slave dies, the man incurs two penalties,—one, the punishment of whoredom, and the other, the payment of the value of such slave to her owner,—because he has
PUNISHMENTS. Book VII.

here committed two offences, whoredom and murder, and hence the law is to be carried into execution with respect to both. It is recorded from Aboo Yoosef that punishment is not incurred by the man because the obligation of responsibility, which lies upon him, is a cause of his property in the slave; and the occurrence of a cause of property, before punishment has taken place, prevents the infliction of it, (as where a thief, for instance, purchases the property stolen of the proprietor before his hand is struck off,) and is the same as if a man were first to commit whoredom with a female slave, and then to purchase her of her master, in which case he incurs punishment, according to Haneefa, but not according to Aboo Yoosef, and so in this case likewise. Haneefa and Mubammed say that the responsibility, in this case, is a responsibility for murder, (in the manner of the Deeyat, or fine of blood,) which does not occasion a right of property [over the slave.]

If a man commit whoredom with the female slave of another, to such a degree that she loses her sight, he owes the price of the said slave to her owner, and punishment drops, because the slave, by the man being thus responsible for her value, becomes his property, and she is still actually existing, wherefore the circumstance of his thus obtaining a property in her occasions a demur sufficient to prevent the punishment.

If a supreme ruler (such as the Khaliif, for the time being) commit any offence punishable by law, such as whoredom, theft, or drunkenness, he is not subject to any punishment, (but yet if he commit murder he is subject to the law of retaliation, and he is also accountable in matters of property,)—because punishment is a right of God, the infliction of which is committed to the Khaliif [or other supreme magistrate,] and to none else; and he cannot inflict punishment upon himself, as in this there is no advantage, because the good proposed in punishment is that it may operate as a warning to deter mankind
mankind from sin, and this is not obtained by a person's inflicting punishment upon himself: contrary to the rights of the individual, such as the laws of retaliation, and of property, the penalties of which may be exacted of the Khulif, as the claimant of right may obtain satisfaction either by the Khulif empowering him to exact his right from himself, or by the claimant appealing for assistance to the collective body of the Mussulmans. And punishment for slander, (although it be in some shape a right of the individual,) is subject to the same rule with other punishments which are a right of God, as the learned have declared that in the punishment for slander the right of God is chiefly considered.

CHAP. III.

Of Evidence in Whoredom, and of Retraction therefrom.

If witnesses bear evidence at a distant period [after the perpetration of the alleged offence,] where there had existed no obstruction (such as their distance from the magistrate, and so forth,) their testimony is not to be credited, except in a case of slander. It is recorded in the Jama Sagbeer,—"If witnesses bear evidence against any person, with respect to theft, or wine-drinking, or whoredom, after a certain period of time shall have elapsed, such testimony is not to be received; but yet the person so accused of theft is responsible for the value of the goods alleged to have been stolen." The principle upon which this case proceeds is, that all evidence, with respect to such punis---

* Arab. Menthādim: this is the participle from Takādim; by which is understood such a distance of time as suffices to prevent punishment. It operates in a way somewhat similar to our statutory limitations.
PUNISHMENTS. Book VII.

ments as are purely a right of God, is vitiated and rendered void by such a delay in the production of it as amounts to Takādim; but with Shafei it is not rendered void, for he considers those punishments as a right of the individual, and supposes evidence under this circumstance to be the same as confession inducing punishment; that is to say, as distance of time [Takādim] does not affect the validity of confession, inducing a distant punishment, so in the same manner distance of time does not forbid the reception of evidence respecting the rights of the individual, because it is apparent that the evidences speak truly; and the same reason holds in such punishments as are purely a right of God.—The argument of our doctors is that a witness in a penal cause has two things at his option, both equally laudable; the first, evidence to an offence committed against the laws; the second, the veiling and concealment of infirmity:—now if it be admitted that the delay in giving in the evidence arose from the charitable motive last mentioned, it follows that any subsequent evidence could only arise from motives of malice, or of private interest, exciting the witness thereto, in which case the witness incurs a suspicion destructive of the validity of his evidence: if, on the other hand, the delay should not have arisen from a wish to cover infirmity, the person giving evidence after such delay must be held unworthy of attention, as having for so long a time neglected that which was incumbent upon him, namely, the giving of evidence;—from all which it follows that, after such a lapse of time as amounts to Takādim, the witnesses are clearly liable to suspicion, either from their falsity, or their unworthiness; and this suspicion impugns the credibility of their testimony. This case is contrary to a case of confession, as men do not bear malice against themselves; and punishment for whoredom, or wine-drinking, or theft, are purely a right of God, whence the retraction of a person who makes a confession inducing such punishments is approved; and for this reason, distance of time in those instances forbids the reception of evidence: but punishment for slander is a right of the individual, as by it the scandal is removed from the person accused by the slanderer.
flanderer; (whence the retractation of a person acknowledging his having flandered another is not admitted;)—and distance of time, in a case which regards the rights of the individual, does not impugn the credibility of the evidence, as the witnesses here do not fall under any suspicion of sinister motives from delay in their testimony, since the claim of the plaintiff is conditional to the admission of evidence concerning the rights of the individual, and therefore their delay in giving evidence is to be attributed to the plaintiff not having called for it. All this is contrary to a case of punishment for theft, in which the evidence of witnesses is invalidated by delay, because the witnesses, by their delay in bearing testimony, become subject to suspicion of sinister motives, as here the claim is not a condition of punishment, since the punishment is purely a right of God, the claim being a condition only in matters of property; and also, because theft is chiefly committed during the night, at a time when the owner of the property is asleep and unwatchful, therefore it is incumbent upon the witnesses to apprise the proprietor of the theft, and to bear testimony to it; but as, in a case of distance of time, or Takádim, they have not so borne evidence, they become criminal and unworthy of credit from their neglect.

TAKÁDIM, or distance of time. As it prohibits the admission of evidence in the first instance, so it prohibits (according to our doctors) the infliction of punishment after the decree of the Kásee: if, therefore, the convicted person were to abscond, after having received a part of his punishment, and, after the lapse of a period sufficient to constitute Takádim, be taken and brought back, the remainder of the correction cannot then be inflicted upon him,—because the infliction of the whole punishment is included in the Kásee’s decree; and a part of it stands in the same predicament with the whole; and as the Kásee, because of distance of time, could not decree punishment, so neither can he, in the same circumstance, decree the infliction of the remainder of the punishment.
Punishments. Book VII.

There are various opinions among the learned respecting the limitation of the Takádim, or distance of time, now under consideration. In the Jamá Ságbier the limitation of it appears to be six months; and the same is mentioned by Tabéée. Haneefa does not prescribe any limitation, but leaves it to the discretion of the magistrate, to be determined according to the customs of each respective age or country. It is recorded from Mohammed that he fixed the limitation of it to one month, as any less space of time falls within the description of Ajil*; (and there is a record from Haneefa and Aboo Yoosaf to the same effect;) and this last is the most approved doctrine, where the witnesses are not at the distance of a month's journey from the Kásee; but where there is a distance of a month's journey between them, their testimony must be credited, because there appears on this occasion an obstruction to their giving evidence, namely, their distance from the Kásee; and hence they are not in such a case liable to suspicion. The limitation of Takádim, in respect to the punishment of wine-drinking, is also the same, according to Mohammed. According to the two Elders the limitation of it is confined to the going off of the smell of the liquor, as shall be hereafter demonstrated.

If witnesses bear evidence against a person "that he has committed whoredom with a certain woman," and the woman be absent, yet punishment must be inflicted on the man: but if witnesses bear evidence against a man that he has committed theft, and the owner of the property stolen be absent, the hand of the accused cannot be cut off. The difference between these two cases is that in theft the previous claim of the plaintiff is a necessary condition to the admission of evidence, but not in whoredom;—and the owner of the property stolen being absent, no claim can be instituted.

* By Ajil is meant a space of time so short as not to admit of its taking the description of delay.—Thus the payment of a debt is termed Mdijil (prompt) where it takes place at any time within a month after it is due.
Chap. III. PUNISHMENTS.

Objection.—It would appear that, in the case of whoredom also, punishment ought not to be inflicted on the man, because it is possible that if the woman were present she might advance some plea productive of a demur.

Reply.—This is a conclusion founded on mere conjecture, and therefore of no weight.

If witnesses give evidence against a man "that he has committed whoredom with a woman whom they do not know," punishment is not to be inflicted upon the man, because it is possible that the woman may be his wife, or his slave, and this, with respect to a Muslim man is most probable. But if a man make confession that "he has committed whoredom with a woman unknown," punishment must be inflicted on him, since, if the woman with whom he committed the fact had been either his wife or his slave, she could not have been unknown to him.

If two witnesses give evidence against a man, that "he has committed whoredom with such a woman, and forced her there-to," and two other witnesses give evidence to the same fact, but with this variation, that "the woman was consenting."—In this case, (according to Haneefa and Zisser) punishment drops with respect to both the parties; and such also is the opinion of Shafii.—The two disciples say that punishment is in this case to be inflicted on the man alone; because the varying witnesses do yet agree in this that the man has committed whoredom, which is the occasion of punishment to him; for the only difference between the witnesses is that one party of them testifies to an additional offence, (namely, his having forced the woman,) which does not occasion the remission of punishment with respect to him: contrary to the case of a woman, with respect to whom punishment drops, because her consent is the condition on which her being liable to punishment depends, and this consent is not proved, because of the contradiction among the witnesses.
nefesse. The arguments of Haneefah on this point are twofold;—
first, the evidence is contradictory with respect to the man, because
whoredom is an act, committed by two persons, the man and the
woman,—and as the evidence is contradictory with respect to the
woman, it must be held so with regard to the man likewise;—
secondly, the two witnesses who bore testimony to the consent
of the woman are slanderers, and consequently their testimony is un-
worthy of any credit.

Objection.—From this it would appear that punishment for
slander is incurred by them, whereas it is not so.

Reply.—Punishment for slander cannot be inflicted on them, on
account of the evidence of the other two witnesses, who have depoed
to force having been used by the man; for the woman can no longer
be considered as married, in the sense which induces punishment for
slander, since the description of married (in this sense) is not appli-
cable to a woman after she has been enjoyed unlawfully, although
she be forced.

If two witnesses bear evidence against a man, that "he has com-
mitted whoredom with such a woman in Kooafa," and two others,
"that he had committed such whoredom with that woman in Bafra," in
this case punishment drops with respect to both the man and the wo-
man, because the circumstance alleged is the act of whoredom, and that
is contradicted by the contradiction with respect to the place. The
evidence to the fact is here in both instances defective, but yet the
witnesses are not liable to punishment for slander, because of a demur,
as the fact of whoredom, to which they bear testimony, is one single
whoredom with respect to the perpetration of it, since the whore-
monger is the same person, and the whore is also the same person, in
the evidence of the contradictory witnesses on both sides, and there
is no difference except with respect to the place in which the fact
was committed. But if witnesses contradict each other, by two
persons bearing evidence that such a man has committed whoredom
with
with such a woman in such a spot of such a house, and by two other persons giving evidence that the man had committed the whoredom with that woman in another spot of the house, in this case punishment is to be inflicted upon that man. This is upon a favourable construction*. Analogy would suggest that punishment is not incurred, since there is also in this case a positive contradiction with respect to the place in which the fact was committed. But the reason for a more favourable construction is that a coincidence between the testimonies may be conceived, by supposing the act to have been begun in one corner of the house, and completed in another corner, in consequence of the motions of the parties; and it is also possible that the act may have been committed in the middle of the house, and a person seeing it from the front may conceive it to be performed in the forepart of the house, and another viewing it from the back part may conceive it to be performed in the back part of the house; and each bears evidence according to his own conception.

If four witnesses bear evidence against a man "that he has been guilty of whoredom with such a woman at sun-rise in Hind," (a place near Koofoa, which is also called the place of Abdal-Ribman,) and four other witnesses give evidence against the man that "he has been guilty of whoredom with such a woman at sun-rise, in Noothla," (which is also a place near Koofoa,) in this case neither the man nor the woman are liable to punishment for whoredom, nor are their accusers liable to punishment for slander. The accused are not liable to punishment for whoredom, because the testimony of the contradicting witnesses must, on one part, be false, although it be impossible to ascertain on which side of the evidence the falsehood lies; and the accusers are not liable to punishment for slander, because it is possible that the evidence on one side may be true; and as this possibility applies equally to both parties, punishment for slander cannot be inflicted upon either.

* That is to say, with respect to the witnesses; for if the evidence be not sufficient to subject the parties to punishment, the witnesses are liable to punishment for slander.
PUNISHMENTS. Book VII.

If four witnesses bear testimony against a woman, that "she has committed whoredom with such a man,"—and it should appear, upon examination made by females employed for that purpose, that the woman is still a virgin, in such case neither of the persons thus accused are liable to punishment for whoredom: nor are the accusers liable to punishment for slander, because the evidence of the females employed to examine the woman accused is a proof which suffices to prevent the infliction of punishment for whoredom upon the parties accused; but it is not a proof sufficient to subject the accusers to punishment for slander*: punishment for whoredom, therefore, is not inflicted on the accused; nor are the accusers liable to punishment for slander.

* Because it is, notwithstanding, possible that the act may have been performed upon the woman, although not to such a degree as to destroy the appearances of virginity.
are reprobate*, or if this character should be affixed upon them by competent proof after they have given evidence, they are not liable to punishment for slander; because, although the evidence of a reprobat person be defective, from his veracity being liable to suspicion on account of the badness of his character, yet he is a competent witness, insomuch that if a Kāsēc issue a decree upon the evidence of a reprobat person, his decree is valid, according to our doctors. The evidence of reprobat persons, therefore, goes to establish a doubtful whoredom, and they are consequently not exposed to punishment for slander; and since, moreover, from the defect in their testimony, on account of their being reprobat, a doubt appears that whoredom has not been committed, the accused are therefore not liable to punishment for whoredom. Shafī'ī dissent from our opinion concerning this case, as he holds a reprobat person to be incapable of being an evidence, and consequently, that he stands in the same predicament as a slave.

If fewer than four persons bear evidence to whoredom, punishment for slander is applicable to them:—this effect is induced, because, although their testimony be good, yet testimony to whoredom is so accounted only where it amounts to evidence; and the testimony of fewer than four persons, in a case of whoredom, is not evidence, so as to be accounted good; wherefore it is slander.

If four persons bear evidence against a man, that "he has been guilty of whoredom," and the Kāsēc should inflict punishment for whoredom upon the parties accordingly, and it should afterwards appear that one of the witnesses is a slave, or has at any time been punished for slander, punishment is incurred by all the witnesses, as the witnesses are on this occasion only three in number. Observe however, that in this case no 'Ariṣa, or fine of damage, is due on account and so also, of the complete number of witnesses, where one of them afterwards proves incompetent: but no fine is due in this case, except

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* Arab. Fāṣī. It is elsewhere rendered majṣṣ; but the term here adopted approaches, perhaps, nearer to the real meaning. Fāṣī signifies a person who neglects decorum in his dress and behaviour, and whose evidence, therefore, is not held to be admissible.
of such flagellation, either from the witnesses, or from the public treasury: but if, in consequence of the evidence, the person accused should have been stoned to death by a sentence of lapidation, the Deity, or fine of blood, is due from the publick treasury. This is the doctrine of Haneefa. The two disciples say that the fine of damage is also due from the publick treasury in the former case. The compiler of the Hadiya remarks that this difference of opinion obtains where the accused happens to be cut by the stripes he has received. The two disciples also hold that if the accused should chance to die in consequence of the correction by scourging, the fine of blood is due from the publick treasury;—in opposition to Haneefa;—and likewise, that if the witnesses should retract from their evidence after the accused has been cut by scourging, or died in consequence thereof, they [the witnesses] become responsible for the fine of damage in the first instance, or the fine of blood in the second. The argument of the two disciples is that, in consequence of the testimony of the witnesses, stripes are to be inflicted generally*, whether they be of a cutting nature or otherwise, since to avoid cutting is not always in the executioner's power; the scourging, therefore, which is due in consequence of the testimony of the witnesses, comprehends both cutting stripes, and also stripes which do not cut, and consequently the cutting is to be referred to the testimony of the evidences, whence they are responsible for the same, where they retract from their testimony. But where the witnesses do not retract, (that is where their evidence is set at nought, not by retraction, but by one of them being afterwards discovered to be incompetent,) the fine of blood is due from the publick treasury, because the act of the executioner is to be referred to the Kāzee, and the Kāzee acts on behalf of the community of Mussulmans, wherefore the atonement for the act falls upon that which is the property of all the Mussulmans, namely, the publick treasury, in the same manner as in a case of wounds, or retaliation. The argument of Haneefa is that as nothing is due in consequence of the testi-

* That is, not restricted to any particular description of stripes.
mony of the witnesses, further than punishment, (by which is understood such a scourging as excites pain, but such as evidently cannot prove destructive, except through the fault of the flagellator, proceeding from his carelessness or incapacity,) the cutting, therefore, is to be referred to him alone, and not to the testimony of the witnesses; but yet (according to the Rawley-Sabbeh) the scourger is not made responsible, lest men should be deterred from the infliction of punishment, by an apprehension of being made answerable for the consequences of it.

If four witnesses bear testimony to an evidence given by four other witnesses, against a man, of his having committed whoredom, punishment is not to be inflicted upon the person so accused, because evidence in support of evidence introduces an increase of doubt, since wherever, in the recital of a fact, the channels of communication are multiplied, the doubt of its truth increases in proportion; and there is in this case no necessity for considering the secondary witnesses in the light of original witnesses. And if the four original witnesses should afterwards come and bear testimony of themselves to the whoredom, in the place where the secondary witnesses had before given their evidence, here also no punishment is to be inflicted on the accused, because their testimony has already been rejected in one shape, in consequence of the rejection of the testimony of the secondary witnesses, respecting 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 for slander is not to be inflicted on either the original or the secondary witnesses, because both are complete in point of number, although punishment for whoredom be not inflicted, on account of a doubt, which is such as suffices in bar of punishment for whoredom, but is not sufficient to subject the witnesses to punishment for slander.
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If four witnesses give evidence against a man, that he has committed whoredom, and he suffer lapidation, and one of the witnesses afterwards retract, punishment for slander is to be inflicted upon him alone, and he is also responsible for one-fourth of the fine of blood. The reason for one-fourth only of the fine of blood being due from him is that three-fourths of the veracity of the evidence remain, in consequence of the evidence of the three remaining witnesses still continuing; by the evidence, therefore, of the witness who retracts, only one-fourth of the veracity is affected.—(Shafei says that the death of the retracting witness is incurred, and not a fine upon his property, according to his tenets concerning witnesses in retaliation, as shall be hereafter shewn in treating of Deyit.)—That punishment for slander is incurred by the witness is the opinion of our three doctors. Ziffer says that punishment for slander is not due, because, if the slanderer be considered as the slanderer of a living person, his slander is rendered void by the death of that person; or, if he be considered as the slanderer of a defunct, the said defunct has suffered lapidation under a sentence of the Kasse, whence originates a demur respecting the propriety of punishment for slander. The argument of our doctors is that evidence to whoredom does not become slander, in consequence of retraction, on any other account than as the evidence is thereby cancelled; the evidence, therefore, at the time of retraction, is rendered slander with respect to the dead; and a person who slanders a married person defunct is liable to punishment for slander. With respect to what Ziffer advances, (that the defunct has suffered lapidation under a sentence of the Kasse, which gives rise to a demur respecting the propriety of punishment for slander,) we reply, that upon the evidence, which is the proof, being cancelled by retraction, the decree of the Kasse, sentencing lapidation, does not give rise to any demur in bar of punishment for slander; wherefore punishment for slander is to be inflicted upon him who retracts from his testimony: contrary to what would be the case if any other than the retracting person were to slander him who had suffered lapidation, as the latter is
is not a Mahjum in respect to any other person, since the sentence of the Kásee against the deceased is, with regard to that other, proper and just.—What is now advanced regards a case where one of the witnesses retracts, after lapidation: but if one of them were to retract before the execution of lapidation, after sentence has been passed by the Kásee, in this case punishment for slander is to be inflicted on all the witnesses; and the punishment of the accused is remitted. This is the doctrine of the two Elders. Mohamined says that, in this case also, punishment for slander is to be inflicted on the retracting witness alone, because the evidence of the witnesses has been corroborated by the Kásee's sentence, and therefore is not cancelled except with respect to the retractör alone,—in the same manner as where the witness retracts after the execution of the sentence.—The argument of the two Elders is, that the infliction of punishment is only a supplement to the sentence of the Kásee; the retractation in the present instance, therefore, is the same in effect, as if one of the witnesses were to retract before the sentence had been passed; (for which reason punishment drops with respect to the accused;) and if one of the witnesses were to retract previous to the Kásee's sentence of lapidation, punishment for slander would be inflicted upon all of them. Ziffer says that in this case also punishment for slander would be inflicted on the retracting witness alone, because his retractation is not of account with regard to any except himself. The argument of our doctors is that the declaration of the witnesses is radically slander, and does not become evidence until it be so rendered by a sentence of the Kásee, passed in conformity to it; and where this sentence has not been passed, such declaration continues to be slander, as it radically was; wherefore punishment for slander is to be inflicted upon all of them.

If true persons bear evidence [to whoredom,] and one of the five retract after lapidation, no penalty whatsoever is incurred by the witness so retracting,—because, four witnesses still remaining, the evidence
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evidence remains complete. But if, afterwards, one of the remaining
four witnesses should retract, punishment for slander is then due upon
both retractors, and each is indebted in one-fourth of the fine of
blood. Punishment for slander is due upon them, because evidence
to whoredom is rendered slander by subsequent retraction, as before
explained; and they are each indebted one-fourth of the fine of blood,
because, by the three persevering witnesses still remaining, three-
fourths of the validity of the body of evidence continues unimpeached,
as the perseverance of those who remain is regarded, and not the re-
traction of those who draw-back, (according to what is said upon
that head in its proper place;) and as only one fourth of the veracity is
destroyed by the retraction of these two witnesses, it follows that
they remain responsible for one fourth only of the fine of blood.

If four witnesses give evidence of whoredom against a man, and
these witnesses be justified by Taxkecat*, and the accused suffer lapi-
dation, and it should afterwards appear that those witnesses were
idolaters, or slaves, (by the purgators retracting their evidence of justi-
fication, and declaring them to be slaves, or idolaters,) in this case the
fine of blood is due from the purgators, according to Hanoea. The
two disciples say that in this case the fine of blood falls upon the pub-
lick treasury. Some hold that this difference exists only where the
purgators, in their retraction, declare that their justification of the
witnesses had been according to the best of their knowledge and be-
lief at that time. The argument of the two disciples is that the pur-
gators have done nothing more than merely speaking in commendation
of the witnesses, in the same manner as if they were to speak in
commendation of the accused, by testifying to his being within the

* That is, by a certain number of other witnesses bearing testimony to the compe-
tency, &c. of witnesses who are giving evidence in any cause, the former being denomi-
nated the Mex-tex, or purgators; the nature of this mode of justification is exhibited at
large in treating of Evidence.
description of *Ibfàn*, in which case nothing is due from them, and so here likewise. The argument of *Haneefa* is, that testimony of the witnesses is not proof, nor worthy of any regard, but through the justification of the purgators; wherefore the justification is, in reality, the efficient cause of the sentence; whence the sentence must be referred and attributed thereto: contrary to their bearing testimony to the *Ibfàn* of the accused, as that state is conditional to a person being considered a *Mabsan*—that is, *married*, under such circumstances as (in case of whoredom) subject him to lapidation. It is also to be remarked that, whether the before-mentioned justifier should pronounce the justification in the proper and formal terms of evidence,— (thus, "We testify that these witnesses are freemen and believers") or not in the formal terms of evidence,—(as thus,—"These are freemen and believers," the effect is in both cases the same, and there is no difference whatever between them; this, however, holds only where the purgators restrict their justification to the *freedom* or *faith* of the evidences, as above; but if they should say, "these witnesses are "*àdils*", and it should afterwards appear that they are *slaves*, in this case the purgators are not responsible for the fine of blood; because *slaves* are, in some instances, of the description of *àdils*—neither are the witnesses, in this case, responsible for the fine of blood, as their declaration does not amount to *evidence*; nor are they subject to punishment for slander, because their accusation was made against a *living* person, but that person is now dead, and his heirs cannot procure punishment for slander to be inflicted on them, as it is not inheritable. If the purgators persevere in their justification, or have unknowingly borne testimony therein, and it should

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* That is, by testifying that the accused is *married*, under such circumstances of *freedom*, and so forth, as (in case of whoredom) subjects a person to lapidation.

† Persons of respectable character, in opposition to *reprobates*.

‡ Because they afterwards appear (from the retraction of the purgators) to be incompetent evidences.
afterwards appear that the witnesses are of an incompetent description, nothing whatever falls on the purgators:—but in this case the fine of blood falls upon the public treasury.

If four persons bear testimony of whoredom against a man, and the Kāzec sentence him to be stoned, and any person should slay him, and it should afterwards appear that the above witnesses were incompetent, in such case, the fine of blood falls upon the slayer, according to a favourable construction of the law:—Analogy would suggest, in this case, that retaliation is incurred, as the slayer has killed an innocent person without cause: but the reasons for a more favourable construction of the law are twofold; first, The Kāzec's sentence of lapidation was, in appearance, regular and valid, at the period of slaying, and hence was established an erroneous admissibility of slaughter: contrary to a case in which the accused is slain before the Kāzec issues his decree of lapidation, as the testimony of the witness is not proof until then:—secondly, The slayer has acted under a conception that the slaying of that man become allowable, he having a confidence in the argument of such permission, namely, the Kāzec's sentence of lapidation; and hence it is the same as where a person slays another, supposing him, from former circumstances, to be an enemy, in which case the fine of blood is incumbent upon that person, and so here likewise.—It is to be observed that the fine of blood thus incurred is a charge upon the estate of the slayer, and does not fall upon his tribe, because it is wilful homicide, for which the tribe is not responsible: and this fine of blood must be discharged within three years, [after the perpetuation of the fact,] as being due on account of homicide. But if no person were in this manner to slay the accused, and he suffer lapidation by the sentence of the Kāzec, and it should afterwards appear that the witnesses were incompetent,—the fine of blood in this case falls upon the public treasury, because the persons who stoned the accused act in conformity with the order of the Kāzec, and hence their act must be referred to the Kāzec; and as, if
the *Kâzee* were to execute the sentence upon the accused with his own hands, the fine of blood would fall upon the public treasury, so also it falls upon the same, where any other person executes such sentence under the *Kâzee*’s authority. This case is evidently contrary to one where the *Kâzee* passes a sentence of lapidation, and another person flays the accused in a different manner, and not by *stoning*; for in so doing he has not acted in conformity to the order of the magistrate.

If witnesses bear evidence of whoredom against a man, declaring that “they had come to the knowledge of it by wilfully looking into “the person’s private apartment at the time of the fact,” yet such evidence is to be credited, nor is it to be rejected on account of the manner in which the knowledge of the witnesses was obtained, as their looking was allowable, in order that they might be enabled to bear evidence; they are therefore the same as *physicians* or *midwives*.

If four witnesses bear evidence of whoredom against a man, and the accused should plead that “he is not a *married* man,” and it should happen that he has a wife who has brought forth a child to him,—(in other words, should deny the consummation of his marriage, after the establishment of all the conditions of it,) he is to be stoned, because the effect of the establishment of the child’s parentage is a consequence of his having had carnal communication with his wife, (whence it is that if he were to pronounce a divorce upon her, a divorce reversible takes place;)—and his being a *married man* is established, on account of the aforesaid effect: and if

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* To explain this it may be proper to remark that a person’s looking into the private apartment of another is an *unlawful act*, which, if it was not justified by the *motive*, would invalidate his testimony.

† Established in him in virtue of his marriage.
the wife should not have borne a child, yet if one man and two women, as witnesses, bear testimony to the marriage of the accused, in this case lapidation is to be inflicted upon him. Shafei says that the accused, in this case, does not suffer lapidation; and this his opinion is founded on his doctrine in the laws of evidence, that “the testimony of women is not admissible, excepting in cases of property.”—Zisser remarks that the circumstance of the accused being a married man, although it appear to be only the condition of the sentence, yet is in reality the cause, as rendering the offence more atrocious; wherefore the sentence must be referred to that circumstance; and this condition being, in reality, the occasion thereof, the evidence of women cannot be admitted in it, any more than with respect to the original offence, namely, whoredom. Thus it is the same as where two infidel subjects of the Mussulman government testify concerning a Mussulman slave, who has committed whoredom, that “his master had emancipated him before the perpetration of the fact,” which testimony would not be admitted, because the Iḥšān of the slave [that is, his being a free married man] is so far a condition of the sentence as to be, in reality, a cause of it. The argument of our doctors is that marriage in a state of freedom is an honourable state, and is repugnant to the commission of whoredom, (as was already stated,) wherefore this circumstance cannot be, in reality, a cause of the sentence. The testimony, therefore, of the witnesses to the Iḥšān of the accused is the same as their testimony in any other case than whoredom; and as their testimony to his Iḥšān would in other cases be credited, so also in a case of whoredom: contrary to the case of the two infidel subjects and the slave, as cited by Zisser, because there the freedom of the slave is proved by the testimony of those two witnesses: but it is not thereby proved that the date of the slave’s freedom was antecedent to the commission of whoredom, either because a Mussulman denies such date,—or because that circumstance would be injurious to a Mussulman. If the witnesses who testify to Iḥšān retract, yet they are not responsible for the fine of blood: contrary to the doctrine of Zisser, according to what was before observed.
CHAP. IV.

PUNISHMENTS.

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Of *Hidd Shirrub*, or the Punishment for drinking *Wine*.

If a *Moslem* drink wine, and be seized whilst his breath yet smells of the wine, or be brought before the *Kâssee* whilst he is yet intoxicated therewith, and witnesses give evidence, that “he has drank *wine,*” punishment for wine-drinking is to be inflicted upon him; and in the same manner, punishment is incurred by him when he makes confession of having drank wine, whilst his breath yet retains the smell; because the offence of wine-drinking is proved upon him, and *Takâdim,* or distance of time*, does not appear, since the flavour of the wine still remains. This doctrine is originally founded upon a precept of the prophet, “*Whoever drinks of wine, let him suffer correction by scourging, as often as he drinks thereof.*”

If a man make confession of having drank wine, after the smell has ceased, in this case punishment is not to be inflicted upon him, according to the two *Elders.* *Imâm Mohammed* maintains that it is to be inflicted. The same difference of opinion obtains in a case where witnesses bear evidence against a man that “he has drank wine” after the smell has ceased. The reason of this diversity of opinion is that *Takâdim,* or lapse of time, forbids the reception of evidence in a case of wine-drinking, according to all the doctors: but *Mohammed* fixes the *limitation* of *Takâdim,* in wine-drinking, to a certain time, namely, *one month,* (according to the most approved authorities,) he conceiving an analogy between this, and a case of *wibrod,* because delay is established by *lapse of time,* and not by the *cessing of a smell;* and

* See the preceding Chapter; p. 35.
the existence or non-existence of a smell is of no weight, as there are other things the flavour of which resembles that of wine. According to the two Elders, on the contrary, Takadim is established by the nonexistence or departure of the smell, for two reasons;—first, a decree of Abdoola Ibn Massood, who, when certain persons brought before him a man charged with drinking wine, directed that "they should examine his breath, and that, if any flavour of wine were discovered, punishment should then be inflicted upon him;" secondly, the existence of the effect (namely the smell,) is an irrefragable proof of wine having been lately drank. And as to what Mohammed advances, that "there are other things the flavour of which resembles that of wine," it may be replied that the difference between the smell of wine, and other articles, may be easily distinguished by one who is possessed of judgment and discernment, nor can any but ignorant persons be doubtful concerning it. Thus, according to Mohammed, confession of wine-drinking is not rendered ineffectual by distance of time, in the same manner as (according to him) confession of whoredom is not rendered ineffectual by distance of time, agreeably to what was before advanced:—with the two Elders, on the contrary,—punishment for wine-drinking is not to be inflicted but on the condition that the smell still remain, because Ibn Massood stipulated that condition, as before stated.

If witnesses seize a drinker of wine * at a time when he is intoxicated, or whilst he still retains the smell of the liquor, and carry him to a city where there is a Kassee, and in the mean time the flavour or the intoxication should cease, before they arrive at the seat of justice, yet in this case punishment for wine-drinking is to be inflicted upon that person, according to all our doctors, because there is an excuse for the delay, analogous to that which is created by distance.

* This case supposes his being seized in some remote place, at a distance from the seat of justice.
of place in a charge of *boredom*; and the witnesses are not suspected where such excuse exists.

If a person be intoxicated by drinking *Naberez*, punishment is incurred by him, because it is related of *Omer* that he decreed punishment for wine-drinking upon a wild *Arab*, who was intoxicated by drinking that liquor.—(The punishment for drunkenness, and the degree of scourging in the punishment for wine-drinking, shall be hereafter explained.)

If the smell of wine be discovered upon a person, or he should vomit wine, yet if witnesses have not actually seen him drinking it, punishment is not incurred, because the smell alone leads but to a very uncertain conclusion, as this appearance may proceed either from the person having drank wine, or from his having fat among wine-drinkers, from whom he may have contracted the smell;—and it is also possible that wine may have been administered to him by force, or menaces, in which case no punishment is incurred.

Punishment for wine-drinking is not incurred by intoxication alone, unless it be known that the person has been intoxicated by the voluntary drinking of wine, or of *Naberez*, because men are sometimes inebriated by the use of articles which are permitted, such as the juice of *Henbane*, or mare’s milk; and men may also be sometimes compelled to drink wine, which is not a punishable offence, when thus committed by compulsion.

Punishment is not to be inflicted upon a wine-drinker, whilst he is intoxicated, nor until his intoxication shall have ceased, in order that the end thereof (namely determent) may be obtained.

* A fermented liquor made by steeping *dates*, *raisins*, &c. in hot water. It is described particularly in another place.
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The punishment of a free person, for drinking wine or other intoxicating liquor, is eighty stripes, on the authority of all the companions; and those eighty stripes are to be inflicted in every respect under the same rules and restrictions as in the case of whoredom, according to what is mentioned under that head: and (according to the Rawâyet Mâshboor,) the wine-drinker must be stripped naked to receive his punishment. It is recorded from Mâbommed that the offender must not be stripped, as nothing concerning the punishment for wine-drinking occurs in the sacred writings, wherefore it is expedient, for the sake of lenity, that a wine-drinker be not stripped to receive correction. The reason for what is recorded in the Rawâyet Mâshboor is that one kind of lenity is already shewn in the number of stripes precribed, those in whoredom being one hundred, whereas in wine-drinking there are only eighty; hence it is not requisite that a second sort of lenity be shewn in the mode of infliction.

If the drinker of wine be a slave, male or female, the punishment for wine-drinking, with respect to such, is forty stripes only, because the state of bondage induces only half punishment, as has been repeatedly mentioned.

If a person make confession to the drinking of wine, or any other intoxicating liquor, and afterwards retract from such confession, punishment is not to be inflicted upon him, as the punishment of wine-drinking is purely a right of God.

Wine-drinking is proved on the testimony of two witnesses; and also by confession once made. It is recorded from Aboo Yoosaf, that two confessions are requisite. But it is to be observed that the evidence of women against men is not admissible in wine-drinking, because the evidence of females is liable to variation, and they may be also suspected of absence of mind, or forgetfulness.
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The degree of intoxication which occasions punishment amounts to this,—that the person so intoxicated be not able to distinguish what is said to him in any shape;—nor to know a man from a woman. The compiler of the Hediyə observes that this is the doctrine of Haneefa. The two disciples have said that the degree of drunkenness which induces punishment is sufficiently found in the intoxicated person speaking confusedly and indistinctly, as it is from this that drunkenness is generally understood. Many doctors agree with the two disciples in this point. The argument of Haneefa is that the drinking of wine is among the causes of punishment, wherefore it is to be noticed only in the excess; for in acts which are causes of punishment the excess of them only is regarded, on account of seeking a pretext for the purpose of averting punishment; and excess of drunkenness appears in the intoxication so far overpowering the reason as not to leave the person a capacity of distinguishing one object from another.——

(In ascertaining the illegality of intoxication produced by drinking any other liquor than wine, regard is had to what the two disciples maintain concerning the punishment for drunkenness produced by wine-drinking.)—Sbeeti, in the punishment for drunkenness, has regard to the appearance of the effect produced by the wine, in the intoxicated person’s walking, or other actions, by his staggering or turning giddy when he attempts to walk; but our doctors say that such effect may proceed from different causes, as they sometimes do not attend drunkenness, and sometimes occur in other cases, (such as weakness for instance,) wherefor this species of effect is not regarded.

If a person, during a fit of intoxication, should make confession of anything which occasions punishment, (such as boredom for instance,) no punishment is to be inflicted upon him, as in such a confession, there is apprehension of falsehood, and this apprehension is to be regarded so far as to avert punishment, since punishment [Hidel] is purely a right of God:—it is otherwise, however, in punishment for Vol. II.

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slander; for if a man in a state of intoxication were to make confession of slander, punishment for slander must be decreed upon him, because this is not purely a right of God, but is also a right of the individual, and therefore a state of drunkenness is here the same as a state of sobriety, for the sake of inflicting a penalty, in the same manner as in all other matters, such as divorce, manumission, and so forth.

If a man, during intoxication, should apostatize from the faith, his wife is not thereby divorced from him, because infidelity depends upon what may be a person's belief, and that cannot be ascertained during drunkenness.

C H A P. V.

Of Hidd Kazaaf, or the Punishment for Slander.

Kazaaf, in its primitive sense, simply means accusation. By Kazaaf, in the language of the law, is understood a man insinuating a charge of whoredom against a married man or woman; the person so acting being termed the Khaif, or slanderer; and the man or woman so scandalized the Makzaaf, or slandered.

If any person expressly accuse of whoredom a man or woman who is married, in such case, if the accused require the magistrate

- Without producing the number of witnesses requisite to prove the charge.
to pass sentence of punishment for slander upon that person, the magistrate is bound to order its infliction.

The punishment for slander is eighty stripes, if the slandered be free, because God has so commanded in the Koran, saying, — “But as to those who accuse married persons of whoredom, and produce not four witnesses, them shall ye scourge with fourscore stripes.” And the conditions upon which this punishment is to be inflicted are twofold; — first, That the accused make requisition thereof, because of his right being involved in it, in as much as scandal is by that means removed from him; — secondly, That the accused be a married man, this being particularly specified in the text already quoted.

It is necessary that the eighty stripes [or strokes] be inflicted on different parts [or limbs] of the offender, in conformity to what has been already advanced upon that subject with respect to the punishment for whoredom: but it is to be observed that the person suffering this correction is not to be stripped naked, because the occasion of the punishment is not absolutely certified, since it is possible that the accuser may have spoken truly, for which reason it must not be inflicted with severity, as in punishment for whoredom. The outer garment or robe, however, together with any clothes which are stuffed or quilted, must be removed, because such a covering would prevent a person from feeling his punishment.

If the accuser be a slave, the punishment for slander with respect to him is forty stripes; as bondage induces only half punishment,—according to what has been before repeatedly observed upon that head.

The state of marriage of the slandered person [which is a requisite condition of punishment to the slanderer] requires that the

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he or she be free, of sound judgment, of mature age, and a Mufful-
man; and also of chasté repute; that is to say,—free from any suspi-
cion of adultery: there are, therefore, five conditions required in it;
first,—The freedom of the accused, because the word of God says,
"Upon them," (that is upon female slaves) "is due half the
"punishment that is due upon Mahsanas,"—Where the word
Mahsanas, by the context, implies free women, in opposition to slaves,
whence it appears that the term married [Mahsan] here applies only
to free people;—secondly, Sanity of intellect, and, thirdly, Ma-
turity of age,—because infants and idiots are not liable to be scandalized,
as whoredom cannot be proved upon such;—fourthly, If him, be-
cause the prophet declared, "A Polytheist is not a Mahsan:" and
fifthly,—Chastity, because no scandal attaches to any other per-
sons than those who are of chaste repute, and the accuser of an
unchaste person, moreover, speaks truly.

If a person deny another's parentage, as if he were to say to him,
"Thou art not the son of thy [reputed] father!" such person thereby
incurs punishment for slander: this, however, is only where the
mother of the person thus addressed is a married woman, because such
denial is a positive accusation with respect to the mother of that per-
som, since the legitimacy of a child cannot be denied unless it be
begotten in whoredom.

If one person, in the heat of passion, say to another, "Thou art
"not the son of such-a-one," and the person mentioned be his fa-
ther, and his descent be established as from him, in this case the
person so speaking incurs punishment for slander. But if these words
be spoken in any other circumstance than the heat of passion, punish-
ment for slander is not incurred by the speaker, because such words,
if spoken in wrath, imply malicious and wanton abuse, whereas, if
uttered in a calm and deliberate moment, they may mean no more
than an upbraiding, by denying any likeness between the person
spoken
spoken to and his father, in point of goodness of disposition, such as benevolence and so forth.

If a man say to another; "Thou art not the son of such-a-one," and it should happen that the person named is the grandfather of him who is thus addressed, the speaker does not incur punishment for slander, because his assertion is literally true. And, in the same manner, if a man should declare another to be the son of one who is his grandfather, he does not thereby incur punishment for slander, because the child's child is metaphorically referred to the grandfather, and is called his child.

If a man call another "a son of a whore," and it should happen that the mother of him who is thus addressed is dead, and had been a married woman, in such case, if he [the son] require punishment for slander to be inflicted upon the speaker, the same must be inflicted accordingly, because the speaker has slandered a married woman after her death. It is to be observed, however, that a right to demand punishment for slander, in behalf of a deceased person, belongs only to one in whose parentage a flaw is created by the imputation, and this is either the parent or the child, because scandal attaches to the child of the accused, and hence the slander applies to the child also in effect. According to Saba, any heir may demand punishment for slander in behalf of a person deceased, because punishment for slander is held by him to be a matter of inheritance, as shall be hereafter demonstrated. According to our doctors, on the other hand, the power of demanding punishment for slander in behalf of a person deceased is not in the way of an inheritance, but for a reason already intimated, that the scandal arising from the slander attaches to the deceased;—whence it is that the right to demand punishment for slander on behalf of a defunct appertains to one who may be excluded from inheritance by the murder of the person from whom he inherits; and that it also appertains to the child of the daughter, in the same manner.
manner as to the child of the son, (contrary to the opinion of Mohammed;) and also, that it appertains to the child's child during the lifetime of the former, (contrary to the opinion of Ziffer;)—and so also, that if the deceased person who was slandered were married, it is lawful for that person's child to demand the punishment for slander, although such child should be an infidel, or a slave. This last is also contrary to the opinion of Ziffer, who argues that if the right of demanding punishment for slander, in behalf of a defunct, were to rest with the child, being an infidel, it must so appertain, either in the manner of an inheritance, or on account of his being a party, because of the slander extending to him by effect,(since the scandal arising from it attaches to him;) and both these inferences are unsupported; the first, because punishment for slander is not a matter of inheritance; and the second, because, as an express accusation of whoredom made against the child does not induce punishment for slander, (since an infidel cannot be a married person in the sense which subjects the accuser to punishment,) so, in a case where the slander is established with respect to him by effect only, it does not induce punishment a fortiori.—Our doctors, on the other hand, argue that, in the case in question, the slanderer, by accusing a married person, has fixed a stain upon the child, for which he will seek satisfaction by punishment for slander:—the principle upon which this proceeds is that the circumstance of the accused being a married person is made a condition [of punishment upon a slanderer] in order that, in the charge of whoredom, the imputation of a stain upon him may be completely established, after which such imputation of a stain descends to his child; and such is the case in the present instance: and although the child be an infidel, yet infidelity does not prevent a claim of right: contrary to a case where an express accusation is advanced against the child himself; for in this case punishment for slander is not incurred, because here the imputation of a stain does not completely exist, as marriage (in the sense which would induce punishment for slander,) does not exist with respect to the accused, on account of his being an infidel.

A slave
A slave is not permitted to demand punishment for slander upon his master,—where the latter has slandered his mother, being a married woman;—nor does it belong to a son to demand punishment for slander upon his father,—where the latter has slandered his mother, being a married woman;—because a master is not liable to any chastisement on account of his slave, nor a father on account of his son; whence it is that retaliation is not executed upon a father on account of his son, nor upon a master on account of his slave. But if the mother should have another son by another father, that son may demand punishment for slander to be inflicted, on behalf of his mother, upon the father aforesaid, because the occasion for punishment, (namely slander,) is in that case fully established, and the obstacle to the demand of it does not exist in the person who demands it.

If any person accuse another of whoredom, and the person so slandered die, punishment for slander is not incurred. Shafei maintains that punishment is not to be remitted. And in the same manner, if the slandered person should die after the infliction of a part of the punishment upon the slanderer, the remaining part thereof ceases, according to our doctors.—Shafei alleges that it does not cease. This difference of opinion obtains because punishment for slander is a matter of inheritance, according to Shafei, whereas according to our doctors it is not so. It is to be observed that there is no difference of opinion concerning the punishment for slander being a right of God, and also a right of the individual;—because the punishment for slander has been ordained by the law for the purpose of removing scandal from the person slandered, and the advantage results solely to the slandered, on which account, punishment for slander is a right of the individual;—and it has also been ordained for the purpose of determent, (whence punishment for slander is termed Hidd*,) and

* See the definition of Hidd in the beginning of this book.
the design of the institution is to purify the world from sin, and this demonstrates that punishment for slander is a right of God:—some of the rules in it, moreover, prove punishment for slander to be a right of the individual, such as that "it cannot be decreed but "where some person sues for it," which is a right of an individual;—and, on the other hand, some of its rules prove punishment for slander to be a right of God, such as, that "the execution of it is committed "to the magistrate, and not to the person slandered."—In short, in the punishment for slander there are two contending principles; and such being the case, Shafei gives the first principle the preference, namely, the right of the individual, considering that as superior to the right of God, the right of the individual being preferable, because of his being necessary, whereas God is not necessary: our doctors, on the other hand, give the second principle the preference, and hold it to be the superior, because in whatever degree the right of the creature may be concerned, the Creator is the surety, and the guarantee thereof; and hence the conversation of the rights of the individual is therein obtained: but the case is not the same in the reverse of this proposition, because there is no authority to exact the right of God, but in the way of a vicarious delegation. These different tenets, as held by each party, are notorious; and from them proceeds a contradiction of opinion respecting a variety of cases in punishment for slander. Thus, according to Shafei, punishment for slander is an inheritance; but in the opinion of our doctors it is not so, as inheritance obtains only in the rights of the individual, and not in the rights of God.—Again, the remission of it is not approved by our doctors; but according to Shafei it is approved: and again, it is not lawful to accept of any thing in lieu of punishment, according to our doctors; but according to Shafei this is lawful. It is recorded that the opinion of Aboo Yoosaf respecting remission is the same with that of Shafei.

Confession of slander, can-

If a person make confession of slander, and afterwards retract from such
such confession, his retraction is not to be credited, because, as the right of the slandered person is therein concerned, it is to be supposed that he will falsify the retraction:—contrary to such punishments as are purely a right of God, where the retraction must be admitted, as there is no person concerned to oppose the veracity of it.

If a man were to call an Arab a Nabatbean *, punishment for slander is not incurred by him, because he is here supposed only to speak comparatively,—implying merely that the person he addresses is a Nabatbean in badness of disposition, or in want of virtue: and in the same manner, if a man were to say to an Arab "Thou art not an "Arab," no punishment would follow for the same reason.

If a man say to another, "O son of the rain," he is not a slanderer, because these words may be considered as implying purity and softness of manners, as rain is distinguished by the qualities of purity and softness.

If a man, in speaking to another, should declare him to be the son of any of his parental relations other than his father, such as his maternal or paternal uncle, or his stepfather, he is not a slanderer, because it is common to bestow the appellation of father upon each of these relations, in the same manner as upon the natural parent.

If a man, being in anger, say to another Zinte-secal-Jiblee †, and should plead that he thereby meant "you climbed up the hill," yet punishment for slander is to be inflicted on him, according to the two Elders. Mohammed maintains that punishment is not to be inflicted

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* The Nabatbeans are a tribe upon the confines of Judd, remarkable for the barbarity and ferocity of their manners.

† This may be either translated "you committed whoredom in the mountain," or "you ascended the mountain," as the term Zima signifies not only whoredom, but also climbing, or ascending."
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on him, because the word Zinte means ascending, in its literal sense, and the mention of a mountain proves that such is intended by it. The argument of the two Elders is that Zinte is used to express whoredom also; and the circumstance of anger proves that by the word Zinte whoredom is intended; wherefore punishment is to be inflicted, in the same manner as if the term Zinte had been used without any mention of a mountain, and he were to say that by Zinte he meant ascent.

If one man were to say to another Zinte ali-al fiblee *, according to some doctors punishment for slander is not incurred by him, because the mention of a mountain, in this place, demonstrates that by Zinte he meant ascending; but according to others, punishment for slander is incurred, because a situation of passion and abuse proves the meaning of the speaker to be whoredom.

If one man should say to another "Thou art a whoremonger," and the other should answer "nay, but thou,"—they both incur punishment for slander, as attempting each to fix an imputation of whoredom upon the other.

If a man should say to his wife "Thou adulteress!" and she should answer, saying, "Nay, but thou!" punishment for slander is incurred by the woman: and there is no Ladn in this case; because the husband and wife are both equally accusers; but the accusation advanced by a husband against his wife induces Ladn; and that by a wife against her husband induces punishment for slander; and punishment for slander is here first inflicted upon the woman in order to prevent Ladn, as a person who has suffered punishment for slander is incapable of making Ladn; for if this arrangement were reversed,

* Diterally, "You ascended upon the mountain," or, "You have committed whoredom upon the mountain." The word al [upon] is the only difference between this and the preceding case.
(that is to say, if the Latn were previously required of the woman,) neither the Latn nor the punishment would drop: the punishment, therefore, is to be first inflicted, in order that Latn may be prevented; for it is laudable to seek a remedy by which Latn may be avoided, because that is also punishment in effect *. But if the wife; in the example here recited, were to reply to her husband, "I have com-
 "mitted adultery with you," in this case there is neither punish-
 ment for slander, nor Latn; for there is a doubt concerning both puni-
 shment and Latn, as it is possible that the woman may allude to a
 fact of whoredom committed before marriage, in which case puni-
 shment for whoredom would be incurred by the woman, and not
 Latn, the having, by her reply, confirmed the assertion of her hus-
 band, in thus imputing whoredom to him; but by the husband
 nothing would be incurred, as he does not confirm her assertion: and
 on the other hand, it is also possible that she may allude to carnal
 connexion after marriage, as if she were to say, [in explanation,]—
 "My adultery consisted in your having connexion with me, after our
 "marriage, against my will," (and this, in such a situation †, is the
 most probable meaning of her words,) in which case Latn would be
 incumbent upon the woman, and punishment for slander would not
 be incurred by her, as the accusation is made by the husband, and not
 by the wife: and in consequence of these two contradictory possi-
 bilities, a doubt exists equally with respect to Latn and punishment for
 slander; wherefore neither is to be inflicted on.

If a man should have acknowledged a child born of his wife, and
should afterwards deny it, in this case Latn is incumbent, because the

* And if the wife were first required to make Latn, and the punishment for slander
(which the Latn would not prevent,) were afterwards inflicted on both parties, she would
(by this mode of proceeding) suffer, in effect, two punishments, which is unlawful. To
understand this rightly it is necessary to remark that the imposition of an oath is considered
as a violence or hardship amounting to punishment.

† Of retribution and seduction.
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Parentage of the child has been established in him by his previous acknowledgment, and by his subsequent denial an accusation is implied with respect to his wife, who is the mother of the child; he must therefore make Lahn. But if he should first deny the child, and afterwards acknowledge it, in this case punishment for slander is to be inflicted upon him, because when he thus falsifies, Lahn is prevented, as Lahn is a sort of punishment imposed from the necessity of the case, owing to a mutual falsification, * in which punishment for slander is the original thing, and hence, in a case where the mutual falsification is done away †, that which is the original must be put in force. The parentage also of the child is established in this man, in both these cases, since he has acknowledged it, whether such acknowledgment be made before denial, as in the former instance, or after denial, as in the latter.

Objection.—In the former instance, upon Lahn becoming incumbent, it should follow that the parentage of the child is not established.

Reply.—Bastardy is not a necessary consequence of Lahn, for Lahn may be imposed without bastardizing the child, in the same manner as where a man denies a child after a long lapse of time from the period of the birth, in which case Lahn is incumbent, and the child is not bastardized, but its parentage remains established;—as, on the contrary, a child may be bastardized in a case in which Lahn is not incumbent; as where a husband denies a child born of his wife, who is a slave, in which case the child is bastardized, but Lahn is not incumbent ‡.

* Where the wife denies the husband's assertion, and the husband denies the chastity of his wife.

† By one of the parties confessing the other to be in the right; as the husband here does, by acknowledging the child after having denied it.

‡ Owing to the wife being a slave.
If a man were to say to his wife "This is neither my child, nor "yet yours," in this case Lathan is not incumbent, nor is punishment for slander due, as the husband here merely denies the child being born of his wife, and a husband is not a slanderer by such denial.

If a man accuse of whoredom a woman who has children, the father of whom is unknown,—or if he should so accuse a woman who has made Lathan, in consequence of any of her children having been denied [by her husband], whether such children be living or not,—in neither of these cases is punishment for slander incurred, because the signs of whoredom are found with the woman, namely her children, who are without any acknowledged father: the reputation of this woman is therefore questionable, on account of these signs; and perfect chastity of repute in the accused is one condition of punishment for slander being incurred by the accuser. But if a man were to accuse of whoredom a woman who has made Lathan in consequence of an imputation of adultery made against her by her husband, and not on account of his denial of her children, in this case punishment for slander is to be inflicted upon the accuser, since here no signs of whoredom are found with the woman.

If a man have unlawful commerce with a woman in whom he has no right of cohabitation*, punishment for slander is not to be inflicted upon his accuser, because chastity of repute is not applicable to the accused, (and this is conditional to his being married, in the sense which induces punishment for slander upon the accuser,)—and also, because the accuser in this instance speaks truly.

It is to be observed as a rule, that punishment for slander is not incurred by the accusation of any person guilty of such a carnal concubinage of a woman who has unlawful commerce with a woman is not slander, under certain restrictions.

* There are many cases of this description which do not amount to whoredom, as may be seen under the head of Erroneous Connexion, &c.
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Junction as is in its own nature unlawful, because the term whoredom [Zinna] signifies a carnal junction of this description:—but where a person forms such a carnal connexion as is unlawful on some other account, punishment for slander is incurred by the accusation of him, as a carnal connexion of this description is not whoredom.—The connexion of a man with a woman who is not his property in any shape whatever, (such as a strange woman,) or with one in whom he has no property in some one shape, (as in a partnership slave, for instance,) is unlawful in its own nature; so also is his connexion with a woman who is his slave, but who is one with whom cohabitation is unlawful to him by a perpetual illegality, (such as his foster sister;) but his connexion with a slave with whom cohabitation is unlawful to him by such an illegality as is not of a perpetual nature, (as in the case of one with whose sister he cohabits, either as his wife, or as his slave,) is unlawful, on another account *. Aboo Hancifa, (in the case of illegal cohabitation under a perpetual illegality,) makes it a condition † that the perpetual illegality be universally admitted and established upon the authority of the most generally accepted traditions, so as to be determined and known beyond all doubt or dispute: for example, if a man were to accuse another, who had carnal connexion with a partnership female slave, in this case punishment for slander is not to be inflicted upon the accuser, because the accused appears to have committed the act with one who is his property in one shape, but not in another. But if a man were to accuse a person who has cohabited with his female slave, being a Pagan, or with his own wife during her courses, or with his Mokatiba, punishment for slander is incurred by the accuser, because here the illegality (supposing the existence of the right of property,) is merely of a temporary nature, continuing only until the removal of

* That is to say, although it be not unlawful in its own nature, yet it is made so by circumstances: but this is not a perpetual illegality, as the prohibition (in the instance here cited) would be removed by the death or other means of removal of the sister: contrary to perpetual illegality, which existing in the subject herself, can by no means be removed.

† Of the act amounting to whoredom.
those obstacles, (namely Paganism, or the course, or the contract of Kitābat;)—this illegality, therefore, is illegality on another account, and hence the act is not wilfully done. It is recorded from Abū Yoosaf that the carnal conjunction of a man with his Mokātība occasions the destruction of Ḩāfīn in him; and such is also the opinion of Żilfer, because a Mokātība is not her owner’s property in respect to carnal enjoyment, (whence it is that if a master commit that act with his Mokātība, he becomes responsible for her Akīr:*)—our doctors, on the other hand, observe that the person of the Mokātība is the property of her master, but that the enjoyment thereof (with respect to the master) is illegal on another account †, since it is an illegality which continues only until such time as the Mokātība appears unable to pay her ransom, or the contract of Kitābat be broken.—If a man accuse a person who has had carnal connexion with his female slave, being his sister’s sister, punishment for slander is not due upon the accuser, because carnal connexion with this slave is prohibited to the master by a perpetual illegality: and this is approved doctrine.

If a person accuse a deceased Mokātīb who may have left effects sufficient to discharge his ransom, yet punishment for slander is not due upon the accuser, because here is a doubt with respect to the perfect freedom of the Mokātīb, the companions differing in opinion upon this point.

If a person accuse a Mussulman convert, who, whilst yet a Pagan, had married his mother, punishment for slander is to be inflicted upon the accuser, according to Ḥanefīa;—but the two disciples allege that it is not due. The foundation of this difference of opinion is that the marriage of a Pagan with his own mother is approved among

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* Meaning the portion which is to be paid to her in the manner of a donor.

† That is, not in its own nature, but occasioned by circumstances.
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the Pagans, according to Haneefa,—but the disciples hold that it is not approved; as was explained at large in the book of Marriage.

If an infidel, residing under protection in a Musulman state, should accuse a Musulman, punishment for slander is incurred by him, because, in punishment for slander, the rights of the individual are concerned, and the protected infidel has undertaken to pay a due observance to the rights of individuals, since, as he himself desires to be screened from injury, it follows that he undertakes that he will not offer injury to others; and also, that he subjects himself to the consequence, if he should do so.

If punishment for slander be inflicted upon a Musulman, his evidence cannot afterwards be received, although he should repent.—Shafei alleges that, in case of repentance, the credibility of his evidence is restored. This point will be further explained in treating of Evidence.

If an infidel suffer punishment for slander, his evidence becomes inadmissible, not only with respect to Musulmans, but also with respect to Zimees,—because competency in evidence appertained to him with respect to all of his own description, (namely, Zimees,) but his evidence is thenceforth to be rejected,—rejection of evidence being one of the consequences of punishment for slander.—But if this infidel should be afterwards converted to the faith, his evidence then becomes admissible with respect to both classes, (that is, both Musulmans and Zimees,) because, upon his embracing the faith, he obtains, de novo, a competency in evidence which did not before exist, and the rejection of which, therefore, is not a consequence of the punishment for slander: contrary to where a slave suffers punishment for slander, and is afterwards emancipated; for here his evidence still

* Namely with respect to Musulmans.
continues inadmissible, since, as he was not competent to appear at all as a witness, during his slavery, so as that the rejection * of his evidence might be the consequence of his having suffered punishment for slander, this circumstance will operate to that effect after his emancipation.

If a single stroke be inflicted on an infidel on account of slander, and he should then embrace the faith, and the remainder of the punishment be afterwards inflicted, in such case his evidence is admissible, because the rejection of evidence is the means of rendering punishment entire and complete, and is therefore a manner of punishment; but as the degree of punishment inflicted after his having embraced the faith is only a partial correction, and not what can be properly termed punishment, the rejection of evidence is not to be considered as a manner of it †.—It is recorded from Aboo Yoosaf that his evidence must for the future be rejected, because the degree of punishment inflicted subsequent to his conversion is the greater proportion of it, and the smaller is a dependent of the greater. But the former is the more approved doctrine.

If a man commit whoredom at several different times, or repeatedly drink wine, and the punishment for either be afterwards inflicted, the single punishment, in either instance, is considered as answering to all the repetitions of offence; and so also, if a person were repeatedly guilty of slander, and punishment for slander be afterwards inflicted on him. The ground of this, in the case of whoredom and wine-drinking, is that the punishment in both these

* Meaning the inadmissibility.
† This strange sophistry turns entirely upon the meaning of the term Hidd, which is defined to be a certain stated correction completely executed, any thing short of this not being Hidd [punishment], but only chastisement.
instances is purely a right of God, and the design, in the infliction of it, is to deter people from the perpetration of such offences; and a probability of this end being obtained is established by a single infliction of punishment, wherefore the obtaining of it by another infliction of punishment is dubious*; and hence punishment cannot be inflicted a second time, because of this doubt: contrary to where a person commits whoredom, and is also guilty of slander, and of wine-drinking, for in this case a punishment is to be inflicted separately for every distinct species of offence, because each of these acts is of a nature different from either of the other two, and the design of each of them is different, wherefore, in the punishment of such acts there cannot be any coalescence: and with respect to slander, in the punishment of it the right of God is held by our doctors to be predominant, whence the same arguments apply to it as to whoredom and wine-drinking. Shafei maintains that, in the case of repetition of slander, if the slandered person be different, (as if the first person slandered were Zeyd and the second A'amar) or, if the person with whom the slandered is accused be different, (as if a man were to accuse Zeyd of whoredom first with one woman and afterwards with another,) in this case there is no coalescence of punishment, but for each slander a separate punishment must be inflicted; for according to Shafei, in the punishment for slander, the right of the individual is predominant.

* Because having been, probably, already obtained, it is, (in that case) impossible that it should be obtained a second time
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Of Ta'zeer, or Chastisement *

Tāzeer, in its primitive sense, means prohibition, and also instruction; in law it signifies an infliction undetermined in its degree by the law, on account of the right either of God, or of the individual; and the occasion of it is any offence for which Hidd (or stated punishment) has not been appointed; whether that offence consist in word or deed.

Chastisement is ordained by the law, the institution of it being established on the authority of the Koran, where God enjoins men to chastise their wives, for the purpose of correction and amendment; and the same also occurs in the traditions. It is moreover recorded that the prophet chastised a person who had called another perjurer; and all the companions agree concerning this. Reason and analogy moreover both evince that chastisement ought to be inflicted for acts of an offensive nature†, in such a manner that men may not become habituated to the commission of such acts; for if they were, they might by degrees be led into the perpetration of others more atrocious. It is also written in the Fatheee Timoor-Tasbee of Imam Sirukhib, that in Tāzeer, or chastisement, nothing is fixed or determined, but

* It is difficult to separate the ideas of chastisement and punishment.—The law, however, considers them as being essentially distinct, since the degree of Hidd (or punishment) is specified by the law itself, whereas, Ta'zeer (which for distinction's sake we render chastisement) is committed to the discretion of the magistrate, and for this reason it is elsewhere rendered discretionary correction.

† Meaning petty offences.

that
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that the degree of it is left to the discretion of the Kānī, because the design of it is correction, and the dispositions of men with respect to it are different, some being sufficiently corrected by reprimands, whilst others, more obstinate, require confinement, and even blows.

In the Fatwāe Shafee it is said that there are four orders or degrees of chastisement; — first, the chastisement proper to the most noble of the noble, — (or, in other words, princes, and men of learning,) which consists merely in admonition, as if the Kānī were to say to one of them, "I understand that you have done thus, or thus," so as to make him ashamed; — secondly, the chastisement proper to the noble, (namely commanders of armies, and chiefs of districts,) which may be performed in two ways, either by admonition, (as above,) or by ĥirr, that is by dragging the offender to the door and exposing him to scorn; — thirdly, the chastisement proper to the middle order, (consisting of merchants and shop-keepers,) which may be performed by ĥirr, (as above,) and also by imprisonment; and fourthly, the chastisement proper to the lowest order in the community, which may be performed by ĥirr, or by imprisonment, and also by blows.

It is recorded from Aboo Yoosaf that the sultan may inflict chastisement by means of property,—that is, by the exaction of a small sum in the manner of a fine, proportioned to the offence; but this doctrine is rejected by many of the learned.

Iṣmā‘īl-Timoor-Tasheeq says that chastisement, where it is incurred purely as the right of God, may be inflicted by any person whatever; for Aboo Ŧafir Hindoodnee, being asked whether a man, finding another in the act of adultery with his wife, might slay him,

* That is, where it is incurred by an offence committed merely against the law, and not affecting an individual.
replied, "If the husband know that expostulation and beating will "be sufficient to deter the adulterer from a future repetition of his "offence, he must not slay him; but if he see reason to suppose "that nothing but death will prevent a repetition of the offence, in "such case it is allowed to the husband to slay that man; and if the "woman were consenting to his act, it is allowed to her husband "to slay her also;"—from which it appears that any man is em- "powered to chastise another by blows, even though there be no ma- "gistrate present. He has demonstrated this fully in the Moontaffee; "and the reason of it is that the chastisement in question is of the class "of the removal of evil with the band, and the prophet has authorised "every person to remove evil with the band, as he has said "Whosoever "among ye see the evil, let him remedy it with his own band; "but if he be unable so to do, let him forbid it with his tongue;"—(to "the end of the speech.)—Chastisement, therefore, is evidently con- "trary to punishment, since authority to inflict the latter does not "appertain to any but a magistrate or a judge.—This species of chastisement is also contrary to the chastisement which is incurred on "account of the right of the individual, (such as in cases of slander, and "so forth,) since that depends upon the complaint of the injured party, "whence no person can inflict it but the magistrate, even under a "private arbitration, where the plaintiff and defendant may have re- "ferred the decision of the matter to any third person.

Chastisement, in any instance in which it is authorised by the law, is to be inflicted where the Imam sees it advisable.

If a person accuse of whoredom a male or female slave, an Am- "Walid, or an infidel, he is to be chastised, because this accusation is an offensive accusation, and punishment for slander is not incurred by it, as the condition, namely Ihsan, (or marriage in the sense "which induces punishment for slander,) is not attached to the accused: chastisement therefore is to be inflicted. And in the same manner, if
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if any person accuse a Mussulman of any other thing than whoredom, (that is, abuse him, by calling him a reprobate, or a villain, or an infidel, or a thief;) chastisement is incurred, because he injures a Mussulman, and defames him; and punishment [Hidd] cannot be considered as due from analogy, since analogy has no concern with the necessity of punishment: chastisement therefore is to be inflicted. Where the aggrieved party is a slave, or so forth, the chastisement must be inflicted to the extremity of it: but in the case of abuse of a Mussulman, the measure of the chastisement is left to the discretion of the magistrate, be it more or less; and whatever he sees proper let him inflict.

If a person abuse a Mussulman, by calling him an ahi, or a bog, in this case chastisement is not incurred, because these expressions are in no respect defamatory of the person towards whom they are used, it being evident that he is neither an ahi nor a bog. Some allege that, in our times, chastisement is inflicted, since, in the modern acceptation, calling a man an ahi or a bog is held to be abuse.—Others again allege that it is esteemed such only where the person towards whom such expressions are used happens to be of dignified rank (such as a prince, or a man of letters,) in which case chastisement must be inflicted upon the abuser, as by so speaking he exposes that person of rank to contempt; but if he be only a common person, chastisement is not incurred: and our author remarks that this is the most approved doctrine.

The greatest number of stripes, in chastisement, is thirty-nine; and the smallest number is three. This is according to Haneefa and Mohammed. Aboo Yoosof says that the greatest number of stripes, in chastisement, is seventy-five. The restriction to thirty-five stripes is founded on a saying of the prophet, "The man who shall inflict scourging to the amount of punishment, in a case where punishment is not established, shall be accounted an aggravor," (meaning, a wanton
wanton aggravator of punishment,) from which saying it is to be inferred that the infliction of a number of stripes, in chastisement, to the same amount as in punishment, is unlawful; and this being admitted, Haneefa and Mohamned, in order to determine the utmost extent of chastisement, consider what is the smallest punishment; and this is punishment for slander with respect to a slave, which is forty stripes; they therefore deduct therefrom one stripe, and establish thirty-nine as the greatest number to be inflicted in chastisement. Aboo Yoesaf, on the other hand, has regard to the smallest punishment with respect to freemen, (as freedom is the original state of man,) which is eighty stripes; he therefore deducts five, and establishes seventy-five as the greatest number to be inflicted in chastisement as aforesaid, because the same is recorded of Alee, whose example Aboo Yoesaf follows in this instance. It is in one place recorded of Aboo Yoesaf that he deducted only one stripe, and declared the utmost number of stripes, in chastisemen, to be seventy-nine. Such, also, is the opinion of Zisser; and this is agreeable to analogy.——Mohammed, in his book, has determined the smallest number of stripes in chastisement to three, because in fewer there is no chastisement. Our modern doctors assert that the smallest degree of chastisement must be left to the judgment of the Inam, or Kasir, who is to inflict whatever he may deem sufficient for chastisement, which is different with respect to different men. It is recorded of Aboo Yoesaf that he has alleged that the degree thereof is in proportion to the degree of the offence; and it is also recorded from him that the chastisement for petty offences should be inflicted to a degree approaching to the punishment allotted for offences of a similar nature; thus the chastisement for licentious acts, (such as kissing and touching,) is to be inflicted to a degree approaching to punishment for whoredom; and the chastisement for abusive language, to a degree approaching to punishment for slander.

* Because, in all other cases the deduction of one from the whole number is sufficient to reduce the thing from an higher to a lower class.

† Meaning the Mahfooz.
PUNISHMENTS.

In the Koran deem it fit, in chastisement, to unite imprisonment with scourging, it is lawful for him to do both, since imprisonment is of itself capable of constituting chastisement, and has been so employed, for the; prophet once imprisoned a person by way of chastising him. But as imprisonment is thus capable of constituting chastisement, in offences where chastisement is incurred by their being established, imprisonment is not lawful before the offence be proved, merely upon suspicion; since imprisonment is in itself a chastisement: contrary to offences which induce punishment for there the accused may be lawfully imprisoned upon suspicion, as chastisement is short of punishment; (whence the sufficiency of imprisonment alone in chastisement;) and such being the case, it is lawful to unite imprisonment with blows.

The severest blows or stripes may be used in chastisement, because, as regard is had to lenity with respect to the number of the stripes, lenity is not to be regarded with respect to the nature of them, for otherwise the design would be defeated; and hence, lenity is not shewn, in chastisement, by inflicting the blows or stripes upon different parts or members of the body. And next to chastisement, the severest blows or stripes are to be inflicted in punishment for whoredom, as that is instituted by the word of God in the Koran. Whoredom, moreover, is a deadly sin, inasmuch that lapsedation for it has been ordained by the Law. And next to punishment for whoredom, the severest blows or stripes are to be inflicted in punishment for wine-drinking, as the occasion of punishment is there fully certified: and next to punishment for wine-drinking, the severity of the blows or stripes is to be attended to in punishment for slander, because there is a doubt in respect to the occasion of the punishment, (namely, the accusation,) as an accusation may be either false or true; and also, because severity is here observed, in disqualifying the slanderer from appearing as an evidence; wherefore severity is not also to be observed in the nature of the blows or stripes.
If the magistrate inflict either punishment or chastisement upon a person, and the sufferer should die in consequence of such punishment or chastisement, his blood is Hiddir; that is to say, nothing whatever is due upon it; because the magistrate is authorised therein, and what he does is done by decree of the Law; and an act which is decreed is not restricted to the condition of safety. This is analogous to a case of phlebotomy;—that is to say, if any person desire to be let blood, and should die, the operator is in no respect responsible for his death; and so here also. It is, contrary, however, to the case of a husband inflicting chastisement upon his wife; for his act is restricted to safety, as it is only allowed to a husband to chastise his wife; and an act which is only allowed is restricted to the condition of safety, like walking upon the highway. Shafeii maintains that, in this case, the fine of blood is due from the public treasury; because, although where chastisement or punishment prove destructive, it is Kattl Khota, or homicide by misadventure, (as the intention is not the destruction, but the amendment of the sufferer,) yet a fine is due from the public treasury, since the advantage of the act of the magistrate extends to the public at large, wherefore the atonement is due from their property, namely from the public treasury. Our doctors, on the other hand, say that whenever the magistrate inflicts a right of God upon any person, by the decree of God, and that person dies, it is the same, as if he had died by the visitation of God, without any visible cause; wherefore there is no responsibility for it.
HE D A Y A;

BOOK VIII.

Of SÂRAKA, or LARGINT.

Chap. I. Introductory.
Chap. II. Of Thefts which occasion Amputation, and of Thefts which do not occasion it.
Chap. III. Of Hirz, or Custody, and of taking away property thence.
Chap. IV. Of the Manner of cutting off the Limb of a Thief, and of the Execution thereof.
Chap. V. Of the Acts of a Thief with respect to the Property stolen.
Chap. VI. Of Katta-al-Tareek, or Highway Robbery.

CHAP. I.

SÂRAKA literally means the secretly taking away of another's property. In the language of the law it signifies the taking away the property of another in a secret manner, at a time when such property is in custody,—that is, when the effects are in supposed security.
security from the hands of other people; and where the value is not less than ten dirms, and the effects taken the undoubted property of some other than of him who takes them.

Custody is of two kinds; first, custody by place, that is, by means of such a place as is generally used for the preservation of property, as a house, or a shop; secondly, by personal guard, that is, by means of a personal watch over the property.

The primitive sense of Larceny, (namely, secretly taking away,) includes, (in a legal view,) the beginning and end of the transaction, where the theft is committed in the day-time,—but the beginning only, where the theft is committed during the night, when the thief secretly breaks into the house, and then takes away the property by open violence. The reason of this is that many thefts are committed during the night, by the thief forcibly carrying away the property, as at that time the injured person cannot obtain any assistance. If, therefore, the circumstance of the thief's secretly breaking into the place of custody, or house of the proprietor, were not sufficient to establish a charge of theft, punishment would in many instances be prevented: contrary to where the theft is committed during the day-time; for as the injured person can then obtain assistance, thefts are never attempted by open violence, at that season; and hence, in the establishment of a theft committed during the day-time, the secretly taking away includes both the beginning and the end of the transaction.

In the greater species of larceny, (namely highway robbery) the secretly taking away is with respect to the Imam, whose duty it is to guard the highways by means of his assistants: in the inferior species, it is with respect to the proprietor, or the person who stands as his substitute.
If an adult, of sound understanding, steal out of undoubted custody ten dirms, or property to the value of ten dirms, the law awards the amputation of his hand; God having said in the Koran, "If a man or woman steal, cut off their hands:" but regard must be had to the conditions of sanity of intellect, and maturity of age; because independent of these criminality cannot be established, and amputation is the reward of criminality. It is also requisite that the property stolen be of importance, and not of trifling or insignificant value; because men do not covet property of a trifling nature; nor do persons take such property secretly, but openly; wherefore that which constitutes larceny*, (namely, secretly taking away,) does not exist in taking property of a trifling nature, nor does any occasion for determent appear therein, as determent is regarded only in matters of frequent occurrence: besides, the theft of mere trifles is uncommon, because they are little coveted. It is therefore requisite that the property for the theft of which the hand of the thief is struck off, be of value and importance.—Concerning the amount of the value there are various opinions: according to our doctors it is ten dirms: according to Shafei it is the fourth of a deenär; in the opinion of Malik it is three dirms. The argument of Malik and Shafei is that, in the time of the prophet, amputation was inflicted for the theft of any article of the value of a shield; now the lowest value of a shield, upon record, is three dirms; and regard must be had to the lowest, as that is precisely ascertained. Shafei also observes that the value of the deenär, in the time of the prophet, was estimated at twelve dirms, the fourth of which is three dirms. Our doctors argue that, in this particular, regard ought to be had to the highest standard, (as this is seeking a means to ward off the infliction of punishment,) because in itself there is a doubt concerning the criminality; and doubt operates to the prevention of punishment. A corroboration of this tenet of our doctors is found in a precept of the prophet, viz. "There is

* Arab. Rahal Sarks, that is, the pillar of larceny.
“no amputation for less than a deenar, or ten dirms *.” It is to be observed that the term dirm is customarily used to express coin, from which it appears that the property stolen must be ten coined dirms, or something to the value of ten coined dirms, being the same as is mentioned in the treatise of Kadoorce, and also in the Zohir Rawdhet; and this is the most approved doctrine, as herein regard is had to the completeness of criminality.—If, therefore, a person were to steal to the weight of ten dirms of silver, uncoined, and it fall short, in value, of ten coined dirms, amputation is not incurred by him. In the weight of the dirm the septimal weight is regarded, [that is, in the proportion of seven Miskals, or 10½ drams, to the dirm,] as this is the usual weight of it in all countries. What was before advanced—“or property to the value of ten dirms,” means that anything else is to be valued by dirms, although it consist of gold.—It is also an indispensable requisite that the property be taken out of a custody respecting which there is no doubt, since any doubt concerning that circumstance would occasion the remission of punishment, as shall be demonstrated in it’s proper place.

The slave and the freeman, with respect to amputation, are upon an equal footing, as in the text which occurs upon this head, no distinction is made between them; and also, because it is impossible to have amputation. The limb of a slave, therefore, is to be struck off in the same manner as that of a freeman, in order that men’s property may be preserved.

* The value of the dirm seems to be very indefinite. It is elsewhere [Vol. I. p. 24.] observed that the dirm is about 2d. sterling, which precisely accords with its relative value, (as there mentioned) in respect to an Miskal of silver. But here we see the dirm estimated at ten dirms: now a deenar, according to the best authorities, is nearly of the same value with a ducat, namely about seven shillings; and hence it would appear that the value of the dirm is from eight pence to nine pence sterling; and upon this calculation the value of a theft, to induce amputation, must be at least six and eight pence sterling. In fact, where the estimates are so various (owing, probably, to difference of times and countries) it is impossible to ascertain any precise standard.

Amputation
L A R C I N Y.

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Amputation is to be inflicted upon a single confession, according to Haneefa and Mahommed. Aboo Yoosaf says that the limb of a thief is not to be struck off upon a single confession, nor until the confession be twice repeated: and it is also recorded from Aboo Yoosaf that the confession must be made twice at two separate sittings [of the Khane’s court,] because confession is proof as well as evidence, and is therefore subject to a similar rule; and as, in evidence, two witnesses are indispensable, so in confession, repetition is required; as in whoredom, (for instance) where, confession being held subject to the rule of evidence, four confessions are required, in the same manner as four witnesses. The argument of Haneefa and Mahommed is that theft is rendered apparent by a single confession, which therefore suffices, in the same manner as in cases of retaliation, or punishment for slander; and there is no ground to judge concerning this from the rule in evidence, since by the abundance of witnesses, in evidence, the suspicion of falsity is lessened with respect to the witnesses; but a repetition of confession is altogether useless, since no suspicion exists with respect to the person confessing, which might be lessened by a repetition of his confession: neither is this repetition of any advantage in precluding a subsequent retraction, as the door of retraction or denial, in a case of punishment, is not shut by a repetition of confession; and in a case of property, retraction or denial are not admitted after confession, although it be only once made, because the proprietor is ready to disprove it: and the rule of repetition of confession, in whoredom, is contrary to analogy, wherefore confession in theft cannot be judged upon the same principle.

Amputation is to be inflicted upon the testimony of two witnesses, because by the testimony of two witnesses the theft is made apparent, and fully established, in the same manner as in all matters of right. But it is incumbent on the magistrate to examine the witnesses concerning the manner of the theft, and also the time and place, for the greater caution, as was mentioned in treating of whoredom. The thief must
also be held in confinement, on suspicion, until the witnesses be fully examined.

If a party commit a theft, and each of the party receive ten dirms, the hand of each is to be cut off: but if they receive less than ten dirms each, they are not liable to amputation, because the occasion thereof is stealing to the amount which constitutes larceny, namely, ten dirms: amputation, moreover, is to be inflicted upon each on account of his offence, wherefore regard is had, with respect to each, to the completeness of the standard amount of theft, which is ten dirms.

CHAP. II.

Of Thefts which occasion Amputation, and of Thefts which do not occasion it.

Amputation is not incurred by the theft of any thing of a trifling nature, and the use of which is allowed among Mussulmans, such as wood, bamboo, graft, fish, fouls, and garden-stuff;—because Ayesha has said that in the time of the prophet this punishment was not inflicted for such petty thefts; and also, because people are little interested in things which, although in their own nature lawful, yet are in no respect particularly desirable: besides, men not coveting these things, it is not probable that any one should take them without the owner’s consent; it is therefore not requisite to make examples, in order to deter people from such thefts; (whence it is that amputation is not incurred by a theft of less than ten dirms.) Custody, moreover, with respect to such articles, is defective, insomuch that pieces of timber (for instance) are thrown down without the door, and are not brought
L A R C I N Y.  Book VIII.

brought within the house, unless for the purpose of making repairs, and not with a view to custody; and fowls run about at pleasure, and game fly away; and in the same manner, things which are naturally lawful (such as the articles before-mentioned) are held, in their original state, to be common property, and this general participation occasions a doubt, which operates to the prevention of punishment. Let it be also observed that salt dried fish, are here considered in the same predicament as flesh: and in the same manner, tame fowls, and geese, and pigeons are included among the fowls before-mentioned, as the precept of the prophet, to wit "There is no amputation for fowls," is general, and extends to all the feathered species. It is recorded from Aboo Yoosof that amputation is incurred by the theft of any article whatever, except water, flowers, and Soorkeen; (and such also is the opinion of Shafei,)—but the tradition of Ayeesba, as before recited, is in proof against them.

AMPUTATION is not incurred by the theft of such things as quickly spoil and decay, such as milk, flesh-meat, or fruit; because of the saying of the prophet, "The hand shall not be cut off for stealing dates, palm-fruits†, or victuals." By the word victuals, mentioned in this tradition, is meant such things as soon spoil, such as victuals cooked or ready for eating, and whatever else is of the same description, such as flesh and fruits; but not grain; because, if a person were to steal wheat, (for instance) or sugar, all the doctors agree that his hand should be struck off. Shafei mentions that the hand is to be struck off for the theft of all the articles aforesaid, because of the saying of the prophet "The hand shall not be

† Arab. Koja. It is not, properly speaking, a fruit, but a species of kernel, weighing six or eight ounces, and resembling, in taste, the kernel of the hazel nut. It grows at the top of the palm-tree, and is a sort of crown to the pith, each tree bearing only one: it is commonly called the cabbage of the palm-tree.
CHAP. II. L A R C I N Y.

"struck off for stealing dates or palm-fruits,—but where those "are kept in a barn*, amputation is incurred by the theft of them."

Our doctors, on the other hand, contend that this saying implies no more than that the hand of a thief shall be struck off for stealing dried dates, according to what is the general usage, (for the general usage is to keep dried dates in barns,) and for stealing dried dates the hand of a thief is struck off according to our doctors also.

Amputation is not incurred by stealing fruit whilst upon the tree, or grain which has not been reaped,—these not being considered as in custody.

The hand of a thief is not struck off for stealing any fermented liquor, because he may explain his intention in taking it, by saying, "I took it with a view to spill it;" and also, because some fermented liquors are not lawful property, such as wine for instance,—and concerning others there is a doubt, as to their being property.

The hand is not to be cut off for stealing a guittar or tabor, these being of use merely as idle amusements.

Amputation is not incurred by stealing a Koran although it be ornamented†. This is the Zahir Rawayet. Shafei says that by stealing a Koran amputation is incurred, because Korans are capable of valuation, and therefore a saleable article. There are two opinions recorded from Aboo Yoosuf upon this point: according to one he coincides with Shafei; but, according to another, he maintains that the hand is to be struck off for stealing a Koran, where the value of the ornaments amounts to ten dirms, because those ornaments are not a constituent

* Arab. Jowzen, a sort of drying-room. † With gold or silver cloths, jewels, &c.
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part of the Koran, and are therefore to be considered separately. The reasons for the decision in the Zahir Rawdyet are twofold: first, the person who takes the Koran may plead that his intention was merely to look into and read it; secondly, a Koran is not property, with respect to what is written in it; and the custody and care of it is only on account of what is written in it, and not for the sake of the binding, the ornaments, or the paper, these being merely appendages; and, as such, not to be regarded:—in the same manner as if a person were to steal a skin containing wine, the value of the skin amounting to ten dirms; in which case the hand of the thief would not be struck off; and so in this instance likewise.

There is no amputation for stealing the door of a mosque, as this is not an object of custody, and is therefore the same as the door of a house; nay, it is still less the object of custody than a house-door, since that serves for the preservation of the effects within the house; whereas the door of a mosque does not answer this purpose; whence it is that amputation is not incurred by stealing such effects as are kept within a mosque.

Amputation is not incurred by stealing a crucifix, although it be of gold,—nor by stealing a chess-board or chess pieces of gold, 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." It is otherwise with respect to coin bearing the impression of an idol, by the theft of which amputation is incurred; because the money is not the object of worship, so as to allow of its destruction, and thus leave it in the thief's power to excuse himself. It is recorded, as an opinion of Aboo Yooqaf, that if a crucifix be stolen out of a Christian place of worship, amputation is not incurred; but if it be taken from a house, the hand of the thief is to be struck off, for in such a situation it is lawful property, and the object of custody.

The
LARCINY.

The hand of a thief is not to be cut off for stealing a free-born infant, although there be ornaments upon it; because a free person is not property, and the ornaments are only appendages; and also, because the thief may plead that "he took it up when it was crying, with a "view to appease it, or to deliver it to the nurse." Aboo Yoosaf says that the hand of the thief is to be cut off where the value of the ornaments upon the child amounts to ten dirms; because, as amputation would be incurred by the theft of the ornaments alone, it is so, where they are stolen along with any thing else.—The same difference of opinion obtains where a person steals a vessel of silver (for instance) containing pottage, or any other culinary preparation. It is to be observed that this difference of opinion holds only where the child is incapable of walking or speaking, for such a child is not in its own power or custody.

Amputation is not incurred by stealing an adult slave, as such an act does not come under the description of theft, being a usurpa-
tion, or a fraud.

Amputation is incurred by stealing an infant slave, as the construc-
tion of theft is applicable to this offence: but if this infant slave be such as can give an account of himself, in this case amputation is not incurred, because an infant of this description is the same as an adult, in this, that both are equally in their own custody. Aboo Yoosaf says that amputation is not to be inflicted for stealing a slave, although he be an infant destitute of judgment, and unable to speak. This proceeds upon a favourable construction of the law, because a slave is a man in one respect, and in this view is not a property, although he be so in another respect. The argument of Haneefa and Mohammed is that this infant slave is property, generally considered, as being capable of producing an immediate profit by the price which would arise from the sale of him, and also of producing a future profit by the service to be exacted from him after he becomes capable of ser-

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vice; he is therefore property at the same time that he is also a man.

The hand of a thief is not cut off for stealing a book, whatever be the subject of which it treats, because there the object of the theft can only be the contents, and that is not property. But yet it is to be observed that the hand is 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 is appreciable property.

The hand of a thief is not cut off for stealing a cur-dog, because such an animal is in it's nature common property *, and not an object of attachment; and also, because concerning it's being property there is a difference of opinion among the learned, and this occasions a doubt upon that head.

The hand of a thief is not cut off for stealing a drum, tabor, pipe, or psaltery;—according to the two disciples, because, in their opinion, these articles bear no price, whence, if any person were to destroy them he is not responsible;—and according to Haneefa, because the person who takes them may excuse himself by saying that he took them with a view to break them.

The hand of a thief is cut off for stealing a flute made of Sinnan †, ivory, ebony, or box, such as is termed, in the Hindostanee dialect, a Satoon, or Sawli, as such is an object of custody, being held in estimation, and not of a common nature.

* Arab. Mistab-al-assy, that is, free to any one to take indifferently.
† A species of hard wood, resembling lignum vities.
The hand of a thief is struck off for stealing a ring set with an emerald, a ruby, or a chrysolite, as such are rare articles, and not held to be of an indifferent nature among Mussulmans; neither are they undesirable; such articles, therefore, are the same as silver or gold.

The hand of a thief is struck off for stealing utensils made of wood, such as a platter or a door (when not set in a wall) or a trunk, (although the hand would not be struck off for stealing a piece of timber,)—because these articles derive an intrinsic value from their fashion, and are therefore objects of custody: contrary to matts*, as in these the workmanship does not exceed the value of the material of which they are composed, for which reason matts are spread in places where they are not in custody: the learned, however, agree that amputation is incurred by stealing Baghdad matts, as in those the value of the workmanship exceeds that of the article. It is to be observed, that by stealing a door, or other article of timber not set in the wall of a house, amputation is incurred where such door or other article is so light as to admit of one man carrying it away, as thieves do not covet articles of timber which are not portable.

A breach of trust†, by a trustee secreting any property committed to his charge, does not induce amputation; as a deposit is not in custody of the proprietor. In the same manner, the hand of a plunderer, ‡ or of one who snatches away any thing, is not struck off, as

* Meaning any articles which are constructed of split reeds or bamboos.

† Arab. Khidāt: (part. Khīyin.) It in this place evidently means breach of trust by the context, but it bears a variety of other meanings, such as to deceive, to betray, &c.

‡ It is difficult to distinguish between rapine and robbery; but this and the next following term, (like Ghef, or usurpation of property,) have, perhaps, a reference to practices prevalent among the Arabs.
the act of such is not theft, since those carry away the property openly, and not in a secret manner; and the prophet has said, "The hand of a plunderer, or a snatcher away of property, or a breaker of a trust, is not to be cut off."

The hand of a Nibdsb, or plunderer of the dead, is not struck off. This is the opinion of Hanefi and Mohammed. Aboo Yosaf and Shafei hold that amputation is incurred upon a Nibdsb, because the prophet said "Whoever theft a winding-sheet his hand shall I cut off;"—and also, because a winding-sheet is an object of custody, and appreciable property: the hand, therefore, is struck off for stealing it. The arguments of Hanefi and Mohammed upon this point are twofold: FIRST, the prophet has said "The hand of a MooKhtahee is not to be cut off;" and, in the dialect of Medina a plunderer of the dead is termed a MooKhtahee: SECONDLY, concerning the property in a winding-sheet there is a doubt; because the deceased is certainly not the proprietor, as a corpse is mere dead matter; and his heir is not the proprietor, as the necessity of the deceased preceeds the inheritance of his heir; and there is also an uncertainty of the design of amputation (namely warning, or deterrent,) being obtained in this case, as this is a fact of rare occurrence. With respect to the declaration of the prophet, quoted by Yosaf and Shafei, it is to be considered merely as a threat. The same difference of opinion prevails in a case of stealing a winding-sheet from a mausoleum, having a door secured by a lock: or where a winding-sheet is stolen out of a coffin whilst upon a journey.

There is no amputation for stealing from the public treasury; because every thing there is the common property of all Mussulmans, and in which the thief, as a member of the community, has a share.

* That is, whilst carrying to the family place of interment, which may sometimes be at the distance of several days journey, in which case the corpse is put in a coffin; for otherwise the coffin is not used.
CHAP. II.

L A R C I N Y.

If a person steal from property of which he is in part owner, in this case amputation is not to be inflicted.

If a creditor steal from the property of his debtor, to the amount of his debt, amputation is not incurred, because this is not theft, but only an exertion of his right: and a deferred debt* is the same as an undenferred, with respect to this rule. The same rule obtains where a person steals any thing which is originally his own property †, because a man has a right in whatever is his own. But if a creditor steal from his debtor any articles of his chattel property [that is, goods or effects,] in this case amputation is to be inflicted, because a creditor is not at liberty to take his right out of the debtor's goods or effects, except by selling them, with the debtor's consent, and reimbursing himself out of the price. It is recorded from Aboo Yousaf that here likewise amputation is not incurred, because many of the learned hold that a creditor is at liberty to seize the effects of his debtor for the purpose of obtaining his right, or by way of pledge. To this our doctors reply, that as this opinion is not supported by any authority, taking the goods as a satisfaction, or in the manner of a pledge, is not admitted without a plea: but, if the creditor should make a plea, by saying "I took these "effects of my debtor only as a pledge in security of my right,"—or,—"as a satisfaction for my right,"—in this case punishment is remitted, because he appears to have proceeded under a conception grounded upon the opposite opinion of Aboo Yousaf, as above recited. The same difference of opinion also obtains if the right of the creditor consist of dirms, and he steal deendrs, some holding that he incurs amputation, as the deendrs are not his right,—whilst others maintain

* Arab. Dyne-Mawjiil, meaning a debt in the payment of which a delay is allowed for a certain specified time, in opposition to a Dyne Mawjiil, or prompt debt, that is, a debt, payable upon-demand.

† As having been borrowed of him by another for instance.
that his hand is not to be struck off, because *money*, (namely *dirms* and *deenars*) is all of one and the same nature.

If a person steal any particular article, and suffer amputation of his hand for the same, and after returning the property stolen to the proper owner, again steal that same article, without its having undergone any change in the interim, his foot is not to be struck off for such repeated theft. This proceeds upon a favorable construction of the law. Analogy requires that his foot be cut off; (and there is an opinion of Aboo Toosaf recorded to this effect; and such also is the doctrine of Shafeei;) because the prophet has said "If he again steal, let amputation be again inflicted upon him;" where no manner of distinction is made with respect to the article stolen in the second theft being the same as that which was stolen in the first, or not, as the second is a complete theft the same as the first, and even more atrocious, inasmuch as the thief, having already suffered punishment, yet dares to repeat the very same offence. The offence is indeed the same as if the owner were to sell the article stolen to the thief, and again to purchase it of him, and the thief then to steal it of him a second time. But the reasons for a more favourable construction of the law herein are two-fold:—first, in consequence of the amputation of the thief's hand, the protection* of the thing stolen ceases,—that is, in consequence of cutting off the thief's hand, the article stolen no longer remains protected in behalf of the right of the individual, (as shall be hereafter demonstrated;)—and although, on returning it to the owner, it revert to a state of protection, yet an apprehension of the protection having ceased still remains, judging from unity of right of property and of subject, and from the existence of the cause of the failure of protection,—that is, judging from the circumstances of this property being that same individual property the protection of which had been already destroyed by the former theft and subsequent punish-

* Arab. *Ishut*. Our lexicons give *Tutamen* as the original and *Coffitas* the occasional meaning of it.
ment,—and of the present proprietor being the same who was formerly proprietor,—and of the cause of the failure of protection (namely, the amputation already inflicted) being still existent: contrary to the case adduced by Shafei, because in that case the right of property has been of a different nature, as being derived from a different source:*—secondly, the repetition of the theft of the same article by the same thief, after his hand being cut off, is a circumstance of rare occurrence; wherefore the infliction of punishment a second time can answer no end; for the end of punishment is to restrain from guilt; and that end is obtained without a second infliction of punishment; the case in question being analogous to one where a person who had been punished for slander again accuses the slandered person of the same fact of whoredom with which he had before charged him, in which instance a second punishment is not incurred by slanderer; and so here likewise.—What is now advanced proceeds upon the supposition that the thing stolen does not undergo any change after being returned to the owner:—but if it be changed from its former state, (as if a person were to steal thread, and suffer amputation, and return the thread to the owner, and the thread be afterwards woven into cloth, and the thief should then steal the cloth,) the thief's foot is cut off, because the thing stolen has been altered by weaving; (whence it is that if a person seize a parcel of thread by Ghab, [usurpation,] and weave the thread into cloth, he becomes proprietor of the cloth in consequence of weaving it:—and this is an example of change, applicable to any subject whatever:) and where the thing stolen undergoes a change, the doubt arising from unity of subject, and amputation on account of the former theft of it, is removed; wherefore amputation is repeated, by cutting off the foot.

* The source or cause of the lost right of property being purchase from the thief, which is totally distinct and different from the cause of the theft or original right of property, whatever that may have been.
CHAP. III.

Of Hirc, or Custody; and of taking away Property thence.

If a person steal any thing from the property of his father, mother, or son, his hand is not cut off; because any of those is at liberty, by a mutual right of usufruct*, to take and use the property of the other; and also, because the effects of either of them is held, in virtue of this mutual right, to be within the custody of the other: and in the same manner, if a person steal from the property of his relation within the prohibited degrees, his hand is not cut off, for the second of the above reasons: contrary to the case of persons who are merely friends, for if one of these were to steal from the other, his hand is cut off; since his act of theft puts an end to their friendship. What is now stated respecting the case of theft from a relation within the prohibited degrees is contrary to the doctrine of Shafei, he accounting the affinity of all except parents and children to be a distant affinity, as was before mentioned, in treating of the emancipation of slaves.

If a person steal, out of the house of his relation within the prohibited degrees, the effects of a stranger, his hand is not cut off; but if he steal the effects of a prohibited relation out of the stranger's house, his hand is struck off; because in the former case the theft is not a violation of custody whereas in the latter it is so.

* Arab. Immīfi, literally meaning "a mutual liberty."
LARCINY.

If a person commit a theft upon the property of his foster-mother, his hand is cut off. This is the Zāhir Rawḥīyet. It is recorded from ʿAbū Yoosaf that his hand is not to be cut off, because men are at liberty, at all times, to enter their foster-mother's apartments without form or permission: contrary to the case of a foster-sister; for the reason which operates in the instance of a foster-mother does not here exist. The ground upon which the Zāhir Rawḥīyet proceeds herein is that although prohibition subsists between a man and his foster-mother, yet there is no relationship between them; and the prohibition which exists independent of affinity (such as that occasioned by whoredom, or touching in lust,;) has not the full effect of prohibition by affinity, whence, if a man were to steal any thing out of the house of the daughter of a woman with whom he had committed whoredom, his hand would be cut off, although between him and the daughter prohibition exist. By stealing, therefore, from the property of a foster-mother, amputation is incurred. The foundation of this is that fosterage is not commonly a thing of notoriety, wherefore men have not a mutual right of usufruct with their foster-mothers, in order to avoid giving room for suspicion: contrary to the right which subsists with respect to the natural mother.

If, of a husband and wife, either party should steal from the property of the other,—or a slave from the property of his master, or of his master's wife, or of his mistress's husband,—in none of these cases is amputation incurred, because in all of them the thief is, by custom, at liberty to enter the house or apartment of the proprietor. If, moreover, in the same case of a husband and wife, either were to steal any thing from a place of custody belonging exclusively to the other, (as if, out of an apartment solely referred to the other's use, and in which they do not both reside,) in this case also the hand of

* See Book II. chap. 2.
L A R C I N Y. Book VIII.

the thief is not cut off, according to our doctors, (who in this instance differ from the opinion of Shafei,) as there is a mutual right of usufruct between husband and wife, both according to custom, and also by construction, for the contract of marriage demonstrates this mutual right of usufruct between them. This dissent of Shafei, in the present case, corresponds with his difference of opinion with respect to giving evidence; for the evidence of a husband or wife regarding each other is not admitted by our doctors; but by Shafei it is admitted.

If a master steal from the property of his Mokatib, his hand is not struck off, because a master has a right in his Mokatib's acquisitions. And in the same manner, the hand of a thief is not cut off who steals any thing out of publick plunder, because in that he has a share. This case, with its reasoning, is taken from Alee.

Custody is of two kinds: First, that which is custody from its own nature, such as a house or Serai*; secondly, custody, by personal guard.—(The compiler of the Hedaya observes that custody is an indispensable requisite to the establishment of larceny, since without custody the circumstance of secretly taking away cannot be established.) Thus custody is sometimes constituted by place, that is by a place constructed or appointed for the safe keeping of goods and effects, such as a house, shop, tent, or trunk; and it is also sometimes constituted by personal guard, that is, by personal watch over the property, such as if a man were to sit in the middle of the highway, or in a mosque, having his effects near him, in which case those effects are in keep or custody; and the prophet once cut off the hand of a person who had stolen a quilt from underneath the head of Sifuan, whilst he lay asleep in a mosque. It is to be observed that an article

* A quadrangular building, having sheds or houses all opening into the square within. A high wall surrounding the whole forms the back of the houses or shops; and the only entrance is by one or (at most) two gateways.
which is in custody by place is not in custody by personal guard: and this is approved, since that article is in custody, without any personal guard, by the custody of place, (such as a house, and so forth,) although that place be without a door, or have a door standing open, (whence if a person steal any of the furniture from that place, his hand is cut off,) because a house or such other edifice is erected for the purpose of security. The hand, however, is not to be cut off unless the article stolen be carried out of the house, for until that happens it is considered as in the hands of the master of the house: contrary to things in custody by personal guard, for here the thief's hand is struck off for the mere taking, as on the instant of taking the property of the proprietor is destroyed; wherefore the larceny is completed by the taking alone. It is to be further observed that no distinction is here made between the keeper being asleep or awake, or the effects being under him, or near him: and this is approved; because a person sleeping near his effects is accounted to be watching them, in common acceptation; upon which principle it is that a trustee or borrower is not responsible, where the trustee sleeps near the deposit, or the borrower near the article borrowed, in case of any accident befalling it, because their sleeping is not held a desertion of the charge of that property: contrary to what is adopted in the Fatāvīe*. for in some decrees it is said that if the trustee or the borrower lie down with the deposit or the loan under his head, and it be stolen, he is responsible.

If a person steal things out of a place which constitutes custody, such as a house,—or from a place which does not constitute custody, whilst the proprietor is near and has them within his guard,—his hand is struck off, because he has stolen property from one of the two species of custody.

* A collection of decrees or decisions of the Muffulman Mufis or Kāzess. There are many law books which bear this title.
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If a person steal property out of a bath, or from a house which
the owner allows all men indifferently to enter, his hand is not to be
cut off, because general access is allowed to a bath by custom, and to
a house by a particular permission, whence there is a doubt with
respect to such a place constituting custody. This is where the things
are stolen out of the bath or house during the existence of such gene-
ral leave of ingress: and the same rule applies to shops or Caravan-
Serails, because the master allows men to enter a shop or Caravan-
Serai:—but yet, if a person were to steal any thing therefrom during
the night, his hand is to be cut off, as those places are constructed for
the protection of property, and people are allowed to enter them in
the day-time only.

If a person steal goods out of a mosque, and the proprietor be near
those goods, the hand of the thief is struck off, as they are under
custody by personal guard: but if a person steal goods out of a bath or
house the owner of which allows people to enter it, and the proprie-
tor of the goods be near them, the thief’s hand is not cut off. The
difference between a mosque, and the bath or house now mentioned,
is that a mosque is not erected with a view to the security of pro-
erty, whereas custody is in that case regarded as constituted by
personal guard, and not by means of the place: contrary to the house
or bath, as these are constructed for the purpose of security, whereas
custody there is not regarded as depending upon personal guard:
and concerning such a place constituting custody there is a doubt, on
account of the general permission of ingress; for which reason the
thief’s hand is not struck off.

Amputation
is not incurred by a
wound healing
from his foot;

If a guest steal the property of his host, his hand is not cut off, as
the house of the host is not a place of custody with respect to 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, and not theft.
CHAP. III.

L A R C I N Y.

If a person steal any thing in a Serai*, his hand is not cut off; because the whole Serai is one place of custody, wherefore it is requisite to the establishment of the theft that the thing stolen be carried quite out of the Serai; and also, because the Serai and whatever it contains is in the hands of the master of it, by construction, wherefore there is a doubt whether the thief has yet conveyed it away. If, however, the Serai be one of those which contain a number of independent habitations, the occupiers of which have no common use of the area or square, excepting merely as a passage or thoroughfare, and a person were to steal any thing out of one of these habitations, and carry it forth into the area, his hand is to be cut off, because every one of these habitations is (with respect to the inhabitants) a separate place of custody; for which reason, if one of these were to steal any thing out of the lodge or habitation of another, he incurs amputation.

If a thief break through the wall of a house, and enter therein, and take the property, and deliver it to an accomplice standing at the entrance of the breach, amputation is not incurred by 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 hence the full sense of larceny is not applicable to the act of either of them. It is recorded from Aboo Tostef that if the thief who goes within the house put his hand through the breach, and the thief without thus take the property from him, the hand of the former is cut off: but if he who remains without put his hand through the breach into the house, and thus take the property from him who is within, each of them incurs amputation. This example is founded upon another which will be hereafter recited.—If the

* That is, out of the outer gate of the quadrangle.
thief within throw the property out, through the hole, into the highway, and then come forth, and take it away, his hand is to be cut off. Ziffer says that his hand is not cut off, because the act of throwing the property out upon the highway affords no pretence for amputation, any more than if he were to go away without carrying off the property, or than if another person were accidentally to come and carry away the property from the place into which it has been thrown, which would not occasion amputation. Our doctors assert that the throwing out of the property is a contrivance commonly practised by thieves, as it may be impossible for a thief to get out with the goods or effects in his hand,—or, in order that the thief may be unincumbered, and at liberty, either to oppose the inhabitants of the house, or to escape; and as, in the case in question, the property does not fall into the possession of any other person, the throwing out and carrying away are both considered as one act. But where the thief comes out of the house, and goes away without carrying off the property, he stands as the destroyer of that property, and not as a thief. And if the thief load the property upon an ass or other animal, and leading the animal, thus take the property out of the house, in this case his hand is cut off, because the motion of the animal is referred to the thief, on account of his leading or driving him.

If a party, or band of robbers, come within the place of custody of any person, and some of them take away the property whilst the others stand by, they all incur amputation. The compiler of the Hedayt remarks that this proceeds upon a liberal construction of the law; for analogy would suggest that those only incur amputation who take and carry out the property, (and such is the opinion of Ziffer,) because, as they take the property out, the definition of larceny applies only to them.—Our doctors, however, assert that they are all, by construction, equally concerned in carrying out the property, as being all aiding therein, in the same manner as in the greater species of larceny, (namely, highway robbery,) where some take the property, whilst
whilst others stand by prepared for an attack; because it is customary for some to carry off the property, whilst others stand ready, with arms in their hands, to resist the proprietor; if, therefore, these were not liable to amputation, the door of punishment would be closed.

If a person make a breach in the wall of a house, and extend his hand through, and in this manner take any thing out, still his hand is not struck off. This is the Zabir Rawdat. Aboo Yosaf has said that his hand is to be struck off, because he has taken the property out of a place of custody, and as this is the design of theft, his entrance into the place of custody is not requisite; in the same manner, as where a thief puts his hand into the chest of a banker, and takes out money, without himself entering the chest; in which case he forfeits his hand; and so here likewise. The reason for the decision in the Zabir Rawdat is that the establishment of larceny rests upon a complete violation of custody, in order that no doubt may remain respecting it; and the violation of custody is completely established only where the thief enters the place of custody, and where the place admits of this being supposed: as, therefore, it is customary for thieves to enter into the place of custody, regard must be had to that circumstance. It is otherwise in the case of a chest, as there the hand only can be introduced, and not the whole person: it is otherwise, also, in the case before observed, of some thieves carrying away the property whilst others stand by, prepared to oppose the proprietor, as this is the custom of thieves.

If a person keep his money in his sleeve, and tie a knot upon it, in such a manner that the knot is on the outside, and a cutpurse come, and tear off the part of the sleeve which contains the money, and take it away, he does not incur amputation. If, however, a person keep his money in his sleeve, and tie a knot upon it, in such a manner that the knot is inside the sleeve, and a cutpurse carry it off by putting his hand under the sleeve and tearing off the part which contains the money,
money, so taking it away, in this case his hand is to be struck off, as he here introduces his hand within the place of custody, (namely the sleeve) whereas, in the former instance, he took the money from without. If, on the other hand, he do not tear away the part which contains the money, but open or untie the knot, and so take away the money, the rule is reversed; that is, in the first of these cases his hand is cut off, but not in the second. The reason of this is that, in the former instance, where the knot is on the outside, by opening it the money falls within the sleeve, whence he is under a necessity of putting his hand within the sleeve, in order to take it away; amputation is therefore incurred, because here he takes the money out of a place of custody, and thus commits a violation of custody: but in the latter instance, where the knot is inside the sleeve, by opening it the money appears outside the sleeve; and as he thus takes it from the outside, and not from within, his taking it is not a violation of custody; his hand, therefore, is not cut off, as he has not committed a violation of custody. It is to be observed that, by the word Sirris, in this work, is to be understood merely the place where the money is deposited in the sleeve, not a separate bag or purse. It is recorded from Aboo Yosef, that in all these cases amputation is incurred, because the property is in custody,—with the proprietor, in the one case, and in his sleeve, in the other. Our doctors, on the other hand, assert that the custody, in the case in question, is constituted by the person's sleeve, as he trusted in it for security; and his design in putting the money there is convenience, in going from place to place, and safe whilst at rest; wherefore the security of it is not his design, his sleeve not being considered as a bag.

If a person steal one out of a string of camels, or steal a load from one of them, his hand is not cut off, because with respect to the camel or the load being in custody there is a doubt. The reason of this is that the design of the drivers and riders is convenience upon the journey, and the transportation of their goods, and not the security or protection of them. If, however, there be a person attending the loads for
for the purpose of looking after them, the learned say that in this case
the hand of the thief must be cut off. If, also, the thief break open the
package, and take its contents, his hand is struck off, because in such
a case the package constitutes the custody, as the design in putting the
goods there is the security of them, in the same manner as a sleeve; in
this case, therefore, the definition of theft; namely, taking property
from custody, is applicable; and such being the case, his hand is cut off
of course.

If a person steal a bag or package, containing goods, from a place
which does not constitute custody, (such as the highway,) whilst the
proprietor of the effects is watching or sleeping near them, his hand
is struck off, because those goods are in custody by means of the guard
of their owner, as regard is had to the customary mode of watching
things, and the owner of the bag sitting near or sleeping upon it is ac-
counted to be in guard of it by custom:—his sleeping near it is
also, from custom, accounted as guarding it;—this is approved
doctrine.

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C H A P. IV.

Of the Manner of cutting off the Limb of a Thief, and
of the Execution thereof.

The right hand of a thief is to be cut off at the joint of the wrist,
and the stump afterwards cauterised. The amputation is on the
authority of the text of the Koran formerly quoted; and it is to be
the right hand, on the authority of the reading of Ibn Mas'ood, who
reads the passage alluded to—"CUT OFF THEIR RIGHT HANDS."

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The
The amputation is particularly directed to be performed at the wrist, because the word yed, in the Koran, signifies the whole arm up to the shoulder, and as the wrist joint is included therein, that is certified, wherefore in that sense the text is followed:—moreover, it is related of the prophet, in the Nahl-Sabeel, that he ordered the hand of a thief to be struck off at the wrist. The cautery is to be applied to the stump; because of a precept of the prophet, “Cut off the hand of a thief, and cauterise the part;”—and also, because, if the cautery were not applied, the amputation might prove destructive; and punishment is inflicted with a view to warning and determent, but not for destruction.—If the thief who has thus been deprived of his hand again commit a theft, his left foot is to be cut off. If, however, he again be guilty of theft, a third time, he is not to suffer any further mutilation, but must be imprisoned, and held in confinement, until he repent. Concerning the time sufficient to effect and confirm such repentance there are various opinions; some saying that this is to be left to the judgment of the Imam or Khuza;—others, that the imprisonment should be for one year;—and others, that it ought to be until death;—whilst others, on the other hand, maintain that he is to be held in durance until such time as repentance be ascertained from his conversation and behaviour. What is here advanced,—“If he be again guilty of theft, a third time, he is not to suffer any further mutilation, but must be imprisoned,” &c. proceeds upon a favourable construction of the law:—and our modern doctors say that Thaneer, or discretionary correction, may also be inflicted. Shafei says that for the third offence the left hand is to be cut off, and, for the fourth, the right foot, because the words of the prophet are “If a man commit a theft cut off one of his limbs; and if he again commit the same; cut off another limb; and if he again commit the same, a third time, cut off another limb; and if a fourth time, another; and if he commit theft a fifth time, put him to death.”—There is also an ordinance of the prophet, still more particularly according with the tenets of Shafei upon this head, which is mentioned by Abou Hareera, who reports
reports the prophet to have said, "Whoever commits a theft, his right hand is to be cut off; and if be again commit theft, his left foot; and if again, his left hand; and if again, his right foot: because the third theft is an offence in the same degree as the first, and is even more atrocious; wherefore for the third offence the law awards punishment in a superior degree." The arguments of our doctors upon this point are threefold: First, Alee has declared, respecting a person who had been a third time guilty of theft, "Wilt I live by the favour of God, shall I not leave him a hand with which to feed himself, or a foot with which to walk?"—the propriety of which declaration being disputed by some of the companions, Alee argued the point with them, and overcame their scruples; wherefore they all subscribed to his opinion, and consequently the whole of them are agreed concerning it: Second, the amputation of the left hand in the third instance, and of the right foot in the fourth, is in fact a destruction of the thief, since by cutting off the left hand he is totally deprived of one faculty, and punishment is instituted with a view to determent and not to destruction: Thirdly, the repetition of theft a third time is a thing of rare occurrence, and determents are instituted concerning things which are of frequent occurrence. It is otherwise in retaliation, with respect to the members of the body; for as that is a right of the individual, so the individual is to exact it, as far as may be practicable, on his own behalf. As to the tradition adduced by Shafei, it is either unworthy of being seriously regarded, (as having been ridiculed by Tabwée,) or else it is to be considered merely as a threat.

If the left hand or right foot of a thief be paralytic, or have been lost by accident, his right hand or left foot must not be cut off, since by the loss of these he is deprived of one of his faculties of walking or carrying. In the same manner, the right hand of a thief must not be cut off where the thumb or any two fingers of the left hand are

* In opposition to punishment, which is a right of God, (i.e. of the Law.)
are lost or useless; because in such a state the hand is held to be incapable of performing its offices: but if only one finger of the left hand be useless or lost, the right hand may be cut off, because there is no apprehension of the hand being disabled from carrying, by the deprivation of one finger only.—It is otherwise where there are two fingers wanting; as two fingers are held to be equivalent to a thumb, in respect to the capacity of carrying; hence from the want of them it is to be apprehended that the hand is useless.

An executioner striking off the left hand instead of the right is not responsible.

If the magistrate order the executioner to cut off the right hand of a certain thief, and the executioner wilfully cut off his left hand, nothing is incurred [by the executioner,] according to Haneefa. The two disciples allege that where the act of the executioner is intentional, he is responsible for the hand, but where it is by mistake, he incurs no retribution. Ziffer says that in a case of mistake he is also responsible; and this is agreeable to analogy. By mistake is here meant an error in judgment; in other words, that the executioner supposes or conceives it is equally lawful to cut off the left hand, considering the text of the Koran, according to which it would appear that either may be struck off indifferently, the right not being particularly specified. Where, however, the executioner mistakes with respect to the hand of the thief, saying afterwards “I supposed this to be the right hand,” this is no excuse, since ignorance is not admitted as an excuse in things which are evident. (Some doctors allege that this also is admitted as an excuse.) The argument of Ziffer is that the executioner has cut off an hand the amputation of which was not awarded; and as a mistake which affects an individual is not an object of remission, he is consequently responsible: but to this we reply that the executioner has only been guilty of an error in judgment arising from the text in question not having particularly specified the right hand; and an error in judgment may be forgiven. The argument of the two disciples is that where the executioner acts intentionally, he unrighteously and without explanation cuts off a limb the amputation of which is not awarded;
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awarded; and as, in so doing, he commits a wilful and designed injury, he cannot be forgiven, although his act proceed from an error in judgment:—it would appear, also, that retaliation is due; yet that is not due, but is even prohibited, on account of the doubt respecting his judgment. The argument of Haneefa is that, although the executioner has destroyed one limb, yet he has left another limb of the same kind and of greater value, whence this privation cannot be accounted destruction; in the same manner as if evidence were given that a person had sold certain effects for an adequate price, and the witness were afterwards to retract from his evidence, in which case nothing lies against the witness, since, although he have destroyed the other's property, yet the proprietor has received an equivalent in return, in consequence of the evidence. Agreeably to this argument of Haneefa, it in the same manner follows that, if any other than the executioner were thus to cut off the thief's left hand, this other is also free from responsibility: and this is approved.—If the thief reach forth his left hand, and say "This is my right hand,"—and the executioner strike it off, he is not responsible, according to all our doctors, since he here acts by the thief's directions.—It is to be observed that where the executioner wilfully cuts off the left hand of the thief, the latter is responsible for the value of the property stolen, according to all our doctors:—according to the two disciples, evidently, for as they hold that, in a wilful case, the executioner is responsible, the amputation is not, in fact, a punishment for theft; and punishment not being inflicted upon the thief, he is responsible for the property stolen, since agreeably to their tenets amputation and responsibility for the property stolen cannot be united:—and according to Haneefa, because in his opinion also the amputation of the wrong hand is not the punishment allotted for theft; for the reason why he holds that no responsibility attaches to the executioner is not because the amputation of that hand is a punishment for theft, but because he has, in lieu of that hand, left another more valuable, as has been already stated: and in a case of error also, the effect is the same, whence in this case likewise Haneefa considers
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considers the thief as responsible for the property stolen, for one reason, because the amputation of the wrong hand is not, in fact, punishment for theft;—but there is another reason why responsibility for the property stolen does not lie against the thief, namely, because punishment for theft is inflicted, according to the best of the executioner's judgment, in conformity with the text of the Koran, which is generally expressed, as has been already stated.

A decree of amputation cannot be passed upon a thief, unless the person from whom the property was stolen be present, and prosecute for the theft, because prosecution is essential to the manifestation of theft; and with respect to this rule, it matters not whether the theft be established by confession or by evidence, because an offence committed against the property of another can in no way be rendered manifest but by the prosecution of the aggrieved. This is according to our doctors. Shafei maintains that in case of confession, the presence or prosecution of the person robbed are not requisite: it is related, however, in the Pattabai-Kadoor, that this was not a tenet of Shafei; but that he held confession to be in all respects equal to evidence. It is here to be observed that, according to our doctors, a sentence of amputation cannot be carried into execution unless the person robbed be present, because in punishment execution is supplemental to the Kasee's decree.

If a person steal a deposit from the trustee, or usurped property from the usurper, or property usuriously acquired from the usurer, (as if a person were to take twenty dirms in lieu of ten dirms, and make seizin of the same, and another were to steal from him twenty dirms, including the ten so acquired,) these are at liberty to prosecute

• From this it appears that the confession of a thief is not attended with any consequence, unless the person robbed come forward to prosecute.
the thief and to procure the amputation of his hand. In the same manner also, (in the cases of trust, or of usurpation,) the proprietor of the deposit, or of the property usurped, is at liberty to prosecute the thief, and to procure the amputation of his hand. Ziffer and Sbafieh say that the thief’s hand is not to be struck off at the suit of the usurper or the trustee. The same difference of opinion obtains where a person steals property from an bier, or borrower, or Mozariib, or a holder of Bazati 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 lies, and in whom the charge of it is vested, although he be not the actual proprietor, (such as the trustee of a charitable appropriation, or a father, or executor,)—in all which cases the hand of the thief is also struck off at the suit of the proprietor of the property so stolen.—In the case of a pawnee, however, the thief’s hand is not to be struck off at the suit of the pawnner, unless the property stolen remain with the thief after payment of the pawnholder’s debt, because the pawnner has no right to the property or claim upon it until the debt be paid. It is a rule with Sbafieh that the trustee, usurper, borrower, &c. cannot sue for the recovery of the property; and accordingly, that the thief cannot suffer amputation at their suit. Ziffer says that as their authority to prosecute, for the recovery of the property, is established, from the necessity of protecting it, they cannot possess the same authority with respect to amputation, for if the thief’s hand were cut off at their suit, the protection of the property would be defeated, since if the property were destroyed whilst in the thief’s possession, he would not be responsible for it after having lost his hand, and therefore, if his hand were cut off at their suit, the property no longer remains protected, but is lost to the proprietor. Our doctors say that theft is, in its own nature, the occasion of amputation: and amputation, in the cases in question, is established by a decree of the Khassee, issued in consequence of a prosecution which is admitted generally, and not from necessity; because, as the prosecution of those persons, for the purpose of manifesting the theft, is on account of their wish to recover the property,
their prosecution must be admitted generally, in the same manner as that of the proprietor: (for, the admission of the prosecution of the proprietor for the purpose of manifesting the theft is because he is desirous of recovering the property from the thief, so as that he may be enabled to dispose of it according to his own pleasure;—and the same motive is applicable to the prosecution of the trustee, usurer, borrower, or so forth, since they are also desirous of recovering the property from him, that they may be enabled to dispose of it according to their pleasure; as the borrower or hirer are desirous to recover it, in order to make use of it, and the pawnor or trustee in order to return it to the owner, and thereby free themselves from the responsibility for it, and from their obligation to the charge of it:) since, therefore, it is evident that their prosecution must be admitted generally, in the same manner as that of the proprietor himself, what Ziffer alleges falls to the ground. With respect to what he further advances, that "if the thief’s hand were cut off at their suit the protection of the property would be defeated,"—we reply that the failure of protection is in this case necessarily involved, since as it appears that their prosecution is the same as that of the actual proprietor, it follows that at their suit the hand of the thief must be cut off; now one consequence of amputation is that the protection of the property ceases; and the failure of this protection, as being a thing necessarily involved, is not to be regarded.

Objection.—Although their prosecution be admitted, yet it would appear that the hand of the thief should not be cut off at their suit, so long as the proprietor is not present, because it is possible that, if he were present, he might declare the thing stolen to be the property of the thief.

Reply.—This supposition is merely imaginary, and therefore of no weight; in the same manner as a similar imaginary supposition would not be regarded in a case where the proprietor was present, and the borrower (or other person from whom the property had been stolen) absent; for then the thief’s hand would be cut off at the suit of the proprietor.
If the hand of a thief be cut off for stealing any property, and another thief steal the property from this thief, neither the first thief nor the proprietor are competent to prosecute the second thief; because the property is not appreciable in respect to the first thief, (whence if it were destroyed in his hands he is not responsible,) and it is not protected in respect to the proprietor, (whence, if it had been destroyed in the hands of the first thief, he could not make him responsible;)—the second theft, therefore, does not occasion amputation. There is one tradition, according to which the first thief may take the property back from the second thief, in order to restore it to the proprietor, which it is incumbent upon him to do: but, according to another tradition, the first thief is not at liberty to take back the property from the second thief, as he had not been himself legally possessed of it, since a legal possession or seizin means a seizin either of proprietary, responsibility, or trust, and the seizin of the first thief is not of any of these descriptions. It is said, in the Faitabat-Takdeer, that it is most eligible, in this case, if the proprietor be present, that the Khawâ'is cause the property to be restored to him, or, if not, that he keep it with himself, as a trust, neither restoring it to the first thief, nor yet leaving it with the second, whose offence is manifest.—If, however, the second thief steal the property before the infliction of amputation upon the first thief, or after the remission of punishment in consequence of some doubt [operating in bar of punishment,] his hand is cut off at the suit of the first thief; because, in this case, the property is appreciable with respect to the first thief, since it would be unappreciable with respect to him only in consequence of amputation; but here amputation has not taken place upon him; he is therefore, in this instance, the same as a usurper.
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If a thief return the property stolen to the owner, before the latter has commenced any prosecution against him, and the owner then bring his complaint before the magistrate, in this case, (according to the Zubir Rawayet,) the hand of the thief is not struck off. It is recorded from Aboo Yoosaf that his hand is to be struck off, on account of the analogy between this and a case where the thief returns the property to the owner, after the accusation. The reason adduced in the Zubir Rawayet is that prosecution is essential to the manifestation of theft; because a theft cannot be made manifest but by evidence; and evidence is adduced only for the purpose of terminating the prosecution; and the termination of a prosecution without the establishment of a prosecution is inconceivable; it is therefore evident that prosecution is essential to the manifestation of theft. Now, in the case in question, the prosecution is terminated [in other words, is precluded,] by the restoration of the property to the owner, as this is the end of prosecution, which is obtained by this means; and as that which is essential to the manifestation of theft does not exist in this case, it follows that the theft is not manifested; and the theft not being made manifest, the thief’s hand cannot be cut off, since without the manifestation of his theft, a thief cannot suffer amputation. It is otherwise where the thief restores the property after accusation and the production of evidence, for in this case his hand is struck off, because the prosecution has arrived at its completion, and is therefore accounted still to remain, though the thief have restored the goods at the time of inflicting amputation.

If the Khasr decree amputation, and the owner of the property stolen then take it, and make a gift of it to the thief, his hand is not struck off; and so likewise, if he sell them to the thief. Zisser and Shafei say that the thief is liable to amputation, (and the same is, in one place, recorded from Aboo Yoosaf,) because in this case, the theft has been fully established, and it does not appear, from the gift or sale, that the thief was the proprietor at the time of his stealing the property;
property; wherefore the gift or sale is not the occasion of doubt.—
Our doctors say that execution is a supplement to the Kāzīz's
decree, in this instance; (because, in the case in question, it is
not absolutely necessary that the Kāzīz should say "I decree in this"
"manner;" since this is said merely for the purpose of declaring or
shewing forth a right, and announcing the same to the claimant of the
right; but amputation is a right of God, and is therefore known to the
claimant of right, namely God himself, without the Kāzīz's declara-
tion;) it is therefore requisite that prosecution exist at the time of
inflicting punishment; and as, in the case in question, no prosecution
appears at the time of punishment, it amounts to the same thing as if
the owner of the property had constituted the thief a proprietor of it
prior to the Kāzīz's decree.

If the value of the property stolen be, by depreciation, diminished
to within the standard of theft, (namely, ten dirms,) after sentence
and before execution, amputation does not take place. It is recorded
from Mōbarek that amputation is to be inflicted, and such also is
the opinion of Zīlīr and Shafei, they conceiving an analogy between
this and a case where a deficiency occurs in the actual thing stolen,
as if, for instance, a thief had stolen ten dirms from some person,
and one of them should afterwards be lost or expended,—in which
case the thief's hand would notwithstanding be cut off,—and so
here likewise.—Our doctors say that the completeness of the standard
of theft being a condition of amputation, it is also a condition that
the completeness exist at the time of inflicting the punishment, ac-
cording to what was before said, that "Execution is a supplement
"to the Kāzīz's decree:" contrary to where a deficiency occurs
in the actual article stolen, for in this case no diminution appears
in respect to the standard of theft; because responsibility for that
article lies against the thief as much as if the whole property stolen were
destroyed, whereas no responsibility lies against the thief for a de-
ciency in the value, by depreciation: there is therefore an evident dif-
ference between the two cases.
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If, after witnesses bearing evidence to a theft, the thief plead that the article alleged to have been stolen is his own property, his hand is not to be cut off although he produce no evidence in support of his plea. Shafeii maintains that the punishment for theft is not remitted upon this plea, because every thief has it in his power to plead that the property stolen is his own,—and hence, if punishment were to be remitted upon such a plea, the door of punishment would be altogether closed. Our doctors say that doubt occasions the remission of punishment; and doubt is established upon the plea, since it is possible that it may be true: and with respect to what Shafeii urges, that "no thief can be at a loss for such a plea," it is not of any weight, because retraction and denial are admitted after confession, although a person confessing have it always in his power to retract and deny.

If two persons confess to a theft, and one of them afterwards plead that the property is his, amputation is not inflicted upon either; because the retraction is admitted and approved with respect to the person retracting, and this gives rise to a doubt in regard to the other thief, as the theft is, in the present case, established upon the evidence of both jointly, and hence the act of both is one act.

If two persons commit a theft, and one of them afterwards abscond, and two witnesses bear evidence to the theft, as committed by both, against him who is present, his hand is cut off, according to the most recent opinion of Haneefa; and such is also the opinion of the two disciples. Haneefa was at first of opinion that the hand of the present thief should not be cut off, since, if the absentee were present, it is possible that he might advance some plea which might occasion doubt. The reason on which the more recent opinion of Haneefa is founded

* This reasoning of the Haneefa doctors is so exceedingly absurd and unsatisfactory, that it might perhaps be suspected there is a mistake either in the translation or the text; but the former is literal; and all the copies of the latter, both Persian and Arabic, perfectly coincide: certain it is that the argument of Shafeii remains altogether unanswered.
is that absence prevents the establishment of theft with respect to the absentee, as a decree of the Khase against an absentee is illegal; therefore the theft of the absentee is, as it were, non-existent, and a thing which is non-existent does not give rise to doubt; and the mere apprehension of the occurrence of a doubt is not regarded, on the grounds before stated.

If a Mahsor slave* make a confession that "he had stolen those "ten dirms,"--(there producing them,) his hand is cut off, and the property stolen is returned to the person who had been robbed of it. This is the doctrine of Hanefa. Aboo Yusef has asserted that his hand is to be cut off, but that the ten dirms belong to his master. Mohammad, on the other hand, says that his hand is not to be cut off, but that the ten dirms belong to his master. All this proceeds upon a supposition that the master denies his slave's allegation.—But if this slave confesses that "he had stolen certain property, which no longer "exists, but is destroyed," his hand is to be cut off, according to all our doctors as here enumerated.—If, moreover, the slave be a Masoom, his hand is to be cut off, whether the property stolen be remaining or expended. Ziffer maintains that the hand of a Masoom is not to be cut off in any of these cases; for it is a tenet of his that the confession of a slave, inducing either punishment or retaliation, is not to be admitted; because, as such confession affects either his whole person, or a part, and as his person, and every part of it, is the property of his master, his confession is a confession affecting another, and a confession affecting another is not to be received; but yet the Masoom must be constrained to make satisfaction for the property stolen, where it has been destroyed; or, if it be remaining, he must

* Literally, a prohibited slave; that is, one who is incompetent to buy, sell, or perform any other act whatever, on his own behalf; in opposition to a Masoom or privileged slave, who (under certain restrictions,) is at liberty to act for himself.
be desired to restore it; since his confession is valid with respect to the property, as he has been invested, by his master, with power to make confession in matters of property, whereas a Mahjoor slave's confession respecting property also is not admitted. Our doctors allege that a Mahjoor's confession, inducing punishment, is admitted, as he is a man*, after which the confession proceeds, dependantly, to affect the property, and thus this confession is valid with respect to the property likewise: a slave moreover cannot be suspected, in a case of confession inducing punishment, since his confession induces pain to himself, as his hand is cut off in consequence of it; and a confession of this nature is admitted although it tend to affect the right of another.---The argument of Mobammed, in the case of a Mahjoor, is that his confession, as affecting property, is null; (whence his confession with respect to an usurpation of property, is not admitted;) any property, therefore, which is in the hands of the Mahjoor, is the property of his master; and the hand of a slave is not cut off for stealing the property of his master. A circumstance which confirms this doctrine of Mobammed is, that the property is the original thing in a prosecution for theft, and the amputation only a dependant, whence a prosecution may be heard respecting the property, independent of amputation,—that is, if the proprietor sue for the property and not for punishment, his suit is heard;—and so likewise, property is established independent of amputation, where the evidence consists of one man and two women,—or, where the thief makes confession of the theft, and afterwards retracts and denies it:—but if the case were reversed,—that is, if the owner of the property declare "I am desirous that his hand "be cut off, and do not want the property," his suit is not heard; and in the same manner, amputation cannot be established unless the property be established: it is therefore evident that the property, in the case in question, is the original thing, and amputation only a de-

* And therefore subject to the penalties of the law, in common with other people.
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Pendant; and the confession of a slave not being valid with respect to that which is the original, (namely the property,) it necessarily follows that it is not valid with respect to amputation, which is only a dependant thereof. It is otherwise in the case of a Manoon, as his confession with respect to the property in his hands is valid, and consequently his confession with respect to that which is its dependant (namely amputation) must be valid likewise. The argument of Aboo Poosaf is that, in the case in question, the Mahjoor has made a confession affecting two points; first, amputation, (which affects his own person, according to what was before observed, that "he is a man," and which is consequently valid;) secondly, property, (which affects his master, and is consequently invalid with respect to the master;) now amputation may be incurred independent of property; as where a free person (for instance) confesses to his having stolen cloth, which is in the hands of Zeyd, by saying "I stole this cloth from Aumroo," and Zeyd affirms the cloth to be his own property, in which case the hand of the person so confessing is struck off, although his confession be not received in respect to that particular piece of cloth, whence it is not to be taken from Zeyd. Haneefa says that the confession of a Mahjoor slave, where it induces punishment for theft, is valid, (according to what was before stated, that "he is a man;")—and his confession must also be valid with respect to the property, in consequence of its being so with respect to punishment; because the confession is made after the perpetration of the theft, and not at the beginning of it; and the property, after the theft, is a dependant of amputation; whence it is that the protection of that property ceases in consequence of amputation; and also, that amputation is inflicted after the destruction of the property. It is otherwise in the case of confession made by a freeman, as before cited; for there amputation only is due, but not the restoration of the property; because the hand of a thief is to be cut off for stealing property from a trufer; and it is here possible that the cloth is the actual property of Zeyd, and that the freeman had stolen it from Aumroo, in whose hands it
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It was deposited.—In a case where a slave steals the property of his master his hand is not cut off; whence there is an evident distinction between this case and that of a freeman.—This, however, applies solely to where the master of the slave falsifies his confession:—for if the master verifies his confession, his hand is cut off in all these cases, on account of the delerificion of that which would prevent it, namely, the right of the master.

If, after amputation being inflicted upon a thief, the actual property stolen yet remain in his possession, it must be restored to the owner, as it still remains within his proprietary: but if the property remain not with the thief, he is not responsible for it, whether it have been consumed or destroyed. This is the opinion of Aboo Yoosaf and Haneefa, according to one report; and such also is the doctrine of the Ruwahjet Masboor. Hasan records, from Haneefa, that satisfaction is due where the property has been consumed or expended. Shaafee says that in every case satisfaction is due for the property, and that responsibility for the property does not cease in consequence of amputation, because amputation and satisfaction for the property are both equally rights, although the cause of each be different; (for amputation is a right of the law, the occasion of it being the persons not restraining from the commission of an act which the law forbids; and satisfaction for the property is a right of the individual, the occasion of it being the taking away of the property;) both, therefore, are due; in the same manner as if a person were to destroy game, the property of another, and kept within an enclosure;—or to drink wine, the property of an infidel subject; in the first of which instances correction and satisfaction for the property are both incurred; and, in the second, punishment for wine-drinking, and satisfaction. The arguments of our doctors upon this point are threefold: first, the prophet has said "No responsibility lies against a thief after amputation;"—secondly, an obligation of responsibility prevents punishment; because if the thief were responsible for the property stolen, he would, by making satisfaction for
for it, become the proprietor from the time that he had taken it, in the manner of a succession*, and it would then appear that he had taken his own property, whence his punishment would be prevented; but as amputation is held, by all the doctors, to be unavoidably incurred by him, he is not made responsible, since his being made so would prevent it: thirdly,—the protection of the property ceases at the time of the theft,—that is, it no longer remains in a state of protection on behalf of the individual,—for if it remain protected merely on behalf of the individual, it follows that it is in its own nature neutral †, and is prohibited ‡ only on account of the right of the individual: now this is a prohibition arising from circumstances, and not existing in the thing itself; and as a thing which is in its own nature neutral cannot occasion punishment, it would follow that amputation is not to be inflicted upon the thief, on account of the doubt respecting neutrality; but as amputation is incurred, according to all the doctors, it necessarily follows that the property, at the time of the theft, becomes prohibited in behalf of the right of the law, in the same manner as carrion; and satisfaction is not due for carrion.—The failure (on the other hand) of the protection of the property, with respect to the consumption of it, is not apparent, as the consumption is another matter, distinct from the theft, and it is not necessary that the failure of protection be regarded with respect to the consumption of the property also.—In the same manner, a doubt concerning neutrality is regarded in the thing which occasions amputation, namely, the theft, but not in the thing which is distinct from that,—namely, the consumption. Upon this is founded what Hasán reports as the doctrine of Haneefah, that, “in case of consumption satisfaction for the property is due.” The argument advanced in the Rawdatul Mafboor is that the consumption is

* That is, in the manner of a transition of property.
† Arab. Mobéb, i. e. common property, which it is lawful for any one, indifferently, to take and use.
‡ Arab. Hirdan, in opposition to Mobéb.
merely the completion of the design, (for the design, in stealing the property, is, to consume it;) regard, therefore, is paid to the doubt of neutrality before-mentioned, and hence satisfaction is not incumbent, since the thief has, as it were, destroyed a neutral property.—The protection of the property, moreover, is held to cease with respect to responsibility, in a case of consumption, as the failure of protection in a case of consumption is a necessary consequence of its failure in a case of destruction;—(in other words, the protection of the property ceases in the present case also, and hence the property is not in protection in such a manner that responsibility should be incumbent, any more than in a case of destruction;) for it is manifest that if the protection of property were to remain in a case of consumption only, and satisfaction for that were made due, the agreement between the property in question, (namely, the property stolen) and the property on account of which satisfaction is due, would be destroyed, since [if such were the case] this property is protected on account of the right of the individual, both in the consumption and also in the destruction of it, insomuch that if any person were to usurp it, he would be responsible for it, whether it be destroyed, or consumed by the usurper,—whereas the property in question, (namely, the property stolen,) is protected on account of the right of the individual in a case of consumption only; and there is no agreement between property which is protected in two situations, and property which is protected in one situation only:—but an agreement between the property in question and the property for which satisfaction is required is indispensable: it therefore appears that in a case of consumption also the protection of the property ceases; and no satisfaction is due for it;—in the same manner as holds in a case of destruction.

If a person be repeatedly guilty of theft, and then suffer amputation for any particular theft, such amputation takes place as answering to all the thefts: and there is no responsibility for the property stolen in any one of them, according to Haneefa. The two disciples say
say that the thief is responsible for the property stolen in every theft excepting that for which he has suffered amputation.—This is where only one of the several owners is present.—If, however, they be all present, and the thief suffer amputation at the suit of the whole, in this case he is not responsible for any thing to any one of them, according to the united opinion of all the doctors.—The argument of the two disciples is that the owner present is not the deputy of those who are absent; and prosecution by the proprietor is essential to the manifestation of theft; but, in the case in question, prosecution does not appear on the part of those who are absent, wherefore the larceny of the thief is established with respect to them; their property, therefore, remains in protection, and hence satisfaction is due for it. The argument of Haneefa is that by all the thefts one amputation only is incurred as the right of God; because, in punishments, the application is made as extensive as possible,—(that is, one single punishment suffices*.)—Now, as prosecution is conditional to the manifestation of the theft with the Kāsce, and as that has taken place, (and punishment for theft is incurred on account of the offence,) so when the Kāsce inflicts one single punishment he inflicts the whole that is due; for it is evident that the advantage (namely determent) is reaped by all. The single amputation, therefore, takes place as answering to all the thefts; and hence satisfaction is not due for any one of the properties stolen. The same difference of opinion obtains in a case where a thief repeatedly steals property from the same person, and that person prosecutes upon one of the thefts, and the thief suffers amputation for it:—that is, according to Haneefa, the thief is not responsible for the property stolen in any of the other instances;—but according to the two disciples he is responsible.

* In other words, answers to all the previous repetitions of the same offence for which that punishment is inflicted.
Of the Acts of a Thief with respect to the Property stolen.

If a thief steal a piece of cloth, and tear it in two, in the house of the owner of the cloth, and then take it out of the house, and carry it off, and the value of the cloth, after being thus divided, amount to ten dirms, the hand of the thief is to be struck off. It is recorded from Abou Yoosuf that his hand is not to be struck off; because, upon his dividing the cloth, a cause of his right of property in it appears, as the tearing of it in pieces is a cause of right of property, on account of its subjecting him to responsibility for the value; thus the subject of responsibility becomes his property upon his making satisfaction for it to the owner. Whereupon the thief, therefore, conveys the cloth out of the owner's house after having divided it, theft is not established, since the thief here conveys out of the house a thing in which a cause of his right of property exists; and in such a case the hand of a thief is not to be cut off; in the same manner as the hand is not cut off where the purchaser of goods steals his purchase in which the seller happens to have a reserve of option, as a cause of property exists in that instance; —and so also in the case in question. Haneefa, on the other hand, argues that the taking of the cloth, together with the tearing of it in pieces, is a cause of responsibility, but not of right of property; for the only principle on which this right is established, after making satisfaction, is that if it were not so, the compensation, and the thing for which the compensation is given, would be united in one state of property; and this does not engender doubt, any more than the simple taking, without tearing: in other words, as the simple taking away is also, in some instances, a cause of right of property after satisf-

* Arab. Khass Fabis; that is, tearing so as to destroy or depreciate the value of the article.
fa\tion being made, and yet does not engender doubt, so the taking with
the tearing, which is a cause of responsibility, and, after satisfaction
being made, becomes a cause of right of property, does not engender
doubt. Similar to this is a case where the seller steals from the pur-
chaser damaged goods which he had sold to him; for here his hand is
to be cut off, although the cause of returning these goods, and there-
in, ultimately, the cause of the propriety reverting to the seller, be
established; for his hand is cut off notwithstanding; and so likewise in
the present case. This is contrary to what is adduced by Ab\o\ Joesaf,
that "if a purchaser steal his purchase in which the seller has a re-
serve of option, his hand is not to be cut off;" &c. since sale is em-
ployed for the purpose of substantiating the right of property. The
difference of opinion here recited obtains only where the owner of
the cloth chuses to take it back, together with satisfaction for the
damage it has sustained.—If, however, he chuse to quit the cloth, and
receive of the thief satisfaction for the full value, in this case his hand
is not to be cut off, according to all our doctors, because the thief is
here considered as the proprietor of that cloth from the time of his
taking it, in the manner of succession, and hence it is the same as if
the proprietor were to make a gift of the property stolen to the thief,
for there the thief's hand is not to be cut off because of doubt, and so
here likewise. All that has been here advanced proceeds upon a sup-
position that the cloth has, by tearing it, sustained a considerable
damage; for if the damage be trifling, the hand of the thief is cut off,
according to all the doctors; because in this case no cause of a right of
property appears, since here it is not in the proprietor's power to
take the whole value by way of satisfaction.

If a thief lay his hands upon a goat, and cut its throat within the
house of the owner, and then convey it forth, his hand is not to be
cut off; because in this case the theft is, in the end, a theft of flesh
meat; and the hand is not cut off for stealing flesh meat.

* That is in the way of a transfer of property.
If a man steal gold or silver, to such an amount as would occasion amputation, and then coin the same into dirms, or deems, his hand is to be cut off; and the dirms or deems are given to the person who had been robbed. This is the doctrine of Haneifa. The two disciples say that the person who had been robbed is not entitled to take the dirms or deems. The difference of opinion here originates in a similar difference of opinion in a case of usurpation. Thus if a person were to usurp dirms or deems, and afterwards convert them into ornaments (such as bracelets, for instance) the proprietor's right in them is terminated, according to the two disciples;—contrary to the opinion of Haneifa. In the same manner, also, in the case in question, by converting the gold or silver into dirms or deems, the right of the person robbed is terminated, according to the two disciples; contrary to the opinion of Haneifa. The reason of this difference of opinion is that workmanship is appreciable, with the two disciples, but not with Haneifa. And here observe that, concerning amputation, in the case in question, (judging from the opinion of Haneifa,) there can be no manner of demur, because the thief is not proprietor of the dirms or deems; but some say that (judging by the opinion of the two disciples) there can be no amputation, because the thief has become proprietor of the coin previous thereto. Some again say that in the opinion of the two disciples also amputation is incurred, because the gold or silver has, by workmanship, become another thing, and the slave becomes proprietor of that thing, and not of the actual thing stolen, (namely, the gold or the silver;) and hence his hand must be cut off.

If a person steals cloth, and dye it red, and afterwards suffer amputation for the theft, the cloth is not to be taken back from him; nor is the value to be taken from him by way of satisfaction. This is the doctrine of the two Elders. Maboomed says that the red cloth is to be taken from him, and he is paid for the expense of dyeing; in the same manner as where a person surfs cloth, and afterwards dyes it.
CHAP. V.

LARCINY.

it, in which case the cloth is taken back from him, and he is paid, by the owner, such additional value as the cloth has received in the dying, for this reason, that the cloth is the original article, and is still existing, and the colour is a dependant upon it, whence a preference is given to the owner; the cloth is therefore returned to the owner, and the usurper is paid the expense of dying; and so also, in the present case, because here also the same reason exists. The argument of the two Elders is that the colour is extant both in appearance, and also in reality, whence, if the owner of the cloth were to take it back dyed, he is responsible for the accession of value in consequence of the dying; now the right of the owner of that cloth exists in the appearance of that cloth only, and not in the reality of it, (namely the proprietary,) because, if the cloth were destroyed, the thief is not responsible; and such being the case, a preference is given to the thief. It is otherwise in a case of usurpation, since in that instance the right of the proprietor and also of the usurper is extant and established both in appearance and in reality, for which reason they are both upon a footing, whence a preference is given to the proprietor for the same reason as Mohammed gives the preference to him. What is now advanced applies solely to where the thief has procured the cloth to be dyed of a red colour: but if he were to get it dyed black, the cloth is taken from him, according to Hanesfa and Mohammed. Aboo Yoosof conceives this case to be the same with the preceding, because he holds a black dye also to increase the value of the cloth, in the same manner as a red dye. With Mohammed, likewise, black is the same as red; yet that does not occasion a termination of the proprietor’s right, he being entitled to take back the cloth in either case. With Hanesfa, on the contrary, black is in reality a defect in the cloth, and therefore does not occasion a termination of the proprietor’s right.
CHAP. VI.

Of Katta-al-Tareek, or Highway Robbery.

When a party go forth, prepared for opposition, (that is, enabled to repel the opposition of others,)—or, when a single person goes forth, ready for opposition, from a confidence in his own prowess,—with an intent to commit depredations on the highway, they are termed, in the Arabick language, Katta-al-Tareek *, and in the Persian, Rab-Zin; and the person upon whom a robbery is so committed is termed Maktoo-al-bee †.

Highway Robbers appear under four different descriptions or predicaments. First, those who are seized before they have robbed or murdered any person, or put any person in fear: Secondly, those who are seized after having only robbed a Mussulman or an infidel subject:—Thirdly, those who are seized after having committed murder only without robbing: and Fourthly, those who are seized after having committed both murder and robbery. The law with respect to these in the first predicament is that the magistrate shall confine them in prison until their repentance be evident,—(that is, until it be known from their demeanor that they have repented, by the marks of repentance and contrition appearing in their countenances.). With respect to those in the second predicament, the law is that the magistrate shall strike off their right hand and left foot, provided the property taken be of such value as when divided amongst the whole, would afford to each to the amount of ten dirms. (The right

* Literally, "Insectes of the highway." † Literally, she depredates.
hand and left foot are here particularly specified, because, if the hand and foot were both taken from one side, one of the faculties would be totally destroyed, which amounts to killing, and the law does not award robbers of this description to be put to death.) With respect to those in the third predicament, the law is that the Kāne shall put them to death*, by way of punishment; whence, if the Vallee-ad-dam or avenger of blood forgive them, no regard is paid to his forgiveness, punishment being a right of God †. (The rule with respect to those three descriptions is founded on a text of the Koran, as the passage which occurs upon this head evidently points to the rules here specified. Let it also be observed that the intent of the words “after having robbed a Mussulman or an infidel subject,”—is that the property may appear protected under a lasting protection‡: if, therefore, a robber take the property of an alien, in the way of highway robbery, amputation of the hand and foot is not to be inflicted upon him.) The law with respect to those in the fourth predicament is that the magistrate has it in his option to punish them in which ever way he sees best: if he please, he may first cut off a hand and foot and then put them to death, or crucify them; or, if he please, he may put them to death at once, without inflicting amputation. Mohammed holds that the magistrate has it at his choice either to put them immediately to death, or to crucify them; but that he is not at liberty to inflict amputation upon them likewise; because highway robbery is a single offence, and therefore cannot occasion two punishments; and also because, in punishment, robbery without violence to the person is included in the murder of the person, (whence it is that if a thief, being married, were

* Executed either by hanging or beheading.
† In opposition to retaliation, which being a right of the individual, may either be forgiven, or remitted for a composition.
‡ In opposition to the property of an alien, which is in protection only during his Amā, (or protection under which aliens are permitted to remain in a Mussulman territory for the space of one year.)
L A R C I N Y.

Book VIII.

to commit 

wboisedom he suffers ludsonation only, and not amputation.)
The argument of Haneefah and Aboo Yoosaf is that the infliction in
question (namely death or crucifixion, together with amputation,) is
only a single punishment, more severe than ordinary, on account
of the superior atrocity of its cause, (namely, a complete ob-
struction of the peace of the highway, by murdering a person, and then
carrying off his property,)—whence it is that cutting off the right
hand and left foot constitutes only a single punishment with respect to
a highway robber, whereas, with respect to a common thief, who is not
a highway robber, it would be two punishments; and a variety
of crimes can only be comprehended in a numerous, but not in a
single punishment. It is to be observed that Kadooree, in his abridge-
ment of his own work, has mentioned that it is in the option
of the magistrate either to expose the body upon a cross, after putting
to death the robber, or to leave it. It is recorded from Aboo Yoosaf
that the body must not be left uncruccified, because crucifixion is par-
ticularly mentioned in the sacred writings, and the design of it is publi-
city, in order that others may take warning by it. Lawyers report,
from Haneefah, that publicity is fully obtained by putting to death, the
crucifixion being only by way of aggravation, wherefore the magistrate
has it in his option either to aggravate or not. Again, Kadooree says
that the highway robber in question is to be crucified alive, and then
to be slain by thrusting a spear through his body: and the same is
recorded from Koorakbee. It is recorded from Tebbee that he must
first be slain and then crucified; but the preceding opinion [of Koorak-
bee] is most approved, because crucifying in the way there mentioned
is calculated to excite men’s tears most forcibly, which is the design.
It is also requisite that the body of the criminal be not suffered to re-
main longer than three days upon the cross, because by that time it
becomes putrid and consequently noxious. Aboo Yoosaf says that it
ought to remain there until it fall to pieces, for the more striking
example: to this, however, it may be replied that the example is
sufficiently made by an exposure of three days.
Satisfaction for the property taken not due in case of punishment.

SATISFACTION FOR THE PROPERTY TAKEN NOT DUE IN CASE OF PUNISHMENT.

SATISFACTION FOR THE PROPERTY TAKEN NOT DUE IN CASE OF PUNISHMENT.

If a highway robber be put to death, satisfaction for the property he had taken is not due from him, because of the analogy which this bears to theft, in which the same rule obtains, as has been already stated.

If any one among a band of robbers be guilty of murder, the punishment for it is inflicted upon the whole, because the punishment is in this instance considered as a penalty for the assault of the whole, which is established by each of them being aiding and abetting to the other; (whence if any of them, in fighting, be hard pressed, the others assist him;) and the condition upon which the punishment is inflicted on them is this, that murder be committed by any one of them, which is the case here. Let it also be observed that it is the same whether the murder be committed with a club, a stone, or a scythe, because highway robbery is equally established in all these cases.

If a robber be taken who has neither murdered nor plundered, but only wounded a person or persons, in this case retaliation is exacted of him, where there is retaliation*, or a fine, where there is fine†. —The exacting of retaliation or fine is committed to those who are entitled to claim it, because in the offence in question there is no punishment, whence it is evident that these are a right of the individual, and hence he is to exact it to whom the right appertains, namely, the Walee jandyat or person upon whom the offence has been committed.

If a robber be seized who has both plundered and wounded any person or persons, his hand and foot are to be cut off; but the personal injury sustained from him is remitted, (that is, neither fine nor retaliation are incurred;)—because, where punishment is incurred as a right of

* As in case of the loss of any eye or organ. † As in case of cuts or bruises.

God, the protection, in behalf of the individual, of every thing short of the whole person ceases in the same manner as the protection of property ceases.

If a robber be taken after having repented, and he should have been guilty of both robbery and murder, in this case the Walee 'ja-näyet or avenger of the offence has it in his option either to slay him, in retaliation, or to forgive him; because, in the offence of highway robbery, punishment is not to be awarded after repentance, according to what is written in the Koran, "Punishment shall be inflicted upon them, excepting such as repent before the magistrate lays his hands upon them;" and also, because repentance only can be confirmed by the robber returning the goods he had taken to their proper owner; in which case amputation is not incurred: but amputation not being incurred, it necessarily follows that the right of the individual holds in respect both to persons and property: the avenger of the offence is therefore at liberty either to exact retaliation or to forgive; and if he forgive, the robber remains responsible for the property taken, whether it be destroyed in his hands, or confiscated by him.

If, among a party of robbers, there happen to be an infant or a lunatic, or a prohibited relation of the person robbed, in this case punishment is remitted, not only with respect to this person, but also with respect to all the rest of the party. What is now advanced concerning an infant and lunatic is the opinion of Hanëfa and Ziffer. It is recorded from Aboo Yoosaf that this rule obtains only where the infant, or the lunatic, is the actual perpetrator of the murder or robbery: but if the actual perpetrator be of mature age and sound understanding, in this case punishment is inflicted upon the rest of the party also, although there be an infant or a lunatic among them;—but yet punishment is not inflicted upon the infant or the lunatic. The same difference of

*See p. 116.
opinion obtains in a case of theft committed by a party, of whom some are infants or lunatics;—that is, (according to Haneefa and Ziffer,) punishment is remitted with respect to the whole. The rule is the same with Aboo Yoosef likewise,—provided that only the lunatics or infants carry forth the property out of the owner's house, and not the others; but if the reverse be the case, punishment is not remitted with respect to such of the party as are sane or adult. The argument of Aboo Yoosef is that the perpetrator is a principal, and the assistant a dependant only: now where the perpetrator is possessed of understanding, there can be no demur respecting the principal; nor, in fact, can any demur exist but with respect to the dependant; and that is not regarded: but if the case be reversed, punishment is remitted in respect to the whole, because here the demur concerns the principal.—The argument of Haneefa and Ziffer is that highway-robbery is a single offence, committed by the whole of the party, and that is the cause of the punishment; but where it happens that the act of some of them is not an occasion of punishment, the act of the others is then only a part of the cause, and an effect cannot be established by a part of a cause; in the same manner as where two persons kill a man by one of them striking him wilfully, and the other accidentally, in which case retaliation does not take place; as the act of the person who struck wilfully is only a part of the cause; and so in this case likewise.—With respect to the words "or a prohibited relation of the person robbed,"—some observe that this description applies solely to a case where the property may be held in common between such prohibited relation and the person robbed; whilst others maintain that the application is general, and not restricted to this particular case; and this is approved, because highway-robbery is a single offence, committed by the whole, and hence a prevention of punishment in respect to any any one of them occasions the prevention of it in respect to the remainder.

* Such as between a father and son. (See Intibat.)

Objection.
LARCINY.

Book VIII.

Objection.—Highway robbery committed on a Moostamin* is not an occasion of punishment any more than where it is committed upon a prohibited relation; and as the circumstance of a prohibited relation being of a caravan robbed would occasion the remission of punishment, it would also follow that the circumstance of a Moostamin being in the same caravan is likewise an occasion of punishment being remitted: this, however, is not the case, as by the commission of a robbery upon a caravan punishment is incurred, although there be a Moostamin along with it.

Reply.—Highway robbery committed on a Moostamin is not an occasion of punishment, because of a doubt existing with respect to the protection of his life and property: but this reason is restricted peculiarly to a Moostamin.—It is otherwise where a prohibited relation happens to be in the caravan; since, from his being there, a doubt arises respecting the custody, as a whole caravan constitutes one single custody, in the same manner as a single house, and hence by taking property from the caravan punishment is not incurred; in the same manner as where a person steals the property of his relation, and also the property of a stranger, from a house in which the relation and stranger reside together; in which case his hand is not cut off, on account of a doubt respecting the custody; and so here likewise. As punishment, however, in the case under consideration, is remitted, it follows that the right of the individual takes place, according to what was before stated; and hence, if the robber should have committed murder, the avengers of the offence have it in their option either to put the murderer to death, or to forgive him.

* An alien infidel, who, not being a fixed resident of the Mussulman government, has yet a temporary protection from it, (never exceeding the space of one year,) either as a fugitive from his own nation, or as a merchant, or as having been deputed on a particular commission. (They are particularly treated of in the next book.)
of the same caravan, punishment is not incurred by them; because a caravan constitutes a single custody, like a single house; and as, if one of two persons living in the same house were to steal property belonging to the other out of that house, punishment for theft is not to be inflicted upon him, so here likewise.

If a person commit a highway-robbery by night,—or by day within a city, or in Koofa, or Heera *,—this person is not accounted a robber, on a favourable construction.—Analogy would require that he be considered as a robber, (and such is the opinion of Shafe'ei,) because an intention of robbery here evidently appears.—It is recorded from Aboo Yosaf that punishment is inflicted by him where he commits a robbery without the precincts of the city, although it be in the neighbourhood of it, because there no assistance can be had: and he further affirms that if robbers make an affray in the city, during the day-time, with deadly weapons,—or if they make an affray during the night, either with deadly weapons, or with sticks and stones,—they are to be accounted as highway-robbers, because deadly weapons are too quick in their effect to admit of assistance coming, and in the nighttime assistance comes slowly.—The reason for a more favourable construction of the fact here is, that highway-robbery signifies attacking people upon the highway, which does not apply to cities, or inhabited places in their vicinity, because it is evident that in such places assistance may be procured; the persons in question, therefore, are not highway-robbers, and hence punishment is not inflicted upon them.—They must, however, be constrained to make restitution of the property taken, in such a manner that the claimant may obtain his right: and they are also to be corrected and imprisoned, as they have committed an offence. If, moreover, they have slain any person, prosecution for

* Heera means, generally, any inclosure.—In the present case it is said to allude to a particular Mawzil, (or resting place for travellers,) near Koofa, constructed by Naman Bin Mandar, in which the lodges, although not touching, are yet all near each other.
that is committed to the avenger of blood for the reasons before stated.—It is to be observed, however, that decrees have passed according to the opinion of Aboos Yossef, as appears in the Fattabal-Takdeer, copied from Tabavee.

If a person provoke another to such a degree that he slays him, the Deyit, or fine of blood, falls upon the tribe of the slayer, according to Haneefa.—(This is a case of homicide upon provocation, which will be hereafter more fully treated of under the head of Deyit.)—If, however, a man repeatedly act thus, he must be put to death for it, as he is a common nuisance in the land of God, wherfore his iniquity must be removed by destroying him.
BOOK IX.

AL SEYIR, or the INSTITUTES.

SEYIR is the plural of Seerit, which, in its primitive sense, signifies regulation, in matters spiritual and temporal.—Seyir, in the language of the law, more especially applies to the institutes of the prophet in his wars.

Chap. I. Introductory.
Chap. II. Of the manner of waging war.
Chap. III. Of making peace, and concerning the persons to whom it is lawful to grant protection.
Chap. IV. Of Plunder, and the division thereof.
Chap. V. Of the Conquests of Infidels.
INSTITUTES

Book IX.

Chap. VI. Of the Laws concerning Mussulmans.
Chap. VII. Of Tithe and Tribute.
Chap. VIII. Of jizyât, or Capitation Tax.
Chap. IX. Of the Laws concerning Apostates.
Chap. X. Of the Laws concerning Rebels.

CHAP. I.

The sacred injunction concerning war* is sufficiently observed when it is carried on by any one party or tribe of Mussulmans; and it is then no longer of any force with respect to the rest. It is established as a divine ordinance, by the word of God, who has said, in the Koran, "Slay the infidels †; and also by a saying of the prophet, "War "is permanently established until the day of judgment," (meaning the ordinance respecting war.) The observance, however, in the degree above mentioned suffices; because war is not a positive injunction ‡, as it is, in its nature, murderous and destructive, and is enjoined only for the purpose of advancing the true faith, or repelling evil from the

* Meaning the Jihâd Fare, or ordained war, enjoined, in various passages of the Koran, to be waged against infidels. It is termed, by some, the holy war.

† Arab. Mußihâkisan; literally, associators; i. e. polytheists, or idolaters.

‡ Arab. Fuzn Ânâ. This is a technical expression which cannot well be translated: it means an injunction or ordinance unconditional in its nature, and general in its application; and the obligation of which extends alike to every individual. Thus fasting and prayer are of the class of Fuzn Ânâ: in opposition to such duties as are merely conditional and occasional.
servants of God; and when this end is answered by any single tribe or party of Mussulmans making war, the obligation is no longer binding upon the rest; in the same manner as in the prayers for the dead; (if, however, no one Mussulman were to make war, the whole of the Mussulmans would incur the criminality of neglecting it;) and also, because, if the injunction were positive, the whole of the Mussulmans must consequent engage in war, in which case the materials for war (such as borses, armour, and so forth) could not be procured.—Thus it appears that the observance of war, as aforesaid, suffices, except where there is a general summons, (that is, where the infidels invade a Mussulman territory, and the Imam for the time being issues a general proclamation, requiring all persons to stand forth to fight,) for in this case war becomes a positive injunction with respect to the whole of the inhabitants, whether men or women, and whether the Imam be a just or an unjust person: and if the people of that territory be unable to repulse the infidels, then war becomes a positive injunction with respect to all in that neighbourhood; and if these also do not suffice, it then becomes a positive injunction with respect to the next neighbours; and in the same manner, with respect to all the Mussulmans, from east to west.

The destruction of the sword is incurred by infidels, although they be not the first aggressors, as appears from various passages in the sacred writings which are generally received to this effect.

It is not incumbent upon infants to make war, as they are objects of compassion: neither is it incumbent upon slaves, or women, as the right of the master or of the husband have precedence: nor is it so upon the blind, the maimed, or the decrepit, as such are incapable.

* All Mussulmans are directed to pray for the dead: but the injunction is sufficiently fulfilled by the act of the Imam, or the relations or Murulas of the deceased.

† Arab. Kaddis; meaning war in its operation, such as fighting, flying, &c.
Institutes. Book IX.

If, however, the infidels make an attack upon a city or territory, in this case the repulsion of them is incumbent upon all Musulmans, insomuch that a wife may go forth without the consent of her husband, and a slave without the leave of his master, because war then becomes a positive injunction, and possession either by bondage or by marriage cannot come in competition with a positive injunction,—as in prayer (for instance) or fasting.—This is supposing a general summons; for, before that, it is not lawful for a woman or slave to go forth to make war without the consent of the husband or master, as there is, in this case, no necessity for their assistance, since others suffice; and hence no reason exists for destroying the right of the husband or master on that account.

If there be any fund in the public treasury, so long as the fund lasts, any extraordinary exactions* for the support of the warrior is abominable; because such exaction resembles a hire for that which is a service of God, as much as prayer or fasting; and hire being forbidden in these instances, so is it in that which resembles them.—In this case, moreover, there is no occasion for any extraordinary exaction, since the funds of the public treasury are prepared to answer all emergencies of the Musulmans, such as war, and so forth. If, however, there be no funds in the public treasury, in this case the Imam need not hesitate to levy contributions for the better support of the warriors; because, in levying a contribution, the greater evil (namely, the destruction of the person) is repelled; and the contribution is the smaller evil; and the imposition of a smaller evil, to remedy a greater, is of no consequence. A confirmation of this is found in what is related of the prophet, that he took various articles of armour, and so forth, from Sîfwan and Omar: in the same manner, also, he took property from married men, and bestowed it upon

* Arab. یُؤُجِ: meaning an extraordinary donation or reward.
the unmarried, in order to encourage them, and enable them to go forth to fight with cheerfulness;—and he also used to take the horses from those who remained at home, and bestowed them upon those who went forth to fight, on foot.

CHAP. II.

Of the Manner of Waging War.

When the Muslims enter the enemy's country, and besiege the cities or strong holds of the infidels, it is necessary to invite them to embrace the faith, because Ibn Abbas relates of the prophet that "he never destroyed any without previously inviting them to embrace the faith." If, therefore, they embrace the faith, it is unnecessary to war with them, because that which was the design of the war is then obtained without war. The prophet, moreover, has said "we are directed to make war upon men until such time as they shall confess there is no God but one God; but when they repeat this creed, their persons and properties are in protection."—If they do not accept the call to the faith, they must then be called upon to pay jizyâ, or capitation-tax *; because the prophet directed the commander of his armies so to do; and also, because by submitting to this tax, war is forbidden and terminated, upon the authority of the Koran. (This call to pay capitation tax, however, respects only those from whom the

* 'Tribute from the person, in the same manner as kirâj is tribute from land.

capitation-
capitation-tax is acceptable; for as to apostates and the idolaters of Arabia, to call upon them to pay the tax is useless, since nothing is accepted from them but embracing the faith, as it is thus commanded in the Koran.)—If those who are called upon to pay capitation-tax consent to do so, they then become entitled to the same protection, and subject to the same rules as Mussulmans, because Alee has declared "Infidels agree to a capitation-tax only in order to render their "blood the same as Mussulman blood, and their property the same as "Mussulman property."

It is not lawful to make war upon any people who have never before been called to the faith, without previously requiring them to embrace it; because the prophet so instructed his commanders, directing them "to call the Infidels to the faith;" and also, because the people will hence perceive that they are attacked for the sake of religion, and not for the sake of taking their property, or making slaves of their children, and on this consideration it is possible that they may be induced to agree to the call, in order to save themselves from the troubles of war.

If a Mussulman attack infidels without previously calling them to the faith, he is an offender, because this is forbidden; but yet, if he do attack them before thus inviting them, and slay them, and take their property, neither fine, expiation, or atonement are due, because that which proceedeth (namely, Islam,) does not exist in them, nor are they under protection by place, (namely, the Mussulman territory,) and the mere prohibition of the act is not sufficient to sanction the execution either of fine, or of atonement for property; in the same manner as the slaying of the women or infant children of infidels is forbidden; but if, notwithstanding, a person were to slay such, he is not liable to a fine.

It is laudable to call to the faith a people to whom a call has already
already come, in order that they may have the more full and ample warning: but yet this is not incumbent, as it appears in the Nabi-Sabreeb that the prophet plundered and despoiled the tribe of Mosulfick by surprise; and he also agreed, with Ashma, to make a predatory attack upon Cobna at an early hour, and then to set it on fire; and such attacks are not preceded by a call. 'Cobna is a place in Syria:—some assert it is the name of a tribe.'

If the infidels, upon receiving the call, neither consent to it, nor agree to pay capitation-tax, it is then incumbent on the Mussulmans to call upon God for assistance, and to make war upon them; because God is the assistant of those who serve him, and the destroyer of his enemies, the infidels; and it is necessary to implore his aid upon every occasion; the prophet, moreover, commands us so to do. — And having so done, the Mussulmans must then, with God's assistance, attack the infidels with all manner of warlike engines, (as the prophet did by the people of Tayef,) and must also set fire to their habitations, (in the same manner as the prophet fired Bawera,) and must inundate them with water, and tear up their plantations, and tread down their grain; because by these means they will become weakened, and their resolution will fail, and their force be broken; these means are, therefore, all sanctified by the law.

It is no objection to shooting arrows, or other missiles, against the infidels, that there may chance to be among them a Mussulman in the way either of bondage or of traffic; because the shooting of arrows and so forth among the infidels remedies a general evil, in the repulsion thereof from the whole body of Mussulmans; whereas the slaying of a Mussulman slave or trader is only a particular evil; and to repel a general evil a particular evil must be adopted; and also, because it seldom happens that the strong holds of the infidels are destitute of Mussulmans, since it is most probable that there are Mussulmans residing in them, either in the way of bondage or of traffic;
and hence, if the use of *missile* weapons were prohibited on account of these *Mussulmans*, war would be obstructed.

If the infidels, in time of battle, should make shields of *Mussulman* children, or of *Mussulmans* who are prisoners in their hands, yet there is no occasion, on that account, to refrain from the use of missile weapons, for the reason already mentioned. It is requisite, however, that the *Mussulmans*, in using such weapons, aim at the infidels, and not at the children or the *Mussulman* captives; because, as it is impossible, in shooting, to distinguish precisely between them and the infidels, the person who discharges the weapon must make this distinction in his intention and design, by aiming at the infidels, and not at the others, since thus much is practicable, and the distinction must be made as far as is practicable. There is also neither fine nor expiation upon the warriors on account of such of their arrows or other missiles as happen to hit the children or the *Mussulmans*, because the war is in observance of a divine ordinance, and atonement is not due for anything which may happen in the fulfilment of a divine ordinance, for otherwise men would neglect the fulfilment of the ordinance from an apprehension of becoming liable to atonement. It is otherwise in the case of a person eating the bread of another when perishing for hunger, as in that instance atonement is due although eating the bread of other people, in such a situation be a divine ordinance; because a person perishing for hunger will not refrain from eating the provision of another, from the apprehension of atonement, since his life depends upon it; whereas war is attended with trouble, and dangerous to life; whence men would be deterred, by apprehension of atonement, from engaging in it.

There is no objection to the warriors carrying their *Korans* and their women along with them, where the *Mussulman* force is consid-

*That is to say, is enjoined and authorised in the sacred writings.*
derable, to such a degree as to afford a protection from the enemy, and not to admit of any apprehension from them, because in that case safety is most probable, and a thing which is most probable stands and is accounted as a thing certain.

If the force of the warriors be small, (such as is termed a Sirree-yat *) so as not to afford security from the enemy, in this case their carrying their women or Korans along with them is reprobated; because, in such a situation, taking those with them is exposing them to dis-honour; and taking the Koran with them, in particular, is exposing it to contempt, since infidels scoff at the Koran with a view of insulting the Mussulmans; and this is the true meaning of the saying of the prophet "Carry not the Koran along with you into the territory of the enemy," (that is, of the infidels.)

If a Muzzulman go into an infidel camp, under a protection, there is no objection to his taking his Koran along with him, provided these infidels be such as observe their engagements, because from these no violence is to be apprehended.

It is lawful for aged women to accompany an army, for the performance of such business as suits them, such as dressing victuals, administering water, and preparing medicines for the sick and wounded;—but with respect to young women, it is better that they stay at home, as this may prevent perplexity or disturbance. The women, however, must not engage in fight, as this argues weakness in the Mussulmans; women, therefore, must not take any personal concern in battle unless in a case of absolute necessity: and it is not laudable to carry young women along with the army, either for the purpose of carnal gratification, or for service: if, however, the necessity be very urgent, female slaves may be taken, but not wives.

* A cohort; a body of men from 300 to 500.
A wife must not engage in fight but with the consent of her husband. nor a slave, but with the consent of his owner, (according to what was already stated, that "the right of the husband and the master has precedence," unless from necessity, where an attack is made by the enemy.

It does not become Mussulmans to break treaties, or to act unfairly with respect to plunder, or to disfigure people (by cutting off their ears and noses, and so forth;) for as to what is related of the prophet, that he disfigured the Ormeans, it is abrogated by subsequent prohibitions.—(The history of the Ormeans is this. A party of the inhabitants of Oorna came to Medina, and there took oaths [of fidelity] to the prophet, and afterwards fell sick, upon which the prophet sent them to his camel stables, directing them to live upon camel's milk; but when they recovered they slew the camel-keepers, and carried off the camels; and the prophet dispatched people after them by night, who overtook them, and cut off their ears and noses by the prophet's order.)—In the same manner, it does not become Mussulmans to slay women or children, or men aged, bedridden, or blind, because opposition and fighting are the only occasions which make slaughter allowable, (according to our doctors;) and such persons are incapable of these. For the same reason also, the paralytic are not to be slain, nor those who are dismembered of the right hand, or of the right hand and left foot. Shafei maintains that aged men, or persons bedridden or blind may be slain; because (according to him) infidelity is an occasion of slaughter being allowable; and this appears in these persons. What was before observed, however, that "the paralytic or dismembered are not to be slain," is in proof against him, as infidelity appears in these also, yet still they are not slain, whence it is evident that mere infidelity is not a justifiable occasion of slaughter. The prophet, moreover, forbade the slaying of infants or single persons; and once, when the prophet saw a woman who was slained.

* Arab. Zirrd; meaning scattered about at random.
flain, he said, "Alas! this woman did not fight: why, therefore, was she slain?"—But yet, if any of these persons be killed in war, or if a woman be a queen or chief, in this case it is allowable to slay them, they being qualified to molest the servants of God.—So also, if such persons as the above should attempt to fight, they may be slain, for the purpose of removing evil, and because fighting renders slaying allowable.

A LUNATIC must not be slain unless he fight, as such a person is not responsible for his faith: but yet where he is found fighting it is necessary to slay him, for the removal of evil. It is also to be observed that infants or lunatics may be slain so long as they are actually engaged in fight, but it is not allowed to kill them after they are taken prisoners: contrary to the case of others, who may be slain even after they are taken, as they are liable to punishment, because they are responsible for their faith.

A PERSON who is insane occasionally, stands, during his lucid intervals, in the same predicament as a sane person.

It is abominable in a Mussulman to begin fighting with his father who happens to be among the infidels; nor must he slay him; because God has said, in the Koran, "HONOUR THY FATHER AND THY MOTHER;" and also, because the preservation of the father’s life is incumbent upon the son, according to all the doctors; and the permission to fight with him would be repugnant to that sentiment. If, also, the son should find the father, he must not slay him himself, but must hold him in view until some other come and slay him, for thus the end is answered without the son slaying his father, which is an offence. If, however, the father attempt to slay the son, insomuch that the son is unable to repel him but by killing him, in this case the son need not hesitate to slay him; because the design of the son is merely to repel him, which is lawful; for if a Mussulman
man were to draw his sword with a design of killing his son, in such a way as that the son is unable to repel him but by killing him, it is then lawful for the son to slay his father, because his design is merely repulsion; in a case therefore where the father is an infidel, and attempts to slay his son, it is lawful for the son to slay the father in self-defence, a fortiori.

C H A P. III.

Of making Peace; and concerning the Persons to whom it is lawful to grant Protection.

If the Imam make peace with aliens*, or with any particular tribe or body of them, and perceive it to be eligible for the Mussulmans, there need be no hesitation; because it is said, in the Koran, "If the infidels be inclined to peace, do ye likewise consent thereto;"—and also, because the prophet, in the year of the punishment of Eubea, made a peace between the Mussulmans and the people of Mecca for the space of ten years; peace, moreover, is war in effect, where the interest of the Mussulmans requires it, since the design of war is the removal of evil, and this is obtained by means of peace: contrary to where peace is not to the interest of the Mussulmans, for it is not, in that case, lawful, as this would be abandoning war both apparently, and in effect. It is here, however, proper

* Arab. Hirda. This, in its literal sense, signifies an enemy, the term, however, extends to all mankind except Mussulmans and Zimmers, whether they be actually at war with the Mussulmans or not. It appears to be synonymous with the Latins Hostis.
to observe that it is not absolutely necessary to restrict a peace to the term above recorded (namely, ten years,) because the end for which peace is made may be sometimes more effectually obtained by extending it to a longer term.

If the Imam make peace with the aliens for a single term, (namely, ten years,) and afterwards perceive that it is most advantageous for the Mussulman interest to break it, he may in that case lawfully renew the war, after giving them due notice; because, upon a change of the circumstances which rendered peace advisable, the breach of peace is war, and the observance of it a desirion of war, both in appearance, and also in effect, and war is an ordinance of God, and the forsaking of it is not becoming [to Mussulmans.] It it to be observed that giving due notice to the enemy is in this case indispensably requisite, in such a manner that treachery may not be induced, since this is forbidden. It is also requisite that such a delay be made in renewing the war with them as may allow intelligence of the peace being broken off to be universally received among them; and for this such a time suffices as may admit of the king or chief of the enemy communicating the same to the different parts of their dominion, since, by such a delay, the charge of treachery is avoided.

If the infidels act with perfidy in a peace, it is in such case lawful for the Imam to attack them without any previous notice, since the breach of treaty in this instance originates with them, whence there is no occasion to commence the war on the part of the Mussulmans by giving them notice. It would be otherwise, how-

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* (So in the original:) meaning, that although, where it advances the Mussulman interest, peace is the same as war, as it answers the same purpose (namely their advantage,) yet this is not the case where advantage is no longer derived from it.

† That is to say, break the peace by any hostile act.
ever, if only a small party of them were to violate the treaty, by entering the Mussulman territory and there committing robberies upon the Mussulmans, since this does not amount to a breach of treaty. If, moreover, this party be in force, so as to be capable of opposition, and openly fight with the Mussulmans, this is a breach of treaty, with respect to that party only, but not with respect to the rest of their nation or tribe; because, as this party have violated the treaty without any permission from their prince, the rest are not answerable for their act; whereas, if they made their attack by permission of their prince, the breach of treaty would be regarded as by the whole, all being virtually implicated in it.

If the Imam make peace with aliens in return for property, there is no scruple; because, since peace may be lawfully made without any such gratification, it is also lawful in return for a gratification. This, however, is only where the Mussulmans stand in need of the property thus to be acquired: for if they be not in necessity, making peace for property is not lawful, since peace is a desertion of war, both in appearance and in effect. — It is to be observed that if the Imam receive this property by sending a messenger, and making peace, without the Mussulman troops entering the enemy’s territory, the object of disbursement of it is the same as that of Jizyat, or capitation-tax; that is, it is to be expended upon the warriors, and not upon the poor. If, however, the property be taken after the Mussulmans have invaded the enemy, in this case it is as plunder, one fifth going to the Imam, and the remainder to be divided among the troops; as the property has in fact been taken by force in this instance.

It is incumbent on the Imam to keep peace with apostates*, and not to make war upon them, in order that they may have time to

* Meaning tribes which apostatise and desert the Mussulman cause, as occasionally happened in the earlier times of Mohammedanism.
consider their situation, since it is to be hoped that they may again return to the faith. — It is therefore lawful to delay fighting with them, in a hope that they may again embrace Islam; but it is not lawful to take property from them. If, however, the Imam should take property from them, it is not incumbent upon him to return it, as such property is not in protection.

If infidels harass the Mussulmans, and offer them peace in return for property, the Imam must not accede thereto, as this would be a degradation of the Mussulman honour, and disgrace would be attached to all the parties concerned in it; — this, therefore, is not lawful, except where destruction is to be apprehended, in which case the purchasing a peace with property is lawful, because it is a duty to repel destruction in every possible mode.

The sale of warlike stores to aliens is not permitted; neither is it allowed to send merchants among them for the purpose of selling their horses and armour; because the prophet has forbidden us to sell warlike stores into the hands of aliens, or to carry them to them; and also, because the aliens, by selling them warlike stores, are strengthened to fight the Mussulmans. — Selling them horses is likewise unlawful, for the same reason. Selling them iron is also prohibited, as it is the material from which arms are constructed. — And as the sale of these articles is disallowed before peace, so is it likewise after peace has been concluded, as peace is of uncertain duration. — It is to be remarked that analogy would require that the rule with respect to selling them provisions or clothing should be the same as with respect to selling them arms: but to sell them viands and clothing is lawful, in conformity with what is recorded of the prophet, that he directed Siimáma to carry provisions to the people of Mecca for sale, although those people were then aliens.*

*That is, had not yet submitted, or embraced the faith.
If a free person grant protection to an infidel, or to a body of infidels, or to the people of a fort or city, the protection is valid, whether the person granting it be a man or a woman; and no person of the Mussulmans is afterwards at liberty to molest them; because the prophet has said "if the least among the Mussulmans grant protection to an infidel, and make a compact with him, it behoves the whole to observe such protection and compact, and not to break it;" and the learned agree that the word adna, [the least,] in this saying, means a single person—and also, because any single Mussulman is empowered to make war upon the infidels, wherefore they fear him, since he is competent to oppose them; by his granting protection, therefore, protection is established as from him, since he is one of whom protection may be asked; because the object of fear is the object to which to look for protection; and a single Mussulman is the object of fear, (according to what was before asserted, that "the infidels fear him;") by his granting them protection, therefore, protection is established as from him, and it then extends to all others besides the person who grants it; in the same manner as in the case of seeing the new moon, at the commencement of Rezadha;—for, if a person testify to seeing the new-moon of Rezadha, saying "I see it," the fast of Rezadha becomes incumbent upon him, and the obligation then extends to all others; and so in the present case likewise, the protection becomes binding upon all others besides the person who grants it,—and the obligation of it extends from him to all the rest,—and they are not at liberty to break it. Moreover, the cause of the validity of protection is the act of protecting; and as that is not of a mutable nature, to the

* The ninth month of the Muhammadan year, during which a strict fast is enjoined, commencing from the first appearance of the new moon.
protection is not divisible, and is therefore complete;—that is, the protection granted by one Mussulman is considered as proceeding from the whole, in the same manner as the exercise of guardianship in marriage:—for if one of several guardians of an infant, who are all upon an equality, in point of guardianship, contract the infant in marriage, the marriage is valid and binding upon all the other guardians, and no one of them is at liberty to annul it: thus, in the present case, if any one Mussulman grant protection to an infidel, the same is established and binding upon all others, and no Mussulman is at liberty to annul it, since the protection is valid,—except where it has an evil tendency, in which case it must be annulled, and intelligence of the same must be communicated to the infidels, in the same manner as if the Imam himself were to grant a protection, and afterwards find it advisable to annul it, in which case he is at liberty to annul it, giving the infidels notice of the annulment, as has been already stated.—The Imam must also reprove any person who singly gives a protection, where the protection is of evil tendency, as he has in this instance presumed to let his own judgment above that of the Imam, and has confided in his own prudence. It is otherwise where the protection is advisable, as the person who grants it has here an excuse, since if he were to delay giving the protection, the good to be derived from it might be defeated.

If a Zimmer grant protection to an alien infidel, his protection is not valid, because the acts of a Zimmer are liable to suspicion, with respect to granting protection, on account of his infidelity; besides, a Zimmer has no authority with respect to Mussulman.

If a Mussulman be residing among the infidels, either as a captive or a merchant, and grant a protection to aliens, his protection is invalid, because he is in the power of the aliens, wherefore the aliens are not in fear of him, and protection is restricted to the object of fear; and also, because, as persons in those situations are liable to be constrained to grant a protection, they may not be directed by what is
is advisable. If, moreover, the protection granted by the captive or
the merchant were valid, whenever the infidels found themselves
pressed in war, and unable to carry it on, they might influence the
captive or the merchant to grant them a protection, and through means
of that protection they might find relief, when the door of victory
over them would be closed.

If a person who has embraced the Mussulman faith in the country
of the aliens, but who has not yet retired into the Mussulman territo-
ries, grant protection to infidels, this protection is not valid, for the
same reasons as are assigned in the preceding case.

If a [Mussulman] slave grant protection, it is not valid (according
to Haneefa) except where his master has given him permission to en-
gage in war. Mohammed says that the protection granted by a slave
is valid, and such also is the opinion of Shafet.—Aboo Yoosef also
agrees with him, according to one tradition.—According to another
tradition, his opinion is the same as that of Haneefa. The arguments
of Mohammed are twofold:—First, Aboo Moosa Albytree relates that
the prophet declared the protection granted by a slave to be a valid
protection:—Secondly, a slave may also be a believer, and may con-
sequently possess a power of resistance*: the protection granted by
an unlicensed slave, therefore, is valid, in the same manner as the
protection granted by a slave who has been permitted to engage in
war;—and in the same manner, also, as a contract of servitude or sub-
jection is valid; (for, if an alien were to execute a contract of servitude
before a slave, and the slave agree thereto, the contract is valid †;—
and so here likewise.)—The reason why a slave, not licenced to en-

* In opposition to the state of an infidel, who not being allowed to carry arms, is held
incapable of resistance.
† That is, the alien is made a Zimmer, or subject of the Mussulman state.
gage in war, is held in the same light as one who is licenced, is that the cause of the validity of the protection granted by the licenced slave is his being a believer, and consequently capable of resistance; and this circumstance is constituted the cause, on the ground that faith is conditional to piety, and war [with infidels] is an act of piety.—This power of resistance, moreover, is made a condition, in order that the protection may be established as from its proper source, since the object of fear is the object to which to look for protection. Now as the slave in question possesses a power of resistance, he is feared, and protection may therefore proceed from him; and the advantage of protection (namely, the advancement of religion, and of the Mussulman interests) is also obtained; for the question supposes a case in which the interest of the whole body of Mussulmans is concerned. It being demonstrated, therefore, that the causes of the validity of a protection granted by a licenced slave are belief; and a consequent power of resistance, and these causes existing equally in the slave who is not licenced, it follows that his protection is equally valid:—but yet it is not lawful for him to fight, because this would be contrary to his master’s interest *, whereas the granting of protection being only a speech, the interest of the master can in no respect be endangered by it.—The arguments of Haneefa on this subject are twofold;—first, a slave who is not licenced to fight is inhibited from fighting, whence his protection is not valid; because the infidels have no fear of him, and consequently he cannot be the source of protection, (since the object of fear is the object to which to look for protection, as was already observed;)—and such being the case, a protection granted by him is of no effect: contrary to a slave who is licenced to fight, since he is established the object of fear.—Secondly, fighting is not lawful to the inhibited slave, as this is an act which affects his master in such a mode as to create an apprehension of damage to him; and the slave’s granting protection is also of the same nature, because granting protection is one branch of

* As it would endanger the life of the slave, who is his master’s property.
military authority, since the design of fighting is to remove the wickedness of the infidels, and this end is obtained by granting protection; the slave’s granting protection, therefore, is one of the branches of war; and in this there is an apprehension of injury to his master;—for a slave sometimes makes a mistake in granting protection, (nay, it is the rather to be apprehended that he should make a mistake,) because, as his time is chiefly employed about his master, he cannot be experienced in war, and hence, if his protection were valid, plunder would be precluded; and this is an injury to all the Mussulmans, of whom his master is one. The protection, therefore, granted by an inhibited slave is an act of military authority, in which there is an apprehension of injury to the master, and consequently is not valid. It is otherwise where a slave licenced to fight grants a protection, because this is valid, although it admit an apprehension of injury in respect to the master, since the master appears consenting to his own injury. A licenced slave, moreover, is seldom guilty of a mistake, because he is accustomed to fighting. The case in question is also different from a contract of fealty; because such a contract is a substitute for conversion to the faith, and therefore stands in the place of a call to the faith; and also, because such a contract is as a balance to capitation-tax; and also, because consent to such a contract, when the infidels desire it, is ordained; and the fulfilment of a divine ordinance is peculiarly advantageous: hence there is an evident distinction between granting protection and attesting to a contract of fealty.

If a boy of immature understanding grant a protection to an infidel, his protection, like that of a lunatic, is not valid.—If the boy be of mature understanding, but not licenced to engage in war, then concerning his protection there is a difference of opinion, the same as before mentioned respecting the unlicenced slave: if, however, this boy be licenced to engage in war, his protection is valid;—and this is approved.

CHAP.
CHAP. IV.

INSTITUTES.

Of Plunder, and the Division thereof.

In the Imam conquer a country by force of arms, he is at liberty to divide it among the Mussulmans, (in the same manner as the prophet divided Khebhir among his followers:)—or, he may leave it in the hands of the original proprietors, exacting from them a capitation-tax, and imposing a tribute upon their lands, in the same manner as Omar did with respect to the people of Irak.—The Imam, therefore, has either of these at his option, and may prefer that mode which is most adapted to his situation. Some, however, assert that the former of these is preferable, where the troops are necessitous,—and that the latter is preferable, where they are not necessitous, in order that the tax and tribute may be reserved as a fund to answer contingencies.—Such is the law with respect to immoveable property and lands:—but with respect to moveable property, it is unlawful to leave that with the infidels, as no mention is made of it in the sacred writings.—Sbeefit maintains that leaving immoveable property with them is also unlawful, since this would be destructive to the right of the troops;—the relinquishment of it, therefore, is illegal without an adequate return; and tribute is not an adequate return, as it is, comparatively, of trifling value. It is otherwise with respect to the persons of the infidels, which the Imam may lawfully release in consideration of a capitation-tax, because, as the Imam may lawfully destroy the right of the troops in their persons, by putting them all to death, it follows that his destroying this right for a return, is lawful a fortiori, although the return be of a trifling nature.—This reasoning, however, is refuted by what is recorded of Omar, as above.—Moreover, leaving the conquered country in the hands of the inhabitants,
in the manner before mentioned, is advantageous to the Mussulmans, and advisable in respect to them, because in this case the inhabitants are merely the cultivators of the soil on behalf of the Mussulmans, as performing all the labour, in the various modes of tillage, on their account, without their being subjected to any of the trouble or expense attending it.—With respect to what Shafeei alleges, that "tribute is, comparatively, of trifling value," we reply, that although tribute be a trifle on the instant, yet with regard to property it is considerable, on account of its being permanent.

If the Imam relinquish to the inhabitants of the territory their lands and persons, it is incumbent on him to resign to them such a portion of their moveable property as may enable them to perform their business, and cultivate their lands, lest abomination be induced; since if he were not to leave them thus much property, it would be abominable.

The Imam, with respect to captives, has it in his choice to slay them, because the prophet put captives to death,—and also, because slaying them terminates wickedness:—or, if he choose, he may make them slaves, because by enslaving them the evil of them is remedied, at the same time that the Mussulmans reap an advantage:—or, if he please, he may release them so as to make them freemen and Zimmerees, according to what is recorded of Omar:—but it is not lawful so to release the idolaters of Arabia, or apostates, for reasons which shall be hereafter explained.

It is not lawful for the Imam to return the captives to their own country, as this would be strengthening the insidels against the Mussulmans.

If captives become Mussulmans, let not the Imam put them to death, because the evil of them is here remedied without slaying them: but
but yet he may lawfully make them slaves, after their conversion, because the reason for making them slaves, (namely, their being secured within the Mussulman territory,) had existence previous to their embracing the faith. It is otherwise where infidels become Mussulmans before their capture, because then the reason for making them slaves did not exist previous to their conversion.

It is not lawful to release infidel captives in exchange for the release of Mussulman captives from the infidels.—According to the two disciples this is lawful, (and such, also, is the opinion of Sbafit,) because this produces the emancipation of Mussulmans, which is preferable to slaying the infidels, or making them slaves.—The argument of Hanifa is that such an exchange is an assistance to the infidels; because those captives will again return to fight the Mussulmans, which is an evil; and the prevention of this evil is preferable to effecting the release of the Mussulmans, since, as they remain in the hands of the infidels, the injury only affects them, and does not extend to the other Mussulmans, whereas the injury attending the release of infidel captives extends to the whole body of Mussulmans.—An exchange for property (that is, releasing infidel prisoners in return for property) is also unlawful, as this is assisting the infidels, as was before observed; and the same is mentioned in the Masbub Masboor.—In the Seyir Kabeer it is asserted that an exchange of prisoners for property may be made, where the Mussulmans are necessitous, because the prophet released the captives taken at Bidar for a ransom.

If a captive become a Mussulman in the hands of the Mussulman, it is not lawful to release and send him back to the infidels in return for their releasing a Mussulman who is a captive in their hands, because no advantage can result from the transaction. If, however, the converted captive consent to it, and there be no apprehension of his apostatizing, in this case the releasing of him in exchange for a Mussulman captive is a matter of discretion.
It is not lawful to confer a favour upon captives by releasing them gratuitously,—that is, without receiving any thing in return, or their becoming Zimmies, or being made slaves. Shafei says that shewing favour to captives, in this way is lawful, because the prophet shewed favour, in this way, to some of the captives taken at the battle of Biddir. The arguments of our doctors upon this point are twofold: first, God says in the Koran "slay idolaters, wherever ye find them;"—secondly, the right of enslaving them is established by their being conquered and captured, and hence it is not lawful to annul that right without receiving some advantage in return, in the same manner as holds with respect to all plunder; and with respect to what Shafei relates, that "the prophet shewed favour, in this way, to some of the captives taken at the battle of Biddir," it is abrogating by the text of the Koran already quoted.

Whenever the Imam is desirous of returning from a hostile country into the Mussulman territory, if he should happen to have along with him baggage—cattle, such as oxen, camels, and so forth, and be not able to convey them into the Mussulman territory, it behoves him to slay and burn them; and he must not hamstring them, or turn them loose. Shafei says that he should leave them, because the prophet forbids us to slay animals for any other purpose than to eat them. Our doctors argue that the slaying of animals is lawful for any approved end; and what end can be more approved than breaking the strength of the infidels who are enemies? After slaying them they must be burnt, in order that the infidels may not derive any advantage from them, whence this answers the same purpose as destroying buildings or dwelling places: contrary to burning before slaying, as the prophet has forbidden this; and contrary, also, to hamstringing, as this is disfiguring, and that also is forbidden. In the same manner,

* Probably meaning the buildings, &c. which the Mussulmans, during their stay in the hostile country, may have constructed for their own accommodation.

† Chap. II. p. 148.
the Imam must burn all such military stores as are capable of being burnt; and what cannot be destroyed in this way must be buried in some place which the infidels are ignorant of, in order that they may not make advantage of it.

The Imam must not divide the plunder in the country of the enemy, but must make the distribution of it in the Mussulman territory. Shafei holds that it may be divided in the country of the enemy. This diversity of opinion is founded in a difference of tenets; for with our doctors the plunder is not the property of the troops, until it be brought into the Mussulman territory,—whereas, with Shafei it is the property of the troops before it be brought into the Mussulman territory. From this difference in principle proceed a number of cases concerning which they differ, as related at large, by the author, in the Kafiyat-al-Muntibee. The argument of Shafei is that the cause of right of property in plunder is conquest, where that conquest extends over property of allowable use, in the same manner as conquest is the cause of right of property with respect to game: now conquest means nothing more than subjection and seisin; and those are fully established with respect to the plunder in question. The arguments of our doctors upon this point are twofold: first, the prophet has forbidden the sale of plunder in the country of the enemy; and as a distribution of property is in effect a sale, a prohibition in respect to the sale extends to the distribution likewise:—secondly, in the case in question conquest is not established; because conquest signifies subjection and seisin, of such a nature that the seizer is capable of protecting the plunder, and also of carrying it from place to place; but in the case in question, the captors of the plunder may possibly be incapable of carrying it off into the Mussulman territory, as the infidels may be able to recuse it from the hands of the Mussulmans, since the property is still in their country.—Some allege that the radical ground of difference between Hayya and Shafei turns upon this question.—Do the effects of right of property (such as the lawfulness of coition, sale, and so forth,) take place
place upon the division of the plunder in the enemy's country, where
the Imám divides it at once without further trouble,—or do they not?
—According to Shafei, the effects aforesaid take place immediately
upon the division; but in the opinion of our doctors they do not take
place: and hence it follows that with Shafei the plunder becomes the
property of the troops before its being conveyed into the Mussulman
territory, since the effects of a right of property cannot exist without
the existence of the property itself;—but with our doctors the plunder
does not become the property of the troops until it be brought into
the Mussulman territory, since if it were their property, the effects of
a right of property would take place upon the distribution of it in
the enemy's country.

In sharing the plunder, the warrior and the auxiliary (being
present with the army,) have an equal claim; because the foun-
dation of a right to plunder, according to our doctors, is the "going
past the boundary of the Mussulman territory with an intention
"to fight;" whereas, in the opinion of Shafei, actual presence, (that
is, being present at the place where war is carried on,) is the cause of
the right; and the warrior and his assitant are equal with respect to
the cause of the right; and such being the case, they are equal in
sharing the plunder. In the same manner, a person who has retired
from the service by the admission of an excuse, (such as jickness, for
instance,) is on an equal footing with him who actually fights, be-
cause he also is, in point of right, upon an equal footing with him
who is actually engaged.

If reinforcements join the army in the enemy's country, before the
plunder is conveyed into the Mussulman territory, they are entitled to
a full share of the booty. Shafei lays that if they join the army
when the fighting is finished, they are not entitled to share with the
warriors, because, in his opinion, the plunder becomes the property
of the troops on the instant of its seizure, wherefore no person is afterwards entitled to share with them in it.—According to our doctors, on the contrary, the plunder is rendered the property of the Mussulmans, only by the circumstance of conveying it into the Mussulman territory, or the distribution of it in the enemy's country, or the sale of it there, (for by any of these the right of the troops is established;) here, therefore, no other person is entitled to share with the troops, whereas, any person who joined them previous to the division, &c. would have a claim to share with them.

The followers of the army have no right in the plunder, unless they actually engage in fight with the infidels. According to one opinion of Shefi, they are entitled to a share in the plunder, in conformity with a saying of the prophet, "The plunder belongs to those who are actually present;"—and also, because the followers are likewise engaged in effect, as they increase the general strength of the army. The argument of our doctors is that those do not go into the enemy's country, or pass the Mussulman borders, with any design of fighting; and this is the apparent cause of a right in the plunder; and as the apparent cause does not exist, regard is had to the actual cause, namely, engaging in fight. If, therefore, they fight, their right is established in proportion to their stations;—that is, if they fight on horseback, they are entitled to a horseman's share, or if on foot, to a foot-soldier's share. With respect to the tradition cited by Shefi, it means that "the plunder belongs to those who are actually present with an intention of fighting."

If the Imam be not possessed of carriages sufficient for the conveyance of the plunder into the Mussulman territory, he must distribute it among the troops, committing to each person his respective share, in the manner of a deposit, until they bring it into the Mussulman territory, when he must take it back from them, and again make a regular
regular distribution of it. The compiler of the Haddya remarks that this is what is mentioned by Kadhoos, in his abridgment of his own work: and he does not make the consent of the troops a condition. The same is also mentioned in the Sevir Kaber. In short, if there be among the plunder any carriage cattle, such as camels, borges, asses, or mules, the Imaam must load the plunder upon them, because here the plunder and the carriage are both the property of the troops; and the rule is the same, if there happen to be any spare carriage attached to the public treasury, since the effects in the public treasury are the property of all the Muffahmans: but if there be any spare carriage attached to the troops, or to any part of them, yet the Imaam must not forcibly seize them for this purpose, because this is bire, and compulsion in bire is not lawful; in the same manner, as when a person’s animal perishes, upon a retreat, and his servant happens to have some spare carriage, in which case he cannot compel his servant to hire him such spare carriage.——This is according to the Sevir Sagbeer. According to the Sevir Kaber, the Imaam is at liberty to use compulsion, for the purpose of having the plunder carried, because this is preventing a general and public injury by the commission of a private injury.

It is not lawful to sell plunder whilst in the enemy’s country, or before it be regularly distributed, because, until then, it is not property. According to Shafee the sale is lawful, because he holds that the plunder becomes property upon the infall of its capture.

If a warrior die in the enemy’s country, he has no right in the plunder; but if he die after the plunder is brought into the Muffahman territory, in this case his share goes to his heirs. The reason of this is that actual right of property is essential to inheritance, and the warrior has not any right in the plunder before it be brought into the Muffahman territory, whereas after it is brought within he has a right
right in it. *Shafs*, on the contrary, maintains that if the warrior die after the defeat of the infidels, his share goes to his heirs, because he holds that the plunder becomes the property of the troops upon the infidels being defeated.

There is no objection to the troops feeding their cattle with plunder whilst in the enemy's country, nor to themselves eating such plunder as is fit for food, such as bread, oil, and so forth. The compiler of the *Hedaya* observes that *Kadooree*, in his abridgment, mentions this absolutely, and does not restrict it to the condition of necessity. There are, however, two reports relating to this subject: according to one, the liberty is restricted to the condition of necessity; and according to the other it is un-restricted. The reason upon which the first report proceeds is that the forage or victuals in question are a partnership property, and hence these acts are not permitted with respect to them except through necessity, agreeably to the rule which respects animals, or cloth: and the arguments upon which the second report proceeds is, first, that the prophet said, at Kbeeber, "Eat the food found in the plunder, and feed your cattle with the forage, and do not carry it along with you, or board it up:"—secondly, the point of law rests upon the argument of necessity, and not upon necessity itself: now the argument of necessity is certified, namely, the circumstance of the troops being in an enemy's country; because a soldier does not carry along with him into the enemy's country either subsistence for himself or forage for his cattle sufficient to serve during his residence there; and in time of war caravans cannot supply troops with subsistence. The food and forage, therefore, remain allowable to use upon the ground of the argument of necessity. It is otherwise in regard to weapons or armour, as it is not lawful for the troops to take these from the plunder, because they carry arms along with them, and hence the argument of necessity, in

* Such as grain, &c.
respect to arms, is not established: but yet regard is had to actual necessity in respect to the use of them; and hence, if any necessity occur for the use of such arms as may be among the plunder, it is lawful for the warriors to make use of them, afterwards returning them into the plunder: and cattle stand in the same predicament with arms in this respect.

There is no objection to the warriors using wood [seized as plunder] in the enemy’s country. It is also lawful for them to make use of oil, such as oil of olives, and also grease, for softening the hoofs of their cattle; because there is sometimes a necessity for these articles.

It is not lawful for the warriors to sell victuals, forage, and so forth; because the legality of sale depends upon the article sold being property; and these are not their property, (according to what has been already advanced,) the eating of the victuals or using the other articles being lawful only by allowance, in the same manner as when a person allows another the use of his victuals, in which case the other may eat them, but cannot sell them. It is to be observed that the prohibition of sale now mentioned implies that it is not at all lawful for the troops to sell these articles in return for either gold, silver, or effects. If, however, they should sell them for gold, silver, or effects, it is incumbent on them to lodge the price along with the rest of the plunder, because this price is a thing held in partnership by the whole army. In the same manner, it is not lawful to dispose of those articles in return for provisions or clothing, without necessity; but if a necessity for provision or clothing occur, the articles in question may lawfully be disposed of in return for these necessaries.

It would be abominable in the troops, without necessity, to make use of cloth or other similar articles of plunder, before the regular distribution,
tribution, because these articles are, until then, held in partnership. If, however, the troops stand in need of cloth, cattle, or other articles, in this case the Imam must distribute these among them, although in the enemy's country, because as a thing prohibited by the law is sometimes allowed in consideration of necessity, it follows that a thing which is merely abominable*, is allowed in a similar case, a fortiori. The foundation of this is that the division of the articles in question is abominable only from the apprehension of succours joining the army in the enemy's country; for these are equal partners with the rest of the troops; and if the plunder were divided before their arrival, and they then join the army, it would be impossible to obtain restitution, for the purpose of paying the auxiliaries their shares, (whence it is that the division of the plunder is delayed until it be brought into the Mussulman territory and this apprehension removed:)—but when the troops stand in need of the cloth, cattle, or other articles, in this case they may be distributed among them in the enemy's country, because the right of the auxiliaries is merely probable, whereas the necessity of the troops is certain, and therefore of prior consideration. Nothing is here said concerning the rule with respect to arms, and armour: there is, however, no manner of difference between these and cloth or other articles, for if any of the warriors stand in need of them, the use is allowed to him, and if all the troops stand in need of weapons and accoutrements, they must be distributed among them. It is otherwise, however, in the case of a want of male or female slaves, for of the captives no distribution can be made on any plea of necessity, because they come under the description of indivisible plunder†.

* Abominable, in the language of the Mussulman law, means a thing not absolutely illegal, but reproved or disapproved.

† The only method of dividing plunder which consists of captives is by selling them at the end of the expedition, and throwing the price for which they are sold into the general stock of plunder. Plunder consisting of cattle is also divided in the same way, but as they are, comparatively, of trifling moment, this is no objection to the use of them.
In a hostile infidel become a Mussulman in the hostile country, his person is his own, (that is, he cannot be made a slave,) because a person who is first a Mussulman cannot then be subjected to bondage, as his Islam forbids this.—In the same manner, his infant children belong to himself, because they also are held as Mussulmans, in dependence of their father.—Such of his property, also, as is in his hands is his own; because the prophet has said "whoever becomes a Mussulman, and is possessed of property, in his own hands, such property belongs to him;"—and also, because his hands have first laid hold of that property, in the manner of the hands of a conqueror.—In the same manner such of his property as is a deposit in the hands of a trustee, whether a Mussulman or a Zimme, is also referred to him, because the seizin of the trustee is the same as that of the proprietor.

If the Imam subdue a country by force of arms, the lands which were the property of one who has embraced the faith become the property of the public treasury*. Sbafii maintains that his lands also continue to belong to him, because they are in his hands, and hence are subject to the same rule as moveable property. Our doctors, on the other hand, allege that his lands are in the hands of the state, or of the sovereign of that territory, (as they are a constituent part of the country,) wherefore they are not, a certiori, in his hands.—Some observe that this is according to the opinion of Haneefa, and a recent opinion of Aboo Yoosaf: for, according to the opinion of Mobammed, and a former opinion of Aboo Yoosaf, the lands of this person are in the same predicament with his other property.—This difference of opinion originates in a difference of doctrine respecting the tenure of land; for Haneefa and Aboo Yoosaf hold that seizin is not established, a certiori, in lands; whereas Mobammed holds that it is established.—The

* Arab: see, meaning that proportion of the plunder which is the right of the state.—The translator avoids introducing it here, from its similarity to the feudal term for, which bears quite a different sense; and has therefore rendered it, throughout, public property, or the property of the state.
wife also of this person is public property, as she is an alien, and is not a dependant of her husband with respect to Islam: and her foetus is also under the same predicament.—Shafei maintains that her foetus is not public property, since it is a Mussulman in dependance of the father, in the same manner as infant children.—Our doctors, on the other hand, allege that the foetus is a portion of the woman, and is therefore a slave in consequence of her becoming a slave, since she is a slave in all her parts: and with respect to what is advanced by Shafei, that “the foetus is a Mussulman, in dependance of the father, in the same manner as infant children,”—they observe that although the foetus be a Mussulman, yet a Mussulman may be a subject of bondage in dependance of another person: contrary to the case of infant children, as the said children are free, because, after being born, they are no longer a portion of the mother.—The adult children of this person are also public property, because they are infidel aliens, and are not dependant of their father in Islam:—and so likewise his slave who fights against the Mussulmans, because the slave, upon throwing off his subjection to his master, goes out of the possession of his master, and becomes a dependant on the people of that territory.—In the same manner, such of his property as is in the hands of an infidel alien, whether in the way of usurpation or deposit, is the property of the state, because the seizure of an infidel alien is not of an inviolable nature:—and such of his property as is in the hands of a Mussulman or a Zimmee, in the way of usurpation, is in the same predicament.—This last is the opinion of Hanefsa.—The two disciples maintain a contrary opinion, for they argue that the property is a dependant of the person, and as the person of the proprietor is under protection in consequence of his conversion to the faith, it follows that his property is also under protection, as a dependant of his person.—The argument of Hanefsa

* That is to say, are made slaves, and as such united to that part of the plunder which is the property of the state.

† By uniting in fight against the believers, of whom his master is now one.
is that the property in question is of a neutral nature*, and therefore liable to be appropriated by right of conquest:—and as to what the two disciples urge, we reply that it is not admitted that the person of the proprietor is under protection "in consequence of his conversion to the "faith," for the molesting of him is originally unlawful, (as appears by his being required to embrace the faith, since if he were originally deserving of death, he would not be required so to do,) and is rendered allowable only by a supervenient circumstance, namely his wickedness, [that is, his infidelity:] but by his conversion to the faith his wickedness is removed: contrary to property, as that is originally created for the purpose of being used, and is therefore a proper subject of appropriation. Moreover, the property in question is not in his hands either actually or virtually: its not being actually so is evident; and it is not virtually so, because the seizin of the usurper does not stand as the seizin of the proprietor, and hence the protection of the property is not established.—Thus it is demonstrated that his property is distinct from his person.

Upon the Mussulman army evacuating the enemy’s country, it becomes unlawful for the troops to feed their cattle with forage belonging to the plunder:—and, in the same manner, it is unlawful for them to eat of such victuals as make a part of the plunder:—because the troops subsisting themselves, or feeding their cattle, out of the plunder, is allowed only on the ground of necessity, which is then removed; and also, because the right of each individual [in the plunder] is then confirmed, whence it is that the share of one who afterwards dies is hereditary, whereas, before the evacuation of the enemy’s country, no person’s share is heritable.—If, also, after arriving in the Mussulman territory, there should chance to remain with any of the troops a part of the plundered food or forage, it must be returned into the stores of spoil, provided the general distribution of that should not

* Arab. Mahab: that is, not under any effectual protection.
yet have taken place.—Shafei in one place agrees with our doctors.—In another place he asserts that those articles are not to be returned into the plunder stores; upon the same principle that a warrior, if he steal the property of an alien, is not required to deliver it into the plunder stores, because this is property of a neutral nature, upon which he has laid his hands first.—Our doctors, on the other hand, allege that the appropriation of the food or forage to the person in whose hands they remain was only from necessity; but upon arriving in the Mussulman territory this necessity is removed: contrary to the case of a warrior stealing the property of an alien, because, as he obtains an exclusive right in that property before his arrival in the Mussulman territory, it follows that he has the same exclusive right in it after his arrival there.—If, moreover, the forage or provision in question remain with any one after the general division of the plunder, in this case, provided the possessor be rich, he must bestow it in alms; but if he be poor, he may convert it to his own use, because the food or forage then stand in the same predicament with a Lookta, or trove property, since the restoration of it to the troops is become impossible.—If, also, any person should see the victuals or forage after arriving in the Mussulman territory, and before the plunder is distributed, it is incumbent upon him to pay the value thereof into the plunder; or, where the plunder has been distributed, he must, if wealthy, bestow the value in alms; but if poor, nothing is due from him, since the value of a thing is a substitute for the thing itself, and is therefore subject to the same rule.
SECTION.

Of the Manner of the Division of Plunder.

In making a division of the plunder, the Imam must set apart one-fifth of the whole, and distribute the remaining four-fifths among the troops, as it was thus the prophet divided it.

The share of a horseman is double the share of a foot soldier, according to Haneefah.—The two disciples say that the share of a horseman is thrice that of a foot soldier, (and such also is the opinion of Shafeei,) because it is recorded by Abduola Ibn Omar that the prophet gave to the horseman three shares, and to the foot soldier one share, for this reason, that the right to plunder is in proportion to the duty and the fatigue,—and the horseman performs several duties:—first, Kirr, or attack,—secondly, Furr, or retreat, (made by way of stratagem, or with a view to return to the charge with increased violence,)—and thirdly, Isbat, or standing firm in one place,—whereas the foot soldier performs only one duty, namely Isbat or standing in his post. The argument of Haneefah is that Abduola Ibn Abbas relates that the prophet gave to the horseman two shares, and to the foot soldier one share; now this is irreconcilable with what is related by Abduola Ibn Omar, whence a contradiction appears between two acts of the prophet; and such being the case, the saying of the prophet is adhered to, “to the horseman belongs two shares, and to the foot soldier one share.”—Ibn Omar relates, moreover, that the prophet gave three shares to the horseman, and one to the foot soldier; and also, in another place, that he gave to the horseman two shares, and to the foot soldier one share; and as these two accounts are contradictory, a preference
preference is given to the relation of another person, namely, Ibn Abbas.—Besides, attacking and retreating are of the same nature, whence it appears that the horsemanship performs no more than two duties, and the foot soldier one duty; wherefore the share of the horseman is only twice as much as that of the foot soldier:—moreover, a regard to the heavier duty of the horsemanship is impracticable, as it is a matter which cannot readily be ascertained: hence the rule, with respect to the shares, must turn upon the apparent ground of claim to plunder; and on the part of the horsemanship two grounds of claim appear, namely, his person, and his horse, whereas, on that of the foot soldier one ground only appears, namely, his person;—the horsemanship, therefore, is entitled to twice the share of the foot soldier.—It is proper to observe, however, that nothing more is to be allowed to a horsemanship than the share on account of one horse, although he have along with him two horses, or more. Aboo Yoosaf says that if he have two horses, or more, the shares on account of two horses are to be allotted him, because it is related, that the prophet once allowed a horsemanship shares for two horses,—and also, because one horse is liable to be sick or turn lame, whence there is a necessity for another horse.—The arguments of Haneefa and Mowammed are twofold.—First, Birrayeen Awoos carried with him to the wars two horses, and the prophet allowed him only a single horseman’s share:—Secondly, one man cannot fight upon two horses at one time, wherefore two horses cannot be considered as affording two claims, whence it is that where a person has three horses, yet he is not entitled to a share for three.—With respect to what is related by Aboo Yoosaf, it is to be thus explained, that the prophet bestowed the share for two horses upon the horsemanship in the way of a gratuity,—in the same manner as he once allowed Salima Bin Akoos two shares, when he served as a foot soldier.—It is also proper to remark that a Birsoon *, an Arab †, an Hoojeen ‡, and a Mokarrirf §, are all equally capable of giving a claim to plunder: be-

* A heavy draft horse. † A first blood. ‡ A packhorse. § An half blood.

cause
cause the expression in the Koran, Irhab, (that is, striking terror,) has a reference to the preceding word Kheel, [a troop, or squadron,] and the word Kheel comprehends all those kinds without distinction;—and also, because although an Arab be apparently of the stronger make, yet a Persian horse is the more docile and manageable; regard is, therefore, had to the advantages of each respectively, and hence they are both upon a footing.—The Birzoon is a horse of the Persian breed, and the Arab is bred in Arabia; the Hoososn, on the other hand, is a Moojânis, or half-breed, whose dam is an Arab and his sire a Persian; and the Makarrif is also an half-breed, whose sire is an Arab, and his dam a Persian.

If a person enter the enemy’s country as a horseman, and his horse be afterwards destroyed, he is still entitled to a horseman’s share of plunder; but if a person enter the enemy’s country on foot, and then purchase a horse, he is entitled to a foot soldier’s share only. This is the Zahir-Rawdhet.—Shafet maintains the reverse of what is here advanced; and Ibn al Mobdrick records, from Hanefi, that, under the second circumstance, the person is entitled to a horseman’s share.—In short, with our doctors regard is had to the station in which a person passes the Mussulman boundary, whereas with Shafet regard is had to the station the person holds at the end of the service. The argument of Shafet is that it is the act of making war which is the cause of a right in the plunder; and hence regard is paid to the station in which a person is at the time of fighting, the passing of the Mussulman boundary being only an introduction to the cause, in the same manner as going out of a house:—and if (as the Hanefites maintain) it were impossible to ascertain the actual fighting, it would follow that the mere actual presence would be a cause of right in the plunder, since actual presence is easily ascertainable.—The arguments of our doctors upon this head are twofold.—First, going forth is the commencement of the war, because it impresses terror upon the infidels; and the continuance constitutes the war itself:—but regard is not paid to
the continuance:—secondly, it is difficult to obtain any certain information respecting the actual fighting;—and so also, concerning the actual presence, because that has regard to the time when the two adverse armies are drawn up in battle array against each other, at which time it is not easy to ascertain who actually engages in fight, or who does not,—or who is present, or who is not;—the act, therefore, of passing the boundary is made the substitute for fighting, or presence, because the act of passing the boundary extends, with regard to appearance, either to war, or to presence, where such act was performed with a design of fighting.—Regard, therefore, is paid to the station a person fills (whether that of a horeman or of a foot soldier) at the time of passing the Mussulman boundary.

If a person enter the enemy’s country as a horeman, and afterwards fight on foot, on account of wanting room, he is entitled to a horeman’s share, according to all our doctors.—If, also, he enter the enemy’s country as a horeman, and afterwards sell his horse, or give him away, or hire or pledge him, he is entitled to a horeman’s share, (according to what Hoofts reports from Haneifa,) regard being had to the station in which he went forth.—According to the Zahir Rawayet he is in this case entitled only to share as a foot soldier, because his disposing of his horse in any of the ways here mentioned denotes that he did not go forth with a design to fight as a horeman.—If a person sell his horse when the service is at an end, his right, which is a horeman’s share, does not drop.—Some hold the rule to be the same, if he sell his horse during the service; but the more approved doctrine is that he is not in this case entitled to a horeman’s share, because the sale here denotes that his design was traffic, but that he waited until the service began, with a view to enhance the price of his horse.
There is no share of the plunder allotted to slaves, women, children, or Zimmee: but yet it is incumbent on the Imam to bestow something upon them, to such amount as he may deem advisable; because the prophet, although he did not fix any share for women or children, yet was accustomed to allow them a small part; and also, because the prophet once demanded aid from a certain party of Jews against another party of the same people, and yet did not allow them anything in the manner of a share or lot; and also, because Jihâd [war with infidels] is an act of piety, of which Zimmee are held incapable; and women and children are unable to perform this duty, whence it is not an injunction upon them; and in the same manner, a slave also is unable, as he cannot engage in war or battle without the consent of his owner: yet it is requisite that they be allowed something, in order that they may be encouraged to fight, and that the inferiority of their station be rendered manifest. (A Mokâthib is in the same predicament with an absolute slave in this particular, since he is still in a state of bondage, and it is possible that, as he may be unable to discharge his ransom, his master will not permit him to engage in fight.)—It is proper to remark, however, that this small allowance out of the plunder is not paid to a slave, except where he actually fights, as he goes into the enemy’s country merely for the purpose of waiting upon his master, and is therefore in the same situation with a merchant who goes into the enemy’s country for the purpose of traffic, and not with a view to fighting. In the same manner, this allowance is not paid to a woman unless she attend the sick and wounded and prepare their medicines; because she is unable actually to fight; but her attendance and assistance are admitted as substitutes for fighting: contrary to the case of a slave, as he is able actually to engage in fight. In the same manner, this allowance is not paid to a Zimmee, unless where he fights, or where he acts as a guide, which is also of advantage to the Mussulmans; and in this last case it is lawful to pay him even more than the share of a Mussulman, if his acting as a guide be attended with any eminent advantage:—but when he only fights, what
what is paid him must be short of a Mussulman's share, because fighting is jibad, and a Zimmer cannot be put upon a footing with a Mussulman in the rules of jibad: contrary to the case of acting as a guide, since that is not jibad, and he may therefore receive a consideration for it, to any amount, in the same manner as for any other service.

The Khams, or fifth, of the plunder * must be divided into three equal portions, one portion for orphans, one for the poor, and one for travellers †.

If one or two particular persons enter a hostile country, with a view to pillage, without authority from the Imam, and make a capture of property, it is not subject to Khams; because there is no Khams in any thing but plunder, and the property in question is not plunder, as this term is applied solely to such property as is taken from the infidels by open force, and not by theft or pillage; and the property in question is not taken by open force.

If one or two particular persons enter a hostile country, by authority of the Imam, and make capture of property, there are two opinions related concerning it; but the most generally received opinion is that a fifth is to be deducted from it, because the Imam, in giving them this authority, undertakes to support them with succours, if necessary, and hence they in this case stand as persons engaged in war in a public sense.

If a party enter a hostile country, in force, and make a capture of property, what they take is subject to Khams, although they act

* Set apart by the Imam, as before-mentioned.
† A long train of reasoning, chiefly consisting of verbal criticisms, and the legality of bestowing a part of the fifth upon the Hashim tribe, is here omitted, as being quite useless, and in some places not admitting of an intelligible translation.
without the authority of the Imam; because this property has been
taken openly, by force of arms, and therefore falls under the de-
scription of plunder;—and also, because it is incumbent upon the Imam to
assist them, since if he were not to do so, the Mussulmans might appear
weak and unable to oppose their enemies:—contrary to the case of
one or two particular persons, since to assist them is no way incumbent
upon the Imam.

SECTION.

Of Tanfeel, that is, a Gratitude bestowed upon particular Persons,
over and above their Share of Plunder.

It is laudable in the Imam to bestow gratuities in time of war;
and by means thereof to encourage the troops to fight, or more pro-
perly to render them zealous in fighting,—by declaring (for instance)
"Whoever kills an infidel shall have his garments,"—and so forth,
(as will be hereafter more particularly mentioned;)—or, by promising
to any particular body of troops, "I have allotted you one fourth of
the plunder, after deducting the fifth;"—because it is laudable to
courage and stimulate to fighting, and making war upon the in-
sidels, God having commanded his prophet in the Kuran, saying
"Excite the believers to battle!"—and bestowing a gratuity in
the manner specified is one way of exciting them.—(It is proper to
observe that gratuity is sometimes held forth in the manner above
described, and sometimes in another manner, as if the Imam were to
declare "Whoever finds any thing, the same shall be his!")—It is
not laudable in the Imam to bestow the whole of the plunder in gra-
tuity, because that is destructive of the right of the troops:—if, how-
ever, he bestow the whole, in gratuity, upon any particular party
or division of the army, it is lawful, because the management of the
plunder
plunder is committed to the Imam, and he may sometimes deem it advisable thus to make gratuity of the whole.

It is not lawful for the Imam to bestow any gratuity after the plunder is secured within the Mussulman territory, because the right of others in it is then confirmed. If, however, he see fit, he may bestow gratuity out of the Khams, or reserved jṣib, because in that the troops have no right.

If the Imam should not bestow in gratuity the Sillib (or personal property) of one who is slain, upon the slayer, it becomes a part of the general plunder, in which the slayer and others have all an equal share. Shafei maintains that the personal effects of the person slain belong to the slayer, provided the latter be one of those who are entitled to share in the plunder, and that he killed the slain in open fight, because the prophet has said, "Whoever slays an infidel is entitled to his personal property."

Objection.—It is possible that the prophet may have mentioned this merely in a gratuitous sense, and not as the award of the law.

Reply.—It is evident, from the situation of the prophet, that he spoke this as an award of the law, since he was sent to enforce the awards of the law. A person, moreover, who kills another prepared to oppose him in open fight exposes himself in a superior degree, and hence the personal property of the slain goes to him, for the purpose of making a distinction between him and others.

—The arguments of our doctors upon this point are twofold.—First, the personal property in question has been taken, virtually, by the force of the whole army *, and is therefore plunder; and such being the case, it is to be generally shared, in the same manner as other spoil, in conformity with the words of the sacred text:—Secondly, the prophet

* Because, without being accompanied and supported by the army, the slayer never could have come at the slain.
once said to Moorkeeb-Bin-Abee-Silma. "No more appertains to you of
the property of the person you have slain, than your Imam may think
proper to allow."—With respect to the saying of the prophet cited by
Shafei, it bears the construction both of the award of the Law, and also
of gratuity; and our doctors receive it in the latter sense, because of the
saying above quoted, and also, because no regard is to be had to any supe-
rior degree of exposure or fatigue in war, as was already demonstrated
in treating of the operations of cavalry. By Sillib is understood what-
ever may be found upon the person of the slait, such as clothes, wea-
pons, and armour; and also the animal upon which he rode, to-
gether with the equipage, such as the saddle and so forth,—or whatever
may be found upon him in his girdle or pockets, such as a purse
of gold and so forth:—but any thing beyond these is not Sillib; nor is
any thing so which is carried upon another animal by his servan.

Gratuity does not become a property until it be brought into the Mussufi-
tam territory.

It is a rule, with respect to gratuity, that the right of others in
whatever may be so bestowed is terminated: but yet it does not be-
come the property of the person to whom it is awarded until it be
secured within the Mussulman territory, according to what has been
already advanced; and consequently, if the Imam were to declare,
"Whoever finds a female slave, she is his," and a Mussulman after-
wards find a female slave, and ascertain his right in her, yet it is not
lawful for him either to have carnal connexion with her, or to sell
her, in the hostile country.—This is according to the two Elders.
Mohammed affirms that he may lawfully do either, because he holds
that gratuity establishes a right in a thing in the same manner as
distribution of plunder in a hostile country, or purchase from the hands
of an alien:—and some allege that Mohammed also holds that satis-
faction is due from any person who should destroy this species of plun-
der,—whereas, with the two Elders, it is not due.

CHAP.
C H A P. V.

Of the Conquests of Infidels.

If infidels of Turkifian conquer infidels of Rome*, and make captives of them or seize their property, they are the rightful proprietors †; because here is established a subjugation over neutral ‡ property, which is a cause of propriety, as shall be hereafter shewn: and if Mussulmans should afterwards conquer those infidels of Turkifian, whatever property of the infidels of Rome they may find with these infidels of Turkifian is lawful to them, in the same manner as their other original property. In the same manner, if infidels obtain possession, by conquest, of the effects of Mussulmans, and secure the same (that is, carry them into their own country,) they are the rightful proprietors thereof. Shafei maintains that they do not become the proprietors, because their conquest over the property of Mussulmans is unlawful both in the beginning and also in the end; and he holds that what is unlawful cannot create a right of property. Our doctors, however, allege that as the conquest of infidels over the property of Mussulmans is a conquest over neutral property, it creates a right, in the same manner as the conquest of Mussulmans would give them a right over the property of infidels. The ground of this opinion is

* This term is used by the people of Asia in a very extensive sense, comprehending the whole of the ancient Roman empire: it here applies, in particular, to the eastern provinces of the Turkifh empire, which some European writers distinguish by the appellation of Romea. Turkifian is a large region lying to the east and south-east of the Caspian sea.

† Meaning that the right of the original proprietors is dissolved and rendered void.

‡ Arab. Mobab. The meaning of this term is explained at large elsewhere.
that the property in question becomes neutral upon being secured within the alien territory; because property is originally neutral with respect to any person whatever, as God has said "the whole that The earth contains hath been created for you," (that is, for mankind;) every thing, therefore, upon the face of the earth, is designed alike for the use of all, and is not appropriated to any person in particular; whoever pleases may enjoy it: but yet, certain of that property becomes appropriated to certain individuals by one or other of the causes of right of property, such as purchase, inheritance, and so forth, in order that the individual may be enabled to make use of it; for if property were not thus appropriated, others would be continually interfering in the enjoyment of it: for this reason, therefore, and of necessity, certain property is assigned to certain individuals, who are respectively the proprietors. Now, when the infidels carry the property of the Mussulmans into their own territory, the proprietor is disabled from enjoying it any longer; and such being the case, the cause aforesaid, which was the occasion of the property being appropriated to the Mussulman, ceases; and the cause ceasing, the property becomes neutral, in the same manner as it was originally neutral: it being demonstrated, therefore, that the property, upon being carried by them into their own territory, becomes neutral, it follows that the conquest of the infidels over it is then a conquest made by them over neutral property, which is a cause of propriety; and hence they become the proprietors. It is to be remarked, however, that their conquest over the property is not established until after its being secured within their territory; because securing signifies being endowed with power over the article secured, (namely, the property) with regard both to circumstance and to substance; now, so long as the infidels do not carry the property into their own territory, their power over it is not substantiated, since whilst it continues in the Mussulman territory it is evident that the Mussulmans may rally and recover it out of the hands of the infidels. With respect to what is alleged by Shafei, that "their conquest over the property of Mussulmans is unlawful, and a thing which is un-
"lawful cannot be a cause of a right of property,"—we reply, that
the conquest is unlawful, for another reason*; because the property
in question is in its original nature neutral, (as has been already ex-
plained,) and conquest over neutral property is not unlawful; the
conquest, also, in the present instance, is unlawful only from a supervenient
cause, namely the propriety of the owner: it therefore ap-
ppears that it is unlawful for another reason; and a thing which is un-
lawful for another reason may yet cause a right, as in the instance of
sale during the time of calling to public prayers. It is to be observed,
however, that if the Mussulmans afterwards subdue the infidel terri-
tory, and the original proprietors of the property in question find it
before the chief has made the distribution among the troops, such
property is restored to the proprietors without any return: and if
they find it after the distribution, they are entitled to take it upon
payment of the value; because the prophet, in a similar case, said to
the owner of a property, "If you find your property before the distri-
bution, it is yours without any return; and if, after the distribu-
tion, it is yours for the value;—and also, because the right of the
former owner has been destroyed without his consent, and hence he
has a right, out of tenderness to his situation, to reclaim it: but if he
were allowed to take it, after distribution, without giving an equiva-
lent, an injury would follow to the person in whose share it may
happen to be included; and hence it is said that he is at liberty to
take it from that person in return for the value, in order that tender-
ness may be observed towards both. Previous to the distribution, on the
other hand, the partnership in the property is general,—(that is, it ap-
pertains equally to all the warriors,)—and hence if the proprietor then
take it, without any return, the injury to each individual is trifling,
for which reason the owner is then allowed to take it without paying
an equivalent.—If, also, a merchant go into the infidel territory,

* Unlawful for another reason; that is, not unlawful in its own nature, but rendered
so by some extraneous circumstance.

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and there purchase property which had been plundered from the Mussulmans, and bring it into the Mussulman territory, in this case the former proprietor has it in his choice either to take the property from the merchant, paying to him the price for which he had purchased it, or to leave it; but he is not at liberty to take the property from the merchant without a return, as this would be injurious to him, since he obtained possession of it by paying the value. The rule here laid down is therefore an act of tenderness to both. If, moreover, the merchant had purchased the property by paying other property for it, the former proprietor is at liberty to take it upon paying the value of such property:—and if the infidels have made a gift of the property to the merchant, the former proprietor is at liberty to take it upon paying the value, because, as the merchant had become possessed of it by an exclusive right, such right cannot be destroyed but in return for the value.—What is here advanced proceeds upon a supposition of the property in question being a thing of a nature not compensable by its like. Where, on the other hand, it is compensable by its like, if it be brought into the Mussulman territory as plunder, the former proprietor is at liberty to reclaim it at any time before the distribution; but he is not at liberty to reclaim it in return for its like after the distribution, since in taking it in return for its like there is no advantage. In the same manner, also, if the infidels should have presented it as a gift to the merchant, the former proprietor is not at liberty to reclaim it in return for its like, since in this there is no advantage; and so also, there is no advantage, where the merchant had purchased it in return for its like with respect to quantity or quality. If, however, the merchant have purchased it for less than its quantity, or in return for something of a different kind, or for an article of the same kind, but in a state of decay, in either of these cases the former proprietor is at liberty to reclaim it in return for the like of whatever the merchant had purchased it with.

If the infidels should make captive and carry off into their own country the slave of a Mussulman, and any person were afterwards to purchase
purchase and bring him back into the Mussulman territory, and any one were after that to put out the slave’s eyes, and this person exact the fine,—the former proprietor is at liberty to reclaim the slave in return for the price for which this person had purchased him of the infidels: but he must not deduct any thing on account of the eyes, because the eye-sight is a natural quality, or sense, and the senses are not estimable at any price;—neither is he at liberty to take from this person the amount of the fine on account of the eyes, because the slave, at the time of putting out his eyes, was the lawful property of the person in question, whence he took the fine, as being the proprietor.

If the infidels take and carry off the slave of a Mussulman into their own territories, and a person there, purchasing him for one thousand dirms, bring him back into the Mussulman territory, and the infidels again take him and carry him off into the infidel territory, and another person should then, in the same manner, purchase him for one thousand dirms, and bring him back into the Mussulman territory,—in this case the former proprietor cannot demand the slave of the second purchaser; because, when taken and carried off a second time, he was not his property: but the first purchaser may demand the slave of the second purchaser for the price at which he had bought him of the infidels, because the slave, when taken the second time, was his property; and then, if the former proprietor chuse, he may take the slave of the first purchaser on paying him two thousand dirms, because the slave has fallen to the latter at that sum; the original proprietor may therefore, if he please, take him for two thousand dirms.—It is a rule that the original proprietor is not empowered to take the slave of the second purchaser, where the first happens to be absent, in like manner as he is not empowered to take him of the second purchaser where the first purchaser is present.
In the infidels attack and conquer a Mussulman territory, yet they do not, by conquest and conveyance into the infidel territory, become proprietors of the Modabibs of Mussulmans, nor of their Am-Walids or Mokátsibs, or of freemen, whether Mussulmans or Zimmies; whereas Mussulmans, on the contrary, by conquest in the infidel territory, become proprietors of all those; because conquest, which is a cause of right of property, produces a right of property in respect to a subject which is capable of it; and the subject capable of it is neutral property; now, a free Mussulman, and so also a free Zimme, are not neutral property, being in their own nature protected and inviolable; and in the same manner, their Modabibs, Am-Walids, and Mokátsibs, because in these also freedom exists in one shape: contrary to the persons of infidel aliens, whether they be free, Am-Walids, Modabibs, or Mokátsibs, because the legislator has withdrawn protection from them, and has made them neutral property, in retribution for their sin of infidelity.

If the slave of a Mussulman desert into the infidel territory, and the infidels make him captive, they do not become his proprietors, according to Haneesa.—The two disciples say that they become the proprietors, because the protection of the slave on behalf of his proprietor existed in virtue of the proprietors seizin, or actual possession of him; and in the case in question this possession is destroyed; whence it is that if the infidels were to take the deserter within the Mussulman territory, and carry him off to their own country, they would become his proprietors.—The argument of Haneesa is that the slave, upon going out of the Mussulman territory, becomes at his own disposal, in the same manner as a freeman; because regard to his being in possession of his own person had ceased only in order that the possession of his master might be established, to enable him to make use of it; and, in the case in question, upon the possession of the master being destroyed, the slave’s possession of his own person takes place, and he becomes in his own nature inviolable, in the same manner.
manner as a freeman; wherefore he no longer remains a subject of acquisition: contrary to an absconded slave whilst in the Mussulman territory, since he still continues in the possession of his master, in virtue of the continuance of the Mussulman power within that territory. So long, therefore, as the possession of him by the master continues, his possession of his own person does not appear, wherefore he is not at his own disposal; and hence, if the infidels were to take and carry him off to the infidel territory, they would become his proprietors. — It is proper to observe in this place, that as the slave, in the present instance, is not the property of these infidels, the former proprietor is entitled to reclaim him without any return in all the cases before treated of,—that is, in case of the infidels having presented him in gift to any person, who afterwards brings him into the Mussulman territory,—or in case of any person purchasing, and so bringing him into the Mussulman territory,—or in case of the Mussulmans making him captive in the way of plunder, and bringing him into the Mussulman territory. In this last case, also, the former proprietor is at liberty to reclaim him without any return either before or after the distribution of the plunder; and if he should take him, after the distribution, from the person to whose share he has fallen, that person must be reimbursed out of the public treasury, a proportionable reimbursement from each individual being impossible, since the warriors are by that time all separated and gone different ways, and cannot again be brought together.—It is also to be observed, that the person who had obtained the slave by gift, purchase, or plunder, is not entitled to take any reward on account of the slave from the proprietor; because either of these appears to have acted solely on his own account, and under a conception that the slave is thereby rendered his property.

If a camel, the property of a Mussulman, stray into the country of the infidels, and they lay hands upon it, they become the proprietors, in virtue of the establishment of their superiority over it; since a brute is incapable of being at its own disposal, in such a manner that the
the camel should become possessed of his own person upon quitting the
Mussulman territory:—contrary to the case of a slave, according to
what was before stated. — If, also, a person were to purchase the camel,
and bring it back into the Mussulman territory, the original proprietor
is entitled to take it upon paying that person the price for which he
had purchased it.

If the slave of a Mussulman abscond into the infidel territory, car-
rying with him a horse, or other effects, and the infidels seize the
whole, and a person afterwards purchase the whole, and bring them
back into the Mussulman territory, the former proprietor is at liberty
to take his slave without any return, and to take the horse or effects
upon paying the price for which they had been purchased. — This is
the doctrine of Haneefa. — The two disciples assert that the former
proprietor is at liberty to take, in return for the price, the slave, to-
gether with the accompanying property. — This difference of opinion
arises from Haneefa holding that the infidels do not in this case become
proprietors of the slave, in the same manner as where the slave ab-
scends alone into the infidel territory, (that is, without carrying any
thing along with him,) in which case the infidels do not become his
proprietors, as has been already explained; — whereas the two dis-
ciples hold that they become proprietors in this case, in the same man-
ner as where the slave absconds into the infidel territory without car-
rying any thing along with him; as was before stated.

If an infidel alien come under protection into the Mussulman ter-
ritory, and there purchase a slave who is a Mussulman, and carry him
into the infidel territory, the slave becomes free, according to Ha-
neefa. — The two disciples say that he does not become free, because
the right of the former owner has been destroyed by the sale, and the
slave has become the property of the infidels, and the power of con-
trol over the slave no longer remains to the former proprietor; the
slave, therefore, continues in bondage with the infidel. — The argu-
ment
Chap. V. Institutes.

ment of Haneefa is that it is incumbent to release a Mussulman from the degradation of subjection to an infidel; wherefore separation of country, which is the condition of the destruction of proprietorship, is made the substitute of manumission, which is a cause of the destruction of proprietorship, for the purpose of releasing a Mussulman, in the same manner as the lapse of three menstruations is a substitute for separation, in a case where a husband or wife embraces the faith in a foreign country.

If the slave of an infidel alien become a Mussulman, and then pass into the Mussulman territory, or the Mussulmans conquer the infidel territory, such slave is free; and in the same manner, if the slave of an infidel alien embrace the faith, and desert to the Mussulman camp, he is free;—because of what is recorded, that certain slaves of the people of Taieef, having embraced the faith, came over to the prophet, and he announced their freedom, saying “those are the freedmen of God!”—and also, because the slave in question, where he takes refuge within the Mussulman territory, has placed his person in protection, in virtue of his coming there against his owner’s will; or, where the Mussulmans conquer the infidel territory, has placed his person in protection, by joining the Mussulmans; since his possession of his own person is to be regarded preferably to the possession obtained over him by the Mussulmans, as the former took place previous to the latter, he being at his own disposal; and he has no occasion to take formal possession of his own person,—nay, he requires no more than that his possession over his own person should be more fully confirmed, since that possession is unconfirmed, on account of the appearance of the master’s right: contrary to others, as they are desirous of establishing a possession over him ab initio;—his possession of his own person, therefore, is to be regarded in preference.
C H A P. VI.

Of the Laws concerning Moostámins *

If a Mussulman go as a merchant into a hostile country†, it is not lawful for him to molest the inhabitants either in person or property, because he, in his acceptance of a protection, has undertaken to observe this forbearance towards them; any molestation of them afterwards would therefore be a breach of agreement; and a breach of agreement is prohibited.—It is therefore unlawful for him to molest them in person or property, unless where the sovereign of the country breaks the engagement with respect to him, by seizing his property, or throwing him into prison,—or where others do so with the sovereign’s knowledge, he not preventing them,—in which case it is lawful for the merchant to molest them in person and property, as here the breach of contract is on their part. It is otherwise in the case of a captive, to whom it is lawful to molest them in person and property, although they should release him of their own accord, because a captive is not under protection.—It is proper, however, to observe that if the merchant break his agreement with the people of the country, and seize any of their property, and bring the same into the Mussulman territory, he becomes the proprietor, because his acquisition of power over neutral property is established;—but yet in his possession of it there is an abomination, because the property has been obtained by a breach of treaty, and this is the occasion of abomination with respect

* Persons residing in a foreign country, under a protection procured from the State or sovereign of that country.

† Arab. Dar-al-hirb: meaning any foreign country under the government of infidels. The translator generally renders it foreign country.
to that property; and hence the merchant must be directed to bestow it in alms.

If a Muffulman, having procured a protection, go into a foreign country, and there purchase goods of an alien upon credit, or dispose of his goods to the alien upon credit, or usurp the property of an alien, or an alien usurp his property, and he afterwards return into the Muffulman territory under a protection, in none of these cases is the Kāzee to pass any decree against one of those in favour of the other:—not in the first instance, because the validity of a decree of the Kāzee rests upon his authority, and here the Kāzee was possessed of no authority whatever at the time of the debt being contracted, with respect either to the debtor or the creditor, on account of separation of country:—neither is he possessed of any authority with respect to the protected alien at the time of the decree, as the alien has not undertaken to submit to the Muffulman laws with regard to acts done in time past, he undertaking only for the future, that is, from the period of his being admitted to protection:—nor in the second instance, because the property usurped has become the property of the usurper, as the usurper's acquisition of power over what he has usurped is an acquisition of power over neutral property, according to what has been before stated.—If, moreover, both of those persons were aliens, and one of them act by the other as above described, and they both afterwards come, under a protection, into the Muffulman territory, the rule is the same, for the reasons here mentioned:—but if both become Muffulmans, and then come into the Muffulman territory, in this case the Kāzee may pass a decree with respect to the debt, because the debt of the one to the other is a lawful debt, as having been voluntarily engaged in; and the authority of the Kāzee exists with respect to both, at the time of the decree, as they have then both submitted to the laws of Islam, by embracing the faith.—If, however, one of them should have usurped property belonging to the other, in this case the Kāzee cannot pass
pas any decree whatever, according to what was before observed, that ‘‘the usurper becomes proprietor of what he has usurped.”

If a Mussulman, having procured a protection, go into a foreign country, and there usurp the property of an alien, and the Mussulman and the alien (having become a Mussulman) come into the Mussulman territory, a notice is to be issued to the Mussulman usurper, in the manner of a decree, directing him to restore the usurped property to the converted alien; but the Kásee must not issue any positive decree upon the subject, for the reason before mentioned, that the usurper becomes proprietor of what he has usurped.—The notice in the manner of a decree is because the article usurped has become the property of the usurper by an invalid appropriation, on account of the breach of compact, which is unlawful.

If two Mussulmans go under protection into a foreign country, and one of them kill the other, either wilfully or accidentally, no retaliation is incurred; but the fine of blood is due from the slayer's property,—and an expiation is also incumbent upon him, where the act was accidental.—The reason why expiation is incurred is that the text of the Koran, upon which the obligation of it is founded, is general, and is not restricted to the Mussulman territory.—The reason why the fine of blood is due, is that the protection of the person, established by residence within the Mussulman territory, is not annulled by the supervenient circumstance, namely, the going under protection into a foreign country:—and the reason why retaliation is not incurred is that the infliction of retaliation is impracticable without the power, and no power exists in the foreign country in the present instance, as power cannot be established but through the Imám, and the collective body of Mussulmans.—The reason why the fine of blood is due from

* Meaning the executive power, acting under the regular lawful authority.
the property of the slayer, in the case of wilful homicide, and not from his tribe, is that the fine for wilful murder is in no case due from the tribe;—and the reason why it is not due from the tribe, in the case of accidental homicide, is that, in the case in question, the tribe of the slayer have it not in their power to prevent the slayer from committing the homicide, or to guard against it; as they are in the Musulman territory, and the slayer in a foreign country; and the fine for homicide falls upon the tribe of the slayer, only on account of their neglecting to guard against it, which is not the case in this instance.

If of two Musulmans, who are captives in a foreign state, one kill the other,—or, if a Musulman residing as a merchant in a foreign country kill another who is a captive there,—in either case nothing is due from the slayer, except expiation where the act was accidental.—This is according to Haneefu.—The two disciples maintain that, in the former case, the fine of blood is due, whether one of the captives have slain the other wilfully or accidentally; because the protection of their persons is not annulled by the supervenient circumstance, (namely captivity,) in the same manner as the protection of a Musulman's person is not annulled by the supervenient circumstance of his obtaining protection and going into a foreign country under its influence,—as was before demonstrated:—but retaliation is not incurred, because power does not exist in a foreign country, and the exacting of retaliation depends upon the existence of power, as has been already stated.—The fine of blood is also due from the property of the slayer, and not from his tribe, as before mentioned.—The argument of Haneefu is that a Musulman, by becoming a captive to the infidels, is a dependant on them, as he is subjected to them, and in their power; (whence it is that he is stationary from their being stationery, and a traveller from their travelling;) and such being the case, the protection of his person is abrogated; he is therefore in the same predicament with a Musulman who has never yet retired out of the infidel territory.
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territory *.—The reason for restricting the necessity of expiation, in all these cases, to accidental homicide, is that (according to our doctors) there is no expiation in a case of wilful homicide.

SECTION.

If an alien come, under a protection, into a Mussulman territory, the Imam must not suffer him freely to reside there for the complete term of a year, but must give him notice that "if he should remain the full year he will impose Jizyat [capitation-tax] upon him."—The reason of this is that an alien is not to be allowed to continue in the Mussulman territory for any considerable space of time, except in slavery, or in consideration of paying the capitation-tax; because, if an alien were to continue for a considerable term in the Mussulman territory in any other than one of those two states, he might become a spy on behalf of the alien infidels, to the detriment of the Mussulmans. He may be allowed, however, freely to remain for a short time, for if a short residence were prohibited, all intercourse would be prevented, and the door of commerce would of course be closed.—Our doctors have fixed the definition of a long space of time to the term of one year, [or upwards] because a year is the term in which capitation-tax becomes due.—If, therefore, the protected alien return to his own country before the completion of the year, after the Imam shall have given him notice, as above, he is not to be molested, nor can the Imam demand any capitation-tax from him:—but if he continue in the Mussulman territory for a whole year, he becomes a Zimme, or subject, because, when he remains a year in the Mussulman territory after the Imam's

* Meaning an alien converted to the Mussulman faith.
notice to him, it is known that he undertakes to pay capitation-tax; and he becomes a subject of course.—It is lawful for the Imam, however, to restrict the free continuance of an alien in the Mussulman territory to any term short of a year, (such as one or two months, for instance,) by giving him notice, that "if he should remain beyond such a time, he will impose a capitation-tax upon him;" after which, if he continue beyond the time prescribed, he becomes a Zimmee:—and after becoming a Zimmee, if he be desirous of returning into his own country, he may be prevented; because a contract of fealty cannot be dissolved, since by the dissolution of it a stop is put to the receipt of capitation-tax; and another consequence also is induced, that such children as are born to him after the dissolution of the contract are aliens, and of course enemies to the Mussulmans, which would be injurious to the latter.

If an alien come, under a protection, into the Mussulman territory, and there make a purchase of tribute-land, and the tribute thereof be imposed upon him, he becomes a Zimmee, or subject; because tribute upon land is the substitute of a tax upon the person, (namely, capitation-tax;) and hence, when he undertakes the payment of tribute, it is known that he has become a resident in the Mussulman territory. He does not, however, become a Zimmee immediately on the purchase of the land, nor until such time as he undertakes the payment of tribute. Since an alien may purchase land in the way of traffic:—but upon becoming subject to tribute, he also becomes liable to capitation-tax for the ensuing year, because by submitting to tribute he becomes a Zimmee, and hence the term of his capitation-tax is to be accounted from the time of his submitting to tribute.

If an alien woman come, under a protection, into the Mussulman territory, and there marry a Zimmee or infidel subject, she becomes a Zimmeea, because she undertakes to reside in the Mussulman state, as being a dependant of her husband.
If a protected alien marry a female infidel subject, yet he does not become a Zimmee, because it is in his power to divorce her, and so return into his own country; his marriage, therefore, does not necessarily infer his design of becoming a resident.

If a protected alien return into his own country, and leave property in deposit with a Mussulman or Zimmee, or leave a debt due from them to him,—upon going into his own country his blood becomes neutral *, because by that act he annuls his protection: and with respect to such of his property as remains in the Mussulman territory, the rule to which it is subject depends upon circumstances;—for if the alien, after returning to his own country, be made a captive,—or, if an army of Mussulmans conquer that country, and he be slain, the person indebted to him becomes discharged from the debt, and his property left in deposit becomes public property †, because the deposit is still virtually in his hands, since the feizin of his trustee is equivalent to his own feizin; the property in deposit, therefore, becomes public property in the same manner as his person if he were made captive. The reason why the debt due to him is remitted is that any thing due to a person is accounted to be in his possession, only as he is empowered to claim it; now, in the present instance, his claim has ceased; and as the debtor has possession of it prior to any other person, it becomes his exclusive right; and he is consequently exonerated from the debt.—If, however, the person in question be slain, without the Mussulman army subduing the country,—or, if he happen to die, in either case the debt or deposit goes to his heirs; because as his person, in this case, has not become subject to the laws of plunder, it follows that his property is not plunder, for this reason, that the effect of the protection still remains with respect to his property, which therefore goes to him, or to his heirs after his decease.

* That is, he may be slain without incurring any penalty.
† Arab fes.—Meaning that portion of the plunder which belongs to the state.
It is to be observed that whenever property belonging to aliens is seized by Mussulmans, without war, it must be expended in defraying all charges of a public nature, in the same manner as tribute. The learned define this to be land, (for instance,) the proprietor of which has been ejected by the Mussulmans,—or capitation-tax:—and this property is not subject to the imposition of a fifth.—Shafei holds that a fifth is due both from the land in question, and also from capitation-tax.—The arguments of our doctors upon this point are twofold: FIRST, it is recorded of the prophet that he exacted capitation-tax, and lodged it in the public treasury, without deducting the fifth: SECONDLY, the property in question has been seized in consequence of fear for the Mussulmans operating upon the hearts of the infidels, without fighting. It is otherwise with plunder, as that is seized in consequence of two circumstances:—one, the prowess of the warriors in sight;—the other, the collective force of the Mussulmans; whence a fifth is due to the state on the former score, and the remainder to the warriors on the latter: and as the former reason does not exist with respect to the property in question, it follows that a fifth is not due from it.

If an alien come, under a protection, into the Mussulman territory, and his wife and children remain in the alien country, and he have also property there, lying as a deposit, some with an alien, some with a Zimmee, and some with a Mussulman, and he become a Mussulman in the Mussulman territory, and the Mussulmans afterwards subdue his country, in this case the whole of his property, together with his wives and children, as aforesaid, are public property,—that is, plunder. His wives and adult children are public property, as being aliens, and adults, and therefore not dependants; and in the same manner, the embryo in his wife’s womb, (according to what has been already stated, in treating of the distribution of plunder;) and so also, his infant children are public property, because an infant child is not held to be a Mussulman, in dependance of the Islam of his father, unless he
be in the father's hands, and subject to his authority; and in the present case the infant children of the person in question are not subject to his authority, since he is in the Mussulman territory, and they in a foreign country. In the same manner, also, his property is not under protection, in virtue of the protection of his person, on account of difference of country, (for he is himself in the Mussulman territory, and his property in another country.) The whole of his wives and children, therefore, together with his property, are plunder.—If, however, the alien in question become a Mussulman in his own country, and then come into the Mussulman territory, and his wives and children continue in the alien country, and he have also property there, some deposited with a Zimmer, some with an alien, and some with a Mussulman, and the Mussulmans afterwards obtain the superiority in that country,—in this case his infant children are accounted Mussulmans, in dependence of their father, because here they were under his authority at the time of his embracing the faith, as he was then in his own country along with his children. Such of his property, also, as is in deposit with a Mussulman or a Zimmer appertains to him, as being virtually in his possession, since the seizin of his trustee amounts to the same as his own seizin.—Anything beyond these, however, is public property:—his wives and adult children, according to what was before stated, that they are aliens and adults;—and such of his property, also, as is in deposit with an alien, because that is not in a state of protection, since the seizin of an alien is no protection: contrary to the seizin of a Zimmer or a Mussulman, as their seizin is a protection, whence it is that such property as he may have in their hands does not become the property of the public.

If an alien embrace the faith in his own country, and a Mussulman slay him, either wilfully or accidentally, and his heirs also embrace the faith there, nothing is due from the slayer, except expiation where the act was accidental. According to Shafei, he is liable to the fine of blood where the act was accidental, and to retaliation where it was wilful; because he has spilled the blood of one whose
blood was protected, since Islam is a protection, as men by Islam obtain a claim to reverence. The reason of this is that the JHomut Mowlsma or sin-creating protection, (that is, the protection in consequence of which the slayer of the protected is an offender,) is the original principle, since through that principle determent is obtained; — for whoever is aware that the murder of the protected is a crime will refrain from committing such murder; thus it is proved that the sin-creating protection is the original protection; and this protection is established with respect to the Mussulman in question universally, since no person presumes to allege that the slayer of this man is not an offender. The JHomut-makkotwim, on the other hand, or protection which bears a price, (that is the protection in consequence of which the slayer of the protected becomes liable to the Devit, or fine of blood,) is not the original principle, but is rather the perfection of the sin-creating protection, since by its means determent is more perfectly obtained, from its inducing both sin and loss of property. Now such being the case, it is evident that the appreciable protection is one description of the sin-creating protection, and it follows that the appreciable protection also is attached to Islam in the same manner as the original or sin-creating protection is attached to it. Fine and expiation are therefore due for killing an alien who has embraced the faith in a foreign country without retiring into the Mussulman territory.—The argument of our doctors is that God has said in the Koran "if the slain be of a people at enmity with you, and be a true believer, it is incumbent upon his slayer to emancipate a true believer." With respect to the arguments of Scei, we reply that his assertion, that "the sin-creating protection is attached to Islam," is not admitted; for, the sin-creating protection is attached, not to Islam, but to the person; because man is created with an intent that he should

* That is, to procure the emancipation of a Mussulman slave: and no fine shall be paid, because in this case the relations of the murderer, being infidels and aliens, have no right to inherit after him.
bear the burthens imposed by the law, which men would be unable to do unless the molestation or slaying of them were prohibited. Since if the slaying of a person were not illegal, he would be incapable of performing the duties required of him. The person therefore is the original subject of protection, and property follows as the dependant thereof, since property is, in its original state, neutral, and created for the use of mankind, and is protected only on account of the right of the proprietor, to the end that each may be enabled to enjoy that which is his own: but the appreciable protection applies to property, because its being appreciable evinces that the atonement for damage must be made in an article of the same nature with that which is the subject of protection; and this is possible with respect to property, but not with respect to the person, because the condition of it is that there be a similarity between the thing damaged and the thing in which the atonement is made, and this similarity may exist between property and property, but not between property and a man's person, since some property resembles other property, whereas property cannot resemble a man's person. In appreciable protection, therefore, property is the original, and the person is a dependant thereof; and when the appreciable protection is established in property by means of the security of country, (which is the protection of the state,) it follows that the protection extends also to the person by means of the security of country: but this does not exist with respect to an alien who embraces the faith in a foreign country, without retiring into the Mussulman territory; wherefore the price of his blood (namely, the Dejit, or fine of blood) is not due.

Objection.—A protected alien, who embraces the faith and afterwards apostatizes, enjoys security of country from residence in the Mussulman territory; wherefore it would follow that the fine of blood would be due for slaying such a one; because appreciable protection is occasioned by residence in the Mussulman territory, and that exists with respect to persons of this description: but we find that the fine of blood is not due for slaying a person of this description.

* Because, as being an apostate, he has forfeited the protection of the law.

Reply.
CHAP. VI. INSTITUTES.

REPLY.—A protected alien, in the Mussulman territory, is virtually an inhabitant of a foreign country, since he intends to return thither: and so likewise an apostate, because he also is desirous of going into a foreign country, for fear of his life; such a person, therefore, does not enjoy security of country from residence in the Mussulman territory.

If a person slay, inadvertently, a Mussulman who has no relations, or an alien who, having come under a protection into the Mussulman territory, has there embraced the faith, the fine of blood falls upon the tribe of the slayer; and the slayer owes expiation for the homicide, because, as he has slain a person of protected blood, the rule holds the same as with respect to all other protected persons. It is also to be observed that the Imám takes the fine, as the person slain has no heirs. If, on the other hand, a person wilfully slay such Mussulman or alien, in this case it is at the option of the Imám either to put the murderer to death, or to exact the fine of blood, because here the slain is of protected blood, and the killing is wilful: and the relations of the murdered person are found either in the whole body of Mussulmans, or in the Sultan, as the prophet has said “The Sultan is the relation of those who are without relations.”—What is here advanced, that “it is at the option of the Imám to exact the fine of blood,” means that if the Imám choose, he may accept of the fine in the manner of a composition; because the law, in a case of wilful murder, awards only retaliation: thus the Imám is at liberty to accept of a fine, as that, in the case here treated of, is more advantageous than retaliation. The Imám is therefore authorised to accept of a composition in property: but he is not at liberty to pardon; because, in the case in question, fine or retaliation is the right of the collective body of Mussulmans; and the Imám’s authority is established for the purpose of guarding the interests of the public; and the remission of their right without some return is a defention of their interest.


C H A P. VII.

Of Tithe and Tribute.

The term Ḡhar [tithe,] in its primitive sense, signifies ten. Khiraj [tribute] signifies the product of lands, and the hire of slaves; in the language of the Law it denotes any established impost exacted as a tax upon land, or upon the persons of Zimmes, which last is termed Jiz-yat, or capitation-tax.

The length of the territory of Arabia Proper is from the banks of the river Uzeib to the farthest part of Yemen, which is termed Amboora: and the breadth thereof from Bereen, and Ribna, and Ramil-Allij to the borders of Syria: and the breadth of the territory of Irak-Arabia is from the Uzeib to the back of Hilwan; and the length thereof from Loalba and Alos to the extremity thereof, which is the fort of Kutschuck upon the seacoast. Of this region, the lands of Arabia Proper are Asboree, or subject to tithe,—and those of Arabia Irak are Khirajee, or subject to tribute. The reasons for the former of these two arrangements are twofold. First, the prophet and the commanders of the faithful did not take tribute upon the lands of Arabia: secondly, tribute is a substitute for that part of the plunder which goes to the state, and is therefore not imposed upon the land of the people of Arabia, in the same manner as capitation-tax is not imposed upon their persons, for this reason, that one condition of imposing tribute upon land is that the people to whom the land be-

* Arab. Khoolsa-Rafidine. The orthodoxy Khalifs: it more particularly applies to the prophet's immediate successors.
longs, be established there as infidels, such as the people of Irák (for instance) who were permitted to continue in infidelity, whereas we are enjoined to make war upon the infidels of Arabia till they embrace the faith. The reason for the second arrangement is that Omar, when he subdued Irák, imposed tribute upon the lands in the presence of all the companions: Amroo Ibn Aas, moreover, when he conquered Egypt, imposed tribute upon the inhabitants; and the whole of the companions, in the same manner, agreed to impose tribute upon the people of Syria. It is to be observed, however, that the lands of the territory of Irák are the property of the inhabitants, who may lawfully sell or otherwise dispose of them; because the Imam, whenever he subdues a territory by force of arms, is entitled to re-establish the inhabitants in their possessions, and to impose tribute upon their lands, and capitation-tax upon their persons; and such being the case, the land continues the property of the inhabitants, as was before stated, in treating of plunder.

Lands, the proprietors of which become Mussulmans, or which the Imam divides among the troops, are Asboorce, or subject to tithe; because there is a necessity that something should be imposed and deducted from the subsistence of Mussulmans, and a tenth is the proportion most suitable to them, as that admits the construction of an oblation and act of piety; and also, because this is the most equitable method, since in this way the amount of what is levied depends upon the actual product of the lands.—Lands, on the other hand, which the Imam subdues by force of arms, and then restores to the people of the conquered territory, are Kberábee, or subject to tribute; because there is a necessity that something be imposed and deducted from the subsistence of infidels; and tribute is the most suitable to their situation, as that bears the construction of a punishment, since it is a sort of hardship, the tax upon tribute land being due from the proprietor although he should not have cultivated it. It is to be remarked, however, that Mecca is excepted from this rule; as the prophet conquered that territory.
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Territory by force of arms, and then restored it to the inhabitants, without imposing tribute. It is written, in the Jami\textsuperscript{a} Sagheer that all land subdued by force of arms, if watered by canals cut by the A\textsuperscript{j}imees, is subject to tribute, whether the Imam have divided it among the troops, or restored it to the original inhabitants:—and if there be no canals, but the land be watered by springs, which rise within it, it is A\textsuperscript{s}booree, or subject to tithe, in either case; because tithe is peculiar to productive land,—that is, land capable of cultivation, and which yields increase; and the increase produced from it is occasioned by water. The standard, therefore, by which tribute is due is the land being watered by tribute water, namely, rivers;—and the standard by which tithe is due is the land being watered by tithe-water, namely, springs.

If a person cultivate waste lands, the imposition of tithe or tribute upon it (according to A\textsuperscript{b}oo Yoosaf,) is determined by the neighbouring soils: in other words, if the neighbouring lands be subject to tithe, a tithe is to be imposed upon it, or tribute if they be subject to tribute; because the rule respecting any thing is determined by what is nearest to it; as in the case of a house, (for instance,) the rule with respect to which extends to its court-yard*, insomuch that the owner of the house is entitled to make use of the court-yard, although it be not his immediate property.

Objection.—According to the tenets of A\textsuperscript{b}oo Yoosaf, it would follow that the lands of Bosra should be subject to tribute, whereas they are not so, but are subject to tithe.

Reply.—Analogy would suggest this; but the companions imposed tithe upon it; wherefore the rule is in that instance set aside, because of the determination of the companions.

* Arab. Finna; meaning any open space immediately about and contiguous to the walls of a dwelling: but to render it of lawful use, it must be a thoroughfare, or belong to the dwelling itself.

Mohammed
Mohammed alleges that if a person cultivate waste lands by means of water drawn from wells dug in them, or by means of springs which rise in them, or with the waters of the Euphrates or the Tigris, or with the water of any large river or lake which has no exclusive proprietor, such lands are subject to tithe; and in the same manner, lands cultivated by means of rain-water:—but if he cultivate those lands with the water of canals cut by the kings of Persia, (such as the Kifree, and the Yezejird,) they are subject to tribute; according to what has been already observed, that with him the water is regarded, as water is the occasion of increase;—and also, because the imposing of tribute upon a Mussulman without his previous consent is impracticable:—in the imposition, therefore, the water is to be regarded, because the tilling of the land with tribute water evinces that the proprietor submits to pay tribute.

The tribute established and imposed by Omar upon the lands of Irak was adjusted as follows. Upon every jureeb* of land through which water runs, (that is to say, which is capable of cultivation) one Sam † and one dirm ‡; and upon every jureeb of pasture-land, five dirms §; and upon every jureeb of gardens and orchards ten dirms ||, provided they contain vines and date trees. (A jureeb of land signifies sixty Zirrâa**, of the Persian Zirra, which is seven Kabzas ††.) This rule for tribute upon arable and pasture lands, gardens, and orchards, is taken from Omar, who fixed it at the rates above-mentioned, none contradicting him; wherefore it is considered as

* (According to the Lexicons) as much land as will produce about seven hundred and sixty-eight pounds weight of corn: its extent is afterwards particularly described; from which it would appear that this calculation must be erroneous.

† About twenty-one pounds sterling; also a weight of about seven pounds.

‡ A small silver coin from two-pence to eight-pence sterling, but now of uncertain value.

§ From ten-pence to two shillings and sixpence sterling.

|| From one shilling and eight-pence to five shillings sterling.

** A square yard or cubit.

†† Kabzas; a span.
agreed to by all the companions. Upon all land of any other description, (such as pleasure-grounds, saffron-fields, and so forth,) is imposed a tribute according to ability; since, although Omar has not laid down any particular rule with respect to them, yet as he has made ability the standard of tribute upon arable land, &c. so, in the same manner, ability is to be regarded in lands of any other description.—The learned in the law allege that the utmost extent of tribute is one half of the actual product, nor is it allowable to exact more; but the taking of a half is no more than strict justice, and is not tyrannical, because, as it is lawful to take the whole of the persons and property of infidels, and to distribute them among the Mussulmans, it follows that taking half their incomes is lawful a fortiori.—By the term gardens [Boostan] is here understood grounds surrounded by a fence, and planted with fruit-trees, either date-trees or others. The compiler of the Hediya remarks that in our country * tribute is levied upon all lands in cafdb: but this is immaterial, because the amount of the tribute is due, according to ability, either in cafdb, or in the actual product of the land. If the land be incapable of yielding the established tribute, the Imam must make an abatement; and it is lawful so to do, where the product falls short. According to Mohammed it is also lawful to exact beyond the established tribute, where the product happens to exceed, judging of a case of increase from a case of deficiency: but, according to Aboo Yoesaf, it is not lawful to take more than the established tribute: and this is approved; because Omar never exacted any thing beyond what was established, upon being informed of any increase of produce: if, however, any thing be voluntarily given in addition to what is established, it may be accepted.

Tribute may be occasion-ally abated, but cannot be increased beyond the established rate.

Failure of the crop causes a remission of tribute.

If tillage be rendered impracticable in tribute lands, from floods or draughts,—or if, after sowing, the crop should fail from any other unavoidable cause, such as locusts, or blights, or violent heats, in

* Meaning the northern Persia.
any of these cases tribute is not due from it;—because the landholder is unable at all to cultivate the soil, either in a case of inundation, or of a scarcity of water; and in a case of failure of the crop from other accidents (of locusts, blights, and so forth,) he is debarred from the advantage of tillage for a part of the year; in both cases, therefore, there is no increase (in the degree which constitutes ability) for the whole year; and it is conditional to the exacting of the tribute that this ability be found for the whole year, in the same manner as increase to the like degree for the whole year is conditional to the payment of Zakat.

If a landholder, where no obstruction to cultivation exists, keep tribute lands untitled, and thus reap nothing from them, tribute is nevertheless due upon them. The two Elders allege that if the landholder, being enabled to sow grain of the first quality, [sow grain of a second quality, he is accountable for the highest degree of tribute: for instance, if his ground be capable of producing saffron, and he should therein sow lentils, in this case tribute as for saffron ground is due from him:—decrees, however, must not be passed to this effect, lest tyrants might be encouraged to oppress the landholder.

If any person subject to tribute become a Mussulman, tribute continues to be imposed upon him after his conversion to the faith, in the same manner as before; because tribute bears not only the sense of a penal impost levied upon infidels, but also, of a provision for the expenses of the state; and in this sense the continuance of it upon a Mussulman is practicable.

It is lawful for a Mussulman to purchase tribute-lands of a Zim- meec; after which tribute is to be taken from him (the Mussulman,) as it is said, in the Nakt-Sabeel, that the companions purchased

* That is, compulsion must not be used to exact the tribute at this rate.

Tribute-land purchased by a Mussulman continues subject to tribute.

A tributary continues subject to tribute after conversion to the faith.
tribute-land, and paid the tribute upon it, which demonstrates that it is lawful for a Mussulman so to do, and not any abomination.

TITHE is not due from the product of tribute-lands. Sbafet affirms that tithe and tribute are both due from it, as they are two separate claims, due from two distinct subjects, and for two different reasons. The subjects are different, as tribute is a debt upon the proprietor's person, and tithe is due from the actual product of the lands: and the reasons for their being due are different, as the reason for tribute being due is, land being productive to the amount of ability, and the reason for tithe being due is, land being productive in fact. In the same manner, the objects of disbursement of each are also different, as tribute is expended upon the troops, and tithe upon the poor. The exaction of the one, therefore, does not forbid the exaction of the other.—The arguments of our doctors upon this point are threefold.—First, the prophet has said "Tith and tribute are not to be united in the land of Mussulmans." Secondly, no instance has ever occurred of any magistrate attempting to unite tithe with tribute:—Thirdly, tribute is due upon such lands as have been conquered by force of arms, and tithe, upon lands the proprietors of which have voluntarily embraced the faith,—and these two descriptions cannot both apply to one soil; but the reason for tithe and tribute is one, namely, a productive soil;—whence it is that tithe and tribute have a reference to land, and it is commonly said, "the tithe of land," and "the tribute of land," which shews that the reason for both is a productive soil,—in tithe, produce actually, and in tribute, produce to the degree of ability.—A similar difference of opinion obtains concerning the uniting of Zakát with tithe or tribute: that is, if a person purchase tithe-land or tribute-land, in the way of merchandise, our doctors hold that nothing but tithe or tribute is due, and that Zakát is not due: whereas Sbafet maintains that together with tithe or tribute Zakát is also due, on account of the traffic;—and the same is the opinion of Mohammed.
In tribute-land should yield two crops in one year, from a double cultivation, yet tribute is not to be levied a second time on account of the second crop, as Omnár did not levy a second tribute, for a second crop. It is otherwise with tithe, as that is repeatedly levied on repeated produce, in tithe-land, because if tithe were not repeatedly levied on account of a repeated crop, the collection of it would be uncertain.

CHAP. VIII.

Of Jizyat, or Capitation-Tax.

JIZYAT, or capitation-tax, is of two kinds. The first species is that which is established voluntarily, and by composition,—the rate of which is such as may be agreed upon by both parties,—because the prophet entered into a composition with the tribe of Binney Bijrán, for twelve hundred pieces of cloth, and not more,—and also, because the fixing of tribute in this mode is a mutual act of both parties, and therefore it is not lawful to swerve from what has been so mutually agreed upon. The second species is that which the Imam himself imposes, where he conquers infidels, and then confirms them in their possessions, the common rate of which is fixed by his imposing upon every ayowedly rich person a tax of forty-eight dirms per annum, or four dirms per month;—and upon every person in middling circumstances, twenty-four dirms per annum, or two dirms per month;—and upon the labouring poor twelve dirms per annum, or one dirm per month. This is according to our doctors. Shiifei maintains that he should exact from each fane and adult person, one deenar, or something to that amount;—and the poor and wealthy are on an equal footing in this point; because the prophet said to Mánaz, "Take from every male and female adult one deenar, or cloth so that value;"—from which it appears
appears that there is no manner of difference between the rich and the poor, as the prophet spoke generally, without making any distinction: moreover, capitation-tax is due only in lieu of destruction*, (whence it is that it is not due from persons the destruction of whom on account of infidelity is illegal, namely women and children,) and in this sense it applies equally to the rich and the poor.—The arguments of our doctors upon this head are twofold.—First, their doctrine is adopted from Omar, Othman, and Ali, with whom all the companions agreed upon this point: secondly, capitation-tax serves as an aid to the troops, and therefore differs in its rate, according to the difference of men’s circumstances, in the same manner as tribute upon land. The ground of this is that capitation-tax is due in lieu of assistance, with person and property†; but as property is different with respect to being more or less, so in the same manner that is different, which is a substitute for it.—With respect to the tradition adduced by Shafii, we are only to understand from it that the taking of debenars, and so forth, from the tribe to whom he alluded was in the way of a composition, in which there is no difference between the poor and the rich, as is further proved by the term female adults, in the saying referred to, since capitation-tax is not incumbent upon women. It is to be observed that in the exaction of capitation-tax from the labouring poor, it is a condition that the person upon whom it is levied be in a state of health for the greater part of the year.

Capitation-tax is to be imposed upon Kitbees, because this is mentioned in the Koran: and it is in the same manner to be imposed upon Majoosees, as the prophet imposed capitation-tax upon Majoosees.—Capitation-tax is also to be imposed upon the idolaters of Ajim, [Persia.] This is contrary to the opinion of Shafii, for he

* That is to say, is imposed as a return from the mercy and forbearance shown by the Mussulmans, and as a substitute for that destruction which is due upon infidels.

† Namely, that assistance which every subject of the Mussulman government is by the law enjoined to afford towards carrying on the injoined war with infidels.
argues that destruction is incurred by all infidels; but the legality of abating from it, in consideration of a capitation-tax, with respect to Kitābees, is known from the word of the Koran, and with respect to Majooсеes, from the traditions; any others, therefore, than those, (namely, idolaters,) remain subject to the original penalty, which is destruction. The argument of our doctors is that as it is lawful to make slaves of the idolaters of ʿAjīn, it follows that it is also lawful to impose capitation-tax upon them; because, in the same manner as, by reducing them to slavery, they are deprived of power over their own persons, so also, they are deprived of power over their own persons by the imposition of capitation-tax, since they must in this case work, and pay the Mussulmans the produce of their labour, and their subsistence is furnished from their labour.

If a Mussulman army subdue an infidel territory before any capitation-tax be established, the inhabitants, together with their wives and children, are all plunder, and the property of the state, as it is lawful to reduce to slavery all infidels, whether they be Kitābees, Majooсеes, or idolaters.

Capitation-tax is not imposed upon the idolaters of Arabia, because their infidelity is particularly atrocious, since the prophet was sent among them, and manifested himself in the midst of them, and the Koran was delivered down in their language; wherefore their depravity is most evident. In the same manner, capitation-tax is not imposed upon apostates, as their infidelity is also of an atrocious nature, because they have apostatised and become infidels after having been led into the way of the faith, and made acquainted with its excellence.—From neither of these, therefore, is any thing to be accepted, but they must embrace the faith, or be put to death. Shaffe holds that it is lawful to make slaves of the idolaters of Arabia:—the reply to him is contained in the arguments of our doctors as before recited.
and upon being conquered they become public property.

If a Muffulman army conquer the idolaters of Arabia, or apostates*, their wives and children are plunder, that is, become the property of the state; because Sideek made slaves of the women and children of the Binney-Haneefa tribe, when they apostatised, and divided those slaves among the troops, and slew such of the men as did not return to the faith, for the reasons before assigned.

Capitation-tax is not due from women or children; because it is due either in return for a remission of destruction, or in lieu of assistance in the wars of the faith, and women and children are not liable to be slain,—nor do they engage in war, as they are incapable thereof. In the same manner, capitation-tax is not due from the maimed, the blind, the paralytic, or the aged, because these are incapable of engaging in war. It is recorded from Aboo Toofeef that capitation-tax is imposed upon the aged, where they are possessed of property, because an aged person, of sound understanding, is liable to be slain.

Capitation-tax is not due from such poor as do no work †. Shafeef maintains that capitation-tax is due from them, because of the tradition of Maks, (before recited) which is generally expressed. The arguments of our doctors are twofold.—First, Othman refrained from imposing capitation-tax upon the poor of this description,—and this, in the presence of other companions:—secondly, as tribute on land is not imposed upon ground incapable of bearing it, so in like manner capitation-tax is not imposed upon one who is unable to pay it: and with respect to the tradition of Maks, although it be generally expressed, yet it relates to the labouring poor only.

* The term apostate applies not only to individuals, but also to whole tribes, who, after embracing the faith, renounced it, and returned to their former way of worship.

† Namely, Fakkeers, or others who subsist by begging.

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Chap. VIII. INSTITUTES.

Capitation-tax is not imposed upon slaves, Mokátibs, Moddabirs, or Am-Walids, because capitation-tax is a substitute for destruction, with respect to them, and, with respect to us, it is a substitute for aid [in the wars of the faith]; now in conformity with the first of these, it would follow that capitation-tax is due from them, and, in conformity with the second, that it is not due; a doubt therefore arises with respect to its being due; and as this is the case, it is determined not to be incumbent upon them: neither is it incumbent upon their owner to pay capitation-tax for them, because he himself by their means pays an increased capitation-tax, as he through them becomes rich, or obtains a mediocrity of circumstances; and in either case he pays capitation-tax in a degree superior to the labouring poor.

Capitation-tax is not imposed upon Rábibs, (that is, Christian or Pagan monks and hermits, who do not mix with the rest of mankind:)—the same is mentioned by Kadooree: Mohammed, in the Jamaica-Sagbeer, reports from Hancefu that capitation-tax may be imposed upon those, where they are capable of labour, (and such is the opinion of Aboo Yosef;) because where, being capable of labour, they refrain from it, they waste their ability; capitation-tax, therefore, is due from them, in the same manner as tribute from the landholder, where he (being able) suffers his land to remain untilled.—The reason for what is related by Kadooree is that a monk is not to be destroyed where he does not mix with mankind; and capitation-tax, with respect to them, would be for the purpose of warding off destruction.

If a person become a Muffulman, who is indebted for any arrear of capitation-tax, such arrear is remitted: and in the same manner, the arrear of capitation-tax due from a Zimmee is remitted upon his dying in a state of infidelity. Shafei holds that the tax is not remitted in either case; because it was due either in return for protection to the person, or in return for permission to reside in the Muffulman territory,
territory; and the Zimmee or convert has continued under protection, and resided in the Mussulman territory: the return from him, therefore, is not to be remitted in consequence of the supervening circumstance of death, or conversion to the faith; in the same manner, as in a case of hire, or of composition for blood;—in other words, if capitation-tax be a return for residence, it comes under the construction hire, and is not remitted in consequence of death, or conversion to the faith, in the same manner as if a Zimmee were to hire a house and reside therein for the period agreed upon, and then die, or embrace the faith, in which case the rent of the house does not cease; and so likewise with respect to capitation-tax:—or, if capitation-tax be a return for protection to the person, it comes under the construction of a composition for blood, and is not remitted in consequence of death or conversion to the faith, in the same manner as if a Zimmee were wilfully to kill a person, and afterwards enter into a composition for the murder with the friends of the deceased, for a certain consideration, and then become a Mussulman, or die, in which case the consideration is not remitted from him;—and so likewise capitation-tax, (which is the consideration for protection to his person,) is not remitted. The arguments of our doctors upon this point are threefold. FIRST, the prophet has declared that "capitation-tax is not incumbent upon Mussulmans."—SECONDLY, capitation-tax is a species of punishment, inflicted upon infidels on account of their infidelity, whence it is termed Jizyat, which is derived from Jizya, meaning retribution; now the temporal punishment of infidelity is remitted in consequence of conversion to the faith; and after death it cannot be inflicted, because temporal punishments are instituted solely for the purpose of removing evil, which is removed by either death or Islam:—THIRDLY, capitation-tax is a substitute for aid to the Mussulmans, and as the infidel in question, upon embracing the faith, becomes enabled to aid them in his own person, capitation-tax consequently drops upon his Islam.—With respect to the argument adduced by Shafeii, we reply that capitation-tax is neither a consideration for protection to the person, nor
nor for residence, because protection to the person is established in virtue of humanity, and a Zimmee resides in the Mussulman territory, within his own dwelling; wherefore the case does not admit that a consideration, for protection to his person, or for residence, should be exacted from him.

If a Zimmee owe capitation-tax for two years, it is compounded;—that is, the tax for one year only is exacted of him:—and it is recorded, in the Jama-Sagbeer, that if capitation-tax be not exacted of a Zimmee until such time as the year has elapsed, and another year arrived, the tax for the past year cannot be levied. This is the doctrine of Haneefa. The two disciples maintain that the tax for the past year may be levied. If, however, a Zimmee were to die near the close of the year, in this case the tax for that year cannot be exacted, according to all our doctors; and so likewise, if he die in the middle of the year, (which instance has been already treated of.) Some assert that the above difference of opinion obtains also with respect to tribute upon land: whilst others maintain that there is no difference of opinion whatever respecting it, but that it is not compounded, according to all our doctors.—The argument of the two disciples (where they differ) is that capitation-tax is a consideration, (as was before said,) and if the considerations be numerous, and the exaction practicable, they are all to be exacted; and in the case in question the exaction of capitation-tax for the two years is practicable: contrary to where the Zimmee becomes a Mussulman, for in this case the exaction is impracticable.—The arguments of Haneefa upon this point are twofold. First, capitation-tax is a sort of punishment inflicted upon infidels for their obstinacy in infidelity, (as was before stated;) whence it is that it cannot be accepted of the infidel if he send it by the hands of a messenger, but must be exacted in a mortifying and humiliating manner, by the collector sitting and receiving it from him in a standing posture: (according to one tradition, the collector is to seize him by the throat, and shake him, saying, "Pay
"Pay your tax, Zimmee!"—it is therefore evident that capitation-tax is a punishment; and where two punishments come together, they are compounded, in the same manner as in Hidd, or stated punishment. Secondly, capitation-tax is a substitute for destruction in respect to the infidels, and a substitute for personal aid in respect to the Mussulmans, (as was before observed;)—but it is a substitute for destruction with regard to the future, not with regard to the past, because infidels are liable to be put to death only in future, in consequence of future war, and not in the past. In the same manner, it is also a substitute for aid with regard to the future, because there is no necessity for aid in the past. With respect to what is quoted from the Jamas Sagbeer—"and another year arrive," some assert that the passage is to be taken in its most extensive sense, that is to say, that it means—"and another year also past," so as to make two years,—for it is there mentioned that capitation-tax is due at the end of the year, wherefore it is requisite that another year be elapsed, so as to admit of an accumulation of two year's tax, after which the two years' taxes are compounded:—Others, again, allege that the passage is to be taken in its literal sense; and as capitation-tax is held by Haneefa to be due upon the commencement of the year, it follows that by one year passing, and another arriving, an accumulation of the tax for two years takes place. It is certain that, with our doctors, capitation-tax is due on the commencement of the year,—and with Shafeei, at the end of it, in the manner of Zakat. The argument of our doctors is that the thing for which the tax is a substitute has regard solely to the future, (as was before explained,) wherefore it cannot be due after the year has elapsed; whence it is that, with our doctors, capitation-tax is due on the commencement of the year.

The tax for the current year is due at the commencement of the year.
SECTION.

THE construction of churches or synagogues in the Mussulman territory is unlawful, this being forbidden in the traditions:—but if places of worship originally belonging to Jews or Christians be destroyed, or fall to decay*, they are at liberty to repair them,—because buildings cannot endure for ever, and as the Imam has left these people to the exercise of their own religion, it is a necessary inference that he has engaged not to prevent them from rebuilding or repairing their churches and synagogues. If, however, they attempt to remove these, and to build them in a place different from their former situation, the Imam must prevent them, since this is an actual construction: and the places which they use as hermitages are held in the same light as their churches, wherefore the construction of those also is unlawful. It is otherwise with respect to such places of prayer as are within their dwellings, which they are not prohibited from constructing, because these are an appurtenance to the habitation. What is here said is the rule with respect to cities; but not with respect to villages or hamlets; because as the tokens of Islam (such as public prayer, festivals, and so forth) appear in cities, Zimmeres should not be permitted to celebrate the tokens of infidelity there, in the face of them; but as the tokens of Islam do not appear in villages or hamlets, there is no occasion to prevent the construction of synagogues or churches there. Some allege that in our country† Zimmeres are to be prohibited from constructing churches or synagogues, not only in cities, but also in villages and hamlets; because in the villages of our country various tokens of Islam appear; and what is recorded from Haneefa, (that the prohi-

* The case suppose a city or country conquered by the Mussulman, and the inhabitants re-established in their possessions.

† Upper Peri, the country of the author.
INSTITUTES

book IX.

bition against building churches and synagogues is confined to cities, and does not extend to villages and hamlets) relates solely to the villages of Koofo; because the greater part of the inhabitants of these villages are Zimmees, there being few Mussulmans among them, wherefore the tokens of Islam do not there appear: moreover, in the territory of Arabia, Zimmees are prohibited from constructing churches or synagogues either in cities or villages, because the prophet has said "Two religions cannot be profess'd together in the peninsula of Arabia."

It behaves the Imam to make a distinction between Mussulmans and Zimmees in point both of dress and of equipage. It is therefore not allowable for Zimmees to ride upon horses, or to use armour, or to use the same saddles and wear the same garments or head-dresses as Mussulmans; and it is written, in the Jama Sagbeer, that Zimmees must be directed to wear the Kifteej openly, on the outside of their clothes; (the Kifteej is a woollen cord or belt which Zimmees wear round their waists on the outside of their garments;)—and also, that they must be directed, if they ride upon any animal, to provide themselves a saddle like the panniers of an ass. The reason for this distinction in point of clothing and so forth, and the direction to wear the Kifteej openly is that Mussulmans are to be held in honour; contrary to Zimmees, who are not to be held in honour (whence it is that they are not saluted sir;) and if there were no outward signs to distinguish Mussulmans from Zimmees, these might be treated with the same respect, which is not allowed. It is to be observed that the insignia incumbent upon them to wear is a woollen rope or cord tied round the waist, and not a silken belt.

It is requisite that the wives of Zimmees be kept separate from the wives of Mussulmans, both in the public roads, and also in the baths: and it is also requisite that a mark be set upon their dwellings, in order that beggars who come to their doors may not pray for them. The learned have also remarked that it is fit that Zimmees be not permitted
mitted to ride at all, except in cases of absolute necessity; and if a Zim-
mee be thus, of necessity, allowed to ride, he must alight wherever
he sees any Mussulmans assembled; and if there be a necessity for him
to use a saddle, it must be made in the manner of the panniers of an
afl. Zimmeees of the higher orders must also be prohibited from wear-
ing rich garments.

If a Zimmee refuse to pay capitation-tax, or murder a Mussulman,
or blaspheme the prophet, or commit whoredom with a Mussulma, yet
his contract of subjection is not dissolved; because the thing in virtue
of which the destruction of Zimmeees is suspended is the submitting to
capitation-tax, not the actual payment thereof; and the submission to it
still continues. Shafei has said that the contract of subjection is dis-
solved by a Zimmee's blasphemy the prophet; because if he were a
believer, by such blasphemy his faith would be broken*; and hence,
in the same manner, his protection is thereby broken, since the con-
tract of subjection is merely a substitute for belief. The argument of
our doctors is that the blasphemy in question is merely an act of insid-
enity proceeding from an infidel; and as his insidelity was no obstruc-
tion to the contract of subjection at the time of making it, this super-
venient act of insidelity does not cancel it.

A contract of subjection is dissolved only by Zimmeees abscond-
ing to the territory of the infidels, or making an attack upon the Mus-
sulmans; in either of which cases the contract ceases to exist; because
the advantage proposed from it is the removal of the evils of war and
bloodshed; and this advantage ceases to exist upon their engaging in
hostilities.

* That is, he would become a virtual apostate, and forfeit the protection and privileges
of a believer. The consequence attending a breach of the contract of subjection is men-
tioned a little further on.

A Zimmee,
A ZIMEET, upon breaking his contract of subjection, stands in the same predicament with an apostate,—that is, he is condemned to death upon absconding to the territory of the infidels, in the same manner as holds in the rule with respect to apostates. The rule also with respect to such property as he may carry off along with him into the said territory, is the same as with respect to the property of an apostate;—that is, if the Mussulmans afterwards conquer that territory, the property aforesaid is forfeited to the State, in the same manner as the property of an apostate:—but if the Zimeet be made captive, he is a slave: contrary to the case of an apostate, who, if he repent not, is put to death.

SECTION.

Of Zakat twice as much is levied upon the property of Christians of the Binney Toglib tribe as is levied upon the property of Mussulmans, because Omar made peace with them upon this condition, and this in the presence of the other companions, none of whom disputed it:—and in the same manner, twice as much is taken from the women of that tribe as from the Mussulmans, because the above peace established the taking of double Zakat, and Zakat is incumbent upon women; double Zakat, therefore, is exacted of the women of that tribe,—but not of the children, because Zakat is not incumbent upon children. Ziffer says that the women of that tribe are also exempted from this, (and such is likewise the opinion of Shafei,) because the double Zakat in question is actually capitation-tax, as Omar declared to them "This is Jizyat, and name it which ever ye please, Jizyat, or Zakat;" (whence it is that whatever is exacted from them is expended upon the same objects of expenditure as capitation-tax:)—it is therefore evident that this is capitation-tax, and women are not subject to it.——
The argument of our doctors is that the thing in question has been made obligatory by the terms of a peace, and women are capable of being subject to such obligations:—and with respect to what is urged by Zisser and Shoefi, that "whatever is exacted of them is expended upon the same objects of expenditure as capitation-tax," it may be replied that this is not applied to the purposes of the Mussulmans, as the property which is applied to the purposes of the Mussulmans is the property in the public treasury, to which the purposes of the Mussulmans is the object of expenditure, and this object of expenditure is not restricted to capitation-tax alone, so as to afford an argument of the thing in question being capitation-tax:—in short, the impost in question is not capitation-tax, and hence the conditions of capitation-tax are not regarded in the exaction of it.

**Capitation-tax** is imposed upon the freedmen* of the Binney-Toghib tribe, and also tribute upon their lands, although capitation-tax and tribute be not exacted from their masters; in the same manner as these imposts are levied upon the freedmen of the Koreish tribe, although a Koreish be not subject to them. Zisser says that there is levied upon their property a twofold proportion of what is levied upon the property of Mussulmans, in the same manner as a twofold proportion is levied upon the tribe of Binney-Toghib;—because the prophet has said "The freedmen of any tribe are of that tribe;" whence it is that it is unlawful to bestow alms upon the freedmen of the tribe of Hafsib, in the same manner as it is unlawful to bestow it upon the freemen of that tribe†. Our doctors, on the other hand, argue that the exaction of a twofold proportion from the Binney-Toghib tribe, by the terms of a peace, is an act of favour with respect to them; because that is not taken from them in the way that capitation-tax is taken from Zimmes, with humiliation and degradation; and a freedman is not connected with his master in any thing which is a favour

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*Arab. Mabicks, meaning emancipated slaves. † Vol. I. p. 58.
to the master, whence it is that capitation-tax is imposed upon the
freedman of a Mussulman, who is a Christian.—It is otherwise with
respect to the prohibition of alms, because prohibition is established by
doubt, whence it is that the freedman of a Hasbimee is connected with
the Hasbimee, with respect to the prohibition of alms.

Objection.—It would hence follow that alms are unlawful to
the freedman of a rich person, in the same manner as they are un-
lawful to the rich person himself; whereas the case is otherwise.

Reply.—Alms are not unlawful to the freedman of a rich person,
because the rich person himself may be one to whom alms are lawful,
but prohibited by wealth, which cause of prohibition does not exist
with respect to his freedman:—a Hasbimee, on the contrary, is utterly
incapable of receiving alms, as he is, by the dignity and superiority
of his rank, precluded from accepting of them; and hence his freed-
man is connected with him as far as respects the illegality of alms.

Tribute, capitation-tax, and public presents, to be expended in
defraying all public charges.

TRIBUTE, and all other exactions from the property of the
Binney-Toglib tribe, as well as the presents sent by foreigners to the
Imam, together with capitation-tax, is expended upon the purposes
of the Mussulmans, such as the construction of fortresses upon the
Mussulman frontiers, building of bridges, and so forth.—Out of
these, also, a sufficient allowance is to be paid to the Mussulman ma-
gistrates, public officers, and learned men.—Subsistence is also paid
out of this property to the warriors, and their families; because the
acquisitions in question are the property of the public treasury, as be-
ing obtained by the Mussulmans without fighting; and the property in
the public treasury is reserved for the purposes of the Mussulmans and
of the warriors in their service;—for the maintenance of a family rests
upon the head of that family, wherefore if he do not receive what
may suffice for their support, he will be under a continual necessity of
seeking a subsistence for them, and consequently, by a variety of en-
gagements, will be occasionally disabled from service.
If any warrior, or other person, die in the middle of the year, having a subsistence appointed to him out of the public treasury, his heirs are not entitled to any of the pay so appointed for him, because this pay is a species of gratuity, and not a debt, (whence it is termed Atta," and therefore does not become his property until he has obtained possession of it, and ceases upon his decease, and consequently is not an inheritance. If, however, a person die towards the end of the year, it is laudable to give his pay to his relations. (Atta is the appointed allowance entered in the books of the Sultan, for soldiers, and for the ministers of religion, who are, in the present times, Kánees, Mooztees, and Doctors;†. In the beginning of Islám, Atta was appointed for any persons of distinction, such as the wives of the faithful, and the families of those who were persecuted.)

CHAP. IX.

Of the Laws concerning Apostates.

When a Mussulman apostatizes from the faith, an exposition thereof is to be laid before him, in such a manner that if his apostacy should have arisen from any religious doubts or scruples, those may be removed. The reason for laying an exposition of the faith before him is that it is possible some doubts or errors may have arisen in his mind, which may be removed by such exposition; and as there are only two modes of repelling the sin of apostacy, namely, destruction or Islám, and Islám is preferable to destruction, the evil is rather to be removed by means of an exposition of the faith;—but yet this exposition of the

*Angelici, bounty. †Arab. Mooldris: a title for any learned person.
faith is not incumbent*, (according to what the learned have remarked upon this head,) since a call to the faith has already reached the apostate.

who, if he repent not within three days, is put to death.

An apostate is to be imprisoned for three days, within which time if he return to the faith, it is well: but if not, he must be slain.—It is recorded in the Jama Sagbeer that "an exposition of the faith is to be laid before an apostate, and if he refuse the faith, he must be slain:"—and with respect to what is above stated, that "he is to be imprisoned for three days," it only implies that if he require a delay, three days may be granted him, as such is the term generally admitted and allowed for the purpose of consideration. It is recorded from Haneefa and Aboo Yoosaf that the granting of a delay of three days is laudable, whether the apostate require it or not: and it is recorded from Shafe'i that it is incumbent on the Imam to delay for three days, and that it is not lawful for him to put the apostate to death before the lapse of that time; since it is most probable that a Muslim will not apostatise but from some doubt or error arising in his mind; wherefore some time is necessary for consideration; and this is fixed at three days. The arguments of our doctors upon this point are twofold.—first, God says, in the Korán, "Slay the unbelievers," without any reserve of a delay of three days being granted to them; and the prophet has also said "Slay the man who changes his religion," without mentioning any thing concerning a delay: secondly, an apostate is an infidel enemy, who has received a call to the faith, wherefore he may be slain upon the instant, without any delay. An apostate is termed on this occasion an infidel enemy, because he is undoubtedly such; and he is not protected, since he has not required a protection; neither is he a Zimmer, because capitation-tax has not been accepted from him; hence it is proved

* That is, it is lawful to kill an apostate without making any attempt to recover him from his apostacy.
that he is an infidel enemy*. It is to be observed that, in these rules, there is no difference made between an apostate who is a freeman, and one who is a slave, as the arguments upon which they are established apply equally to both descriptions.

The repentance of an apostate is sufficiently manifested in his formally renouncing all religions except the religion of Islam, because apostates are not a fict: or if he formally renounce the religion which he embraced upon his apostacy, it suffices, since thus the end is obtained.

If any person kill an apostate, before an exposition of the faith has been laid open to him, it is abominable, (that is, it is laudable to let him continue unmolested.) Nothing however, is incurred by the slayer; because the infidelity of an alien renders the killing of him advisable; and an exposition of the faith, after a call to the faith, is not necessary.

If a Mussulman woman become an apostate, she is not put to death, but is imprisoned, until she return to the faith. Shefii maintains that she is to be put to death; because of the tradition before cited;—and also, because, as men are put to death for apostacy solely for this reason, that it is a crime of great magnitude, and therefore requires that its punishment be proportionably severe, (namely, death,) so the apostacy of a woman being likewise (like that of man) a crime of great magnitude, it follows that her punishment should be the same as that of a man. The arguments of our doctors upon this point are twofold.—First, the prophet has forbidden the slaying of women, without making any distinction between those who are apostates, and those who are original infidels. Secondly, the original principle in the retribution of offences is to delay it to a future state, (in other words, not to inflict punish-

* Arab. Hīrbe; a term which the translator has generally rendered alien, and which applies to any infidel not being a subject of the Mussulman government.
ment here, but to refer it to hereafter,) since if retribution were executed in this world, it would render defective the state of trial*. as men would avoid committing sin from apprehension of punishment, and therefore would be in the state of persons acting under compulsion, and not of free agents: but in the case of apostacy of men the punishment is not deferred to a future state, because it is indispensably requisite to repel their present wickedness, (namely, their becoming enemies to the faith,) which wickedness cannot be conceived of women, who are, by natural weakness of frame, incapable thereof: contrary to men.—A female apostate, therefore, is the same as an original female infidel; and as the killing of the one is forbidden, so is the killing of the other also. She is however to be imprisoned, until the return to the faith; because, as she refuses the right of God after having acknowledged it, she must be compelled, by means of imprisonment, to render God his right, in the same manner as she would be imprisoned on account of the right of the individual. It is written in the *Jama Sagheer,*—"A female apostate "is to be compelled to return to the faith, whether she be free, or a "slave."—The slave is to be compelled by her master:—she is to be "compelled, for the reasons already recited; and this compulsion is to be executed by her master, because in this a regard is had to the right both of God and of the master. It is elsewhere mentioned that a female apostate must be daily beaten with severity until she return to the faith.

An apostate’s right over his property is dissolved by his apostacy, by a suspended dissolution: if, therefore, he again become a Mussulman he again becomes endowed with a right over his property, in the same manner as before. Lawyers observe that this is an opinion of Haneefa. According to the two disciples, his right over his property is not dissolved, because he is necessitous, and also liable to de-

* Meaning that probation which is the chief design of the present state of man.
mands; and it is requisite that such a person's right over his property be not dissolved, since a person notpossessed of this right is incapable of answering such demands as may be made upon him: his right over his property, therefore, endures until he be put to death, in the same manner as that of a person under a sentence of retaliation, or of lapi-
dation. The argument of Haneefa upon this head is that an apostate is an insidel enemy*, and is in our hands until he be put to death. Now the killing of him is only lawful in consequence of his shewing himself an enemy: and this circumstance proves that his right over his property is destroyed; but yet, as his being invited back to the faith affords room to hope that he may again become a Mussulman, it is for that reason said that his right over his property is dissolved by a suspended dissolution. If, therefore, he again become a Mussulman, it is accounted the same as if he were always a Mussulman, and he stands, (with respect to the dissolution of his right,) as if he never had apostatised; that is, the apostasy which occasioned a destruction of his right is in this case of no effect. If, however, he do not again become a Mussulman, but die or be slain in his apostacy, or abscond to a foreign country, and the Kásee issue a decree of expatriation † against him, his insid比利ty becomes then confirmed and established, and the cause above-mentioned takes effect in the destruction of his right, and his right is destroyed accordingly.

If an apostate die or be slain in his apostacy, his property acquired during his possession of the faith goes to his heirs who are Mussulmans, and whatever he acquired during apostacy is public property of the community of Mussulmans,—that is, it goes to the public treasury.—This is according to Haneefa. The two disciples allege that his

* Literally, "issue a decree connecting him with a hostile country." The term expatriation is adapted by the translator, as the decree in question does not amount to banishment, but only to a suspension of civil life.

† Upon an apostate dying, his property acquired in apostacy becomes forfeited to the state; and the
property of both descriptions goes to his heirs who are Mussulmans. 
Sbaféi, on the other hand, holds that they are both public property,
because he died in a state of infidelity, and a Mussulman cannot inherit 
of an infidel; and as he is an infidel enemy, his property is forfeited to 
the public,—that is, to the state. The argument of the two disciples 
is that what the apostate acquired during his profession of the faith, 
and also, what he acquired during his apostacy, are both equally his 
property until his decease, for the reason already mentioned: the 
whole of his property, therefore, devolves to his heirs in consequence 
of his decease, in virtue of their right of inheritance resting upon a 
time when he was not an apostate; because apostacy occasions death; 
and hence it is placed in the same state as if he had acquired the whole 
property during his profession of the faith; and as his heirs are heirs 
to that property from the period of his profession of the faith, it fol-
 lows that a Mussulman inherits of a Mussulman, not that a Mussulman 
inherits of an infidel.—The argument of Haneefa is that the succession 
to inheritance, in such a way that a Mussulman inherits of a Mussul-
man, is possible with respect to the property acquired during Islam, 
as that property existed before apostacy, which was a species of civil 
death: but this succession to inheritance is not in such a way possible, 
with respect to the property acquired during apostacy, because this 
property did not exist whilst the person in question professed the faith; 
and the existence of the property during his profession of the faith is 
a condition of succession to inheritance.—It is necessary to observe that 
no person can inherit of an apostate but one who was competent to 
inherit at the time of his apostacy, by being then free and a Mussul-
man, and who continued of this description till the time of the apostate's 
decese or desertion into a foreign state. This is recorded from 
Haneefa by Hoofi-Bin-Zeeyad, and proceeds upon the ground that in 
inheritance regard is had to succession; and in succession it is a con-
tdition that the successor be first certified, and then his succession de-
clared; and it is requisite that the qualities which entitle to inheri-
tance exist in the successor at the time of certifying his right to 
succession,
succession, which are, his being a Mussulman and free. It is also a re-
quiseite that these qualities exist in him at the period of succession;
insoinuch that, if any of the apostate’s relations were to become Muss-
ulmans upon his apostacy, or if a child be born to him begotten in his
apostacy, they cannot (according to this doctrine) inherit of him.
There is, however, another doctrine of Haneefia recorded upon this
head, which is, that any person inherits of the apostate who was
entitled to inherit of him at the time of his apostacy; and that the
continuance till the time of his decease of those qualities which entitle to
inheritance is unnecessary;—according to which doctrine the right of
the person entitled to inherit of the apostate at the time of his apo-
tacy is not annulled by his decease*, but bis heir steps in as his sub-
stitute, because apostacy is a species of death, and hence in establishing
the right to inheritance the period of apostacy is regarded. This is the
substance of what is said by Aboo Toofsf. — A third doctrine is that re-
gard is had to the existence of the heir at the time of the apostate’s
death or desertion into the enemy’s country; and such is the opinion
of Mohammd, who has said in the Malfoot that this is the most ap-
proved doctrine, because whatever occurs posterior to the existence of a
cause, but before the completion thereof, stands in the same predicament
with that which occurs previous to the existence of the cause;—in the
same manner as a child born of a purchased slave previous to the seizin
of the purchaser;—that is, a child born of a purchased female slave
posterior to the purchase, but previous to the seizin of the purchaser,
is considered as existing at the time of the contract of sale, so far as to
be a subject of the contract, and to have a part of the price set against
it:—contrary to where it is born subsequent to seizin.—An heir, there-
fore, discovered subsequent to the apostacy, is in the same predicament
with one who existed previous to the apostacy, and at the time of
the apostate’s professing the faith; and consequently inherits of the
apostate.

* That is, supposing him to die in the interim between the date of the apostacy and
the death of the apostate.
The wife of an apostate, being a Musslimād, inherits of him, where he die or be slain during her edit from separation in consequence of his apostacy, because the husband, in this case, becomes an evader*, although he be not sick at the time of his apostacy.

The property left by a female apostate goes to her heirs, whether it have been acquired during her profession of the faith, or in her apostacy; because the woman's person is inviolable†; and the protection of her blood is not destroyed by her apostacy; (whence it is that she is not put to death;) and as the protection of her blood still holds good, and her person continues inviolable, it follows that the protection of her property also is not destroyed, (since property is a dependant of the person;)—and hence her property does not become forfeited to the state.—It is otherwise in the case of a male apostate; because he (according to the doctrine of Hanēfia) has made a distinction between his property acquired during Ḥiṣām, and his property acquired during apostacy,—as a male apostate is liable to be put to death.

The husband of a female apostate (being a Mussulman) inherits of her, provided she have apostatised during sickness, with a view to invalidate her husband's right:—but if she have apostatised whilst in health, her husband cannot inherit of her, because a female apostate is not put to death for her apostacy, and hence her husband's right does not, in consequence of her apostacy, become connected with her property:—contrary to the case of a male apostate.

If an apostate go off to a foreign country, and the magistrate issue a decree uniting him to the infidels, his Moodābbirs and Ami-Walīds are free, and his deferred debts become undereferred, (that is, the pay-

* For a full explanation of this term, see Vol. I. p. 283.

† Arab. Mosōm-al-dām: that is, of protected blood; meaning, not liable to be slain (on account of her apostacy.)
ment of them becomes immediately due,)—and his property acquired during his profession of the faith goes to his Musulman heirs. Shafei maintains that his property continues in suspense; because his expatriation is merely a species of absence, and therefore operates in the same manner as his absence within the Musulman territory; and as in the latter case his property remains in suspense, so in the former case likewise. The argument of our doctors is that an apostate, by going into a foreign country, becomes an alien; and as aliens are the same as the dead with respect to the laws of Islam, on account of the termination of the power of subjecting themselves to those laws, (in the same manner as that power ceases with the dead,) a desertion to a foreign country amounts to death. His desertion however to the foreign country is not confirmed but by a decree of the magistrate, as there is still a possibility of his returning into the Musulman territory, and hence it is requisite that the Kāzī issue a decree, uniting him to the foreign country, so that such union may be confirmed and become established:—and as his desertion to a foreign country stands (upon the Kāzī’s decree) in the place of his death, those things which have a connexion with death do then become established, (namely, the freedom of his Moddbirs, and so forth, as aforefaid) in the same manner as they become established upon his actual decease. In taking possession of the inheritance, Mohammed has regard to the heir being entitled to inherit at the time of the apostate’s desertion, because it is such desertion which is the occasion of the inheritance, no regard being had to the decree of the Kāzī farther than as being a confirmation thereof,—in other words, by the Kāzī’s decree all possibility of a return into the Musulman territory is cut off, and the desertion becomes confirmed. Aboo Yoosuf, on the other hand, maintains that regard is had to the heir being entitled to inherit at the time of the Kāzī’s decree, because the apostate is accounted as dead upon the Kāzī issuing such decree. The same difference of opinion obtains where a female apostate absconds into a foreign country.—The debts contracted by the apostate during his adherence to the faith and Moddbirs are free; and his property acquired in Islam goes to his heirs; and all his debts become immediately payable.
faith are to be discharged out of his property acquired during the same, and the debts contracted during his apostacy are to be discharged from his property acquired in apostacy. The compiler of the Hedaya remarks that this is one opinion of Haneefa.—Another opinion recorded from him is that his debts are all to be discharged from the property acquired during his adherence to the faith; and if that be not sufficient, but a part of the debts still remain unpaid, then such remaining debt is to be discharged out of the property acquired during apostacy.—There is also a third opinion recorded from him, the reverse of this.—The reason for the first of these opinions is that each of those two descriptions of debt has been contracted on a distinct and separate account, as the debts incurred during adherence to the faith have been contracted in the course of transactions undertaken for the acquisition of property during adherence to the faith, such as purchase, sale, and so forth,—and in the same manner, the debts incurred during apostacy have been contracted in the course of transactions undertaken for the acquisition of property during apostacy; and as the cause of incurring each description of debt is different, each is respectively to be discharged from the property acquired by the transaction in the course of which the debt was incurred: the debt, therefore, contracted during adherence to the faith is discharged out of the property acquired during adherence to the faith;—and the debt contracted during apostacy is discharged out of the property acquired in apostacy, as the cause of the acquisition of each property, respectively, is the cause of each description of debt being incurred.—The reason for the second opinion is that the property acquired by the apostate during his adherence to the faith is his right, whence it is that his heir becomes proprietor thereof by succession: now it is a condition of succession that the property descending be free from incumbrance on the part of the original possessor; and as his debts are an incumbrance upon it, the payment of those precedes the right of the heirs:—but as the property acquired during apostacy is not his right (the power of appropriation being destroyed by apostacy, accord-
ing to Hannafa,) his debts are not to be discharged from that except
where they cannot be discharged out of the other property, in which
case what remains unpaid is to be discharged out of this property;  
in the same manner as where a Zimmee dies without heirs, in which
case his property goes to the collective body of Mussulmans; but yet if
any debts lie against the Zimmee, such debts are previously to be dis-
charged out of his estate; and so also, the property acquired by the
apostate during apostacy is not his property, but if, notwithstanding, any
debts lie against him, the discharge of which cannot be effected from
his other property, such debts are to be discharged out of the afore-
said property.—The reason for the third opinion is that the property
acquired by an apostate during his adherence to the faith is the right
of his heirs;—but the property acquired during his apostacy is purely
his own right, wherefore the payment of his debts is first made out of
this property, except where this is impracticable, (from the property
not sufficing for that purpose,) in which case the remainder of them is
to be discharged out of the property acquired during adherence to the
faith, as his right precedes the right of his heirs.

Objection.—It was before understood that the property acquired
by an apostate during apostacy is not his right; but here it is asserted
that it is "purely his own right,"—which is a contradiction.

Reply.—The expression that the property is "purely his own
"right," implies only that the right of others is not connected with it,
in the manner that the right of another is connected with the property
of a dying person; nor does it hence follow that the property in ques-
tion is his right, so as to occasion a contradiction.—The two disciples
maintain that his debts are to be discharged out of his property of
both descriptions, since both (according to their tenets) are equally
his right, whence it is that the right of his heirs extends to both.

All acts of an apostate with respect to his property, (such as pur-
chase, sale, manumission, mortgage, and gift,) done during his apostacy,
are suspended in their effect. If, therefore, he become a Mussulman,
those acts are valid; but if he die, or be slain, or desert into a foreign

H h 2 country,
country, those acts are null. This is the doctrine of Haneefa. The two disciples say that those acts on his part are lawful in either case, that is, whether he become a Mussulman, or die, or be slain, or desert into a foreign country. It is here proper to observe that the acts of an apostate are of four kinds. First, those which are universally admitted to be of authority, such as claim of offspring, and divorce,—because claim of offspring does not depend upon actual right of property, inasmuch that if a father lay claim to a child born of his son’s female slave, his claim is valid, and the female slave becomes his Am-Walid, although she be not his actual property, but he has a dubious property in her;—and so also, divorce does not depend upon a complete power, since divorce proceeding from a slave is lawful, although his power be defective.

Objection.—Upon the instant of his apostacy, separation takes place between the husband and wife: how, then, can he pronounce divorce upon her?

Reply.—This supposes a case where the husband and wife apostatisate together; as is mentioned in the Kafsee.

Secondly, those which are universally held to be null, such as marriage and sacrifice, because the validity of marriage and sacrifice depend upon the person’s sect, and an apostate is of no sect.—Thirdly, those which are universally held to remain suspended in their effect, such as contracts of copartnership, as the validity of these depends upon similarity of religion, and there is no similarity between the religion of a Mussulman and that of an apostate.—Fourthly, those concerning the suspension of which there is a difference among our doctors, Haneefa holding that they are suspended, and the two disciples, that they are not suspended; and these are the acts before-mentioned, namely, purchase, sale, manumission, mortgage, and gift.—The argument of the two disciples is that the legality of those acts depends upon competency, and the validity of them upon the right of property: now there is no doubt of competency appertaining to an apostate, since he is subject to the same civil obligations with other people; and in the same manner (according to them) there is no doubt concerning his power of possessing, since (by their tenets) his right
right over property continues unaffected until his death, according to what was before stated, that "he is necesititous, and also liable to de-mands," (to the end;)—his right over his property, therefore, still endures, whence if a child be born of his Mussulman wife within six months from the date of his apostacy, such child inherits of her; but if his child die after his apostacy and before his decease, such child does not inherit of him;—and such being the case, his acts, as aforesaid, are legal and valid. According to Aboo Yoosaf the acts of an apostate in a state of health are lawful, because it is probable that he may again become a Mussulman, upon perceiving his error, and consequently may not suffer death; and such being the case, a male apostate is, with respect to all acts, in the same predicament as a female. Mobammed on the other hand, holds that the acts of an apostate are legal and valid, in the same manner as the acts of a sick person, because it is not probable that a person who is converted and embraces any religious persuasion will readily abandon it, especially where he embraces it after having forsaken his former faith in which he has been educated; it is therefore most probable that he will suffer death for his apostacy: contrary to a female apostate, she not being liable to be put to death.—The argument of Haneefa is that an apostate's right over his property is dissolved by a suspended dissolution, (as was before stated,) and the dissolution or continuance of this power remaining in suspense, it follows that the acts in question also remain suspended in their effect, as they are founded upon the right. An apostate, moreover, is (according to Haneefa) in the same predicament with a hostile infidel who comes into the Mussulman territory without a protection; because an apostate is also a hostile infidel, and is in the Mussulman territory without a protection; and as the hostile infidel is liable to be imprisoned and prosecuted, and his acts remain suspended, until it be seen whether he is made a slave, or slain, or released out of courtesy, so in the same manner the acts of an apostate remain suspended, until it be seen whether he become a Mussulman, or be slain in his apostacy. In reply to the arguments of the two disciples, we observe that
that an apostate is liable to be put to death in consequence of the abrogation of his protection, in the same manner as a hostile infidel, who comes into the Mussulman territory without a protection, is liable to be put to death, from being destitute of protection to his person;—and the exposure to death for such a reason occasions a doubt with respect to the competency of the person who is liable to it. It is otherwise in the case of an adulterer or a murderer, because, although these be liable to death, yet their being so is not in consequence of destruction to the protection of their persons, but as a retribution for their offence; and as this does not occasion any doubt respecting their competency, their acts are all legal and valid.—It is otherwise, also, with respect to a female apostate, because, as she is not accounted an infidel enemy, she is not liable to be slain.

If an apostate, after a decree being issued uniting him to the infidels, become a Mussulman, and return into the Mussulman territory, he may take back whatever of his property he finds remaining in the hands of his heirs, because the heirs have not taken the same, in virtue of their right of succession, for any other reason than as he has no further occasion for it; but when, becoming a Mussulman, he returns into the Mussulman territory, he has occasion for the property; and as his necessity precedes the right of the heirs, he may resume the property out of their hands.—It is otherwise where there is no property remaining in the hands of the heirs, for in this case he is not entitled to seek indemnification from them, because the heir has expended the property, from his own possession, at a time when it was lawful for him so to do: neither does the above rule apply to his Am-Walids or Medabbi, because they are free, and the apostate is not at liberty to recover them, as the decree of the Kásse, awarding their freedom, has been rendered valid by the circumstance which imparts to it that property *, and hence cannot be reversed.

* Probably, meaning, his desertion to a foreign country.
If an apostate who had deserted into a foreign country, becoming a Musulman, come back into the Musulman territory, before the Kazee shall have issued any decree respecting him, in this case it is accounted the same as if he had continued uniformly a Musulman, and had never apostatised; as was before-mentioned.

If an apostate have carnal connexion with a Christian female slave, who had been in his possession during his adherence to the faith, and this slave produce a child after more than six months from the date of his apostasy, and he claim the child, in this case the slave becomes his Am-Walid, and the child is his child, but yet does not inherit of him. If, however, the female slave become a Muslima, the child inherits of him, upon his death, or expatriation. His claim of offspring is valid, for this reason, that the validity of a claim of offspring does not depend upon actual possession, (as was before stated;)—and the child's inheriting where the mother is a Muslima, and not inheriting where she is a Christian, is because the child of an apostate is a dependant on the father where the mother is a Christian, (since the father is more nearly related to Islam, as compulsion will be used to make him return to the faith, and it is probable that he may again become a Musulman;) and such being the case, the child is accounted the same as an apostate, and an apostate cannot inherit of an apostate; but where the mother is a Muslima, the child is a Musulman, as a dependant on the mother,—and a Musulman may inherit of an apostate.

If an apostate go off, with his property, into a foreign country, and the Musulman forces afterwards obtain possession of that property.

* Arab. Pshebd: the term of law for a master laying claim to (or acknowledging) a child born of his female slave, and declaring it to be of his own begetting, which legalises the child to him. It is treated of at large under the head of Minumission of Slaves.
property as, in this case such property is plunder, and the right of the state:—but if the apostate first desert to the foreign country, and then come into the Mussulman territory and take his property, and carry it off into the foreign country, and the Mussulman forces afterwards obtain possession of that property, and the apostate’s heirs discover it before the general distribution†, in this case it must be delivered to them; because, in the former case, the property is a property in which no inheritance had ever existed, whereas, in the latter case, inheritance had existed, (whence it became the property of the heirs upon the Kāzee’s decree of outlawry) and therefore the heir is, in fact, already the proprietor of it.

If an apostate desert to a foreign country, leaving a slave in the Mussulman territory, and the Kāzee decree the slave to belong to his son, and the son constitute the slave a Mokātib, and the apostate afterwards, becoming a Mussulman, return into the Mussulman territory, the Akid Kitābat or contract of ransom is lawful; but the ransom, as well as the Willa-right over the Mokātib, appertains to the reconverted apostate;—because the contract of ransom was legal and valid, as the son constituted the slave a Mokātib after the Kāzee’s decree of expatriation, and the slave then fell under the son’s absolute authority, whence it is that the contract is legal. The son, therefore, who is his father’s heir, is made to stand as his agent: now the rights of a contract appertain to the constituent, and hence the ransom belongs to the father; and as the slave becomes liberated upon paying his ransom, the Willa-right refts with him of course, since the Willa of emancipation rests with the person from whom the slave becomes emancipated.

* That is to say, take it in war, in a military excursion against the people of that country.

† Of the spoil, at the end of the excursion.
If an apostate slay any person accidentally, and then desert to a foreign country, or be slain in his apostacy, the fine of blood is due only from his property acquired during his adherence to the faith, according to Haneefa.—The two disciples hold that it is due from his property of every description,—(that is, both from that acquired during his adherence to the faith, and also, from that acquired in apostacy,)—because the tribe of an apostate are not liable for the fine of his offence, since the tribe never pay the fine imposed upon a murderer, unless where a connexion still subsists between them; and as no connexion continues between the apostate and his tribe, the fine for the apostate’s offence falls upon his property:—for the two disciples hold that property of either description is his property, and, of course, that inheritance holds equally in both (as was formerly mentioned;) whereas Haneefa, on the contrary, maintains that nothing is his property except what he acquired during his adherence to the faith,—and that, as the property acquired during his apostacy does not belong to him, inheritance does not hold with respect to it, but it is forfeited to the state.

If a person wilfully cut off the hand of a Mussulman, and the Mussulman afterwards apostatize, and then die in his apostacy in consequence of the loss of his hand,—or go off to a foreign country, and the Kāneec issue a decree of expatriation against him, and he afterwards become a Mussulman and return into the Mussulman territory, and then die in consequence of the loss of his hand,—in either case an half fine only is due from the maimer to the apostate’s heirs:—IN THE FIRST INSTANCE, because no regard is had to the consequence of the act of maiming, as this consequence followed upon an unprotected subject, (namely, the person of an apostate,) wherefore nothing is regarded but the original act of maiming, which took place during the adherence of the deceased to the faith, at which time he was in a state of protection, whence an half fine is due:—contrary to where a person cuts off the hand of an apostate, and the apostate afterwards becomes a Mussulman,
Mussulman, and then dies in consequence of the loss of his hand; for in this case no fine whatever is due, because here the act occurred during apostacy, and is therefore biddir *, and of no account; and a thing which is biddir cannot afterwards obtain any regard;—for as a thing which is in itself worthy of regard may become biddir, (as where the avenger of blood discharges the offender) so in the same manner an act is rendered biddir by apostacy;—and in the second instance, because the apostate is in this case accounted as dead, and death precludes the consequence;—that is, if a person cut off another's hand, and this person die from some other cause, the consequence of the maiming can never take place;—wherefore in this case also no regard is had to any thing but the maiming, on account of which an half-fine is due; and no regard is had to the consequence after his again becoming a Mussulman, which is a species of re-animation to him, because, as his becoming again a Mussulman in this manner is a new birth to him, no effect can afterwards take place from the former offence. This is where the Kaisce has issued a decree uniting him to the infidels. But if the Kaisce have not issued any such decree, whether the apostate abscond to a foreign country or not,—and he become a Mussulman, and then die, in consequence of the loss of his hand, in this case a complete fine is due from the maimer. This is the doctrine of the two Elders. Mohammed and Ziffer maintain that in all these cases an half fine is due, because, from the maimed person apostatizing after the loss of his hand, any effect attending the maiming becomes biddir, and does not afterwards occasion a complete fine in consequence of his becoming a Mussulman, any more than where a person strikes off the hand of an apostate, and he becomes a Mussulman, and dies in consequence of the loss of his hand. The argument of the two Elders is that, in the case in question, the offence of maiming was committed upon a person who from being a Mussulman was, at the time of maiming, in a state of protection, and its consequence also takes

* Sheding blood, or permitting it to be shed, unrevedenged.
place upon a protected person, as the person maimed is a Mussulman at the time of his decease, wherefore a complete fine, (being the responsibility for the person) is due, in the same manner as it would be due if he never had apostatized. The ground of this is that no regard is had to the permanency of protection throughout the duration of the offence, regard being had to the existence thereof only at the time of the cause taking place (the maiming, for instance,) and at the time of the establishment of the effect of that cause. Now the time of duration of the offence is neither the time of the cause taking place, nor of the establishment of the effect of that cause, and therefore no regard is had to the permanency of protection throughout the duration of the offence; in the same manner as no regard is had to the permanency of property throughout the duration of a vow;—that is,—if a man lay to his slave, "If you enter this house, you are free," and he afterwards sell that slave, and again purchase him, and the slave then enter the house, he is free, although after the vow, and in its duration, he had not been in the possession of that person.

If a Mokātīb become an apostate, and desert to a foreign country, and there acquire property, and be afterwards made a captive with such property, and brought back, and refuse to embrace the faith, and do not become a Mussulman, he is to be put to death; and the property is to be paid to his owner in discharge of his ransom;—but if any thing remain after discharging the ransom, it goes to his heirs, according to all the doctors. This, according to the tenets of the two disciples, is evident; because, as they hold that whatever is acquired by an apostate belongs to him if he be free, so in the same manner, whatever is acquired by an apostate belongs to him, if he be a Mokātīb: and it is so according to Ḥanefīa likewise; because a Mokātīb is proprietor of his own requisitions solely in virtue of his contract of ransom; and as this contract is not suspended by his apostacy, but continues in full force, so in the same manner his power over property is not suspended by his apostacy, he continuing proprietor of

"If you enter this house, you are free,"
of his own acquisitions; and his acquisition, as being his own property, must be applied to the discharge of his ransom; and whatever may remain goes to his heirs; for this reason, that as the acts of a Mokāṭib are not suspended by the stronger obstruction, (slavery,) it follows that they are not suspended by the weaker obstruction, (apostasy,) a fortiori.—Bondage is here termed the stronger obstruction, and apostasy the weaker, as several acts of an apostate are universally admitted to be legal and valid, such as the claim of offspring; for instance, as was formerly stated, (and most of his acts, such as sale, purchase, and so forth, are by the two disciples held to be so,) whereas no act whatever of a slave is of any force.

If a husband and wife both apostatize, and desert to a foreign country, and the woman become pregnant there, and bring forth a child, and to this child another child be afterwards born, and the Muf’ulman troops then subdue the territory, the child and the child’s child both are plunder, and the property of the state:—the child is so, because as the apostate mother is made a slave, her child is so likewise, as a dependant on her:—and the child’s child is so, because he is an original infidel and an enemy; and as an original infidel is fee, or the property of the state, so is he: the woman’s child may moreover be compelled to become a Muf’ulman, but not the child’s child. Hasfan records from Haneef that compulsion may be used upon the child’s child also, to make him embrace the faith, as a dependant of the grandfather.—It is to be observed that there are four things respecting which, (according to a tradition of Hasfan,) the grandfather may be made the father’s substitute, and according to the Zábir Rawdyet he may not be made the father’s substitute:—first, Islâm,—secondly, Sadka-fittir,—thirdly, devolution of Willa,—and fourthly, bequests to relations.—The case of Islâm is stated above;—the case of Sadka Fittir is, that if a father be poor, or a slave, and the grandfather be rich, and free, the Sadka-fittir of the grandchild is incumbent upon the grandfather, according to Hasfan,—but according to the Zábir Rawdyet
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Rawahyet it is not incumbent. The case of devolution of Willa is that when a slave marries an emancipated female slave, and they have a child, the Willa of the child rests with the Mawla of the mother, but if the father be afterwards emancipated, the Willa of the child devolves upon the Mawla of the father; and if the father be not emancipated, but the grandfather, the Willa devolves upon the Mawla of the grandfather, according to Hassan—but according to the Zahir Rawahyet it does not so devolve. And the case of bequests to relations is, that if any person make a will in favour of "his relations," the father and mother are not included in it:—now the question is whether the grandfather be included in it or not?—according to Hassan he is included; but according to the Zahir Rawahyet he is excluded, in the same manner as the father.

The apostacy of a boy, who though under age is yet arrived at years of discretion, is also regarded, according to Haneefa and Mobammed; and he may be compelled to return to the faith; he is not, however, to be put to death, but must he imprisoned. In the same manner, regard is paid to the Islam of a boy of the same description, for which reason he cannot inherit of his parents if they be infidels. Aboo Yoosaf says that his Islam is regarded, but not his apostacy. Zisser and Shafeei, on the other hand, maintain that no regard is paid either to his Islam or his apostacy. The arguments of Zisser and Shafeei upon this point are twofold:—FIRST, the boy is a dependent on his father and mother in Islam, and therefore cannot be considered as original in it, since between dependancy and originality there is a contradiction:—SECONDLY, if his Islam be regarded, he is subject to certain effects from it which are injurious to him, such as incapacity to inherit [of an infidel,] and separation from a wife who is an idolater; and hence he is not accounted as one of the Mussalmans. The arguments of Haneefa, Aboo Yoosaf and Mobammed in support of regard

* This supposes the term relations to be mentioned in a will generally, and without any specification.
being had to his *Islam* are also twofold:—first, *Alee* embraced the faith whilst he was yet a boy; and the prophet considered his *Islam* as valid and sufficient, insomuch that *Alee* obtained much honour by the action:—secondly, the boy acknowledges the faith in his heart, and testifies to it with his lips, and this is the substance of *Islam*, and the substance of any thing is not liable to be set aside: the consequences of *Islam*, moreover, are eternal happiness and future salvation, and these being the greatest advantages and natural effects of *Islam*, they are accordingly established;—and any injury to which he may be subject in consequence of his *Islam* (such as incapacity to inherit, and so forth) is comparatively of little moment. The argument of *Aboo Yoosaf*, *Ziffar*, and *Shafeii*, in support of their opinion that no regard is to be paid to his apostasy, is that the apostasy is injurious to himself*. The argument of *Haneefa* and *Mohammed*, to prove that no regard is to be paid to his apostasy, is that the apostasy substantially exists, and what is substantial is not liable to be set aside, as was before urged in support of the opinion which affirms that regard is paid to his *Islam*.—It is to be observed that the boy may be compelled to return to the faith after apostasy, as this is for his advantage; but he is not to be put to death on account of his apostasy, as that is punishment, and punishment is suspended with respect to infants, they being objects of mercy.—All that is here stated applies to boys under age, but arrived at years of discretion.—As to a boy who has not yet attained discretion, no regard is had to his apostasy according to all the doctors, because the declaration of such does not amount to a change of faith. The same rule applies to lunatics:—and a person intoxicated with liquor so as to be deprived of his reason is accounted the same as a lunatic.

* A person under age is not held in law to be capable of any act by which he may injure himself, such as contracting debt, emancipating slaves, and the like; and the same rule is by those doctors applied to the circumstance of such a person’s apostasy.
CHAP. X.

Of the Laws concerning Rebels.

Persons who resist the Imam's authority are of four descriptions.—
I. Those who live in a state of disobedience to the Imam without assigning any reason, whether in open force or otherwise; and who rob and murder Mussulmans, and put travellers in fear;—and these are termed Katta-al-Tareek, or highway robbers, the laws respecting whom have been already treated of.—II. Those who are not engaged in open force, and who rob and murder Mussulmans, and put travellers in fear; but who proceed upon some avowed pretext; and these are also subject to the same law with highway robbers.—III. Those who being in a large body, and possessed of a power of open resistance, withdraw themselves from their obedience to the Imam, under an apprehension which leads them to suppose that he conducts himself improperly, and which impropriety of conduct is in their conception a sufficient cause of war, whether it be tyranny, or infidelity: and these are termed Kharijets, or insurgents; and they hold the destroying of Mussulmans, the seizing of their property, and enslaving their women, to be lawful, and accuse the companions of the prophet of infidelity: the laws therefore respecting such, according to all the learned, and all the traditionists, are the same as the laws concerning rebels.—IV. Mussulmans who withdraw themselves from their obedience to the Imam, and who hold it lawful to destroy Mussulmans, and to seize their property, and enslave their women, in the same manner as insurgents. People of this fourth description are termed Bagbût, [rebels:] Bagbat is the plural of Bagbee: the word Bagbee, in its literal sense, means prevarication; also injustice and tyranny:
in the language of the law it is particularly applied to injustice, namely, withdrawing from obedience to the rightful Imám, (as appears in the Fattabah-Koadea.)—By the rightful Imám is understood a person in whom all the qualities essential to magistracy are united, such as Islanifin, freedom, sanity of intellect, and maturity of age,—and who has been elected into his office by any tribe of Mussulmans, with their general consent;—whose view and intention is the advancement of the true religion, and the strengthening of the Mussulmans,—and under whom the Mussulmans enjoy security in person and property;—one who levies tithe and tribute according to law;—who, out of the public treasury, pays what is due to learned men, preachers, Kásées, Mooffis, philosophers, public teachers, and so forth;—and who is just in all his dealings with Mussulmans: for whoever does not answer this description is not the right Imám, whence it is not incumbent to support such a one, but rather it is incumbent to oppose him, and make war upon him, until such time as he either adopt a proper mode of conduct, or be slain; as is written in the Médin-al-bikkáyek, copied from the Fawáyed.

It is incumbent upon the Imám to recal rebels to their allegiance, and shew them what is right, in such a manner that the misunderstanding which occasioned their defection may be removed;—because Alee thus conducted himself with respect to the people of Hirroo (a district in the territory of Koofa,) when they rebelled;—and also, because this mode of proceeding is easier than force, and it is possible that this more easy mode of proceeding may succeed in removing the evil, so as to afford no occasion for more violent measures:—it is therefore requisite that they be recalled to their allegiance to the Imám, and shewn what is right.

The Imám must not, however, neglect more forcible measures, but in the beginning of an insurrection may oppose rebels by force of arms, sufficient to quell them. Our author remarks that Kadooree has
has thus asserted in his compendium: and Imám Khābir Zāda says that our doctors hold it to be lawful for the Imám to begin by making war upon them, where they are levying troops and collecting themselves together. Shaf'ii maintains that it is not lawful to make war upon rebels, until they commit acts of hostility, because it is not lawful to kill Mussulmans but for the purpose of repulsion, and rebels are Mussulmans:—contrary to the case of infidels, the commencing war with whom is lawful, as their infidelity (according to Shaf'ii) legalizes the putting them to death. The reasoning of our doctors is that the propriety of commencing war upon rebels rests upon a circumstance which argues that they will commit hostilities on their part; and their levying troops, and collecting themselves together, and withdrawing themselves from their obedience to the Imám, are all circumstances which argue an hostile intention; for if the Imám were to wait until they had actually commenced hostilities, it is likely that he might afterwards find the repulsion of them impracticable; it is therefore highly requisite that he commence hostilities against them, under any of the above circumstances, in order that their wickedness may be repelled.

Upon the Imám being informed of rebels purchasing arms and instruments of war, and preparing for hostilities, he must instantly seize and imprison them, until they turn from their rebellion, and repent, in order that their wickedness may be (as far as is possible) repelled.

If the rebels have a body of forces to which those who fly from battle may join themselves, in this case it is necessary, without loss of time, to put to death all the wounded, and to pursue those who fly, in order that they may not join that body, and that their wickedness may be repelled: but if the rebels have not a body of this kind in reserve, their wounded must not be slain, nor those of them pursued who fly from battle, as in this case their wickedness is repelled without.
The families and property of rebels remain inviolate.

The families of rebels are not to be reduced to slavery, nor their property divided among the Mussulmans, [in the manner of plunder.] The reasons for this are twofold:—first, Allee, in the war of faml, ordered that "the slaves of the rebels should not be slain, nor their wives or families enslaved, nor their property taken," and he is legislator in this particular; (the exposition of that passage, in the orders of Allee, that "the slaves should not be slain, is, that they are not to be slain, where there is no body of the rebels to which they might unite themselves, if suffered to go;—for where there is such a body, it is at the discretion of the Imam either to kill the slaves, or to imprison them, so as to prevent their joining this body:)—secondly, rebels are Mussulmans, and Islamism occasions protection to person and property.

The Mussulmans need not hesitate to fight rebels with such of their arms as fall into their hands, provided they have occasion for them. Shafei maintains that this is unlawful: and the same difference of opinion subsists respecting such borfes of the rebels as fall into the hands of the Mussulmans. The argument of Shafei is that as these are the property of Mussulmans, the use of them, unless with consent of the owner, is illegal. The arguments of our doctors upon this point are twofold.—first, Allee divided the arms of the rebels among his followers.
CHAPTER X.

INSTITUTES.

 lowers in Bafra, and this division was made on account of necessity, and not as a transfer of property:—secondly, as it is lawful for the Imam to take the arms of others who are not rebels, and to divide them among the troops, to use according to necessity, it follows that the same act with respect to the property of rebels is lawful in the Imam a fortiori, on this ground, that it is lawful to adopt a small evil, for the purpose of repelling a great one. It is incumbent on the Imam, moreover, to detain the property of rebels in custody; and he must neither share it as spoil, nor restore it to the owners until they repent; but upon their repentance, he may restore to them their property: their property is not to be shared as spoil, because rebels are Mussulmans, and Islam is occasions protection to person and property, as was before stated;—but it is to be detained in custody, as their wickedness may be repelled by cutting off their resources; their property, therefore, is to be held in custody although the Mussulmans have no occasion for it: (such horses, however, as are among their property, must be sold, because keeping the price is both easy, and also advantageous to the owner:)—and their property must be restored to them upon repentance, because the reason of detention ceases upon repentance, and the property is not spoil.

If the rebels should have exacted tithe or tribute of the inhabitants of a territory which they had overcome, the Imam must not again levy tithe or tribute there, because the Imam is vested with authority to collect those taxes of the people, in virtue of the protection he affords them; and in the case in question he has not protected them. If, then, the rebels expend the tithe and tribute upon their proper objects, it suffices with respect to the people of whom those taxes had been collected by them, and the tithe and tribute owing by them is duly rendered, as the claimant to them has received his right:—if, however, the rebels have not expended the tithe or tribute upon their proper objects, the people of that district are bound in conscience to pay them over again, because what they first gave has not been applied to the proper
proper object. Our author remarks it as an opinion of the learned in
the law, that it is not incumbent upon the people to pay tribute over
again, because the rebels are also warriors, who make war upon infi-
dels*, and are therefore proper objects of expenditure of tribute, al-
though they be rebels; and in the same manner, it is not incumbent
upon them to pay tithe a second time, where the rebels are in a state
of poverty, since tithe is a right of the poor.—But for the future, the
Imám will collect tithe and tribute from those people, because he
then protects them, and consequently his authority over them is
evident.

If, in an army of rebels, one of them kill another, and the rebels
be afterwards overcome by the troops of the rightful Imám, no fine of
blood is exacted of the slayer; nor is he subject to retaliation; because
the authority of the rightful Imám did not extend over him at the
time of the murder, and hence the act does not occasion either re-
taliation or fine;—in the same manner as a murder committed in a
foreign country; that is, if one Mussulman kill another in a foreign
country, and the Mussulman forces afterwards overcome that territory,
the murderer is not liable to any punishment;—and so also in the case
in question;—because the reason (namely, non-existence of the Imám's
authority at the time of the fact,) appears in both cases alike.

If rebels overcome a city, and one of the inhabitants wilfully
murder another, and the troops of the rightful Imám afterwards re-
cover the city and drive the rebels away, before they have been able
to establish any jurisdiction over the inhabitants, in this case retaliation
must be executed upon the murderer, because in such an instance the
authority of the Imám has never been completely terminated there:—
retaliation is therefore due.

* As being Mussulmans, and consequently subject to the divine injunction in this par-
ticular.
If a person, not a rebel, slay a rebel, the murderer nevertheless inherits of the rebel*, where connexion of inheritance subsists between the parties (such as father and son for instance.)—If, moreover, one rebel kill another, and declare that "he had slain him in the right†," and persist in this declaration, in this case also the slayer inherits of the slain: but if the slayer aver that "he had killed him unrightfully," in this case he cannot inherit of him. This is the doctrine of Haneefah and Mohammed. Aboo Toosif* maintains that the slayer cannot inherit of the slain in either case, and such is also the opinion of Shafeéi. This difference of opinion has its foundation in the rule of our doctors, that where any person, not a rebel, destroys either the person or the property of a rebel, nothing whatever is incumbent upon him, neither fine, retaliation, nor indemnification for the property,—nor is he an offender, because every person not rebellious is commanded to make war upon rebels, for the purpose of repelling their wickedness;—and in the same manner a rebel, if he kill one who is not a rebel, is not liable either to fine or retaliation:—but yet he is an offender.—According to Shafeéi, on the other hand, (in conformity with an opinion of his before delivered,) the rebel is liable to fine, retaliation, or indemnification for the property:—and the same difference of opinion obtains in a case where an apostate dies, or deserts to a foreign country, after having destroyed the person or property of any one. The argument of Shafeéi is that the rebel in question has destroyed protected property, or has slain a person of protected blood, and is consequently answerable, in the same manner as is the rule with respect to an apostate who is guilty of a destruction of person or property before he has become independent of the Muffulman government‡ by uniting him-

* By the law of inheritance, a murderer is incapacitated from inheriting of the person whom he has murdered, whatever be their relative connexion.

† That is, in the cause of the rightful Imam, as being a rebel.

‡ Literally, before he has acquired a power of open resistance, for upon this power of open resistance being (by whatever means) acquired, a person is no longer considered as being subject to the law.
self to a foreign power. The arguments of our doctors upon this point are twofold:—FIRST, what they maintain is the united opinion of all the companions, as recorded by Zábrez:—SECONDLY, the rebel in question has committed the destruction under an invalid pretext; and an invalid pretext stands the same as a valid pretext, in respect to the obligation of responsibility, where, together with the invalid pretext, there is also a power of open resistance;—in the same manner as where an alien kills a Mussulman in a foreign country, in which case the alien, if he afterwards become a Mussulman, is not responsible for the murder; because (at the time of the murder) he possessed a power of open resistance*; and also a pretext.—The principle upon which this proceeds is that in order to the law taking effect upon a person against whom any thing lies, it is requisite that he either acknowledge the law, or that there exist a power of enforcing the law upon him at the time of the fact:—now a rebel does not acknowledge the illegality of slaying one who is not a rebel, since in his belief (in conformity with his invalid pretext,) the slaying of such a person is allowable;—neither is there a power of enforcing the law upon a rebel, since the Imam's authority is terminated with respect to a rebel, in consequence of the rebel being possessed of a power of open resistance.—The case is otherwise previous to the establishment of the power of open resistance, as the Imam's authority is then not extinguished.—It is also otherwise where he slays without a pretext, as in this case an obligation of responsibility rests upon him according to his own belief.—It is contrary, also, to criminality, as a rebel is an offender in slaying a person who is not a rebel, although he be possessed of a power of open resistance; for the possession of this power does not prevent a circumstance being sinful, since the sinfulness of an act is on account of the right of the law, and his possession of the power of open resistance is not established with respect to the law.—This point, therefore, being established, it is to be observed

* That is, was altogether independent of the Mussulman government.
that the slaying of a rebel by one who is not a rebel is not an unrightful act, (the rebel being slain by him in the right,) and therefore neither prevents inheritance nor occasions responsibility.—The argument of Aboo Yoosaf, (in the case of a rebel killing a loyalist) is that an invalid pretext has no regard paid to it further than merely to prevent responsibility; responsibility therefore is not incumbent: but yet the slayer does not inherit, because his being the heir depends upon the previous establishment of his right of inheritance; and an invalid pretext is of no consideration to establish a right of inheritance; wherefore he does not inherit of the slain. The argument of Haneefa and Mohammed upon the point in question is that the sole reason why one relation inherits of another relation is because relationship occasions the establishment of a right of inheritance;—and relationship exists in the case here supposed: now inheritance is rendered illegal only by the act of killing, which being supervenient, there is a necessity to abrogate the supervenient illegality; and an invalid pretext is sufficient for this purpose, in the same manner as it suffices to abrogate the obligation to responsibility: the invalid pretext, therefore, is regarded for the purpose of doing away the illegality:—one condition of it, however, is that the murderer continue steady in his invalid pretext, and in his belief;—for if he were to say, "I now am sensible that I slew him unrightfully,"—in this case he would be responsible for the act, as the pretext aforesaid, which had prevented responsibility, no longer exists.

The sale of armour or warlike stores to rebels, or in their camp, is abominable, because selling arms into the hands of a rebel is an assistance to defection. There is, however, nothing objectionable in the selling of arms in a city (such as Kofa, for instance,) either to an inhabitant, or to a person of whom it is not known whether he be a rebel, although he should actually belong to the rebels, because the bulk of people in cities are commonly of loyal principles.—It is to be observed, also, that it is not criminal to fell to rebels any thing except
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except what may be strictly termed arms, inasmuch that materials to construct arms, (such as iron, and so forth,) may be sold to them without offence;—in the same manner as it is illegal to sell musical instruments (such as lutes, for instance,) but it is not illegal to sell the wood of which they are made;—and analogous to this is also the sale of grapes, or wine,—that is to say, the selling of grapes to a person who will make wine of those grapes is not illegal, although the sale of wine be prohibited.
HE D A Y A.

BOOK X.

Of the Laws respecting Lakeets, or Foundlings.

LAKEET, in its primitive sense, signifies any thing lifted from the ground:—the term is chiefly used to denote an infant abandoned by some person in the highway:—in the language of the law it signifies a child abandoned by those to whom it properly belongs, from a fear of poverty, or in order to avoid detection in whoredom.—The child is termed Lakeet, for this reason, that it is eventually lifted from the ground, wherefore this term is figuratively applied, even to the property which may happen to be found upon it. The person who takes up the foundling is termed the Mooltakit, or taker-up.

The taking up of a foundling is laudable and generous, as it may tend to preserve his life. This is where the finder sees no immediate reason to suppose that if the child be not taken up it may perish;—

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A foundling is free; because freedom is a quality originally inherent in man; and the Mussulman territory, in which the infant is found, is a territory of freemen, whence it is also free: moreover, freemen, in a Mussulman territory, abound more than slaves, whence the foundling is free, as the smaller number is a dependant of the greater.

The maintenance of a foundling is to be defrayed from the public treasury; because it is so recorded from Omar;—and also, because, where the foundling dies without heirs, his estate goes to the public treasury; and as that is the property of the Mussulman community, his maintenance must be furnished from this property, since as the advantage results to the community, the loss also falls upon the community;—whence it is that the Deyit or fine of blood is due from the public treasury, where a foundling commits manslaughter.

The Mooltakits is not to exact any return from the foundling on account of his maintenance, since in maintaining him he acts gratuitously, as he has no authority over him:—he therefore cannot exact any return from the foundling,—except where he has furnished him maintenance by order of the magistrate, in which case this maintenance is a debt upon the foundling, because, the magistrate’s authority being absolute, he is empowered to exact the return from the foundling.

If any person take up a foundling, no other person is at liberty to take the foundling from him, because the right of charge of the foundling is established in him, as he first laid hands upon it.—If, however, any person claim the foundling, saying “This is my child,” the claimants declaration is credited on a principle of benevolence. This is where the Mooltakits does not advance any claim of parentage: but if the Mooltakits also make a claim, saying “This is my child,” he
he has the preference, because both parties are upon an equal footing with respect to their claim; but one of them, namely, the Mooltakit, is in immediate possession, and is therefore preferred to the other. Analogy would require that the declaration of the claimant be not credited, because in consequence of it the right of the Mooltakit is destroyed: but the reason for a more favourable construction of the law in this particular is that the claim of the plaintiff is a declaration upon a point which is advantageous to the infant, as he thereby obtains the honour of an avowed parentage, and the disgrace of a want of parentage is by the claim removed from him. Some have asserted that the declaration in question is valid only with respect to the establishment of parentage, but not with respect to the destruction of the Mooltakit’s right of possession;—and some, again, say that upon the parentage being established, the Mooltakit’s right of possession is destroyed, because one consequence of an establishment of parentage is that the father has a preference, in the charge of his child, over all others.

If a Mooltakit declare his foundling to be his own child, after having already declared it to be a foundling, some say that his declaration is valid, both from analogy, and also on a principle of benevolence, because his claim respects a thing already in his hands, and is uncontroverted,—nor is any other person’s right thereby destroyed. The better opinion, however, is that his claim is valid only on a principle of benevolence, and not from analogy, because the Mooltakit contradicts himself, as he at first declared the child to be a foundling, and afterwards avers it to be his own child;—and the reason for a more favourable construction is that the contradiction respects a thing of a concealed nature, since it is possible that this child may have been born of his wife, without his knowledge, and that he afterwards comes to a knowledge of the circumstance.

If two persons advance a claim together, each assenting—“the foundling in the hands of such a person is my child,” and one of them...
them point out a particular mark upon the foundling's body, and not the other, the foundling is adjudged to him, because apparent circumstances bear testimony in his favour, as the mark corresponds with his declaration. But if neither of them point out any particular mark, the foundling is adjudged in both of them, because they are both upon a footing with respect to the ground of their claim. If one of them, however, lay his claim first [that is, before the other,] the foundling is adjudged to him, because his right is established at a time when no person controverted it;—except where the other brings evidence, as evidence is more powerful than a simple claim.

If a foundling be taken up in a Mussulman city or village, and a Zimme claim it as his child, the parentage is established in the Zimme, but the child is a Mussulman. This proceeds upon a favourable construction; because the claim of the Zimme involves two points, I. a declaration of parentage, which is advantageous to the child,—II. a destruction of the Islamifin established from the circumstance of the child being found in a Mussulman territory, which is injurious to the child; and his claim is admitted so far as it is advantageous to the child, but not so far as to be injurious to him. If, however, the child be found in a city or village of the Zimmes, or in a church or synagogue, it is a Zimme. This last opinion is universal, (that is to say, is unanimously admitted) where the foundling is taken up, in those places, by a Zimme,—but if a foundling be taken up in any of those places by a Mussulman, or if a Zimme take up a foundling in any Mussulman place, there is a difference of opinion; for it is said in the Mabfoot, treating of foundlings, that in this case the place is regarded, and not the Mooltakit or taker-up of the foundling;—that is, if it be found in a Mussulman place, the foundling is a Mussulman, and if not, it is a Zimme, whether it be taken up by a Mussulman or an infidel: and the reason is this, that the foundling has been first discovered in that place. In some copies of the book of claims from the Mabfoot it is said that in this case regard is had to the Mooltakit;
Moolakita;—that is, if a Mussulman have taken up the foundling, it is a Mussulman, and if a Zimmee have taken it up it is a Zimmee:—
(and the same is mentioned by Ibn Simiaia from Mohamned;) and the reason is this, that possession is more powerful than place; because, if parents were brought as captives, with their infant child from a foreign country into the Mussulman territory, the infant is an infidel in conformity with the state of the parents, from which it is evident that possession is more powerful than place. In other copies of the book of claims it is said that, out of tenderness to the child, regard must be invariably had to Islam;—in other words, if the child be found in a place belonging to Zimmes, and be there taken up by a Mussulman, it is a Mussulman; and if it be taken up by a Zimmee in a Mussulman place, it is in this case also a Mussulman.

If any person lay claim to a foundling, as being his slave, his claim is not admitted, because as it is apparent that the foundling is free, it cannot be supposed a slave unless the claimant produce evidence to prove that it belongs to him as such. Observe, also, that if a slave were to claim a foundling, saying “this is my child,” the parentage is established in him, because this is advantageous: the foundling, however, is free, because the child of a man who is a slave is free when born of a free woman, and it is a slave when born of a woman who is a slave; concerning the child being a slave, therefore, there is a doubt; and hence its freedom, which is shewn by apparent circumstances, cannot be destroyed, because of the doubt. A freeman, in claiming a foundling, has preference to a slave, and a Mussulman has preference to a Zimmee, because the claim of a freeman or of a Mussulman is most advantageous to the infant.

If there be any property upon a foundling (such as bracelets and so forth,) such property belongs to the foundling, because apparent circumstances argue this: and in the same manner, and for the same reason, if there be any property fastened on the animal upon which a foundling
foundling is exposed, such property also belongs to the foundling. The Mooltakit moreover must expend this property in supplying the wants of his foundling, upon an order from the Kásee, because no person is known as proprietor of it, and the Kásee has authority to expend property of this nature upon such an object. Some say that the Mooltakit is at liberty to expend the property in supplying the wants of his foundling, without any order from the Kásee, because it appears that the property in question belongs to the foundling; and a Mooltakit is authorised to provide subsistence for his foundling, and to purchase such articles as are requisite and necessary for him, such as victuals and clothing.

A Mooltakit cannot contract his foundling in marriage; nor perform any acts in respect to his property (without authority): but he may take possession of gifts.

It is not lawful for a Mooltakit to contract his foundling in marriage, because he has no authority for so doing, since the reason for such authority, (namely, relationship, proprietorship, or sovereignty,) do not exist in him. In the same manner, it is not lawful for a Mooltakit to perform any acts respecting the property of his foundling; analogous to the restriction upon a mother;—that is, a mother has a right to the charge of her infant child, but yet it is not at liberty to perform any acts respecting his property; and a Mooltakit stands in the same predicament. The principle upon which this proceeds is that authority to act with respect to the property of an infant is established with a view to the increase of that property; and this is assured only by two circumstances, perfect discretion, and complete affection: now in each of the persons in question only one of these qualities exists; for a mother, although she entertain a complete affection for her child, is deficient in point of discretion; and a Mooltakit, although he be possessed of perfect discretion, is deficient in affection.

It is lawful for a Mooltakit to take possession of anything presented to his foundling as a gift, because this is of singular advantage to the foundling: and for this reason it is that an infant is at liberty to take possession of a gift, where he has attained discretion; and in the
same manner the mother of an infant, or her executor, are at liberty to
take possession of any gift presented to the infant.

A MOOLTAKIT is at liberty to send his foundling to school for
the purpose of education, because this comes under the head of tuition
and instruction, and attention to his welfare.

A MOOLTAKIT is at liberty to hire out his foundling.—Our author
remarks that this is recorded by Kadooree in his compendium. In
the Jama Sagbeer it is said that it is not lawful for a MOOLTAKIT to hire
out his foundling;—and this is approved. The ground upon which
the report of Kadooree proceeds is that letting out to hire is one mode
of instruction. The reason for the opposite doctrine, as stated in the
Jama Sagbeer, is that a MOOLTAKIT is not at liberty to turn the faculties
of his foundling to his own advantage; he is therefore in the same
situation as an uncle: contrary to the case of a mother, since she is at
liberty to turn the faculties of her child to her own advantage, as
shall be hereafter demonstrated in treating of Abominations.
H E D Å T A.

BOOK XI.

Of Looke, or Trues.

Lookto signifies property which a person finds lying upon the ground, and takes away for the purpose of preserving it, in the manner of a strait. It is proper to observe that the terms Laken and Looke have an affinity with respect to their sense, the difference between them being merely this, that Laken is used with regard to the human species, and Looke with regard to any thing else.

A Looke, or True property, is considered as a trust in the hands of the Mealtakin or finder, where he has called persons to witness that "he takes such property in order to preserve it, and that "he will restore it to the proprietor,"—because this mode of taking it is authorised by the Law, and is even the most eligible conduct*,

* That is to say, the taking up of the property is permitted by the Law, and is even more eligible than suffering it to remain where it is found.

according
according to many of our doctors. This is where there is no apprehension of the property being damaged or destroyed*—but where that is to be apprehended, the taking of it up is incumbent, according to what the learned in the law have remarked upon this point. Now such being the case, the property is not a subject of responsibility; that is, indemnification for the trove property is not incumbent upon the finder, where it happens to perish in his hands: and in the same manner, the finder is not responsible in a case where himself and the proprietor both agree that he had taken the property avowedly “for the owner;” because their agreement in this point is a proof with respect to both; and hence the declaration of the proprietor that “he [the finder] had taken them for the owner” amounts to the same as if the finder were to produce evidence that he had taken them for the owner.—If, however, the finder declare “I took them for myself,” responsibility is incumbent upon him according to all authorities, because he here appears to have taken the property of another without that other’s consent, and without the permission of the law.

If the finder should not have called any person to witness, at the time of his taking the property, that “he took it for the owner,” and he and the owner afterwards differ upon this point, the finder saying “I took it for the owner;”—and the owner denying this,—indemnification is due, according to Haneefa and Mobammed. Aboo Yooofy says that indemnification is not due, and that the finder’s declaration is to be credited, as appearances testify in his behalf, because it is probable that his intention was virtuous, and not criminal. The argument of Haneefa and Mobammed is that the finder has already acknowledged the fact which occasions responsibility, (namely, his taking the property of another,) and afterwards pleads a circumstance in consequence of which he is discharged from responsibility, by de-

* Meaning—“in case of its not being taken up.”
pling that he had taken the property for the owner; but as this is a doubtful plea, he is not discharged from responsibility: and with respect to what is urged by Aboo Yosaf, that "appearances testify in the finder's behalf," they reply that in the same manner as appearances argue that the finder took the property for the owner, so do they likewise argue that he has taken them for himself, as it is probable that a person who performs acts with respect to property does so for himself, and not for another; and hence, as appearances on both sides lead to opposite conclusions, they are on both sides dropt.

In calling people to witness it suffices that the finder say to the bystanders "If ye hear of any one seeking for this trove-property, direct him to me;"—and this, whether the trove property consist of a single article, or of numerous articles, because, as the term Looka is a generic noun, it applies either to a single article, or to several different articles.

If the trove property be of less value than ten dirms, it behoves the finder to advertise it for some days,—(that is, for so long as he deems expedient,)—but if it exceed ten dirms in value, he must advertise it for the space of a year. The compiler of the Hadda Ya remarks that this is one opinion from Haneefa. Mohammed, in the Mabfoo, maintains that the finder should advertise it for the space of a year, whether the value be great or small, (and such is also the opinion of Shafeei,) as the prophet has said "the person who takes up a trove property must advertise it for a year,"—without making any distinction between a small property and a great property. The reason for the former opinion is that the fixing it at the space of a year occurred respecting a trove property of the value of one hundred deenars, which are equal to a thousand dirms; now ten dirms, or any thing above that sum, are the same as a thousand dirms with respect to the amputation of a thief's hand, or the legalizing of generation.

Ten dirms is the smallest dower admitted in marriage.

whence
whence it is enjoined to advertise a trove property for a year, out of caution; but any thing short of ten dirms does not resemble a thousand dirms with respect to any of those particulars, whence this point is left to the discretion of the finder of a property of that value. Some allege that the approved opinion is that there is no particular space of time, this being left entirely to the discretion of the finder, who must advertise the trove property until he see reason to conclude that it will never be called for by the owner, and must then bestow it in alms. All that is here advanced proceeds upon a supposition that the trove property is of a lasting and unperishable nature: but if it be of a perishable nature, and unfit to keep, it must be advertised until it is in danger of perishing, and must then be bestowed in alms. It is proper to remark that the finder must make advertisement of the trove property in the place where he found it, and also in other places of public resort, as by advertising it in such places it is most probable that the owner may recover it.

If the trove property be of such a nature as that it is known that the owner will not call for it, (such as date-stones, or pomegranate skins) it is the same as if the owner had thrown it away, insomuch that it is lawful to use it without advertisement: but yet it still continues the property of the owner*, as transfer to a person unknown is not valid.

If the finder duly advertise the trove property, and discover the proprietor, it is well:—but if he cannot discover him, he has two things at his option:—if he choose, he may bestow it in alms, because it is incumbent to restore the property to the owner as far as may be possible, and this is to be effected either by giving the actual property

* That is to say, although it be lawful for the finder to use it, yet the owner has a claim upon him for the value.

A trove of an insignificant nature may be converted by the finder to his own use.

If the owner do not in due time appear, the finder may either bestow the property in alms, or keep it for the owner.
to the owner, where he is discovered, or by bestowing it in alms, so as that a return for it, (namely, the meris) may reach the owner, as he will assent, upon hearing of its having been so bestowed: or if the finder chuse, he may continue to keep the property, in hope of discovering the owner and restoring it to him.

If the finder of a trove property discover the owner, after having bestowed it in alms, the owner has two things at his option:—if he chuse, he may approve of and confirm the charity, in which case he has the meris of it; because, although the finder has bestowed it in alms by permission of the law, yet as the owner has not consented to his so doing, the alms-gift remains suspended upon his consent to it: as the praper, however, becomes endowed with the property in question previous to his consent, it does not remain suspended upon the continuance of the subject*: (contrary to a case of sale by an unauthorised person; in other words, if an unauthorised person execute a sale, the validity of it depends upon the continuance of the subject†, that is, of the article sold, because the purchaser does not become endowed with it until after consent:) or, if the owner chuse, he may take an indemnification from the finder, because he has bestowed a property upon the poor without consent of the proprietor.

Objection. It would appear that indemnification is not incumbent upon the finder, as he has bestowed the property in alms, with the consent of the law.

Reply.—His bestowing it in alms, with the consent of the law, does not oppose the obligation of responsibility, in behalf of the right of the owner; in the same manner as where a person eats the property of another when perishing with famine; for in this case he owes in-

* "Upon the continuance of the subject." That is, upon the continuance of the property in the hands of either the donor or the proprietor.

† That is, upon the continuance of the property, which is the subject of the alms, in the hands of the owner.
demnification, although he be permitted by the law to eat another's property in such a situation; and so also in the case in question.

—Or, if the owner chuse, he may take indemnification from the pauper, where the trove property has perished in his hands,—because he has taken possession of the property of another person without his consent;—or, if the property be remaining in the hands of the pauper, the owner may take it from him, as he thus recovers his actual property.

Objection.—It has been already stated that the pauper becomes endowed with the property previous to the owner's consent; whence it would appear that the owner has no right to restitution.

Reply.—Establishment of property does not oppose a right to restitution; in the same manner as a donor is at liberty to resume his gift, although the donees have become proprietor upon taking possession of it.

It is laudable to secure and take care of strayed cattle; such as oxen, goats, or camels. Malik and Shafi'i maintain that where a person finds strayed camels or oxen in the desert*, it is most eligible to leave them, the seizing of them being abominable:—and concerning the securing of strayed berfs there is the same difference of opinion. The argument of Malik and Shafi'i is that illegality is originally connected with taking the property of another, which is not allowable except where there is apprehension of its perishing if it be not taken: but where a trove property is of such a nature as to be capable of repelling beasts of prey, (such as oxen, who may repel them with their horns; or camels and berfs, who may repel them with their hoofs or their teeth,) there is little apprehension of its perishing: it is still however to be suspected that it will perish, and hence it is declared abo-

* Arab. silica. This is the term applied in general to the extensive and barren deserts of Arabia; it also means any waste or unoccupied land.
minable to secure it, and most laudable to leave it*. The argument of our doctors is that the animals in question are *trove property*, and there is reason to apprehend their perishing, whence it is laudable to secure and advertise them, in order that the property may be preserved, in the same manner as the securing of strayed goats is laudable according to all. If, moreover, the finder give subsistence to troves of this description without authority from the magistrate, it is a gratuitous act, because of his not possessing any authority: but if he give subsistence by order of the magistrate, it is a debt upon the owner, because the magistrate is endowed with authority over the property of an absentee, for the purpose of enabling him to act with kindness† to the absentee; and the giving of subsistence is a kindness on some occasions, as shall be demonstrated elsewhere. If the question respecting the subsistence of the troves be brought before the magistrate, he must inquire into the particulars; and if the troves be capable of hire, (such as horses, camels, or oxen) he must order them to be hired out, and subsisted from their hire, because in this case the animals continue the property of the owner without subjugating him to any debt: (and a similar judgment must be passed with respect to fugitive slaves) — but if the troves be unfit for hire, (such as goats or sheep,) and it be apprehended that, if the finder were to subsist them, the subsistence would equal their value, the magistrate must direct them to be sold, and the price to be kept, in such a manner that the troves may be virtually preserved, in their value, because the preservation of them in subsistence is impracticable. — If, however, the magistrate deem it fit to give subsistence, he must adjudge subsistence to be given, making the same a debt upon the owner of the animals, — because the magistrate is appointed for the purpose of exercising huma-

* This is strange reasoning: it may perhaps have some reference to predynasism; i.e. as those animals seem destined to perish, it is impious to attempt to prevent this destiny.

† By the term kindness is here and elsewhere meant a due attention to the interest of the party concerned.
nity and kindness; and the giving of subsistence is a kindness both to the owner and to the finder;—to the owner, because his property is thus preserved to him in substance; and to the finder, because the subsistence he furnishes is thus made a debt upon the owner. The learned in the law, however, have said that the magistrate is to issue the order for subsistence only for the term of two or three days, in hopes that the owner may appear; and that if the owner do not appear, he must then order the troves to be sold, because to afford subsistence to them for a continuance would be to eradicate the property, whence there would be no kindness in affording them subsistence for a long term (that is, for a term beyond three days.)—It is observed, in the Mabfoot, that the production of evidence is requisite,—that is, the magistrate is not to give an order for subsisting the animal, except where the finder produces evidence to prove that "such an animal is a trove;" and this is approved, because it is possible that he may have obtained possession of the animal by usurpation, and in a case of usurpation the magistrate does not give an order for subsistence, but directs the thing usurped to be restored to the owner, except in a case of deposit, which cannot be proved without evidence; the production of evidence, therefore, is essentially requisite, in order that the actual state of the case may be ascertained.

Objection.—Evidence is not admissible without an adversary; and in the case in question there is no adversary;—how, therefore, can evidence be admitted?

Reply.—The evidence, in the present case, is not required for the purpose of a judicial decree, so as to make the existence of an adversary a necessary condition.

If the finder say "I have no evidence of the animal being with me as a trove," still as it is apparent that it is a trove, the magistrate must say "subsist this animal provided your declaration be true!" and then, if the finder's declaration be true, he will have a claim upon the owner for the subsistence, but not if he be an usurper. It is here necessary to remark that what is advanced above, that "the magistrate must adjudge subsistence to be given,"
The finder has no claim upon the owner for the subsistence, unless the magistrate expressly declare in his order, that the owner is responsible for the same.

"given, making the same a debt upon the owner of the animals," plainly implies that the finder will have no claim upon the owner for such subsistence, upon his appearing at a time when the trove has not yet been sold, unless the magistrate, in his decree, direct that "shall have such a claim upon him;"—but if the magistrate should not thus have rendered the subsistence a debt upon the owner, the finder would have no claim upon him for it:—this is approved doctrine. Some say that the finder has a claim upon the owner for the subsistence, where he furnishes it by order of the magistrate, whether the magistrate may have explicitly declared the same to be a debt upon the owner or not.

Upon the owner appearing, the finder is at liberty to detain the trove, until he pay him for the subsistence; because the finder has preserved the trove, and kept it alive, by subsisting it. The case is therefore the same as if the owner had obtained his right of property through the finder; and consequently the trove resembles an article of sale; that is, in the same manner as the seller is entitled to detain the article sold until the purchaser produce the price, so also, the finder is entitled to detain the trove until the owner produce an equivalent for the subsistence. The finder, moreover, resembles a person who apprehends and brings back a fugitive slave, that is, in the same manner as that person is entitled to detain the slave on account of a recompense (since it may be said that he has preserved him) so also, the finder is at liberty to detain the trove on account of the subsistence to be afforded to it, since he has thus preserved it alive. It is to be observed that the debt for subsistence is not extinguished by the circumstance of the trove perishing in the hands of the finder, before his detention of it: but it is extinguished by the trove perishing in his hands after detention, because by detention it is placed in the same state as a pledge, and as debt is extinguished by the destruction of the pledge, so in the same manner the debt for subsistence is extinguished by the trove perishing after detention.
TROVES of lawful articles and of unlawful are the same, in this respect, that the finder is to advertise them for a year. Shafei contends that an unlawful article is to be advertised until the owner appear, because the prophet has declared "A trove of a forbidden thing is not lawful to any but the Moonshid," (that is, the claimant or the owner;)—and it thus appearing that the trove is unlawful to any except the owner, it is indispensable that the finder advertise it until the owner appear, and he restore it to him; for it must not be bestowed in alms. The arguments of our doctors upon this point are twofold:—First, the prophet has said, "Advertise the trove by its marks," and then continue to advertise it for a year," in which no distinction is made between a lawful article and an unlawful:—Secondly, the unlawful article in question is a trove; and if, after the expiration of the term of advertisement, it be bestowed in alms, the owner's right of property in it still continues in force;—and such being the case, the finder may bestow it in alms, after the expiration of the term aforesaid, in the same manner as any other troves.—With respect to the saying quoted by Shafei, the explanation of it is, that a trove of a forbidden thing is lawful only to the Moonshid, (that is, to the advertizer, or person who makes notification of it,) and that it is not lawful for any person to take it for his own use. A trove of a forbidden thing is particularly adverted to in this saying, because such a trove must be advertised, although it appear to be the property of strangers, (who are continually passing through the country,) and if it were not for such an injunction, people might apprehend that, as

* Literally, "advertise the bag or purse containing the trove,—and its tying,—and then advertise the trove for a year."

† As he still has a claim of restitution. (See p. 269.)

‡ The difference here turns solely upon the sense in which the term Moonshid is to be taken. Moonshid literally signifies a person who points to the place where any thing is left,—a description which applies equally to the finder or the advertizer. Shafei takes it in the former sense, and Haneefa in the latter.
being the property of strangers who will probably never return to demand it, the advertising is useless.

If a person appear, and lay claim to a trove, it is not to be given to him until he produce evidence. If, however, the claimant describe the tokens of the trove, by mentioning the weight of the dirnas, (for instance,) or the purse in, which they are contained, and its tying, it may be lawfully given to him:—but the magistrate is not to use any compulsion upon this point. Malik and Shafei allege that the magistrate may compel the finder to give up the trove; because he merely disputes with the claimant the possession of the trove, and not the right of property in it; and such being the case, a description of the tokens is made a condition, as the parties dispute concerning the possession, but the production of evidence is not made a condition, as they do not dispute concerning the right of property. The argument of our doctors is that possession or seisin is a right which may be desirable, in the same manner as actual property in a thing, wherefore no person is entitled to claim the possession of it but through proof, that is, through evidence, in the same manner as no one is entitled to claim the property in it, but through evidence:—but yet it is lawful for the finder to surrender the trove to the claimant, upon his describing the tokens, because the prophet has said "If the owner appear, and describe the thing which contains the trove, and the quantity of the contents, let the finder surrender it to him;"—that is, it is allowable to surrender it to him; for the ordinance here is merely of a permissive nature, since it appears, in the Hadees Mashboor, that the claimant must produce evidence, and the defendant must swear,—which evinces that the command contained in this saying is of a permissive and not of an injunctive nature, otherwise it would not be incumbent upon the claimant to produce evidence.

When the claimant describes the tokens of the trove, without producing evidence, and the finder surrenders it to him, it is incumbent
Book XI. T R O V E S. bent on the finder to take security from him out of caution*; and concerning this point there is no difference of opinion (according to the Rawayet Sabeeb) because here the finder requires the security for himself†. This is contrary to the case of security required in behalf of an absentee heir;—that is, where the Kâzee distributes the effects of a person deceased among such of his heirs as are present,—in this case there is a difference of opinion concerning his requiring security of the present heirs, in behalf of an absentee heir, provided such should hereafter appear,—for, according to Haneefa, security is not required in behalf of the absentee heir,—but according to the two disciples security is so required.

If any person claim a trove, and the finder verify his claim, yet some say that the Kâzee must not compel him to surrender the trove;—similar to the case of an agent empowered to take possession of a deposit; in other words, if any person plead that "he is an agent "empowered to take possession of a deposit from such a person," and the trustee verify his declaration, yet he is not compelled to surrender the deposit to the agent; and so here likewise. Some, on the contrary, say that compulsion may be used, because in the case in question, the owner is a person unknown, whereas, in the case of a deposit, the owner of the deposit is a person who is known, whence the possessor cannot be compelled to surrender it to the agent, he not being the owner.

The finder must not bestow the trove in alms upon a rich person, because the prophet has said, "If no owner of a trove property appear, A trove cannot be bestowed in alms.

* Left another person should afterwards appear, and prove the trove to belong to him, by evidence.

† He takes the security in his own behalf, and not in behalf of any future possible claimant, who, if he should appear, has recourse to him for restitution.
"BESTOW IT IN ALMS;"—and it is not lawful to bestow alms upon an opulent person; a trove, therefore, resembles Zakât.

If the finder be in opulent circumstances, it is not lawful for him to derive any advantage from the trove. Shafii affirms that this is lawful, because the prophet said to Yewâbi, who had found an hundred dinars, "If the owner come, surrender the trove to him; but if not, make use of it;"—and yet Yewâbi was in opulent circumstances. Moreover, the use of the trove is allowed to the finder, where he happens to be in indigent circumstances, only in order that this permission may be a motive to him to take up the trove, in such a manner that it may be preserved; in other words, the finder, in hope of this advantage, will take up the trove from the ground, and it will thus be preserved from perishing. Now, the poor and the rich are both alike in this particular; and consequently, the finder who is rich may lawfully convert it to his own use, as one who is poor. The argument of our doctors is that a trove is the property of another, and hence it is not allowable to derive an advantage from it without his permission, because the passages in the sacred writings which prohibit the enjoyment of another's property are generally expressed.—The use, moreover, is permitted to the poor, (contrary to what analogy would suggest,) in consequence of the saying of the prophet already mentioned, and of the opinion of all the doctors; and therefore, any others than those remain under the original predication, which is an inhibition of the less. —With respect to what Shafii urges, (that "the use of the trove is allowed to the finder where he happens to be in indigent circumstances, only in order that this permission may be a motive to him to take up the trove, so that it may be preserved, in which particular the rich and the poor are both alike,")—we reply that this reasoning is not admitted; because a rich person may sometimes take up a trove from the ground under the idea that he may himself possibly become a pauper within the term prescribed for advertising; and a poor person, on the other hand, may sometimes
sometimes neglect to take up a trove, under the idea that he may, possibly, become rich within that term; what Sbeṣṣi urges, therefore, under this idea, is no ground of argument. With respect to the instance adduced of Yeṣaḇee, it is to be considered that he converted the trove to his own use by permission of the Inām; and the use of a trove, by permission of the Inām, is lawful.

If the finder of a trove be poor, he need not hesitate to make use of the trove*, since in such a disposal of it a kindness is performed both to the owner and to the finder†.—Upon the same principle, also, it is lawful to bestow it upon any other poor person: thus if the finder be rich, and his parents, children, or wives poor, he may bestow the trove in alms upon them, for the reason above alleged.

* After having duly advertised it, as before directed.

† Because the finder thus obtains a relief from his wants, and the owner has the merit of the charity.
BOOK XII.

Of IBBÂK, or the Absconding of SLAVES.

An absconded male or female slave is termed Abîk, or fugitive; but an infant slave, who wanders away in consequence of want of understanding, is termed Zâl, or strayed, and not fugitive.

The apprehending of a fugitive slave is laudable with respect to those who are enabled to apprehend him, because this gives life to the owner’s right, since a fugitive slave is the same as one who is dead with respect to his owner. With respect to strayed slaves, some say that the taking of them is also laudable; but others, on the contrary, maintain that it is laudable to let them go, since it is most probable that such a one will not wander far, and consequently, that the owner will recover him. *

* Without being subjected to the expense of a Jâl, or reward, for the recovery of him.
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The person who seizes an absconded slave must bring him before the Sultan*, he not being of himself equal to the charge of him: contrary to the case of a trove, which any person is equal to the care of. And upon this person delivering the slave to the Sultan, he [the Sultan] must imprison him;—but if a person deliver a stray'd slave to the Sultan, he must not imprison him;—because no confidence can be placed in a fugitive slave, as it is to be apprehended that he may again abscond: contrary to one who is only stray'd.

If a person, having seized and brought a fugitive slave from the distance of three days journey, or upwards, deliver him to his master, it is incumbent upon the master to pay that person the Fadl, or reward, which is forty dirms. And if he have apprehended and brought him from a distance short of three days journey, he is entitled to a proportional recompence. This is upon a favourable construction. Analogy would require that nothing whatever be due to him, except where it has been stipulated before-hand; (and such is the opinion of Shafei;) because the person in question, in seizing and bringing back the slave, has acted gratuitously. Thus the case resembles that of a stray'd slave; in other words, as nothing is due to a person who restores a stray'd slave to his master, (because of this being a gratuitous act,) so in the same manner nothing is due for the fugitive slave where he is restored to his master, for the same reason. The reasons for a more favourable construction of the law upon this point are threefold:—first, the companions all agree that a reward is due; some of them, however, contend that this reward is forty dirms, whilst others say that it is less than forty; and hence it is that we say forty dirms are due in a case of distance of three days journey, and less than forty, where the distance is short of three days, in order that the different rates [established by the

* By this term it is always to be understood the sovereign, or chief magistrate.

companions]
ABSCONDING  Book XII.

companions] may be thus reconciled:—SECONDLY, if a reward be made incumbent, men's property will be secured, because people will seize fugitive slaves and restore them to the owners, in hopes of the reward;—for the performance of acts merely from a motive of conscience seldom occurs in the world, more especially in the present times:—(the rating the premium at forty dirms, or less, is grounded upon oral testimony*; but no report has reached us concerning strayed slaves, and hence, in their case, nothing is declared to be due:)—THIRDLY, in the instance of strayed slaves the necessity of conservation is less urgent than in the case of fugitive slaves, because a strayed slave does not conceal himself,—whereas a fugitive slave endeavours to keep concealed; a fugitive slave, therefore, is essentially different from a strayed slave; and hence a premium is established in the case of the former, and not in the case of the latter. As to what was before advanced, (that, "if a person apprehend and bring back a fugitive slave, from a distance short of three days journey, he is entitled to a proportional recompense,"—(it is to be observed that if the service be calculated at the rate of value of the established premium, there will be thirteen dirms and one third of a dirm due for each day invariably, which is what some have alleged. The best method, however, is to refer this point to the discretion of the magistrate, or to leave it to the parties themselves, (namely, the restorer of the slave and the owner,) in which case the restorer is entitled to whatever sum they may agree upon.

If the value of the fugitive slave be short of forty dirms, the owner must be directed to pay to the restorer thirty-nine dirms, provided he have seized and brought him back from a distance of three days journey.—Our author remarks that this is the opinion of Mohammed.—Abu Yusuf maintains that he is entitled to forty dirms, be-

* This phrase is applied (in law language) to anything which is not founded either upon the text of the Koran, or the ordinances of the prophet.
cause, as the rate is so established upon the authority of the sacred writings, it cannot be lessened; whence it is that if the restorer of the slave and the owner were to enter into a composition at a rate above forty dirms, it would be unlawful;—but if, on the contrary, they agree for fewer than forty, it is lawful, because as the restorer is at liberty to decline accepting of any part of the forty dirms, it follows that he may lawfully accept of less than that sum. The argument of Mohammed is that the design, in establishing a reward, is to excite and encourage men to restore fugitive slaves to their owners, in order that the proprietor may recover his property; and hence one dirm is deducted, in order that some part of the fugitive may remain for his master, and that the advantage of instituting a reward may be ascertained.

Am-Walids and Modabbiros are, with respect to the reward, considered in the same light as absolute slaves, provided they be restored before the demise of their owner, because slaves of the above descriptions are a property to their owner, and the restoration of them is a vivification of them with respect to him; the reward, therefore, is due—but where they are restored after the owner’s decease, no part of the reward is due, because slaves of both the above descriptions are free upon the demise of their master; contrary to the case of absolute slaves, since they do not become free upon their master’s death, for which reason the reward for restoring them is due, although they be restored after the master’s decease.

* This apparently contradicts what was before mentioned, that the rate of the premium at forty dirms, or less, is grounded upon oral testimony: the oral testimony however relates solely to the additional words, or less.

† The doctrine of Mohammed, as stated in the case in question, is according to the Persian version of the Hadéya. The translator, conceiving it his duty to adhere closely to his text, has not ventured to alter it. The passage, however, is much more clearly expressed in the Arabic copy, and in a way to which the reasoning of Mohammed is directly applicable (which is not the case here)—It simply says “If the value of the slave be short of forty dirms, let the restorer be decreed the value, except a dirm.”
There is no reward for restoring a slave to a father or son (living in the same family) or to a husband or wife.

The death of the slave in the hands of the person who takes him does not occasion responsibility: but the taker is not entitled to a reward.

If a fugitive slave abscond from the hands of the person who apprehended him, or die whilst in his possession, no indemnification whatever is due from him to the owner, because the slave is a trust in his hands. This, however, obtains only where the person who took him has called people to witness that "he seized such a slave, "with a view of restoring him to the owner,"—(in the manner already mentioned in treating of troves.)—In the case here supposed, no reward whatever is due to the person who apprehended the slave, because he stands in the predicament of a seller, and the master of the slave stands as a purcaher; (whence the former is at liberty to detain the slave on account of the reward, in the same manner as a seller is at liberty to detain the article sold, until he receive the price;) and such being the case, no part of the reward is due to the person who takes the slave, in the same manner as no part of the price is due to the seller, where the article sold perishes in his hands.

If the master of a fugitive slave emancipate him on the instant of his being brought to him, and before the person who took him has delivered him up, he is considered as being seized of the slave at the moment of emancipation, in the same manner as where the purchaser of a slave emancipates him before seizin, in which case he is considered as having taken possession of him on the moment of emancipation: and upon the same principle, if the master of the slave sell him to the person who apprehended him, he is considered as being seized of him on the instant of sale, on account of his thus securing to himself a recompence for the slave in the price of him.
It is incumbent upon the person apprehending a fugitive slave to call some persons to witness that "he takes this slave in order to restore him to his master." It is moreover to be observed that it is incumbent upon the taker (according to Hanesa and Mohammed,) thus to call witnesses at the time of his taking the slave; insomuch that if a person restore the slave to his master without having called people to witness at the time of seizing him, he is not entitled to any reward; because his neglecting to call witnesses argues that he has taken the slave for himself; and the case is consequently the same as if a man were to purchase the slave from the person apprehending him,—or to accept of him, from the same person, as a gift,—or, as if the slave had descended to him from the same person by inheritance,—and this man, so possessing him by purchase, gift, or inheritance, then restore the slave to his owner, in which case no reward is due to him, because he here restores the slave to the proper owner for his own advantage; in other words, in consequence of getting possession of the slave he becomes responsible for him, and by returning him to his owner he is discharged from the responsibility; his returning him, therefore, with a view to discharge himself from responsibility, is in fact returning him with a view to his own advantage: no reward, therefore, is due to him,—unless, at the time of purchase, he had called some persons to witness that "he purchased this slave with a view to restore him to his owner," in which case the reward is due to him; but the purchaser, in this instance, is considered as having acted gratuitously in paying a price for the slave.*

* And consequently, the purchaser has no claim upon the proprietor for the price he has paid.

The taker must declare, to witnesses, his design in seizing the slave, or he is not entitled to the reward.
he is pawned, since it is only through means of this property that he
can recover what is due to him: the reward, therefore, is due from
the person who has him in pawn,—and this whether the slave be re-
stored during the life of the pawnor, or after his decease, because a
contract of pawn is dissolved by the decease of the pawnor. This is
where the value of the slave does not exceed the debt of the pawnor:
but if the value exceed the debt, the reward is due from the person
who has him in pawn, to the amount of the debt, and the remainder
from the pawnor, because the right of the creditor who receives a
pawn extends only to what it involves. The reward, therefore, is sub-
ject to the same rule with the price of medicine, or quittance for an
offence;—that is to say, if a pawned slave fall sick, and medicine be
purchased for him, the price for the medicine is due from the person
having him in pawn to the amount of the debt involved in the slave,
and the remainder from the pawnor, where the value of the slave ex-
ceeds the debt;—and in the same manner, if a pawned slave commit
an offence, it is incumbent upon the creditor who has him in pawn
to pay the quittance of offence to the amount of the debt involved in
the slave, and thus release him, the pawnor paying the remainder;
and the same in the case here treated of.

If a fugitive slave be involved in debt, the reward for appre-
hending him is due from his owner, where he chuses to discharge the
debs: but if the owner do not chuse this, the slave is to be sold for
the discharge of the debts,—the reward to be previously paid out of
the price for which he is sold, and the remainder afterwards distrib-
uted among his creditors; because the reward is an expense attend-
dant upon the right of property; and the right of property in the slave
resembles a suspended property, as it is held in suspense between two
parties; (since, if the master chuse to defray the debts, the right of
property rests with him,—or, if he prefer selling the slave, it rests
with the creditors;) and the right of property thus remaining in sus-
pense, that which is an expense attendant upon the right of property
(namely
(namely the reward) also remains in suspense:—the reward, therefore, is incumbent upon him in whom the right of property rests.

If a male or female fugitive slave commit an offence, the reward for apprehending is incumbent upon the master, provided he agree to pay the Fiddeeyya Jawat, or quittance of offence, because the advantage of the slave results to his master; but if he prefer surrendering him to the party aggrieved, (or avenger of the offence,) the reward in this case is due from the party to whom the advantage of the slave accrues.

If a person make a gift of a slave to another, and the other take possession of him, and the slave abscond from the donee, and a third person seize and restore him to the donee, the reward is due from the donee although the donor resume his share from the donee after restoration; because it is not in consequence of the restoration to the donee that the advantage of the slave accrues to the donor, [after resumption,] but rather in consequence of the donee not having disposed of the slave in any way after restoration,—since, if the donee had so disposed of him, (by manumission, sale, or so forth,) the resumption could not have been effected.

If the master of a fugitive slave be an infant, the reward is due from his property, because the reward is an expense attendant upon the right of property. If, however, the restorer of the slave be the infant’s guardian, no reward whatever is due to him, because he is manager of the infant’s concerns, and consequently it is his duty to seek after and recover the slave. In the same manner, also, if an orphan be resident in any person’s family, and this person seize and restore a fugitive slave belonging to the orphan, no reward whatever is due to him, as it is his duty to seek for and restore the slave. In the same manner, moreover, no reward is due to the Sultan where he restores a fugitive slave to the owner.
HE DÁ A.

BOOK XIII.

OF MAFKOODS, or MISSING PERSONS.

MAFKOOD, in its literal sense, means lost and sought after. In the language of the law it signifies a person who disappears, and of whom it is not known whether he be living or dead, or where he resides.

MAFKOOD, in its literal sense, means lost and sought after. In the language of the law it signifies a person who disappears, and of whom it is not known whether he be living or dead, or where he resides.

When a person disappears, the Kácey must appoint some person to look after his property, and to manage his affairs, and maintain his rights; because the Kácey is appointed for the purpose of attending to the interests of all such as are unable to attend to their own concerns; and as a missing person is of this description, (whence he stands in the same predicament with an infant or an idiot)—it is for his interest to appoint a person to look after his property and manage his affairs.—By what is above stated, that "the person appointed by the Kácey shall
"shall maintain the rights of the missing person," is meant that this person shall take possession of all acquisitions arising to the missing person from his tenements, lands, or effects, and also of such debts as are acknowledged by his debtors;—and that he shall also prosecute for debts owing in consequence of contracts entered into by himself and which are disputed by the debtor, as the rights of the contract appertain to him, he being the contractor;—but he is not to prosecute on account of debts owing in consequence of any contract entered into by the missing person, and which are disputed by the debtors; nor can he prosecute for the missing person's share in lands or effects, in the hands of a third person, who disputes the same; because he is neither the principal, nor the deputy of the principal, being no more than merely an agent for seizin on the part of the Kazaee, who is not empowered to prosecute, according to the united opinion of our three doctors;—for their only difference of opinion is with respect to an agent for seizin appointed by the proprietor himself, in a case of debt, whom Hanefza holds to be empowered to prosecute, whereas the two disciples deny him this power.—The reason of this is that if it were lawful for the Kazaee's agent for seizin to prosecute, and he were to prosecute accordingly, and the debtor to produce evidence proving that the missing person had already received the debt, or discharged it, the Kazaee must necessarily pass a decree accordingly, and this would be a decree against an absentee, which is unlawful.—It is not lawful for him, therefore, to prosecute, except where the Kazaee is of opinion (with the sect of Shafii,) that it is lawful to pass a decree against an absentee, and he directs accordingly, in which case it is lawful, because a decree is of force where it is passed in any case concerning which there is a difference of opinion.

Objection.

* On behalf of the Missing or absent person.

† That is, where the Kazaee may happen to dissent in opinion from the Hanefi doctors. The Arabic copy simply says "in which case it is lawful, because the Kazaee is a person supposed to be possessed of judgment and learned in the law." What is here
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Objection.—The point upon which the difference of opinion rests, on the present occasion, is the decree itself; and hence the case requires that the validity of the decree be suspended upon the warranty of another Kâzec.

Reply. The decree itself is not what the difference of opinion rests upon in the present instance, but the cause of the decree, namely, the evidence, the point of difference being, merely, whether evidence, where there is no actual prosecutor, amounts to proof?—and where the Kâzec is of opinion that the evidence amounts to proof, and directs accordingly, his decree is legal and valid.

—It is to be observed that, if there be, among the effects of the missing person, articles of a perishable nature, (such as fruit, and so forth) the Kâzec must sell them; because, as the preservation of them both in substance and in effect is impracticable, they are to be preserved in effect. But he is not to sell any articles not liable to perish, either on account of subsistence, or for any other purpose; because the Kâzec is invested with authority, with respect to an absentee, for the conservation of his property, and hence it is incumbent upon him to preserve it in substance where that is practicable.

The Kâzec is to give subsistence to the wife and children of a missing person out of his property. This rule is not restricted to his immediate children, but extends to all related to him in the line of paternity, such as the father, the grandfather, the son's son, and so forth; for it is a rule that every person entitled to a subsistence from the property of the missing person whilst he was present, independent of an order from the Kâzec (such as his infant children, and adult daughters, or adult sons who are disabled) must in his absence be...
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furnished with a subsistence, out of his property, by the Kāsee:—but to those who, whilst the missing person was present, had no right to subsistence independent of an order from the Kāsee, (such as brothers, sisters, or maternal uncles or aunts,) no subsistence is, in his absence, to be furnished by the Kāsee, because these are entitled to a subsistence only through a decree, and a decree against an absentee is illegal. By the property of the missing person, as here mentioned, is meant money, because the right of the above persons is meat and clothing, and where those are not to be found among the missing person’s effects, there is a necessity for the Kāsee to decree the value; and the value consists of cafb. Bullion (that is, uncoined gold and silver) is in this respect subject to the same rule with cafb, since that also admits of being given as value, in the same manner as cafb. This is where the Kāsee has money in his hands. If, however, there be no money in his hands, but there happen to be some in trust, in the hands of another person,—or a debt owing from some other person, the Kāsee is in that case to provide the subsistence from such deposit or debt, where the trustee or debtor acknowledges the deposit or debt, and also the marriage or parentage. This acknowledgment, however, is necessary only where these points are not fully known to the Kāsee; for if they be fully known to him, the acknowledgment is not requisite.—If, on the other hand, some of these points be known, such as the debt and the deposit,) and others unknown (such as the marriage or the parentage)—or vice versa, in this case the acknowledgement is requisite with respect to that which is unknown: this is approved. If the trustee or debtor furnish the subsistence without an order from the Kāsee, the trustee is responsible for such disbursement, and the debtor is not discharged from his debt, because in so doing they have not paid any thing either to the owner or to his representative: contrary to where they furnish subsistence by order of the Kāsee, because he appears as representative of the owner.

If the trustee or debtor deny the deposit or debt, together with

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the marriage and parentage, or if they deny the marriage and parentage only, in this case the persons entitled to subsistence cannot be admitted, as plaintiffs, to prove and establish those points which the trustee or debtor denies; because a claim is not admitted, unless it be laid against either the principal, or his representative; and the principal, in the present instance, is absent; and the debtor or trustee are not either actually or virtually his representatives:—they evidently are not actually so, because he has not constituted any person his agent; nor are they virtually so, because, in the prosecution of the plaintiff’s claim against the absentee, the specification of the occasion* of the claim is no good plea for the establishment of his right,—(namely, subsistence from the property in the debtor’s or trustee’s hands,)—since, in the same manner as subsistence is due from that property, it is also due from any other property belonging to the missing person:—

the debtor or trustee are therefore not virtually the missing person’s representatives.

The *Kāsār cannot effect a separation between a missing person and his wife. *Mālik maintains that, at the expiration of four years, the Kāsār may pronounce a separation, after which the wife is to observe an *edīt of four months and ten days, such being the *edīt of widowhood,—and she may then marry whoever she pleases; because Oman thus decreed with respect to a person who disappeared from Medina; and also, because a missing person, by his absence, obstructs the woman’s right:—the Kāsār, therefore, must pronounce a separation between the parties after the lapse of a certain time, because of the analogy this case bears to that of Aīla, or of impotence;—that is to say, in the same manner as, in a case of Aīla, an irreversible

*Meaning, the circumstance of “the trustee or debtor having property belonging to the missing person in his hands,” which is not admitted as a plea on behalf of the plaintiff, since his subsistence is equally due from any other part of the missing person’s property.

divorce
divorce takes place at the end of four months, on account of the husband, by Aila, obstructing his wife’s right,—and in the same manner also as, in a case of impotence, the Kā'ce pronounces a separation at the end of a year, on account of the husband thus obstructing his wife’s right,—so likewise, in the case in question, the Kā'ce must pronounce a separation, for the same reason:—and the case of absence being equally analogous to a case of Aila and of impotence, the length of the term is adjusted with a regard to both, by adopting the number four from Aila, and the term year from impotence, so as to make practice in this particular accord in the same manner with the other two. The arguments of our doctors upon this point are twofold.—First, the Prophet once declared, with respect to the wife of a missing person, “She is his wife until such time as his death or divorce shall appear:” and Alee also said, with respect to the wife of a Masjood, “She is a mourner, wherefore she must be patient, until she be perfectly informed of his death, or of his having divorced her.”—Secondly, the existence of the marriage is notorious; and as the mere disappearance of the husband is not a sufficient cause of separation, and his death is a matter of uncertainty, it follows that the marriage cannot be dissolved, because of the doubt. With respect to the authority of Omar, as cited by Maliik, we reply that he afterwards adopted the opinion of Alee.—As to what he farther urges respecting the analogy between the case in question, and a case of Aila, it is not admitted; because Aila, in times of ignorance, was an immediate divorce, but the law afterwards constituted it a deliberate divorce, and hence it is that Aila occasions a separation.—In the same manner also, the analogy urged by him between the case in question and a case of impotence is not admitted;—because where a

* See vol. I. p. 306.  
† See vol. I. p. 354.  
‡ Arab. Talak Masjil, meaning a divorce which is to take place within a certain time.  
§ That is to say, it is for this reason, and not because of the husband obstructing his wife’s right, as supposed by Maliik.
husband disappears, it is possible that he may re-appear, whereas it is not possible that an impotent person should recover his virility, after his impotence has continued for above a year.

When one hundred and twenty years shall have elapsed, from the day of the missing person's birth, he is to be declared *defunct*. — The compiler of *Hedîya* remarks that *Hassan* has related this as an opinion of *Hanefîa*. According to the *Zâbir Rawîyet*, this point is to be determined by the decease of the *co-evals* of the missing person, or of his equals—that is, those who are known to resemble him in health and habits of body. It is recorded from *Aboo Yoosaf* that the term is one hundred years.—Some of the learned, again, fix it at *ninety years*. Analogy requires that the term should not be fixed at any particular period, such as *one hundred* years, or *ninety years*, since to fix a time merely from *judgment* or *opinion* is illegal: but yet it is requisite that it be fixed by some specific standard, such as the demise of the missing person's co-evals, because, if no criterion whatever were established, his decease could never be declared. The *benevolence* of the law, however, suggests that the term be fixed at *ninety years*, as this is the *shortest fixed term mentioned†*, and it is difficult to ascertain anything respecting the circumstances of the missing person's co-evals or equals.

Upon the death of the missing person being duly declared, his wife must observe her *edî* for four months and ten days from the date of the declaration, such being the *edî* of *widowhood*; and his property is to be divided among such of his heirs as are then living: the case, therefore, is the same as if he had actually died upon the

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* This is the rule in the *Sonna*. The compiler of the *Hedîya*, however, has fixed it at *ninety years*, as appears a little below.

† By any of the law doctors or commentators.
Book XIII. **MISSING PERSONS.**

instant of the declaration, and hence any person who died previous to
the declaration does not inherit of him.

If the relation of a missing person die during his disappearance,
the missing person is not an heir, because his existence at the time is
established merely from circumstances, as having been once known,
and consequently accounted to continue so long as nothing appears to
the contrary:—now mere circumstantial evidence is but weak, and
therefore incapable of constituting proof to a claim (that is, to the
establishment of a thing as yet un-established)—although it constitute
proof sufficient for repulsion, (that is to say, to prove the continuance
of a thing already established.) With respect to the expression “the
missing person is not an heir,”—it means that, whatever may be his
portion of inheritance, he does not obtain a property in it, but it is
held in suspense;—because his being in life is doubtful; and this is a
sufficient cause of suspense.—If, therefore, he afterwards appear to
be living, it goes to him;—but if there be no evidence of his being
in life when ninety years have elapsed, his portion, which has been
so suspended, is then to be distributed among those who were heirs to
the original proprietor at the period of his demise, as in the case of
embryos in the womb. In the same manner, also, if a person make a
bequest to a missing person, and the testator die, the bequest does not
take place, but is held in suspense, because †bequest stands upon a similar
footing with inheritance:

It is a rule that if there be another heir beside the missing person;
who is not entirely precluded by the missing person, but whose right is
diminished by his intervention, this heir is to receive that which is
the leaft of the two portions of inheritance, and the remainder is held
in suspense. If, on the other hand, there be another heir, who is
entirely precluded by the missing person, no part of the inheritance is
to be paid to him, but the whole portion of inheritance must be held
in suspense. An example, in illustration of this case, is as follows.

A person.
MISSING PERSONS.

A person dies, leaving two daughters, and a son who has disappeared; and also, a son's son, and a son's daughter; and his estate is in the hands of a stranger;—and the above heirs, and the stranger, all agree that the son of the deceased is a missing person; and the two daughters demand their inheritance; in which case they are paid their moiety out of the deceased's estate, as this is their undoubted share: but the other moiety, which is the portion of the missing person, is held in suspense, and no part of it paid to the son's children, because they are entirely precluded by the missing person, if he be living, and are therefore not entitled to receive the inheritance, because of the doubt:—and this remaining moiety is not to be taken out of the hands of the stranger, unless he be discovered, in some dishonest practices.—

Apposite to the example of the missing person is the case of a foetus in the womb, for whom a child's inheritance is reserved, according to an opinion upon which decrees are passed.—If, also, there be another heir beside the foetus, who is not in any circumstance precluded, nor his portion altered by the intervention of the foetus, his compleat portion is paid to him: but if this heir be such as is entirely precluded by the intervention of the foetus, nothing whatever is paid to him:—thus, if a man die, leaving a maternal sister, and a pregnant wife, nothing whatever is paid to the sister, as she is entirely precluded from inheritance by the intervention of a child, whether male or female. If, on the other hand, the heir be one whose share is altered by the intervention of the foetus, in this case the smaller of the two portions is paid to him, as this smaller share is his undoubted right,—in the same manner as in the case of a missing person.—For instance, a man dies, and leaves a pregnant wife, and a mother who acknowledges the pregnancy, in which case the wife is paid an eighth and the mother a sixth,—because, if the foetus be born alive, the wife would receive an eighth, and the mother a sixth; but if it be not born alive, the wife would receive a fourth, and the mother a third:—a sixth and an eighth are therefore paid immediately, as these are their portions at all events.
HEDATA

BOOK XIV.

Of SHIRKAT, or PARTNERSHIP.

SHIRKAT in its primitive sense, signifies the conjunction of two or more estates, in such a manner, that one of them is not distinguishable from the other. The term Shirkat, however, is extended to contracts, although there be no actual conjunction of estates, because a contract is the cause of such conjunction. In the language of the law it signifies the union of two or more persons in one concern.

Partnership is lawful, because in the time of the prophet men were accustomed to have transactions in partnership, and the prophet confirmed them therein.

Partnership is of two kinds, Shirkat Milk, or partnership by the right of property, and Shirkat Akid, or partnership by contract.
Shirkat Milk applies where two or more persons are proprietors of one thing;—and it is of two different natures, optional and compulsive:—optional, where two persons make a joint purchase of one specific article; or where it is presented to them as a gift, and they accept of it; or where it is left to them, jointly, by bequest, and they accept of it;—or where they both obtain possession, by conquest, of one specific article in an enemy’s country;—or where they unite their respective properties in such a way as that one is not distinguishable from the other, (such as the mixture of wheat with wheat,)—or where it may be difficult to distinguish them, (as in a mixture of wheat with barley:)—and compulsive, where the properties of two persons become united without their act, under such circumstances as render it difficult or impossible to distinguish between them; or, where two persons inherit one property. In this species of partnership, therefore, it is not lawful for one partner to perform any act with respect to the other’s share, without his permission, each being as a stranger with respect to the other’s share. It is, however, lawful for either partner to sell his own share to the other partner, in all the cases here stated:—and he may also sell his share to others, without his partner’s consent, excepting only in cases of association or admixture of property, for in both these instances one partner cannot lawfully sell the share of the other to a third person without his partner’s permission. The distinctions upon this point are related in the Kafiyat-al-Moontibee.

Shirkat Akid, or partnership by contract, is effected by proposal and consent,—that is, by one person saying to another, “I have made you my partner in such a property,” &c. and the other replying “I consent:” and it is a condition of the contract that the concern respecting which it is made be of such a nature as to admit of delegation, in order that the acquisition arising from it may be participated in by both parties, and that thus the effect or design may be
be established,—in other words, that the acquisition may become equally the property of both.

**Partnership by compact** is of four kinds, viz.

I. Shirkat-Mofawizat, or partnership by reciprocity.

II. Shirkat-Aimán, or partnership in traffic.

III. Shirkat-Sinnaia, or partnership in arts.

IV. Shirkat-Woojoob, or partnership upon personal credit.

**Shirkat-Mofawizat**, or partnership by reciprocity, is where two men, being the equals of each other, in point of property, privileges, and religious persuasion, enter into a contract of co-partnership;—because this species of partnership is an universal partnership in all transactions, where each partner reciprocally commits the business of the partnership to the other, without limitation or restriction; for the term Mofawizat, in its literal sense, means equality. It is therefore indispensible that a perfect equality exist throughout, in the property, that is, in the partnership capital, such as dirms and d恒ards. (No regard, however, is paid to an excess in any thing beyond the partnership capital, such as goods or effects, lands, or debts;) In the same manner, it is indispensible that an equality exist with respect to privileges; because, if either partner were endowed with privileges not vested in the other, there could be no perfect equality. In the same manner also, equality is indispensible in point of religion and of sect, as shall be hereafter demonstrated. Partnership by reciprocity is lawful, upon a favourable construction;—but, according to analogy, it is unlawful. This, also, is one opinion of Shafei.

* The commentators define it partnership in purchase and sale. The term does not admit of any literal translation.

† Arab. Tifferaz, that is, power of action.
PARTNERSHIP. Book XIV.

Malik says "I know not what Mosawwiat is!"—Analogy would suggest that a partnership of this description is unlawful,—because it includes a power of agency with respect to an unknown subject, and also an obligation of security with respect to a thing undefined; and as each of these, individually, is illegal, it follows that, when united, they are illegal a fortiori. The reason for a more favourable construction upon this point is that the prophet has said "Enter into partnerships by reciprocity, for in that there is great advantage." In this manner, also, men had transacted together, no person forbidding them. Analogy, therefore, is abandoned. Ignorance, moreover, in the contract in question, is lawful as a dependant of another circumstance,—that is, as a dependant of equality;—in the same manner as in a contract of Mozāribat, where the contract comprehends a commission of agency for the purchase and sale of articles unknown, which commission is in itself illegal, but is nevertheless legal in a contract of Mozāribat, as a dependant of the contract; and so also in the case in question.

The term reciprocity must also be expressed in the contract.

A contract of reciprocity is not complete unless reciprocity be expressly mentioned in it, by the parties declaring "we are partners in a partnership by reciprocity,"—because the conditions of it cannot otherwise be known. If, however, in entering into such a contract, they declare all the conditions of it, the contract is lawful, although the term reciprocity be not particularly expressed in it, because regard is had to the sense, and not to the letter.

It is lawful between free adults, whether Mussulmans, or both Zimmies, since, in either case, an equality exists between the parties. If one of them, also, be a scriptural Zimmie*, and the other a Pagan; the contract is lawful, because infidelity is one general description with respect to faith, and hence equality in point of religion exists in this instance.

* A Jewish or Christian subject of the Mussulman government.

A contract
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 those instances;—as an adult freeman is competent to transact business, and to give bail, whereas a slave is not competent in either of those points, but by consent of his master; and an infant is not at all competent to give bail, nor to transact business, but by permission of his guardian.

A contract of reciprocity is not lawful between a Mussulman and an infidel, according to Haneefa and Mohammed. Aboo Yoosaf alleges that it is lawful, because equality exists between those in point of agency and bail, since in the same manner as it is lawful for a Mussulman to be an agent or a surety, so it is also for an infidel: and with respect to those particular transactions which are lawful to one of thefe, and not to the other (such, for instance, as dealings in wine or pork,) they are not regarded, in the same manner as a similar-difference is not regarded where a Haneefite enters into a contract of reciprocity with a follower of Sbafis; for here the contract is lawful, notwithstanding the different tenets of those sects respecting wilful dealings in the offspring of Tafsinees*, which are held to be lawful by the followers of Sbafis; but which are deemed illegal by the Haneefites, as being (according to them) forbidden. Such a contract, however, between a Mussulman and a Zimme is nevertheless abominable (according to Aboo Yoosaf;) as Zimmes frequently enter into engagements of an unlawful nature, in consequence of which a Mussulman might fall into what is prohibited. The argument of Haneefa and Mohammed is that the two persons in question are not upon an equality in point of power of action,—because, if a Zimme purchase wine or pork with the capital stock, the purchase is valid, whereas, if a Mussulman were to

* Tafsinees are camels turned loose and suffered to pasture at large without a herdsman, as being dedicated to God.
purchase these articles it is invalid: hence the parties are not upon an equal footing in point of transaction.

A contract of reciprocity is not valid between two slaves, two infants, or two Mokáibs, because a contract of reciprocity is founded upon each party being surety for the other, and the bail of such persons is invalid. It is to be observed, however, that on all occasions where a contract of reciprocity proves invalid from the non-existence of some of its conditions, and those conditions are not requisite in Aimán, (or partnership in traffic,) the contract of reciprocity becomes a contract of partnership in traffic because of the existence of all the conditions requisite in such a contract.

A contract of reciprocity comprehends the properties both of agency and bail. It comprehends the property of agency, because if each of the contracting parties were not the agent of the other, the end, (namely, a mutual participation of property,) would be defeated. It also comprehends the property of bail, because if each party were not surety for the other, the equality, in certain particulars essential to traffic (such as the demand of payment from either of them for purchases made by the other,) could not exist.

Whatever is purchased by either of two partners under a contract of reciprocity is participated of by both, except the food and clothing purchased by the partner for himself and his family;—because a contract of reciprocity requires that both parties be upon a perfect equality: and as each is the other's substitute in all dealings, it follows that a purchase made by one is equivalent to a purchase by both. This, however, is exclusive of such articles as are here excepted, (which exception proceeds upon a favourable construction,) as the articles in question must be excluded from a contract of reciprocity, necessarily, because there is perpetual occasion for them: for one partner cannot be made answerable for the other's wants; neither
neither can one of them expend the property of the other in the supply of his own wants; yet the purchase of these articles is indispensable; and, on account of this indispensable necessity the food and other articles mentioned appertain solely to the purchaser. (Analog) would suggest that those articles also are participated in by both partners, in conformity with what was before advanced that "a contract of reciprocity requires that both parties be upon a perfect equality." The seller of the food or clothing is, however, at liberty to take the price of his commodity from either partner, as he pleases; from the purchaser, evidently, since it was he who bought the article; and also from the other partner, since he is surety for the purchaser; and in this last case the other partner takes from the purchaser a moiety of what he has paid to the seller, as having discharged a debt of the purchaser out of property common to both.

Whatever debt is incurred by either of two partners in reciprocity, for a thing in which partnership holds, the other partner is responsible for the same, in order that equality may be established. Of those things in which partnership holds are sale, purchase, and receipt of hire or wages; and of those in which partnership does not hold are marriage; and divorce for a compensation, composition for blood willfully shed, and composition for a subsistence, and offense against the person.

If a partner in reciprocity become, in behalf of a third person, surety for property to a stranger, it is binding upon the other partner likewise, according to Hanefi. The two disciples allege that it is not binding upon the other partner; because a person's becoming surety for another is a gratuitous act; (whence it is that the bail of an infant, a Mazoon, or Mokadib, is invalid,—and also, that if a per-

* All concessions, or acts of a gratuitous description, are admitted in law to affect only the actor himself.
for give bail upon his deathbed it is valid with respect to a third of his property only;—and as becoming surety is a gratuitous act, it is equivalent to the act of granting a loan, or giving bail for the personal appearance of any one; in other words, if one of two partners in reciprocity were to grant a loan to a stranger out of the partnership stock, it does not affect the other partner, insomuch that the right of exacting repayment rests solely with the lender, as lending is a gratuitous act;—and in the same manner, if one of two partners in reciprocity become bail for the personal appearance of any one, a requisition for the production of the person bailed cannot be made to the other partner;—and so likewise in the case in question.

The argument of Hanaefa is that bail for property is gratuitous in its principle, but in its consequence induces a kind of obligation or contract; because, in consequence of the bail, the surety is entitled to exact of the person bailed whatever he pays to his creditors, provided the bail had been given with his concurrence: it is therefore comprehended in a contract of reciprocity, with regard to its continuance; (and the circumstance of its continuance is the point in question, as we say “it becomes binding upon his partner after becoming so upon himself.”) With respect to what the two disciples urge, that “a person’s becoming surety for another is a gratuitous act; whence the bail of an infant, a Maxoon, or Makātib, is invalid; and consequently, that it is not comprehended in a contract of reciprocity,” we reply, that a contract of bail entered into by incompetent persons is invalid in its principle; but in the case in question it is binding upon the other partner in the circumstance of its continuance only. Bail, therefore, with regard to its continuance, as being an act of exchange, bears a relation to traffic; and traffic is comprehended in a contract of reciprocity. If a dying person, on the other hand, enter into a contract of bail, it is valid with respect to a third of his property, in regard to its execution, as well as its continuance. Thus

* There is a material difference between bail for property, and bail for the person; as is shown at large elsewhere. (See Bail.)
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Bail for property is not of a gratuitous nature in its continuance, whereas bail for the person on the contrary, is gratuitous, both in its execution and its continuance. Hence bail for property is in no respect analogous to bail for the person. As to what the two disciples further urge, that "if one of two partners in reciprocity were to grant a loan to a stranger out of the partnership stock, it does not affect the other partner, as lending is a gratuitous act,"—it is not admitted; because it is recorded from Haneefa, that the act of lending does affect the partner: if however it even were admitted by Haneefa, as not affecting the other partner, we reply that a loan in money is equivalent to the act of lending any article of goods or effects; and hence the property paid to the lender by the borrower may be said to be the same identical property which he had borrowed, and not a compensation for it, (whence a stipulated time or place of repayment are not valid in it,) and therefore, that lending does not bear the property of exchange. All which is here advanced proceeds upon a supposition of the bail for property having been contracted with the concurrence of the person bailed. If, however, it be entered into without his concurrence, it is not binding upon the other partner, (according to the Rawbyet Sabeel of Haneefa,) because in a bail so contracted the property of mutual obligation or exchange does not exist in its continuance. Let it be observed, also, that indemnification for usurped property, or indemnification for damages, stand on the same ground as bail for property, as these are of a retributive nature in their principle.

If a property of such a nature as that partnership in it is valid, should fall to one of two partners in reciprocity, by inheritance.—or, if any person present him with such property, by gift, and he take possession of it,—the contract of reciprocity is null, and the partner-

* Arab. Mill. Meaning property in cash, bullion, or other article capable of constituting capital stock, in opposition to Rabi and Motae, that is, specific goods and effects.
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ship becomes a Shirkat Ainân, because equality in point of property (such as is capable of constituting capital stock) is a condition essential to a contract of reciprocity throughout, and this does not exist in the present case, as the other partner is not a participator in the property so acquired by gift or inheritance, no principle of partnership therein appearing with respect to him. The partnership by reciprocity, however, is resolved into a Shirkat Ainân, or partnership in traffic, as the case admits of such a partnership, equality not being essential thereto; in reciprocity, on the other hand, it is essential, and consequently reciprocity no longer continues. The reason of this is that a contract of reciprocity is not of an absolute nature: now, in a contract which is not of an absolute nature, the rules with respect to its continuance and its commencement are one and the same; hence an increase of the capital stock [of either parties] during its continuance is equivalent to an inequality in its commencement; and as an inequality of capital, in the commencement of a partnership of reciprocity, is prohibitory to contracting it, so, in the same manner, such inequality taking place during its continuance prohibits it:—the contract of reciprocity, therefore, terminates. If one of two partners in reciprocity inherit goods or effects*, these are his sole property; but the contract of reciprocity does not become null; (and the same rule also obtains if one of them inherit land;) because, as those articles are incapable of constituting capital stock, equality with respect to them is not a condition.

Arab. Rakht wa Mattâ. In opposition to Mâl.

SECTION.
PARTNERSHIP by reciprocity, cannot be contracted but in dirms, deenârs, or fluctuating falsos*. Mâlik alleges that such a partnership is lawful in goods and effects, and also in all articles estimable by weight, or measurement of capacity, where the species is the same, because a partnership so contracted respects a known and specified capital, whence those articles are equivalent to money. It is otherwise in a contract of Mozâribat; for that is restricted solely to cash, the legality of it being contrary to analogy; since under this species of engagement a profit is acquired on property concerning which there is no responsibility, (as the manager is not responsible for the Mozâribat stock,) and the prophet has forbidden the acquisition of gain upon property in which there is no responsibility; the contract, therefore, must not go beyond what is prescribed by the law; and the only thing in which the law declares Mozâribat to be lawful is cash. The arguments of our doctors upon this point are twofold.—First, if a contract of reciprocity, in goods and effects, were held to be legal (as maintained by Mâlik,) it would necessarily induce a profit upon a property concerning which there is no responsibility; because, upon each partner in reciprocity selling his own particular capital, (consisting of goods and effects,) if the goods of one partner produce a greater price than the goods of the other, the excess of profit upon the goods of the former would be due to the latter; and this would be a profit from property for which the person who gains by it is not responsible, and in which he has no right; because in this instance the contract is

* Arab. Falsâs-Rabiba. Falsâs is a copper coin of uncertain value. Falsâs-Rabiba means copper coin on which an advantage may be gained, (owing to the fluctuation in its value,) and hence the term Rabiba is here rendered fluctuating.
connected with actual goods, and not with the semblance of them, such as debts; and the goods are a trust in the hands of each partner respectively;—whence it is evident that a profit is induced upon property concerning which there is no responsibility. It is otherwise with cash, because whatever either partner may purchase with the capital stock, consisting of cash, the purchase thereof is not connected with the actual capital, but with its semblance, namely debt, (since the price of it is a debt;)—now the purchase being connected with the semblance of the capital, (namely debt,) and the other partner also being liable to be called upon for it, (as a contract of reciprocity involves mutual bail,) it follows that the consequence objected (of profit upon property concerning which there is no responsibility) is not induced, since this is a property in which there is responsibility.—Secondly, The first transaction in goods and effects is the sale of them; and the first transaction in cash is purchase made with it:—now a person selling his property under the condition of another being his partner in the proceeds is unlawful, since this is endowing with a right of property in the debt, and an endowment of right in a debt, made to any other than the debtor himself, is illegal: on the other hand, his making a purchase with his own property, under the condition of another being his partner in the article purchased, is lawful, since this is endowing with a right of property in an actual substance, and not in a debt.—Raloos-Rabiba, or fluctuating copper coins, are connected with dirams and deenars, [cash,] as they pass current, in the same manner as gold and silver coin. Mohammed is of this opinion, because he holds that raloos are cash, insomuch that they cannot be particularized by specification; whence it is that if any person were to purchase an article, for certain raloos, he is at liberty to give any other raloos in place of them; and also, that two specified raloos cannot be sold for one raloos, according to what is established. According to the two elders, partnership, or Monárribat, are not lawful in raloos, although they be current, as the valuation of them fluctuates from time to time, and they at length become the same as goods or effects.
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Abou Yoosaf is elsewhere said to entertain the same opinion with Mowammed upon this point. It is also recorded, from Haneefa, that a contract of Mozaribat is lawful in current saloes; but not a contract of reciprocity. Thus partnership by reciprocity is not lawful in any thing beyond dirms, deenars, and current saloes. It is to be observed, however, that if gold or silver bullion, by general usage, passes current for value, in this case partnership by reciprocity is lawful in it. This is also related in the Kadooree. It is asserted, in the Jama Sagbeer, that partnership by reciprocity is not lawful in gold or silver bullion; for, according to that authority, uncoined gold and silver are the same as household stuff, distinguishable by identical specification, and therefore incapable of constituting capital in either partnership or Mozaribat. It is said in the Maboot, treating of exchange, that gold or silver cannot be identified by specification, inasmuch that a contract of sale is not broken in consequence of any accident to the bullion before delivery;—(that is, if a person purchase any article, agreeing to give for it certain gold or silver uncoined, and it be lost before delivery, the contract of sale is not broken, because the gold or silver cannot be particularly specified.)—Now such being the case, it follows (according to this statement) that uncoined gold or silver are capable of constituting capital stock, in either Mozaribat or partnership, on this ground, that the precious metals were originally introduced for the purpose of valuation. The opinion delivered in the Jama Sagbeer, however, is the most approved; because, although the precious metals were originally introduced for the purposes of traffic, yet their capacity to represent property depends upon their being coined, as when once coined, they are no longer liable

* That is, are no longer current.
† That is, such as have not yet become depreciated below the current standard.
‡ Arab. Simn (or Tbibn); meaning a representation of property, and therefore used (in purchase and sale) to express price.
§ Arab. Sil-Sinmeeat; that is, for the purpose of constituting price, or (in other words) of representing property.
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to be used for any other purpose (such as making ornaments for the person, and so forth;) uncoined gold or silver, therefore, does not constitute value, except where the use of it in that way is customary, in which case it is the same as coin, and consequently a representative of property, and as such capable of constituting capital stock. It is to be observed that what was before advanced, that "partnership by reciprocity is not lawful in any thing beyond dirms, denârs, and current fahos," applies to all articles of weight and measurement of capacity, or which are of a heterogeneous nature. The illegality of reciprocal partnership in these articles is admitted by all our doctors, provided the partnership be contracted previous to the union or admixture of stocks, in which case it is illegal, and each partner receives the profit arising from his own particular commodity, and the loss upon it also falls on him. If, also, two persons mix homogeneous stocks, and then enter into a contract of partnership, Aboo Yousef holds the rule to be the same, and that a partnership by right of property is here established, not a partnership by reciprocity. Such, also, is the doctrine of the Zâbir Rawâyet. According to Mohammed, the contract of partnership, in this instance, holds good. The result of this difference of opinion appears where the property of both partners is equal, and they stipulate a larger profit to one, and a smaller profit to the other;—for in this case, according to Aboo Yousef, each is to receive in proportion to his property, and he in whose favour the larger profit had been stipulated is not on that account entitled to receive any excess; but, according to Mohammed, each is to receive agreeably to what was stipulated. The ground upon which the Zâbir Rawâyet proceeds is that articles of weight and measurement of capacity, and so forth, are distinguishable by specification after admixture, in the same manner as before. The argument of Mohammed is that the articles in question are, in one shape, value; for if a person were to

* Arâb. ʻAwna Moukhrik, that is, resembling in appearance, but differing in species.

† Meaning always grain, or liquid, such as are capable of admixture; in opposition to Rakb and Matb, that is goods and effects.
fell goods for such articles, so that the price of the goods, (consisting of those articles,) is a debt upon the purchaser, it is lawful; and, in another shape, they are subjects of sale, as admitting of specification: attention, therefore, is paid to both these circumstances, with respect to situations both of admixture and of non-admixture: in other words, partnership in them, before admixture, is unlawful, as they are then subjects of sale; but after admixture it is lawful, as they then constitute value: contrary to the case of goods and effects of any other description, since these are not value in any shape. If the stocks [of the respective parties] be of two different species, such as barley and wheat, or olives and pepper, and the proprietor unite them, and then enter into a contract of partnership, it is unlawful according to all our doctors. The reason for this distinction, according to Mohammed, is that whatever is mixed, of one species, is Zoodtal Injil*; and whatever is mixed, of two different species, is Zoodtal Keem†: now as things of different species, when mixed together, are Zoodtal-Keem, ignorance exists with respect to them; (because, it is requisite that appraisers fix the value of them‡,) and they are therefore incapable of constituting capital stock, in the same manner as any other goods or effects:—a partnership in them is consequently invalid; and such being the case, they become subject to the rules in admixture of property, as treated of under the head of decrees, in the Juma Sagbeer, and which shall be fully set forth (in this work) when we treat of deposits.§

* Things compendable by an equal quantity of their own species, (such as wheat for wheat, barley for barley, &c.)

† Things compendable only by an equivalent in money.

‡ Before the respective proportion of each partner, in the capital stock, can be ascertained.

§ The arguments throughout this and the preceding passages are so much involved in subtle distinction and perplexing casuistry, and are in many places so little capable of an intelligible translation, (from the impossibility of rendering clearly the technical terms which
Where two persons are desirous of entering into a contract of partnership in goods and effects, each must sell one half of his own goods in lieu of one half of the goods of the other, so that a Shirkat-Mulk, or partnership by right of property may be established between them; and then let them enter into partnership by compact. (Our author remarks that in this instance a partnership in right of property is established, but that a partnership by reciprocity is not lawful, as goods and effects are incapable of constituting stock in such a partnership.) With respect to what is advanced above, that "each partner must sell one half of his own goods in lieu of one half of the goods of the other,"—it means, that each is thus to sell a moiety of his goods to the other, provided the value of the goods of each be equal. If, however, the value of the goods of each be different, it is requisite that he whose goods are of least value sell such a proportion as may suffice to establish a partnership; for instance, if the value of the goods of one be four hundred dirms, and that of the other be one hundred dirms, then let the latter sell four-fifths of his goods to the former, in lieu of one-fifth of his goods, so that the whole of the goods may be held in partnership between the parties, in five lots, or shares. With respect to what is advanced by our author, as above, that "a partnership in right of property is established, but a partnership by reciprocity is not lawful," it is of no weight; for, rendering goods and effects capital stock in a contract of reciprocity is illegal, only, because this would induce a profit upon property concerning which there is no responsibility,—or, because the respective capital of each would be unknown at the time of division: but neither of these reasons exist in the case in question:—the first reason does not which so frequently occur in them,) as greatly to obscure the matter. The principle upon which the whole turns is that "a partnership by reciprocity cannot be entered into with respect to any articles which are not standards of value;" and the question is, "what articles they are which may be considered as standards?"—which some of the doctors confine solely to cash in the precious metals: others extend it to bullion; and others, again, to copper coins [saloes;] whilst some include grain, contending that this is a standard of value, and may therefore be used to represent property, in the same manner as cash.
exist, because upon each selling a moiety of his estate to the other, the half of each partner, respectively, is a subject of responsibility to the other, with respect to its value, and hence the profit which accrues from the property of both is a profit from property which is a subject of responsibility: and the second reason does not exist evidently, because there is no occasion for specifying the respective capital of each partner at the time of division, so as to require the valuation of appraisers, thence inferring ignorance respecting it, because the property of both is equal, and they are both partners in that property, and consequently, whatever price the property may bring must necessarily be divided between them in equal shares.

Shirkat-Ainân, or partnership in traffic, is contracted by each party respectively becoming the agent of the other, but not his bail. This species of partnership is where two persons become partners in any particular traffic, such as in cloths or wheat, (for instance)—or where they become partners in all manner of commerce indifferently. No mention, however, is to be made concerning bail, in their agreement, as bail is not a condition in a partnership of this nature:—but it is indispensible requisite that each act as agent on behalf of the other; since, without this, the design, (namely, partnership in property,) cannot be obtained; as acts done on behalf of another are performed either in virtue of some avowed authority, or of agency; and no authority existing, agency is constituted, in order that each may act for the other, so that the property may be held in partnership between them.

If the stock of one of these partners exceed that of the other, it is lawful, because there is occasion for this equality, (as shall be hereafter demonstrated,) and the terms in which such a partnership is contracted do not require equality.
In partnership in traffic, it is lawful that the stock of each partner be equal, and yet the profit unequally shared,—that is, that it be stipulated that the profit to one partner exceed the profit to the other. Ziffer and Shafii maintain that this is not lawful; for if, with equality of stocks, an inequality of profit be admitted, it induces a profit upon property concerning which there is no responsibility; because, if the capital appertain to the two in equal shares, and the profit be divided into three lots (for instance,) the sharer in the larger proportion of profit is entitled to a superior profit without any responsibility, since the responsibility is in proportion to the capital;—and also, because a partnership in the profit exists in virtue of partnership in the capital, (according to their tenets, whence they likewise hold the admixture of the property to be a condition;) the profit upon the property, therefore, is the same as increase of living stock; and each is consequently entitled thereto, in proportion to his original right of property in the capital. The arguments of our doctors upon this point are twofold.—First, the prophet has said "The profit between them is according to their agreement, and their loss in proportion to the property of each respectively;"—where no distinction is made between the equality or inequality of their properties.—Secondly, in the same manner as a person is entitled to profit in virtue of property, he is also entitled to it in virtue of labour, (as in a cafe of Manzribat, for instance:) it may also sometimes happen that one of the partners is more skilful and expert in business than the other, and consequently, that he will not agree to the other sharing equally in the profit, whence it is requisite that one have a larger share than the other. It would be otherwise if the whole profit were restricted to one of the partners, because in this instance the contract is not a contract of partnership: neither is it a contract of Manzribat; for if, in Manzribat, the whole profit be assigned to the manager, it is a loan; or if to the proprietor of the stock, it is a Banzi. With respect to what is objected by Ziffer and Shafi, that "if, with equality of stocks, an inequality of profit be admitted, "it
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"it induces a profit upon property concerning which there is "no responsibility,"—we reply that a contract of partnership in traffic resembles a contract of Mozāribat, in this particular, that each party respectively manages with the stock of his partner; and it also resembles partnership by reciprocity, both with regard to its name, (as being a partnership,) and likewise with regard to the conduct of it, because both partners act in it. In consideration, therefore, of its resemblance to Mozāribat, we determine that it is lawful to stipulate a profit upon property concerning which there is no responsibility; and, in consideration of its resemblance to partnership by reciprocity, we determine that, if it be stipulated that both partners shall act alike*, yet the contract of partnership in actual stock is not invalidated.

It is lawful for either party, in partnership in traffic, to engage in the contract with respect to a part of his property only, and not the whole, because an equality in point of stocks is not essential to it, since the term Ainān does not require it.

PARTNERSHIP in traffic is not valid except in such property as is lawful in partnership by reciprocity.

It is lawful for two men to engage in a partnership in traffic, where the stock of one party consists of dirms, and that of the other party of deanārs, or where on one side it consists of white dirms, and on the other of black dirms†. Zijfer and Shafēī allege that this is illegal. This difference of opinion is founded on a difference of sentiments respecting the admixture of stocks; for, according to those

* Although a greater share of the profit be conditioned to one of the partners.
† The translator has not been able to discover the difference between black dirms and white dirms:—it is probably some local distinction, known in Persia and Arabia.
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two doctors, a *coklefsence* of the capital is essential to the partnership; and that cannot take place where the two stocks are *het-rognecous*. This point will be more fully treated of hereafter.

Debts can only be claimed from the partner who incurs them.

and this partner, on making payment, has recourse to the other for his proportion.

Where one of two partners in *traffic* makes a purchase, the demand for the price lies against him, and not against the other partner; (because, as has been already demonstrated, the contract of partnership in question comprehends *agency*, but not *bail*; and the agent is the original with respect to rights*;) and on making payment, the purchaser is to take from the other partner his proportion of the price, (provided he has satisfied the demand out of his own particular property, and not out of the partnership stock,) because he is the other's agent with respect to his share. If, however, it be not *known* whether he has paid the price out of the partnership stock, or out of his own property, except from the declaration of the purchaser himself, it is in this case incumbent upon him to produce proof; because the purchaser here advances a claim for property against his partner; and the partner resists his claim: and the declaration of a defendant (delivered upon oath,) is to be credited.

The contract is annulled by the loss of the whole capital; or of the stock of either partner in particular.

If the whole partnership stock, or the stock of either partner in particular, perish before any purchase be made, the contract of partnership is annulled: because, in a contract of partnership, the *subject* of the contract is *property*, (that being specified in a contract of partnership, in the same manner as in a *deed of gift*, or a *will*,) and, in consequence of the destruction of the subject, the contract is dissolved, in the same manner as in *sale*. It is otherwise in *Mozáribat*, and *singular agency†*, because in those the *divers* or *dearers* cannot be identified by *specification‡*, or in any other mode than by *actual*.

* That is, he is the person upon whom all demands are to be made.

† Arab. *Widhit-Mozradis*; meaning, agency with respect to some particular act.

‡ That is, by the mention of them in the contract.
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seizin. The agency herein mentioned is restricted to the singular description, for the purpose of distinguishing it from the agency implicated in a contract of partnership or of pawnage, because that is annulled by the dissolution of the partnership or the pawnage, as a thing which is comprehended is annulled by the dissolution of that which comprehended it. An example of singular agency is where a person commissions another to purchase him a slave, (for instance,) in which case, if he give the agent money for that purpose, and the money perish in the agent's hands, yet the agency is not annulled.—"It is otherwise" (says Fakr-al-Ilham in his commentary on the Zee'adat,) "in cases of Massribat and partnership, because the dirms and deenars are in both identified by specification, inasmuch that if the money be lost before delivery, the Massribat is annulled." This is contradictory to what our author has above advanced, that, "in Massribat and singular agency, the dirms and deenars cannot be identified by specification, nor in any other way than by actual seizin." It is, however, probable that there are two opinions recorded on this point. What is above said, that "if the whole partnership stock, or the stock of either partner in particular, perish before any purchases be made, the contract of partnership is annulled,"—is evident, where the whole stock of both partners perishes; and where the stock of one of the partners perishes the contract also annulled; because the partner whose property has not perished had agreed to the other participating in his property for no other reason than that he should also participate in the other's property; but, upon this being rendered impossible, he will not agree that the other should participate in his property. The contract, therefore, is void, as its continuance is useless: and, to whomsoever the destroyed property belonged, the loss affects him only, and not the other, whether it perish in his own hands, or in the hands of his partner;—if in his own hands evidently; and also, if in the hands of his partner, because it is a trust in the hands of that person.

* A trustee is not responsible for his trust in cases of loss or destruction. (See Deposits.)
It is otherwise, however, where the stock perishes after admixture; for in this case the loss falls upon the partnership stock generally, since, as the property of each is no longer distinguishable, it follows that the loss must affect both.

A purchase made by one partner, where the stock of the other afterwards perishes, is participated in by both; and the partnership continues in force, agreeably to the contract:

If one of the partners in question make a purchase with his own stock, and the stock of the other afterwards perishes before he has made any purchase with it, in this case the thing purchased by the first partner is in partnership between the two, agreeably to stipulation; because, as partnership subsisted between them at the time of the purchase, the article purchased became a subject of partnership between them at that time; and the effect is not altered by the destruction of the other's property after the purchase. This partnership in the purchase is a partnership by contract* (according to Mohammed,) insomuch that, whoever of the two sells it, the sale is lawful. Hassen-Ibn-Zeydd alleges that the partnership is merely a partnership by right of property†, insomuch that it is not lawful for either partner to sell more than his own share, because the contract of partnership was dissolved in the present instance, in consequence of the destruction of stock, in the same manner as where the destruction takes place before any purchase being made; nothing, therefore, remains, except the effect of the purchase, namely, right of property [in the thing purchased,] and hence it is a partnership by right of property. The argument of Mohammed is that the contract has been completely fulfilled with respect to the article purchased, and consequently cannot be rendered void by the destruction of property after such completion. It is to be observed that, in the case now under consideration, the purchaser is to take from his partner his proportion

* Meaning, that the partnership (with respect to the purchase) continues in force under the original contract.

† That is, existing merely in virtue of a mutual right of property, and not of the contract.
of the price [of the article purchased], because he bought a moiety of it by agency, and paid the price out of his own substance, as was before mentioned.——What is now advanced proceeds upon a supposition of the purchase made by one partner having been effected before the destruction of the other's stock. If, however, the stock of one partner first perish, and the other partner then make a purchase with his own substance, and it should have been expressly agreed, in the contract, that each is to act as an agent on behalf of the other; in this case whatever the purchaser may have bought is divided between the two, according to their previous stipulation; because, although the contract of partnership be annulled, yet the agency, which was expressly mentioned in it, continues in force; the purchase is therefore participated in by both, in virtue of the agency; the connexion continues a partnership by right of property; and the purchaser is accordingly to take from his partner his proportion of the price, for the reason before stated. If, on the other hand, the partnership only be mentioned in the contract, and nothing expressed in it respecting each partner acting as an agent on the other's behalf, the article purchased by one partner appertains solely to him; because, if the article were participated between the two, it could be so only in virtue of the mutual agency implicated in the contract; but, that being annulled, the power of agency implicated in it is also annulled. It is other wise where the parties have expressly mentioned a mutual power of agency; because in this case the agency is not annulled by the annulment of the partnership, as agency is here one especial design of the contract, and is not merely implicated in it.

A PARTNERSHIP is legal, although the parties should not have mixed stocks. Ziffer and Shefel maintain that it is illegal, because the profit is a branch of the stock, and the branch is not to be participated in except where the original stock itself is also participated, which cannot be so but by coalescence or admixture. The ground upon which they proceed is that, in a contract of partnership, the stock

but if it perish before the other's purchase, that continues between them under a partnership by right of property.

unless there be no mention of mutual agency in the contract; for in this case it belongs solely to the purchaser.
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Stock is the subject of the contract, (whence it is that the partnership is referred to the stock, by each partner saying to the other "I make "you my partner in such stock,"—and also, that the specification of the capital is an essential,)—and, such being the case, it is indispensably requisite that the stock be participated in by both. It is otherwise in Mezrabat, as that is not partnership, since it implies nothing more than that, as the manager is to act for the proprietor of the stock, he is consequently entitled to a share in the profit, as wages on account of his labour, which is different from the case in question, where the profit is a branch of the stock, and not wages for labour.

This is a grand leading principle with Ziffer and Shafei, insomuch that (arguing upon this ground) they allege it to be indispensable, in a contract of partnership, that the stock of both partners be of the same species; for, if otherwise, (as where one is possessed of dirms and the other of deenars,) they hold that the contract is invalid because of the capital not being participated in by both: and they also allege (upon the same principle) that admixture is an essential: and likewise, that it is unlawful to stipulate an excess of profit to either partner, where their stocks are equal, as the profit is a branch of the stock:—and also, that partnership in arts* and trades† is illegal, as in those there is no stock, (as shall be hereafter explained.)—The arguments of our doctors upon this point are twofold.—First, partnership in profit is referred to the contract, and not to the stock; because, as the contract is termed "a contract of partnership," it is indispensable that the property of the term partnership exist in it; and, such being the case, it follows that the admixture is not essential.—Secondly, as the money [of which the stock consists] is not specified, the profit is not derived from the capital, nor indeed from anything else than the transactions [which are had with the stock:] because each party is a principal, with respect to one half of the stock, and an

* Arab. Shirkat Takâlal (synonymous with Shirkat Sinai.)
† Arab. Shirkat Anud"
agent with respect to the other half; and, as it hence appears that partnership may be established, in point of transaction, without admixture of stocks, it follows that it may also be established in the thing which accrues from transaction, (namely, the profit,) without such admixture: and, as the contract of partnership thus becomes similar to a contract of Moxribat, a similarity of species in the stocks, and an equality of profit, are not essentials, although the stock of each be equal. A partnership in arts is also lawful on the same principle.

A contract of partnership, which stipulates any particular sum out of the profit for one of the partners, is unlawful, as this condition is a means of destroying partnership, since it is possible that no more profit may be acquired altogether, than the sum so stipulated. Correspondent to this is a case of cultivation; that is to say, where the parties, in a compact of cultivation, stipulate a particular quantity of produce to one of them, (that is, to the cultivator or to the landlord,) the compact is invalid; because such a stipulation is a means of destroying partnership; and in cultivation it is essential that the produce of the land be equally participated between those persons.

Each of the partners, in a contract either of reciprocal partnership or of partnership in actual stock, is at liberty to give his stock in the manner of a Bandr; because it is customary so to do in contracts of partnership; and also, because either partner is at liberty to hire any person to work for the acquisition of profit; and as the acquisition of profit without any return is still less objectionable than hiring with the same view, he is consequently authorised to adopt the other mode a fortiori. In the same manner also, either of them is at liberty to lodge this capital as a deposit, as this is customary, and sometimes necessary, among merchants. Each of them is also at liberty to give his capital in the way of Moxribat, because, as Moxribat is subordinate to partnership either by reciprocity or in traffic, it follows that a contract of partnership comprehends Moxribat. It is recorded from Hanefia.
PARTNERSHIP. Book XIV.

Hence that a partner has not this in his power, because Monāribat is also a mode of partnership. The former opinion, however, is according to the Mahfoot, and is the most approved, because partnership is not the design of a contract of Monāribat, the only view in it being the acquisition of profit. It is therefore lawful to give the capital in the way of Monāribat, in the same manner as it is lawful for the proprietor of the stock to hire a labourer with wages. It is lawful, indeed, in a superior degree, because, where the Monārib manages, and no profit is acquired, there are no wages owing to him from the proprietor of the stock, whereas, in a case of hire, where the hired person manages the stock and no profit is acquired, wages are nevertheless due to him from the hirer. It is otherwise with respect to a contract of partnership, for neither party is at liberty to engage in such a contract with a third person, with regard to the capital, because a thing cannot be a dependant of a similar thing.

Either of two partners, by reciprocity, or in traffic, is at liberty to constitute a person his agent to transact for him, because the appointment of an agent for purchase and sale is a dependency of traffic; and contracts of partnership are formed for the purpose of traffic. It is otherwise with an agent for purchase, for he is not at liberty to constitute another person his agent, to make the purchase on his behalf, as the appointment of an agent for purchase is a particular contract, the end of which is the acquisition of some specified and existent article, and a thing cannot be the dependant of its similar.

The possession of each of two partners, by reciprocity or in traffic, over the partnership stock, is considered as the possession of a trust, since each possesses the property with consent of the proprietor, for this reason, that he is to give something in lieu of it, in the same manner as where a person takes possession of a thing with a view to purchase it; (not because it is a pledge, as in payment;) the stock is therefore a deposit.

SHIKKAT SINNAI,
Book XIV.  PARTNERSHIP.

Shirkat Sinnai, or partnership in arts, (which is also termed Shirkat-Takabbal*) signifies where two tailors, or two dyers, (for instance) become partners, by agreeing to work and to share their earnings in partnership; which is lawful, according to our doctors. Ziffer and Shafei allege that this is unlawful; because the design of partnership is a participation of gain between the parties, and the partnership in question is not calculated to answer this end, since a capital is indispensable, as partnership in profit is founded on partnership in stock, (according to their tenets, as before set forth,) and in the case in question there is no capital. The argument of our doctors is that the design of the contract in question is the acquisition of property, which is attainable by each party constituting the other his agent; because upon each becoming agent on the part of the other with respect to one half, and a principal with respect to the other half, a partnership is established in the property to be acquired.—Unity of trade and of dwelling-place are not essentials in this species of partnership. Mlik and Ziffer controvert this; for according to them unity of trade and of residence are essentials.

Objection. It was before mentioned that, according to Ziffer, partnership in arts is unlawful; but here it appears that he holds it to be lawful; which is a contradiction.

Reply. There are two reports of the opinion of Ziffer upon this point. That before recited is conformable to one report; and what is now mentioned is according to another report.

The argument of Ziffer in support of his latter opinion is that if the parties be of different trades (such as where a dyer and a bleacher become partners,) each will be at a loss with respect to the business undertaken by the other, as that is not his trade; the end of partnership, therefore cannot be obtained: in the same manner also, if their places of residence be different, each is at a loss with respect to the business of the other. The argument of our doctors is that the

* Literally "a partnership by mutual agreement."
cause of the legality of the partnership (namely, the acquisition of property) is in no way affected by unity of trade and place of residence, or the reverse:—it is not affected by unity of trade, or the reverse, because an appointment of agency made by agreement, with respect to any business, is approved, whether the person who undertakes it be able to execute it in a good and sufficient manner, or not at all, since the person who so agrees is not under any obligation to perform the business himself, but is at liberty to appoint any other person to perform it; and as each party has it in his power thus to appoint a person to perform the business in question, the contract is consequently valid: neither is it affected by unity of place, or the reverse, because, if one of the two partners work in one shop, and the other in another shop, yet it is evident that no difference whatever is thereby created in essential circumstances.—It is to be remarked that if, in the case now under consideration, the partners stipulate to perform equal labour, and to divide the acquisition arising from it in three lots*, the same is lawful, upon a favourable construction. Analogy would suggest that this is unlawful, because the responsibility is in proportion to the labour, whence, if this stipulation were admitted, it would induce a profit from a matter concerning which there is no responsibility: any excess to either party, therefore, is unlawful in the present instance, in the same manner as it is unlawful in a Shirkat Waaljoeab, or partnership upon credit,* (as shall be hereafter demonstrated.)—The reason for a more favourable construction is that what each of the partners takes he does not take in the manner of profit; as gain does not bear the denomination of profit except where the flock and the gain are of the same nature; but they are not of the same nature in the case in question, because the capital, in this instance, is industry, and the profit substance; the property so acquired, therefore, is not profit, but merely a return for industry: now industry is appreciable by means of estimation; and consequently, where

* Two lots for one partner, and one lot for the other.
both partners agree to receive a certain specific proportion, such proportion is an estimate of the industry of each respectively: the excess, therefore, is not unlawful with respect to him in whose behalf it is stipulated. It is otherwise in a partnership upon credit, because in that instance the gain is of the same species with the capital, (as both consist of substance;) and profit is established where the capital and the gain are of the same nature; and as profit on property concerning which there is no responsibility is unlawful, except in a contract of Mozáribat, it follows that it is unlawful in a contract of partnership upon credit: the case in question, therefore, is in no respect analogous to a case of partnership upon credit.

In a partnership in arts, whatever work one partner agrees to is incumbent upon him, and also upon the other partner, insomuch that the employer may require the performance of it from either; and each is entitled to demand payment from the employer for the business performed. Upon the employer, also, thus paying either, he is thereby discharged of all demands. This is evident where the partnership in arts is of a reciprocal nature, (by both partners being upon an equality with respect to those particulars in which equality is requisite in a contract of reciprocity;)—and where the partnership in question is not of a reciprocal nature, but in the manner of a partnership in traffic, the same is admitted, on a favourable construction, Analogy would suggest otherwise; because the partnership has been contracted in general terms, without any mention of bail; and bail is not one of the articles of a partnership in traffic: it would therefore follow that the employer is not empowered to require the performance of the business from either of them indifferently; and also, that they are not both empowered to require payment from the employer;—and likewise, that the employer is not discharged from all demands, by paying either indifferently. The reason for a more favourable construction is that the partnership is an occasion of responsibility; that is, in consequence of the partnership, the performance of work
is incumbent upon the parties; whence any business engaged in by either is incumbent upon the other also; and the other is accordingly entitled to the payment, as one of them engaging to perform any work equally affects the other; for if the other also were not subject to this obligation, he would not be entitled to payment: the partnership in question, therefore, is equivalent to a partnership by reciprocity, with respect to the obligation of work, and the taking possession of the payment for it.

Shirkat Wadjoob, or partnership upon credit, is where two persons, not being possessed of any property, become partners by agreeing to purchase goods jointly, upon their personal credit*, (without immediately paying the price) and to sell them on their joint account. This species of partnership is termed Wadjoob, for this reason, that no person can purchase articles upon credit but one possessed of personal notoriety [Wijábit] among mankind. It may lawfully constitute a partnership by reciprocity; because each partner may become both bail and agent for the other. Where, therefore, two persons, capable of bail, make a purchase of any article, on condition that it shall be held between them in equal shares; introducing the term “by reciprocity” into their agreement, it is a contract of reciprocity. If, on the other hand, they express their agreement merely in general terms, it is a Shirkat Aínán, or partnership in traffic, because when thus generally expressed, it is conducted in the manner of such a partnership. The legality of the partnership in question is according to our doctors. Shafei alleges that it is illegal. The arguments on both sides have been already recited.

In partnership upon credit, each partner is agent on behalf of the other, with respect to what he purchases;—because any act which affects another is unlawful, except it be performed in virtue either of

* Arab. Wijábit. Literally, personal presence, or notoriety.
Book XIV. PARTNERSHIP.

agency or of authority*; and as authority does not exist in the present instance, agency is certified.

If the partners agree that what they purchase shall be held between them in equal shares, and that the profit also shall be equally divided, it is lawful: but it is not lawful, in such a case, to stipulate an excess of profit to one of them. If, however, they agree that what they purchase shall be held between them in three lots, and that the profit also shall be divided into three lots†, it is lawful. In short, if the profit be in proportion to the right of property it is lawful, but otherwise not. The reason of this is that men are entitled to profit only on account of stock, management, or responsibility; thus the proprietor of a stock is entitled to profit in virtue of the stock; a manager in virtue of his management; and a master artisan, who employs a scholar or apprentice at half wages or third wages (for instance) is entitled to the profit arising from his work in virtue of his responsibility for such work;—(whence it is that if a person say to another "Transact with your own stock on condition that the profit be mine," it is unlawful, because in such a case, no one of the above particulars exists.) As men, therefore, are entitled to profit only on some one of these three principles, and as, in a partnership of credit, the title to profit is in virtue of responsibility (as aforesaid)—and as, also, responsibility attaches in proportion to the right of property in the thing purchased,—it follows that whatever exceeds the proportion of such right of property is a profit upon a thing concerning which there is no responsibility. Now the stipulation of profit from a thing concerning which there is no responsibility is not valid except in a contract of Mazribat; and a partnership upon credit has not the property of a contract of Mazribat. It is otherwise in a partnership

* Arab. Wilhyat. Meaning the authority derived from natural or personal rights, such as that of a guardian or a proprietor.

† That is, two lots to one, and one lot to the other.
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in traffic, as that has the property of a contract of Mozrribat, inasmuch as each partner in traffic transacts business with the stock of the other partner, in the same manner as a manager transacts with the stock of the proprietor, whence a partnership in traffic is, in effect, a Mozrribat.

SECTION.

Of Invalid Partnerships.

Partnership is not lawful in wood, grafs, or game. If, therefore, two persons enter into a contract of partnership with respect to such articles, and afterwards collect wood, or grafs, or kill game in hunting, the wood or grafs so collected, or the game so killed, by either of them, belongs to him solely, and not to the other partner. The same rule holds in cases where two persons enter into a contract of partnership with respect to any other articles of a neutral nature, (such as fruit collected from the trees of the forest, which are common property;) because a contract of partnership comprehends a commissio of agency; and the appointment of an agent for procuring things of a neutral description is null, because the instructions of a constituent to this effect are invalid, since an appointment of agency signifies an endowing with authority to transact concerning a matter originally subject to the acts of the constituent only, and not of the agent; but it is otherwise in the case in question, as the agent is here at liberty himself to take the neutral article without the instruction of his constituent, and consequently is incapable of appearing as his deputy concerning it. In short, a right of property in a neutral article is established only by the acts of taking and putting it in custody: if, therefore, both partners take it jointly, it is equally in partnership
partnership between them, as they are both equally entitled to it:—
but if one of them only exert himself in taking it, the other doing
nothing, it belongs wholly to the one who acts: if, on the other
hand, one be the chief actor, and the other only an assistant, (as where
one plucks the fruit, and the other collects it,—or, where one both
plucks and gathers it, and the other carries it away,) in this case the
assistant is to receive wages in proportion to his labour.—This is ac-
cording to Mohammed. (Abu Toosaf alleges that this rule holds only
where the wages do not exceed half the value of the article in que-
tion; but that, if the wages exceed this, one half of the value only
is paid to the assistant, because, as he had agreed to accept one half
of the article specified, his right fails with respect to any larger pro-
portion.)

If one man possesses a mule, and another a Mafshack, (or leather
bucket, such as is used in drawing water,) and they enter into a
contract of partnership in drawing water*, by agreeing that whatever
may be acquired thereby shall be in partnership between them, such
partnership is invalid, the whole acquisition going to the person who
actually draws the water; and if this be the owner of the mule, he
owes the other the adequate hire for the bucket; or, if it be the owner
of the bucket, he owes the other an adequate hire for the mule. The
reason of the partnership being invalid is that it is contracted with
respect to an article of a neutral nature, (namely, water,) and is
therefore unlawful. The hire of the mule or the bucket is due, be-
cause the neutral article (namely the water) becomes the property of
the person who drew it; and as he derives an advantage, under an in-

* Water is in many parts of Asia procured from draw-wells, sunk to a considerable
depth. From the edge of such wells a road is constructed or cut, going off from twenty
to thirty yards, in an inclined plain; and over the well is erected a frame or craft piece, fur-
nished with a pulley, through which a line runs, having suspended at one end a large leather
bucket, [Mafshack:] the other end is fastened to traces, in which a mule, bullock, or
other animal, moving to and fro' on the inclined road, by this means draws the water.
valid contract, from the property of another person, (namely, from his mule or his bucket,) it follows that he owes a hire for the same.

In all cases of invalid partnership, the profit is in proportion to the stock; any stipulation, therefore, of an excess of profit to either partner is null. Accordingly, if the stock be between the partners in equal shares, and they agree to their profit being in three lots, such agreement is null, and the profit must be equally divided; because, as the profit which accrues is a dependant of the stock, the degree of it must be in proportion to the stock, in the same manner as, in a contract of cultivation, the grain which is reaped is a dependant of the seed. The reason of this is that a claim to an excess profit can exist only in virtue of a previous specific agreement: but in the case in question this agreement has become invalid in consequence of the invalidity of the contract of partnership itself: the claim, therefore, remains in force only in proportion to the capital stock.

If one of two partners die, or apostatize, and be united to a foreign country*, the contract of partnership is annulled;—because a contract of partnership comprehends an appointment of agency, which is essential to the existence of partnership, for the reasons already assigned: now agency is annulled by death; and it is also annulled by the circumstance of desertion to a foreign country during apostacy, where the Kâsâr issues a decree in consequence of such desertion, because that is equivalent to death,—as has been already shewn in treating of apostates: upon the agency, therefore, being annulled, the contract of partnership is also annulled. It is also to be observed that the surviving partner being aware of the decease of his fellow, or otherwise, makes no difference whatever with respect to the dissolution of the partnership; because as, in the case in question, the

* That is, be expatriated by a decree of the Kâsâr, issued in consequence of his apostacy and desertion. (See Institutes, p. 229.)
survivor is virtually discharged from the agency by the decease of his partner, it is not essential that he be informed of that event. It is otherwise where one of two partners breaks the contract of partnership, for the effect of such a breach depends upon the knowledge of the other partner, as the breach is a designed dissolution of the contract.

SECTION.

It is not lawful for either partner to pay the Zakât upon the other's property without his permission, as the payment of Zakât is not a branch of traffic.

If each of the partners give a general permission to the other to pay the Zakât upon his property, and each should afterwards first pay the Zakât upon his own particular share in the stock, and then pay Zakât upon his partner's share, in this case he who last paid the Zakât is responsible, whether he be aware of the other having already paid it or not. This is according to Hanefi. The two disciples allege that he is not responsible, where he is not aware of that circumstance. What is here advanced proceeds upon a supposition of each partner having paid the Zakât upon their respective shares of stock successively, and not all together; for where they have paid it all together, each is responsible for the other's proportion of it. A correspondent difference of opinion obtains where any indifferent person directs another to pay the Zakât upon his property, and the other accordingly pays the Zakât upon his property after the person who so directed him had already paid it; for, according to Hanefi, the person acting under such direction is responsible, whether he pay the Zakât with a knowledge of the above circumstance, or otherwise. The two disciples, on the other hand, maintain that he is not responsible unless
unless he pay it, having a knowledge of that circumstance, as he has acted by direction, and consequently cannot be held answerable. They admit, indeed, that it may be objected that what the person acting under such direction pays is not Zakāt*, and consequently he ought to be responsible:—but to this they reply that the order which the person in question received was not in fact an order to pay so much Zakāt, but rather, merely, an order to transfer so much to the poor, since the payment of actual Zakāt is not within his province, as this is connected with the intention of the principal, and no more can be required of the person so directed than what is within his province and ability:—the person in question, therefore, stands in the same predicament with one who is directed to perform sacrifice on behalf of another, in a case of detention; thus, if a person engaged in the ceremonies of pilgrimage were to fall into the hands of an enemy, and to direct any other person to perform sacrifice at the temple on his behalf, and the other perform sacrifice accordingly, after the principal had been released from the enemy, and had completed his pilgrimage, yet he does not bear the loss†, whether he be aware of the detention having ceased, or otherwise. The argument of Haneifa is that the person in question has been directed “to pay Zakāt;” and as what he pays is not in fact Zakāt, it is evident he has acted contrary to the orders of his principal, whose design in giving such orders was to discharge himself from an obligation incumbent upon him; (for it is evident that his sole view in subjecting himself to such an expense is to ward off the divine anger attending the neglect of Zakāt;)—now, as (in the case in question) this design has been fully answered by the payment of the principal himself, it can no longer be so by the pay-

* Because Zakāt has been already paid by the principal, and hence what this person pays is not properly Zakāt, but rather gratuity or alm-gift.

† That is to say, the expense attending the sacrifice, (although it be insufficient and nugatory under such a circumstance,) nevertheless falls upon the director, not upon the person directed.
ment of his substitute, and hence it follows that the substitute is discharged from his commission, whether he be aware or not, because this is a virtual discharge, and to that knowledge is not essential. With respect to the case of sacrifice under a circumstance of detention, as adduced by the two disciples, some in reply to it allege that the principle there advanced is not generally admitted, as concerning that also there is a difference of opinion. Others, again, maintain that there is an essential difference between that case, and the case under consideration. The reason they give for this difference is, that sacrifice is not incumbent upon the detained person, as he is permitted to delay it until his detention shall cease. The payment of Zakat, on the other hand, is incumbent, whence the design in appointing an agent to pay it is to discharge an obligation; and as this design is not fulfilled*, it follows that the agent has no credit for his payment, and that what he pays is a waste and destruction of the property of his principal, for which he is consequently responsible. The case of sacrifice under a circumstance of detention, therefore, is not analogous to the case now under consideration, as sacrifice in such a circumstance is merely lawful but not incumbent, and hence the sacrifice performed by the delegate is not to be regarded as a waste and destruction of the property of his principal, for which reason he is not responsible.

If one of two partners by reciprocity permit the other partner to purchase a female slave with the partnership stock, and to have carnal connexion with her, and the other act accordingly, in this case the slave appertains to the purchaser, and he is not responsible for anything. This is according to Haneesa. The two disciples allege that the other partner is entitled to take half the price of the slave; because the purchaser has paid for the slave out of the partnership stock, and consequently his partner has a right to be repaid his share in the

* As it has been already fulfilled by the payment of the principal himself.
same manner as in the purchase of victuals or clothing;—(that is, as, where one of two partners by reciprocity purchases victuals or clothing, paying the price out of the partnership stock, the other partner is entitled to take half the price from the purchaser, so also in the case in question.) The ground upon which this proceeds is that the slave in question has become the sole and exclusive property of the purchaser because of the necessity of legalizing generation; and as the price is due in proportion to the right of property, it follows that the price of the slave is solely and exclusively due from the purchaser. The argument of Haecces is that the slave has fallen into the possession of both partners, a certiori, according to what partnership requires; (for they cannot alter the requisites of partnership;) the slave, therefore, is the property of both, in the same manner as if no permission had been given: now the permission implies that the person who grants it makes a gift of his share to the purchaser; for carnal connexion is lawful only in virtue of right of property; and there is no mode of establishing that in the present case but by gift; because sale cannot be supposed on this occasion *, as the establishment of a right of property by sale would be repugnant to the requisites of a contract of partnership; for if the partner were to sell his share to the purchaser, still that share is in partnership between the two, and does not belong exclusively to the purchaser. His share, therefore, is made the property of the purchaser by gift implied in the permission granted to the purchaser to have carnal connexion with the slave. It is otherwise with respect to victuals and clothing, because as these are excepted from the contract of necessity, they are the sole property of the purchaser in virtue of the spirit of a contract of purchase and sale; he, therefore, must pay half the price thereof to his partner, because he has discharged a debt due from himself [for the above articles] out of the partnership stock, whereas, in the case under consideration the purchaser discharged a partnership debt, which was.

* Meaning a complete sale from one partner to the other.

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equally due from both partners, for the reasons already alleged.—It is to be observed that, in the case in question, the seller of the slave is at liberty to take the price from either partner, according to all our doctors, because this price is a debt incurred by an act of traffic. A contract of reciprocity, moreover, comprehends bail; and hence the price of the slave resembles (in this respect) the price of victuals or clothing.
BOOK XV.

Of WAKF, or APPROPRIATIONS*.

WAKF, in its primitive sense, means detention. In the language of the law, (according to Haneefa,) it signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall still continue, and the advantage of it go to some charitable purpose, in the manner of a loan. Some give it as the opinion of Haneefa that, as the advantage of a thing is a nonentity, and as the alms-gift of a nonentity is invalid, it follows that appropriation is utterly illegal †. It is, moreover, recorded in the Mab-foot that Haneefa held appropriation to be invalid. The most approved authorities, however, declare it to be valid according to him; but since (like a loan) it is not of an absolute nature ‡, the appropriator

* Meaning always of a pious or charitable nature. † That is, has no force in law. ‡ That is, it is not irrevocable.
ator is held to be at liberty to resume it, and the sale or gift of it is consequently lawful. According to the two disciples, *Wakf* signifies the appropriation of a particular article, in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a *property of God* by the advantage of it resulting to his creatures. —The two disciples, therefore, hold appropriation to be absolute; and, consequentially, that it cannot be resumed, or disposed of by gift or sale; and that inheritance also does not obtain with respect to it. (There is, indeed, one point upon which the disciples differ in opinion: for, according to *Aboo Yosaf*, the appropriation is absolute from the instant of its execution; whereas *Mohammed* holds it to become absolute only on the delivery of it to a *Mootwale*, or procurator *;* —as will hereafter appear.) Thus the term *Wakf*, in its literal sense, comprehends all that is mentioned both by *Hanefia* and by the two disciples. Now, such being the case, no preference can be given to the tenets of one party over that of the other, as drawn from the meaning of the term; this preference, therefore, must be given as drawn from arguments. The arguments of the two disciples upon this subject are twofold: first, when *Oniar* was desirous of bestowing in charity the lands of *Simh* the prophet said to him "You must be below the actual land itself, in order that it may not remain liable to be either sold or bestowed, and that inheritance may not bold in it:"—secondly, there is a necessity for the appropriation being absolute, in order that the merit of it may result for ever to the appropriator; and this necessity is to be answered only by the appropriator relinquishing his right in what he appropriates, and dedicating it solely to God; which dedication, as being agreeable to the law, in the same manner as that of a mosque, must therefore be made in the same mode. The arguments of *Hanefia* concerning it are

* Literally, a person endowed with authority; the term procurator is adopted by the translator, as being peculiar to the management of a religious foundation, and as distinguishing this office from that of a common agent.
various. First, the prophet has said "Property cannot, after the "decease of the proprietor, be detained from division among his heirs;"—(in other words, appropriations are not absolute, but inheritable.) Shirrāb moreover says "the prophet determined the sale of an appro-
"priation to be lawful,"—which is as much as to say that "before "the promulgation of the law by the holy Mōhammed, (on whom "be the blessing and peace of God) appropriations were absolute; "but our law has rendered them otherwise."—Secondly, the ap-
propriator’s right in the article appropriated must still continue in
force, for this reason, that it is lawful for the creatures of God to de-
rive an advantage from it, either by tillage (if it consist of land;) or by
residence, (if it consist of dwelling-houses;) for if no one had any
right in it, any acts with respect to it would be unlawful, in the same
manner as with respect to a mosque. It is, therefore, evident that a
right of property in it still continues: and it is also evident that this
right of property must rest with the appropriator, and not with any
other person, as he alone is entitled to expend the revenue arising from
it upon the objects of the appropriation, and to appoint a procurator
over it: but yet, as the term Waḳf implies giving in charity, the use
of it resembles that of a loan. Thirdly, the appropriator wishes to
apply the revenue arising from what he appropriates to some charitable
purpose in perpetuity, which is impossible, unless his right of property
in it continue. Fourthly, it is impossible that the appropriator’s
right of property in the Waḳf should be extinguished, during its exist-
ence, without its becoming the property of some other person, as the
law does not admit the idea of a thing, during its existence, going
out of the possession of one proprietor without falling into the possession
of another proprietor. Waḳf, therefore, in this particular resembles a
Sayeeba. (A Sayeeba is a female camel, set at liberty in pursuance of a
vow, (as where a man says “if I return home from this journey,” or,
“recover from this disorder a certain female camel of mine is Sayeeba”)

* Literally, running about at liberty. It may be used towards a female slave as a formula
of manumission.

which
which the owner prohibits himself from any further use of; in the
same manner as a Babeera, or female camel, which, after producing
ten colts, it was customary, in times of ignorance, then to set at
liberty, rendering it unlawful to be used or eaten.) Appropriation,
in short, resembles the Pagan act of setting a camel at liberty, in this
respect, that the thing appropriated does not go out of the right of
property of the proprietor:—in other words, if a man constitute his
quadruped a Sayeeba, still it continues his property; and so also, if a
person appropriate his lands or quadruped. It is otherwise in a case
of manumission, as that is a dereliction of property. It is otherwise also
in the case of a mosque, as that is dedicated purely to God, (whence it
is unlawful to derive any advantage from a mosque,) whereas, in a case
of appropriation, the right of the individual still continues in force, and
that, consequently is not dedicated purely to God.

It is reported by Kadoree, from Haneefa, that the appropriator's
right of property is not extinguished, except where the magistrate so
decrees, or where the appropriator himself suspends it upon his de-
cease, by declaring "When I die, this house is appropriated to such a
"purpose," (and so forth.) Aboo Yooosaff alleges that his right of
property is extinguished upon the instant of his saying "I have appro-
"priated;"—(and such also is the opinion of Shafeei,) because that is
a dereliction of property, in the same manner as manumission. Mo-
bammed says that it is not extinguished until he appoint a procurator,
and deliver it over to him: and decrees are passed upon this prin-
ciple. The reason of this is that the right of God cannot be es-
tablished in an appropriated article, but by implication, in the consign-
ment of it to his creature; (as a transfer to the Almighty, who is
himself the proprietor of all things, although it cannot be effected
actually and expressly, yet may be so dependantly;)—it therefore be-
comes subject to the rules of divine property dependantly, and conse-
quently resembles Zakht and alms-gift. With respect to what is re-
ported from Haneefa, that "the appropriator's right of property is
extinguished
“extinguished by a decree of the magistrate,”—our author remarks that this is approved doctrine, as such a decree removes all difference of opinion. With respect, however, to what is further reported from him, that “the appropriator’s right of property is extinguished in consequence of his suspending that upon his decease,” it is altogether unfounded, as his right of property cannot be extinguished but by his bestowing the use of the article for charitable purposes in perpetuity, in which case it is the same as a bequest of perpetual usufruct;—in this instance, therefore, his right of property becomes extinct, and the appropriation is absolute. It is related, in the Fatáwee Khásee Kháán, that judicial degrees are issued on the subject of appropriations only in cases where a person having appropriated a particular article, and delivered it over to a Mootwalee or procurator, is afterwards desirous of resuming it; and the latter disputes the resumption, on the plea of the appropriation being absolute; and they carry the matter before a Khásee, who decrees it to be absolute.—Concerning a case where the parties authorize any third person to decide upon this point, and he decides the appropriation to be absolute, there is a difference of opinion: it is certain, however, that such a decision is not binding upon the parties.

If a person make an appropriation upon his death-bed, Tuláwee reports that, according to Haneefa, it stands in the same predicament with a bequest after death,—(that is to say, is absolute:) contrary to an appropriation made during health, which is held by Haneefa not to be of an absolute nature. The true statement, however, is that the appropriation in question is not absolute, according to Haneefa; but it is absolute, according to the two disciples; with this distinction, however, that the appropriation here treated of is regarded as from the third of the appropriator’s estate, whereas an appropriation made during health is regarded as from the whole of the appropriator’s property.

Upon
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Upon an appropriation becoming valid, (that is, absolute, according to the various opinions of our doctors, as here stated,—according to Haneefa, in consequence of the appropriator's declaration, and the magistrate's subsequent decree,—and according to Aboo Yoosaf, by his simple declaration,—and according to Mobammed, by his declaration and delivery to a procurator,)—it passes out of the possession of the appropriator; but yet it does not become the property of any other person; because, if this were the case, it would follow that it is not in a state of detention, but may be sold in the same manner as other property; and also, because if the person or persons to whom it is assigned were to become the proprietor of it, it would follow that it could not afterwards pass out of his possession in consequence of any condition stipulated by the former proprietor,—whereas it is not so, for if a person were to appropriate a dwelling-house (for instance) to the poor of a particular tribe, and the poverty of any one of these were afterwards removed, the right in it passes to the others, which it could not do if this person were a proprietor.

The appropriation of an undefined part or portion of any thing* is lawful, according to Aboo Yoosaf. Mobammed alleges that an appropriation of this nature is unlawful; because, as actual possession is held by him to be an essential, (by the procurator taking possession of the article appropriated,) so, in the same manner that without which possession cannot take place is also an essential, namely division; and this can only be in a thing capable of division. (With respect, however, to a thing incapable of division, the appropriation of an indefinite portion of it is held to be legal by Mobammed also, as he conceives an analogy between this and a gift, or charitable donation.) The ground upon which the opinion of Aboo Yoosaf proceeds is, that the separation of an indefinite part of any thing is indispensable to the taking possession of it; but as the taking possession is not (according to him) essential in

* Such as the half, or the fourth, of a field, house, &c.

X x 2  a case
a case of appropriation, (whence the means of taking possession is also unessential,) it follows that the appropriation of an indefinite part of any thing is held by him to be lawful. From this rule, however, he excepts a mosque, or burying-ground, the appropriation of any undefined portion of which is unlawful, although it be of an indivisible nature; because the continuance of a participation in any thing is repugnant to its becoming the exclusive right of God; and also, because the present discussion supposes the place in question to be incapable of division, as being narrow and confined, whence it cannot be divided but by an alternate application of it to different purposes, such as its being applied one year to the interment of the dead, and the next year to tillage, or, at one time to prayer, and at another time to the keeping of horses, which would be singularly abominable. It is otherwise with regard to the appropriation of any thing else than a mosque or burying-ground; because the appropriation of an undefined portion of any other matter, where it is of an indivisible nature, is decreed to be lawful by all our doctors, as it may be hired, (for instance,) and the parties may divide the rent.

Is a person appropriate land*, and it should afterwards appear that an indefinite portion of the land (such as a fourth) was the property of another person, the appropriation is void with respect to the remainder: also, according to Mohammed, because, in this instance, the separation into indefinite divisions is associated with the appropriation, which is consequently invalid, in the same manner as a gift. It is otherwise where a donor resumes a part of his gift; or where the heirs of a donor who had made the gift upon his death-bed resume two thirds of his gift after his decease: for if a person, upon his death-bed, make a gift or appropriation of the whole of his pro-

* Arab. al-khāṣṣ; meaning any immovable property whatever, whether lands or tenements. Zīmān is the term in the Persian version, and the translator therefore renders it land throughout.
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Property, and the heirs resume two thirds, still the gift or appropriation are not rendered void, because, in this instance, the separation into indefinite divisions is supererogation, and not associated; that is, at the time of the gift or appropriation the article was not divided into undefined portions, but became so afterwards. If, however, it should appear that another is entitled to a portion of the land, of a specific and not an undefined nature in this case the appropriation is not void with respect to the remainder, because of no indefinite division existing in this instance: and gifts and charitable donations are also subject to the same analogy.

An appropriation is not complete, according to Hanefia and Mobammed, unless the appropriator define its ultimate application to objects not liable to become extinct; as where, for instance, a man designates its application ultimately to the use of the poor, (by saying, "I appropriate this to such a person, and after him to the poor,")—because these never become extinct. Abū Yūsuf maintains that where the appropriator names an object liable to termination (as if he were to say "I have appropriated this to Zeyd,") it is valid, and after the death of Zeyd it passes, as an appropriation, to the poor, although the appropriator had not named them. The argument of Hanefia and Mobammed upon this point is that appropriation requires an extinction of right of property, without a transfer of it; and as this, like manumission, is of a perpetual nature, it follows that if a thing be appropriated to a finite object, the appropriation is imperfect; whence it is that an appropriation is rendered void by making it temporary, in the same manner as a sale is made void by limiting its duration.

Objection.—This argument of Hanefia, that the right of property becomes extinct without "a transfer of it," contradicts what was formerly said, that, "according to Hanefia, in appropriation the "right of property is not extinguished."

Reply.—There are two reports from Hanefia upon this subject. One of them is that which was before stated. Another makes the opinion
opinion of Haneefa to agree with that of Mohammed. Some also allege, in reply to this objection, that what is here advanced from him proceeds upon a supposition of the magistrate having decreed the appropriation to be absolute, under which circumstance it passes out of the possession of the appropriator according to all our doctors.

The argument of Aboo Yoosef is that the design of the appropriator is to perform an act of piety acceptable to God; and this is fully answered in either case; because piety on some occasions may consist in the appropriation of an article to a terminable object,—and it may at other times consist in the appropriation of a thing to an interminable object;—the appropriation, therefore, is equally valid in both instances. Now some say that perpetuity is essential to it. Aboo Yoosef, however, does not confine the mention of perpetuity as an essential, as the terms appropriation or charity do clearly argue thus much, according to what was before advanced, that "Appropriation, like marriage, signifies an extinction of a right of property without a "transfer of that right." According to Mohammed, on the other hand, the mention of perpetuity is an essential; because appropriation is a charitable donation of the use of a thing, or of actual product; and as those are sometimes temporary and sometimes perpetual, the general mention of it cannot be understood as a perpetuation: it is therefore indispensable that perpetuity be expressly mentioned.

The appropriation of land is lawful; because several of the prophet’s companions appropriated their lands: but the appropriation of moveable property is altogether unlawful, whether purposely, or as a dependant. This is the opinion of Haneefa. Aboo Yoosef alleges that if a person appropriate lands, together with the cattle and slaves attached to them, it is lawful; and the same of all instruments of husbandry; because those are all dependants of the soil in the fulfilment of the design; the appropriation of these, therefore, as dependants of the land, is lawful; for many things are admissible dependantly, which are not so positively; thus the sale of wine (for instance) by itself
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It is unlawful, whereas, along with land it is lawful,—and in the same manner the appropriation of the beam of a house is unlawful, whereas along with the house it is clearly legal. The opinion of Mohammed, also, accords with that of Aboo Yoosef in this point, because as he holds the appropriation of moveables to be lawful merely in virtue of the appropriator's declaration, it follows that he admits the appropriation of them as a dependant to be legal a fortiori. Mohammed is also of opinion that if a person appropriate borjes, camels, or arms, to carry on war against infidels, it is lawful;—in which opinion, (as lawyers report,) Aboo Yoosef coincides with him. This proceeds upon a favourable construction; for analogy would suggest that such an appropriation is unlawful, for the reasons already alleged. The reason for a more favourable construction, however, is that the prophet once said "Khaliid has appropriated his horse and armour in the way of God;—and Telliha has appropriated his horse in the way of God."—According to Mohammed, the appropriation is lawful of all moveables, the appropriation of which is commonly practiced, such as spades, shovels, axes, saws, planks, coffins (and their appendages) stone or braced vessels, and books: but according to Aboo Yoosef it is unlawful; because analogy cannot be abandoned but on the express authority of the sacred writings; and as borjes and armour only are there mentioned, the admission must be restricted accordingly. Mohammed says that analogy may be abandoned on account of utility, (as in arts or manufactures, for instance;) and utility exists in the articles in question. It is, moreover, recorded of Naifer Ibn Tebee that he appropriated his books, as conceiving that to be analogous to the appropriation of a Koran: (in other words, as the appropriation of a Koran is lawful, so also is the appropriation of any other book :) and this is approved, because other books as well as Korans are kept for the purpose of reading and instruction. Most lawyers have passed decrees according to the opinion of Mohammed in this particular. It is written in the Fathee-Khaee-Khøn that there is a difference of opinion.

* That is, in waging war against the infidels.
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nion between the Elders concerning the appropriation of books.—Fikke-Aboo-al-Seyb, however, holds it to be lawful; and decrees pass accordingly.

It is not lawful to appropriate moveables, the appropriation of which is unusual or uncommon, according to our doctors. Shafei alleges that the appropriation is lawful of every thing which admits of the use without a destruction of the subject, or of every thing lawfully saleable, because such articles as admit usufruct resemble land, horses, or arms. The argument of our doctors is that appropriation requires perpetuity, according to what has been already stated; and this cannot exist in moveables, since these are not of a lasting nature: analogy therefore suggests that the appropriation of moveables in general is unlawful:—it is admitted, however, in some articles, (although contrary to analogy,) because of the traditions already recorded,—and in other articles (such as axes, saws, and so forth,) because of utility: but the appropriation of furniture, clothes, and slaves, is unlawful, as being contrary to the suggestions of analogy, because they have neither tradition nor utility to support the legality, and therefore resemble dirms and deenars. With respect to what Shafei has advanced that "those articles are analogous to lands, horses, and armour," we reply that no analogy can be admitted between them; because land endures perpetually; and horses and armour are instruments of war against infidels, which is among the highest religious obligations, whence the property of piety exists in the appropriation of these articles in a much stronger degree than in the appropriation of other moveables;—the analogy, therefore, is not allowed.

Upon an appropriation becoming valid and absolute, the sale or transfer of the thing appropriated is unlawful, according to all lawyers: the transfer is unlawful, because of a saying of the prophet, "Be "flow the actual land itself in charity, in such a manner that "it shall no longer be saleable nor inheritable. An appropriation, there-
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fore, is incapable of sale or transfer, upon becoming valid and absolute. If, however, the appropriation consist of an undefined part of any thing, and (in conformity with the doctrine of Aboo Yoosuf) become absolute, and the partner require it to be divided off, such division is lawful; because division implies separation and distinction. In all things, indeed, except those which are computable by weight or measure, exchange chiefly prevails: in appropriation, however, a superior regard is had to separation and distinction, in order that the appropriation may be valid: the dividing it off, therefore, is not to be regarded in the light of a sale or transfer, and is consequently legal.

If a person appropriate his share in partnership lands, he must divide it off and detach it from those of his partner; because he alone has authority to do this during his life, or his executor, after his decease. If, on the other hand, a person appropriate the half (for instance) of his own land, in this case the Khasse is to divide it off, and alienate it from the appropriator:—(or the appropriator may sell one half (for instance) of his land to any other person, and then divide off the portion appropriated and alienate it from that person, and afterwards repurchase the remainder from the purchaser *:)—for the appropriator is not at liberty himself to divide off the portion of land which he has appropriated, or to separate it from that portion which he has not appropriated, because one person is incapable of himself making a division and thus giving to himself, since division can take place only between two.

If, in dividing off appropriated land, any balance occurs, (as where a person appropriates his share in partnership land, and he and his partner accordingly make a division of the land, and the share of one of them proves defective, and the other makes up the difference by a payment in money,) it is unlawful, where this balance is paid to the

* This is merely a device, for the purpose of obviating legal objections.
appropriator, as the sale of an appropriated article is unlawful: but if it is the appropriator who pays the balance, it is lawful, and what he gets in return is his property;—if, therefore, he be desirous of having it divided off from the part he has appropriated, he must refer the matter to the Kâzee, in order that he may separate the portion appropriated from what he [the appropriator] gets in return for the balance.

It is incumbent that the income of an appropriation be in the first instance expended in the repairs* of it, whether the appropriator may have stipulated this or not; because his design was that the income should serve as a perpetual fund; and as a perpetual income cannot be drawn from the article appropriated unless it be preserved in continual repair, that is a necessary attendant upon it; and also, because all acquisition must be attended with expence,—(in other words, he who enjoys the profit must also bear the loss.)—In short, upon the person to whom the advantage of a thing accrues must rest the inconveniences attending it; and such being the case, it follows that the repair of an appropriation resembles the subsistence of a slave whose service has been bequeathed to any one, for the subsistence of such slave rests upon the legatee of usufruct. If, therefore, the appropriation be to the poor, and the requisition of repairs from them be impossible, (because of the appropriation itself being their sole dependance,) the repairs must be afforded out of the income arising from it. If, however, the appropriation be to some particular person, in the first instance, and after him to the poor, the repairs are in this case due out of that person’s property, (but he is at liberty to furnish the means out of whatever part of his property he chooses,) during his life; and in this case no part of the income is laid out in repairs, be-

* Arab. Tanmer: meaning, the rendering a place habitable, by cultivation, if it be land, or by rebuilding, &c. if it be house.
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cause the requisition from the person who enjoys the benefit is in such instance possible, since he is specified and known. It is to be understood, however, that the repairs are to be made out of the property, only in such a degree as may be requisite to preserve it in the state in which it was appropriated: if, also, it fall to ruin [or run waste] it is to be restored to the state in which it was appropriated, because the income of it was made over to others, and was to be derived from it as in that state, and not as in any superior state; and as such income is the right of him to whose use it is appropriated, it is not lawful, without his permission, to expend it in repairs to a degree beyond the original state of the appropriation. Some are also of opinion that the same rule obtains where the appropriation is to the poor at large, and not to any particular individual;—that is to say, the income is not to be expended in repairs beyond the original state of the appropriation. Others allege that this is lawful. The former, however, is the better opinion; because the income arising from an appropriation is expended in the repairs of it only from the necessity of preserving it as it was originally, and there is no necessity for repairs beyond what may suffice for this purpose.

If a person appropriate a house, with this condition, that his son or any other person shall reside therein during life, the repairs are incumbent upon him who has the right to inhabit it, because he who enjoys the profit must also bear the loss, (as has been already stated,) and the case consequently resembles the subsistence of a slave whose service has been bequeathed to any person by his master. If, therefore, the person in question refuse or neglect to repair the house, or be incapable of so doing, from poverty, the magistrate must in this case let it, and provide for the repairs out of the rent; and must return it to him upon the repairs being completed; because, by this means attention is paid to the rights both of the appropriator and of the person to whose use it is appropriated, since, if it were not duly repaired, the tenement would be lost, and the rights of both would be consequently destroyed;

The repairs of a house are incumbent upon the individual occupant pro tantum; or if he neglect this, the magistrate must let the house, and furnish the repairs out of the rent:
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destroyed; the repair must therefore be provided out of the rent, in order that the rights of the parties may be secured. It is to be observed, however, that where the person to whom the article is appropriated refuses to make the repairs, he is not to be compelled, because the repairs would be at his loss, his case being the same as that of the proprietor of the seed, in a contract of cultivation, who, if he refuse to cultivate the land, is not liable to any compulsion, as the cultivation cannot be effected without the loss of his property, namely the Seed.

Objection.—Upon the occupant refusing to make the repairs, it would appear that the magistrate should not return the house to him after the repairs are completed; because, as he thus afflicted to the destruction of his right, any attention to that is unnecessary.

Reply.—The refusal of the occupant to repair the house does not argue his assent to the destruction of his right, as there is a doubt with respect to the motive of his refusal, since it is possible, that he has refused merely on account of the expense to his property; his right, therefore, is not destroyed, because of the doubt.

—It is proper to observe that it is not lawful for the occupant to let the house, since he is not the proprietor. The magistrate, on the contrary, possesses a general power, as being the agent of the community.

Such buildings or materials of an appropriation as become damaged or useless, must be employed by the magistrate in the repairs of it, where necessary; and if these be not immediately necessary, he must keep the articles in question until such time as occasion offers, when he must employ them in making the necessary repairs; as repairs are required from time to time, in order that the appropriation may be continually preserved, and the design of the appropriator answered. If the materials of the decayed place be damaged so much as to render it impracticable to employ them in the repairs, (by the timbers being broken, for instance,) it is incumbent on the magistrate to sell them, and expend the price in such repairs: but it is not lawful for him
him to give them to the occupants, because the timbers, and so forth, are constituent parts of the actual appropriation, in which no person has any right,—their right being merely to the use, and not to the thing itself.

If a person appropriate an house (for instance,) with a reserve of the income to his own use during life, and after his death to go to the poor, this is lawful, according to Aboo Yoosaf. Our author remarks that this is deemed lawful by Aboo Yoosaf; but that, judging from the opinion of Mohammed, it is unlawful; and such is the opinion of Hittal Khase and Sbaifi respecting it. Some allege that the difference between Aboo Yoosaf and Mohammed upon this point is occasioned by their difference of opinion concerning the necessity of consignment; for, according to Mohammed, the consignment of the appropriation to the Mootvallee, or procurator, is an essential, and consequently it is unlawful for the appropriator to reserve the income to himself: according to Aboo Yoosaf, on the contrary, this is lawful, as he does not hold the consignment to a procurator to be an essential. Others, again, allege that their difference upon this point is not occasioned by their difference upon any other point, but is merely an original difference of opinion with respect to the present case itself. This difference of opinion between the disciples subsists in every case, that is, whether the appropriator reserve the whole or a part only of the income to himself during life, and after his death to go to the poor. If, also, the appropriator reserve the whole or part of the income from his appropriation to the use of his Am-Walids, or his Modabbiir, during their lives, and after their deaths definite it to the poor; some say that this is lawful according to all our doctors. Others, however, maintain that, in this instance also, the above difference of opinion obtains; and this is approved, because his reserving the income to their use for their lives is equivalent to his reserving it to his own use. The argument in favour of Mohammed's opinion is that appropriation is a gratuitous act, effected in the transfer of a property to God, by delivering over
over the thing appropriated to a Maorunak or procurator; (for a transfer to the Almighty, who is himself the proprietor of all things, although it cannot be effected actually and expressly, yet may be so dependantly;) and the reserving of the whole or part of the income arising from it to his own use is repugnant to this, because, the delivery cannot be made to himself. — The case, therefore, resembles the reserve of an alms-gift, — and also the reserve of a part of a mosque: — in other words, if a person were to assign certain property to the poor, stipulating at the same time, that his right in part of it should continue, the alms under such a condition are unlawful; — or, if the founder of a mosque stipulate that his right in a part of the mosque shall continue, this opposes the legality of the whole foundation: — and so also in the case in question. The arguments of Aboe Toufik upon this point are threefold. First, the prophet was accustomed himself to consume the revenue arising from what he had appropriated. Now the use would not at any rate be lawful, unless the appropriator had previously stipulated it for himself at the time of appropriation; the prophet consuming the revenue, therefore, argues that it is lawful for an appropriator to reserve that to his own use. Secondly, appropriation implies the owner of a property destroying his right in that property by a transfer of it to God, under some pious intention, (as was formerly stated;) and such being the case, where an appropriator reserves a part or the whole of the revenue arising from what he appropriates to his own use, it follows that, in so doing, he reserves to himself a thing which is the property of God, (not that he reserves to himself what is his own;) and a person’s reserving to himself a thing which is the property of God is lawful; thus, if a man build a caravansera, or construct a reservoir, or give ground for a burial-place, reserving to himself the right of residing in the caravansera, or of drinking water out of the reservoir, or of interment in the burial-place, it is lawful; and so likewise in the case in question. — Thirdly, the design, in appropriation, is the performance of an act of piety: and piety is consistent with the circumstance of a person reserving the revenue to his own use,
use, as the prophet has said "A man giving a subsistence to himself is giving alms."

If the appropriator reserve to himself a right of changing the lands he appropriates for any other lands, at pleasure, it is lawful, according to Aboo Yosaf. Mohammed maintains that the appropriation itself is valid, but that the condition reserved is void; because the condition does not prevent an extinction of right of property; and the appropriation is consequently complete, because of the extinction of this right; but the condition, as being invalid, is void, in the same manner as the reserve of a right of change, in the foundation of a mosque, is void.

If the appropriator reserve to himself a right of option with respect to his appropriation, for three days, by saying (for instance) "I appropriate this house to such and such purposes, with this condition, that I shall have a right of option for three days;" according to Aboo Yosaf both the appropriation and the condition are lawful. According to Mohammed, on the contrary, the appropriation is null. Their difference of opinion upon this point originates in the difference of their doctrine respecting a reserve of the revenue of an appropriation to the use of the appropriator: for as, according to Aboo Yosaf, an appropriator may lawfully reserve to his own use, during life, the revenue arising from what he appropriates, it follows that he deems it lawful that the appropriator reserve a right of option for three days, for the purpose of consideration. Mohammed, on the other hand, holds that the possession of a Mootwalee or procurator, is an essential, and as a reserve of option prevents possession from being

* As where (for instance) a man appropriates the whole of his property, thus reducing himself to poverty, in which case the charity is as effectual with respect to him (where he necessarily reserves a sufficiency from the product for his own subsistence) as with respect to any other pauper.
completely taken, it follows that, according to him, the appropriation is void. An appropriation, moreover, is not complete without the will of the appropriator; and as, where he makes a reserve of option, this cannot be ascertained, it follows that the appropriation is void; and being once void, its validity cannot afterwards be restored by the condition ceasing to operate.

If a person appropriate land, with a reserve of his authority over it, it is lawful, according to Aboo Yosef.—Our author remarks that Kadores has expressly declared this. Such also is the doctrine of Hilal: and it is, indeed, the generally received opinion. Hildal particularly mentions it in treating of appropriations. Some doctors allege, that if the appropriator particularly stipulate a reservation of authority over the lands, this authority remains to him accordingly; but not unless it be particularly stipulated by him. Our modern doctors, however, consider it as very doubtful whether this be an opinion of Mobammed, because it is a tenet of his that delivery into the hands of a procurator is essential to the validity of an appropriation; and where such delivery takes place, the appropriator can no longer possess any authority over it. According to the tenets of Aboo Yosef, on the other hand, the delivery to a procurator is not an essential, and consequently the authority remains with the appropriator, although he should not have so stipulated. What was mentioned above, concerning the opinion of Mobammed, that "where the delivery to a procurator takes place, the appropriator can no longer retain any authority over the appropriation," applies to a case where the appropriator had not stipulated any reservation of authority to himself at the first;—for if he had stipulated this at the time of making the appropriation, his authority is not rendered void by delivery to a procurator; because as his authority continues where he stipulates a right of authority in behalf of another, it follows that, where he stipulates it in behalf of himself, it continues a fortiori.—The arguments in support of the opinion of Aboo Yosef; (which is the most generally
generally received doctrine,) are twofold. First, the procurator enjoys his authority, only on behalf of the appriator, in consequence of his reservation; and it is impossible that the appriator himself should not be possessed of any authority, at the same time that another person enjoys an authority held on his behalf.—Secondly, the appriator stands in a nearer relation to what he appropriates than any other person, and it is consequently proper that he possesses an authority over it; in the same manner as where a person builds a mosque, in which case the business of repairing it, as well as the appointment of all the officers, &c. appertains solely to him; or as where a person emancipates a slave, in which case the Wills appertains solely to him, as he stands in a nearer relation to the slave than any other person.

If, however, the appriator who makes this condition, (namely, a reservation of authority to himself,) be a person of infamous character and unworthy of confidence, the magistrate may take the appropriation out of his hands, from a regard to the interest of the poor; in the same manner as he is at liberty to suspend the powers of an executor, where he happens to be a person of bad character, from a regard to the interest of the orphans. If, also, an appriator constitute another the Moorwadies or procurator, declaring that “the sovereign shall not take the appropriation out of his charge,” yet these are at liberty to take it from him, where he happens to be a person of bad character;—because, as such a declaration is repugnant to the precepts of the law, it is consequently void.

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If a person build a mosque, his right of property in it is not extinguished so long as he does not separate it from the rest of his property,
property, or give general admission to people to come and worship in it; but as soon as the people in general, or a single person, say their prayers in it, his right of property is extinguished, according to Hanéefa. The utter separation of it from the rest of the appropriator's property is indispensable, for this reason, that the mosque cannot become dedicated solely to God until that be effected; and the performance of prayer in it is a condition; because, as a confisgment (according to Hanéefa and Mohammed) is indispensable, it follows that confisgment is requisite in this way, since confisgment must be carried into execution in whatever way may be proper to the nature of the appropriation, and the mode of confisgment proper to a mosque is public worship; or, the performance of prayer is a condition, because as it cannot be conceived that God himself should take possession of a mosque, it follows that that which is the design must stand as a substitute for the taking possession of it. It is proper in this place to observe that if a single person say his prayers in the mosque it suffices, (according to one report from Hanéefa and Mohammed;) because, as it is impossible that all men should perform their prayers in it, the circumstance of a single individual performing his prayers is the condition. It is also reported, from Hanéefa and Mohammed, that the performance of prayer by a whole congregation is a necessary condition, because a mosque is founded with a view to public worship. Aboo Yoojaf maintains that the founder's right of property is destroyed immediately upon his saying "I constitute this a mosque!"—because he does not hold confisgment to be a condition, since according to him appropriation signifies a relinquishment of rights on the part of the individual; the thing appropriated, therefore, appertains solely to God merely in consequence of the right of the individual ceasing,—as was before demonstrated.

Cases of a mosque, as connected with a dwelling place.

If a person erect a building of two stories, making the under story a mosque, and the upper story a dwelling, or vice versa,—with the door of the mosque towards the public road, and detach the mosque
mosque from his own property [in the manner before described,] he is nevertheless at liberty to sell it;—or, if he die, the mosque is an inheritance;—as the mosque does not, in this instance, appertain solely to God, because of the individual's right in it still subsisting. This, however, is only where the dwelling has not been constructed merely for the purposes of the mosque; for if it have been constructed for the purposes of the mosque, (as in the great mosque at Jerusalem,) the appropriation is absolute. Hasan reports, from Hasefa, that if the lower story be a mosque, and the upper story a dwelling, the former continues for ever a mosque; because a mosque is one of those things which are designed to continue in perpetuity, and an under story answers this purpose better than an upper story. The reverse of this is reported from Mubammed, because reverence is indispensably due to a mosque, and where an upper story is constructed over a mosque, for the purpose either of dwelling in, or of letting out to hire, this reverence cannot be observed. It is recorded, also, that when Aboo Jofesf went to Bagdad, and beheld the narrow and crowded condition of the place, he held the appropriation to be lawful and absolute in either case,—that is, whether the mosque be in the lower story and the dwelling in the upper, or vice versa;—but this he admitted out of necessity. The same is recorded of Mubannasd, when he went to Râi*, and for the same reason.

If a person convert the center hall of his house into a mosque, giving general admission into it, still it does not stand as a mosque, but remains saleable and inheritable;—because a mosque is a place in which no person possesses any right of obstruction;—and wherever a man has such a right with respect to the surrounding parts, the same must necessarily affect the place inclosed in them; this place, therefore, cannot be a mosque:—besides, it is necessarily a thoroughfare for the family, and consequently does not appertain solely to God. It

* The capital of Irâ, (the ancient Chaldea.)
is reported from Mohammed that the center hall of a house, thus constituted a mosque, cannot afterwards be given away, sold, or inherited: he consequently considers it to stand as a mosque;—and Aboo Yoosaf is of the same opinion;—because, as the person in question was desirous that this place should become a mosque, and as it cannot become so without a road, or entrance into it, the road is included without specification, in the same manner as in a case of hire.

If a person appropriate ground for the purpose of erecting a mosque, he cannot afterwards resume or sell it, neither can it be inherited, because this ground is altogether alienated from the right of the individual, and appertains solely to God. The reason of this is that all things whatever are originally the property of the Almighty: when, therefore, the individual relinquishes his right in the ground, it reverts to its original state, and his power over it terminates; in the same manner as a master’s power over a slave terminates in consequence of manumission, and cannot be resumed.

If the place in which a mosque is situated should become deserted or uninhabited, insomuch that there is no farther use for the mosque, no person coming to worship therein, still it continues to stand as a mosque (according to Aboo Yoosaf,) and does not revert to the founder; because, as he had put it out of his own possession, it cannot again become his property. Mohammed alleges that the mosque again becomes the property of the founder, or of his heirs, in case of his decease; because he had erected it for the purpose of public worship; and as that has ceased, the mosque is in the same predicament with the materials for building a mosque: In other words, if there be no farther occasion for materials (such as bricks and so forth) designed for the erection of a mosque, they revert to the founder, and so also in the case in question. This, however, is a conclusion which does not accord with the doctrine of Aboo Yoosaf, for he holds that where there is no farther occasion for those materials in the construction of this mosque, they must be carried to another.
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If a person construct a reservoir for public use, or a *caravanferra* for travellers, or erect a house upon the infidel frontiers for the accommodation of the Mussulman warriors in their excursions, (which is termed a *Ribat,* or dedicate ground as a burying-place, his right of property therein is not extinguished until the magistrate issue a decree to that effect;—because no termination of the proprietors right takes place in this instance, insomuch that he may still lawfully continue to use those things, (by residing in the house or *Ribat,* or drinking water out of the reservoir, or interring in the burial-place.) It is therefore requisite either that the magistrate issue a decree, in order to complete the alienation, or that the founder himself refer the appropriation to his decease, in order that it may stand as a *bequest,* and become absolute upon that event;—in the same manner as in the case of an appropriation made to the use of the poor. It is otherwise in the case of a mosque, because in that instance no right of usufruct remains to the founder, as the mosque appertains solely to God independent of any magisterial decree. All that is here advanced is according to *Hanefia.* *Abû Yoosaf* is of opinion that the person's right of property ceases on the infant of his saying "I have made "this for such and such purposes," (of residence, interment, or so forth,) because with him it is a rule that appropriation is absolute, and that confisment is not a condition of it. *Mohammed* maintains that as soon as people drink water out of the reservoir, or enter the *Caravanferra,* or warriors take up their residence in the *Ribat,* or interment takes place in the burying-ground, the proprietor's right is extinguished; because confisment (which he holds to be a condition) is established by such acts, as the confisment of any thing must be made in the mode proper to that thing. It is sufficient also, (according to him,) if these acts be performed by, or with respect to, only a single individual; because as the whole community cannot engage in those acts, regard must necessarily be had to them as performed in any single instance. Wells and fountains are also subject to the same rule.

Ir,
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Ir, in the cases last recited, the founder confign the article to a Moorwale or procurator, such confignment is approved, because the procurator is in the character of a deputy, and the act of the deputy is the act of the principal. With respect to a mosque, indeed, some allege that the delivery of it to a procurator is not a complete confignment, because there is no business for a procurator in a mosque. Others again say that confignment is established, as it is necessary, in a mosque, that there be some person to keep it in order, and lock up the doors; the confignment of a mosque, therefore, to a procurator, is approved. Some also assert that a burying-ground is considered in the same light as a mosque in this particular, because the procurator of a burying-ground is an office not in use. Others, again, maintain that it resembles a reservoir, or caravansera; if, therefore, it be delivered to a procurator, confignment is established; because such an appointment is valid although it be contrary to general usage.

If a man, having a house in Mecca, appropriate it to the accommodation of pilgrims, or, if a person, having a house in any other place, appropriate it to the accommodation of the poor, or mendicants, or, having a house upon the frontiers, dedicate it to the accommodation of the Mussulman warriors and their cattle, or dedicate the revenue from his lands to the support of the warriors in the way of God*, and make over or confign those houses or lands to the prince, (who is impowered to act in those particulars,) such confignment is lawful. If, therefore, the person in question be afterwards desirous of revoking his appropriation, he cannot lawfully do so, for the reasons before alleged. The revenue arising from the lands, however, is lawful to the poor only, and not to the rich—but the use of any of the other articles (such as residing in the caravansera, or drinking water from the well, fountain, or reservoir,) are lawful to rich and poor alike.

* That is, engaged in war against the infidels.
The reasons of this distinction are twofold. First, people in general, in the appropriation of a revenue, intend only the relief of the needy, whereas, in that of the other articles, the accommodation of rich and poor is equally intended. Secondly, the articles of drink and lodging are requisite, equally, to the rich and to the poor; but in the article of pecuniary assistance the rich are not necessitous, on account of their wealth, whereas the poor are necessitous.
BOOK XVI.

Of SALE.

EEYA, or sale, in the language of the law signifies an exchange of property for property with the mutual consent of the parties. Shirra signifies purchase. The seller is termed Bayee; the purchaser Mosbterree; the thing sold Mooba; and the price Simmin.

Chap. I. Introductory.
Chap. II. Of Optional Conditions.
Chap. III. Of Option of Inspection.
Chap. IV. Of Option of Defect.
Chap. V. Of invalid, null, and abominable Sales.
Chap. VI. Of Akba, or the dissolution of Sales.
Chap. VII. Of Sales of Profit and of Friendship.
Chap. VIII. Of Ribba, or Usury.
Chap. IX. Of Rights and Appendages.
Chap. X. Of Claims of Right.
Chap. XI. Of Simim Sales.
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**Sale** is completed by declaration and acceptance, the speech of the first speaker, of the contracting parties, being termed the declaration, and that of the last speaker the acceptance. Thus, if Zeid should first say to Omar "I have sold to you a particular article belonging to me for ten dirms," and Omar should then say "I have bought that article belonging to you for the said price," the speech of Zeid is in that case termed the declaration, and that of Omar the acceptance. If, on the contrary, Omar should first say to Zeid "I have purchased a particular article belonging to you for ten dirms," and Zeid should then say "I have sold the same to you for the said price," the speech of Omar is in this case termed the declaration, and that of Zeid the acceptance.

It is a necessary condition that the declaration and acceptance be expressed in the *present* or *preterite* tense indicative; for if either be expressed in the *imperative* or *future* the contract is incomplete. Thus, if the seller should say to the purchaser, "Buy this article belonging to me for ten dirms," and the purchaser reply, "I have bought the said article for ten dirms,"—or, if the seller should say "I have sold this article to you for ten dirms," and the purchaser reply "I will purchase the said article for ten dirms,"—in neither case would the sale be binding.

It is to be observed that in the same manner as a sale is established by the words, "I have bought," or "I have sold," so also is it established by any other words expressive of the same meaning;—as if either of the parties, for instance, should say "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 had to the spirit of the contract, and the particular use of the words bought and sold is not required; whence it is that sale may be contracted simply by a *Tahâa* 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 the interposition of speech. Some have alleged...
alleged that this mode of sale by a mutual surrender is valid with relation to things of small value; but not otherwise. It is, however, certain that sale by a mutual surrender is valid in every case, as it establishes the mutual consent of the parties.

Objection. It would appear that the sale, as recited above to be rendered complete by the words "Take this," &c. is not valid, as it was before declared to be a necessary condition that both declaration and acceptance should be expressed in the present or preterite tense indicative, and neither of them in the imperative.

Reply.—In this case the words “Take,” &c. are not of themselves a declaration, but merely indicate the existence of a declaration in the preterite tense;—as if the seller had first said “I have sold this thing,” and were then to add “Take this,” &c. for the command is consequent to the declaration.

If either of the parties make a declaration, it is in the power of the other to withhold his acceptance or refusal until the breaking up of the meeting; and this power is termed the option of acceptance.

The reason of this is that if such a power did exist in one of the parties, it must necessarily follow that the sale would take effect without his consent. It is to be observed, in this instance, that as the declaration is not of itself efficient to complete the contract, the person making the declaration is at liberty to recede from it.

If either the buyer or seller should send a letter or a message to the other, that other has the power of suspending his acceptance or refusal until he leave the place or meeting where he received such message or letter.

If the purchaser make a declaration of his purchase of merchandise at a particular price, the seller is not in that case entitled to construe his acceptance as limited to a part of the merchandise only at a rate

* Arab. Ebiir-al-Kabul.
rate proportionate to the declaration for the whole;—and, in the same manner, if a seller should make a similar declaration, the purchaser is not at liberty to construe his purchase after that manner;—because this is a deviation from the terms proffered; and also because the declarer has not expressed his assent thereto. If, however, the person who makes the declaration should specify a particular rate, opposed to particular parts of the merchandise, the acceptance may be limited. Thus if a person should say “I will sell this heap of grain for ten dirms,” the purchaser, if he declare his acceptance, is not in that case at liberty to limit his purchase to half the grain for five dirms; whereas, if the seller should say “I will sell this grain at the rate of one man for a dirm,” the purchaser, after declaring his acceptance, may limit his purchase to what quantity he pleases.

If either a seller or purchaser make a declaration, and one of the parties quit the place before any acceptance be expressed, the declaration so made is void.

When the declaration and acceptance are absolutely expressed, without any stipulations, the sale becomes binding, and neither party has the power of retracting unless in case of a defect in the goods, or their not having been inspected. According to Shafi‘i, each of the parties possesses the option of the meeting*,—(that is, they are each at liberty to retract until the meeting break up and a separation take place,) because of a saying recorded of the prophet “The buyer and seller have each an option until they separate.” Our doctors argue that the dissolution of the contract, after being confirmed by declaration and acceptance, is an injury to the right of one of the parties; and that the tradition quoted by Shafi‘i alludes to the option of acceptance, as already explained.

If, at the time of concluding a contract of sale, either the merchandise or the price, or both, be present and alluded to in it, (as if

the seller should say "I have sold this wheat to you for these dirms," or the purchaser, "With these dirms now present I have purchased such an article belonging to you," in this case the sale is valid, although neither the quantity of wheat, (such as "so many loads," for instance,) nor the amount of the money (such as "so many dirms") be mentioned; for the reference made to them is sufficient to ascertain the subjects of the contract, and does not leave room for any dispute.

If, at the time of concluding the contract, the dirms or deenârs be not present, so as to admit of being referred to; in this case the general mention of them, without a specification of the numbers or of the quality, is not valid; because the delivery of them on the part of the purchaser is requisite; and as the general mention of them would occasion a contention between the purchaser and seller, (the one wishing to give a few and of a bad quality, the other insisting on a greater number and a better quality,) the delivery would therefore become impracticable. (It is here proper to observe that every species of uncertainty which may prove an occasion of contention is invalid, in a contract of sale.)

A sale is valid either for ready money, or for a future payment, provided the period be fixed; because of the words of the Koran, "A Bolute sale is lawful;" and also, because there is a tradition of the prophet having purchased a garment from a Jew, and promising to pay the price at a fixed future period, pledging his coat of mail for the performance of it. It is indispensably requisite, however, that the period of payment be fixed, as an uncertainty in this respect might occasion a contention, and be preventive of its execution, since the seller would naturally demand the payment of the price soon, and the buyer would desire to defer it.

A sale, stipulating a payment of dirms in an absolute manner,
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(as if a person should say "I have sold this for ten dirms," is valid; provided however that all the different species of dirms be of the same value: and in that case the purchaser is entitled to pay the price in any of the species he pleases.—If the different species of dirms be of different value, the sale then repts upon that which is most generally in use. If, however, the different species be of different values, and it be impossible to ascertain the one of most common use, the absolute expression of dirms in this case renders the sale void, because the price being thereby rendered uncertain, a contention must necessarily ensue: still, however, if the parties choose to remove the cause of contention by voluntarily fixing the rate, the sale is valid.

It is lawful to sell wheat, or other kinds of grain, either by means of measures of capacity, or by conjecture*, provided it be in exchange for a different kind of grain; because the prophet has said, "Sell any thing that is in exchange for a different kind, in whatsoever manner you please and without regard to the quality;" and also, because the uncertainty in this case proves no bar to its delivery. It is not lawful, however, to sell grain in exchange for the same kind by conjecture, because this is of an usurious nature.

It is lawful, in sale, to use the measure of a particular vessel, of which the exact capacity may not be ascertained,—or the weight of a particular stone, the exact weight of which is not ascertained;—because the uncertainty in this case cannot be productive of contention, since either of these instruments of estimation may be used and the delivery take place immediately after; and it is not probable that the vessel or stone should be lost or destroyed in the interval between the measurement and the delivery, the only case in which a contention could arise. A measurement of this kind, however, is not allowed in Silliam sales (that is, where the price is advanced, and the merchandise delivered)

* Meaning, by Estimate.
delivered afterwards,) because in such case there is a probability of the
vessel or stone being lost or destroyed during the long interval that
takes place between the conclusion of the contract and the delivery of
the goods; in which case, as the parties had no other criterion (during
the existence of the stone or vessel) than their eye-sight to judge from,
a contention might afterwards arise as to the size or weight of the
stone or vessel.

If a person sell a heap of grain, by declaring "I have sold this
heap at the rate of one dirh for every Kafeez," in this case (ac-
cording to Haneef) the sale takes place in one Kafeez only; nor can
it extend beyond that quantity, unless the seller should explain, in
the same meeting, the sum of the Kafeez's.—The two disciples are of
opinion that the sale of the whole is valid in both cases. The rea-
soning of Haneef is that it is impracticable to extend the sale to the
whole of the heap, because both the goods to be delivered and the
price to be received are in this case uncertain: it must therefore be
construed as existing in one Kafeez, the only ascertained quantity.
It is rendered valid, however, with respect to the whole quantity, by
the removal of the uncertainty,—that is, by the seller either ex-
plaining the total, or ascertaining it by measurement during the
meeting. The argument of the two disciples is, that the power of
removing the uncertainty rests with the parties: and that the uncer-
tainty, in this case, ought not to be deemed a bar to the validity of
the sale; in the same manner as it is not a bar where a person sells
one slave out of two, leaving it in the option of the purchaser to fix on
either of them.

If a person say "I have sold my flock of goats at the rate of one
" dirh for each," the sale in that case is altogether invalid,—in other
words, it is not extended even to one goat,—according to Haneef;

* A measure containing about sixty-four pounds weight.
and in the same manner, the sale is altogether invalid if a person sold cloth at the rate of one dirhm the yard, without explaining the number of yards; and the same of every other article, such as wood, pots, or the like.—The two disciples are of opinion that, in all these cases, the sale is valid with respect to the whole quantity; because the removal of the uncertainty is in the power of the parties; and also, because such uncertainty does not prevent the validity of the sale, as is demonstrated in the preceding case. The arguments of Haneefa in support of his opinion are also the same as those advanced by him in the preceding case;—in which, however, he has admitted the validity of the sale with respect to one Kafees of wheat, because all Kafees's of wheat being the same, no contention can arise in the delivery of it,—whereas, in the case in question, the different articles comprehending in themselves unequal unities, the delivery could not be made without contention.

If a person purchase a heap of grain for one hundred dirhms, on the condition of the heap amounting to one hundred Kafees's, and it be afterwards discovered to fall short of that amount, in this case the purchaser has the option of either taking the actual amount, at a rate proportioned to the terms of the contract, or of undoing the contract entirely; because a breach of the terms takes place before the deed is rendered complete, since, in order to render the deed complete, it is necessary that the actual quantity stipulated be taken possession of. If, on the other hand, the heap be afterwards found to contain an excess beyond the stipulated amount, the sale is valid with respect to the amount of the one hundred Kafees's, and the excess continues the property of the seller; because the sale is restricted to a specific quantity; and the excess is not included in the description, so as to be a dependant thereof, and not a separate article.

If a person sold a piece of cloth for ten dirhms, on the condition of its contents amounting to ten yards,—or a piece of ground for one hundred
hundred dirms, on condition of its measuring one hundred yards,—
and a deficiency afterwards appear, the purchaser has in that case the
option either of cancelling the bargain entirely, or of taking the ground,
or cloth, thus defective, at the stipulated price; for the specification
of yards is a mere description of the length and breadth; and no part of
the price is opposed to the description of the wares; —in the same
manner as in cases with respect to animals; —in other words, if a
person purchase a goat, which afterwards appears to want an ear, he
would have the option of taking the defective goat for the price stipu-
lated, or of undoing the bargain: but he would have no right to dimi-
nish the price on account of such defect, because no part of the price
is opposed to the ear in particular, so as to admit of any fixed dimi-
nuation on account of its deficiency; —and so also in the case in ques-
tion. It is otherwise in the preceding case, relative to wheat; be-
cause there the deficiency comes under the head of the quantity and
not the description of the wheat; and the price being opposed to
quantity, a proportionate diminution is accordingly made from it.
Still, however, the purchaser has the option of undoing the contract
if he please, on account of the difference from the terms; his consent
having been given to the purchase of one hundred Kafers's. If,
however, the ground or the cloth should prove larger than the descrip-
tion, in this case the excess becomes the property of the purchaser,
and no option remains to the seller, because (as has been already ex-
plained) the specification of yards relates merely to description and not
to substance. The case, in short, becomes the same as if he had
sold a slave on the supposition of his being defective, but who after-
wards proves to be perfect.

If a person sell a piece of cloth, by declaring "I have sold this
piece of cloth, which measures one hundred yards, at the rate of
one dirm for each yard," and a deficiency should afterwards ap-
pear, in this case the purchaser has the option, either of taking it,
with a proportional deduction from the price, or of dissolving the
contract
contract entirely; because, although the specification of yards comes under the head of description, yet in this case the yards are considered as relating to the substance, the seller having opposed the price to each of them, which renders each (as it were) a separate piece of cloth. Besides, if the seller should take the defective quantity at the rate proposed for the whole, it would follow that the terms of the contract (namely the payment of one dirham per yard) did not take place:—if, on the other hand, the amount of the cloth exceed one hundred yards, the purchaser has the option, either of taking the whole, at the rate of one dirham for each yard, or of dissolving the bargain; for although he has an advantage in the receipt of more cloth than he had contracted for, yet this being tempered with a loss, in the necessity it lays him under of paying an additional sum, he is therefore left at liberty either to abide by the contract on these conditions, or to undo it. 

If a person purchase ten yards of a house or bath measuring one hundred yards, such purchase is invalid, according to Hanefia, whether the buyer may or may not have known the measurement of the whole house. The two disciples maintain that it is valid. If, on the contrary, a person purchase ten shares of a house or bath containing one hundred shares, it is valid, in the opinion of all our doctors. The argument adduced by the two disciples in support of their opinion is, that ten yards of a house of an hundred yards in capacity are in fact the same as ten shares out of an hundred shares. Hanefia, in support of his doctrine, argues that a yard, in its original meaning, is a stick applied to the purpose of measurement; but it is also used to denote the thing measured, and the thing so measured must be relative and not an abstract idea of the mind, such as a share: now it is impossible, in this case, to render such yards relative, since there exists an uncertainty, as no mention is made of the particular side of the house from which they have been measured; and such uncertainty would occasion contention between the parties. It is otherwise with respect to shares,
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for these are abstract ideas of the mind and not undefined relatives; and although, of consequence, an uncertainty exist with respect to them also, yet such uncertainty cannot occasion a contention, since the possessor of ten shares of the house may either enjoy them indefinitely, or may receive his share according to the mode prescribed in the division of joint property.

If a person purchase a package containing cloth, on condition of there being ten pieces in it, and it afterwards appear that there are nine or eleven pieces in it, the sale is invalid, because of the uncertainty, with regard to the price, in the one case, and to the merchandise in the other; for in case of there being nine pieces, as the price of the piece wanting is unknown, that of the remaining nine is of consequence also unknown; and where, on the other hand, there is one too many, it is unknown which are the specific ten that ought to be delivered. If, however, the seller should explain the price of each piece of cloth, and there be too few, the sale is valid; but the purchaser has the option of undoing it if he please; whereas, if there be too many, it is invalid, because of the uncertainty with respect to the goods, as it would be impossible to ascertain the particular ten that are included in the sale.—Some have said that in case of deficiency also the sale is invalid, according to Hanefi. But this is unfounded.

A sale is null in tene, if the description of the goods be at all fallacious.

If a person sold two pieces of cloth, on the condition of their being Herāđee, and one of them afterwards prove to be Murumelc*, in that case the sale is completely invalid, that is, does not hold good even with respect to the true one, although the seller should have specified the prices of both; for when the seller joined together both pieces in the declaration of a sale of Herāđee pieces, he, as it were, established a

* Of the manufacture of the provinces of Herāś and of Murumelc.
condition that the purchaser should accept a piece of Murwatlee, which being a false condition the sale is therefore annulled.

If a person purchase a piece of cloth, on the condition of its measuring ten yards, and at the rate of one dirm for each yard, and the measurement afterwards prove to be ten yards and a half, or nine yards and a half; in this case the purchaser (according to Haneefa) must pay ten dirms in the first instance, and nine in the second; still having the option of undoing the contract if he please. Aboo Toosaf alleges that if the purchaser choose to abide by the contract, he must pay eleven dirms in the first instance, and ten in the second. The opinion of Mohammed is, that in case the purchaser chooses to abide by the contract, he must pay ten and a half dirms in the first instance, and nine and a half in the second; because the measurement of a yard having been fixed at one dirm, it necessarily follows that half a yard must be rated at half a dirm. The reasoning of Aboo Toosaf is that as the price of each yard was fixed at one dirm, it follows that each yard becomes virtually a distinct piece of cloth; and as one of these proves defective, it follows that the purchaser has the option either of undoing the bargain, or of taking the goods according to the terms of the contract. The arguments adduced by Haneefa in support of his opinion are, that the specification of yards is considered as referring to the description, and not the real quantity of the thing, excepting only where the price of each given measurement is specifically stipulated as a condition of the contract. Now as, in the case in question, the rate is opposed to each complete yard, but not to any smaller quantity, it follows that such smaller quantity must be considered as remaining in its original form—that is, as applying merely to description, and therefore cannot involve an additional payment.

Some have observed that in coarse cotton cloths, of which the extreme and interior parts are of a similar texture, it is not lawful for the purchaser to take any excess beyond the terms of the contract; as it may be cut off and restored to the seller without any injury to the piece, in the manner of things
things estimable by weight; and hence the learned deem it lawful
to sell even a single yard of it.

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

In a person sell the place of his abode (in other words, his house) the foundation and superstructure are both included in such sale, although they may not have been specified by the seller; because they are comprehended in the common acceptation of the term; and also, because, being joined to the ground in the nature of fixtures, they are considered as dependant parts of it.

In the sale of land, the trees upon it are included although they be not specified, because they are joined to it, in the same manner as foundation and superstructure in the preceding case.

In a sale of ground, the grain then growing on it is not included unless particularly specified by the seller; because it is joined to the ground, not as a fixture, but for the purpose of being cut away from it, in the same manner as goods of any kind which may have been placed upon it.

So also, if a person should sell a tree on which fruit is growing, the fruit belongs to the seller, unless it had been specifically included in the sale; because the prophet has said “If a person sell a date tree with fruit upon it, the fruit belongs to the seller, unless the purchaser should have stipulated its delivery to him as a condition of its sale.” Besides, although the fruit be, in fact, a part of the tree, yet as it is intended to be plucked and gathered, and not to be suffered to hang on the tree, it is therefore the same as grain. It is to be observed, however, that in the sale of a tree with fruit, or of ground with grain upon it, the seller must be immediately desired to clear them away, and deliver the property to the purchaser; because, in these cases, the property of the purchaser and seller being implicated
implicated together, it becomes incumbent on the seller to clear away what belongs to him; in the same manner as if he had placed any of his goods upon the ground, in which case the clearance of them would have been requisite. Shafei maintains that in both these cases the grain and the fruit must be suffered to remain until they become ripe, because there ought to be a period stipulated for the delivery of the things sold, and that period ought to be extended to the complete growth and maturity of these vegetables; in the same manner as in the case of a lease of ground, where if, at the expiration of the lease, the grain on the ground be green, it is suffered to remain until it ripen. Our doctors, on the other hand, argue that the obligation is the same on a lease; and if he be permitted to extend the lease on account of the unripeness of the grain, he must, however, pay additional rent for it, which is a substitute for the delivery; and the substitute is in effect the same as the thing itself. It is to be observed that in the sale of a tree, the fruit is not included, whether it be of an appreciable nature or otherwise, unless it be specifically mentioned.

If a person sell a piece of ground in which seed has been sown, but of which the growth has not appeared above ground, in this case the seed is not included in the sale. If the apparent growth should have taken place, though not in such a degree as to render the vegetable of any value, in this case there is a difference of opinion. Some allege that the vegetation is not included in the sale; and others, that it is. This difference of opinion has its foundation in the different sentiments which the parties entertain with regard to the validity of the sale of vegetation, prior to its being fit to be cut down by the hook, or used by animals in the way of forage; for those who consider the separate sale of such vegetation to be valid are of opinion that it is not included; whilst those who consider the sale of it as invalid are of opinion that it is included in the sale of the ground.

Grain
The immemorial is not included, in the sale of land or trees, although the rights and appendages be expressed in the contract; nor unless all its dependencies be generally expressed; nor can any product be included after being gathered, or cut down.

Grain and fruit are not included in a sale of ground, or of a tree, although the purchaser and seller specify the rights and appendages, (in other words, although the seller declare "I have sold this ground, or this tree, with all its rights and appendages," because grain and fruit do not fall under these descriptions. (The rights of a thing are those without which it cannot be enjoyed, and which form the principal object of possession, such as a water course or a road:—the appendages are things from which we derive use, but which are more particularly considered as dependant parts, such as a cook-room, or a house for keeping water.)—In the same manner, if the seller should say "I have sold this tree, or this piece of ground, with every thing small and great of its rights and appendages which I possess in it," still neither the fruit nor the grain is included in it.—If, however, he should say in a general manner, "I have sold this tree, (or this piece of ground,) with every thing great and small which I possess in it," in this case the grain and the fruit are necessarily included in it.—It is to be observed that grain which has been cut, or fruit which has been plucked, cannot by any construction whatever be included in the sale, unless expressly mentioned as such.

The sale of fruit upon a tree is valid, whether the strength of the fruit be ascertained or not;—that is, whether it may or may not have reached such a degree of strength as may preserve it from common accidents;—because fruit is a property of certain value, either immediately, in case of its being ripe, or hereafter, in case of its being in an unripe state:—(some have said that the sale of fruit in a weak state is invalid: the first doctrine is, however, the most authentic:) and the sale of fruit in an absolute manner being valid, the purchaser must immediately take it from the tree, whether this be particularly expressed as a condition in the sale, or otherwise. If, however, the condition of suffering the fruit to remain on the tree be stipulated, the sale is null, because such a condition is illegal, since it implicates together the right of property of the two parties, which is repugnant to the
the nature of sale; and every condition of this kind invalidates the sale. Besides, in this case it must necessarily follow that one deed is interwoven with another; in other words, that either a loan or a lease is implicated with the sale, which is unlawful. In the same manner, the sale of grain, with a stipulation of leaving it on the seller's ground, is unlawful, and for the same reason. The same rule also obtains (according to Hanefa and Abou Yousaf,) where the fruit or corn has attained its full growth, as this implicates the right of property of two parties. Mohammed is of opinion that, in this instance, such a condition is lawful, because of the existence of the whole of the thing in question; whereas, in the former case, the part of the property which afterwards vegetated was not in being at the time of the conclusion of the deed; and the stipulation of a condition with regard to a nonentity being illegal, the sale is therefore null.

If a person purchase fruit upon the tree before it had reached its full growth, in an absolute manner, (that is, without stipulating the condition of its remaining upon the tree until it become ripe,) and afterwards, with the permission of the seller, suffer it to hang on the tree, in this case the additional growth becomes his lawful property. If, however, he act in this manner without the consent of the seller; he must then bestow the difference in charity, as being the produce of the property of another without the consent of that other.—If, on the other hand, the sale should have taken place when the fruit had attained its full growth, and the purchaser suffer it to remain until it become ripe, he is not on that account required to bestow any thing in charity, because in this instance a change from one state to another takes place without any increase being made to the substance.

If a person, having in an absolute manner purchased fruit which had not attained its full growth, should afterwards suffer it to remain on the tree till it became ripe, by taking a leaf of the tree till that period,
period, in this case the increase of substance is lawful to him, because the lease is null, on account of a want of precise knowledge with respect to the period of it,—and also, on account of its not having been warranted by absolute necessity, since it was in the power of the lessee to have purchased the tree itself:—and the lease being null, there remains only the consent of the seller, to which regard must be had. It is otherwise where a person purchases grain upon the ground, and having then taken a lease of the ground until the grain be capable of being cut down, suffers it to remain until that time; for the increase of substance is not in such case lawful to him, since the lease so made is invalid, and an invalid lease is the occasion of baseness and abomination.

Any new fruit which may grow in the interim, is the property of the seller and purchaser.

If a person, in an unconditional manner, purchase fruit upon a tree which had not completely vegetated, and afterwards, before he had received a formal seizin of it, new fruit should grow, in this case the sale is invalid, because of the impracticability of delivery on the part of the seller, from the impossibility of distinguishing between what was the subject of the sale and what was not. But if new fruit should appear after the seizin of the purchaser, such fruit is in an equal degree the right of both, because of its intermixture with the property of both. The assertion of the purchaser, however, with regard to the quantity is credited, because the fruit is in his possession. (The sale of artichokes or melons which are growing is subject to the same law as that of fruit growing upon trees.)

Rule in the purchase of vegetables.

If a person wish to purchase fruit, artichokes or melons, and afterwards to have it in his power to let them remain until they become ripe, or until they shall yield a new crop, so as to have a lawful claim to the property, the expedient to be practised, in order to render such conduct legal, is to purchase the tree or bed itself, and after clearing it of
of the fruit when ripe, to undo the contract of sale with regard to the tree or bed*.

If a person should sell fruit, with a reservation of a specific number of Rattis of it, the sale is invalid, whether the fruit be upon the tree or off it; because although the reservation be itself specific and known, yet the residue is unknown. It is otherwise where a reservation is made of a specific tree; because there the remainder is known, being obvious to the eye.—Our author remarks that this doctrine is conformable to a tradition of Hafes, adopted by Tabéœci: but that such a sale is valid, according to the Zabir Rawiyet, and also in the opinion of Shafei, because it is a rule that whatever may be lawfully sold, separately, may also be lawfully excepted from a deed of sale. Thus the sale of one Kafes from a heap of grain being lawful, the exception of it is also a lawful act.—It is otherwise with respect to a fetus in the womb, or any particular member of an animal; because as the separate sale of such subjects is illegal, so also is the reservation of them.

The sale of wheat in the ear, or of beans in the husk, is valid; and the law is the same with respect to rice or rape seed in the husk. Shafei is of opinion that the sale of green beans in the husk, or of walnuts, almonds, or Pistachio nuts in the shell, is not valid; but with respect to wheat in the ear, he has given two opposite opinions. All these sales are, however, valid in the opinion of all our doctors. The reasoning of Shafei is that the subject of the sale, in these cases, is hidden within a thing of no value in itself, namely the husk, and that therefore the case becomes the same as if a goldsmith should sell a heap of earth mixed with particles of gold, in exchange for another

* The consent of the seller is here presupposed; for neither of the parties can undo a sale without the consent of the other. This expedient is therefore suggested on a supposition of the future undoing of the sale being equally agreeable to both parties.
heap of a similar nature, which is invalid. The arguments of our
doctors upon this point are twofold. First, the prophet has said
"The sale of fruit upon the tree, or of grain in the ear, is invalid, un-
less it approach to a state of ripeness*. Secondly, wheat is an ar-
ticle capable of yielding advantage; and hence the sale of it in the ear
is valid in the same manner as that of barley, the one being an appre-
ciable article as well as the other. It is otherwise with gold dust,
for the sale of that, mixed with earth, is unlawful from the possibility
of its being usurious.

Is a person sell a house of which the locks are not of the hanging
but of the fixed kind, in this case, the keys of such locks are considered
as included in the sale; because the locks themselves are included in
the house, in consequence of their being fixtures; and the sale of a
lock includes the key, without its being expressly stipulated, because
it is considered as a constituent part of it, since a lock without a key
is of no use.

The wages of the measurer† of the goods, or of the essayer of the
money, must be paid by the seller:—the wages of the measurer, be-
cause, as measurement is essential to enable the seller to deliver over
the goods, the payment of the expence attending that falls properly
upon him; (and so also, the wages of weigthers or tellers:)—and the
wages of the essayer, because of a tradition, delivered by Ibn Rashtin,
that such is the doctrine of Mohammed; and also for this reason that
the effay of the money takes place after the delivery, when it becomes
the business of the seller to have it essayed, in order that he may dis-
tinguish what is his right and what is not; and that he may ascertain
the bad coin in order to reject them. Ibn Saudit relates it as the opi-

* Whence it may be inferred that the sale, in the ear, or upon the tree, is admissible.
† Meaning, properly, some person who is employed as a sworn or professed measurer.
S A L E.

Chap. I.

Mr. Mohammed that the purchaser should defray the wages of the assayer, because he stands in need of ascertaining the good dirms which he has stipulated to deliver, and the good dirms are known by means of an assayer, in the same manner as quantity, by means of a measurer.

The charge of weighing the price is due by the purchaser, because he is under the necessity of delivering it to the seller, and the delivery is completed after the ascertainment of the weight. In a sale stipulating immediate payment, the purchaser must first deliver the price to the seller, because his right (namely the goods sold) is of a fixed and determinate nature, whereas the price is not so; and it is therefore incumbent on him, in order that both parties may be on a par, to deliver the price to the seller, which fixes and determines it; for it cannot be determined but by delivery.

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

Thus if the price stipulated be ten dirms, and the purchaser be in possession of a thousand dirms (for example) in this case, although the number ten be determinate, yet the units to compose that number and to be taken from a great number, are not specific and determinate, until actually delivered. This doctrine is frequently and particularly enlarged upon in the sequel of this book.
C H A P. II.

Of Optional Conditions *.

An optional condition is where one of the parties stipulates it as a condition that he may have the option, for a period of two or three days, of annulling the contract if he please.

The stipulation of a condition of option, on the part either of the seller or purchaser, is lawful; and it may be stipulated to continue for three days or less; but it must not be extended beyond that term; because it is related that Hooban having been defrauded in several of his bargains, the prophet addressed him thus, "Hooban, when you make a purchase bar deceit, and stipulate a condition of option."

* Arab. Khidr-al-Shirr. In contracts of sale there are five different options. These are, 1st. 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 homogenous 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.—The translator has thought it proper, in this note, to bring into one point of view an explanation of the several kinds of option, as it may possibly tend to give a clearer idea of them than what could be collected from the scattered definitions of them as they occur in the course of the work.
An optional condition, stipulated to remain in force for a period exceeding three days, is unlawful according to Haneefa; and Ziffer and Shafeei are of the same opinion. The two disciples, on the contrary, maintain that it may be stipulated to continue to any length of time whatever; because it is related that Ibn Omar extended it to two months; and also because it is ordained, by the Law, for the purpose of answering the necessities of man, in enabling him to consider and set aside what is bad; and as a period of three days may not be sufficient for this purpose, the indulgence is therefore extended with respect to the merchandise, in the same manner as with respect to the price. The argument of Haneefa is that an optional condition is repugnant to the nature of the act, which fixes an immediate obligation on the parties, and is allowed only because of the saying of the Prophet already quoted; whence it cannot be extended to a period beyond what has been there specified.

Although a conditional option beyond three days be not permitted, still if such a condition be stipulated, and the person making such stipulation, before the lapse of the three days, declare his acceptance of the contract, the sale is in that case valid, according to Haneefa. Ziffer, however, is of a different opinion; for he argues that the sale being invalid from the beginning, on account of the illegality of the condition, it cannot be afterwards rendered valid by the removal of such condition. The arguments of Haneefa on this point are twofold. First, as the acceptance of the sale was declared before the lapse of the three days, the cause of its invalidity has not begun to operate. Secondly, the invalidity takes place on the fourth day; and as the acceptance is declared before that period, the sale is consequently kept free from any cause of invalidity. From this second argument some have considered that the invalidity of the sale does not take place until the commencement of the fourth day; whilst others, (founding their opinion on the first argument,) hold that the contract was provided it exceed not the term of three days.
was invalid from the beginning; but is afterwards rendered valid by
the removal of the cause of its invalidity previous to its operation.

It is lawful for a person to make a purchase on this condition,
that "if, in the course of three days, he do not pay the price, the sale
shall be null and void." If, however, instead of three days he sti-
pulate four, the sale is not valid, according to Haneef and Aboor Toosif.
Mohammed is of opinion that it is valid, whether he stipulate four days
or more. All our doctors however agree, that in case of such a stipu-
lation having been made, if the purchaser, in the mean time, pay the
price, previous to the lapse of the third day, the sale is valid. The
reason of this is that a condition of this nature is of the same nature
with an optional condition, because, in case the purchaser cannot fur-
nish the price, the seller stands in need of a power to annul the act.
As, moreover, Haneef holds that a sale is invalid, where the condi-
tion of option extends beyond three days, but may afterwards be ren-
dered valid by a formal confirmation previous to the lapse of the third
day, so also in the case in question. As Mohammed, on the contrary,
holds that the extension of the condition of option beyond the third
day is lawful, so also in the present instance. Aboor Toosif, on the
other hand, although (contrary to analogy) he hold the extending of
a condition of option beyond three days to be lawful, because of a tra-
dition which he quotes to this effect, yet is of opinion that the same
extension is unlawful in the present instance, (arguing from analogy,) as there is no tradition in support of it. There is another explana-
tion, from analogy, with respect to this case, which has been adopted
by Ziffer, to the following effect, that, in the sale in question, an inval-
lid dissolution has been stipulated, (for the dissolution is invalid, as it
depends upon a condition;) and as a sale is rendered void by the sti-
pulation of a valid dissolution, it follows that by the stipulation of an inval-
lid dissolution it is rendered void a fortiori. The reason, however,
for a more liberal construction in this particular is, that the condition
here stipulated is considered as an equivalent to a condition of option, as has already been explained.

If the seller stipulate a condition of option, the right of property over the goods does not in that case shift from him, because the completion of the sale depends on the mutual consent of the parties, and the condition of option evinces that the seller has not completely consented. In, therefore, under these circumstances, the seller should emancipate a slave whom he had in that manner sold, the emancipation would hold good.—Neither is the purchaser in such a case entitled to use or employ the goods, although he should have taken possession of them with consent of the seller.—If, after the purchaser had possessed himself of the goods, they should perish or be destroyed previous to the expiration of the period of optional condition, he becomes in that case responsible for the value; because by the destruction of the goods the sale is annulled; (for the execution of it rested only on the consent of the seller; and where the subject of it is lost, the execution of it becomes impracticable; and it is null of course;) and as the goods were in possession of the purchaser with a view to purchase, (which circumstance renders a purchaser responsible for the value,) he is responsible accordingly. If, on the other hand, the goods be lost in the possession of the seller, the deed is annulled; and no payment is incumbent on the purchaser, in the same manner as in the case of an absolute sale, that is, a sale where no condition is stipulated.

If the condition of option be stipulated by the purchaser, the right of property over the goods shifts from the seller, because the sale is rendered complete on his part. The right of property, however, although it shift from the seller, does not vest in the purchaser, according to Hanefia. The two disciples have said that the purchaser becomes the proprietor; for, if this were not the case, it must necessarily follow that, after it moved from the seller, it would remain subject but the property in it devolves upon the purchaser where the stipulation is made on his part; and he is consequently responsible for
subject to no person; and this is a state not supposed by the law. The arguments of Haneefa on this point are twofold. First, as the right of property with respect to the price has not shifted from the purchaser, it follows that if the right of property with respect to the goods also vested in him, the property with respect both to the thing purchased, and the return for it is centered in one person, which is absolutely illegal. Secondly, If the right of property with respect to the goods were to vest in the purchaser, it might frequently happen that the goods would, in the interval, before the completion of the sale, be made away, without any intention on the part of the purchaser; (as if the purchaser had bought a slave related to himself within the prohibited degrees*) and as the sole object of the reserve of option is the benefit of the purchaser, in allowing him time for consideration, it follows, that if the right of property were to vest immediately in him, he might be deprived of the advantage which is the object of the reserve of option.

If the merchandize, where the stipulation of option is on the part of the purchaser, perish or be destroyed, the purchaser is in that case answerable for the price. In the same manner also, if the goods receive an injury, the purchaser is responsible for the price; because the goods, after sustaining an injury, cannot be returned, and the sale consequently becomes binding. The purchaser, therefore, is responsible for the price in either instance; for destruction necessarily implies previous injury; and hence in a case where the purchase is utterly destroyed, the sale first becomes binding and complete, and the destruction takes place afterwards; and as, in a case of injury, the payment of the price becomes obligatory, so also in a case of destruction. It is otherwise where the merchandize perishes in the possession of the purchaser when the option had been stipulated by the seller; for in

* In which case the slave would become immediately free. See Vol. I. p. 432.
this case the purcaher is answerable only for the value *; because the
condition of the injury does not render the restitution impracticable, since the seller, in that case, has the option either of taking the merchandize thus injured, or of rejecting it, if he please, as the optional condition remains with him: and hence, as the sale does not become binding on the occurrence of the injury, if the seller chooses to confirm it, the purchaser in that case only pays the value of the injured merchandize.

If a person purchase his own wife, with a reserve of option for three days, in this case the marriage subsists during that interval, as the right of property does not take place because of the optional condition: and if he have carnal connexion with her during that interval, the condition of option is not thereby annulled; because he has it still in his power, after such connexion, to undo the sale, since his cohabitation with her is the exercise of a right in virtue of his marriage, and not of his right of property.—If, however, his wife be a virgin, his cohabitation with her annulls the condition of option, and establishes the sale, as it is a damage to her, and a diminution of her value.—This is the doctrine of Haneefa. The two disciples are of opinion that the husband becomes immediate proprietor of his wife by the optional purchase, whence the marriage is immediately annulled. If, therefore, he should have cohabitation with her, he cannot afterwards reject her, although she may have been a woman †; because, the marriage being null, the cohabitation was not in virtue of marriage, but of property.—This difference of opinion between Haneefa and the two disciples, respecting the property vesting immediately in a conditional purchaser, has given rise to opposite decisions in a variety of different cases. Of this number are the following.

* And not for the price set upon it in the contract.
† That is to say, not a virgin.
If a person make an optional purchase of a slave related to him within the prohibited degrees, the emancipation, in the opinion of the two disciples, takes place immediately; whereas, according to Haneesa, it does not take place until after the confirmation of the contract.—If, also, a person make a vow to emancipate a slave whenever he becomes proprietor of one, then, according to the two disciples, if he make a conditional purchase of one, the emancipation takes place immediately; whereas, according to Haneesa, it does not take place till after the confirmation. If, also, a person make an optional purchase of a female slave, and her monthly courses happen during the term of option, these courses are included in the prescribed term of abstinence, according to the two disciples; whereas, according to Haneesa, they are not included. And if the purchaser, availing himself of his optional condition, should return her to the seller, the seller need not observe the prescribed term of abstinence, according to Haneesa; whereas, the two disciples hold that such observance is incumbent on him.—If, on the other hand, a person make an optional purchase of his own wife, and if she, during the interval of option, bring forth a child, she is not an Am-Walid to the purchaser, according to Haneesa; whereas, according to the two disciples, she is so.—If, also, a person make an optional purchase of merchandise, and having, with the consent of the seller, received possession of it, afterwards give it in deposit to the seller, and it be lost in the interval, in this case, according to Haneesa, the trust is null and void, as the deposit was not the property of the purchaser, and therefore he is of opinion that the loss results to the seller; whereas the two disciples, holding the said deposit to be valid, are of opinion that the loss results to the purchaser, agreeably to the law of deposits.—If, on the other hand,

* The purchaser of a female slave is required to abstain from carnal connexion with her until she shall have had three different courses from the period of her becoming his property, that it may be ascertained whether she be pregnant or not. (See Edit.)
hand, a privileged slave make an optional purchase, and the seller, during the interval of option, exempt him from the payment, in this case, according to Hanessa, the condition of option remains in force; because if he should return the merchandise, it follows that he does not choose to accept of the property, and a privileged slave has the power of accepting or rejecting as he pleases—but, according to the two disciples, the condition of option is annulled by the exemption of payment; because (in their opinion) the property having vested from the beginning, it follows that if he were to return the merchandise to the seller it would be in effect a gift to him, and a privileged slave has not the power of making a gift.—If, moreover, a Zimmer purchase spiritual liquors from a Zimmer, on a condition of option, and the purchaser, in the interval, become a Mussulman, in this case, according to the two disciples, the condition of option remains no longer in force, because the purchaser having (agreeably to their tenets) become proprietor of the liquor, it follows that if he were permitted to reject it, he would create in another a right of property with respect to liquors which no Mussulman is allowed to use.—According to Hanessa, on the contrary, the sale becomes void, because the purchaser, (agreeably to his tenets,) not being then the proprietor, and the circumstance of becoming a Mussulman putting it out of his power to become the proprietor by removing the condition, the sale is of necessity annulled.

In case of a sale on a condition of option, it is lawful, according to Hanessa and Mohammed, for the party possessing the option to annul the contract within the stipulated period, or to confirm it; which latter he may do without the knowledge of the other party: but it is not lawful for him to annul it without the knowledge of the other.—Aboo Yosaf alleges that the party possessing the option may annul the contract without the knowledge of the other; and such, also, is the opinion of Shafei.—The argument of Aboo Yosaf is that the party possessing the option is empowered, on the part of the other, to annul
the contract; and that, therefore, such annulment cannot rest upon that other’s knowledge of it; in the same manner as his knowledge of it is unnecessary in case the possessor of the option confirm the contract; as in the case of an agent for sale, (for instance,) who may lawfully act in every matter to which his agency extends, without the knowledge of his constituent, in virtue of the powers given to him on his behalf.—The arguments of Hanefi and Mohammed are, that a contract of sale involves the rights of both parties; and that the annulment of the sale by one party only is an exercise of a right partly belonging to the other, whilst at the same time such exercise may eventually be attended with a loss to the other: for supposing the possessor of the option to be the seller, and that he annul the sale without the knowledge of the purchaser, and the purchaser, in the mean time, in the confidence of the sale being complete, take possession of the merchandise, then, in case of its destruction, he must of consequence be responsible for it:—or, supposing the purchaser to be the possessor of the option, and that he annul the sale without the knowledge of the seller, then an eventual loss may rest to the seller, as it is possible that, on the presumption of his goods being already sold, he may enquire out another purchaser. Hence, as such an exercise, on the part of either, of the right of the other, may be attended with an eventual injury, the annulment of an optional sale is therefore made to rest upon the knowledge of the other party.—This case, in short, resembles the dismission of an agent: for if a person, having appointed an agent, should afterwards dismiss him without his knowledge, it would not be valid until the agent was himself informed of it; and so also in the case in question.—It is otherwise with the confirmation of a sale; as the exercise of such a right by one party only does not entail an injury.—The assertion of Aboe Yoosof that “the possessor of the option is empowered to make such annulment on the part of the other,” is not admitted; for how can the other, who does not himself possess such power, bestow it upon the possessor of the option?
In the person possessing the option annul the sale without informing the other party, and such knowledge, nevertheless, reach him before the expiration of the stipulated period, then, because of his acquisition of such knowledge, the annulment is rendered complete. If, on the other hand, it should not have reached him until the expiration of the stipulated period, then the annulment is rendered complete, because of the expiration of the stipulated period.

If a person possessing the right of option in a sale should die, the sale is then complete, and the right of option becomes void, and does not descend to his heirs.—Shafet maintains that the option descends to the heirs, because, being a fixed and established right in sale, it may be inherited, in the same manner as an option in case of defect, or an option of determination. The arguments of our doctors are that an option is in reality nothing but desire, or disposition, which is not capable of being transferred from one to another; and nothing but what is capable of devolving from one person to another can be inherited.—It is otherwise with respect to option in case of defect, as that is granted to the heir, because of his right to obtain possession of a thing whole and complete, in the same manner as the deceased, and not because of his right of inheritance, since option is incapable of being a subject of inheritance. It is otherwise, also, with respect to an option of determination, as the heir becomes the proprietor in that instance, because of the mixture of property, and not because of his right of inheritance.

If a person, in purchasing any article, stipulate the option of another person, in this case, provided either the purchaser or the possessor of the option confirm the sale, it is valid; or, if either of them annul it, it becomes void.—The reason of this is, that the stipulation of the option of another is admitted, upon a favourable construction.—Analogy would suggest that it is inadmissible, and such is the opinion of Ziffer, because option being one of the articles of the contract, it follows
follows that the stipulation of it for another, who is not one of the contracting parties, is illegal, in the same manner as if it were stipulated that some other than the purchaser should pay the price.—The arguments of our doctors are, that the establishment of the right of option, in one who is not a party to the contract, is by way of appointment from him to act as his substitute.—In this case, therefore, the option is vested both in the party and in his substitute; and consequently it is lawful for either of them to confirm or annul the contract.—If one of them should confirm, and the other annul the contract, in this case the first of these acts which may have been performed becomes valid. If both should have been performed at the same time, then (according to one tradition) the act of the contracting party is valid; or (according to another) the validity of the annulment is preferred to that of the confirmation. The principle on which the first tradition proceeds is that the act of the contracting party is of superior force to that of a substitute who derives his authority from him; and the principle on which the second tradition is founded is that annulment is of superior force to confirmation, because annulment may take place after confirmation, but confirmation cannot take place after annulment. Some have asserted that the first tradition is conformable to the doctrine of Mabammed, and the second to that of Abou Yosaf;—arguing from their different decisions in the case of an agent of sale and his constituent: for if both of them should at the same time fell the same thing to different persons, the sale of the constituent is valid, according to Mabammed;—whereas, according to Abou Yosaf, both sales are valid; but the article sold must be divided between the two purchasers.

If a person sell two slaves for a thousand dirms, stipulating an optional condition with respect to one of them, the case admits of four different statements.—I. Where the seller does not oppose a specific price to each of the slaves, nor specify the one respecting whom the optional condition is to operate; and this is illegal, because of the uncertainty
certainty both as to the subject of the sale and the price; for as the
slave, concerning whom the condition of option is stipulated, is not (as
it were) included in the sale, and as he is not specified, it follows that
the other, who is the subject of the sale, is also unknown.—II. Where
the seller sets a particular price upon each of the slaves, and also speci-
ifies to which the condition of option relates; and this is valid, be-
cause of the certainty with respect to the subject of the sale and the
price.

Objection.—It would appear that the sale is in this case illegal;
because the slave who is the subject of the condition is not, in effect,
included in the sale; and as both are joined together in one declaration,
it follows that the acceptance of the sale with relation to what is not
the subject of it, becomes a condition of the validity of the sale with
regard to what is; it being the same, in short, as if a person should
join a freeman and a slave in one declaration of sale, which is illegal,
because the acceptance of the sale with regard to what is not capable of
being the subject of it (namely, the freeman) is here made a condition
of the validity of the sale with respect to the slave; and this condition
is the cause of annulling the sale: it therefore follows that the sale is
in the same manner invalid in the case in question, as the same con-
dition (which occasions an annulment of the sale) is equally induced in
this instance.

Reply.—The sale, in the case in question, is lawful; because,
although the acceptance of the sale, with respect to the slave concern-
ing whom the option is stipulated, be a condition of the validity of
the sale with respect to the other slave also, still such condition does
not annul the sale, since the optional slave is a fit subject for sale: it is
therefore, in fact, the same as if a person were to join a Madabbir and
an absolute slave in one declaration; and as the sale is in that instance
valid, so also in the case in question:—contrary to where a seller joins
a slave and a freeman in one declaration; because a freeman is not a fit
subject of sale.

—III.
III. Where the seller opposes a particular price to each slave, but does not specify to which of them the condition of option relates.—IV. Where the seller specifies the slave to whom the condition of option relates, but does not oppose a specific price to each of them.—In both these cases the sale is invalid, because of the uncertainty of the subject of the sale in the one instance, and of the price in the other.

If a person purchase one of two pieces of cloth for ten dirhms, on the condition of his being at liberty for three days to determine on the particular piece which he may approve, such sale is valid; and the condition so stipulated is called an option of determination. A sale is in the same manner valid, where a person purchases, with a reserve of option, one out of three pieces; but it is not lawful to purchase in that manner one out of four pieces. What is here advanced proceeds upon a favourable construction. Analogy would suggest that the sale is not lawful in either of these three cases; because the subject of sale is uncertain; and such, also, is the opinion of Zisser and Shafee. The reason for a more favourable construction is, that optional conditions have been ordained for the benefit of man, in order that he may thereby be enabled to set aside the bad, and to choose the good for himself: it is, moreover, evident that man stands in need of contracts of this nature, in order that he may be enabled to shew the merchandise to some person in whose judgment he confides; or, if an agent be employed, that he may shew it to his constituent; and this the seller would not permit him to do unless such a condition were stipulated. This species of sale, therefore, being in effect the same as an optional one, it follows that it is in a similar manner lawful. This necessity on the part of man, however, is fully answered by means of three pieces, as this number comprehends the three qualities of good,

* Arab. Khier-al-tegen.
bad, and medium; and there can be no uncertainty with respect to
the subject of the sale, in this species of contract, to occasion con-
tention, as regard is had solely to the price on which the purcaher
determines.

Objection.—Why then is it not lawful with respect to four
pieces, as in that case also no contention would take place?

Reply.—Although, in this case also, there would be no uncer-
tainty with regard to the subject of the sale, to occasion contention,
still the efficient cause of the legality (namely, the necessity of man)
does not here exist; and it is therefore unlawful.

Some have observed that, in a case of option of determination, a
condition of option is also indispensable; and this is recorded in the
Jama Sagbeer. Others again, (following the Jama Kabeer,) say
that the condition of option is not requisite; and hence it is inferred
that what has been recorded in the Jama Sagbeer is that such a con-
dition often takes place; not that it is absolutely necessary. It is to be
observed, however, that if, in a sale stipulating an option of determination, it should not be thought necessary to insert a condition of op-
tion, the period for determining the choice must in that case, accord-
ing to Haneefa, be limited to three days: but according to the two dis-
ciples it may be fixed to whatever period they please. It is also to be
observed that in a case of option of determination, the subject of the sale
is one piece of cloth (for example), and the other piece is a deposit
in the hands of the purchaser*. If, therefore, one of the pieces be
lost or spoiled, the sale takes place with respect to it in exchange for
the stipulated price; and the other price is as a deposit; because it is
impossible to reject the piece which is lost or spoiled. If, on the other
hand, both pieces be lost at the same time, the purchaser must in that
case pay the half of the price of each, because the determination of

* And consequently (according to the laws of deposit) he is responsible in case of acci-
dents, for one piece only.

Vol. II. E e e purchase
purchase not having been made with respect to either of the pieces, it follows that sale and trust operate indefinitely with respect to each.

and both may be returned in case of a condition of option.

If, besides the option of determination, a conditional option be also stipulated, the purchaser is in that case at liberty to return both pieces.

The heir of the person endowed with an option of determination may return one of the two articles referred to the purchaser's option, in case of his death.

Option is declared and the sale made binding, by any act of the purchaser in relation to the article sold.

If a person possessing an option of determination should die, his heir is empowered to return one of the articles; for an option of determination (as has been before explained) necessarily descends to an heir, because of the implication of his property with that of another; whence he is not, in his option of determination, restricted to three days.—If, on the contrary, a person recently possessed of a power of option die, his heir has no option, as was before explained.

If a person purchase a house under a condition of option, and the adjoining house be afterwards sold before the expiration of the period of option, and the purchaser under the condition of option claim the right of Shaffa, in this case his assent to the first sale is thereby virtually given, and his right of option exists no longer;—because his claim of Shaffa presupposes him to be confirmed in the adjoining property, otherwise he would have no right to make such a claim; and it is therefore inferred, that he first tacitly annuls his condition of option, and then urges his claim. It is to be observed that the necessity of this explanation arises from the doctrine of Haneefa; for, by his tenets, a purchaser under a condition of option does not become proprietor of the article of sale during the interim of option. The two disciples hold, on the contrary, that he becomes immediate proprietor under the condition of option; whence this explanation is, with regard to their doctrine, unnecessary.

* Because a condition of option is not inheritable. (See p. 389.)

If
If two persons purchase a slave, on this condition, that both purchasers shall have the option of rejecting him, and one of them afterwards express his consent, the other cannot reject him, according to Haneefa. The two disciples allege that if the other chuse, he may reject his share in the slave. The same disagreement subsists with respect to two purchasers in a case of option of inspection or option from defect. The argument of the two disciples is that as the power of rejection was vested in both the purchasers, it consequently operated in each of them; and the rejection of one cannot abrogate the right of option with respect to the other, as that would be a destruction of his right, which is not lawful. The argument of Haneefa is that the subject of the sale, when it issued from the tenure of the seller, was not injured by the defect of participation; but if one of the purchasers have the liberty of rejecting his portion singly, it necessarily follows that upon the rejection the seller holds the article in partnership with one of the purchasers; and this is a defect in the tenure, to which he was not before subject.

Objection.—It would appear that the rejection of one of the purchasers is valid although attended with an injury to the seller, since the seller has himself virtually assented to it, because in giving such power to two persons, it is evident that he assents to a possible rejection by one of them.

Reply.—The consent of the seller to the injury is inferred from a supposition of his having consented that one might reject where the power of rejection was given to two. This, however, is not the case in the present instance; for it is to be supposed that the seller understood that both should declare their rejection together; and on this supposition his consent was given, not on the other.

If a person purchase a slave on account of his being a scribe, or a baker, and he prove to be neither of these, the purchaser is in that case at liberty either to abide by the bargain, or to undo it, as he pleases; because the descriptive quality being the object he had in view,
view, and being specified as a condition in the contract, is therefore his right; and the want of it gives him the power of dissolution if he please, because his assent signified was on this condition, and not otherwise.

Objection.—It would appear that the sale is in this case invalid, in the same manner as in the case of purchasing a male slave who afterwards proves to be a female.

Reply.—The sale in the case quoted is invalid because of difference of sex, which does not exist in the case in question. Thus a person that is a baker or not a baker is of the same sex and differs only in the quality; and hence the analogous application of the one case to the other is unfounded. It is to be observed that a difference of the sex does not invalidate the sale, unless it defeat the purchaser’s object. Thus the object in the purchase of a man (for instance) is different from that in the purchase of a woman, and therefore the sale is invalid in case of a difference: if, on the contrary, a man should purchase a be-goat on the supposition of its being a female, the sale would not be invalid, but it would remain with the purchaser to abide by it or not, as he pleases. It is to be observed, however, that, in the case in question, if the purchaser chuse to abide by the bargain, he must pay the whole of the price; as no diminution is admitted on account of the defect of quality, which (as has been before explained) is of a dependant nature.

C H A P. III.

Of Option of Inspection*.

A purchaser may reject an article, upon which a person purchase an article without having seen it, the sale of such article is valid, and the purchaser after seeing it has the option

* Arab. Khéd-al-Roqet.
of accepting or rejecting it as he pleases. Shafei maintains that
a sale of this nature is wholly invalid, because of the uncer-
tainty with regard to the object of it. The arguments of our
doctors are,—First, a saying of the prophet, that "whoever pur-
ches a thing without seeing it, has the liberty of rejection, after sight
of it. Secondly, the uncertainty with respect to the object can-
ot occasion litigation, since, if it be not agreeable, the purchaser is at
liberty to reject it.

If a person, having purchased an article unseen, should say, "I
am satisfied with it," in this case also he is at liberty, after sight of
it, to reject it if he please, for two reasons. First, as the option of
inspection, (according to the tradition already quoted) rests entirely
upon inspection, it follows that it becomes established by the inspec-
tion, whereas before that it was not established: and as the acquiescence
signified previous to the inspection is not repugnant to this, it confe-
quently remains established.

Objection.—If the right of option do not exist previous to the
actual sight of the article of sale, it would follow that the purchaser,
before inspection, has not the power of annulling the contract;—
whereas we find, on the contrary, that he is actually possessed of this
power before inspection.

Rei py.—His right to dissolve the contract, previous to this in-
spection, proceeds from the contract not being then binding; and not
from any reference to the tradition above quoted.

Secondly, The purchaser's acquiescence in the article before he at-
tains an actual knowledge of its qualities, is perfectly nugatory; and
hence no regard is paid to his acquiescence previously signified:—con-
trary to his rejection, which is regarded, because the contract has not
as yet become binding.

If a person sell a thing which he himself has not seen, he has no
option A seller has no option of
The right of option of inspection is not, like an optional condition, confined to a particular period: on the contrary, it continues in force until something take place repugnant to the nature of it.—It is also to be observed that whatever circumstance occasions the annulment of an optional condition, (such as a defect in the merchandize, or an exercise of right on the part of the purchaser,) in the same manner occasions an annulment of the option of inspection. If, therefore, the exercise of right be such as cannot afterwards be retracted, (such as the emancipation of a slave, or the creating him a Modabbir,)—or, if it be such as to involve the rights of others (such as absolute sale, mortgage, or hire,)—the option of inspection is immediately annulled, whether the thing have been seen or not; because these acts render the sale binding, and the existence of the option is incompatible with the obligation of the sale. If, on the contrary, the exercise of right be not such as to involve the right of others, (such as a sale with an optional condition, a simple tender to purchase, or a gift without de-

* That is, he has no power of retraction, if, upon inspection of the article sold, he should happen to repent of the sale.
livery,)—the option of inspection is not annulled previous to the actual 
fight of the article sold; because acts of this description are not of a 
stronger nature than the purchaser’s acquiescence; and as the pur-
chaser’s express acquiescence to inspection is not the cause of annulling 
the option of inspection, (as has been already demonstrated,) it fol-
 lows that the acts above described do not annul it, a fortiori;—where-
as those acts after inspection annul the option of inspection, as they 
indicate an acquiescence, and an acquiescence after the sight of the 
thing occasions the annulment of the option.

If a person should look at a heap of grain, or at the outward ap-
pearance of cloth which is folded up, or at the face of a female slave, 
or at the face and posterior of an animal, and then make purchase of the 
same, he has no option of inspection. In short, it is a rule that the 
sight of all the parts of the merchandise is not a necessary condition, be-
cause it is often impracticable to obtain it, and therefore it is sufficient 
to view that part whence it may be known how far the object of the 
purchaser will be obtained. In the purchase, therefore, of articles of 
which the parts are similar, (such as articles sold by weight or mea-
surement of capacity, and the mode of ascertaining the goodness of 
which is by presenting a sample to the purchaser) the sight of a part 
is sufficient; that is, no option of inspection can afterwards be claimed 
unless the other parts of the article should prove inferior to the part 
which has been seen. In the purchase, on the other hand, of things 
of which the individuals are not similar, (such as cloths or animals,) the 
sight of one does not suffice;—on the contrary, the purchaser must see 
each individual article. Of this kind are eggs and walnuts, according to 
Koorokbee. (The compiler of this work observes, however, that these are 
of the nature of wheat and barley, since their individuals are nearly alike.) 
—Now such being the established rule, it follows that the sight of a 
heap of wheat is sufficient, as the quality of what is hidden may be in-
ferred from what is seen, wheat being an article sold by measurement 
of capacity, and the quality of which may consequently be ascertained 
by
by means of a sample: and in the same manner, the sight of
the outside of a piece of cloth suffices, unless there be a particular
part within the folds necessary to be known, such as (in stamped cloths)
the pattern, in which case the option of inspection is not annulled until
the purchaser see the inside of the piece. In the case of a man*, on the
other hand, a sight of the face is sufficient; and in animals a sight of the
face and posteriors.—Some allege that in animals a sight of the fore and
hinder legs is necessary. What was first related is on the authority
of Abū Tūsif. In goats purchased on account of their flesh it is ne-
cessary to squeeze and press the flesh in the hands, as that ascertains
the goodness of it. But if purchased for breed, or for giving milk,
it is necessary to look at their dugs. In purchasing viéptuals ready
dressed it is necessary to taste them, to ascertain their goodness.

If a person look at the front of a house, and then purchase it, he
has no option of inspection, although he should not have seen the apart-
ments:—and so also, if a person view the back parts of a house, or
the trees of a garden from without. Zisser has said that it is requisite that the purchaser inspect the apartments of the house. Our au-
thor also remarks that what is here advanced with respect to a sight of
the front or back part of a house being sufficient, is founded on the
customs of former times, when, all their buildings being of an uni-
form nature, the sight of the front or back parts sufficed to ascertain
the interior parts; but that in the present time it is very necessary to
enter in, as buildings are in those days variously constructed, whence
a view of the outside is no standard by which to judge of the inside;
and this is approved.

The inspection of an agent appointed to take possession of an ar-
ticle purchased is equivalent to the inspection of the purchaser, and

* Meaning a sale set up to sale.
consequently, after the inspection of such agent, the purchaser has no power of rejecting the article purchased, unless in a case of a defect. The inspection, however, of a messenger on the part of the purchaser is not equivalent to his own inspection. This is the doctrine of Haneefa. The two disciples hold that an agent and a messenger are in effect the same, (that is, the inspection of neither is equivalent to that of the purchaser,) and consequently, that the purchaser has afterwards the liberty of rejection in both instances. The argument they adduce in support of their opinion is, that as the constituent has appointed the agent merely to take possession, and not to annul his option, it follows that such annulment does not belong to him;—in the same manner as holds with respect to option from defect; in other words, if an agent should knowingly take possession of a defective article, the option of the purchaser is not thereby annulled;—and in the same manner, also, as holds with respect to a condition of option; that is, if a person should purchase any article, with a reserve of option, and his agent, in the interval, take possession of the article, the purchaser's right of option is not annulled;—and in the same manner also, as holds in the wilful annulment of an option of inspection; as if an agent should take possession of an article concealed, and after inspection expressly declare the option to be null; in which case the purchaser's right of option would nevertheless still continue in force.—Haneefa, on the other hand, argues that seizin, or the act of taking possession, is of two kinds.—I. Perfect, which is the seizin of the article with sight and knowledge. II. Imperfect, which is the seizin of it without sight, that is, whilst it is concealed. The first is termed perfect, and the second imperfect, because the completeness of seizin depends upon the completeness of the bargain*, which cannot be complete whilst an option of inspection remains; and as, in the former instance, this option has been done away, it follows that the bargain is in that instance complete and perfect; but as, in the latter instance, on the

* Arab. Seizia, literally, the act of striking hands, in making a bargain.
contrary, it still continues in force, it follows that the bargain is in that instance imperfect.—Now as the constituent is empowered to take possession in either of these modes, it follows that the agent is equally empowered, since his constituent has appointed him, in an absolute manner, his agent for seizin. Where, however, an agent takes possession of an article without seeing it, his power is terminated by such imperfect seizin, and he consequently cannot afterwards exert an option of inspection, so as to destroy that privilege on the part of his constituent by any express declaration. It is otherwise in the case of an option from defect, because, as that is no bar to the completeness of the bargain, the seizin is in that instance perfect, notwithstanding the continuance of the option of defect.—Concerning the case of condition of option there is a difference of opinion.—Admitting, however, that the agent has not the power of annuling such option, it is because the constituent himself is not in this case empowered to make a perfect seizin, in as much as the object of such conditional option is experience and trial, which can only be acquired after seizin; and as the constituent himself is not empowered to make a perfect seizin, it follows that his agent cannot be so.—With respect to a messenger, he possesses no power, being barely commissioned to deliver a message, and cannot therefore be capable of taking formal possession of any thing.

Sale or purchase, made by a blind person, is valid: and after purchase, he has still an option, as having purchased an article without seeing it; which option is determined by the touch of the article, provided it be of such a nature that the touch may lead to a knowledge of it; or by the smell, if it be of a nature to be known by the smell; or by the taste, if the article be of an esculent nature;—in the same manner as all these modes determine the option of a person possessed of sight.
CHAP. III.

SALE.

The option of a blind person, in the purchase of land, is not determined until a description of the qualities of it be given to him; because such a description is equivalent to a sight of the object, as in the case of Sillim sales.—It is recorded from Aboo Youosof, that if a blind person, in purchasing land, should stand on a spot whence, if he possessed his sight, he might inspect the whole, and should then declare "I am content with this ground which I have purchased," the right of option is annulled; because the standing on the spot in this manner is analogous to the actual view of it; and the semblance is equivalent to the reality where the reality is unattainable; as in the case of a dumb person, the motion of whose lips is deemed equivalent to the reading of the Koran; or, as in the case of a bald person, with respect to whom the motion of the razor to and fro over his head is deemed equivalent (in case of his making a pilgrimage to Mecca) to actual shaving.—

Hooft-Bin-Zereyd has said that a blind person must appoint an agent for seizin, who may inspect and take possession of the article on his behalf; and this is conformable to the doctrine of Haneefa, who is of opinion (as has been already explained) that the inspection of an agent is equivalent to that of his constituent.

If a person, having seen one of two garments, should purchase both, and should afterwards see the other, he has then the option of rejecting both; because, as garments differ essentially from one another, a sight of one is not equivalent to a sight of both; and therefore his right of option remains with respect to the one he had not seen. He has it not in his power, however, to reject that one singly; for in such case an alteration in the bargain would take place before the completion of it *, as a bargain is not complete whilst an option of inspection

* A contract of sale, when settled by the parties, does not become complete until the execution of it; yet it cannot admit of any alteration of the terms of it in the interval. Thus, if two bushels of wheat be sold for two dirms, and the parties, before the execution of the contract, agree to deliver three bushels of wheat for three dirms, the bargain is still unexecuted; for a new bargain, not a revision of the former, has taken place.
inspection remains: and hence it is that the purchaser may reject the article, independant of an order from the Kāsee, or the consent of the seller; and such rejection is a dissolution of the sale from the beginning.—in other words, it becomes the same as if the contract had never existed.

If a person possessing the option of inspection should die, the option in such case becomes null; for (according to our doctors) it is not a hereditament, as has already been explained in treating of optional conditions.

If a person, having once seen an article, should afterwards, at a distant period, purchase it, and the article, at the time of purchase, exist in the form and description in which he first saw it, he has not in this case any option, because he is possessed of a knowledge of the qualities from his former inspection; and an option is allowed only in defect of such knowledge.—If, however, the purchaser should not recognise or know it to be the same article, he has in that case an option; because under such circumstances his consent cannot be implied: or if, on the other hand, the nature of the article be changed, he has an option; because the qualities being changed, it becomes in fact the same as if he had never seen it.

If a purchaser and seller dispute concerning any recent change in the nature of the article,—the purchaser asserting this circumstance, of the contract, mutually agree to reduce the sale to one bushel for one darm, this agreement, as being an alteration of the terms previous to their fulfilment, would be unlawful. In short it is requisite, in this instance, either that the parties previously dissolve the first contract, and then enter into a new contract of sale of one bushel for one darm; or that they formally complete the first contract by mutual seizin, and that the purchaser then sell one of the bushels to the seller for one darm.

* Arab. Ḥādīs, [or Ḥādīth] meaning, supervenient upon the contract.
and the seller denying it,—in this case the allegation of the seller, confirmed by an oath, must be credited; because the interval between the sight and the purchase being short, the probability is in favour of the assertion of the seller, that such change did not happen till after the purchase had taken place. If, however, a long period should intervene between the sight and the purchase, our doctors are in this case of opinion that the allegation of the purchaser is to be credited; because, as it is the nature of every thing to decay in course of time, it follows that his assertion is supported by probability.

If the parties dispute concerning the period when the article was inspected, the seller asserting that the purchaser had first seen and then purchased the article, and the purchaser denying this,—in that case the allegation of the purchaser, upon oath, is to be credited.

If a person purchased a bundle of clothes of a Zoota* without seeing them, and afterwards fell or gave away part of them; in this case he has not the power of rejecting any of those that remain unless they should prove defective. In the same manner, if he purchased a bundle of clothes of a Zoota, stipulating a condition of option, and afterwards fell or bestowed in gift part of them, his right of option is annulled; because it is not in his power to reject what he has no longer any property in; if, therefore, he were to reject the remainder, it would induce a deviation from the bargain before the completion of it; (for the existence of an option of inspection, or of a condition of option, is a bar to the completeness of the bargain.) It is otherwise in an option from defect; as the bargain, notwithstanding the existence of such option, is completed upon seizing the article.

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* A tribe of black Arabs.---*Zoot.---A tribe of Arabs who, formerly inhabited the "fenny region lying between Wadi and Bofra; they were defeated and reduced to servitude by Moufem, the eighth Khâif."—(De Herbeot.)
S A L E. Book XVI.

sold, although it be not complete before seizin;—but the present case proceeds on the supposition of possession having been taken. If, however, the supervenient deeds of sale or gift, on the part of the purchaser, be rendered null, (as if the secondary purchaser should undo the bargain on account of the discovery of a defect,—or, as if the purchaser himself should recede from his gift,) in this case the option of inspection still remains.—This is from Shimsb-al-Ayma. It is related, as an opinion of Aboo Yoosif, that an option of inspection once annulled cannot again revive, any more than a conditional option; and Kadoore has adopted this doctrine.

C H A P. IV.

Of Option from Defect.

If a person purchase and take possession of an article, and should afterwards discover it to have been defective at the time of sale, it is at his option either to take it for the full price, or to reject it; because one requisite, in an unconditional contract [of sale,] is that the subject of it be free from defect;—when, therefore, it proves otherwise, the purchaser has no option; for if the contract were obligatory upon him, without his will, it would be injurious to him. He is not, however, at liberty to retain the article, and exact a compensation, on account of the defect, from the seller; because, in a contract of sale, no part of the price is opposed to the quality of the article;—and also, because the seller does not consent to be divested of the property for
for a less price than that which he stipulates:—if, therefore, the purchaser were to retain the defective article, and exact a compensation from the seller on account of the defect, it would be injurious to the latter:—but it is possible to obviate the injury to the purchaser without entailing an injury on the seller, by permitting him either to retain the article, if he approve of it with the defect, or to reject it.—If, however, the purchaser, at the time of sale, or of taking possession, be aware of the defect, and nevertheless knowingly and wilfully make the purchase, or take possession, no option remains to him; because when he thus purchases or takes possession of the article, it is evident that he assents to the defect.

Whatever may be a cause of diminishing the price amongst merchants is considered as a defect; because injury is occasioned by deficiency in point of value; and deficiency in point of value occasions deficiency in price; and the mode of ascertaining this is by consulting merchants who are practised in estimating the value of articles.

A disposition to abscond, or to make urine upon carpets, or to commit theft, are defects in children during their nonage, but not after they attain to the age of maturity. If, therefore, any of these defects appear in an infant slave during childhood whilst in the hands of the seller, and afterwards appear in him during childhood whilst in the hands of the purchaser, he [the purchaser] is in that case at liberty to return him to the seller, in virtue of option from defect; because this is the same defect that existed whilst in the possession of the seller. If, on the other hand, any of these defects should occur in him, in the purchaser’s hands, after he attains to maturity, the purchaser is not at liberty to return him by option from defect; because this defect is different from that which appeared during childhood in the hands of the seller, since these defects proceed from different causes in the periods of childhood and maturity; for the making of urine upon a carpet
carpet (for instance) during the time of childhood, is owing to a weakness in the bladder,—whereas, after maturity, it arises from a disease in the interior parts; and, in the same manner, the running away of a child is from a desire of play; and the commission of theft from thoughtlessness; but these, where they occur after maturity, are the effect of innate wickedness.—By a child is here meant one in its perfect senses; for a child not in its perfect senses is incapable of running away; whence it is that the term used in that case is lost or strayed, not absconded:—the running away, therefore, of such a one is not a defect.

Madness during infancy operates as a perpetual defect:—in other words, if an infant slave be subject to lunacy in the hands of the seller, and the lunacy recur whilst in the hands of the purchaser, whether during childhood or after maturity, the purchaser is at liberty to return him to the seller; because this madness is in effect the same as had originally existed whilst the slave was yet in the seller's hands, as being occasioned by the same cause, namely, an internal malady.—It is not, however, to be understood (as some have imagined) that the return of the madness is not required as a condition to enable the purchaser to dissolve the bargain; for God Almighty, as being all powerful, may remove the madness, although that seldom happen. Hence it is necessary that the madness return, to enable the purchaser to dissolve the bargain; for, unless it actually return, he has not this privilege.

A bad smell, from the breath or armpits, is a defect in regard to female slaves, because in many instances the object is to sleep with them; and the existence of such defects is a bar to the accomplishment of that object.—These, however, are not defects with regard to male slaves; because the object, in purchasing them, is merely to use their services; and to this these defects are not obstacles, since it is possible for a slave to serve his master without the necessity of the master's sitting down with
with him, so as to receive annoyance from these defects. — If, however, they proceed from disease, they are considered as defects with regard to male slaves also.

Whoredom and bastardy are defects with regard to a female slave, but not with regard to a male; because the object, in the purchase of a female slave, is cohabitation and the generation of children, which must be affected by either of the above circumstances; whereas, the object in the purchase of a male slave is the use of his services, the value of which is not depreciated by his committing whoredom. — If, however, a male slave be much addicted to whoredom, our lawyers are of opinion that it is a defect, because in the pursuit of women he neglects the service of his master.

Infidelity is a defect in both a male and female slave; because the disposition of a Mussulman is averse to the society of infidels; and also, because as, in the expiation of murder, the emancipation of an infidel slave does not suffice, it follows that the possession of such a slave is not what is desired, since a part of the object is thus defeated. If, on the contrary, a person should purchase a slave, on condition of his being an infidel, and he afterwards prove a Mussulman, the purchaser has no power of dissolving the bargain, since the exemption from infidelity is no defect.

A total suppression of the courses, or an excessive evacuation of them, are defects with respect to a female slave, as they proceed from internal maladies. It is to be observed, however, that the want of the courses is not considered as a defect until the extreme period of maturity be elapsed, which in females (according to Haneefa) is seventeen years; and this knowledge must be had from the information of the

* That is, supposing the slave to be purchased as a Mussulman, and he prove to have been an infidel at the time of purchase.
slave herself.—If, therefore, a person purchase a female slave arrived at full maturity, (that is, seventeen years of age,) and learn from herself that her courses have not appeared, he is then entitled to return her to the seller before taking possession; and even after taking possession, provided the seller simply deny the circumstance, and refuse to confirm it with an oath. If, however, the seller deny the circumstance upon oath, the purchaser is not entitled to return her.

If an article, after being sold, should receive a blemish in the hands of the purchaser, and the purchaser should afterwards learn that it had also a blemish at the time of sale, he is, in that case, entitled to receive from the seller a compensation for the defect; but he is not permitted to return it to him, as that would be attended with an injury to the seller, since it would necessitate him to receive again into his property a thing with two blemishes which, in issuing from him, had only one. As, therefore, the return of the article is in this case impracticable, and as it is necessary to remove injury from the purchaser, the expedient of entitling him to a compensation from the seller for the defect has been devised: unless, however, the seller should consent to receive it with the two blemishes, and voluntarily acquiesce in his own loss.—By the phrase compensation for defect, is to be understood, throughout this work, the difference between the value of an article in its perfect state, and the value it afterwards bears in its defective state.

If a person purchase cloth, and cut it up, and then, before he had begun to sew it, discover it to be defective, he is in this case entitled to a compensation for the defect from the seller; because although, in consequence of the cloth being cut, a bar be opposed to the returning of it to the seller, (as the cutting is a defect which the purchaser himself is the occasion of,) yet the return is eventually possible, by the seller's acquiescing in it, which he may do if he please, since
since the bar is opposed only in tenderness to his right; and this right it is in his power to forego. If, however, after cutting the cloth, the purchaser should sell it to another, he is not then entitled to any compensation for the defect; for although, after cutting the cloth, the bar to his returning it to the seller may be eventually removed, by his [the seller's] acquiescence, yet when the purchaser afterwards disposes of it to another, he himself fixes a bar to the possibility of its being returned to the seller, for which reason he is not entitled to a compensation for the defect.

If a person purchase cloth, and, after cutting, either dye it or sew it,—or purchase flour, and mix it up with oil,—and afterwards discover the article to be defective, the is in that case entitled to a compensation for the defect; because the return of the article to the seller is in either of those instances impracticable, as it has become implicated with a thing which cannot be separated; it is therefore impossible to return the article simply by itself; nor can it be returned with the addition, since the addition was not in any respect a subject of the sale; and the seller, moreover, is not at liberty to receive it back with such addition, because the obstacle to the return, in these instances, is not in right of the seller, but in right of the law*. If the purchaser, therefore, in any of these instances, should sell the article, after discovering it to be defective, he is still entitled to a compensation from the seller; because, as the bar to his returning the article to him existed previous to the sale of it on his part, he cannot by such sale be considered as the cause of detaining it from the seller.

If a person purchase cloth, and cut it out for clothing on account of an infant son, and after having sewn it up discover a defect in it, he is not entitled to a compensation for the defect from the seller. If, 

* Because the law (meaning the text of the Koran) forbids usury, under which head this transaction falls, as being the receipt of an addition, with the original.

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however, the son in this instance be an adult, the purchaser is entitled to such compensation.—The reason of this distinction is that, in the former instance, the right of property, with regard to the infant, takes place immediately on the cutting of the cloth, and previous to its being sewn; and consequently, as the purchaser by this act invests the infant with a right of property immediately upon cutting the cloth, he becomes the cause of the detention of it from the seller previous to its being sewn, and is therefore not entitled to the compensation:—in the latter instance, on the contrary, the right of property with regard to the adult does not take place upon the sewing, nor until he actually take possession of the garment; and hence, as it is by the sewing, and not by the investiture in the adult, that the return of the cloth to the seller becomes impracticable, it follows that the purchaser, by making this investiture, does not detain the cloth from the seller, and consequently, that he is entitled to a compensation.

If a person purchase a slave, and afterwards emancipate him,—or the slave die in his hands, and the purchaser then become acquainted with his having been defective, he is in either case entitled to a compensation from the seller:—in case of the slave dying, because death renders his property in the slave complete and perfect, and the impracticability of returning him does not arise from any act of the purchaser, but from an unavoidable calamity;—and also in case of his emancipating the slave, upon a favourable construction of the law—Analogy would suggest that in this last case the purchaser is not entitled to a compensation, because the obstacle to the return proceeds, in this instance, from the act of the purchaser: the case, therefore,

* As an infant is incapable of taking possession in a case of gift, the property vests in him immediately on the declaration of the donor, or on his [the donor's] performing some act which manifests his intention, as in the cutting of the cloth by the purchaser in the above case: in the case of an adult person, on the contrary, actual seizure is requisite to an investiture with right of property.
is the same as if he had killed the slave; and as, in that case, he would not have been entitled to any compensation for defect, so in this instance likewise. He is, however, so entitled, upon a favourable construction, because by the emancipation his property attains to its height and completion; for man is not, in his original nature, a subject of property, all men being originally created free; nor can any right of property exist with respect to him but under restriction, and of limited duration, continuing in force no longer than until he be made free: emancipation, therefore, like death, occasions a completion of right of property, and it may consequently be said that a right of property still remains in the subject of the sale, notwithstanding the impossibility of returning it, as a thing is rendered fixed and unalterable by its completion. — It is to be observed that constituting the slave a Modabbir or an Am-Valid is, in this particular, equivalent to emancipation.

If a person purchase a slave, and afterwards emancipate him in return for property *, and then discover him to have been defective, he is not entitled to a compensation from the seller, as the detention of the return is, in effect, a detention of the consideration. — It is recorded, from Haneefa, that the purchaser is in this case also entitled to a compensation; because an emancipation, whether it be gratuitously made or otherwise, occasions the completion of the right of property.

If a person purchase a slave; and afterwards put him to death, and then discover him to have been defective, he is not entitled to a compensation for the defect, according to Haneefa. — This also is agreeable to the Z imb-Rhawayet. — It is reported, from Aboo Yoosuf, that the purchaser is entitled to a compensation; because the law annexes

* See Manipulation for a Compensation.
no worldly punishment to the murder of a slave by his master, and the case is therefore the same as if he had died a natural death. The principle on which the Zhlir-Raswayet proceeds is that murder, wherever it takes place, occasions responsibility; and as, in the case of a master killing his slave, the responsibility is remitted only on account of the master's right of property, the master consequently, as it were, takes the responsibility in return for his right of property: the case is therefore the same as if he had sold the slave. It is otherwise where he emancipates him without any return, as that act does not occasion responsibility, any more than where a poor person emancipates his portion in a partnership slave.

If a person purchase any articles of food, and eat them, and be then informed of a defect in them, in that case, according to Haneefa, he is not entitled to any compensation from the seller.—According to the two disciples he is entitled to a compensation.—The same difference of opinion subsists with respect to the case of a person who, having purchased garments, and worn them until they had become ragged, then discovers that a defect had formerly existed in them.—The arguments of the two disciples are that the purchaser having performed no act with respect to the subject of the sale but what is agreeable to the object of the purchase, and what is customary, the case is therefore the same as if he had emancipated a slave.—The argument of Haneefa is that the return of the food to the seller is impracticable, because of the purchaser having performed an act with regard to it which induces responsibility; and the case is therefore the same as that of sale or of murder. The act of a purchaser, moreover, although it be the object of the purchase, is nevertheless disregarded: whence it is that the purchaser is entitled to no compensation for a

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* That is, it only subjects the murderer to expiation by charity, fasting, or other religious penances.

† In other words, "bears the loss."  
defect.
defect, after having sold the goods, notwithstanding sale be one of the objects of purchase.

If a person purchase certain articles of food, and eat part of them, and then discover them to be defective, he is not, according to Haneifa, entitled to return to the seller what remains, and to demand from him a compensation for the defect in what he had eaten; because provisions are in the nature of an unity; and the case is therefore the same as if a person were to sell part of goods purchased by him, and then to discover a defect in them; in which case he would not be entitled to return the remainder to the seller, and demand a compensation for the defect; and so also in the case in question.—There are two opinions of the two disciples on this case.—According to one opinion, the purchaser may retain the remaining part of the provisions, and receive from the seller a compensation for the defect of the whole: and, according to the other, he may return the remaining part to the seller, and receive a proportionable compensation for the defect of what he had eaten.

If a person purchase eggs, musk melons, cucumbers, walnuts, or the like, and after opening them discover them to be of bad quality; in that case, if they be altogether unfit for use, the purchaser is entitled to complete restitution of the price from the seller, as the sale is invalid, because of the subject of it not being in reality property.—If, on the other hand, notwithstanding their badness, they be still fit for use, the purchaser is not entitled to return them to the seller, because the opening of them is an additional defect of his own creation: he is, however, entitled to a compensation for the defect; as by this means the injury he would otherwise sustain is remedied to the greatest possible extent. Shafi'i has said, that he is entitled to return them after opening them; because that is the exercise of a power committed to him by the seller. In reply to this our doctors argue, that the seller has empowered him to open them in virtue of his becoming the proprietor.
proprietor. Hence the case is the same as where a person purchases a garment, and, after having cut it, discovers a defect in it; in which case the purchaser is not entitled to return the garment upon the seller's hands, although he [the seller] had authorized him to cut it down.—In short, if the articles prove defective only in a small part, the sale is valid, upon a favourable construction, because it is incident to walnuts, and such other articles, to be bad in a small part; (by a small part is meant what is commonly the case, such as one or two in a hundred:) but if, on the other hand, a great part prove bad, the sale is invalid, and the purchaser is entitled to a complete restitution of the purchase-money; because in this case the seller has united together entities and non-entities with regard to value; and the case is therefore the same as if a person were to sell together freemen and slaves.

If a person, having purchased a slave, should sell him to another, and that other return the slave to him on discovering him to be defective, and he agree to receive him back, on the Káze's issuing a decree to that effect, founded on the proof of the defect by witnesses, or on the refusal of the first purchaser to confirm his denial upon oath,—in that case the first purchaser is entitled to return the slave to the seller; because, although it be not lawful for a purchaser, after the sale of the article on his part, to return it to the seller, still in this case, the second sale having been annulled by the Káze, it becomes the same as if no such sale had ever existed.

Objection.—As the first purchaser denied the defect, and obliged the second purchaser to establish the fact by witnesses, it would appear that he is not entitled to return the slave; because, if he ground his right on the defect, he is guilty of prevarication, since he first denies the defect, and then affirms it.

Reply.—The disproof of the denial by the Káze's decree, founded on the proof of the fact by witnesses, renders such denial of no validity in law; hence the apparent contrariety of his denial and assertion
affirmation is reconciled, and as the first sale continues in force, and the
defect is at the same time proved, it follows that he is entitled to re-
turn the slave to the seller. — If, therefore, he chuse to return him, it
is a valid rejection: but if he should rather chuse to keep him, the
sale continues in force. — It is otherwise where an agent for sale dis-
poses of an article, and the purchaser returns it to the agent in con-
sequence of a defect; — for this is in reality a return to the constituent;
and the agent is not required to return the article to his constituent,
because, in this case, there is only one sale, whereas in the case in
question there are two, whence the dissolution of the second sale does
not dissolve the first. — In short, if the second purchaser, on the dis-
coveiy of a defect, return the slave, and the first purchaser receive
him back, in consequence of a decree of the Kassee, he [the first pur-
chaser] is in that case entitled to return him to the original seller. — If,
on the other hand, the first purchaser agree to receive him back with-
out a decree of the Kassee, he in that case is not entitled to return him
to the original seller, because, although the second sale be annulled
with regard to himself and the second purchaser, still it is equivalent
to a sale de novo with regard to all other persons; and the original seller
is another person. — It is recored, in the Juma Sagbeer, that when the
subject of the sale is returned to the first purchaser, without a decree of
the Kassee, on account of such a defect as very rarely happens, (such
as an additional finger, for instance,) the first purchaser has not the
power of returning it to the original seller; and this (as our author re-
marks) is a direct proof that the effect is the same in both cases; that
is, whether the defect be of such a nature as may have recently hap-
pened, or such as never recently happens. — In some traditions it is
mentioned, that in the latter case the purchaser may return the
subject of sale to the original seller, as there is then a certainty
that such defect did exist whilst in the hands of the original
seller.
Conduct to be observed by the magistrates, in case of a purchaser, after taking possession, alleging a defect in the article.

If a person purchase a slave, and take possession of him, and then assert a defect in him, the Kâzee in such case must not enforce the payment of the price on the part of the purchaser until he shall have investigated his assertion, either by the declaration of the seller, upon oath, that the slave had no defect, or by the proof of the fact on the part of the purchaser by witnesses. The suspension of the Kâzee's decree with regard to the payment of the price is requisite, lest such decree should be rendered vain and useless by the subsequent proof of the defect; and also, because the tenor of such decree is that the purchaser shall pay the complete price in fulfilment of the specific claim of the seller,—whereas the purchaser, by asserting a defect, denies the obligation on him to pay the complete price. The Kâzee, therefore, must first proceed to examine into the circumsstance of the defect; and if the purchaser should say that his witnesses are in Syria *, he must then exact from the seller his denial upon oath. If the seller should take the oath accordingly, the Kâzee must then decree the payment of the price;—because in suspending the price till the arrival of the witnesses an injury would result to the seller; and the immediate enforcement of the payment does not in so great a degree injure the purchaser, because after the return of the witnesses from Syria, if he should establish his proof, the purchase-money will be returned to him on his returning the slave to the seller.—If, however, the seller should refuse to take an oath in support of his denial, the assertion of the purchaser is then established, as such refusal is an argument in favour of the existence of the defect.

In a person, having purchased a slave, should afterwards assert that "he had run away from him, and had also run away whilst in the "possession of the seller," and the seller offer to take an oath that "he "had never run away from him" [the purchaser,] the Kâzee must in that case refuse to receive his deposition, until the purchaser first

* That is, at such a distance as renders their appearance in court impracticable.
prove by witnesses that "he had run away from him" [the selle],
after which the Kadda must tender an oath to the seller to this pur-
port. "by God, I have sold the said slave and delivered him to the
purchaser, and he never ran away whilst he belonged to me:" (as is
mentioned by Mohamed in the Jama:)—or to this purport, "by
"God, the purchaser has no right to return to me such slave, on ac-
count of the defect which he asserts:"—or in this manner, "by
"God, such slave never ran away whilst he belonged to me."—He
must not, however, tender an oath to him to this purport, "by God,
"I sold the said slave at a period when he had not the said defect:"—
or in this manner, "by God, 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
although he had such a defect formerly, 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 pur-
chaser should not be able to prove, by witnesses, that the slave had
run away from him [the purchaser,] the oath, in that case also, (accor-
ding to the two disciples,) must be tendered to the seller.—Our
modern doctors have differed concerning the opinion of Haneefa upon
this point; as some of them say that, according to him, an oath is
not to be administered to the seller in this instance.—The argument
of the two disciples is, that as the assertion of the plaintiff is worthy
of regard, and such as would be attended to in case of its being proved
by witnesses, it follows that in default of such witnesses the seller
must be required to deny the assertion upon oath.—The reasoning
of Haneefa (as recorded by those who have said that, according to
him, an oath is not to be administered to the seller) is that the form
of swearing a defendant has been ordained by the law for the purpose
of removing any litigation that may happen to arise,—not for the pur-
pose of exciting litigation. Now, in the present case, the exaction
of an oath from the seller will only give birth to a new litigation; be-
cause, in case he should refuse to take it, and the proof of the fact be

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thence
hence established, it will become a new subject of contention whether the said defect did exist or not during his being in the seller’s possession, and there will be a necessity for tendering to him another oath, upon this point, for the purpose of removing this fresh cause of dispute.

If a person purchase a female slave, and having received her from the seller, should, on the discovery of a defect, desire to return her, and the seller assert that “he had sold two female slaves to the purchaser of which he only produced one,” and the purchaser maintain, on the other hand, that “he had only sold one,”—in that case the declaration of the purchaser, upon oath, is to be credited; for, as the disagreement here relates to the quantity taken possession of, the person who took possession must be credited, as being the most competent judge;—in the same manner as holds in a case of usurpation;—that is, if the person whose property is usurped assert the usurpation of a particular quantity, and the usurper deny the quantity, his declaration upon oath is to be credited;—and so also in the case in question. If, on the other hand, the purchaser and seller agree in the extent of the sale, but differ with respect to that of the sexes, (as if both should allow the two female slaves to have been the subject of the sale,—the seller asserting that “the purchaser had received both,” and the purchaser, on the other hand, maintaining that “he had only received one,”)—in that case also the declaration of the purchaser, upon oath, is to be credited, for the reason already explained.

If a person purchase two slaves by one contract, and take possession of one, and then discover the other to be defective, he is not in that case permitted to retain the one he had taken possession of, and to relinquish the other; but he has the option of either retaining or relinquishing both; because until both be taken possession of the terms of the contract are not fulfilled; and hence, if he should retain one and relinquish the other, it would induce a deviation from the bargain
bargain previous to its fulfilment, which (as was before explained) is unlawful. If the defect should lie in the slave of which possession had been taken, in that case there is a disagreement among our doctors. It is recorded, from Aboo Yosaf, that the purchaser is in such case entitled to return the defective slave only. The more approved doctrine, however, is that he must retain both or relinquish both; because the fulfilment of the bargain rests upon a complete possession of the subject of the sale, namely the two slaves. This case, therefore, resembles a case of detention of the article sold, in satisfaction for the price; that is, if the seller should detain the goods in satisfaction for the price, such detention cannot be abrogated until he actually receive complete possession of the price; and in the same manner, in the case in question, the bargain is not perfected, until the purchaser receive complete possession of the articles sold. If, however, in the case in question, the purchaser should have made seizin of both, and should afterwards discover a defect in one of them, he is then entitled to return the defective one singly. Ziffer has given a different opinion; because in this case a deviation from the bargain takes place; and it is not free from injury, since it is an established custom, in sales, to unite good and bad things together: the case is therefore the same as if he had rejected one before the seizin of the whole,—or, as if he had made the purchase under a condition of option, or, with an option of inspection. Our doctors, on the other hand, allege that in this case the deviation from the bargain takes place after the fulfilment of the contract; because the seizin of the goods renders the contract complete; and the existence of the option of defect does not operate against the completion of the contract after seizin. A deviation, moreover, from the bargain, after the fulfilment of it, is lawful, as has been already demonstrated: whence it is that if, after taking possession of both slaves, one of them should be found to be the property of another, the purchaser is not in that case at liberty to return both to the seller; but must retain one, and receive from the seller a deduction of the price, on account of the one belonging to another, notwithstanding
ing this be a deviation from the bargain:—contrary to conditional options, or options of inspection, for the existence of such conditions is a bar to the fulfilment of the bargain, notwithstanding seizin may have taken place.

If a person purchase articles estimable by weight, or by measure of capacity, (such as silver or wheat, for instance,) and he afterwards discover the article to be in part defective, he is entitled, in that case, either to return the whole to the seller, or to retain the whole; but he has not the power of returning the defective part only, because the unities of articles estimable by weight or by measure of capacity are considered as forming one individual, provided they be all of the same species. Some have alleged that this proceeds on a supposition of the articles in question being contained in one vessel; but that, if they be contained in two, the one containing the defective article may be returned, and the other retained.

If a part of such articles prove the property of another, all the purchaser is not at liberty to return the remainder.

If, after the purchase of articles estimable by weight, or measurement of capacity, a part of them should prove to be the property of another, the purchaser is not in that case allowed to return the remainder to the seller; because no injury can result to him from his being obliged to keep them, as articles of this nature may be separated and divided without sustaining any blemish, and the proof of part of the subject of the sale having been the property of another is no impediment to the completion of the contract, since that depends on the consent of the seller and purchaser, and not of the person who is discovered to be the proprietor of a part. This is where possession has been taken by the purchaser, before a part of the subject is discovered to be the right of another;—for if the right of property of the other be discovered previous to the purchaser taking possession, he is, in that case, entitled to return the remainder, since a deviation from the contract takes place previous to the completion of the bargain. If the articles be not such as are estimable by weight, or measurement of capacity,
capacity, but cloth, for instance, then the purchaser is entitled to re-
turn the remainder to the feller at all events, as division and separation
of the article would, in this instance, prove an injury to it.

If a person purchase a female slave, and discover that she has an
ulcer or some other such ailment, and apply a remedy to it,—or, if a
person purchase an animal, and discover it to be defective, and ride upon
it on some business of his own,—the application of a remedy in the one
case, or the act of riding in the other, indicate an acquiescence in the
defect on the part of the purchaser, and he is therefore not entitled to
return either the slave or the animal on the plea of an option from the
discovery of a defect. It would be otherwise if he had purchased the
animal on a condition of option; for the object of such condition is an
experimental knowledge, which cannot be obtained but by a trial. If,
moreover, he were to ride upon the animal, not on his own business,
but merely with an intention of restoring it to the feller, no inference
could be drawn of his acquiescence in the defect;—and so also, if he
were to ride upon the animal with an intention of giving it water or
forage; provided, however, the riding for these purposes be unavoid-
able, either because of the animal being unruly and ungovernable, if
not mounted, or because of the purchaser himself being incapable of
walking.

If a person purchase and take possession of a slave, not knowing
that he had formerly, whilst in the possession of the feller, been guilty
of theft, and the theft be afterwards proved, and the slave suffer am-
putation for it in the feller’s hands, the purchaser is, in that case, en-
titled, according to Haneefa, to return him to the feller, and receive
back the whole of the price. According to the two disciples, the
purchaser is still to keep possession of the slave, and to receive from
the feller the difference between the value whilst in his perfect state,
and that which he bears after his hand is cut off. The same disagree-
ment subsists in case of a slave suffering death whilst in the possession
of

A purchaser, by applying a remedy to the defective article, or
making use of it, deprives himself of the power of re-
turning it to the feller.

If a purchased slave suffer amputation for a theft com-
mitted with the feller, the pur-
chaser may return him and receive back the price:

and so also, if he suffer death, for a
of the purchaser, for a crime he had committed whilst in the possession of the feller; Haneefa being of opinion that the purchaser is entitled to a restitution of the whole of the price; and the two disciples, that he is 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 *. In short, according to Haneefa, the existence of a cause of mutilation or death is equivalent to a claim of right †,—whereas, according to the two disciples, it is equivalent to a defect. The reasoning of the two disciples is that the cause only of mutilation or death occurred with the feller, but not the actual death or mutilation itself;—now the existence of a cause of death or mutilation is not repugnant to the subject being property; the slave, therefore, notwithstanding the existence of the cause of mutilation or death, is nevertheless property, and capable of being the subject of a sale; as, however, a slave in whom exists a cause of death or mutilation is defective, it follows that the purchaser is entitled to receive from the feller a compensation for the deficiency, where the return has become impracticable; and in either of these instances the return is impracticable;—where he suffers death evidently; and also where he suffers mutilation; because such mutilation is a defect that has taken place in the hands of the purchaser;—in the same manner as where a person purchases a pregnant female slave, being ignorant of the circumstance, and the slave dies in labour, in which case the purchaser is entitled only to a compensation for the difference between the price which she bore when not pregnant, and that which she bore when pregnant. The reasoning of Haneefa is, that the cause of mutilation and death occurred with the feller; and as a cause induces its effects, the death or mutilation must be referred to the period of the cause. The case is, therefore, the same as if a person

* That is, has become forfeited to the law, and consequently liable to be slain without responsibility.

† In other words, is the same, in effect, as if the slave, after the purchase, should prove to be the property of another person.
were to usurp a slave, and the slave, whilst in his possession, were to commit a crime inducing mutilation or death, and the usurper then restore him to his proper owner; and the slave then suffer death or mutilation; for in that case the usurper would be responsible for the whole of the value to the owner; in the same manner as he would have been in case of the slave's having been put to death whilst in his own possession; as the cause, in either instance, occurred with him. With respect to the case of pregnancy, adduced by the two disciples, it is not admitted by Haneefa. If, however, it were admitted, still there is no analogy between it and the case in question, since pregnancy is the cause of delivery, and not of death, except in a few instances.

If a slave first commit theft with the seller, and then, after being sold, commit theft with the purchaser, and afterwards suffer amputation for both thefts, in that case, according to the two disciples, the purchaser is entitled to the difference of relative value of the slave at the time of sale, and after the commission of the second theft. According to Haneefa, on the other hand, the purchaser is not entitled to return him, unless the seller should of his own accord consent to receive him: but he is entitled to a compensation for the fourth of his value; and if the seller should himself agree to receive him, in that case he must restore 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 forfeited for the commission of two thefts, it follows that a deduction of one quarter ought to be made on account of the theft committed whilst in the possession of the purchaser.

If a slave, having been severally sold, and delivered to three different persons, should then suffer amputation for a theft which he had committed whilst in the possession of the first seller, and of which the different purchasers were not apprized at the period of concluding

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Cafe of a slave suffering amputation for two thefts, one committed with the seller, and the other with the purchaser.
their respective contracts,—in that case, according to Haneefa, the last purchaser has a right to return him for a full retribution of the price to the person from whom he bought him; and he again is entitled to return him, on the same condition, to the person from whom he bought him; and in this manner the return may be made through the different gradations of purchasers to their immediate sellers, until at length the slave be returned to the seller in whose hands he committed the theft;—in the same manner as in a case of claim of right; for the existence of a cause of amputation is (according to Haneefa) equivalent to a claim of right, as was before explained. According to the two disciples, on the other hand, the last purchaser is entitled to a compensation from the immediate seller; but he again is not entitled to any compensation from his immediate seller; in the same manner as in a case of defect; for the existence of a cause of amputation is (according to them) equivalent to a defect, as was before explained. (It is to be observed that the mention of the purchaser being ignorant of the theft committed by the slave, is insisted on in the two preceding examples, on account of the particular tenets of the two disciples; for as, in their opinion, the existence of a cause of mutilation is equivalent to a defect, it follows that if the purchaser had previous knowledge of the existence of such cause, he would appear to have acquiesced in the defect, and consequently have relinquished any right to a compensation. As Haneefa, on the contrary, holds the existence of a cause of mutilation to be equivalent to a claim of right; and as the knowledge or ignorance of this circumstance makes no difference with respect to the purchaser, it follows that such specification, with regard to his tenets, is perfectly immaterial.)

If a person should sell a slave, stipulating an exemption to himself of all responsibility for his defects, as if he should say, "I have sold this slave with all his defects,"—in that case, if the purchaser ac-

* See p. 224.
quiesce in such condition, and exempt him from any responsibility, he is not afterwards permitted to return him to the seller on account of any defect, notwithstanding the condition of the seller may have been general, that is, without specifying the particular names of the defects from the responsibility of which he exempted himself.—Shafie is of opinion that such exemption is not valid, unless the name of every defect to which it refers be specified;—for it is a rule, with him, that exemption from undefined claims is invalid; because exemption has some of the properties of investiture, (whence it is that it may be rejected,) and investiture of an undefined nature is invalid. The argument of our doctors is that the grant of such exemption is in fact a voluntary surrender of one’s own right, the uncertainty with respect to which can be no cause of contention, since delivery is not requisite. It is to be observed that Abū Yoosaf is of opinion that the exemption, in this case, includes all defects actually existing at the time of sale, and also all which may happen in the interval between that and their delivery. Mohammmed and Zisser, on the contrary, are of opinion that the defect which may happen in the interval ought not to be included. The argument of Abū Yoosaf is that the probable object of such surrender on the part of the purchaser is to render the sale binding and conclusive, which would not be the case unless the defects that may happen in the interval between the sale and the seizin were also included.
Of Invalid, Null, and Abominable Sales.

A sale is invalid where it is lawful with respect of its essence, but not with respect of its quality; and null, 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.

A sale in exchange for carrion, blood, or the person of a freeman, is null, because none of these cases bears the characteristic of sale (namely, an exchange of property for property,) since these articles do not constitute property with any person. A sale in exchange for wine or pork (on the other hand,) is merely invalid; because the characteristic of sale does exist in these instances, as these articles are considered as property with some descriptions of people, such as Christians and Jews; but they do not constitute property with Mussulmans, and a contract comprehending these articles is therefore invalid.

In a sale that is null, the purchaser is not empowered to perform any act with respect to the subject of the sale, but it remains as a

* The word in the original is Mahrosh, which the translator (following its literal and common acceptation) has rendered abominable. The term, however, in this work, is not to be understood in the ill sense in which it is generally employed in the English language; the cases to which it relates being such as are in every respect legal, but which being attended with circumstances of impropriety, an abstinence from them is recommended.
trust in his hands, according to some of our modern doctors; because, as the contract of sale, in such an instance, is totally disregarded, there remains only the seizin of the purchaser with the consent of the seller: and accordingly, if the article were to perish in the purchaser’s hands, in this instance, he is not responsible for it. Others are of opinion that the subject of the sale, in this case, is not a deposit, but that the purchaser is not responsible for it;—(in other words, if it perish in the purchaser’s hands, he is answerable;)—because the article is as much in his possession, in this instance, as an article detained in a person’s hands with an intention of purchase, and for which he is responsible. Some allege that Haneefa is of the first opinion, and the two disciples of the second. The reasons for this difference of doctrine will be explained in treating of the decease of an Am Waliid or Modabbir, in the hands of a purchaser.

In a case of invalid sale, the purchaser becomes proprietor of the article upon taking possession of it; and is responsible for it [if it be lost in his hands.] Shafeii is of a different opinion, as will be hereafter explained.

The sale of carrion, blood, or the person of a freeman, is null, in the same manner as a sale in return for those articles is null; because, as those articles do not constitute property, they are unsaleable.

A sale of wine or pork, if in return for money, is null; and if in return for any other article, (as cloth, for instance,) it is invalid,—whence it is that the seller of pork or wine, for cloth, becomes the proprietor of such cloth, although the actual pork or wine do not become the property of the purchaser. The distinction in these cases is, that wine and pork are held by Zimmeees to be property, whereas Mussulmans consider them as articles from which no use can be derived, because the law has commanded the contempt of them, and prohibited
prohibited all regard to them among Mussulmans. Now, a Mussulman's purchasing either of these for specie implies a regard to them, because it is not money (which constitutes the price) that is the object of the sale, as it is merely the instrument of acquiring the object; for in fact it is only the wine or pork that is the object; and as these articles are not appreciable with respect to Mussulmans, it follows that the sale of them is null. It is otherwise if a Mussulman purchase cloth for pork or wine, because that can admit of no other construction than that he regards the cloth as the object of the transaction, considering the pork or the wine only as the means of attaining such object, and not (as in the other case) as the object itself. The specification of the pork or wine, therefore, is regarded merely that the purchaser may become the proprietor of the cloth, and not in order that the seller may become proprietor of the wine or pork; and hence the mention of those articles is invalid, and the payment of the price of the cloth, and not the delivery of the flesh or liquor, is incumbent on the purchaser: — (and so also, where a person sells wine or pork for cloth;) for, as cloth is a saleable article, the cloth must, in this instance, be considered as the subject of the sale; for which reason this is an invalid and not a null sale; because where, in a contract of sale, the subject on both sides consists of something else than money, either may with equal propriety be considered as the subject of the sale. (This species of sale is termed a Beeya Mookáyexa, or barter.)

The sale of an Am-Walid, a Modabbir, or Mokáttib, is null;—because an Am-Walid has a claim to freedom, as the prophet has said, "Her child hath set her free," (that is, her child is a cause of freedom to her;) — and the cause of freedom, with respect to a Modabbir, is not established upon the decease of his owner, but must be considered as actually extant in him at present, as the owner is incapable of emancipating him after his decease; — and a Mokáttib, on the other hand,

* See Vol. L p. 479.
hand, is possessed of his own person as a right established in him, and binding upon his owner, insomuch that the owner cannot of himself break or infringe upon it:—if, therefore, the sale of any of these were valid, that which is established in them would be rendered null;—hence the sale of them is null.—Respecting a case where a Mokātib himself acquiesces in being sold, there are two opinions recorded. According to the Zabir Rawḍet, the sale in such case is valid. It is to be observed that by a Modabbir is here meant such as is absolutely so, and not one whose condition of freedom is restricted to the non-recovery of his master from the illness under which he laboured at the time of granting the ta'dīber.  

In another, the sale of an Am-Walid or Modabbir, and the seizin of the purchaser, one or other should die, in this case, according to Hanefī, the purchaser is not responsible. According to the two disciples he is responsible for the value:—(and there is one tradition which reports that Hanefī coincides with them on this point.)—The reasoning of the two disciples is, that as the purchaser took possession of the Modabbir or Am-Walid in virtue of a sale, he is therefore responsible for the loss; in the same manner as for the loss of any other property after purchase and seizin;—for this reason, that an Am-Walid or Modabbir may be included in a contract of sale; whence it is that any article united with them in a contract of sale becomes the actual property of the purchaser. It is otherwise with respect to a Mokātib, as the purchaser is not responsible for the loss of him, because, being possessed of his own person, the purchaser's seizin of him is not fully established; and the responsibility attaches in virtue of the seizin. The argument of Hanefī is, that actual sale cannot operate with respect to what is not in reality a fit subject of it; and the purchaser is not responsible if they die in his hands.

† That is, the loss is considered as falling upon the seller, and not upon the purchaser.
‡ That is, "may be joined with other articles."
and as a Modabbir or Am-Walid are not in reality fit subjects of sale, they are therefore considered in the same light with a Mokdrisib. In reply to what the two disciples urge it may be observed, that an Am-Walid or Modabbir are not included in a sale for the sake of their persons, but only in order that the effect of sale may be established with respect to such articles as may have been united with them in the contract; in the same manner as where property of the burdener happens to be involved in the contract;—in other words, if a person purchase two slaves by one contract, and one of those slaves happen to be his property, such slave is nevertheless included in the contract;—not indeed for the sake of his person, but merely in order that the effect of the sale may extend to the other slave, who is united with him in it.

The sale of fish which is not yet caught is null, as it is not in that state property. In the same manner also, the sale of a fish which the vender may have caught, and afterwards thrown into a large fountain from which it cannot be taken without difficulty, is null, because there the delivery is impracticable. (It is lawful, however, in case the fountain be so small as to admit its being caught with ease.)—If fish should of themselves come into a fountain without the proprietor's having taken any means, by the erection of a dam, or the like, to prevent their egress, they are not considered as property, and the sale of them is therefore null.

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

The sale of a fetus in the womb, or of the offspring of that fetus, is null; because the prophet has prohibited it; and also, because there is a probability of fraud, from there being a want of certainty in the case.
The sale of milk in the udder is null; because there is a possibility of fraud, in the udder’s being perhaps void of milk, and full of wind; or, because there might arise a contention with respect to the mode of extracting the milk; or because it might happen that the udder contained more milk at the time of extracting it than at the time of sale; and hence there might be implicated in the sale something not properly the subject of it.

The sale of wool or hair growing upon an animal is null; because, whilst joined to the animal, it is considered as a constituent part of it; and also, because it cannot be exactly cut away from the animal, without either leaving a part of it or taking away part of the skin, since it is not practicable to pull it out. It is, moreover, recorded in the Naki Sabeeb, that “the prophet prohibited the sale of ‘wool upon the animal, of milk in the udder, and of butter in the milk.” It is recorded of Abou Yousef, that he admitted the legality of the sale of growing wool: but to this the above tradition is an answer.

It is not lawful † to sell a piece of wood sustaining a weight, such as a pillar or a beam, although the piece of wood be specified and determinate. Neither is it lawful to sell a yard from a piece of cloth which is sewed, whether the parties specify that the yard shall be cut off from it or not; because in this case a delivery without injury is impracticable. It is otherwise where a person agrees to sell ten drams (for instance,) from an ingot of silver, for these may be cut off from the ingot without injury to it. It is to be observed, however, that if the seller, before the dissolution of the contract, should cut off the

* That is, before it has been extracted by churnig.

† By the phrase “it is not lawful” is here (and in the following examples) to be understood, “it is invalid.”
S A L E.

or of which
the quality or
existence can-
not be affer-
tained.

yard of cloth, or pull away and separate the piece of wood, the sale in
that case becomes complete, since the cause of its invalidity is re-
moved. It is otherwise with respect to the sale of the kernels of dates,
because that continues null, although the stones be afterwards opened
and the kernels taken out; since (contrary to the case of the yard of
cloth, or the piece of wood) the existence of them was originally un-
certain.

It is not lawful for a game-catcher to sell "what he may catch
at one pull of his net;" because the subject of the sale is uncertain;
and also because the purchaser may be deceived, as it is possible that
none may be caught.

It is not lawful to sell dates growing upon a tree in exchange for
dates which have been plucked, and which are computed, from con-
jecture, to be equal in point of measurement to those that are upon
the tree. This species of sale is termed Mondbinat*; and has been
prohibited by the prophet, as well as the sale termed Mobakila, which
is the sale of wheat in the ear, in exchange for a like quantity of
wheat by conjecture. The law is the same with respect to the sale
of grapes on the vine in exchange for raisins. Sbafi holds these sales
to be lawful, provided they be not extended to a quantity exceeding
five Wujas†; because, although the prophet has prohibited a sale by
Mondbinat, yet he has permitted what is termed Ordya; which he
explains to be, a sale of dates upon a tree, provided the quantity be
less than five Wujas, in exchange for a quantity which have been
plucked, and which are similar, in point of measurement, according
to computation. Our doctors, on the other hand, explain Ordya in its

* Properly, a sale without weight or measure.
† Wujah literally means a camel's burthen, which is computed to be sixty sale. (See
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Sale.

Literal sense to mean a gift; and the nature of it is this. A person makes a gift of the dates of his orchard to another, who thereupon comes and enters the orchard. This gives disgust to the proprietor, as his family reside in the orchard; but being, at the same time, unwilling to violate his agreement, he prohibits the other from entering into the orchard, and gives him a quantity of dates which have been pulled in exchange for those which were growing in the orchard. This is the proper interpretation of the traditional saying of the prophet, quoted by Shafei; and this mode of sale, which is termed Moojär, is valid in the opinion of our doctors. It is not, however, in reality a sale, because the right of property had not vested in the donee, on account of his not having made seizin of the dates, and therefore the diy dates which were afterwards given to him is considered as a new gift.

It is not lawful to sell goods by the way of Molamija, Monazibee, or Alka Hadgir;—that is, the touching of the goods, the throwing of the goods; or the casting of a stone;—as where, for instance, a person having exhibited his goods to another, and specified the price, the parties agree between themselves that the contract shall be binding, either 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 inhibited by the prophet.

It is not lawful to sell grass growing on a common, because it is not the property of the seller; for it is declared in the traditions that "in grass all men are alike sharers;"—(that is, it is common to all.) Neither is it lawful to let it out on lease; because, as it is not permitted to farm any thing, where the object is the destruction of it, even though it be the property of the lessor, it is consequently in a superior degree unlawful to let in lease an article of which the property is
is common to all, where the object of the lessee is the destruction of it.

The sale of bees is not lawful according to the two Elders. Mohammed is of opinion that it is lawful, provided the bees be in a place of custody, and not wild; and such is also the opinion of Shafei; because a bee is an animal yielding good; and as we are permitted by the Law to enjoy the good which that creature yields, it follows that the sale of the animal is permitted. The reasoning of the two Elders is that, the animal being of an offensive nature, the sale of it is therefore unlawful, in the same manner as in the case of wapts. Besides, the good is derived from its produce, not from its substance, whence no advantage can be derived from it until the honey be produced. If, however, the comb be sold, with the honey in it, and the bees, the sale of the bees is in this case lawful, as a dependant. Koorokbee is also of this opinion.

It is not lawful to sell silk-worms, according to Haneefa, as they are animals of an offensive nature. Aboo Yoosaf thinks that if the silk have appeared they may then lawfully be sold, as a dependant. Mohammed is of opinion that the sale of them is lawful in any case.

* The object of a lease is afruit, or (in the language of the Mussulmān lawyers) the destruction of the produce of the thing, but not of the thing itself: thus if a person should take a lease of a piece of ground, or a fruit tree, he would be entitled to appropriate to himself the produce of the ground, whether grain or g rains, or the fruit that might grow upon the tree; but he would have no right to use the ground or the tree (the immediate subjects of the lease) so as to occasion any destruction of their substance. Hence proceeds the illegality of a lease of a field of grain, of grain, of the fruit of a tree or the like; for the lease in any of these cases, would be entirely useless, since the lessee, being entitled only to the use of the produce of the subject of the lease, would not be entitled to the use of any of these which are themselves the immediate subject of the lease.

† Such as a hive, or bee-box.

‡ Literally, "not in the air."
as being an animal whence an advantage is derived. *Hanefsa* is of opinion also, that the sale of their eggs is unlawful. The two disciples, on the contrary, are of opinion that such sale is lawful of necessity.

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

It is not lawful to sell an absconded slave, because the prophet has prohibited this; and also, because the delivery is impracticable. If, however, the purchaser should declare that "the fugitive is in **his possession**," the sale is lawful, because the obstacle on which the prohibition is founded is in this case removed.—It is to be observed that if the purchaser, in this instance, should have declared, before witnesses, that "he had taken possession of this slave with intent to **restore him to his owner**," he is not held, on the conclusion of the contract, to become seized of him in virtue thereof; because the former seizin, being in the nature of a trust, cannot stand in the room of that made on account of *purchase*. If, on the other hand, he should have made no such declaration, in that case he is held to be seized of the slave, in virtue of the sale, immediately on the conclusion of the contract; because the former seizin, being in the nature of an *usurpation*, may therefore stand in the room of a seizin for sale; for both are the same in effect, as they both equally induce responsibility. If the slave should have eloped to some other person, and the purchaser say to the proprietor "tell me your slave who has run away to such an one," and the seller accordingly agree, the sale is in that case also unlawful, because of the impracticability of the delivery.

If a person, having sold a fugitive slave, should after the sale recover him, and deliver him to the purchaser, the sale is nevertheless unlawful, although the seller should afterwards recover and
unlawful, because it was originally null, in the same manner as if it had related to a bird in the air. It is recorded, as an opinion of Ḥa-
seef, that the sale in this case is valid, provided it was not undone previ-ous to the delivery, because it was founded on property, and there was no bar to its effect except the impracticability of the delivery, which is removed by the recovery of the slave; (and such is also re-lated as the opinion of Mobammed;)—in the same manner as if a slave, after having been sold, should run away previous to the seizin of the purchaser, in which case, if the seller should afterwards recover him, and deliver him to the purchaser, the sale is binding, provided it was not dissolved in the interval.

The sale of a woman's milk is unlawful, although it be in a vessel. Shafeef is of opinion that if it be in a vessel the sale of it is lawful, because it is a pure beverage. The argument of our doctors is that, as being part of a human creature, it ought to be respected; and the exposure of it to sale is an act of disrespect. In the Zabir-Rawdyet there is a distinction between the milk of a female slave and a free woman. It is related, as an opinion of Aboo Toofae, that the sale of the milk of a female slave is lawful, because the sale of the slave herself is lawful. The answer to this is that the sale of the female is legal, because of the bondage, which is a quality of her person; but such quality does not relate to the milk; the one being alive, and the other dead.

The sale of the bristles of a hog is unlawful, because the animal is essentially filthy, and because the exposure of this article to sale is a de-gree of respect, which is reprobated and forbidden. It is lawful, how-ever, to apply it to use, such as stitching leather, for instance, in the room of a needle, as this is warranted by necessity.

Objection.—It would appear that the sale of it is warranted from necessity, in the same manner as the use of it.

Reply.
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REPLY.—There is no necessity for the sale of it, since any quantity of it may be had gratuitously and without purchase.—It is to be observed that hogs’ bristles falling into a little water renders it impure, according to Aboo Toodsaf.—Mohammed is of a different opinion, because the legality of the use of the article in question, is (according to him) an argument of its purity. Aboo Toodsaf, on the other hand, argues that the legality of the use of it is founded on necessity, and not on its purity; and there exists no necessity in the case of its falling into water.

The sale of human hair is unlawful, 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 necessarily subjects it. It is moreover recorded, in the Hadees-Shareef, that “God denounced a curse upon a Wajila and a Mawshuwa.”—(The first of these is a woman whose employment it is to unite the thorn hair of one woman to the head of another, to make her hair appear long; and the second means the woman to whose head such hair is united.) Besides, as it has been allowed to women to increase their locks by means of the wool of a camel, it may thence be inferred that the use of human hair is unlawful.

The sale of the hides of animals is not lawful until they be dressed, because the use of them, until then, is prohibited in the traditions of the prophet. It is lawful, however, to sell undressed hides.

It is permitted either to sell or apply to use the bones, sinews, wool, horns, or hair, of all animals which are dead, excepting those of men and hogs. The reason of this is that these articles are pure, and are not considered as carrion: besides, death does not affect them as it but animal substances of all descriptions (excepting those of men or hogs).

* By a little water (as the commentators) is here meant such a quantity as may be contained in a cup or other vessel.
does the animal, as these articles are not possessed of life.—It is to be observed that Mobammed, considering an elephant as essential filth, like a hog, holds the sale of it to be unlawful:—but the two disciples, considering it in the nature of a wild animal, regard the sale of it, or of the bones of it, as lawful.

A right cannot be sold, unless it involves property.

In a house, of which the upper and under apartments belong to different persons, the whole, or the upper story only, should fall down, in that case the proprietor of the upper story is not permitted to sell his right, (namely, the right of building another upper story,) because this, as being only a right, is not property.

Objection.—It would hence appear that the sale of a right to water * (that is, of a share in water used in tillage) is not lawful, as it is not the seller’s property, but merely his right; whereas such a sale is allowed, if made along with the land, according to all authorities; and according to one tradition (which has been adopted by the Sheikhs of Balkh) the sale of the right to water by itself is lawful.

Reply.—The sale of a right to water is valid, because the term Shibr means a share in water; and that is an existent article, and in the nature of property;—whence it is that if a person, in a case where it is enjoyed by rotation, should destroy it during the term of his right, he is responsible for the value of it;—and also, that, when it is sold along with the ground, a part of the price is opposed to the right to water.

Any thing may be sold which admits of a price.

If a person bestow or sell a road † it is lawful: but neither the sale nor the gift of a water-course is valid. These cases admit of two suppositions.—I. The sale may be of the absolute right to the road or

* Arab. Shibr.—This term properly signifies draw-wells dug for the purpose of watering lands, and the right to the use of which is transferable, in the same manner as any other property.

† By a road is here meant a lane or narrow passage leading into a street or high-road.

water-course,
water-course, without defining the length or breadth of either. — II. It may be of the right of passing upon the road, or receiving the benefit of the water †. — Upon the first supposition, the difference between the two cases is that the road is certain and ascertained, 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 ground the water covers. — Upon the second supposition, there are two traditions with respect to a sale of a right of passage on the road: — according to one tradition the sale is lawful; and according to another it is invalid. — The difference between the sale of a right of passage on the road, and a right of benefit from the water, (as inferred from the first tradition,) is that a right of passage is a point which admits of being precisely ascertained, as it is connected with a known object, namely, the road; whereas the right of benefit from the water is of a nature which cannot admit of being precisely ascertained, — and this, whether the water be conveyed in a trough supported upon a wooden frame, or in a trench cut in the ground.

If a person sell a slave as a female, who afterwards proves to be a male, in that case the sale is utterly null. — It is otherwise where a person sells a goat (for instance) as a male, and it afterwards proves to be a female; for in that case the contract of sale is complete: the purchaser, however, has the option of keeping the animal, or rejecting it. The difference between these two cases is founded on this general rule, — that wherever denomination and pointed reference are united, by the seller pointing to the subject of the sale, and mentioning its name, (as if a person should say "I have sold this goat, for instance,) — in this case, if the article referred to prove essentially different from what was mentioned, the sale is supposed to relate to the article named; and therefore if the article referred to prove of a different species from what was named, the sale is null. — If, on the other hand, the article

* Literally, causing the water to run, (by opening a sluice, or so forth.)

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referred to prove of the same species with the article named, but of a different quality, in this case the sale relates to the article referred to; and where the article referred to is found, the sale is complete: the purchaser, however, has in this instance an option, because of the quality mentioned not existing in the article;—as where, for instance, a person sells a slave as a baker, and he proves to be a scribe.—Now it is to be observed that a male and a female slave are not of the same, but of two different sexes, which is accounted, in this instance, as equivalent to being of different species, because of their different uses; whereas in goats the object for purchase (namely, to eat their flesh,) is the same, with respect both to the male and the female, and therefore they are not held to be of two different species.—It is proper to remark, in this place, that, amongst lawyers, the unity or difference of the object, and not the unity or difference of the essence, determines the unity or difference of the species. Thus vinegar of the grape is held to be of a different species from the sweet juice of the grape.

A re-sale to the seller, for a sum short of the original price, before payment of that price, is invalid:

If a person purchase a female slave for a thousand dirms, stipulating either a future or immediate payment, and having taken possession of her, should sell her to the person from whom he had purchased her, for five hundred dirms, previous to his having made payment of the thousand dirms, this second sale is invalid. Shafeii is of opinion that as the right of property in the slave had vested in the purchaser, because of his having taken possession of her, such sale, on the part of the purchaser to the seller, is valid, in the same manner as it would have been valid to any other person,—or as it would have been valid to the seller in case the second price had been equal to or greater than the first,—or in case it had been in exchange for other goods, although these should have been of a less value.—The arguments of our doctors are,—First, a tradition that Ayeesba, having heard of a woman who, having purchased a female slave from Zeyd Bin Rakim for eight hundred dirms, had afterwards sold her to the said Zeyd for six hundred dirms, spoke
spoke to her thus: "This purchase and sale on your part is bad; in-""form Zeyd, that certainly God will render null his pilgrimages "and enterprizes achieved along with the prophet unless he repent of such "conduct."—Secondly, if the sale in question be valid, it follows that the first seller remains indebted to the purchaser for five hundred dirms, and the purchaser to him for one thousand dirms. Now if their account should be balanced, and five hundred dirms be struck off from the debt of the purchaser, in liquidation of his claim upon the seller, there remains five hundred due by the purchaser, for which he has received no return, and this is unlawful. It is otherwise where the seller, in the second sale, gives the purchaser goods in return; because there the difference is not obvious; being apparent only with respect to articles of the same kind.

If a person, having purchased a female slave for five hundred dirms, and taken possession of her, should afterwards, before he had discharged the price, sell her, in conjunction with another, for five hundred dirms, to the person from whom he had purchased her, in that case the sale is valid with respect to the female slave whom he had not formerly purchased from that person, but null with respect to the other. The reason of this is that, as a part of the price is necessarily opposed to the new slave, it follows that he purchases a slave, and sells her again to the same person for a less price than he had purchased her for, which is not lawful, as has been already shewn.—No such reason of illegality, however, existing with regard to the sale of the other slave, it is therefore valid, in a price proportioned to her value.

Objection.—It would appear that the sale of the other slave is also invalid, because the person has sold both by one contract, and as the sale of the one is invalid, it would follow that the sale of the other is also invalid, (according to the tenets of Haneefa,) in the same manner as where a freeman and a slave are sold by one contract, the sale but the contract is not invalid with respect to any other subject which may be joined to the original in the re-sale.

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salle of the slave being in that case invalid as well as that of the freeman.

Reply.—The sale of the other slave is valid; and the invalidity of sale with respect to one does not affect the sale of the other; because the invalidity, in this instance, is weak, as there is a difference of opinion regarding it amongst our doctors; and also, because it is founded on a suspicion of usury, the effect of which suspicion cannot extend beyond the subject of suspicion, namely, the first slave.

If a person purchase oil, on this condition, that it be weighed with the vessel in which it is contained, and that a deduction of fifty rats shall be made on account of the weight of the vessel, such sale is not valid; whereas, if the condition be, in general terms, that "a deduction shall be made for the weight of the vessel," it is valid;—because the former condition is not essential to the contract, whereas the latter is essential.

If a person, having purchased oil in a leathern bag, should carry it away with him, and afterwards return a bag to the seller weighing ten rats, and the seller assert that "this is not the bag he had carried away with him, as that weighed only five rats;" in this case the averment of the purchaser is to be credited, whether the question of disagreement be considered as relating to the bag being different,—or to the consequent-difference it creates with respect to the quantity of oil; because, if the difference be considered as relating to the identity of the bag of which the purchaser had taken possession, his assertion must be credited, since the word of the possessor is to be credited, whether he be responsible for the article (as in the case of an usurer) or merely a confident (as in the case of a trustee)—or if, on the other hand, the difference be considered as relating to the quantity of oil, this resolves itself into a difference with respect to the amount of the price.
price, the seller claiming more, and the purchaser acknowledging less: the purchaser is therefore the defendant; and the assertion of a defendant, upon oath, must be credited.

If a Muffulman desire a Christian either to purchase or sell wine or a hog on his account, and the Christian act accordingly, in that case (according to Haneesa) such sale or purchase is valid: but an order of a Muffulman to this effect being in the highest degree abominable, he is therefore enjoined: (where it respects the sale of those articles) to devote the price obtained for them to the poor.—The two disciples maintain that the purchase or sale of wine or a hog by a Christian, on account of a Muffulman, is invalid; (and the same difference of opinion also obtains with respect to the case of a Mohrim appointing an agent for the sale of the game he may have caught, when it became unlawful for him to make such sale.) The argument of the two disciples is that the constituent, as not having himself the power of selling or purchasing these articles, cannot of consequence invest others with such power:—besides, as all the acts of an agent revert to the constituent on whose behalf they are performed, it is therefore the same as if the Muffulman were himself to sell or purchase these articles, which would be illegal. The argument of Haneesa is that the contractor (that is, the purchaser or the seller) is, in this instance, no other than the agent;—for this reason, that he is fully empowered to perform these acts: the reverting, moreover, of the property to the constituent is a necessary and unavoidable effect, and therefore is not prevented by his Ildm:—in the same manner as the articles in question may descend to a Muffulman by inheritance;—(in other words, if a Christian, whose heir is a Muffulman, should himself embrace the religion of Ildm, and afterwards die; before releasing his hog, or converting his liquor into vinegar, in that case they would descend to his Muffulman heir.)—It is to be observed, however, that although Haneesa admits the validity of the purchase of these articles by a Christian agent, on behalf of a Muffulman, still he holds it incumbent on the
the Mussulman to convert the liquor into vinegar, and to set free
the hog.

If a person sell a male slave, on condition that the purchaser shall
emancipate him, or make him a Modabbir, or a Mokātib,—or if a
person sell a female slave, on condition that the purchaser shall make
her an Am-Valid,—such sale is invalid; because this is a sale suspended
on a condition;—and such sales are condemned by the prophet.—The
rule, in this particular, is founded on a tenet of our doctors, that the
insertion of any condition which is a necessary result of the contract
(such as where the seller bargains that "the purchaser shall become
"proprietor of the article sold,"”) can no way affect the validity of the
contract, since that would be established independant of any stipula-
tion;—and, on the other hand, that the insertion of any condition
which is not a necessary result of the contract, and in which there is
an advantage either to the buyer or the seller,—or to the subject of the
sale, if capable of enjoying an advantage, (such as where the seller bar-
gains that “the purchaser shall emancipate the slave he sells to him,”)
renders the contract invalid; because an additional and extraneous act
is, in this instance, required from the purchaser, without stipulating
a recompence to him, and which of consequence is of an usurious na-
ture;—and also, because as there is an advantage in this condition to
the subject of the sale, who is capable of claiming it, it follows that a
contention must necessarily ensue, and hence the object of sale
(namely, the prevention of strife) is frustrated.—Conditions of this
nature are therefore unlawful, excepting where custom and precedent
prevail over analogy; as where a person purchases unsewed shoes on
condition of the seller’s sewing, or causing them to be sewed for him.
The insertion, on the other hand, of any condition which is not a
necessary result of the contract, and which, moreover, is not attended
with advantage to any particular person, does not invalidate the con-
tract.—An example of this occurs where a person sells an animal, on
condition that “the purchaser shall sell it again;” which condition
is lawful, because there is no particular person whose right it is to claim the performance of it, (since the animal is incapable of so doing,) and hence neither usury nor strike can attend such a stipulation. Now, having explained the tenets of our doctors, it is proper to remark that the conditions recited in the cases in question are repugnant to the nature of the contract, as they tend to deprive the purchaser of every right to which the sale entitles him; and they also involve an advantage to the subject of the sale, who is capable of claiming it:—they therefore invalidate the contract.—Shafii dissent from our doctors, as he holds the sale of a slave, on condition of his emancipation, to be valid.

If a person should emancipate a slave whom he had purchased on that condition, then the sale, which, because of such condition, was previously illegal, becomes valid, according to Hanefi; and the purchaser is responsible to the seller for the price. The two disciples are of opinion that the emancipation does not render the sale valid; and that therefore the payment of the value, and not of the price, is incumbent on the purchaser; because, as the sale was originally invalid, in consequence of the condition, it cannot afterwards be rendered valid by means of the emancipation, any more than by the purchaser’s murdering or felling the slave. The reasoning of Hanefi is, that although the condition of emancipating the slave be not, in itself, agreeable to the requisites of a contract of sale, (as was before explained,) still it is so in effect; because it completes the right of property on the part of the purchaser; and a thing becomes established and confirmed by its completion; whence it is that the emancipation of a purchased slave is no bar to a right of compensation from the seller in case of a defect.

If a person sell a slave, on condition that “he shall serve him for the space of two months after the sale,” —or a house, on condition that “he shall reside in it for the space of two months after the sale,” but such sale recovers its validity, by the purchaser performing the condition with the article purchased:
the seller from the article sold.

"sale,"—or, if a person sell any other article, on condition of the purchaser's lending him a dirm (for instance,) or making him some present,—the sale so suspended on any of these conditions is invalid: 

First, because these conditions are not agreeable to the nature of a sale, and are attended with an advantage to the seller. Secondly, because the prophet has prohibited a sale on condition of a loan: and, 

Thirdly, because, if any diminution be made in the price, on account of the services of the slave, or the residence in the house, it follows that a contract of rent is interwoven in that of sale; or if, on the other hand, no diminution be made in the price on these accounts, it follows that a deed of loan is interwoven in the sale; and both of these are illegal.

If a person sell goods on condition of his being permitted to suspend the delivery for a month, the sale is in such case invalid, because a suspension with respect to the delivery of goods which are extant and specific is an unlawful condition. The reason of this is that a suspension in point of time has been ordained by the law, merely for the purpose of sale, and is therefore only applicable to a debt, in order that the debtor may have time to collect the sum within the prescribed period and pay it accordingly;—but with respect to a thing actually extant, (such as cloth, for instance,) there can be no occasion for such suspension.

The sale of a pregnant slave, with a reservation of the status in her womb, is invalid; 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 nature is a status. The sale, therefore, is invalid, because of the invalidity of the condition. It is to be observed that a contract of Kitâbat, of hire, or of pawnage, are the same with a contract of sale, in this respect, that an invalid condition is a means of invalidating the deed. In the case of Kitâbat, however, the invalid condition must actually exist in the deed; as when a person
person enters into covenant with his slave to emancipate him on condition of his giving him wine, or a hog. It is also to be observed that in the cases of gift, alms, marriage, Kheela, and composition for wilful murder, the exception of the fatus does not invalidate the deed; on the contrary, the deed takes place in full; but the condition is invalid. In the same manner, an exception of the fatus does not invalidate a legacy, for in this case the exception is a valid condition.

If a person purchase cloth, on condition that the seller sew it into the form of a vest on his account, the sale is in such case invalid; since this condition, besides being attended with an advantage to the purchaser, is not a requisite of the contract of sale. Moreover, this necessarily supposes the implication of terms of two different contracts; that is, either of sale and loan, or of sale and hire.

If a person purchase one shoe from another, on condition that the seller prepare a fellow to it on his account,—or purchase a pair of shoes on condition of the seller making straps to them, for the purpose of tying them, the sale in either case is invalid.—(The compiler of the Hediyat remarks that this is according to analogy; for a more favourable construction would suggest that such sale is lawful, on account of its being customary amongst men.)

If a person should purchase an article, and stipulate the payment of the price on the day of the new year, or on the Mibraj, or on the fast of the Christians, or the day of breaking lent amongst the Jews, the sale, under such conditions, is invalid, provided both parties be not informed with certainty respecting those periods. The sale, or by a stipulation of the payment of the price, at a period not precisely known to both parties.

* This is also termed Mirhaka. A festival observed by the ancient Persians on the day of the autumnal equinox.

† Refer.

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however,
however, is lawful, if these periods be ascertained within the knowledge of both parties.

A sale is not valid where the price is stipulated 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 none of these cases is the period absolutely determinate: contrary to the act of giving bail; for the giving of bail, until any of these periods, is lawful; because a small degree of uncertainty does not invalidate a bail-bond, in the same manner as it does a contract of sale.—

If, however, a sale be made in an absolute manner, and the seller afterwards agree to receive the price at any of the periods in question, it is lawful, because, this stipulation not being included in the contract of sale, it becomes a stipulation with regard to payment of debt, (not the price) which admits of a small degree of uncertainty.

A sale, invalid in consequence of stipulating an uncertain time of payment, recovers its validity by the removal of the uncertainty.

If a sale be made, stipulating payment of the price at any of the periods above stated, and afterwards the purchaser and seller jointly, or the purchaser alone, remove the obstacle of uncertainty*, prior to the actual occurrence of the period stipulated, the sale then becomes valid. Ziffer maintains that, the sale being originally invalid, the subsequent removal of the obstacle cannot render it valid; in the same manner as a marriage originally contracted for a fixed period would not become valid by rendering it perpetual. The argument of our doctors is, that the invalidity of the sale, in this case, is merely because of the apprehension of the litigation, to which the uncertainty may give rise; and of course, when this uncertainty is removed, the sale remains valid. Moreover, as the uncertainty, in this case, relates only to an accidental circumstance, that is, to the period when the price is to be paid, and not to the price itself, which is one of the

* By paying the price, or fixing the time of payment to some specific period, such as forty days for instance.
essentials of sale, the uncertainty is capable of being removed. It is otherwise where a person sells one *dira* for two *dira*, and afterwards relinquishes the additional *dira*; for the sale does not in consequence of such relinquishment become valid, since the invalidity related to the price itself which is an essential of the sale. It is also otherwise in a case of marriage for a particular period, because this, in fact, is not a marriage, but a separate deed called *Makt* *, and by no subsequent acts can one deed be transmitted into another deed.

If a person expose to sale a freeman and a slave, and sell them both in one contract,—or, in the same manner, sell a carrion goat †, and one that has been slain by the prescribed form of Zibby,—such sale, according to Hanefi, is utterly invalid with respect both to the freeman and the slave, as in the first case, and the carrion, and slain goat, as in the second;—and this, whether the seller have opposed a specific price to each or not: (the two disciples are of opinion that if a specific price be opposed to each, the sale is valid with respect to the slave, or the slain goat.) If, on the contrary, a person unite in sale, an absolute slave and a *Modabbir*, or a slave that is his property, and another that is not, the sale is in either case lawful, with respect to the absolute slave, or the slave which is his property, in return for a proportion from the whole price stipulated. This is, according to our doctors, (namely, Hanefi and the two disciples.)—Ziffer is of opinion that the sale is not lawful in either case, with respect to either subject. The two disciples argue, that where a specific price is opposed to each particular subject, the invalidity of the sale extends only to that subject which contains a cause of invalidity, (namely, the freeman or the carrion) but does not reach to the other subjects, (namely, the slave or the slain goat;)—in the same manner as where a person marries a strange woman and his own sister by one contract, in which case the marriage is valid with respect to the stranger, although it be invalid

* See Vol. I. p. 91. † Meaning any dead *bemer*, not slain according to law.

MM 2

with
with respect to his sister,—for that invalidity does not extend to the stranger;—and so also in the case in question. It is otherwise where the price of each particular subject has not been specified; for in that case the invalidity extends to the whole. *Hateesa* argues that there is a material difference between the two cases;—namely, the case of joining in sale a freeman with a slave, and that of joining a Modabbir with a slave; because a freeman, as not being property, is utterly incapable of being included in a contract of sale; and as the comprehension of him in the sale necessarily establishes the condition of the acceptance of the sale with respect to him, it follows that the sale is invalid, because of the invalidity of the condition: contrary to marriage, as that is not rendered invalid by an invalid condition. The sale, on the other hand, of a slave the property of another, or of a Mokātib, Modabbir, or Am-Walid, is merely suspended, for these may be included in a contract of sale, as they are property;—whence it is that the sale of them may be carried into execution, in the case of the stranger's slave, by the consent of the proprietor,—in the case of a Mokātib by his own consent,—and in the case of a Modabbir or Am-Walid (in the opinion of the two Elders) by a decree of the Kāsee to this effect;—but as it is to be supposed that the proprietor of the slave, on account of his right to the subject of the sale, and the Mokātib, Modabbir, or Am-Walid, because of the claims established in their persons, will repel the sale, the sale therefore is executed only with relation to the absolute slave; in the same manner as where a person purchases two slaves, of whom one dies previous to the purchaser taking possession of them; in which case the sale holds good with respect to the other.

**SECTION.**
SECTION.

Of the Laws of Invalid Sales.

Whenever the purchaser, in an invalid sale, takes possession of the goods, with the consent of the seller, then, provided both the goods and the price be property*, the purchaser becomes proprietor of the article sold, and remains responsible, not for the price, but for the value of the goods, in case they be destroyed in his possession. Shafet maintains that the purchaser does not become proprietor, although he take possession of the article, because an invalid sale is forbidden, and therefore cannot substantiate a right of property: besides, any thing which is forbidden is not sanctioned by the law, since prohibition is repugnant to ordinance; an invalid sale, therefore, is in no respect sanctioned by the law; (whence it is that the purchaser of goods does not become proprietor before seizin;) and the case is consequently the same as if a person should sell something in exchange for carrion, or should sell wine in exchange for money. Our doctors, on the other hand, argue that, in this case, the essential of sale (namely, an exchange of property for property) exists. The subject of the sale, moreover, is property, and is therefore a fit subject. The buyer and seller also are both competent to the act:—and where all these circumstances exist, the sale is duly contracted. Besides, the prohibition is no way repugnant to the legality of the sale itself, because the prohibition relates only to an accessory circumstance, namely an invalid condition; the right of property, therefore, after seizin, accrues to the purchaser in virtue of the sale itself, which is legal, and

* That is, of such a nature as to constitute property.
not in virtue of any matter which is prohibited, or contrary to the law. The purchaser, moreover, does not become proprietor of the goods before seizin, for two reasons:—first, because, although an invalid sale be a cause of right of property, yet it is a weak cause, and therefore stands in need of the aid of seizin to give it effect:—secondly, because, if the purchaser become proprietor previous to the seizin, it would necessarily follow that a sanction is given by law to the invalidity, whereas it is incumbent to remove the invalidity. With respect to the cases of a sale of any thing in exchange for carrion, or of wine in exchange for money, the essentials of sale do not exist in either of these, as has been already demonstrated. It is established as a condition, in this instance, that the seizin be made with the consent of the seller; it is sufficient, however, (according to a favourable construction of the law,) if this consent be by implication; as if the purchaser should make the seizin in the place of sale, and in presence of the seller. The reason for a favourable construction of the law, in this particular, is, that as the seller, by the contract of sale, virtually impowers the purchaser to make seizin, and as the purchaser does so in his presence, without his making any objection thereto, it is therefore construed to have been made with his consent: in the same manner as the seizin of a gift, in the place where the deed of gift is executed, is valid according to a favourable construction of the law. It is also a condition, that both the goods and the return be property, in order that an exchange of property for property (which is one of the pillars of sale) be established; for if this were not the case, the sale would be null, in the same manner as a sale in return for carrion, blood, the person of a freeman, air, or the like; and hence if, in these cases, the purchaser should take possession of the goods with the consent of the seller, still he is not responsible for them. With respect to what was stated, that the seller "remains responsible, not for the price, but for the value of the goods," it relates only to such goods as are of a nature to be compensated for by money; for with respect to such as are compensable by similars, the purchaser is responsible for a similar; because
that which is a similar both in appearance and in effect is a more equitable compensation than that which is similar in effect only.

In an invalid sale, either of the parties, previous to the seizin, has the power of annulling the contract, in order that the invalidity of it may be removed. The law is also the same after seizin, provided the invalidity exist in the body of the contract. If, however, the invalidity be occasioned by the addition of an invalid condition, the person stipulating the condition is allowed to annul it, but not the other party.

If the purchaser, in an invalid sale, take possession of the article, and then sell it, in that case the second sale is valid,—as the first purchaser, having become proprietor in virtue of seizin, is fully competent to sell the article:—and, upon his so doing, the right of returning the article to the first seller expires:—FIRST, Because the right of the individual (namely the second purchaser) is connected with the second sale; and the annulment of the first sale in consequence of its invalidity, is on account of the right of God*; but the right of the individual has preference to the right of God, as the individual is necessitous, whereas God is not so:—SECONDLY, Because the first sale is legal in its essence, but invalid in its quality,—whereas the second sale is legal in point of both; and it follows that the latter cannot be obstructed in its operation by the former: and, THIRDLY, because the second sale is made with the virtual assent of the first seller, as the power to that effect was by him bestowed on the first purchaser.—It is otherwise where the purchaser of a house, in which there is a right of Sbassa, sells it to another; for there the person entitled to the right of Sbassa has nevertheless a just title to it; because it is the right of the individual, in the same manner as that of the second purchaser; is

* In other words,—the right of the LAW.

* Equal
equal to it in point of legality; and has not been forfeited by any power given by him to the purchaser to make the sale.

If a person purchase and take possession of a slave, in exchange for wine, or a hog, and afterwards either emancipate him, sell him, or bestow him in gift, all of these acts are valid, because of the purchaser, in virtue of the seizure, having become proprietor; and he is responsible to the seller for the value of the slave. In the case of emancipation, as the property immediately ceases, the slave becomes (as it were) destroyed, and hence proceeds 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 annulled in consequence of these deeds, as has been already explained. It is to be observed that pawnage, or the making a slave a Mokāṣib, is equivalent to sale, and therefore annuls the right of return to the seller. The redemption of the pledge, however, or the inability of the Mokāṣib to perform his covenant, restores the right, because the bar to its operation is removed.

In an invalid sale, the seller is not allowed to resume the goods from the purchaser, until he shall have first restored the purchase-money; because the goods, being opposed to the purchase-money, are retained in the nature of a pledge until the restitution of it. If the seller should die, then the purchaser has a prior claim to the subject of sale; that is, he is permitted to take payment of the price from the sale of the goods, giving the remainder (if there be 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 has a right preferentially to the seller’s heirs or creditors after his decease; in the same manner as the holder of a pawn. It is to be observed, that if the price was paid in dirms, the purchaser has a right to exact from the seller the identical dirms he paid him; since the purchase-money, in the case of an invalid sale, remains in the hands of
of the seller in the nature of an usurpation. If, however, the identical dirms be not in his possession, then the purchaser is entitled to an equivalent.

If a person purchase a house by an invalid sale, and afterwards convert it into a mosque, he is in that case responsible, according to Haneefa, for the value of the house. This is also related by Aboo Yoosaf, in the Jama Sagheer, as the opinion of Haneefa: but he afterwards entertained doubts respecting it. The two disciples maintain that the house must be restored to its original state, and then returned to the seller.—The same difference of opinion obtains, if the purchaser should plant trees in the court-yard of the house. The argument of the two disciples is that the right of the neighbour* is of weaker consideration than the right of the seller;—(whence it is that the right of a neighbour requires to be supported by a decree of the Kaseen, and also, that it becomes null, by any delay in the demand of it,—neither of which is the case with respect to a seller’s right;) and as the right of the neighbour, which is the weaker right, would not be annulled by the conversion of the house into a mosque, it follows that the right of the seller, which is the stronger, is not thereby annulled a fortiori. The argument of Haneefa is, that the act of building or planting proceeds on an idea of perpetual possession; that the purchaser in so doing acts in virtue of a power to that effect which he holds from the seller; and that therefore the seller has no right to the restitution, in the same manner as in the case of its being resold by the purchaser. It is otherwise with the right of a neighbour, as he does not give power to the purchaser to build or plant on the place over which his right extends; whence it is that if the purchaser had either bestowed it in a gift, or sold it, his right of neighbourhood would nevertheless still have remained in force. Aboo Yoosaf, who reported what is here advanced as the opinion of Haneefa on this sub-

* Arab. Shaheer; meaning the person entitled to the right of pre-emption in virtue of Shaheen.
jeft, afterwards distrustted his memory, as has been already observed. Mohammed, however, in treating of Shaffa*, expressly infers the difference of opinion here recited;—for, he says, “where a purchaser, “under an invalid sale, builds upon the ground he has purchased, “the neighbour has no right of Shaffa therein, according to the two “disciples, any more than previous to the purchase.” Now as Hannefa, on the other hand, has maintained that in such case the neighbour is entitled to take the place, upon paying the value, in virtue of his right of Shaffa, it clearly follows that in his opinion the right of the seller is annulled; because it is on this circumstance that he founds his opinion of the existence of the right of Shaffa, since so long as the right of the seller remains in force, that of the neighbour cannot take place;—whereas, according to the two disciples, the right of the seller is not destroyed by the building of the purchaser, and therefore the claim of Shaffa does not take place.

Is a person purchase a female slave (for instance) by an invalid contract, and take possession of her, and the seller take possession of the purchase-money, and the purchaser then dispose of her, by sale, to another person at a profit, it is in that case incumbent on him [the purchaser] to bestow in charity the profit so acquired:—but if the first seller should have acquired a profit upon, or by means of, the purchase-money, he is not required to bestow such profit in charity. The reason of this distinction is that as the female slave (for instance) is a definite article, the second contract of sale relates identically to her, and the profit acquired by the sale of her is accordingly base.—Dirrns and decnars, on the other hand, are not definite in valid contracts; and as the second contract is of a valid nature, it consequentely does not relate to them identically, and accordingly the profit acquired by them is not base. This distinction, however, obtains only where the baseness is founded on the invalidity of the right; for where it is founded

* In the Malifat.
on the absolute non-existence of right of property,—(as where, for instance, a usurper acquires a profit upon the property he has usurped,)—there is no difference whatever;—that is, from whichever subject the profit is obtained, it is unlawful, and must be bestowed in charity*; because, where a person sells an article, the identical property of another, (such as any article of household goods,) the contract of sale relates to that actual article, and the profit acquired by it is accordingly unlawful;—where, on the other hand, a person purchases a thing with money belonging to another, although the contract do not relate to that actual money, (since, if other money were given instead of it, the contract nevertheless holds good,) still, however, there is a semblance of the contract relating to that particular money; for if he were to give that actual money to the seller, the article purchased in return would remain appropriated to him; or if, on the contrary, he were only to point to that money, and then give other money instead of it, the amount of the price of the article is, virtually, in that money;—for this reason, therefore, there is a semblance of the contract relating to that money, and consequently that the profit is acquired by means of the property of another person.

Now, as the baseness occasioned by an invalidity of right is of less moment than that occasioned by the absolute non-existence of right, it follows that the baseness occasioned by the invalidity in the right of property occasions a semblance of baseness in any thing in which the absolute non-existence of right occasions actual baseness; (and that is any thing of a definite nature, such as a slave girl, for instance, as in the case in question;)—and, on the other hand, that it occasions an apprehension of a semblance of baseness in any thing in which the absolute non-existence of right occasions only a semblance of baseness;—and regard is had to a semblance of baseness, but not to

* For an explanation of the principle on which this proceeds, see Partnership, (Vol. II. p. 325.) where it is declared that "profit cannot be lawfully acquired upon a property concerning which there is no responsibility."
an apprehension of a semblance.—It is to be observed that if a person claim a debt from another of a thousand dirms, and obtain payment of the same, and both parties afterwards agree that the debt was not due,—in that case the profit which the claimant may in the meantime have acquired by possession of the money is lawful to him; because the bafeness, in this instance, is occasioned by invalidity of right; for this reason, that the debt had been owing in consequence of the demand of the claimant, and the defendant's acknowledgment of it; and it afterwards appears that this debt is not the right of the claimant, but of the other, (namely, the defendant:) still, however, the thousand dirms which the claimant took in satisfaction for his demand have become his property, as the satisfaction for a claim becomes the property of the claimant, although it be under an invalid right;—and as the bafeness, in this instance, is occasioned by the mere invalidity of right of property, and not by the absolute non-existence of that right, it consequently cannot operate, nor have any effect with respect to a thing of an indefinite nature, such as money, for instance.

SECTION.

Of Sales and Purchases which are Abominable.

The prophet has prohibited the practice of Najisb,—that is, the enhancement of the price of goods, by making a tender for them, without any intention to purchase them, but merely to incite others to the offer of a higher price. The prophet has also prohibited the purchase of a thing which has already been bargained for by another; but this prohibition supposes that both parties had before come to a mutual
mutual agreement; for otherwise there is no impropriety in such subsequent purchase.

The Prophet has also prohibited an anticipation of the market,—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. This prohibition, however, proceeds on a supposition that the forestallers deceive the merchants with respect to the price of grain in the city; for otherwise there is no impropriety in this practice.

The Prophet has also prohibited a citizen from selling for a countryman;—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, in order that he may sell it at a high price to the people of the city.—Some have given a different explanation of this prohibition, by supposing it to allude to a citizen's selling any thing at a high price to a countryman: but in the Fattabul Kadeer of Moqjibba the former is mentioned as the most authentic explanation.—It is to be observed, however, that this prohibition supposes that a scarcity of grain prevails in the city, as otherwise such conduct is not improper.

It is abominable to buy or sell on a Friday*, after the cryer proclaims the hour of prayer, because God has said, in the Koran, "When ye are called to prayer, on the day of the assembly, hasten to the commemoration of God, and leave merchandising." Moreover, if at such time purchase and sale were allowed, an absolute duty (namely, attendance at prayers) would necessarily be omitted. It is to be observed, however, that although such purchases and sales be abominable, still they are not

* Friday is the Mussulman Sabbath.
invalid; for the invalidity, in such instances, exists with respect merely to points that are extraneous and additional, and not with respect to the essentials of the contract, nor with respect to the establishment of any condition essential to its obligation.

A sale to the highest bidder is not abominable. Thus, if a merchant, for instance, having shewn his wares to a purchaser, should receive from him a tender for them, but, before he had expressed his acquiescence, should receive a higher tender from another, in that case it is not abominable in him to sell them to the latter;—because the prophet sold a cup and a sheet to a higher bidder; and also, because sales of this kind are for the interest of the poor.

It is abominable for a person possessing two infant slaves, related to each other within the prohibited degrees, to separate them from each other; and the rule is the same where one of them is an infant and the other an adult. This decision is founded on a declaration of the prophet, “Whosoever causes a separation between a mother and her children, shall himself, on the day of judgment, be separated from his friends by God.” It is, moreover, related that the prophet gave two infant brothers to Alce, and afterwards enquired of Alce concerning them, and being answered, by him, that “he had sold one of them,” the prophet then said “take heed! take heed!” and repeatedly enjoined him to take him back. Besides, one infant naturally conceives an attachment to another, and an adult person participates in the sorrow of an infant, and hence the separation of them in either case argues a want of tenderness to a child, which has been reproved in the traditions, where it is declared “Whosoever does not show tenderness to a child, and respect to an elder, is not of my people.” A separation, therefore, either between two infants, or between an adult and an infant, is prohibited. It is to be observed that the cause of the prohibition, in this instance, is affinity within such a degree only as prohibits marriage between the slaves in question, and
and not general affinity, for which reason any distant relation, such as a step-mother, or one prohibitory by fosterage, or by affinity with the fosterer, are not included; nor the son of the uncle; nor any one that is not within the prohibited degrees. Neither are a husband and a wife included in this prohibition, notwithstanding they be both infants, and they may consequently be separated, because the tradition which contains the prohibition, as being contrary to analogy, must therefore be observed in its literal sense; that is, it must be applied to such only as are within the prohibited degrees. Moreover, in the aforesaid tradition, both relations are required to be the property of one master: if, therefore, one infant brother belong to Zeyd, and another infant brother to Omar, each is at liberty to sell his respective property. It is allowed, likewise, to separate two infant slaves related to each other, if with a view to fulfil an incumbent duty, as where one of the two commits a crime, and is given up, as a compensation for such crime, to the avenger of the offence. In the same manner, also, one of the two may be sold, for the payment of a debt incurred by him in the course of purchase and sale, in consequence of his being a privileged slave,—or, by the destruction of the property of another,—in either of which cases that slave may be sold alone, in discharge of the debt, although this induce a separation.—So also, it is lawful to return one of the two to the seller of them, in case he should prove defective. The adjudication; in all these cases, proceeds on this principle, that the object of the prophet in this prohibition was to prevent an injury to the infants without detriment to the proprietor; an object which, if the prohibition were extended to these cases, must necessarily be defeated.—It is to be observed, however, that if a person separate one infant from another, or an infant from an adult, by selling one of them, such sale is valid: yet still the act of separation is abominable. It is recorded, from Aboo Toofaf, that a sale of this nature is invalid only where the relation of paternity (such as mother and son, for instance) exists between the parties; but that in all other cases it is valid.
Another report, from Aboo Yoosaf, mentions that sales of this nature are invalid in all cases where the separation is abominable, because of the tradition already mentioned with respect to Alee; for the prophet positively enjoined him to take back the slave he had sold, whence it may be inferred that he considered the sale as invalid, since a return of the commodity is not admitted but in an invalid sale. The reasoning of Haneefa and Mohammed is that, in the case in question, the sale is transacted by a competent person, and with respect to a fit subject; it is therefore valid; and the abomination does not apply to any thing except what is merely a concomitant, or immediate effect of the sale, namely, the distress occasioned to the two infants, which is a degree of abomination exactly equivalent to that of a person purchasing a thing over the head of another, from whence no invalidity arises.—Moreover, the order of the prophet to Alee to take back the slave must be construed either into a dissolution of the sale, or a repurchase of the slave from the person to whom he had sold him.

It is not abominable to separate two slaves that are adults, notwithstanding they be related within the prohibited degrees; for this case falls not under the ordinance before mentioned; and there is an authentic tradition of the prophet having occasioned a separation between Maria and Sireen, two female slaves that were sisters.
Of Akāla, or the Dissolution of Sales.

Akalā literally signifies to cancel.—In the language of the Law it means the cancelling or dissolution of a sale.

The dissolution of a sale is lawful, provided it be for an equivalent to the original price, because the prophet has said "whoever makes an Akāla with one who has repented of his bargain, shall receive an Akāla of his sins from God, on the day of judgment;"—and also, because, as the contract of sale comprehends the rights of both parties, namely, the buyer and the seller, they have therefore the power of dissolving such contract, to answer their own purposes.—If, however, either a greater or less sum than the original price be stipulated as the condition of the dissolution, such condition is null, and the dissolution holds good; and the seller must return to the purchaser a sum equal to the original price.—It is a rule with Haneefa, that a dissolution is a breaking off of the contract with respect to both the parties, but a sale de novo with respect to others. If, therefore, the breaking off be impracticable, the dissolution is null.—According to Aboo Toosaf, on the other hand, it is a sale de novo: but if a new sale should from any cause be impracticable, then it must be considered as a breaking off: and in case of that also being impracticable, the dissolution then becomes null.—The opinion of Mohammed is that it is a breaking off; and in failure of this, from impracticability, a sale de novo; and in case of that also being impracticable, it is null.—The argument of Mohammed is that Akāla, in its literal sense, signifies dissolution; and, in its constructive sense, sale; (whence it is a sale de novo with relation to
to all others than the parties:) it is therefore regarded as a dissolution or breaking off, agreeably to the literal meaning of the term; or, if the breaking off be impracticable, it is regarded as a sale, agreeably to the constructive meaning.—The argument of Aboo Yoosaf is that Akala means an exchange of property for property with the mutual consent of the parties, which corresponds with the definition of sale, and is also subject to the same rules; whence it is that, in case of the loss of the wares in the possession of the purchaser after the conclusion of the Akala, or dissolution, it [the Akala] is null; and also, that the seller is allowed to return the wares to the purchaser in case of their having been blemished or become defective whilst in the hands of the purchaser; and that the right of Sbooffa is also established by it.—Haneefa, on the other hand, argues that Akala means a dissolution, or breaking off, and cannot, by any construction of it, be supposed to mean sale, although the breaking off should be impracticable; because sale and dissolution are terms of opposite import, which no one word can be supposed to bear:—if, therefore, the breaking off be impracticable, the Akala is null. With regard to its being a sale de novo, in relation to others, this is a mere matter of necessity; as to them it exhibits similar effects with sale; that is to say, the seller, in virtue of the Akala, becomes again proprietor of the wares; and it is accordingly a sale with respect to all others than the seller and purchaser, for this reason, and not because of the meaning of the word, which in reality is the opposite of sale.—Such are the opinions and arguments of our three doctors with regard to Akala.—Hence it appears that if a stipulation be made, that the seller shall return to the purchaser a sum greater than the original price, the dissolution, agreeably to the tenets of Haneefa, would hold good to the amount of the original price; because (according to his tenets) Akala is a dissolution; and a dissolution cannot possibly relate to the excess, as there is no sale which might be opposed to such excess; and it is impossible to dissolve what does not exist:—the condition, therefore, is invalid, but not the dissolution, as that is not rendered null by involving an invalid condition.—It is otherwise
wise with respect to sale,—(that is, the sale of one dirm for two dirms, for instance,—for if a person should sell one dirm for two dirms, such sale would be invalid; nor could it be construed as existing with respect to one dirm, and as null with respect to the additional one, so as to render such sale lawful; because the establishment of an excess in sale is possible, as that is an establishment of a matter as yet unestablished, and it is no way difficult to establish an unestablished point; but if the excess dirm were established, it would induce usury:—a sale of this nature, therefore, is invalid.—The conclusion therefore is, that the dissolution in question is valid, but the condition is otherwise. The law is also the same where a stipulation of a smaller amount than the original price is made; that is to say, the dissolution holds good, but the condition is void; because, the sale being established with regard to the original price, and the deficiency not then existing, it follows that the dissolution can apply only to what does exist,—namely, the original price,—since it is impossible to dissolve what does not exist.—If, however, this deficiency be stipulated on account of a defect which had taken place in the wares, it is lawful.—In the opinion of the two disciples, the stipulation of a sum exceeding the original price, in a dissolution, amounts to a sale:—according to Aboo Yoojaj, because (as has been already explained) he considers Akála as a sale:—and also according to Mobammed, because, although he be of opinion that a dissolution is a breaking off, yet he has said that, in case of the impracticability of a breaking off, it must be considered as a sale; and as the dissolution in question is of that nature, he is therefore of opinion it is a sale.—With respect to a dissolution in which is stipulated an amount less than the original price, Aboo Yoojaj (proceeding on his general opinion concerning dissolutions,) considers it as a sale: but in the opinion of Mobammed it is a dissolution with respect to the whole of the original price; because he considers the deficiency to be a silence maintained with respect to a part of the price; and as the dissolution would have been valid if a silence had been maintained with respect to the whole, so it is in a superior degree.
valid when the silence is maintained only with respect to a part. A
dissolution, stipulating a smaller sum than the original price, in a case
where the wares have been blemished in the hands of the purchaser,
is considered by Moabmed as a dissolution; the deficiency being op-
posed to the blemish.

If a dissolution be agreed upon, stipulating, in lieu of the original
price, an equivalent of a different kind, it is a breaking off*, according
to Haneefa, for the original price; and the stipulation of a differ-
ent kind is nugatory. The two disciples consider this dissolution as
a sale, founding their opinion on their ideas of the nature of dissolu-
tions, as already explained.

If a dissolution of sale take place with respect to a female slave
who had borne a child whilst in the possession of the purchaser, it is
null, according to Haneefa, because (agreeably to his tenets) a disso-
lution is a breaking off; and the birth of the child is preventive of a
dissolution, as this is a supernumerary addition of a separate thing; and
such addition, after seisin, prevents a dissolution of the bargain.—
This dissolution, however, is considered as a sale by the two disciples.

The dissolution of a sale previous to taking possession of the article
sold, whether of a moveable or immovable description, is a breaking
off, according to Haneefa. According to Aboo Yoosaf it is a break-
ing off with regard to moveable property only, because a sale of move-
able property, previous to taking possession of it, is not lawful, and
hence a dissolution with respect to moveable property, previous to the
seizin of it, cannot be considered as a sale, and is consequently a
breaking off. A dissolution with respect to immovable property, on
the contrary, previous to the taking possession of it, is a sale, (accord-

* And consequently valid, as it completely annuls the contract.
ing to Aboo Yoosof;,) as he holds that the sale of immoveable property, previous to the seizin of it, is lawful.

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

In cases of Mookhyeza, or a sale of goods for goods *, a dissolution agreed upon after the destruction of one of the two subjects is valid; because each of them falls under the description of the subject of the sale; and applying this term, therefore, to the one that remains, it follows that the dissolution is lawful, because of the existence of the subject of the sale.

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CHAP. VII.

Of Moorâbihat, and Tawleet, that is, Sales of Profit and of Friendship †.

Moorâbihat, or a sale of profit, means the sale of any thing for the price at which it was before purchased by the seller, with the super-addition

* That is, barter:—the term by which Mookhyeza will be hereafter always expressed.

† Moorâbihat and Tawleet are technical terms, which (like many others in this work) do not admit of a literal translation. Neither is the definition of them, as here given (according to the Persian version of the Heddyas) completely satisfactory. In the Arabic copy,
addition of a particular sum by way of profit. Tawleet, or a friendly sale, is where one person sells any thing to another for the exact price which he himself paid for it. Both these modes of sale are lawful; because the conditions essential to the validity of a sale exist in them; and also, because mankind stand in need of them. For example, a man who has himself no skill in making purchases is necessitated to confide in a purchase from a person skilled in such matters; in other words, he will purchase the article from this person at the same rate at which he had purchased it, without allowing him any profit upon it, as in a case of Tawleet, or friendly sale,—or, he will purchase it from him, at the same rate at which he had purchased it, allowing him an addition, by way of profit, as in a case of Moorabibat, or profitable sale; and this will leave him satisfied and at ease in his mind; since a person destitute of skill is by either of these modes secured from fraud, whereas, following any other mode, he would be exposed to great imposture. Mankind, therefore, having occasion for both these modes, they are both permitted:—and as, in both instances, the purchaser is under a necessity of placing an absolute confidence in the word of the seller, who is skilled in the business of traffic, it is therefore incumbent on the seller to be just and true to his word, and to abstain from fraud, or from the semblance of fraud. Fraud is where a person avers that he had purchased a certain thing for twelve dirms, when, in fact, he had only paid ten dirms; and the semblance of fraud is where a person sells any thing by a profitable sale,
stipulating prompt payment, when, in reality, he had himself pur-
chased the same thing on credit.

Profitable and friendly sales are lawful only where the price of
the wares is of the description of similars, such as dirms and dennes,
for instance; because, if the price stipulated be an article of which the
unities are not similar, (such as a slave, for example,) it follows that
the purchaser becomes proprietor of the wares for a price of which
the value is unknown, a circumstance which induces illegality in a
sale. If, however, the purchaser should, in the mean time, have
acquired possession of the price, (as if, for instance, the price be a
slave, and that identical slave be then the property of the purchaser) in
such case a sale of friendship is lawful; and also a sale of profit,—pro-
vided the profit be stipulated in money, or in articles estimable by
weight, or measurement of capacity, which are described and ascer-
tained;—because the purchaser is in this case enabled to make delivery
of the thing which he has rendered obligatory on himself. It is not
lawful, in a sale of this nature, to stipulate a profit proportionate to
part of the price, (such as a profit of one dirm upon ten, two upon
twenty, and so forth;) because the particular value of the price [the
slave] not being ascertained, this could not be carried into practice:—
it is necessary, therefore, to stipulate a general profit upon the whole
price.

It is lawful for the seller †, in a profitable or friendly sale, to add
to the capital sum ‡ the wages of the bleacher, the dyer, or the

* Meaning the person who enters into the Tawleset or Murābībat agreement with the
first purchaser.

† Meaning the party who first purchased the article, and then agrees to transfer it by
Tawleset or a Murābībat. (The terms seller and purchaser are thus to be understood
throughout this section.)

‡ Arab. Rās Māl: meaning (in this place) the prime cost or original price of the
article.
S A L E.

Book XVI.

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:—this, moreover, is a general rule, applying to all the articles here mentioned; for the drying, figuring, or spinning is an increase to the substance of the article; and the bleaching of linen, or the porterage of wheat, and so forth, is an increase to their value, because cloths are rendered more valuable by being bleached, and the price of wheat varies in different places. It is requisite that the seller, in making or including such addition, should say “this article has cost me so much,” and not “I have pur-
chased this at such a rate,” because the latter assertion would be false. It is to be observed that the driving of goats from city to city is equivalent to the porterage of wheat; but neither the wages of the shepherd, nor the rent of the house in which the wares are kept, is to be included, as no increment with respect either to the substance or the value arises from these circumstances:—neither are the wages of a teacher of the Koran, or the like, to be included*, because the increase of value obtained 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, must be placed to the head of the wisdom, or natural ability, which is the immediate cause, and not to the teaching, which is a remote cause.

* In the sale of a slave.

If, in a sale of profit, the purchaser should discover that the seller had practised a fraud in stating the price of the wares, in such a case, according to Haneefa, the purchaser is at liberty either to adhere to or undo the bargain, as he pleases; and in case such fraud should be practised in a sale of friendship, the purchaser is at liberty to deduct the amount of the fraud from the price. Aboo Yosef is of opinion
opinion that a deduction proportionate to the fraud must be made in either case; but that, in the sale of friendship the deduction is made from the price; and in a sale of profit, from both the price and the profit. Mohamned maintains that in both cases the purchaser has the option of adhering to or relinquishing the contract as he pleases:—for he argues that the mention of the price is to be regarded, as that is known; and the mention of friendship or profit, is made with a view to incite desire, and is therefore to be considered as the inducement, in the same manner as the inducement of security against a blemish or defect; and consequently, if the inducement fail, the purchaser is at liberty with respect to the contract. The argument of Aboo Yoosaf is that, in cases where friendship or profit are mentioned, it is an essential that friendship or profit be established:—whence it is that the sale in question is concluded, if the seller say to the purchaser, "I have sold this thing to you, by way of friendship, for its original price,"—or, "I have sold this thing to you for a profit on its original price," provided its original price in both cases be known and ascertained. Now, such being the case, it necessarily follows that a deduction must be made in proportion to the fraud of the purchaser, in order that Tawleet or Moordhibat may be established:—in a case of Tawleet the deduction is made from the price; and in a case of Moordhibat from the price and the profit. The argument of Haneesa is that if, in a sale of friendship, no deduction be made for a fraud, the description of Tawleet no longer appertains to it, since the price, in such a case, must otherwise exceed the original price, and consequently the transaction, which is supposed a transaction of friendship, would be altered in its nature: a deduction is therefore adjudged:—if, on the other hand, no deduction were made in a profitable sale, yet the sale would still retain its original nature of a profitable sale, with the difference only of the extent of it; for which reason the purchaser is at liberty to abide by or undo the contract as he pleases. Hence if, in a profitable sale, after the purchaser had become acquainted with the fraud, the wares should be lost or destroyed.
stroyed in his possession,—or, if they should have contracted some blemish preventive of a dissolution of the sale, the purchaser is responsible, according to all the most authentic traditions, for the whole price,—since in such a case no proportion whatever of the original price is opposed to the option of the purchaser, so that he might deduct such proportion, because of the destruction of his option;—as holds in cases of option of inspection or condition of option. It is otherwise in cases of option of defect; for there the claim which the purchaser has on the seller relates to a loss with respect to the wares, arising from a defect; and a deduction is accordingly made from the price on account of such loss, provided it be not in the power of the seller in any other way to repair such loss arising from defect.

If a person purchase cloth (for instance,) and afterwards dispose of it to another by Mooráhibat, and then repurchase it from that other at the price for which he had originally purchased it, in that case, if he should again wish to sell it by Mooráhibat, it is necessary that he 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 acquired in the intermediate sale:—but if after such deduction nothing remain, he is not allowed to sell it by Mooráhibat. This is according to Hanéfa. The two disciples maintain that it is lawful for him to sell it with an addition of profit grounded on the last sale. To exemplify this case:—suppose that a person purchases cloth at ten dirms, afterwards sells it to another for fifteen dirms, and again purchases it from that other for ten dirms; in this case, if he should wish to resell it by way of profit, he must fix the price at five dirms, being what in reality the cloth has cost him, and what he ought therefore to found a profit upon:—suppose, on the other hand, that a person purchases a piece of cloth for ten dirms, and having sold it to another for twenty dirms, afterwards repurchases it from that other for the original price, namely ten dirms; in this case he is not entitled to sell it again with an addition of profit. The two disciples maintain that he is in both cases
cases entitled to sell it for a profit on the last price; namely ten dirms; and their reasons are, that the repurchase is a new contract, and has no connexion with the effects of the former sale; and that therefore a profit may be imposed, founded on the second contract; in the same manner as if the second purchaser should sell it to a third purchaser, and the first purchaser repurchase it from the third one, in which case it would be lawful for the first purchaser to sell it at a profit on the last price, and so also in the case in question. The argument of HanEEfa is, that in the case in question, there is an apprehension of the first profit being obtained by means of the second contract, since until the person repurchased the cloth there was a possibility that he might return it upon the seller’s hands in consequence of a defect, and that his [the seller’s] profit might thereby have been lost, although upon his repurchasing it from the purchaser, this possibility vanishes, and the profit remains confirmed and established. The apprehension, however, had existed; and in MoorE-bibat sales apprehension is regarded as equivalent to certainty, out of caution; (whence it is that a profit of this nature is not allowed upon any thing given in composition; in other words, if a person be indebted to another to the amount of ten dirms for instance, and he compound the debt with his creditor by a piece of cloth, it is not lawful for the creditor to sell this cloth at a profit of this nature over and above ten dirms, because in the composition it is to be apprehended that the value of the cloth was about of ten dirms, as composition is founded upon remission of a part.)—In the case in question, therefore, the seller, because of the apprehension above stated, appears, in consequence of the second contract, to have purchased five dirms, together with the cloth, for ten dirms; he must therefore deduct five dirms from the whole, and declare that “the cloth has fallen to him for five dirms;” and take his profit upon those five. It is otherwise where the second purchaser sells the cloth to a third person, and the first seller then repurchases it from this person; for in this case the acquisition of the first profit is confirmed and established by means of
the second purchaser's having sold it into the hands of another, and not by means of the first seller repurchasing it from the third person so as to leave any room for apprehension in this case also. There is therefore a material difference between this case, and the case under consideration, and consequently it is evident that the analogy adduced by the two disciples is unfounded.

If a privileged slave, involved in debt, should purchase a piece of cloth for ten dirms, and afterwards sell it to his master for fifteen dirms, and the master with to sell the said cloth in the manner of Moorābibat, he must set his profit upon ten dirms. In the same manner, if a master purchase a piece of cloth for ten dirms, and sell it to his privileged slave for fifteen dirms, the slave is not entitled to dispose of it at a profit upon more than ten dirms. The reason of this is that, in both cases, there is a semblance of illegality in the sale; because the property of the slave being, as it were, the property of his master, it appears that the master, in the first case, purchases his own property; and that, in the second case, he sells his own property to himself.

If a person give to another ten dirms, in the way of Moorāribat, stipulating that the profit acquired therefrom shall be equally divided between them, and the Moorāhib, or manager so constituted, purchase with the said money a piece of cloth, and then sell it to his constituent for fifteen dirms, and the constituent afterwards wish to dispose of it by a profitable sale, he is not allowed to fix the price at more than twelve and a half dirms. The reason of this is, that although the purchase made by the proprietor of a Moorābibat stock from his manager be, in fact, the purchasing of his own property with his own property, yet such purchase is held to be lawful by our doctors; because the proprietor of the stock has no power over it whilst in the hands of the manager; and as this power, which is a desirable object, resulted to him from the purchase, the said purchase, because of its being the means of procuring to him an object of desire,
is therefore lawful; nevertheless, as there is in this case an appearance of invalidity of sale, (since the constituent did as it were purchase his own property with his own property, by which means a mutual exchange of respective property did not take place) the purchase is therefore reckoned null so far as regards the half of the profit; and accordingly, in the case in question, the profit must be imposed upon twelve and a half dirms.

If a person purchase a female slave, and she afterwards, without any appearance of violence, but merely from a natural cause, become blind of an eye,—or if, being a woman *, he cohabit with her, without harm accruing,—it is in either case lawful for him to dispose of her by Moorábibat, without giving any explanation of either of these circumstances; for neither in consequence of the blindness or the cohabitation does anything remain to him in opposition to which a deduction might be made from the price; because no part of the price is opposed to the quality of the article, (whence it is that if the quality be destroyed previous to seizin by the purchaser, no deduction from the price would on that account be allowed;) and in the same manner, no part of the price is opposed to the use of a woman’s person. It is reported, from Aboo Yoosuf, that in the first case the slave must not be disposed of in the manner of Moorábibat, without an explanation being given of the blindness, any more than where blindness has been occasioned by violence: and this opinion has been adopted by Shafei. —It is to be observed, that if the purchaser himself had occasioned the blindness, or if it had been occasioned by another from whom the purchaser either had or had not received an amercement, he is not in either of these cases entitled to dispose of the slave by Moorábibat, without giving an explanation of the blindness; because

* Arab. Sayyeha: in opposition to a virgin. The reason for restricting the case to muliebrity, in this instance, is that cohabitation with a woman is not considered as a depreciation of her value:—contrary to the case of deflowering a virgin.

An article may be disposed of by Moorábibat, where a defect has intervened not proceeding from the seller, or where the seller has said the article, in the interim, without injury to it.

but if the defect be occasioned by, or compensated to, the seller, a proportionable deduction must be made from the price.
here the purchaser, (or another,) did with design or intention destroy the eye; and it is consequently requisite that a proportionable deduction be made for a defect so occasioned. The same rule also obtains where a purchaser has cohabitation with a female slave who is a virgin; because virginit, being merely a tender membrane, is a constituent part of the slave, and this the purchaser has destroyed.

If the cloth which a person had purchased be burnt by fire, or damaged by vermin, in that case it is lawful for the purchaser to dispose of it by Moorabibat without explaining either of these circumstances: but if the cloth be torn in the folding and opening of it, it is not lawful for the purchaser thus to dispose of it without noticing the same to the party, because the damage, in this case, is occasioned by his own deed.

If a person, having purchased a slave (for instance) for one thousand dirms, payable at a future period, should afterwards sell him for one thousand dirms, payable immediately, with a profit of one hundred dirms, without noticing to the other the respite of payment he himself has obtained,—in that case the other, if he should afterwards discover this circumstance, is at liberty either to abide by or undo the bargain at his option; because the suspension of the payment resembles an addition to the substance of the wares; and hence it is a custom amongst merchants, in granting a respite of payment, to increase the price of the merchandise. Now a semblance, in a sale by profit, is deemed equivalent to reality; and hence it follows that the said person did, as it were, purchase two things for one thousand dirms, namely, a slave and a suspension of payment; and afterwards sold only one of these things by way of profit, grounded on the price which he paid for both; a fraud from which an abstinence is particularly enjoined in cases of Moorabibat:—the purchaser, therefore, has an option of adhering to or undoing the bargain as he pleases, as in the option from defect. If, however, the purchaser should destroy the
the wares, and then receive notice of the fraud which had been practised upon him, he is not in such case entitled to make any deduction on that account from the price, because no part of the price is in reality opposed to the suspension of payment.

If a person, having purchased a slave (for instance) for a thousand dollars, payable at a future period, should afterwards dispose of him to another, by a Tartleent, for a thousand dollars ready money, without intimating the respite of payment, in that case the other, on discovery of this circumstance, is at liberty either to abide by, or annul the contract, as he pleases; because an abstinence from a fraud of this nature is equally enjoined in friendly as in profitable sales.—If, however, in this case, the purchaser, having destroyed the slave, should then become acquainted with the suspension of payment that had been granted to the seller, it is incumbent on him to make a prompt payment, according to the agreement; nor is he entitled to make any deduction from the price on the score of suspension of payment, as before explained.—It is related, as an opinion of Aboo Toosaf, that the purchaser is in this case to pay the value to the seller, and to receive from him the whole of the price; in the same manner as holds (according to him) in a case where a creditor, having received payment of the debt due to him in a bad specie, discovers this circumstance after having expended 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 like number of good specie.—Some have said that an appraisement ought to be made of the value in the case of prompt payment, and also in the case of a distant payment; and that the difference should be given by the seller to the purchaser.—All that has been here advanced proceeds on a supposition of the suspension of the payment being included in the contract of sale; for if, without such stipulation, it should happen that the payment be made at a distant period, (as is often the case amongst merchants,) there subsists, in such case, a difference of opinion upon this point, whether, under these circumstances, the value is to be made up as a present payment, or is to be reserved in a distant payment; the one opinion being that the value is to be made up in the present payment, and the other that it is to be made up in the distant payment, and that the difference is to be given by the seller to the purchaser.
these circumstances, in a subsequent sale of profit or of friendship, it
be incumbent upon him to make known this matter.—Some have
said that such notification is incumbent on him, since an established
custom is equivalent to a condition.—Others, again, allege that he is
under no necessity of giving such notification, since it is evident that,
as no condition was stipulated, the sale was therefore for prompt
payment.

In a sale of friendship the rate must be specified.

If a person dispose of a thing to another by a sale of friendship,
declaring that "he sells it to him at the rate it had stood him in,"—
and the purchaser be not acquainted with that rate, the sale is invalid,
from the uncertainty with regard to the price:—if, however, the
seller should afterwards inform the purchaser of the rate, at the same
meeting, the sale then becomes valid, but it still remains in the op-
ton of the purchaser to abide by or recede from the contract as he
pleases, since the acquiescence he had before expressed was not fully
established, from his ignorance of the price, and after the knowledge
of it he has an option, in the same manner as in the case of an option
of inspection. The reason of the validity of this sale is that the in-
validity does not become firmly established until the departure of the
parties from the meeting.—When, therefore, the purchaser, in the
meeting, is informed of the price, it becomes the same as if a new
contract had taken place after the purchaser had acquired this know-
ledge; and it is for him to withhold his acquiescence until the end of
the meeting.—If, however, the parties should separate, the invalidity
then becomes fixed; nor can it be removed by any knowledge which
the purchaser may afterwards obtain of the amount of the price.—
Similar to this is the case where a person sells cloth for the value
which is marked upon it, but of which the purchaser is ignorant; for
such sale is invalid, but may be rendered otherwise by the explana-
tion of the seller, before the breaking up of the meeting.
SECTION.

It is not lawful for a person to sell moveable property, which he may have purchased, until he receive possession of the same; because the prophet has prohibited the sale of a thing prior to the seizin of it on the part of the feller; and also, because there is an unfairness in it, since, if the merchandise should be lost or destroyed before the seizin, the first sale becomes null, and the property reverts to the former proprietor, in which case it must necessarily appear that the person in question has sold the property of another without his consent.

The sale of land*, previous to seizin, is lawful, according to Haneefa and Aboo Yoosof. Mohammed maintains that it is unlawful; because the traditional saying of the prophet before quoted is absolute, and not particularly confined to moveable property; and also, because of its analogy to moveable property. Besides, the sale of land is similar to the hire of it; in other words, as it is unlawful to let land before seizin, so is it likewise to sell land before seizin. The reasoning of the two disciples is that, in the case in question, the sale is effected by competent parties with respect to a fit subject;—that there is no unfairness in it, since the destruction of ground is rare, whereas that of moveable property is probable;—and that the prohibition of the prophet is founded on the possibility of the unfairness already explained, which does not exist in the case of land, the destruction of it being rare.—Some have asserted that a lease of land before seizin, as added by Mohammed, is lawful in the opinion of the two disciples.—Admitting, however, that it were unlawful according to all our doc-

* Arab. Aikar; meaning any species of immovable property. Zimeen is the term used in the Perse version, whence the translator renders it land.

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tors, it proceeds evidently on this principle, that a lease is made with a view to the produce, the destruction of which not being uncommon, the unfairness already explained (with respect to the sale of moveable property before seisin) may consequently take place in it. This, however, cannot happen with respect to the sale of ground, the destruction of which is rare, and consequently the one case is not analogous to the other.

If a person purchase articles estimable, by a measure of capacity, such as wheat, or articles of weight, such as butter, as if he should say "I have purchased this wheat, on condition of its being equal to ten bushels," or "this butter, on condition of its weighing ten māns,"—and if, having measured or weighed these articles accordingly, he should then take them and sell them to another, on the same condition of measure or weight, in that case it is not lawful for that other to sell or use these articles, until he has measured or weighed them on his own account; because the prophet has prohibited the sale of wheat until it be measured both by the buyer and the seller; and also, because there is a possibility of these articles exceeding the warranted quantity; in which case the excess, as being the property of the seller, would not be lawful to the purchaser; and an abstinence in the case of this possibility is necessary.—It is otherwise where the sale is made by conjecture, without any condition of measurement; for the excess, in that case, is the right of the purchaser; and it is also otherwise in the sale of cloth by yards, for there likewise the excess is the right of the purchaser; since yards (as has been already explained) are a description of the cloth, and not a quantity, as in the case of articles of weight or measure of capacity.—It is to be observed that the measurement of the cloth by the seller, previous to the sale, is not valid, although it should have been done in the presence of the purchaser, because the measurement of both the seller and purchaser is required, and these terms are not applicable to the parties until after the sale takes place. So also, the measurement made by the
the seller after the sale is invalid, unless it be in the presence of the purchaser, because the object of measurement is delivery, and delivery without the presence of the purchaser is impracticable.

If the seller only should measure the merchandise after the sale, in presence of the purchaser, a question has arisen, whether this be sufficient?—or, whether it be not necessary that the purchaser should also examine it by his own measure?—Some 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 doctrine, however, is that it is sufficient, since 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 instance, a person having purchased, measured, and taken possession of a thing, afterwards sold it to another; in which case it is necessary that the second purchaser himself 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 Silius sales.

It is related as an opinion of the two disciples, that articles of tale are analogous to those of longitudinal measurement; that is, if a person, having purchased and received articles of this nature on condition of their amounting to a particular number, should afterwards sell them to another on the same condition, there is, in that case, no obligation on that other to enumerate them on his own account, because such articles are not susceptible of usury.—It is related, also, as an opinion of Haneefa, that articles of tale are similar to those of weight, because in regard to them the receipt of any excess beyond the stipulated number is unlawful to the purchaser: articles of tale are therefore analogous to articles of weight.
A seller may dispose of the price of his goods without having taken possession of it.

ANY deeds of the seller with regard to the price of the merchandise, prior to the actual receipt of it, such as gift, sale, hire, or bequest, is lawful, whether the price be stipulated in money or goods;—because the cause of legality, namely, right of property, is established in the seller; and the act is attended with 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 expressed in dirms and denarbis, is indeterminate, and is therefore incapable of being destroyed; and if it consist of anything else, still the sale is not invalidated by a destruction, since the value remains due from the seller.—It is otherwise with respect to the article purchased, as the sale of that before receipt of it induces fraud, as was before explained.

It is lawful for the purchaser to make an increase of the price in favour of the seller; and for the seller to make an increase in the merchandise in favour of the purchaser;—and it is also lawful for the seller to make abatement from the price in favour of the purchaser; and this increase or abatement is incorporated in the original contract; (that is to say, in case of an increase, the original and additional form of the price; or the article; and in case of an abatement, what remains after the deduction is the price of the article.) Hence, in the first case, the seller possesses a right to the original price, together with the increase superadded to it; and, in the second case, the purchaser has a right to the original merchandise with the increase superadded. Shafei and Ziffer are both of opinion that such increase is a mere act of favour, and therefore cannot be incorporated in the original sale; for, if so, it must necessarily follow that a person gives his own property in exchange for his own property, since, previous to the increase of the price, the article was the property of the purchaser in exchange for the original price; and, consequently, if the increase be made in the price, the property of the purchaser is given in exchange for what was before his property: in the same manner, also, in the second case, as the price, previous to the increase, was the property of the seller, it...
it follows that in increasing the wares, he gives his own property in exchange for his own property.—Neither can an abatement from the price, by the seller, be incorporated with the original contract; but it must rather be considered as an act of favour; because, prior to the abatement, an exchange of the merchandise for the whole of the price had taken place; and it is impossible to set aside any part of the price, since in such case it must follow that a part of the merchandise had no correspondent exchange opposed to it; and this is unlawful.

Objection.—This consequence does not follow; because the remaining sum, after the deduction of the abatement, is considered as an exchange for the whole of the merchandise.

Reply.—It is impossible to consider the remainder as an exchange for the whole, because no new contract has taken place with regard to the diminished price, and the old contract relates only to the full price.

The reasoning of our doctors is, that the buyer and seller, by means of the increase and abatement, do only alter the contract from one lawful accident to another lawful accident; and that, as the parties possess the power of annulling the contract, they are, a superiiori, entitled to make an alteration in the non-essential properties of it. The case is therefore the same as if the parties should annul an optional power, or stipulate one after the conclusion of the contract.—Now, since it is lawful for the parties to alter the accident of the contract by means of increase or abatement, it follows that such increase or abatement is incorporated with the original contract; because the accident of a thing adheres to that thing, and does not exist abstractedly of itself. It is otherwise where a seller abates the whole price; for such abatement could not be incorporated with the original contract, since in that case a change would take place in regard to what is an essential property, and not an accident of the contract.—It is also to be observed, that from the increase and abatement being incorporated with the original contract, it does not necessarily follow that a person gives his own
own property in exchange for his own property, because the original contract does as it were relate to such increase or abatement.—The advantage of the incorporation of the increase and the abatement in the original contract is evident, in a case of friendly or profitable sale; for if a person sell something by a profitable sale to a purchaser who increases the price in the seller's favour, in that case it is lawful for him [the seller] to charge his profit on the original and the increase united; as, in case of an abatement, on the other hand, his profit must be charged on the residue after the deduction.—The advantage arising from this is also evident in a case of Shaffa; for the person possessing the right of Shaffa is entitled to the subject of the sale, in case of an abatement in exchange for the diminished price.

Objection.—Since the abatement and increase are incorporated with the original contract, it would follow that, in a case of increase, the person possessing the right of Shaffa is to take the subject of the sale at the aggregate amount of the original price, and its increase,—instead of taking it (as is the case) at the original price only.

Reply.—In case of an increase of the price, the proprietor of the right of Shaffa takes the subject of the sale at the original price only, because his right relates to the original price, and it is not in the power of the buyer and seller, by any act of their's, to annul such right.

Any increase of the price, after the destruction of the wares in the possession of the purchaser, is not valid, (according to the Zahir-Rhwayet,) because of the wares not having been in a state that admitted of the lawful opposition of an exchange for them.

Objection.—It would appear that the increase of the price remains in force after the destruction of the goods; for although the goods be not then in a state to admit any exchange being opposed to them, yet the increase incorporates with the original contract, which was concluded at a time when, the goods being extant, it was lawful to oppose an addition to the exchange for them.

Reply.
CHAP. VII.  S A L E.

REPLY.—If the wares had remained in a condition to admit of an exchange of property for them immediately, then such exchange might have been immediately established, and referred afterwards to the period of forming the contract; for a thing is first established on the instant, and is then referred to the formation of the contract;—but as, in the present instance, the immediate exchange of the property cannot be established, the wares no longer existing, the reference back is impossible; and hence any increase of the price is evidently invalid.—It is otherwise with respect to an abatement of the price after the destruction of the wares, because these, after their destruction, are in a state which admits of a diminution of the price; which is therefore referred to the formation of the contract.

If a person, having sold something on condition of prompt payment, should afterwards agree to receive the price at a future fixed period, it is lawful, because the price is solely the right of the seller; and as it is in his power, if he chuse, to forego it altogether, he is consequently entitled, for the convenience and ease of the purchaser, to take a future payment instead of a prompt one, a fortiori.—If the period stipulated be not certain, and the uncertainty be very great, (as if he should stipulate payment when the wind blows, for instance,) it is not lawful. If the period, on the contrary, be only in a small degree uncertain, (as if he should stipulate the payment at the cutting of the corn, or the threshing of it,) it is lawful, in the same manner as in the case of bail, of which an explanation has already been given.

Every debt immediately due may be suspended, in its obligation, to a future period, by the creditor, on the principles laid down in the preceding case,—excepting a loan *, the suspension of the obligation of

* Arab. Karz; signifying a loan of money, in opposition to Arzet, which means a loan of any thing but money. These deeds are considered, by Mussulmans, to be of a distinct
of which is not approved.—The reason of this is that the lending of money, is, in the immediate act, equivalent to a loan of any other thing †, and an act of benevolence; (whence it is that if a person should tender a loan of money to another, expressing his intention by the word *Areent*,—as if he should say, "I deliver these ten dirms as "an *Areent*,"—it is valid; and also, that no person who is incapable of any gratuitous act, such as an *infant* or a *lunatic*, is competent to this deed :)—but in the end it operates as an *exchange*, since the borrower gives to the lender an *equal sum*, but not the identical specie he received.—In consideration, therefore, of the *immediate act*, a respite is not binding upon the lender, as there can be no constraint in an act purely gratuitous; and, in consideration of the *end*, the respite is not approved, for in this case the transaction would resolve itself into a sale of money for money, which is *usufruct*.—It is otherwise, in the *bequest* of a loan for a fixed period; for if a person bequeath the loan of one thousand dirms to another, for a year, (for instance,) the performance of this is incumbent on the executor; nor is he entitled to make any demand on the legatee until the expiration of the term, since this bequest is of a *gratuitous* nature, and resembles the bequest of the services of a slave, or the use of a house.

distinct and separate nature. In the one the intention is to destroy the substance of what is borrowed, that is, to spend the identical money received, and afterwards return an equal number of similars. In the other, the intention is to enjoy the usufruct without injuring the substance, which is to be returned in its identical state.

† Literally, "*a Karz is, in its immediate occurrence, equivalent to an Areent.*"
C H A P. VIII.

Of Ribba, or Usury.

**Ribba**, in the language of the law, signifies an excess, according to a legal standard of measurement or weight, in one of two homogenous articles [of weight or measurement of capacity] opposed to each other in a contract of exchange, and in which such excess is stipulated as an obligatory condition on one of the parties, without any return,—that is, without any thing being opposed to it. The sale, therefore, of two loads of barley (for instance) in exchange for one load of wheat does not constitute usury, since these articles are not homogeneous:—and, on the other hand, the sale of ten yards of Herat cloth in exchange for five yards of Herat cloth is not usury, since, although these articles be homogeneous, still they are not estimable by weight or measurement of capacity.

**Usury** is unlawful; and (according to our doctors) is occasioned by *rate*, united with *species*.—Shoefi maintains that usury takes place only in things of an *esculent* nature, or in money.—It is necessary, in order to the operation of the illegality, that the articles be homogeneous; but an equality in point of weight or measurement of capacity annihilates the usury.—It is to be observed that a superiority or inferiority in the *quality* has no effect in the establishment of the usury;

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* It may be necessary here to observe that *rate*, amongst the *Mussulmans*, applies only to articles of weight or measurement of capacity, and not to articles of longitudinal measurement, such as cloth, or the like.—The phrase here used implies an *inequality of rate with a similarity of species.*

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R e r

and
and hence it is lawful to sell a quantity of the better sort of any article in exchange for an equal quantity of an inferior sort.

The sale, at an unequal rate, of articles of weight or measurement of capacity, in exchange for homogeneous articles, is usurious, according to our doctors, although the articles be of a description not esculent, (such as loam or iron, for instance;)—because they hold that the cause of usury exists, in articles of weight and measurement of capacity, although they be not of an esculent nature. Shafi'i maintains that such sale is lawful, agreeably to his tenets with respect to usury. Supposing, however, the equality of the rate, such sale is lawful in the opinion of all the doctors.—(It is to be observed that loam is an article of measurement by capacity, and iron of weight.)

The sale of any thing not measured out according to the legal standard, at an unequal rate, is lawful. Thus it is lawful to sell one handful of wheat in exchange for two handfuls; or two handfuls in exchange for four;—and also, one apple in exchange for two apples; because, in such case, the measurement not having been made according to a legal standard, it follows that a superiority of measurement (which is essential to the establishment of usury) has not, according to the rules of measurement, taken place. Shafi'i maintains that such sale is unlawful; because the article is, in this instance, of an esculent nature, which (according to his tenets) is the efficient cause of usury; and also because the equality destructive of usury does not here exist. (It is to be observed that whatever is less than half of a Sad is considered equivalent to a handful, since the law has fixed no standard of measure beneath that quantity.)

Where the quality of being weighable or measurable by capacity, and correspondence of species (being the causes of usury) both exist, the stipulation of inequality, or of a suspension of payment to a future period, are both usurious. Thus it is usurious to sell either one measure
SURE of wheat in exchange for two measures,—or one measure of wheat for one measure deliverable at a future period. If, on the contrary, neither of these circumstances exist, (as in the sale of wheat for money,) it is lawful either to stipulate a superiority of rate, or the payment at a future period. If, on the other hand, 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 a suspension in the payment. Thus one measure of wheat may 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 payable at a future period; nor one slave for another, deliverable at a future period. SHAFTES is of opinion that correspondence of species alone does not render illegal a suspension of delivery; because where, in an exchange, a prompt delivery is opposed to a future delivery, there is only a semblance of a superiority of rate, founded on the preference given to prompt payment. Now if a superiority of rate, in reality, be not preventive of the legality of the sale (as in the case of one slave for two slaves) it follows that the semblance only of a superiority is not preventive of such legality, a fortiori. The arguments of our doctors are, that wherever either correspondence of species, or the quality of being weighable or measurable exists, the wares are, in one shape, of that description in which usury takes place; and accordingly, a semblance of usury takes place in them, which is repugnant to the legality of the sale in the same manner as actual usury. The ground of this is what is written in the Hadces Shireef, that "articles of different species may be sold in any manner the parties please, provided the bargain be from hand to hand."

Objection.—Since correspondence of species, or the quality of being weighable or measurable does either of them singly prevent the legality of a suspension of delivery, it would follow that a contract of Sillim sale stipulating an exchange of saffron for dirms or deenars, is invalid, as both are articles of weight:—whereas such a sale is valid.
REPLY.—The contract is lawful, notwithstanding saffron and deenars be both articles of weight, because they do not agree in the quality of the weight, as saffron is weighed by Māns, and being a subject of sale only, is therefore definite by specification; whereas dirms and deenars are weighed by stone, being only price and not a subject of sale; and therefore do not become definite by specification. In the same manner, also, if a person should sell saffron to another for one hundred dirms, ready money, that other may lawfully employ the said dirms either in purchase or in any other mode without reweighing them:—whereas, if a person sell saffron, on condition of its being two Māns, the purchaser is not afterwards at liberty to dispose of it by sale or by any other mode without reweighing it; as holds with respect to all articles of weight or measurement of capacity. Now it being thus demonstrated that the weight of saffron and other articles is different from the weight of dirms and deenars, in appearance, substance, and effect, it follows that they do not unite in any circumstance with respect to the quality of the weight; and consequently, that the semblance of usury, in this case, is only an apprehension of a semblance, which is not regarded.

Every thing in which the usuriousness of an excess has been established by the prophet on the ground of measurement of capacity, (such as wheat, barley, dates, and salt,) is for ever to be considered as of that nature, although mankind should for sake this mode of estimation;—and in the same manner, every thing in which the usuriousness of the excess has been established by the prophet on the ground of weight, continues for ever to be considered as an article of weight, like gold or silver; because the custom of mankind, which regulates the mode of measurement, is of inferior force to the declaration of the prophet; and a superior cannot yield to an inferior. (Abū Yosaf is of opinion that in all things practice or custom ought to prevail, although in opposition to the ordinance of the prophet; for the ordinance of the prophet was founded on the usage and practice of his own time:—in ordinances,
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ordinances, therefore, the prevalent customs among mankind are to
be regarded; and as these are liable to alter, they must be attended
to, rather than the letter of an ordinance.) If, therefore, a person
should sell wheat in exchange for an equal quantity, by weight, or gold
in exchange for an equal quantity, by a measurement of capacity,
neither of these sales would be lawful, (according to Haneefa and
Mohammed,) although these modes of weighing wheat and measuring
gold should become sanctioned by the custom of mankind.

Whatever is referred to Ratls is considered as an article of
weight. This the compiler of the Hadiza explains to mean that
whatever is sold by the Awkiyat must be considered as an article of
weight; for an Awkiyat is a fixed standard of weight in opposition to
all other measures of capacity, as none else are standards of weight.
Now as every thing sold by the Awkiyat comes under the descrip-
tion of an article of weight, it follows that if this thing be sold by the
measurement of any other vessel not of a fixed standard of weight, op-
posed to a similar vessel, such sale is unlawful, because of the prob-
bility of a disparity of weight, notwithstanding the equality in point
of measurement of capacity; for this, in fact, is the same as if one
person should sell one article of weight in exchange for another of the
same kind and adjust the quantity by conjecture.

It is to be observed that a Sirf sale means the sale of price in
exchange for price; and price implies dirms and deenars. In this
mode of sale it is a necessary condition that the interchange of pro-
erties take place at the meeting, because the prophet has ordained
the sale of silver in exchange for silver, from hand to hand,—as shall
be explained at large in treating of Sillim sales; but in every other ar-
ticle, provided it be of that kind in which usury takes place (such as

* This term has been formerly mentioned to signify an ounce. (See Vol. I. p. 24.) From the context, however, it would appear that it also signifies a measure of capacity.
wheat in exchange for wheat, for instance,) the interchange upon the spot is not a condition, it being only required that the article be specific. Shafi'i maintains that in the sale of wheat for wheat mutual seizin is a condition, because of the ordinance of the prophet, "Sell it from hand to hand;" and also because, if one party should make seizin, and not the other, it follows that an appearance of usury takes place, inasmuch as prompt payment is superior to future payment. Our doctors argue that wheat, as being a determinate subject of sale, does not, like cloth, stand in need of seizin, since the object of the contract is the attainment of a power over the article, which is fully established by its being determinate. It is otherwise with respect to Sifr sales, for there the seizin is made a condition in order that the price and subject of the sale may be rendered determinate, which is only to be effected by means of seizin. With respect to the ordinance of the prophet, enjoining the sale from hand to hand, Obâdeh Bin Simat, has explained it to mean the sale of one determinate thing in exchange for another. Besides, on the postponement of the seizin, no loss is reckoned to resultant, in the opinion of mankind:—contrary to where a prompt and future payment is stipulated; because the latter in the opinion of mankind is a detriment.

The sale of one egg in exchange for two eggs, from hand to hand, is lawful; and the same with respect to dates and walnuts; because these articles are neither subject to measurement of capacity or weight, with regard to which only usury relates. Shafi'i, in this case, differs from our doctors; because usury, according to his opinion, relates to articles of an esculent nature, of which kind these are.

Tax sale of one specific Fals* in exchange for two other specific Fals, is valid, according to Haneefa. Mohammed maintains it to be unlawful; because, as the fitness to constitute price is established

* A copper coin. (See Vol. II. p. 305.)
in Faloos, with the consent of mankind, it cannot be annulled by any agreement of a seller and purchaser counter thereto; and as the fitness to constitute price still continues, the Faloos cannot be rendered determinate by means of a stipulation to that effect in the contract. The case, therefore, becomes the same as if a person should sell one undeterminate Faloos in exchange for two undeterminate;—or, as if a person should sell one dirms in exchange for two. The reasoning of the two disciples is that this fitness to constitute price in Faloos cannot subsist with relation to a buyer and seller, unless by their mutual agreement to that effect*; and, consequently, where they agree to the contrary, the fitness to represent price is, with respect to them, null; nor can the general consent of others, to admit Faloos as a representative of price, operate as an argument with respect to them, since in this matter others have no power over them. Hence it follows that, as the fitness to constitute price is, with respect to them, null, the Faloos may be identified by their specification.

Objection.—Upon the fitness to constitute price being done away by the agreement of the parties, the Faloos will of consequence revert to their primary nature, namely weight, (for the Faloos was originally a weight.)—It would therefore follow that the sale of one Faloos for two Faloos is not valid, although the fitness to constitute price be done away by the agreement of the contracting parties.

Reply.—The Faloos do not revert to their original nature, because, by the agreement of mankind, they are considered as articles of tale, and this agreement remains in force. Hence they stand in the same predicament as walnuts, or other articles of tale, and the unequal sale of them is of consequence in the same manner lawful.—It is otherwise with respect to dirms and denars, because these naturally constitute price.—It is also otherwise with respect to the sale of one undeterminate Faloos in exchange for two undeterminate Fa-

* That is to say, copper coins are not to be considered as price but by a previous agreement of the parties.
for this is, in fact, a stipulation of future payment and future delivery, a species of sale which has been forbidden by the prophet.—It is also otherwise where the stipulation of one of the parties relates to undeterminate Falsus, for this is equivalent to a postponement of payment, and such postponement is rendered unlawful by homogeneity alone.

The sale of wheat in exchange for the flour or meal of wheat is unlawful, because wheat, and the meal and flour of it, are all of one species.—It is impossible, moreover, to ascertain the equality between those articles by measurement; since flour and meal are of a close and compact nature, and wheat is not. Hence this kind of sale is essentially invalid, even in the exchange of one measure of the one for one measure of the other.

The sale of flour in exchange for flour is valid, provided the quantities be equal by measurement, because the condition of legality (namely, equality) is here established.

The sale of flour in exchange for meal is not valid, according to Hanafia, in any mode; neither at an equal, nor at an unequal rate; for as it is not lawful to sell flour in exchange for parched wheat, or meal in exchange for raw wheat, so also it is not lawful to sell either of those articles for the other, because of their homogeneity.—According to the two disciples the sale in question is lawful; because flour and meal are of different species, in as much as the object to be derived from each is different; for the object of flour is bread, and that of meal is a culinary preparation, mixed up with water or oil.—But the answer to this is that the original object of both is the same, namely, food; which is not affected in its nature by the modification

* Arab. Semb. A sort of coarse meal prepared either from wheat or barley.—Also, what remains after sifting off the fine flour.
of it, since raw wheat and parched wheat are considered as of the same species, and likewise wheat affected by vermin and wheat that is whole and preserved,—although, in answering particular objects, these kinds be different.

The sale of flesh in exchange for a living animal is lawful, according to Haneefa and Aboo Yossef. Mohammed is of opinion that the sale of flesh in exchange for a living animal of the same species is unlawful, unless the quantity of the dead flesh exceed that of the living flesh, in order that the excess may be opposed in exchange to the other parts of the living animal, independant of flesh; and the remaining part of the slain flesh remain opposed in an equal degree to the living flesh; because otherwise usury must necessarily take place, since, if the quantities of flesh were exactly equal, it must necessarily follow that the other parts of the living animal had no exchange opposed to them;—or if, the quantities of flesh being equal, a deduction be made from the dead flesh, in opposition to the other parts of the living animal, it would necessarily create an inequality in the exchange of flesh for flesh. The sale in question, therefore, resembles a sale of sesame seed in exchange for sesame oil which is unlawful. The arguments of the two disciples in support of their opinion is, that the case in question is in fact the sale of an article of weight for what is not an article of weight; since it is not customary to weigh living animals, it being indeed impracticable to ascertain their weight, as they are not at all times of equal weight, an animal being lighter when hungry, and heavier when filled with food.—It is otherwise with oil-seeds, as by weighing those may at once be ascertained the quantity of oil contained in them when separated from the dregs or refuse.

The sale of fresh dates in exchange for dried ones is lawful, according to Haneefa. The two disciples hold a different opinion, because of a tradition, in which it is mentioned that a person having interrogated the prophet regarding the legality of such sale, the pro-
phet, in return, desired to know whether fresh dates did not diminish in drying?—and upon that person answering in the affirmative, he declared that, such being the case, the sale of fresh dates in exchange for dry ones was not lawful. The arguments of Haneefah in support of his opinion are twofold:—first, the word Tamnir, expressive of dry dates, is also applicable to fresh dates, because there is a tradition that a person brought some fresh dates from Kheebir to the prophet, who, on their being presented to him, inquired if all the Tamnir of Kheebir were of that kind? and as fresh and dry dates are from this circumstance held to be of the same kind, it follows that the sale of the one in exchange for the other, on condition of an equality in the rate, is lawful, since the prophet has said, "Sell Tamnirs in exchange for Tamnirs, at an equal rate." Secondly, if it be not admitted that fresh dates fall under the appellation of Tamnir, still the sale is lawful, because of another saying of the prophet, "When two things are of different species, then let them be sold in whatever manner the parties please." In regard to the saying quoted by the two disciples, it rests entirely on the authority of Zayd Ibn Abbas, which is considered weak among the traditionists.—It is to be observed that the same disagreement subsists with respect to the sale of dried and fresh grapes, founded on the same arguments as those already cited. Some have asserted that the sale of dried grapes in exchange for fresh is unlawful, according to all our doctors, grounding this assertion on the analogy which subsists between this case and that of parched and raw wheat, the sale of which in exchange for each other is universally declared to be invalid.

The sale of fresh dates in exchange for fresh dates, at an equal rate in point of measurement of capacity, is lawful, in the opinion of all our doctors.

* The remainder of this case, which is of considerable length, as well as the complete succeeding case, has been omitted in the translation, because the disputations contained in them are founded entirely on verbal criticisms, which do not admit of an intelligible translation.
The sale of olives in exchange for oil of olives is unlawful, excepting when the actual oil is greater in quantity than the oil contained within the olives, in which case the excess being opposed to the dregs that will necessarily remain after the expression of the oil, prevents the establishment of usury. — The law is the same with respect to 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 in exchange for grapes or dates. With respect to the sale of cotton in exchange for the thread of it there is a difference of opinion. The sale of cotton, however, in exchange for calico is universally allowed to be legal.

It is lawful to sell one species of flesh, in any manner, in exchange for another species of flesh, (such as the flesh of a cow for that of a camel or a goat.) It is to be observed that the flesh of a cow and of a buffalo are of the same species, as is also the flesh of a sheep and that of a goat.

The milk of a cow and of a goat are of different kinds, and may therefore be lawfully sold in exchange for each other at unequal rates. It is related, as an opinion of Shafei, that these are of the same kind, because the object to be derived from each is the same. But our doctors argue that the flesh of these animals is evidently of a different kind, since it would not be lawful for a person, on whom the gift of a cow in alms was enjoined, to substitute a goat in lieu of a cow, if it prove defective; the milk of these animals, therefore, differs in point of species in the same manner as their flesh. It is to be observed that the vinegar of dates is of a different kind from the vinegar of grapes, because of the difference of their originals. So also, the wool of a sheep is of a different kind from that of a goat, because they answer different objects.
It is lawful to sell bread made of wheat in exchange for wheat, or the flour of wheat, at an unequal weight, because bread is considered either as an article of tale or of weight, and consequently is of a different kind from wheat or flour, which are subject to measurement of capacity.—It is related as an opinion of Haneefa, that such sale is utterly invalid; but decrees pass according to the first adjudication, and this, whether the delivery of either the wheat or the bread be stipulated to take place at a future period. According to Haneefa the borrowing of bread is utterly unlawful,—that is, whether it be considered as an article of tale or weight,—because there is great difference with respect to cakes of bread, either in respect to themselves, or the workmanship of the baker. According to Mohammed it is absolutely legal; that is, whether the bread be considered as an article of tale or weight. According to Aboo Yeusef it is lawful, if considered as an article of weight; but not if considered as an article of tale, because of the difference of the unities.

Usury cannot take place between a master and his slave, because whatever is in the possession of the slave is the property of the master, so that no sale can possibly take place between them, and hence the impossibility of usury.—This proceeds upon a supposition of the slave being privileged and free from debt; for in the case of a privileged slave who is insolvent, usury may take place between him and his master, according to Haneefa, because (agreeably to his tenets) the possessions of such slave do not belong to the master;—and according to the two disciples, because although (agreeably to their tenets) the possessions of such slave be 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 consequently usury may exist in their dealings.

Usury cannot take place between a Mussulman and a hostile infidel,
fidel, in a hostile country.—This is contrary to the opinion of Aboo Yoosef and Shefii, who conceive an analogy between the case in question and that of a protected alien within the Mussulman territory. The arguments of our doctors upon this point are twofold. First, the prophet has said, "There is no usury between a Mussulman and a hostile infidel, in a foreign land."—Secondly, the property of a hostile infidel being free to the Mussulmans, it follows that it is lawful to take it by whatever mode may be possible, provided there be no deceit used.—It is otherwise with respect to a protected alien, as his property is not of a neutral nature, but sacred, because of the protection that has been afforded to him.

**CHAP. IX.**

Of Rights and Appendages.

The rights of a sale are things essentially necessary to the use of the subject of the sale, such as, in the purchase of a house, the right of passing through the road that leads to it; or, in the purchase of a well, the right of drawing water from it.—Appendages imply things from which an advantage is derived, but in a subordinate degree, such as a cook-room, or a drain.

If a person purchase a Mansil above which there is another Mansil, he is not entitled to the upper Mansil, unless he have stipulated the purchase of the Mansil "with all its rights, and all its appendages."
"ages,"—or, "with every thing great and small upon it, in it, or of it."—If, on the other hand, a person purchase a Bait above which there is another Bait, with a stipulation of all its rights, still he is not entitled to the upper Bait. But if a person purchase a Dār (that is, a ferai) with its enclosure, he is entitled to the upper stories and the offices; because the term Dār signifies a place comprehended within an enclosure, which is considered as the original subject, and of which the upper story is a dependant part. Bait, on the contrary, simply signifies any place of residence; and as the upper story of a house is of this nature as well as the under, it cannot be included in the purchase of a Bait, unless by an express specification, since a thing cannot be a dependant of its fellow. A Mansil, on the other hand, is a mean;—that is, it is greater than a Bait, and smaller than a Dār;—for although it comprehends every thing necessary to a dwelling-place, still it is deficient in having no place for cattle: a Mansil, therefore, is in one respect similar to a Dār, and in another respect similar to a Bait; and hence, from its similarity to a Dār, the upper house is included in virtue of its being a subordinate part, whenever a specification of the rights is made; and, from its similarity to a Bait, the upper house is not included in the sale, unless a specification of the rights be made.—Some have said that, in the practice of the present age, the upper house is necessarily included in all the above cases; because a Bait (which means a house in the Persian language) does necessarily include the upper story.

A porch over a road, of which the beams in one end are laid upon a Dār [or house] which is the subject of a sale, and in the other end upon the opposite house, or upon a pillar, is not included in the sale of the house, unless a specification of rights be made in the sale; because the porch covering the road is held to be of the same nature as a road.—The two disciples have observed that if the said porch should form the entrance into the house, it is then virtually included in the sale.
If a person purchase a room [Bait] in a house [Dár] or dwelling-place [Manzil], he is not entitled to the use of the road, unless he have stipulated the rights and appendages, or the great and small belonging to it.—In the same manner, in the sale of land, a well or drain is not included, unless by a specification of the rights or appendages; because they are not considered as a part of the ground, but as a dependant on it.—It is otherwise with respect to a lease, for that virtually includes the well and road without any specification, because the object of a lease is an usufruct, which is not to be obtained but by the use of the road and well; and it is not a custom amongst farmers to rent a road or a well. But the object of a sale may be answered without the necessity of including the road or well, since it is customary, amongst purchasers, to sell and trade with the subjects of their purchase, and to dispose of them into the hands of another; whence an advantage is derived from the transaction, without the road or other appendage being included.

CHAP. X.

Of Claim of Right (preferred by other to the Subject of a Sale)

If a female slave, being sold, bring forth a child whilst in the purchaser’s possession, and another person afterwards establish, by witnesses, that she was originally his property, and had not belonged to the seller, such person is entitled to the female slave, and also to the child.
child.—If, however, the proof be established by the acknowledgment of the purchaser, the claimant is in this case entitled to the female slave only, unless he also specifically include the child in the claim, in which case the acknowledgment of the purchaser entitles him to both. The distinction between a case of evidence and a case of acknowledgment is, that testimony is absolute proof, being adapted for the elucidation of the fact. By evidence, therefore, it is manifested that the slave belonged to the claimant ab initio, that is to say, from a time prior to the purchase of her; and as, at that period, the child was a dependant part of her, (since it had not issued from the womb,) it follows that the claimant has a right to it as well as the mother.—

Acknowledgment, on the contrary, is deficient proof, since it establishes the right of property of the thing claimed in the claimant, purely from the necessity of verifying acknowledgment; because an acknowledgment is a declaration; and if the establishment of the right of property did not in any degree take place, the declaration must of course be false.—Now this consequence may be prevented by the establishment of the right of property at the time of the acknowledgment; and the child, at that period, not being a dependant part, as having issued from the womb, is therefore not included in the property of the claimant.—Some have said that, in case of the establishment by testimony, when the Kāzee issues his decree for the claimant to take the slave, the child, from its dependance, is virtually included; and that there is no necessity for a specification of it in the decree. Others, again, have said that the specification of the child is an absolutely necessary condition, of which the adjudication in several analogous cases is a clear proof. Thus Mohammed has declared that where the Kāzee decrees the original to any person, without having any knowledge of the subordinate parts, such subordinate parts are not comprehended in the decree. Where, also, in a case of a claim of right to a female slave, purchased by another, the Kāzee decrees the slave to the claimant, and it so happens that the child she has brought forth is in the hands
hands of some other person than the purchaser, such child is not comprehended in the decree.

If a person purchase a slave, and the slave afterwards prove by witnesses that he is free, notwithstanding that, at the time of concluding the contract, he had said to the purchaser "purchase me, " for I am a slave,"—and the seller be present, or absent at a place that is known, the purchaser is entitled to recover the price from him: but if the seller be absent, and the place of his sojournment unknown, the purchaser is in that case entitled to take the price from the slave, who is to recover the same from the seller whenever it may be in his power.—If, on the contrary, a person accept of a slave in pawn, on the ground of the slave saying to him, "accept of me in pawn, for I am a slave," and it afterwards appear that he is free, the pawnee is not in that case at liberty to take payment from the slave of the sum due to him, whether the pawner be absent or present, but must at all events seek it from the pawner. *Abu Yousef* holds that the same rule also obtains in the case of sale,—that is, that the purchaser has no right, under any circumstances, to an indemnification from the slave, because he has no right to take the price from any but the seller, or his security,—and the slave is neither of thefe, but merely a liar, which does not superinduce responsibility.—The argument of the two disciples is that, in the case in question, the purchaser engaged in the contract on the sole ground of confiding in the slave's declaration, "purchase me, for I am a slave;" and hence it follows, that where a slave has been guilty of a deceit, he is liable for the price, in case the recovery from the seller be impracticable, in order that the injury occasioned by his deceit may be removed from the purchaser. The recovery from the seller, however, is impracticable only in case of his being absent at a place which is not known.—As, moreover, sale is a contract of exchange, it is possible to render the director of it responsible for the consideration, (namely, the price,) when the subject is lost or destroyed to the purchaser, this being what a contract of sale requires.
requires. It is otherwise with respect to pawn, as that is not a contract of exchange, but merely a contract of security for the receipt of the substance of the pawnee’s right; for which reason it is lawful to give a pawn as security for the price, in a Sirk sale, or for the goods, in a Sillim sale, although an exchange with respect to either of these be unlawful:—in other words, if a pledge should be destroyed whilst in the possession of the pawnee, the pawnee is in that case held to have received the substance of his right;—whereas, if a contract of pawn were in the nature of a contract of exchange, it would follow that in these cases an exchange for the price in a Sirk sale, or for the goods in a Sillim sale, had been made previous to the feizin, and this is unlawful. The person, therefore, who directs others to enter into a contract of pawn cannot be rendered responsible for the debt to which the pawn is opposed. Analogous to this is a case where the master of a slave says to merchants, “trade with this slave of mine, for I have privileged him to trade;” and the merchants having traded with him accordingly, it becomes afterwards known that the said slave is the property of another; for in this case the creditors have a right to receive payment of their debts from the master.—It is to be observed that the difficulty, in this case, arises from the tenets of Haneefa; for, according to him, a claim is a necessary condition for the establishment of freedom; and here a claim is out of the question, since, if the slave, after the acknowledgment of his slavery, should assert a claim to his freedom, he would be guilty of prevarication; and prevarication is destructive of the validity of a claim. It is therefore impossible that, after his own declaration, his freedom should be made apparent; and hence the statement of this case, according to the tenets of Haneefa, is erroneous.—But, in reply to this objection, some have observed that the proper statement of this case is,—that a person purchases a slave at a time when the slave himself said “purchase me, for I am a slave,” and it afterwards appears that the person so purchased was originally free; for this statement is strictly agreeable to the tenets of Haneefa, since (according to him)
the claim of freedom is required as a condition only in the case of a freedman, and not in that of a person originally free.—Others again maintain that the claim of freedom, in this statement of the case also, is a necessary condition; and that the prevarication so occasioned is not destructive of the validity of the claim; for generation is a concealed circumstance; and the person not knowing that his mother was free at the time of his generation, he on that account declared himself a slave; but afterwards, attaining a knowledge of his mother’s freedom at that period, he therefore claims his freedom.—If it be thus stated, that, a person having purchased a slave, it afterwards appears that the person so purchased was free, as having been emancipated by his master, such statement is correct, as it does not involve prevarication, since the master is empowered to emancipate his slave.—This case is therefore, in fact, the same as if a woman should purchase her divorce from her husband, and should afterwards establish, by witnesses, that previous to such bargain he had divorced her three times; or, as if a Mokātib should establish, by witnesses, that, previous to the contract of Kitābat, his master had emancipated him;—for in both these cases the claim and the evidences are admitted, notwithstanding the prevarication; and so also in the preceding case. The ground of this is that the master being competent to emancipate his slave, he may have done it during his absence, and the slave may afterwards have preferred his claim immediately on its coming to his knowledge; and on this supposition the prevarication is not held to be destructive of the claim.

If a person claim a right in a house, in an indefinite manner, and then compound his claim with the possessor of the house for an hundred dirms, and a third person afterwards prove a right to the whole of the house excepting the quantity of a cubit, for instance, in that case the possessor of the house has no right to any restitution from the person with whom he entered into the composition; because that person, having before made an indefinite claim without explaining the extent of
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of it, may now lawfully declare it to have been the quantity excepted by the third person.—If, on the other hand, a person, having claimed the whole of a house, should then compound with the possessor for an hundred dirms, and another person should afterwards lay claim to part of the house, in that case the possessor of the house is entitled to a restitution of a part of the sum he had paid in composition, proportionate to the amount of the second claim.—It is to be observed that a composition of an undefined right for defined property is lawful, because the annulment of an undefined right cannot occasion contention.

SECTION.

Of Fazoollee Beea, or the Sale of the Property of another without his Consent.

A sale contracted without authority may be dissolved by the proprietor of the subject.

If a person sell the property of another without his order, the contract is complete, but it remains with the proprietor either to confirm or dissolve the sale as he pleases. Shafei is of opinion that the contract, in this case, is not complete; because it has not issued from a lawful authority; for that is constituted only by property or permission, neither of which exist in this case. The arguments of our doctors are, that such a sale is a transaction of transfer, performed by a competent person with respect to a fit subject: it is therefore indispensible that the contract be regarded as complete; for, besides that there is no injury in this to the proprietor, (as he has the power of dissolving it,) it is attended with a great advantage to him, inasmuch as it frees him from the trouble of seeking for a purchaser, settling the price with him, and other matters.—Moreover, it is attended with an
an advantage to the seller, whose word it preserves sacred, and to the
purchaser, to whom it confirms a bargain, with which, as having
voluntarily concluded it, he may be supposed to be pleased.—In order,
therefore, to obtain these advantages, a legal power is established in
the seller of another’s property, more especially as the consent of that
other has been given by implication, since a wise man naturally affents
to a deed attended with advantage to himself.—It is to be observed
that it is requisite that the proprietor give his consent on the condition
of the subject of the sale, and the buyer and seller being extant; be-
cause, as his affent is a deed relative to the contract, it is necessary, of
consequence, when he gives it, that the contract be in existence;
and the existence of the contract depends on the existence of the parties,
and of the subject of the sale.

When the proprietor of an article, in a Faxooler sale, gives his af-
fect to it, the price becomes his property, and remains in the hands
of the Faxooler seller as a deposit, in the same manner as if he had been
an agent for sale; because the affent is equivalent to a previous ap-
pointment of agency.

It is in the power of the Faxooler, or person who sells the pro-
erty of another without authority, to dissolve the contract without
having obtained the consent of the proprietor. It is otherwise in the
case of a marriage contracted by a Faxooler, as that cannot be dis-
solved without the consent of the person on whose account he con-
cluded it.

It is to be observed that the existence of the parties, and of the
subject of the sale, is sufficient towards the consent of the proprietor
only in case of the price being in money; for, if it be stipulated in goods,
then the existence of the price also is a necessary condition.—In this
case, however, the consent of the proprietor is not an affent to the
contract of sale, (because the sale is, in this instance, a sort of pur-
chase,
chafe, and a Fazioole purchase does not rest upon the assent of the person on whose account the Fazioole made the purchase, inasmuch as the purchase is considered in law to have been made for himself,) but merely an assent to the Fazioole purchaser making over the property he has agreed to give in return for the property which has been constituted the price of it. This price, therefore, consisting of goods, becomes the property of the Fazioole, who remains responsible for the subject of the sale, payable in a similar, if it be of a nature that admits of similars,—or, if otherwise, for the value of it.

If the proprietor should die, then the consent of the heirs is of no efficacy in the confirmation of the Fazioole sale, in either case; that is, whether the price have been stipulated in money or in goods; because the contract rested entirely on the personal assent of the deceased.

If a person, having given his assent to a Fazioole sale, should afterwards die, and it be not known whether the subject of the sale was extant or not when he gave his assent, in that case, (according to one opinion of Aboo Yoosaf, which has been adopted by Mohammed,) the sale is valid, because of the probability of the existence of the subject of the sale at the period of assent. Aboo Yoosaf, however, afterwards receded from this opinion, and declared this sale to be unlawful, because of the doubt with regard to the existence of the subject of the sale, which in his opinion is destructive of its legality.

If a person usurp a slave, and sell him to another, and, that other having emancipated him, the original proprietor afterwards confirm the sale, in this case the emancipation, according to Haneefa and Yoosaf, is valid, upon a favourable construction. Mohammed maintains that it is not valid, since an emancipation cannot be made except with relation to property, in conformity with a tradition of the prophet to that effect; and the purchaser was not proprietor of the slave at the time of the emancipation, because the validity of the sale then rested
rested on the assent of the proprietor; and a suspended sale does not endow with a right of property. Where, moreover, the right of property is confirmed by the master’s assent to the sale, it becomes confirmed, first in the usurper and then in the emancipator, by a retrospect and devolution; and a right of property thus confirmed is established in one shape but not in another shape; and manumission is not valid except where the right of property exists in every shape, in conformity with the tradition above cited. Upon this principle it is that emancipation is not lawful where a person, having usurped a slave, gives him his liberty and afterwards makes a retribution to the proprietor; —or, where a person, having purchased a slave, allowing an option to the seller, emancipates him, and afterwards receives from the seller a confirmation of the sale. On the same principle also the sale is unlawful, where a person, having purchased a slave from an usurper, sells him again to another, and the proprietor afterwards confirms the sale of the usurper; —and emancipation is likewise invalid, where a person, having purchased a slave from an usurper, gives him his liberty, and the usurper afterwards makes a retribution to the proprietor. The argument of the two Elders is that, in the case in question, a suspended right of property is established in the purchaser in virtue of an absolute deed instituted for the purpose of enjoyment of property, namely, an absolute sale without any stipulation of option; and as, in the establishment of this right of property, no injury results to any one, it follows that the emancipation of the purchaser, (which rests upon his right of property,) is also established in suspense, in the same manner as the right of property. When, therefore, in virtue of the assent of the proprietor, the right of property operates, it follows that the suspended emancipation also operates: —in the same manner as where a person purchases a slave in pawn from the pawnner, and afterwards emancipates him, —in which case the emancipation remains suspended in its operation, as well as the right of property of the purchaser, until the consent of the pawnner be obtained, or the pawn be redeemed by the pawnner: —or, as where an heir emancipates
emancipates a slave belonging to the deceased, at a time when the estate was encumbered with debt,—in which case the emancipation remains suspended in its operation until the debts be liquidated, when it immediately takes place. It is otherwise where an usurer, having emancipated the slave he had usurped, afterwards makes a composition with the proprietor; because usurpation does not entitle to the enjoyment of property:—or, where a purchaser of a slave, under a sale stipulating a condition of option to the seller, emancipates the said slave; because in that case the sale is not absolute, and the existence of the option is preventive of the operation of the right of property in the purchaser:—or, lastly, where a person, having purchased a slave from an usurer, sells him to another, and afterwards the original proprietor gives his assent to the sale of the usurer; because in virtue of the assent of the proprietor the right of property vests in the purchaser, upon such assent being signified, but not before: the right of property, moreover, of the second purchaser was suspended; and consequently, as the right of property vests in the first purchaser now (and not before,) it necessarily follows that such suspended right of property becomes null.

If a person purchase a slave from one who had usurped him, and the slave be maimed * by any person whilst in the possession of the purchaser, and he [the purchaser] exact the fine of trespass from the maimer, and the original proprietor then give his assent to the sale,—in this case the fine is the property of the purchaser; because the slave is in such case considered as the property of the purchaser, from the period of the purchase, whence it is evident that he was so at the time of the maiming: and this is an argument against the doctrine of Mohammed, exhibited in the preceding case, since as the fine is, in this instance, the right of the purchaser solely in virtue of the establishment of right of property in him from the period of the purchase,

* By dismemberment of a limb, such as the hand.
purchase, it follows that the *emancipation* of the purchaser would be valid for the same reason. The reply of *Mohammed* to this is, that a right of property established in one shape only (that is, in an *incomplete* manner) is sufficient to entitle to a fine, but not to the performance of emancipation, which requires that the right of property be *perfect* and *complete*. It is to be observed that although the fine, in this case, be the right of the purchaser, still if it exceed the half of the price, it is requisite that he bestow the excess in charity; because the fine for the destruction of the limb cannot exceed half the price, as the *fine of trespass* for maiming a *freeman* is one half of the *fine of blood*, and consequently, the fine for maiming a *slave* is one half of his *value*. Now nothing can be included in the responsibility beyond what may be opposed to the price, and implicated in it. Any excess, therefore, over half the price, is an acquisition to which the proprietor is not entitled, or to which his claim is doubtful, and is therefore not perfectly lawful to him.

If a person purchase an usurped slave, and sell him to another, and the proprietor afterwards give his assent to the first sale, in that case the second sale is invalid; because the right of property then established in the first purchaser destroys the *suspended* right of property of the second purchaser, as has been already explained; and also, because there is an unfairness in it, since it is possible that the proprietor may not give his assent to the sale. But if, after the sale of the slave by the purchaser, he should then either die or be killed, and the proprietor afterwards give his assent to the sale, such assent is not valid; because the existence of the subject of the sale is requisite to the assent, and that no longer exists in either instance.

**Objection.**—The reason here alleged is a *valid* one where the slave dies a natural death; but it is not so where he is slain, because in that case the slave, in virtue of the existence of the *amercement*, is considered, as it were, to be *himself* in existence,—for if a slave, having been sold by a valid contract, should afterwards be murdered whilst

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in the possession of the seller, still the sale is not null, since the consideration for the subject of the sale (namely the amercement) is extant,—whereas, if he die a natural death in the hands of the seller, the sale is null. It would therefore appear that the assent, in case of the murder of the slave, is of no effect.

Reply.—In the case in question it is not possible to consider the fine as the right of the purchaser, since not having been the proprietor of the slave at the period of the murder, he can have no right to the amercement, nor can the slave, in virtue of the existence of the amercement, be considered as extant with respect to him. The slave, therefore, is not extant with relation to him, either actually or virtually. It is otherwise in the case of a valid sale, because there the purchaser had acquired a right of property to the slave which may be transferred to the consideration for him; and consequently the slave may be considered as extant with respect to him.

An article purchased through the medium of an unauthorized person cannot be returned to the proprietor, although the purchaser prove the want of authority, or the proprietor's assent to the sale:—but if the seller avow his not being authorized, the sale is null.

If a person sell a slave, the property of another, and the purchaser establish by witnesses that the seller had acknowledged that he had sold him without the assent of the proprietor,—or, that the proprietor had declared that he had not given his assent to the sale, and the purchaser wish to return the slave, the evidence adduced by him is not to be admitted; because there is a prevarication in his plea, since his act of purchasing the slave amounts to a declaration of the validity of the sale, and the plea he afterwards prefers is contradictory of this: his plea, therefore, is not valid; and testimony is to be taken only where the plea it tends to establish is of a valid nature. If, however, the seller should declare before a magistrate that he had made the sale without the authority of the proprietor, the sale in that case becomes null, provided the purchaser desire the dissolution of it, because the inconsistency of the purchaser is no bar to the validity of the declaration of the seller, and when the parties both concur in the same wish the sale is rendered null of course:—but the concurrence of the purchaser is a necessary condition. What is here advanced, that "the evidence
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"evidence adduced by the purchaser is not to be admitted," is the doctrine of the *Jama Sagbeer*. The compiler of the *Hedaya* observes that it is mentioned in the *Zeeadat*, that if a person purchase a female slave (for instance) for one thousand *dirms*, and take possession and pay the price, and afterwards, in consequence of another person claiming her as his property, and asserting his right to her, surrender her to him,—and he [the purchaser] establish, by witnesses, that the seller had acknowledged that the slave was the property of the said claimant, the testimony so given is inadmissible. Between these two cases, therefore, there is an evident contradiction, which, however, our modern doctors thus account for. In the case alluded to in the *Jama Sagbeer*, the slave was in the possession of the purchaser when he produced the witnesses; but in that from the *Zeeadat* the slave was in the possession of the claimant and not of the purchaser; and the condition on which a restitution of the purchase-money from the seller is warranted (namely, non-existence of the subject of the sale with relation to the purchaser) not existing in the first case, but existing in the second, the evidence in the first case is therefore rejected, and in the second it is admitted.

If a person sell a house belonging to another, without his permission, and make delivery of it to the purchaser, and afterwards declare that he had sold it without the permission of the owner, then (according to *Hanefia* and the last opinion of *Aboo Tootaf*) the seller is not responsible*. The first opinion of *Aboo Tootaf* was that the seller is responsible, and this opinion has been adopted by *Mohammed*. This case is one of the examples of usurpation over immoveable property, concerning which there is a difference of opinion, as will be fully explained under the head of Usurpations.

* Meaning, that the proprietor is not to look to the seller for the price of his house, but to the purchaser;—or, that the seller is not security for the purchaser.
C H A P. XL

Of Sillim Sales.

Kadooree explains Sillim literally to signify, a contract involving a prompt delivery in return for a distant delivery. In the language of the law it means a contract of sale, causing an immediate payment of the price, and admitting a delay in the delivery of the wares. In this kind of sale, the wares are denominated Muqsim-fee-bee *, the price Rafal-Mal †, the seller Muqsim-ali-bê ‡, and the purchaser Rubul Sillim §.

A Sillim sale is authorized and rendered legal by a particular passage in the Koran, and also by an express declaration of the prophet prohibiting any one from the sale of what is not in his possession, but authorising a Sillim sale. It is to be observed that Sillim sale is contrary to analogy, because of the non-existence of the subject of it, since it is a sale of a non-existent article, as the subject, in a Sillim sale, is merely the thing for which the advance is made, and that does not appear. Analogy, however, is abandoned in this instance, because of the text and tradition above cited.

A Sillim sale, with relation to articles of weight, or measurement of capacity, is lawful, because the prophet has said "Whoever enters into a Sillim sale with you, let him stipulate a determinate weight and measurement, and a determinate period of delivery." Dirms and deinars, however, are not included in the description of articles of weight,

- Literally, the advanced on account of.
- The capital stock.
- Literally, the advanced to.
- Literally, the advancee.

weight,
weight, because both of these are representatives of price, and in a Sillim sale it is requisite that the subject of it be otherwise than a representative of price. Hence if a person should enter into a Sillim sale, stipulating the immediate payment of ten yards of cloth to the seller in lieu of ten dirms to be delivered to him by the seller at a future period, the Sillim sale so contrac ted is invalid. Some have said that this sale is absolutely null. Others, again, have said that although, considering it as a Sillim sale, it is certainly invalid, still it is not null, since it may be executed so as to answer the views of the parties as far as possible, by considering it simply as a sale of cloth for a price payable hereafter; more especially since, in all contracts, the spirit is what is to be attended to. The former, however, is the better opinion; because, although sales may lawfully be rendered valid in every possible degree, with relation to the things concerned with the parties have contracted, yet as, in the case in question, the things so contracted for are dirms and deenars, which from an express prohibition are incapable of being made the subject of a Sillim sale, the contract with relation to them cannot in any degree be rendered valid.

A Sillim sale with respect to articles of longitudinal measurement, such as cloth, or the like, is lawful, because it is possible to define them exactly by specification of the number of yards in respect to the length and breadth, and the quality and workmanship of it. (By the quality is meant the fineness or coarseness; and by the workmanship the looseness or closeness of the texture.) The specification by a recital of these particulars, moreover, is requisite, in order that ignorance may be avoided: it is therefore essential to the validity of the contract. In the same manner also, a Sillim sale is lawful with respect to all articles of tale, which do not essentially differ in their unities, such as eggs and walnuts; because, in all articles of tale between the unities of which the difference is trifling, the rate is ascertainable, the quality definable, and the delivery to the purchaser practicable: a contract of Sillim, therefore, with respect to such articles is lawful. In articles of
this nature, also, the great and the small are considered as the same, because mankind have agreed in making no account of the difference. It is otherwise with respect to melons and pomegranates, because the difference in them is considerable. It is to be observed that where there is a difference in the individuals of any kind, it may be known whether such difference be of any account or not by the effect it has on the price. Thus articles of which the individuals of the same kind bear a different price are considered as different; but where the price is the same with respect to the individuals they are considered as similar. It is related, as an opinion of Hannifa, that ostrich eggs are not similars, as they bear different prices.

It is to be observed that in the same manner as a Sillim contract is lawful with respect to similars of tale according to number, so is it lawful with respect to them according to a measurement of capacity. Ziffer has said that it is not lawful according to a measurement of capacity, as that does not apply to articles of tale; and it is also a tenet of his, that a Sillim sale with respect to articles of tale is unlawful because of the difference between the individuals of the kind. The reasoning of our doctors is, that quantity is sometimes ascertained by number and sometimes by measurement of capacity; and that similars of the same species being considered as articles of tale only because of the consent and practice of mankind, they may for the same reason be subjected to a measurement of capacity by the consent of the parties. A Sillim sale is likewise lawful with respect to Fallos. Some have said that this is the opinion of the two disciples; but that Mohammed is of a different opinion, since, according to his doctrine, Fallos are representatives of price. The doctrine of the two disciples on this head has been already explained in treating of Usury.
difference can take place, in the same manner as in the case of cloth. Our doctors, on the other hand, argue that after such explanations the difference may still be great with respect to various qualities and hidden circumstances, which must occasion a contention: in opposition to the case of cloth, because, as being the workmanship of man, there is rarely any material difference in two pieces of the same kind. Besides, it is recorded in the Nāţl Sabeeb that the prophet forbid the Sillim sale of animals; and this prohibition extends to every species of animals, even to sparrows.

Sillim sale is not lawful with respect to the parts of an animal, such as the head, or the feet, because those are not similiars of tale, nor is there any measure by which the size of them might be ascertained. In the same manner also, a Sillim sale is unlawful with respect to skins, according to number, or firewood according to bundles, or hay according to packages, except the quantity be ascertained by specifying the length of the string that ties them; for then the Sillim sale with respect to them is lawful, provided the mode of binding be not such as to create a difference.

A Sillim sale is not lawful, unless the subject of it be in existence, from the conclusion of the contract, until the stipulated period of its delivery. Hence the sale is not lawful if the subject be not in existence at the formation of the contract, but be extant at the period stipulated for its delivery; or vice versa;—or if, being extant at the formation of the contract, and the time of delivery, it should have been non-existent at some period of the intervening time. Shafei maintains that the existence at the period of delivery is sufficient, whether the article have been extant before or not; because in this case the seller is capable of delivery at the period on which delivery is required. The arguments of our doctors upon this point are two-fold.—First, a saying of the prophet "Ye shall not sell fruits by way of
"of Sillim until their ripeness be apparent," which evidently implies that the capability of the delivery from the formation of the contract is necessary. Secondly, the capability of delivery is founded on the article being fit to be taken possession of by the purchaser, and it is therefore indispensable that it be in uninterrupted existence from the formation of the contract to the instant of delivery.

If, at the promised period of delivery, the subject of the Sillim be lost or disappear, the purchaser has in that case the option of dissolving the contract, and receiving back the price from the seller,—or of waiting until the subject of the sale may be recovered. This is analogous to the absconding of a slave after the sale of him but before the delivery, in which case the purchaser has the power of either dissolving the contract or waiting until the slave may be recovered.

A Sillim sale is lawful with respect to dried and salted fish, provided it be according to a standard weight, and the species be known; because in this case the subject of the sale is of an ascertained nature, the quality is defined, and the delivery is practicable, since such fish is always fit to be taken possession of. This species of sale, however, is not allowed according to tale, since the individuals amongst fish are not similar:—nor is it allowed with respect to fresh fish,—unless at such a particular period of the year as renders the procurement of them certain, in which a Sillim sale with respect to them, according to a fixed weight, is lawful, provided the species be defined. The reason of this is that fresh fish is not always to be had, being sometimes withheld, in the winter season, in consequence of the water being frozen. In any city, however, where fresh fish are always to be procured, a Sillim sale with respect to them is perfectly lawful, provided it be according to weight, and not by tale.—It is related, as an opinion of Haneefa, that it is not lawful to make a Sillim sale with regard to the flesh of fish of so large a nature as to occasion their flesh to be cut in the same manner as that of oxen or goats for instance, because,
cause, being illegal with respect to all other animals, it follows that it is likewise so with respect to flesh, of which the flesh is equivalent to that of any other creature.

A sallim sale of flesh is utterly unlawful, according to Haneefa. The two disciples maintain that it is lawful with respect to the flesh of quadrupeds, provided a notification be made of the flesh of a known and determinate part, (such as the haunch, for instance,) and that a description be given of the qualities, (such as fatness or leanness for instance;) because in this case the weight of the flesh is determined, and the qualities are ascertained,—whence it is that, in case of its destruction, a compensation of a similar is given, and also that it is lawful to borrow it according to weight, and that usury takes place with regard to it. It is otherwise with respect to the flesh of birds, for a sallim sale of that is unlawful, since it is impossible to specify the flesh of a particular part, inasmuch as it is not a custom to separate the parts of birds in sale, because of their smallness. The argument of Haneefa is that the quantity of flesh is uncertain, because of the difference occasioned by the bones, in regard either to their number or grossness; and also, because of the difference which takes place with respect to the fatness or leanness, as animals are fat or lean according to the seasons; and as this uncertainty is a cause of contention, such sale is therefore inadmissible;—and for the same reason, the sallim sale of flesh without bones is not lawful. This is approved.

With respect to the cases quoted by the two disciples of a compensation of a similar being made for flesh in case of its destruction, and of its being lawful to borrow it, the legality of such compensation, &c. is not admitted: but admitting the legality, still the principle on which the compensation of a similar proceeds is evidently because the retribution of a similar is more equitable than that of money, since money answers only to the object, whereas the similar answers both object and appearance; and the legality of borrowing flesh is because
a seizin made by borrowing is an obvious and perceptible one; in opposition to that of a Sillim sale, which rests upon description.

A Sillim sale is not lawful unless the period for the delivery of the wares be fixed.—Shafei has said that it is lawful in either case; (that is, whether the period of delivery be fixed or not;) since it is recorded in the traditions that the prophet authorized Sillim sales in an absolute manner, without any restrictions regarding the limitation of the period. The arguments of our doctors upon this point are twofold.—First, the prophet has ordained that all Sillim sales shall be made with a stipulation of a fixed period for delivery.—Secondly, the prophet has prohibited man from selling what is not in his possession, but has nevertheless authorized and rendered legal Sillim sales, on this principle, that poor people stand in need of such engagements in order that, by means of the money they receive in advance, they may acquire the subject of the sale, and deliver it to the purchaser. It is therefore requisite that a fixed period be stipulated, because if the seller were liable to an instantaneous delivery on demand, the principle on which the legality of such sale is founded would not be answered. Moreover, an indefinite period is unlawful, because of the uncertainty; in the same manner as in a sale where the price settled is to be paid at a future period without defining it. It is to be observed that the smallest term that can be fixed for a delivery, in a Sillim sale, is one month.—Some allege the smallest term to be three days; others again fix it at any term exceeding half a day. The first opinion is authentic; and decrees are passed accordingly.

The stipulation of a private measure of capacity or longitude is not lawful in a Sillim sale, because of the uncertainty, founded on the possibility of the criterion being lost in the interval between the conclusion of the contract and the delivery; as has been already explained. It is necessary also that the instrument of measurement be of a substance
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stance not liable either to contract or expand, but that it be of a fixed nature, such as a large cup. Leathern bags, however, (such as those in which water is contained,) are allowable for this purpose, according to Abooe Yousef; because of the practice of mankind.

A SILLIM sale, with respect to the grain of a specific village, or the fruit of a specific orchard, is not lawful; for if any accident should happen to these particular places, the delivery becomes impracticable: such practice has moreover been prohibited by the prophet.—This specification is, however, lawful according to some doctors, provided it be to define the quality, as where a specification is made of the grain of Kishmaran in Bokhara, or of Bofbakes in Fargana.

A SILLIM sale is not lawful, according to Haneefa, except on seven conditions. I. That the genus of the subject of the sale be specified, such as wheat or barley. II. That the species of it be fixed, such as wheat of a soil that is watered by means of a canal, or other artificial mode, or wheat of a soil watered by rain. III. That the quality of it be fixed, such as of the best or worst kind. IV. That the quantity of it be fixed according to a standard of weight, or measurement of capacity. V. That the period of the delivery be fixed, according to the ordinances in the traditions. VI. That the rate of the capital advanced be fixed, provided it be of a nature definable by a rate, as where it is an article of weight, or measurement of capacity, or of tale.—And, VII. That the place of delivery be fixed, provided the subject of the sale, on account of its weight, require portage. The two disciples have said, that if the capital to be advanced be present, and exhibited, there is then no need of any mention of the rate; and also, that there is no need of explaining the place of delivery, since the delivery must be made in the place where the contract is concluded. Thus there is a disagreement of opinion with respect to these two conditions between Haneefa and the two disciples.—The argument of the two disciples in support of their former position, is that as the
the price is present and exhibited, the object may be obtained by a reference to it, the case being, in fact, the same as that of cloth stipulated as the price, in a Sillim sale, of which specification is not a requisite condition, provided it be produced to view and capable of a reference. The arguments of Hanefi are twofold. First, as it often happens that many of the dirms and denars are of a bad kind, and that the purchaser during the meeting is incapable of exchanging them, the seller therefore returns them; and a proportionate deduction being made from the wares, the sale remains extant in a degree proportionate to the sum received by the seller. Now, in this case, and under such circumstances, if the amount of the dirms be not known, it follows that it cannot be known in what extent the Sillim sale exists. Secondly, as it sometimes happens that the seller, being incapable of acquiring the subject of the sale, is under the necessity of restoring the price, it follows that if this should not have been explained, it is impossible to judge what sum he ought to return.

Objection.—These two suppositions are merely imaginary, and therefore of no weight.

Reply.—Imaginations, with respect to Sillim sales, are equivalent to realities; because such sales are of but a weak nature, being authorized (as has been already explained) in opposition to analogy. Hence imaginations with respect to them are of weight; and it is necessary that the price be definite with respect to the rate, provided it be of such a kind as that the contract may relate to a rate; but if it be cloth, the specification of a number of yards is not required as a condition, since these are not considered as the rate, but the description.

—As, also, (according to Hanefi,) an explanation of the rate of the price is an essential condition to a Sillim sale, it follows that (agreeably to his tenets) a sale of this nature is not lawful where the wares, being of different kinds, (such as wheat and barley,) are opposed to any specific sum, (one hundred dirms, for instance,) without a separate price being specified in opposition to each of the kinds, because the
the amount being here opposed generally to both, the particular price of each remains unknown.—In the same manner also, it is not lawful where, the price being of different kinds, (such as dirms and deanars,) an explanation is given of the quantity of one of these kinds and not of the other; for in this case the contract of Sillim is not lawful in the degree to which an unknown quantity is opposed to it; and consequently, it is also invalid with respect to the degree in which it is opposed to a known quantity, since one contract relates to both. According to the two disciples both these modes of Sillim are lawful, since in their opinion an exhibition of the price without any explanation of the rate is valid.—The argument of the two disciples in support of their second position is, that the place of the contract is fixed for the delivery, because the contract, which is the cause of the delivery, did there take place: the case is therefore the same as that of a borrower or usurper, on each of whom it is incumbent to deliver what he may have borrowed or usurped at the place in which these deeds took place.—The reasoning of Haneefa is, that as the delivery of the subject of a Sillim sale is not immediately incumbent, the place in which the contract is concluded is not absolutely fixed as the place of delivery.—(It is otherwise in cases of loan or usurpation, since the repayment of the loan and the restitution of the usurped article are incumbent upon the instant.)—Now as the place of concluding the contract is not necessarily fixed as the place of delivery, it is requisite that some place be specified, as the uncertainty in this particular may otherwise produce a contention, since the price of goods varies in different places: it is therefore indispensable that a place of delivery be specified by the parties.—Ignorance, moreover, with respect to the place of delivery, is equivalent to uncertainty with respect to the quality of the goods or the quality of the price:—and accordingly, some of our modern doctors have said that if a contention arise between the parties with respect to the place of delivery, then, agreeably to the tenets of Haneefa, their oaths must be severally taken, as in the case of a contention regarding the quality of the price;—whereas, agreeably to the
the tenets of the two disciples, their oaths are not to be taken.—
Others, again, have said that, agreeably to the tenets of Haneefa, their oaths are not to be taken; whereas, agreeably to the tenets of the two disciples, their oaths are to be taken, because, according to them, the place of delivery is virtually involved in the contract itself, and consequently a contention with respect to it induces the necessity of the oaths of both parties, in the same manner as if it related to the goods or price:—and that the delivery, in the opinion of Haneefa, not being involved in the contract, but existing only as a condition, is therefore equivalent to a condition of option, or a determination of the period of the payment of the price;—and a contention regarding these does not induce the necessity of the oaths of the parties, but is determined by the affirmation of the seller.

It is to be observed that, in the same manner as Haneefa and the two disciples disagree regarding the specification of the place of delivery in a Sillim sale, so also they disagree regarding the specification of a place for the payment of the price, (where it is stipulated at a future period,)—the specification of a place for the payment of rent,—and also, the specification of a place for the payment of a sum due from a partner in a division of stock.—An example, with respect to payment of the price, appears where a person purchases any thing in exchange for articles of weight or measurement of capacity,—or for some definite price,—in which case, according to Haneefa, it is requisite that the place of payment be specified, provided the price be payable at a future period;—whereas, according to the two disciples, such condition is unnecessary, as the place of concluding the contract is absolutely fixed for the payment.—(Some have said that Haneefa, in this particular, coincides with the two disciples. This, however, is erroneous, since it is certain that a difference of opinion obtains, as has been already stated; and such, also, is the opinion of Shimsal-Ayna.)—An example, with respect to rent, appears where a person rents a house, a quadruped, or the like, stipulating the price to con-
S A L E.

If the article for which the advance is made be of such a nature as does not require any expense of porterage, such as musk, camphire, saffron, or small pearls, there is no necessity, according to all our doctors, for fixing the place of delivery; because the difference of place occasions no difference of price; and in this case the delivery must be made where the contract is concluded.—The compiler of the Hedaya remarks that this is the doctrine laid down in the Jama Sagheer, and also in the Masfoot treating of sales;—but that in the Masfoot treating of hire it is said that the seller may deliver the goods wherever he pleases;—and this is approved; because the delivery is not immediately due; and also, because, all places in this case being similar, there is no necessity for the particular determination of any. Now, the question is, if the parties agree upon a place of delivery, whether it be absolutely fixed thereby or not.—Some are of opinion that it is not fixed, because in so determining it there is no advantage.—Others, again, maintain that it is fixed thereby, as its being so is advantageous, since the danger of the roads is thereby avoided.—If, in
§ 28. 

A Sillim sale is not valid unless the seller receive the price in the meeting, prior to a separation from the purchaser; because if the price be stipulated in money, it would otherwise follow that one debt is opposed to another debt, a practice which has been prohibited by the prophet; or, if the price be stipulated in wares, it is invalid, because the characteristic of Sillim is "a prompt receipt of something in lieu of "something to be given," which would not be established if a prompt delivery of the price did not take place. Besides, the payment of the price is necessary, to enable the seller to acquire the goods, that he may become capable of delivery; and hence lawyers have said that a Sillim sale, containing a condition of option in favour of both or one of the parties, is invalid, because a condition of option is a bar to the completion of the seizin, inasmuch as it prevents the conclusion of the contract in regard to its effect, namely, the establishment of right of property; and also, that the purchaser has no option of inspection, because it is vain and useless, since the goods are a debt due from the seller, and consequently undetermined; whereas a thing seen becomes determined. — It is otherwise with respect to an option of defect; because that is no bar to seizin; and hence, if such a stipulation be made, and the parties annul it before the close of the meeting, and the seller be in possession of the price, such Sillim sale is valid: in opposition to the opinion of Ziffer.

* A league, about 18,000 feet, or 31 miles in length.
If a person purchase a Koor of wheat, by a Sillim contract, for two hundred dirms, and the seller being indebted to him one hundred dirms, he [the purchaser] make the advance by immediately paying to him [the seller] one hundred dirms, and opposing the debt of one hundred dirms to the remainder,—in that case the contract is invalid in the amount of the debt of one hundred dirms,—because a present seizin is not made of them; but it is valid in the amount of the one hundred dirms paid down, because of the observance of the conditions of legality with respect to that proportion, and because it is not affected by the invalidity of the other proportion, as such invalidity is supervenient, the sale being valid originally; and hence, if the purchaser, in this case, should pay down one hundred dirms on account of the debt before the end of the meeting, the sale becomes valid: but as, in the present instance, the purchaser does not pay off his debt, but merely opposes a clearance of his debt in lieu of ready payment of one hundred dirms, and the contracting parties separate from the meeting, the sale is therefore invalid in that degree.—The reason of this is, that if a debt be established as the price, in a contract of sale, still that is not absolutely fixed as the price; (whence if a person purchase goods in exchange for a debt due to him by the seller of the goods, and both parties afterwards agree that the debt was not due, yet the sale does not become null;)—and since the debt is not absolutely fixed as the price, so as to be capable of constituting capital stock, it follows that the contract, in such case, does originally take place, and afterwards becomes invalid from that circumstance.

It is not lawful for the seller to convert to use, or, by any deed, to dispose of the price advanced, in a Sillim sale, (as if he should sell it, for instance,) prior to his seizin of it, because in this case the seizin of the price, which is an essential condition in a Sillim sale, would be

* A dry Babylonish measure of 7,100. lib.—(See Richardson's Dictionary.)
nor can the purchaser perform any act with respect to the goods, until he receive them.

If both parties agree to dissolve a contract of Sillim, the purchaser is not, in that case, entitled to accept or purchase anything from the seller in exchange for the stock he has advanced, until he has first received it back complete; because the prophet has said, "Where ye dissolve a contract of sale upon which an advance has been made, take not from him to whom ye have paid the advance any thing except that which ye have advanced to him;"—and also, because, as the capital advanced, in this instance, is resembling and like unto the subject of the sale, it follows that any act with respect to it, previous to seizin, is invalid.—The reason why the capital advanced resembles the subject of the sale is, that a dissolution is equivalent to a new sale with relation to a third person, (that is, to any other than the parties themselves,) and it is therefore necessary that the subject of the sale be extant. Now it is impossible that the goods contracted to be provided can be considered as the subject of the sale, since they are not extant; it is therefore necessary to consider the price in that light; and this consequently becomes a debt due by the seller, in the same manner as the goods were.

Objection.—Since a dissolution is equivalent to a new contract, similar to the first, it would follow that it is indispensable that the advanced capital be received back by the purchaser at the meeting in which the dissolution is determined on, in the same manner as it is requisite that it be advanced to the seller at the time of concluding the contract: whereas it is otherwise.

Reply.—It is not indispensable that this be received back at the interview.
XI.  

SALE.

Interview of dissolution, because the dissolution is not in all respects similar to the first contract.

Concerning the case in question Ziffer has given a different opinion, for, according to him, any deed relating to the price, previous to the seizin, is lawful:—but the reasoning above stated is a sufficient refutation of this opinion.

If a person sell a Koor of wheat by a Sillim sale, and afterwards, when the period of delivery arrives, purchase the same from another, and then desire the purchaser to receive it from that other in discharge of his claim upon him; and the purchaser accordingly take possession of the same, still he is not considered to have made seizin of the subject of the Sillim sale, and consequently, if the wheat be lost or destroyed whilst in his possession, the seller is responsible for the same. But if the seller should have desired him to receive it first on his [the seller's] account, and afterwards on his own account, and the purchaser, accordingly, first measure it out and receive it on account of the seller, and afterwards measure it out and receive it on his own account, the subject of the Sillim sale is in that case delivered, and the purchaser becomes completely seized of the same. The reason of this is, that there is here a conjunction of two contracts; first, the Sillim sale; and, secondly, the sale between the seller of the Sillim sale and the third person; and it is a necessary condition that the measurement take place in both, because the prophet has prohibited the sale of wheat until the measure both of the purchaser and the seller shall have been applied to it; and this prohibition (as has been already explained) evidently alludes to the conjunction of two contracts, such as in the case in question.

Objection.—As the Sillim sale is previous to the purchase of wheat made by the Sillim seller, it follows that the two contracts are not conjoined.

Reply.—The Sillim contract is antecedent, but the seizin of the subject of it is posterior;—and the seizin here is equivalent to a sale de novo; because, although the subject of the Sillim sale was a debt incumbent
incumbent on the seller, and what the purchaser had received was a determinate thing, and consequently, in reality, different from a debt, yet they are in this case considered as one and the same thing, left it should follow that the exchange of the subject of a Sillim sale has been made previous to the seizin of it; for if they were to be considered as two things, it would follow that the subject of the Sillim sale prior to the seizin of it was given in exchange for what the purchaser made seizin of, namely, a determinate thing and not a debt.—Now since the seizin is proved to be in the nature of a sale de novo, it follows that two contracts are conjoined, namely, the purchase of the wheat by the Sillim seller, and the seizin of it by the Sillim purchaser, which is equivalent to a sale de novo; that is, the case is the same as if the Sillim seller, having purchased it from the purchaser, were to re-sell it to the Sillim purchaser.

If a person, indebted to another in a Koor of wheat, not on account of a Sillim sale*, but on account of a loan, should purchase a Koor of wheat from another, and then desire his creditor to receive the same from the other, in lieu of what he had borrowed, and the creditor, having measured out the same, should accordingly take possession of it, such seizin is valid, and a re-payment of the loan is established; because a loan of indefinite property [Karo] is equivalent to a loan of specific property. [Areaat,]—and hence the Koor of wheat so measured and received by the lender may be said to be his actual right, for which reason the transaction is not regarded as a conjunction of two contracts, [with respect to one subject] and it is consequently not requisite that the wheat be measured a second time.

If a person, having purchased a Koor of wheat by a Sillim sale, should order the seller to measure it and put it into his (the purchaser's) sack, and the seller having accordingly measured it out, should put it into the sack at a time when the purchaser is not himself present,

* That is, as an article for which he had received an advance.
present, in this case a delivery of the goods is not held to have taken place, (insomuch that if the wheat should in that situation be destroyed, the loss falls entirely on the seller;) because the purchaser, in a Sillim sale, does not become proprietor of the article, for which he makes the advance, until actual seizin, as his right is of an indefinite nature and not determinate: now the wheat, in the case in question, is a determinate article, and hence the order given to the seller by the purchaser to measure it out was not valid,—since the order of a director is of no account except with respect to his own property.—Thus the seller, as it were, borrowed the sack of the purchaser, and put wheat which was his own property into it;—in the same manner as if a person, having a debt of some dirms due to him by another, should give his purse to the debtor and desire him to weigh the dirms and put them into it; in which case if the debtor act accordingly, still the creditor does not by the performance of this act become seized of those dirms.—If, on the contrary, a person, having purchased wheat that is determinate and present, should direct the seller to measure it, and put it into his [the purchaser's] sack, and the seller act accordingly, at a time when the purchaser is absent, the purchaser is nevertheless seized of the same in virtue of that act, because his directions to the seller were efficient, as the property of the wheat had vested in him in consequence of his purchase of it.—Hence it appears that in a common sale the purchaser becomes proprietor of the article previous to the seizin,—whereas, in a Sillim sale, the right of property does not vest until after the seizin.—Hence, also, in a Sillim sale, if the purchaser desire the seller to grind the wheat, put in the manner above recited into his bag, the flour is the property of the seller;—whereas, if the same were to be done in case of a common sale, it would be the property of the purcahser. In the same manner, also, if the purchaser should desire the seller to throw the wheat into the river, and he act accordingly, then, in a Sillim sale, the loss would fall to the seller,—whereas, in a common sale it would fall upon the purchaser, and he would remain responsible for the price, since his order was efficient.
If a person purchase wheat, and direct the seller to measure it out and put it into his own sack, and the seller act accordingly, the purchaser is not seized of it, inasmuch as he borrowed the sack of the seller without taking possession of it, and consequently does not become seized of its contents.—The case is therefore the same as if the purchaser had directed the seller to measure out the wheat and place it in a particular corner of his own house, which being completely in the possession of the seller, the purchaser cannot consequently be seized of any thing in it.

If an undetermine and a specific thing be joined together, by a person (for instance) purchasing a specific Koor of wheat, and also entering into a Sillim contract for another Koor of the same (the former of which is specific and the latter undetermine,) and then directing the seller to measure out both into his own sack, in that case, if the seller first measure the specific wheat into the sack, and afterwards the undetermine wheat, the purchase is seized of both the measures of wheat;—of the determine wheat, because his directions to the seller with respect to it were efficient, as it was his undoubted property;—and of the undetermine wheat, because, upon the seller measuring it out, and placing it in the bag, it then becomes implicated with the property of the purchaser, and on account of such implication the purchaser becomes seized of it.—The case therefore is analogous to where a person, having solicited the loan of some wheat, desires the lender to scatter it on his (the borrower's) ground,—or, where a person consigns his ring to a jeweller with directions to add
to it more gold, to the weight of half a denar;—for in both these cases the seizin takes place immediately on the implication with the property.—If, on the contrary, in the case in question, the seller first measure out the undetermine wheat, and place it in the purchaser’s sack, and afterwards the specific wheat, the purchaser does not become seized of either; because his directions to measure out the undetermine wheat were not efficient, and consequently the property of it remained with the seller, as before:—and having afterwards mixed the determinate wheat with his own property, he thereby destroys and annuls the right of property of the other. —This is founded on the doctrine of Haneefa, according to whom the implication of the property of another with one’s own is destructive of the right of property of that other; and on this principle he holds the sale with respect to the determinate wheat to be dissolved.

Objection.—The above implication is with the consent of the purchaser, since it was by his order that the seller made the measurement, and hence the sale ought not in this case to be dissolved.

Reply.—The implication is not made with the consent of the purchaser, since there is a probability that his object was that the specific wheat should first be measured out.

—What is here advanced is founded on the doctrine of Haneefa, as above stated. The two disciples are of opinion that the purchaser has the option of either dissolving the sale or sharing with the seller in the mixed property; because, according to them, the implication of the property of another with one’s own is not in all cases destructive of the right of property of that other.

If a person purchase a Koor of wheat by a Sillim contract, making a female slave the price advanced, and after the seller taking possession of the slave the parties dissolve the contract, and the slave afterwards die whilst yet in the possession of the seller, in this case the seller is responsible for the value she bore on the day of seizin.—If, also, the dissolution be made after the death of the female slave, it
is valid, and the seller in the same manner remains responsible for
the value at the period of seizin.—The reason of this is that the va-

dility of a dissolution rests upon the existence of the contract, and
that, again, rests upon the existence of the subject of it: now, in a
contract of Sillim, the article advanced for is the subject of the con-
tract; and as that, in the case in question, still continues in existence,
it follows that the dissolution is valid:—and the dissolution being
valid, and the contract of Sillim consequently cancelled with respect
to the article advanced for, it follows that it is also cancelled with
respect to the slave, (being the price paid in advance,) as a dependant
of the article advanced for, although it be not valid with respect to
the slave, originally, because of her non-existence, since there are
many things which, although not valid originally, are yet so depend-
antly.—The contract, therefore, being cancelled with respect to the
slave, it becomes incumbent upon the seller to return her; but as
this is impracticable, he must pay her value.

If a person, having purchased a slave, should agree with the seller
to dissolve the bargain, and the slave afterwards die in his possession,
the dissolution is invalid;—or, if the slave die first, and the parties
then agree to dissolve the contract, in this case also the dissolution is
invalid;—because, the slave being the subject of the sale, and his death
of consequence destroying the existence of the contract, the dissolution
is therefore invalid from the beginning in the second case, and be-
comes invalid in the end in the first case,—as the subject no longer
remains. It is otherwise in a case of Beqa Mookayena, or barter; be-
cause a dissolution in that case is valid after the decay or destruction
of one of the articles; since either of them being capable of becoming
the subject of the sale, the existing one is therefore considered as such.

If a person enter into a contract of Sillim for a Koor of wheat, at the
rate of ten dirms, and the seller afterwards assert that "he had agreed for
"wheat of an inferior sort," and the purchaser deny this, asserting that
"the
"the stipulation of wheat was made in an absolute manner, and therefore the contract is invalid," in such case the assertion of the seller, corroborated by an oath, must be credited, since he pleads the validity of the contract, by virtue of the declaration of a condition of it; and the assertion of the purchaser, notwithstanding his denial of the validity of the contract, is not credited, because it tends to a destruction of his own right, since it is a custom, in Sillim sales, that the goods advanced for be superior to the sum advanced.—If a vice versa disagreement take place between the parties, the learned say that, agreeably to the doctrine of Haneefa, the assertion of the purchaser is credited, since he claims the validity of the contract.—According to the two disciples, the assertion of the seller is credited in both cases, as he is the defendant in both, notwithstanding that, in the latter, he deny the validity of the contract. This will be more fully explained hereafter.

If a disagreement take place between the parties to a Sillim sale, by the seller asserting that a period of delivery had not been determined in the contract, and the purchaser asserting that it had, the assertion of the purchaser must be credited, because a determination of a period for delivery is a right of the seller, and his denial is therefore a wilful injury to himself.

Objection.—The seller denies the determination of a period for delivery from a view to his own advantage; since such denial is the cause of annulling the contract, by which means he obtains the property of the goods he had engaged to deliver. Hence his denial is advantageous and not injurious to himself.

Reply.—The invalidity of a Sillim contract, because of the period of delivery being undeterminate, is not certain, since our doctors have disagreed on this point. The advantage, therefore, in this view, is of no account; whereas the advantage to the seller, from the determination of such period, being obvious, his denial of it thereupon is an injury to himself.—It is otherwise in the case of a disagreement
between the parties with regard to the existence of a condition concerning the quality of the article; because in that instance the invalidity of the contract, from a want of a definition of the quality, is certain.

—If, on the other hand, the seller assert that the period had been determined, and the purchaser deny this, in that case, according to the two disciples, the assertion of the purchaser must be credited, because he denies the right which the seller claims from him, although, at the same time, he deny the validity of the contract; in the same manner as holds with respect to the proprietor of the stock in a contract of Moonribat; that is to say, if the proprietor of the stock were to say to his Moonrib, or manager, "I stipulated that a half of the "profit shall go to you excepting ten dirhms;" and the manager deny this, and assert that he had stipulated a half of the profit in his favour, in this case the assertion of the proprietor of the stock is credited, since he denies the claim of right of the agent, notwithstanding he thereby at the same time deny the validity of the contract between them.—Haneefa says that, in the case in question, the assertion of the seller is to be credited, because he claims the validity of the contract. Besides, the purchaser and seller both agree in their having made a Sillim contract, and consequently they both apparently agree in the validity of it;—but, again, the purchaser, in denying the assertion of the seller, denies the validity of the contract, which is the denial of a thing he at the same time admits, and is consequently not worthy of credit.—It is otherwise in the case of Moonribat, because a contract of Moonribat is not binding upon either the manager or the owner of the stock, since the manager may refuse the execution of the Moonribat at any time, and the constituent may dismiss him when he pleases: such a disagreement, therefore, in the case of Moonribat, is of no consequence, the plea of invalidity, in this instance, amounting, in fact, to nothing more than a refusal to carry the contract into execution, which it is lawful for either party to do. There remains, therefore, only the claim to profit on the part of the
the manager; and as this is opposed by the proprietor of the flock; his declaration must consequently be credited.—A *Silium* contract, on the contrary, is absolute, and therefore of a different nature.

—From the above discussion it appears to be a general rule that the assertion of a person who denies his own right, and not the right of another upon him, is not credited in the opinion of all our doctors;—and that whoever pleads the validity of a contract must be credited in his assertion, according to Haneefu, provided both parties be agreed in the uniformity of the contract, such as that of *Silium*, which, whether valid or invalid, is of an uniform nature; in opposition to *Monaribat*, which, in case of its validity, is a contract of participated profit, and in case of its invalidity is merely a contract of hire.—The two scholars are of opinion that, in the case in question, the assertion of the defendant must be credited, notwithstanding he thereby deny the validity of the contract.

If a person enter into a *Silium* contract with respect to cloth, describing its length, breadth, and quality of fineness or coarseness, such sale is valid, because it is a contract of *Silium* which relates to a known thing, and of which the delivery is practicable. If the subject of the sale be a piece of *fik* stuff, it is necessary, in addition, to settle the weight, *that* also being an object in this instance.

A *Silium* sale of jewels or marine shells is not lawful, because the unitities of these vary in their value.

A *Silium* sale of small pearls that are sold according to weight is lawful, as the weight ascertains the subject of the sale.

There is no impropriety in a sale of *bricks*, whether they be in a wet or dry state, provided a description be given of the mould in which they are formed, because bricks, in their unitities, are of a similar nature, more especially where their mould is described.—In short,
and (in short) in all articles which admit a general description of quality, and ascertainment of quantity; every thing of which it is possible to comprize a description of the qualities, and a knowledge of the quantity, is a fit subject of Sillim sale, as it cannot occasion contention; on the other hand, a Sillim sale is not lawful with respect to things incapable of being defined by a description of quality or quantity; because the subject of a Sillim sale is a debt due by the seller; and if its quality be not known there consequently exists a degree of uncertainty from which a contention must arise.

There is no impropriety in a Sillim sale of pots or vessels for boiling water, or of boots, or the like, provided these articles be particularly defined, because the conditions essential to the validity of a Sillim sale are here observed:—but if the articles be not defined, the sale is absolutely invalid, the subject of the sale being in such case an undefined debt. It is also lawful to bespeak any of these articles from the workman without fixing the period of delivery.—Thus if a person should desire a boot-maker to make boots on his account, of a particular size and quality, such agreement is lawful, on a favourable construction, founded on the usage and practice of mankind, although it be unlawful by analogy, as being the sale of a nonentity, which is prohibited.

It is to be observed that a contract for workmanship is a sale and not merely a promise. This is approved. The subject of the sale, moreover, in such case, although in reality a nonentity, is yet considered, in effect, as an entity; and the thing upon which the contract rests is considered as a substance, (that is, as boots, for instance) and not as the work of a manufacturer in an abstracted manner;—and accordingly, if the manufacturer bring boots that had been worked by another, or boots which he had himself worked prior to the contract, and the person who had bespoken them should approve of the same, the contract is legally fulfilled.—Besides, articles that are bespoken are not determined for the person who bespoke them until
until he approve of them; and hence, if the workman should sell them to another before he had shewn them to this person, it is lawful.—All this is approved.

**Whosoever** bespeaks goods of a workman has the option of taking or rejecting them, because of his having purchased articles which he has not seen.—The workman, however, has no option, insomuch that the person who bespoke them may, if he please, take them from him by force.—This is recorded by *Mohammed*, in the *Mahfoot*, and is the most authentic doctrine.—It is related however, as an opinion of *Hanefea*, that the workman also has an option, inasmuch as it is impossible for him to furnish the articles bespoken without detriment, since in order to make *boots*, (for instance,) it is necessary to purchase hides, and instruments to cut them, and this is not free from loss. It is related, as an opinion of *Aboo Yoosaf*, that neither party possesses an option; for the workman, as being the seller, is not entitled to an option,—in the same manner as, in a sale of goods unseen, the seller hath no option; and with regard to the person who bespeaks the goods, if an option were given to him it would be an injury to the seller, since if he rejected the goods other people might not chuse to purchase them for the value;—as where, for instance, a commander of high rank bespeaks goods, and the workman accordingly makes them in a style suitable to his rank, and he afterwards rejects them;—in which case the common rank of people would not purchase them for their value.

**A contract** with a workman for the furnishing of goods is not lawful with respect to such articles as it is not customary among mankind to bespeak,—as *cloth* (for instance,) because the bespeaking of goods is in itself unlawful, and is therefore admitted by the law only so far as it is authorized by the custom of mankind, which is considered as a necessary instrument of its legality.—It is also requisite, in bespeaking articles authorized by the custom of mankind, to describe their
their quality, in order to enable the workman to furnish them accordingly; and unless such description be given, the contract is unlawful.—It is to be observed that the prohibition of a stipulation of a period for delivery, as recited in the first of these cases relative to contracts of this kind, proceeds upon this ground, that if a period were stipulated in a contract for the supply of work of articles authorized by custom, and the price paid immediately to the workman, it would then become a Sillim sale in the opinion of Aboe Yousaf: in opposition to that, however, of the two disciples, who hold that it would still remain merely a contract for the supply of work:—but if the period should be stipulated in the case of articles not authorized by custom, it then becomes a Sillim sale in the opinions of all our doctors.—The reasoning of the two disciples in support of their opinion in the first case is that the word Iftinad literally means a requisition of workmanship, and ought of consequence to be used in that sense, so long as the context does not determinate it to some other sense.

Objection.—The stipulation of a period is a context which clearly indicates that Iftinad is to be taken in a sense different from its literal meaning; and that it is to be understood as implying a Sillim agreement; otherwise what need for the stipulation of a period?—It would therefore appear that in such a case it amounts to a Sillim.

Reply.—The stipulation of a period, as in the first case, is not a convincing argument that the word Iftinad is not to be taken in its literal sense, but ought to be understood as implying an agreement of Sillim; because the stipulation of a period may be supposed to have been made with a view to expedition,—and it may be supposed that the object of the bespeaker, in fixing a period, was to prevent delays: in opposition to the case of things not authorized by custom, for there a contract for a supply of workmanship, as being invalid, is construed to mean a Sillim sale, which is lawful.

—The reasoning of Haneefa is that, when a period is stipulated, it fixes the subject of the sale to be a debt, because periods are not fixed
fixed except with regard to debts;—and the subject being proved to be a debt, the construction of the contract into a Sillim sale is easy and natural. It is therefore construed to be a Sillim sale, which is lawful, in the opinion of all our doctors, beyond a doubt; whereas, there is a doubt with respect to the other, since practice means the deeds of all people of all countries, and this can never be known with certainty: as, therefore, the legality of a Sillim sale is certain, and practice is not free from doubt, it follows that it is preferable to construe a contract for a supply of work to mean a contract of Sillim.

SECTION.

Miscellaneous Cases.

It is lawful to sell a dog or a hawk, whether trained or otherwise. It is related, as an opinion of Aboo Yoosef, that the sale of a dog that bites is not lawful;—and Shafei has said that the sale of a dog is absolutely illegal; because the prophet has declared "the wages of whoredom, and the price of a dog, are in the number of prohibited things;" and also, because a dog is actual filth, and is therefore deserving of abhorrence; whereas the legality of sale entitles the subject of it to respect; and is consequently incompatible with the nature of a dog. The arguments of our doctors upon this point are twofold. First, the prophet has prohibited the sale of dogs, excepting such as are trained to hunt or to watch.—Secondly, dogs are a species of property, inasmuch as they are capable of yielding profit by means of hunting and watching; and being property, they are therefore fit subjects of sale; in opposition to the sale of noxious animals, such as snakes or scorpions, which are not capable of yielding use. With respect to the
the tradition quoted by Shafei, it applies to the infancy of Islam, at
which period the prophet prohibited every one from eating the price of
a dog, in order to restrain men from a fondness for dogs, as it was
then a custom to keep dogs for breed, and to suffer them to sleep on
the same carpet. But when this custom fell into disuse, and men ab-
stained from a fondness for dogs, the prophet ordained the fale of them.
With respect to the assertion of Shafei, that dogs are actual filth, it is
not admitted; but admitting this, still it follows that the eating, and
not the felling of them is unlawful.

It is not law-
ful to sell
wine or pork.

Rules with
respect to
Zimbabwe in
sale.

The sale of wine or pork is not lawful; because, in the same
manner as the prophet has prohibited the eating or drinking of these,
so also has he prohibited the sale of them, or the eating of the price of
them; and also, because these are not substantial property with re-
gard to Mussulmans, as has been before frequently explained.

Zimbabwe, in purchase and sale, are the same as Mussulmans;—
because the prophet has said "Be regardful of Zimbabwe, for they are
entitled to the same rights, and subject to the same rules with Mus-
"Sulmans;"—and also, because, being under the same necessities,
in the transaction of their concerns, as Mussulmans, they stand in need
of the same immunities. They are therefore the same as Mussulmans
with respect to purchase and sale,—excepting, however, in the sale
of wine and pork, which is lawful to them, as the sale of wine, by
them, is considered in the same light with that of the crude juice of
the grape by the Mussulmans; and the sale of pork by them is equi-
ivalent to that of the flesh of a goat by Mussulmans; because these
things are lawful in their belief, and we are commanded to suffer
them to pursue their own tenets. Moreover, Omar commanded
his agents to empower the Zimbabwe to sell wine, taking from them
a tenth part of the price: a proof that the sale of wine is lawful among
them.
CHAP. XI.  

SALE.

If a person say to another, "sell your slave to a particular person for one thousand dirms, on condition that I be responsible to you for five hundred dirms of the price, independant of the one thousand dirms," and the said person act accordingly, it is valid, and he is entitled to one thousand dirms from the purchaser, and to five hundred dirms from the security; whereas, if he were simply to say, "I will be responsible for five hundred dirms," without mentioning the words "of the price," the seller is, in that case, entitled only to the one thousand dirms from the purchaser, and has no claim on the surety.—The reason of this is, that an increase in the price; or in the wares, is lawful, according to all our doctors, and is joined to the original contract, (as has been already explained,) being only an alteration of the contract from one lawful quality to another lawful quality;—and as it is lawful for the purchaser to make an alteration in the price, although he be no gainer in other respects by it, (as if he should increase the price, notwithstanding it be adequate to the value of the goods before the increase,) so also it is lawful for a stranger to lay himself under an obligation for an increase of price, although he have no advantage in other respects;—in the same manner as the consideration for Kboola becomes incumbent upon a wife in virtue of her assent to the Kboola, although she receive nothing in exchange, for woman is originally free, and the procurement of a divorce adds nothing to her original freedom. It is essential, therefore, to the validity of the seller's claim upon this person, that the increase be opposed to the goods by the specification of the words "of the price;" and if these words be omitted, the declaration or stipulation is of no account.

If a person, having purchased a female slave, make her over in marriage to another before seizin, and that other cohabit with her, such marriage is lawful, as having been concluded in virtue of the authority of the proprietor— and it also determines the seizin of the purchaser. If, however, the husband should not cohabit with her, A female slave may be contrasted in marriage by the purchaser without his taking con-

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the marriage does not, in that case, determine the seizin according to a favourable construction of the law.—Analogy, indeed, would suggest that the purchaser becomes seizin of the slave on the instant of the marriage-contract, since, in consequence thereof, the right of property over the slave is rendered virtually defective;—it would therefore follow that the seizin becomes established as an effect of the contract, in the same manner as in the case of an actual defect occasioned by any act of a purchaser.—The reason for a more favourable construction, on this occasion, is that any act by which an actual defect is occasioned infers an exertion of power over the subject, which consequently established a seizin of the subject: but an act which merely induces a virtual defect does not admit of this inference, so as to establish seizin.

If a person, having purchased a slave, should afterwards absent himself without taking possession, or paying the price, and the seller prove by witnesses that he had sold the slave to the absentee, in that case, provided the place of his retirement be known and ascertained, the slave cannot be re-sold on account of the exigences of the seller, for these may be otherwise answered, and such sale would destroy the right of the first purchaser:—but if the absentee's place of retirement be not known, the slave may be re-sold, and the debt of the purchaser to the seller paid by means of the price; for the seller has proved, by witnesses, that the slave is the property of the purchaser, and that he has a claim upon him: and consequently, when the place of retirement of the purchaser is unknown, it is incumbent on the magistrate to direct the slave to be sold for the satisfaction of the seller, which could not otherwise be obtained;—in the same manner as where a pauper dies before having released his pledge, in which case it is sold for the discharge of his debt to the pawn-holder.—It is otherwise where the purchaser disappears after seizin, for in this case the slave cannot be sold to answer the right of the seller, since his right is not particularly connected with the slave, as he, in such a circumstance, stands
stands in the same predicament with the other creditors.—It is to be observed that, in case of the slave being sold on account of the seller, if any thing remain after the discharge of his claim by means of the price, the seller must keep such remainder in behalf of the purchaser, to whom it is due as an exchange for his property:—but if the price should not suffice to answer his claim, he is in that case entitled afterwards to the remainder from the purchaser.—Supposing there be two purchasers, and only one of them disappear, the one that is present is entitled to pay the whole of the price of the slave, and to take complete possession of him; and if, in this case, the other purchaser afterward appear, he is not entitled to receive his share until he shall have paid to his partner the price of it.—This is the adjudication of Haneefa and Mobammed. Aboo Yoosaf has said that, if the present purchaser pay the whole of the price, still he is only entitled to take possession of his own share, and that, as the payment of the debt of the absentee was a gratuitous and unsolicited act in his favour, he is not entitled to receive it from him, since he paid it without his authority. Besides, as the present purchaser is, as it were, a stranger with respect to the absentee, he is not entitled to take possession of his share. The reasoning of Haneefa is that the present purchaser, in making payment on behalf of the absentee, acted from necessity, and not from choice; because it was not otherwise possible for him to enjoy his own share, since, having purchased the slave jointly with the other by one contract, it was impossible for him to detain him in his possession whilst there existed the claim of another with respect to part of him. Now whosoever pays the debt of another from necessity is entitled to repayment, notwithstanding his having acted without authority; as in the case of the loan of a pledge; for if a person lend to another something in order that he may pledge it, and that other having pledged it accordingly, the lender afterwards, from a necessary want of the said thing, redeem it from the pawnee, he is, in such case, entitled to repayment from the borrower, although he have redeemed the pledge without authority from him.—Since, therefore, the present
sent purchaser, in the case in question, has a right to repayment from the absentee; it follows that he has also a right to detain in his possession the share of the absentee until he receive payment of the same due to him; in the same manner as an agent for purchase, who pays from his own property the price of the goods purchased on behalf of his constituent, is entitled to retain possession of them until he receive payment of the price from his constituent.

If a person purchase a female slave in exchange for one thousand miskals of gold and silver,—saying “I purchase this slave for one thousand miskals of gold and silver,” in that case it is incumbent on him to pay five hundred miskals of gold, and five hundred miskals of silver; for the reference of the miskal to the gold and silver having been in an equal degree applicable to each, an equal proportion in the payment is of consequence incumbent.—If, on the other hand, the purchaser should say, “I have purchased this slave in exchange for one thousand miskals of gold, and five hundred dirms of silver, (of the septimal weight;)” for the term one thousand having been referred to the gold and silver in a general manner, it is therefore construed to apply to the weight in common use with respect to each in particular.

If a person indebted to another in the amount of ten dirms of a good sort, afterwards pay him this amount in an inferior species, and the other, being ignorant of this circumstance, receive them, and afterwards expend them, or lose them, in this case the debt is completely discharged, and the creditor is not entitled to any compensation for the difference of quality.—This is according to Haneefa and Mohammed.—Abou Yoosaf has said, that in this case the creditor is entitled to return to the debtor a tantamount of dirms of the sort he received, and to demand from him ten dirms of a superior sort, to which he has a right; because, in the same manner as his right relates to the
the substance of the dirms, so also is it established in the quality. A conservation of each right is therefore indispensable: but as the conservation of the second right, by means of an allowance in exchange for the difference of quality, is impracticable, (since quality in homogeneous articles is of no relative value,) this mode must necessarily be adopted. The reasoning of Haneefa and Mohammed is, that the bad dirms are of the same species with the good; and that after the receipt and expenditure, or destruction of them, the debt is discharged; because the claim which remains relates to quality, and this is impossible to satisfy by the granting of a compensation, inasmuch as quality in itself bears no value.

If a bird incubate its eggs in the land of a particular person, the right of property over the brood does not, in virtue of such incubation, vest in the proprietor of the ground; on the contrary, they remain free to the person who shall first seize them.—The law is also the same with respect to eggs which a bird lays upon any particular ground.—So also, if a deer should sleep for a night in a field, it does not by that act become the property of the proprietor of that field; on the contrary, it remains free to whomsoever it may be caught by. The reason of this is, that both the young ones and the deer are considered in the nature of game, and as such are free to the person who catches them, although no stratagem be used for that purpose;—and the same, also, of eggs; whence, if a Mohamud should either break or broil them, he is subject to make expiation.—Moreover, the proprietor did not purposely prepare his land that the bird should lay or incubate her eggs, or that the deer should sleep upon it.—It is therefore the same as if a person should spread out his net for the purpose of drying it, in which case, if any game should fall into it, it would not become immediately the property of the proprietor of the net, but would continue neutral until some one seize it;—or, as if game should come into a house, in which case it does not become the immediate property of the proprietor of the house;—or,
as if a person, scattering sugar or dills (for instance) among the people, should chance to throw these into the clothes of some one; in which case the property does not immediately vest in that person, until he wrap it up or prepare to seize it.—It is otherwise with respect to honey, for the property of it vests in the proprietor of the ground in which it is gathered together; because honey is considered as the produce of the ground, and hence the proprietor of the ground obtains a property in it as a dependant of the soil, in the same manner as in the trees which grow in his land, or in water which flows through it.
BOOK XVII.

Of SIRF SALE.

BEeya. SIRF means a pure sale, of which the articles opposed in exchange to each other are both representatives of price. This is termed Sirf, because Sirf means a removal, and in this mode of sale it is necessary to remove the articles opposed to each other in exchange from the hands of each of the parties, respectively, into those of the other. Sirf also means a superiority; and in this kind of sale a superiority is the only object; that is, a superiority of quality, fashion, or workmanship; for gold or silver being, with respect to their substance, of no use, are only desireable from such superiority.
an absolute manner, and not to the ten dirms of the Sirf sale in a specific manner. Our doctors, on the other hand, argue that price, in a Sirf sale, is also a subject of the sale; because, as every sale must have a subject, and as the articles, in a Sirf sale, are both representatives of price, without any of them having a preference over the other, it follows that either of them is the subject; and the sale of the subject previous to the seizin is unlawful.

Objection.—The consideration, in a Sirf sale, is a representative of price, and therefore of an undeterminate nature; whence it would follow that it cannot be considered as the subject, since the subject of a sale is required to be determinate.

Reply.—The subject of a sale is not required to be determinate; for, in a Sillim sale, the thing on account of which the advance is made is the subject of the sale; but still it is undeterminate.

The sale of gold for silver, by conjecture, is lawful, because equality, in a sale of this nature, is not required.—It is unlawful, however, to sell gold for gold, or silver for silver, by conjecture, because in such sale there is a suspicion of usury.

In the sale of an article having any gold or silver upon it, the price paid down is opposed to the gold or silver.

If a person sells, for two thousand Miskal's of silver, a female slave whose real value is one thousand Miskal's, and on whose neck there is a collar of silver equivalent to one thousand Miskal's of silver, and the purchaser having paid a thousand Miskal's of silver, ready money, the parties then separate from the meeting, such payment is considered to be the price of the collar, because the seizin of so much of the price of the whole was a necessary condition, as the sale in that proportion was a Sirf sale; and hence it is reasonable to conclude that the seller paid the exact amount of which he knew the seizin to be indispensibly necessary. In the same manner, also, if he purchase the said slave with the collar, for two thousand Miskal's of silver, of which one thousand is prompt and the other thousand postponed, the prompt payment is considered as

* That is, by a loose undeterminate estimate.
the price of the collar, because the stipulation of payment at a future period not being lawful in a Sirf sable, and being permitted in the sable of a slave, it is reasonable to suppose that the parties, in contracting the sable, and stipulating the distant period, intended to proceed according to law. —If, also, a person sell, for one hundred dirms, a sword, of which the silver ornaments amount to fifty dirms, and the purchaser pay immediately fifty dirms of the price in prompt payment, such sable is lawful, and the payment made is considered to be for the price of the ornaments, although the purchaser may not have specified this. —The same rule, also, holds if the purchaser say to the seller, “Take these fifty dirms in part of the price of both,” (that is, of the ornaments and sword,) because two things are sometimes mentioned where only one is intended, and this supposition is here adopted from the probability of it. If, however, the parties separate without a mutual seizin, the sable is null with respect to the silver ornaments, because of its being in that degree a Sirf sable, to the validity of which mutual seizin is essential: —or, if the sword be so framed as not to admit a separation of the ornaments without sustaining detriment, the sable of it is in this case also null, because so situated the separate sable of it is not permitted, in the same manner as it is not permitted to fell the beam of a roof. —If, on the other hand, the sword admit of a separation of the ornaments, without detriment, the sable, in the manner above-mentioned, is valid with respect to the sword; but with respect to the ornament it is null. —It is to be observed that the sable of a sword with silver ornaments in exchange for dirms is lawful only where the silver of the dirms exceeds that of the ornaments; and that, if the silver of the dirms be either barely equal to, or less than, that of the ornaments, —or, if it be not known whether it be more or less, the sable is invalid. The reason of the invalidity in case of its not being known whether it be more or less is, that the probability is in favour of its being invalid; since there are two causes of invalidity, namely, equality and inferiority; whereas there is only one cause of validity, viz. superiority.
If a person, having sold to another a silver vessel, should receive payment in part, and both parties then separate, in that case the sale is null with respect to the amount remaining to be paid, but valid in the amount taken possession of; and the parties have each a share in the property of the vessel;—because this sale is Sirf, or pure, with regard to the whole of the subject, and consequently valid in that degree in which the conditions of a pure sale have been observed, and invalid in the degree in which they have been omitted; for the invalidity, in this case, is not essential, but accidental, inasmuch as the sale was valid in its formation, and afterwards, in consequence of the separation of the parties after the receipt of a part, became invalid with relation to part of the subject; and hence the invalidity, which is accidental, does not operate upon the part in which all the conditions of the sale have been observed.

If a person sold a silver vessel which afterwards appears to be in part the property of another, in that case the purchaser has the option either of retaining a right of property in the remaining part of the vessel, or of cancelling the bargain entirely; because partnership in a vessel is equivalent to a blemish in it.

If a person sold an ingot of silver, and part of it afterwards appears to be the property of another, the purchaser is in that case constrained to take the remaining part at a proportionate price:—and he is not allowed an option, in this instance, because the division of an ingot of silver does not in any shape injure it.

The sale of two dirms and one deenar, in exchange for two deenars and one dirm, is valid; because in this case the dirms are considered as opposed to the deenars; and as they are of a different genus, an inequality in the proportion is therefore admitted. Shafet and Ziffer maintain that this sale is unlawful; and they have disagreed in the same manner with respect to the legality of the sale of one Koor of barley and
and one Koors of wheat in exchange for two Koors of wheat and two Koors of barley. Their reasoning in support of their opinion is that the seller and buyer have opposed one total to another total; and this requires that every separate part of the one be opposed to every separate part of the other, (in an indefinite and not a definite manner;)—now in the opposing of each genus, respectively, to a different genus, a modification is induced in this particular, which is not lawful, notwithstanding such a construction of the sale be the means of rendering it valid.—In the same manner as where a person, for ten dirms, purchases a silver bracelet weighing ten dirms, and again, for other ten dirms, purchases a piece of cloth, and then disposes of both articles, together, by a Moor dibbat contract, (suppose) for thirty dirms, in which case the Moor dibbat sale is invalid, although it be possible, by supposing the whole of the profit to be exacted on the cloth, to render it valid:—or, where a person purchases a slave for one thousand dirms, and, previous to the payment of the price, sells him, along with another, for fifteen hundred dirms, to the person from whom he had bought the slave for one thousand dirms; for in this case the sale is invalid in relation to the slave of a thousand dirms, because there is a possibility that the other slave may have been worth more than five hundred dirms; and supposing this, it necessarily follows that the seller has purchased the slave for a smaller price than that for which he formerly sold him; although in this case it be possible to render the sale valid by supposing the one slave to be opposed to one thousand dirms, in a specific manner, and the other to five hundred dirms, so as to remove the possibility of the seller having received him at a smaller price than that for which he had sold him:—or, where a seller, having exhibited two slaves, of which one only is his property, says to the purchaser, “I have sold to you one of these slaves,” in which case the sale is invalid, notwithstanding it be possible to render it valid by supposing that the seller meant his own slave:—or, where a person sells a dirm and a piece of cloth for a dirm and a piece of cloth, and both parties then separate without making seizin,—in which case the sale is invalid
valid, although it be possible to render it valid by supposing the dirms on each side to have been opposed to the cloth of the other:—for, in all these cases, although there be a possibility of rendering the sales valid, still they remain invalid, for the reason already alleged. The arguments of our doctors are, that the opposition of a total to a total, provided it be in an absolute manner, (that is, without any particular specification,) admits of this supposition, that the separate parts are opposed to the separate parts;—as in the case of an homogeneous sale, for instance, such as a sale of two dirms for two dirms, in which the unities on each side are opposed to those on the other respectively; whence if each of the contracting parties respectively take one dirm, and they then separate from the meeting, the sale is valid to the amount seized;—whereas, if the separate parts of the subject of the sale, instead of being opposed to each other in a definite manner, should be opposed to each other in an indefinite manner, the sale in the amount seized would not be lawful, since it must necessarily follow that the amount seized by each of the parties would stand opposed, indefinitely, to what was seized and what was not seized.—It is therefore evident that the opposition of a total to a total infers the opposition of the unities respectively; and as this, to give validity to the contract in question, must be in a definite manner, it is presumed to be so, in order that the contract may be valid.—With respect to what Zisser and Shafei urge, that "a modification is induced with regard to the requisites of the contract," we reply, that a modification is induced with respect to the quality of the contract, but not with respect to the original requisites of it, because the original requisite of the contract is that a total shall be transferred in exchange for a total, and this continues unaltered.—Analagous to this is a case where a person sells the half of a slave, shared in an equal degree between him and another; for in that case the law supposes the sale to apply to his own share, in order to its validity. The cases enumerated by Zisser and Shafei, on the contrary, are not analogous to this in question.—The first case (namely, that of a Moorabiat sale) is not analogous, as it is not possible to suppose that the whole of the profit is exacted on the
the cloth, for, if so, the sale of the bracelet would be rendered a sale of friendship, and hence an alteration would take place in the essence of the contract. The second case, also, is not analogous, because the mode there proposed for legalizing the sale is not determinate, since in the same manner as it is possible to construe the sum opposed to the slave to be one thousand dirms, so also is it possible to construe it to be more than one thousand, in every different gradation, until it amount to one thousand four hundred and ninety-nine dirms; in opposition to the case in question, where the mode proposed is determinate. The third instance, also, is not analogous, because the force of the sale there rests upon an indefinite object, which is incapable of being the subject of sale; and as indefiniteness and specification are of opposite import, it is impossible to construe the sale as applicable to any specific article. In the last instance, on the other hand, the sale is originally valid, and becomes otherwise from an accident, namely, the separation of the meeting: but the present question relates to a contract in its original formation, and not to any adventitious circumstances.

A sale of eleven dirms in exchange for ten dirms and one deenar, is valid:—and in this case ten dirms are considered as opposed to ten dirms, and the remaining dirm to the single deenar; because in a sale of dirms for dirms equality is indispensable, and it is therefore reasonable to suppose that such was the intention of the parties; and with respect to the remaining part of the sale, namely, the opposition of one dirm to one deenar, equality is not requisite, as they are not homogeneous.

If, in a sale of gold for gold, or silver for silver, the subject, on one part, be inferior in point of weight to the other, and there be joined to the inferior something equal in value to the deficiency arising from the difference of weight, in this case the sale is valid, without being abominable. If, on the other hand, the value of the thing so added be not equal to the difference, still the sale is valid, but
but abominable. But if, on the contrary, the additional thing bear no value, (such as dust, for instance) the sale is not valid, because of its being usurious, inasmuch as nothing is opposed to the difference of the weight.

A debt may be commuted in the course of a Sef sale.

If a person, indebted to another to the amount of ten dirms, fell to his creditor one deenar for ten dirms, and having delivered the deenar to him, the parties then commute the ten dirms which they reciprocally owe to each other, it is lawful. This case, however, supposes the sale of the deenar to relate to ten dirms in an absolute manner, and not to the debt.

The sale of one pure dirm and two base ones in exchange for two pure dirms and one base one, is lawful.—By a base dirm is to be understood, such as passes amongst merchants, but is rejected at the public treasury.—The reason of the legality, in this instance, is that an equality according to weight is established, and the quality of purity is of no account.

Description of, and rules respecting, base coinage.

Dirms in which the silver is predominant are considered as silver, and deenars in which the gold is predominant are considered as gold; and a difference in the proportion with respect to them in a sale is consequently unlawful, in the same manner as in the case of pure dirms or deenars. Hence it is unlawful either to sell base money in exchange for pure, or base in exchange for base, unless upon a footing of equality in regard to weight.—In the same manner, also, it is unlawful to borrow base money except according to weight: for dirms and deenars, in common, are not free from a mixture of base metal; because gold and silver do not receive the impression well without a mixture of it, and it is sometimes innate in them.

If, however, in dirms and deenars, the base metal predominate, they are not, in effect, dirms and deenars, because the law adverts to the
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the predominancy. Hence if a person should purchase pure silver in
exchange for dirms of that nature, the law is the same as has been al-
ready stated in the case of a sword with silver ornaments. It is law-
ful, moreover, to sell dirms and decuars of this nature in exchange
for others of the same kind, at an unequal proportion; for as these
consist of two different materials, (namely, gold and base metal, or
silver and base metal,) one genus may therefore be opposed to an-
other.—This, however, is nevertheless a Sirf sale, because of there
being an opposition of gold or silver on each side; and hence mutual
seizin in the meeting is necessary: and in the same manner as seizin
of the silver or gold is necessary in the meeting, so also is that of the
base metal, because a separation cannot be effected without detriment.

—The compiler of the Hedaya observes that the modern lawyers of
his country * do not pass decrees agreeably to this doctrine; for as
base money is there much in use, it follows that if the sale of it at an
unequal proportion were permitted, the door of usury would thereby
be opened.

WITH respect to money in which the base metal predominates,
it is to be remarked that, if it pass current by weight, purchase, sale,
and loans are transacted in it by weight. If, on the other hand, it
pass current by sale, all matters are transacted in it by sale.—If, how-
ever, both modes prevail, it is in that case permitted to follow either;
for custom is decisive with respect to matters of this kind, provided
they be not otherwise determined by the ordinances of the law.—
It is also to be observed that money of this kind, whilst it continues in
use, is a representative of price, and is therefore incapable of being
rendered determinate: but if it should not be in use, it is considered
as other wares or articles of merchandize, and is therefore capable of
being rendered determinate.

* Mawur al Nibr.

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If dirms be adulterated to such a degree as to pass current with some, but not with others, they are equivalent to Zeyf or base dirms. Hence, if a person enter into a contract for something in exchange for a hundred specific dirms of this description, the contract does not relate to those specific dirms in particular, but to a similar amount of base dirms, provided the seller were aware of the circumstance;—but if otherwise, it relates to a similar number of pure dirms;—because in the first case the assent of the seller to receive the base species is established by his knowledge of the baseness,—whereas in the second case his assent is unestablished because of his ignorance of the baseness.

If a person purchase wares in exchange for base dirms, and, previous to the payment of them, they should fall into general disuse, in that case the sale, according to Haneefa, is null. Aboo Yoosaf maintains that it is incumbent on the purchaser to pay the value which these dirms bore on the day of sale. Mohammed, on the other hand, alleges that it is incumbent on him to pay the value which they bore on the last day of their currency. The arguments of the two disciples are that the contract in itself is valid; but the delivery of the dirms becomes impracticable from the disuse of them; a circumstance, however, which does not induce invalidity;—any more than where a person purchases an article for fresh dates, and the season for those passes away;—in which case the sale is not invalid; and so also in the case in question.—As, therefore, the contract is not invalid, but still endures, it follows that, according to Aboo Yoosaf, the value the dirms bore at the time of the sale is due, because from that period responsibility for them takes place; in the same manner as in a case of usurpation;—and that, according to Mohammed, (on the other hand) the value they bore on the last day of their currency is due, since at that period the right of the seller shifted from them to their value.—The argument of Haneefa is, that the price is destroyed by the disuse; for money is the representative of price solely from custom, and hence this property is annulled from disuse. The sale, therefore, remains without
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without any price being involved in it, and is consequently null; and as the sale is null, it is of course incumbent on the purchaser to restore the goods to the seller, provided they be extant; or, if otherwise, the value which they bore on the day he obtained possession of them; in the same manner as in an invalid sale.

A sale in exchange for Faloo is valid, because they are considered as durable property. If, therefore, the Faloo pass in currency, the sale is lawful, although they may not have been specified,—because Faloo are, from custom, representatives of price, and consequently stand not in need of specification. If, however, they should not pass in currency, it is in that case requisite that they be particularly specified, in the same manner as other articles of merchandize.

If a person purchase wares for Faloo, which at that time passed in currency, but which previous to the payment of them fall into disuse, the sale is in that case null, according to Hannafa: contrary, however, to the opinion of the two disciples.—The difference of opinion upon this point is analogous to what has been already mentioned in treating of dirms in which the alloy is predominant.

If a person borrow Faloo, and their currency should afterwards cease, then, according to Hannafa, the borrower must make repayment in similars*; because Karz [a loan of money] is equivalent to Arceat [a loan of substance,] and therefore requires the restoration of the actual article with respect to its nature, that is, its value.—The property of representing price, moreover, is merely an adventitious property, in copper coin, to which no regard is had in the borrowing of them; on the contrary, they are borrowed on the principle

* By similars is always understood any articles compensable by an equal number of the same description, such as eggs for eggs, Faloo for Faloo, &c. It is treated of at large in various other parts of the work.
of their being similars; and this quality they retain after the diffuse of them as money, whence it is that a loan in them is valid after they have loft their currency.—According to the two discipes, on the contrary, the borrower must in this case pay to the lender the value of the Faloos; for their quality of representation of price being annulled by the diffuse, it is therefore impracticable for the borrower to restore them with the qualities they possesed when he received them; and hence, as the payment of similars would be an injury, it is required that he pay the value; in the same manner as holds where a person borrows any articles of which the unities are similars, and the whole genus of which afterwards becomes extinct.—According to Aboo Yoosaf, their value must be fixed from the day of seizin; and according to Mobammed, from the last day of their currency, in conformity with what has been already explained. This difference of opinion originates in a difference of doctrine respecting a case where a person usurps an article of the class of similars, and of which the similars afterwards become extinct*, when, according to Aboo Yoosaf, the usurper is responsible for the value the article bore on the day of usurpation; and, according to Mobammed, for the value it bore on the last day of its existence.—It is to be observed that the opinion of Mobammed is founded upon tenderness to mankind, and that of Aboo Yoosaf on convenience.

It is lawful for a person to purchase any thing in exchange for a half dirm of Faloos†; and in this case he is required to pay the number of Faloos adequate to the price of half a dirm.—In the same manner, it is lawful to purchase any thing for the Faloos of a dánik ‡ of

* Such as fruits, or other articles which are to be had only at particular seasons of the year.

† That is, For Faloos to the value of half a dirm.—(The distinction, in this instance, turns entirely upon the nature of the phrase in the original idiom.)

‡ A small silver coin, the sixth part of a dirm.
silver, or a Kerdt* of silver.—In all these cases, Ziffer is of opinion that the bargain is unlawful, because Faloo being an article of tale, estimated by number and not by their relation to dirms or daniks, a specification of the number ought therefore to have been made.—The reasoning of our doctors is, that the exact number of Faloo adequate to the price of a half dirm, or a danik, is known, (for the case in question proceeds on the supposition of such a knowledge,) and that a specification of the number is therefore unnecessary.—If the purchaser were to say, "I have bought this thing for the Faloo of one dirm, or two dirms," the bargain in that case also is valid, according to Aboo Yoosaf; for this expression means the number of Faloos to which the price of one or two dirms is adequate, and not the weight.

It is related as an opinion of Mobammed, that a sale for the Faloo of one dirm is not lawful; but that a sale for the Faloos of any thing under a dirm is lawful, as it is customary to purchase things for Faloo, where the value is not adequate to a dirm, but not otherwise. Lawyers have observed, that the opinion of Aboo Yoosaf is the most approved, especially in countries where the practice of selling and purchasing for Faloos is common, and where, of course, the rate they bear, with respect to dirms, is known and ascertained.

If a person, having delivered a dirm to a Sirref, or money changer, should say to him, "Give me Faloo in exchange for one half of this, and a half dirm wanting one grain of silver in exchange for the other half," in this case the sale, according to the two disciples, is valid with respect to the one half in exchange for Faloo, and invalid with respect to the other; because the sale of a half dirm in exchange for Faloo is lawful (as has been already explained;) but the exchange of a half dirm in exchange for a half dirm wanting one grain of silver, is usurious, and consequently unlawful. Agreeably to the tenets of

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

Haneesa,
SIRF SALES.

Haneefa, the sale is in this case completely null, because the whole is comprehended under one contract, and the invalidity being strong, with respect to a part, does therefore communicate itself to the whole. If, however, the word "Give" be repeated, by the person saying, "Give me Faloo in exchange for one half, and give me a half dirm wanting one grain in exchange for the other half," the opinion of Haneefa, in such case, accords with that of the two disciples, because here exist two separate sales, one valid, and the other invalid.

—If the purchaser, without opposing the halves of the dirm, were to say, "Give me, in exchange for this dirm, the Faloo of half a dirm, and a half dirm wanting one grain;" the sale is valid in full, because, in this case, it is construed to be an opposition, on the one hand, of one half dirm wanting a grain in exchange for one half dirm wanting a grain; and on the other, of a half dirm with the super-addition of a grain for the Faloo of a half dirm; and this is lawful.

HEDAYA.
HEDART.

BOOK XVIII.

Of Kafālīt, or Bail.

KAFĀLĪT literally means junction. In the language of the law it signifies the junction of one person to another in relation to a claim: (some have said, in relation to a debt only; but the first is the most approved definition.)—The person who renders obligatory on himself the claim of another, whether it relate to person or property, is termed the Kafeel, or surety:—the claim itself, in favour of which bail is given, whether it relate to the person or property, is termed Makfool-be-bee:—the claimant is termed Makfool-le-booo; and the principal, or person who gives bail, is termed Makfool-an-booo. —In cases of bail for the person, however, the terms Makfool-be-bee and Makfool-an-booo relate to the same thing.
Bail is of two descriptions. I. Bail for the person, which is termed Ḥāṣir-Zāminee. II. Bail for property, which is termed Māl-Zāminee.

Bail for the person is valid; and in virtue of it the surety is bound to produce the principal, or person whom he has bailed.—Shafei is of opinion that bail for the person is not valid, because the surety undertakes and renders obligatory on himself a delivery which he is not capable of performing, inasmuch as he possesses no power or authority over the person of the principal: contrary to bail for property, as in that case the surety possessing power and authority over his own property is thereby enabled to discharge the obligation he has contracted.

—The arguments of our doctors upon this point are twofold. First, the prophet has said "The surety is responsible," which is a proof that both modes of bail are lawful. Secondly, the surety is in a degree capable of delivering the person for whom he is bail, as he may inform the claimant of his place of abode, and thus remove the bar between them, since, after obtaining such knowledge, the claimant may demand the aid of the officers of the Kazee, by whose means he may
may secure his presence. There is, moreover, a necessity amongst mankind for this kind of bail; and the characteristic of bail, namely, a junction of one person to another in relation to a claim, is observed in it.

Bail for the person is contracted, where any one says; "I have " become bail for the person of a particular man," or, "for his " neck," or "for his soul," or "for his body," or "for his head," or "for his face;" because some of these words really mean, in their common acceptation, the whole of the person, and others bear that sense metaphorically, as has been already explained under the head of divorce.—The effect is also the same when a person says, "I have " become bail for the half of a certain person," or "for a third of " him," or "for a part of him;" because the person, in the case of bail, being incapable of division or dismemberment, the mention of a part indefinitely is therefore equivalent to the mention of the whole. It is otherwise where a person says "I have become bail for the hand," (or "the foot,")) because neither of these parts are ever used to denote the whole of the person, and the bail so given is therefore invalid.

If a person say "I am responsible [Zāmin] for such a person," it is a valid bail; because this is an express declaration of the intention of bail. It is also a valid bail, if a person say, "This " is upon me," or, "This is towards me," because both these expressions indicate an obligatory engagement.—In the same manner, also, bail is contracted by the words Zeyim and Kābeel, for both of these signify bail, and hence it is that bail-bonds and other instruments of obligation are termed Kabāla. If, on the contrary, a person say, "I am responsible for the notoriety of a certain person," bail is not contracted, since the responsibility, in such case, relates merely to the notoriety and not to the claim. Hence if a person should say, in the Persian language, "His acquaintance is upon me," he does not thereby become bail.—If, however, he should say, "He is
my acquaintance," lawyers are of opinion that he becomes bail because of ancient custom.

If, in a contract of bail, it be stipulated that "the surety shall, at a fixed period, deliver over the principal or person bailed to the claimant," it is in that case necessary that he be delivered to the claimant, if it be required, either at the fixed period, or at any time afterwards, in order that the surety may acquit himself of the engagement into which he has entered.—If, therefore, he deliver the person bailed on the demand of the claimant, he then becomes released from his engagement; but if he refuse to deliver him, the magistrate must in that case imprison him for failure in the performance of his engagement. He is not, however, to be imprisoned on the first summons, as he may not then know for what reason the Kâzee had summoned him.

If the principal disappear, the surety must be indulged with time to search for him; and the contract is fulfilled by delivering up the principal at any place which admits of litigation.

If, in a case of bail for the person, the principal should disappear, it is in that case incumbent on the Kâzee to afford the surety a sufficient period to go and come in search of him; and afterwards to imprison him, in case of his not producing the principal, because he is then proved to have failed in his engagement.—If, however, he produce the principal, and deliver him to the claimant, in such a place as may enable him to litigate his suit with him, the surety is then released from his engagement of bail, because of his performance of the obligation he had contracted; and the end of the contract is likewise answered, as it only requires that he deliver him once. If he should have agreed to deliver him "in the assembly of the Kâzee," and afterwards deliver him in the market place, still he is released from his engagement, because the object of the bail is answered. (Many have observed that in the present age the surety would not in such case be released from his obligation; because, as the probability in this age is that the people would aid the defendant in preventing his appearance in the assembly of the Kâzee, and that they would not assist the
the claimant in enforcing it, such a clause is therefore beneficial.

—If, however, the surety deliver over the principal in a desert, he is not released from his engagement, because the claimant could not in such place litigate his suit with him, and the object of bail remains therefore unaccomplished. In the same manner, he is not released from his obligation in case he deliver him up in a village where there is no Kâzee; because, where there is no Kâzee, the claimant can obtain no decree. If he should deliver him up in another city than that in which he had entered into the contract of bail, he is then (according to Haneefa) exempted from any further obligation.—The two disciples are of a different opinion, because it may often happen that the witnesses are in the city in which the contract was formed.

—If, moreover, he deliver over the principal in the prison, where he had been previously confined by another for a different cause, he is not released from his engagement, because the claimant has no power, in such situation, to litigate his suit with him.

If, in a case of bail for the person, the principal should die, the surety is then released from his engagement; first, because of the impracticability of producing the person; and, secondly, because, in the same manner as the appearance of the principal is by such event defeated, so also is the enforcement of it on the part of the surety. The same rule also holds in case of the death of the surety; because it then becomes impracticable for him to deliver up his principal; and, also, because his property is not of an analogous nature, so as to admit a discharge of the obligation by means of it.—It is otherwise in the case of bail for property; for if the surety for property die, the obligation of bail does not then cease, since it is necessary to discharge it by means of his property, to whatever amount he may have rendered himself liable.

If the claimant should die, his executor (if there be any) or otherwise his heirs, are entitled to claim the fulfilment from
from the surety; because heirs and executors represent the
dead.

Ir, in a case of bail for the person, the surety should not stipulate
his release from the bail on the delivery of the person, he is never-
theless released on such delivery, because this being the intention of
the contract, it is consequently established independant of an express
declaration. It is to be observed, likewise, that the surety becomes
exempt from his obligation on the delivery of the person, without the
acceptance of the claimant being required as a condition, in the same
manner as in the payment of a debt. The effect is also the same,
in case the principal should of himself present his person, as if he should
say "I have presented myself on account of the bail of a particular
person who has become surety for me." This is approved, be-
cause the surety being entitled to contend with him, in order that he
may deliver himself up, it is therefore permitted to him to deliver
himself up voluntarily to prevent contention. It is also lawful for the
agent or messenger of the surety to deliver the person, as these are the
representatives of the surety himself.

If a person become bail for the appearance of another, on this con-
dition, that, if he do not deliver him within a particular period, he shall
then be responsible for the claim upon him, (a thousand dirms for in-
stance,) and he afterwards fail of producing him within the fixed pe-
riod, he is then bound to make good the claim upon the suretee;—
because in this case a bail for property is suspended on the condition,
namely, the failure in producing the person within a fixed period;
and such suspension is valid, because of the custom of mankind. Hence,
when the condition is not fulfilled, the surety becomes responsible for
the claim; and he is not, nevertheless, released from the bail for the
person; because bail for the person and bail for the property are not in-
compatible.—Shafei maintains that the bail in this instance is not
valid; because bail for property induces a responsibility for property in
the
the same manner as sale; and hence it is unlawful to suspend it on a matter of doubt and uncertainty; in the same manner as in the case of sale.—The reasoning of our doctors is that bail for property is ultimately like sale, inasmuch as it entitles the surety to repayment from the principal of what he advanced to the claimant on his account,—and that in the beginning it resembles a gift, being an acquiescence in responsibility without any exchange.—In due observance, therefore, of both these circumstances, it is declared that the suspension of it, on an uncertain condition, (such as the blowing of the wind, the falling of the rain, and the like,) is invalid; but that it is valid if suspended on a certain condition, such as in the case in question.

If a person be bail for the appearance of another “on the morrow,” under a condition of answering the claim upon the other himself, in case of failure, and the principal die before the morrow, he is in that case surety for the property, because here the condition on which he agreed to the responsibility clearly takes place.

If a person claim one hundred deenars from another, either with or without an explanation of their quality, and a third person become bail for the person of the debtor, under a condition that “if he do not deliver him on the morrow, he shall be responsible for an hundred deenars,” and he fail in the delivery of him on the next day, he is in that case responsible, according to Haneefa and Aboo Yousaf, for the one hundred deenars.—Mohammed maintains that if the quality of the deenars be not explained previous to the acceptance of the bail, the claimant has no right afterwards to explain their quality and demand them from the surety.—His arguments in support of this opinion are twofold. First, the surety has rested indefinite money upon a matter of doubt and uncertainty, inasmuch as he has not specifically referred the one hundred deenars to those which were claimed; (for which reason the bail is invalid, even if a definition of the quality have been previously given.)—Secondly, the claim of an hundred deenars, without
without a definition of their quality, is invalid; whence no obligation
lies on the surety to produce the debtor; and as, where the production
of the debtor is not obligatory on the surety, the bail for the person is
of consequence invalid, it follows that the bail for the property is also
invalid, since this rests upon the other.—(From what is here ad-
vanced it appears that the bail in question is valid if the quality of the
déenars be specified.)—The argument of the two elders is that the
déenars mentioned by the surety do evidently, from the circumstances
of the case, relate to those claimed.—It is, moreover, a frequent prac-
tice to keep a claim in a state of doubt and uncertainty.—The claim
in question, therefore, is valid, in this way, that the claimant will
(it is to be expected) explain the quality, and such explanation will
be applied to the original claim:—and upon the claim becoming valid,
the first bail (namely bail for the person) becomes valid; and in conse-
quence thereof the second bail (namely bail for the property) also be-
comes valid.

Bail for the person is not lawful in cases of punishment
and retaliation, according to Ḥanefī;—that is, the Kāzī has no
tower to exact it by compulsion.—If, however, the person upon
whom punishment or retaliation is claimed, should in a voluntary
manner give bail of himself, it is admissible in the opinion of all
our doctors; because that which is the end of bail for the person
is in this case also answered, since the production of the person
of the accused is hereby secured.—It is to be observed that the per-
son upon whom punishment or retaliation is claimed, must not be im-
prisoned until evidence be given, either by two people of unknown
character, (that is, of whom it is not known whether they be just or
unjust) or by one just man who is known to the Kāzī; because the
imprisonment, in this case, is founded on suspicion, and suspicion cannot
be confirmed but by the evidence of two men of unknown character,
or of one just man. It is otherwise in imprisonment on account of
property; because the defendant, in that instance, cannot be imprisoned
but
but upon the evidence of two just men; for imprisonment on such an account is a grievous oppression, and therefore requires to be grounded on complete proof.—In the Mahfoot, under the head of duties of the Kásee, it is mentioned that, according to the two disciples, the defendant, in a case of punishment for slander, or of retaliation, is not to be imprisoned on the evidence of one just man, because, as the exaction of bail is in such case (in their opinion) lawful, bail is therefore to be taken from him.

It is lawful to take a pledge or accept of bail for the payment of any fixed tribute, because tribute being a debt of which the payment is demanded, it may be discharged by means of the pledge or the bail, and hence the objects of these contracts is answered.

If bail for the person be first taken from one, and afterwards from another, the bail in that case holds with respect to both; for the design of bail is to fix the obligation of a claim, and this may be extended to many, so as to render them severally responsible. Besides, as the object of bail is security, this is increased by the taking of bail from another; and hence there is no incongruity in the existence of both at the same time.

All that has been here advanced relates to bail for the person.—With respect to bail for property, it is lawful, whether the extent of the property be known or uncertain, provided it be founded on a just debt,—that is, a debt which cannot be annulled but by payment or exemption: in opposition to a claim of ransom, which is a debt due by a Mokátib to his master,—because that may possibly become null without payment or exemption, by an inability in the Mokátib to discharge it. Property known in the extent is (for instance) where a person says to a claimant: "I have become bail for a person who owes you a thousand new dirms." The nature of uncertain property may also be explained by an example; as for instance, where a person says "I have become
become bail for the debt which a particular person owes to you;" or, "I have become bail in this case for whatever claim may hereafter be made on the subject of it,"—which bail is termed Kafūlit-be'l-dirk, or bail for accidents, that is, for whatever may happen. In short, bail for certain or uncertain property is lawful, because bail rests upon a broad foundation, and a small degree of uncertainty in it is therefore of no consequence. Besides, all our doctors are agreed in the legality of Kafūlit-be'l-dirk, or bail for what may happen; which is a convincing argument of the legality of bail for uncertain property. Moreover, bail is lawful in the case of unintentional Shoodja [a wound occasioned by the throwing of a stone] although there be in it a great degree of uncertainty; because it is possible that death may ensue, which induces retaliation; and it is also possible that a recovery may take place, in which case a fine of property only is required. Now if, notwithstanding this degree of uncertainty, the bail be lawful, it follows that it is in the same manner lawful in the case of uncertain property.

In a case of bail, the claimant is at liberty to make his demand either from the surety or the principal.

The person to whom the bail is given is at liberty to demand payment either from his debtor, who is the principal, or from his surety, because bail signifies a junction of personal responsibility to the personal responsibility of the debtor, in a claim; and this does not imply an exemption to the debtor from the claim; on the contrary, it marks the continuance of his responsibility;—unless such exemption should have been specified as a condition in the contract of bail, in which case the contract of bail becomes a contract of transfer, in the same manner as a transfer becomes bail, if a condition of exemption to the debtor be not specified; because regard must be had to the spirit of the contract; and in the former instance the contract bears the sense of a transfer, in the same manner as, in the latter, it bears the sense of bail.

If the person to whom the bail is given call upon one of the two parties,
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parties,—that is, upon either the debtor or the surety,—he is entitled also to call upon the other; and he may, if he please, call upon both.—It is otherwise where the proprietor demands compensation for his property from one of two usurpers,—(that is, from the original usurper, or from another who has usurped it again from him;) for he cannot then demand it from the other; because upon his agreeing to accept compensation for the usurped property from one of them, he thereby constitutes him proprietor, since option of compensation involves investiture with right of property; and hence the impossibility of his afterwards constituting the other proprietor. A claim in virtue of bail, on the contrary, does not involve an investiture with right of property.—There is therefore a difference between these cases.

The suspension of bail upon a condition is lawful.—Thus if a person say to another "If you sell your goods to Zeyd, the price is upon me,"—or, "If any thing be due to you from a certain person, that is upon me,"—or, "If a certain article be usurped from you, the damage is upon me,"—in all these cases the bail is lawful, because all our doctors have agreed upon the legality of Kafalit-be’il-dirik, when suspended on a condition.—It is to be observed, however, that although conditional bail be lawful, still it is requisite that the condition on which it is suspended be of a nature adapted to the contract of bail,—either by resting upon the obligation of a right, (as if the surety should say, "If the subject of the sale be not claimed by another, I hold myself responsible for the price,")—or, by resting upon the possibility of the exaction of a debt, (as if he were to say, "upon Zeyd [meaning the principal] arriving," &c.) or, by resting upon the impossibility of the exaction of a debt, (as if he were to say, "upon such a person [meaning the principal] disappearing," &c.) for the suspension upon a condition not of a fit nature,—(such as, upon the falling of rain, or the blowing of wind,) is unlawful.—In the same manner also, it is unlawful to stipulate these events as the period for payment of debt;—as if a person should say, "I have become bail for
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"the debt due to you by a certain person, until the rain fall, or the
wind blow," in which case the bail is valid, but the condition is
invalid, and therefore an immediate payment of the money is required;
because the suspension of bail on a condition is valid, and it does not
become invalid from the invalidity of the condition, being similar to
the case of divorce and emancipation.

If the surety say to the claimant "I am bail for the debt due to
you by a particular person," and it be afterwards proved, by wit-
nesses, that the debt amounts to one thousand dircus, in that case the
surety is answerable for that sum, because proof by testimony is equiva-
 lent to that by actual sight. But if the amount of the debt should not
be proved by witnesses, the averment of the surety is in that case to be
credited in the amount which he may acknowledge; for, with respect
to whatever sum may be alleged beyond his own acknowledgment, he
is considered as the defendant.—Hence if the principal acknowledge a
greater amount than that acknowledged by the surety, it cannot be ad-
mitted to operate against him; because, considered as an acknowledg-
ment or declaration with regard to another, it is invalid, as an ac-
knowledger has no power over another.—It must be credited, how-
ever, with relation to himself; for he has power over his own
person.

It is lawful to become bail either with or without the desire of
the principal; because the tradition with respect to it is absolute, and
does not restrict it to the desire of the principal. Bail, moreover, being
an obligatory engagement, is a deed relative to the surety himself, in
which there is an advantage to the claimant and no detriment to the
principal: for if he should have become bail without the desire of
the principal, then he has no right to apply to him for what he may
pay on his account; or if, on the other hand, the bail was contracted
by his desire, then the principal has expressed his acquiescence in his
claim of repayment from him, to which he is entitled because of his
having
having made the payment in virtue of authority from him,—whereas he has no right to repayment in case of having become bail without the desire of the principal, as the payment so made was a gratuitous deed.—It is to be observed that the surety has a right to a repayment, from the principal, of the sum which he may have advanced on his account in virtue of the responsibility he contracted by his desire.—As for instance, if the debt be one thousand good dirms, and he pay the claimant one thousand good dirms, he is then entitled to the repayment of one thousand good dirms.—But if he should make a payment of a nature different from his engagement,—as if, having become bail for one thousand good dirms, he should pay the claimant one thousand bad, or vice versa,—he is in that case intitled to receive from the principal the full amount for which, by his desire, he had become responsible; because the surety, from the payment of the debt, becomes proprietor of it, and stands therefore in the place of the creditor;—in the same manner as if he had become proprietor of it by virtue of a gift, or of inheritance;—(that is, as if the claimant had bestowed on him a gift of the debt due to him by the principal, and permitted him to take possession of it,—or, as if the surety had succeeded to the debt in right of heritage;—or, in the same manner as where the person to whom a debt has been transferred acquires a property in the debt by either of these modes.)—It is otherwise in the case of a person instructed to pay a debt; for if a person be desired by another to pay a debt on his account, and pay it accordingly, he is in that case entitled to receive from the other the exact sum he has paid on his account, although the debt relate to bad dirms, and he pay it in good; because a person so instructed, having incurred no responsibility, has therefore no right to become proprietor of the debt in virtue of his having paid it.—It is otherwise, also, if a person, having become bail for a debt of one thousand dirms, should compound with the claimant for the payment of five hundred dirms;—for in this case he is intitled to receive only five hundred dirms from the debtor, because composition is similar to annulment of part of the debt, and the case is therefore the same as if the claimant
claimant had remitted part of the debt to the surety; and as, in case of remission of the debt by the claimant, the surety has no right to receive anything from the debtor,—it follows that, in the case of composition also, he has no right to receive more than he has actually paid.

A surety has no right to advance any claim on the principal until he make payment on his account, because he does not become proprietor of the debt until he pays it.—It is otherwise with respect to an agent for purchase; as he is entitled to receive from his constituent the price of the merchandise previous to the payment of it on his part. The reason of this is that there virtually subsists a contract of exchange between the constituent and his agent; because the right of property is first established in the agent, and afterwards shifts to the constituent;—and hence they stand to each other in the relation of buyer and seller;—whence it is permitted to the agent to detain the merchandise from his constituent until he receive the price from him.

If the claimant importune the surety in pursuit of his claim, then the surety may in the same manner importune the principal or suretee. If, also, the surety be imprisoned by the claimant, he is in the same manner entitled to imprison the principal.

If the claimant remit the debt to the suretee, or receive payment of it from him, the surety is in that case released from his engagement, because the debt, in reality, is due by the suretee:—but if he exempt the surety, the suretee (or principal) does not thereby become exempted from his debt; because the surety is merely a dependant; and, also, because he is liable only to a claim, whereas the debt exists in the principal independent of such claim.

If the claimant allow the principal a respite from his claim, or suspend his claim upon him to a more distant period, such respite or suspension...
suspension of claim operates also in favour of the surety;—but if he
grant a respite of his claim to the surety, it does not operate in favour
of the principal;—because respite or suspension, as being a temporary
remission, is therefore analogous to an absolute remission.—It is other-
wise where, the debt being immediately due, the creditor accepts bail
for the payment at the period of a month afterwards; for this suspen-
sion of his claim for a month operates also in favour of the principal,
because here the period of suspension agreed upon is a circumstance
annexed to the debt, which, at the time of contracting the bail, was
immediately due.

If a surety, in a debt of one thousand dirms, compound with the
 creditor for a payment of five hundred dirms, in that case both the
principal and the surety become exempted from their respective obli-
gations for the remaining five hundred dirms;—because the surety
having referred the composition to the thousand dirms due by the
principal, the principal becomes thereby released from his obligation
by the payment of five hundred dirms; for composition is a cancelling
of part of the debt;—and the release of the debtor from his obligation
occasions the release of the surety.—He is also in this case entitled to
five hundred dirms from the surety, provided he entered into the
bail with his consent.—It were otherwise if the surety should
compound the debt for some thing of a different species, (as if, in-
stead of the dirms, he should agree to pay a particular number of deenars;
or any article of merchandize;) for in such case he is entitled to a full
payment of the debt, since such composition is in the nature of a con-
tract of exchange, and the surety becomes proprietor of the debt in
virtue of his having given a consideration for it.

If the surety compound with the creditor for an exemption from
the obligation contracted by him in virtue of the bail, the principal is
not thereby exempted, because the said composition is merely an ex-
emption

A surety, compounding
the debt of the principal
with the claimant, dis-
charges both from any fur-
ther demands;

and has a claim upon the surety for
what he pays in compo-
sition.

A surety com-
pling for an exemption
on his own behalf does
emption granted to the surety from a claim upon him.—Thus, for in-
stance, if the surety for one thousand dirms compound with the creditor
for one hundred dirms,—in other words, if the creditor agree that, on
condition of his paying one hundred dirms, he will exempt him from
the rest of his obligation,—in that case he becomes exempted from re-
ponsibility; and, provided he had become bail by desire of the prin-
cipal, he is entitled to receive one hundred dirms from him, whilst the
creditor retains his claim on the principal for the remaining nine hun-
dred dirms.

If a claimant say to the surety, who had become bail by desire of
the principal, “You are enlarged from the claim towards me,” in
that case the surety is entitled to receive the amount in question from
the principal; because, according to the rules of grammar, this sen-
tence, in which the preposition from with respect to the object, and
that of towards with respect to the claimant of such object, are used,
means that the claim has been discharged.—Hence the claimant, in
this case, is held to have made an acknowledgment of the discharge of
the claim; and for this reason the surety is entitled to receive the pay-
ment of it from the principal.—But if he should merely say “I have
enlarged you,” the surety is not entitled to any thing from the prin-
cipal; because his enlargement, being here expressed without any
mention made of its operation towards another, is considered as an
annulment, and not as a declaration of discharge.—If he should only
say “you are enlarged,” without adding, “towards me,” in that
case there is a disagreement amongst our doctors.—Mohammed alleges
that it is similar to the second instance—“I have enlarged you.”
Aboo Toofaf, on the other hand, is of opinion that it is similar to
the first instance,—“You are enlarged from the claim towards
me.”—Some, again, have said that, in all these cases, if the
claimant be present, it is requisite to demand an explanation from
him, since he has used a dubious expression.
The suspension of enlargement from bail on a condition is not lawful; because an enlargement of this kind, as well as that of other descriptions, involves an endowment with right of property, and the suspension of an endowment with right of property is not lawful*. — There is a tradition that such suspension is lawful; because, in fact, a surety is responsible for a claim, and not for a debt,—whence such enlargement is, like divorce, a mere annulment †, and therefore cannot be undone by the rejection of the surety §:—and the enlargement from bail being a mere annulment, it follows that the suspension of it upon a condition is lawful, in the same manner as the suspension of divorce or emancipation: in opposition to the enlargement of the principal; as that is an endowment with right of property, and may therefore be rejected by him.

Bail is not valid with respect to any right of which the fulfilment is impracticable by means of bail, as in cases of punishment or retaliation,—because proxies are not admitted in case of corporal punishment. But bail for the persons of criminals under the sentence of such punishments is lawful.

* An endowment with a right of property (such as a gift, for instance) must operate immediately, otherwise it is not valid.

† This doctrine is founded on the metaphysical distinction which the Mussulmans draw betwixt a debt and a claim. Thus where a person remits to another a debt contracted by borrowing, purchase, or the like, he, as it were, conveys or makes over so much property to that other:—but where he remits an obligatory claim upon another to answer the debt of a third person, he merely annuls a right of his own; for as that other had not in reality received any property from him, he cannot by such remission be said to have made over so much property to him.

§ A gift, or any deed vesting property in another, cannot operate without the consent of that other. On this principle a gift is not held to take place until the seizin of the donee, as, until then, it is in his power to render it void by a rejection. But it is not in the power of the surety to prevent the operation of the exemption in his favour by the rejection of it, as it is held to be an annulment of a right on the part of the claimant, and not a deed conveying property to him.

A PERSON.
A person may lawfully become bail, on the part of a purchaser, for the payment of the price, because price is a debt: but it is not lawful to become bail, on the part of the seller, for the merchandize; for that is substance, of which the compensation, in case of destruction, is insured, by means of something of a different kind, namely, the price; and although bail for insured substance be lawful in the opinion of all our doctors, still it is required that the substance be insured for a similar in kind, such as the subject of an invalid sale, an article seized in virtue of an intention to purchase, or an article usurped; but not for any substance which is insured for something of a different kind, such as the subject of a valid sale, or a pawn; nor for any substance held in the nature of trust, such as a deposit, a subject of rent, a loan, Mendribat stock, or partnership stock. — If, after the purchaser, in a case of sale, had paid the price, a person become bail for the delivery of the goods to him,—or if, in a case of pawnage, a person become bail for the pawnee’s restitution of the pledge,—or, in a case of hire, for the renter’s restoring the article hired,—in all these cases the bail is valid, because of the surety having engaged for the performance of what was due and incumbent.

If a person hire a quadruped for the carriage of a burthen, and another be bail for the animal carrying the said burthen, it is not valid, because of the animal being the property of another. — This, however, proceeds on a supposition of the hire having related to a specific animal; — for, if the animal be not specific, the bail is valid, as in that case it is in the power of the surety to supply an animal of his own for the carriage of the burthen. In the same manner, in case of a person hiring a slave for service, bail given for his performance of the service is invalid, as the slave is not the property of the surety, and he has consequently no power of enforcing what he has undertaken.

A contract of bail is not valid unless it be formed with the consent of the claimant. — This is according to Haneefa and Mobammed.

Aboo
—Abou Yoosaf alleges that a contract of bail is valid, if, having been formed without the knowledge of the claimant, it receive his assent on its being notified to him: and (according to several copies of the Mahfoor) his assent is not a condition.—This disagreement relates equally to bail for the person, and bail for property.—The reasoning of Abou Yoosaf, in support of his opinion, is, that as bail signifies an obligatory engagement, it is therefore binding on the person who undertakes it; and hence it would appear that it does not depend on the assent of the claimant: but the reason for suspending it upon his concurrence is the same as occurs under the head of marriage, treating of Fazoolee marriages; “The declaration of the surety that he has been come bail for a particular thing, on the part of a particular person, renders the contract complete; but as it is a deed affecting the claimant, (inasmuch as it invests him with a right to a claim,) it is therefore suspended upon his assent.”—The reasoning of the other two doctors is that bail creates a right; in other words, the surety constitutes the claimant proprietor of a claim upon him, which he accordingly demands from him after the completion of the contract.—Hence it follows that two points are necessary to the completion of the contract, namely, the speech of the surety, (which is equivalent to a declaration with respect to the claimant,)—and the speech of the claimant, (which is equivalent to acceptance.)—Now in the case in question there exists only one of these two requisites: the contract, therefore, is not suspended beyond the meeting; and consequently a contract of bail is not valid but through the consent of the claimant at the meeting:—excepting only in one instance,—namely, where a sick* person says to his heir, “be you bail for whatever debts I may owe,” and the heir becomes bail accordingly in the absence of the creditors; for in this case the bail is effectual, notwithstanding the absence of the creditors, upon a favourable construction,—for two reasons; First, the bail so contracted is, in effect, a will, and is therefore

* Arab. Mareaa.—Always meaning a person sick of a mortal illness.

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valid without the intervention of the claimant;—(and hence lawyers have remarked that this species of bail is not lawful unless when the sick person is in possession of property; because a will would not otherwise be lawful;) secondly, the sick person is the representative of his creditors, because he stands in need of being so, in order that he may divest himself of his obligations; and also, because this is attended with an advantage to the creditors.—The case is therefore the same as if creditors had themselves been present.

Objection.—If the sick person represent his creditors, it follows that his acquiescence is a necessary condition, in the same manner as that of the creditors, had they been present; and that the expression of "Be you bail on my part for whatever I owe," is not conclusive of the contract;—whereas this renders it conclusive.

Reply.—The bail founded on this speech of the sick person is valid, and his acquiescence is not required as a condition; because the meaning to be deduced from the speech is, evidently, a desire on the part of the sick man that the bail be concluded, and not merely a consultation respecting it; and his speech therefore resembles an order for the conclusion of a marriage, as already explained under the head of marriage.—(It is to be observed that if the speech of the sick person be addressed to a stranger, there is in that case a disagreement with respect to the validity of the bail.)

Is a debtor die without leaving any property, and another becomes bail to his creditors, such bail is not valid, according to Hameesfa.—The two disciples allege that it is valid; because it is undertaken on account of a debt, established as the right of the creditors, and which is still extant, since no person has discharged it, whence it still exists so far as relates to the laws of futurity; that is to say, the debtor, if it be not discharged, becomes a criminal before God Almighty.—As, also, if the surety were actually to discharge the debt, such discharge would be valid, being a gratuitous act of justice, in the same manner: bail for it is consequently valid.—The argument of Hameesfa in support
port of his opinion is, that the bail is in this case given for a debt which
is annulled with relation to the laws of this world; and the validity
of bail being founded on the laws of this world, it cannot be legally
given for what no longer legally exists.

If a person, by desire of another, should become his bail for one
thousand dirms which he owes, and the debtor give the surety one
thousand dirms by way of payment, prior to his [the surety's] having
paid the creditor, he [the debtor] is not in that case permitted to take
from the surety the money he has advanced to him, for two reasons.
First, the right of the possessor (namely, the surety) is connected
with the one thousand dirms on the probability of his having occasion to
pay them to the creditor, and therefore whilst such probability exists
the principal surety has no right to take them from him; similar to a case
where a person hastily (that is, before the stated time) pays Zakat to
the collector, in which case he would not be entitled to take it back
from him. Secondly, the surety becomes proprietor of the said sum
in virtue of the seizin, on a principle which shall be presently ex-
plained.—It is otherwise where the debtor gives the sum to the surety
by way of commission; (as if he were to say to him, "Take this sum
" and deliver it to the debtor;") because the surety does not become
proprietor in virtue of such a seizin: on the contrary, he is in such
case merely a trustee.—It is to be observed that where the surety thus
receives the thousand dirms, and becomes proprietor in virtue of such
receipt, he is not required to devote in charity whatever profit he
may acquire from it*; because in this instance the property vests in
him immediately on the receipt. Where he receives it after having
himself paid the debt, the reason of the property then vesting in him
is evident; and where he receives it before he has paid the debt, he

* That is to say, whatever profit may arise from it between the period of his receiving it,
and that of gratifying the claimant.

becomes
becomes proprietor immediately on the receipt.—The reason of this is, that the surety has a claim on the debtor for an article similar to that for which the creditor has a claim upon him: but the claim of the surety upon the debtor is suspended until he pay the debt to the creditor.—The claim of the surety, therefore, is in the nature of a debt to become due hereafter; (whence it is that if the surety should, previous to his having discharged the debt to the creditor, exempt the debtor from the claim he had upon him, such exemption would be valid.)—Now as an article similar to that for which the surety is responsible to the creditor is due to him by the debtor, it follows that on his receiving payment from the debtor he becomes proprietor in virtue of such receipt.—The degree of bajenesi, moreover, which obtains in such a transaction, (as shall be hereafter set forth) does not take effect, where a right of property exists, with respect to indefinite things; as has been already explained in treating of invalid sales.

In bail be given for a koor of wheat, and the principal deliver a koor of wheat to the surety, and he sell and acquire profit by the same, in that case the profit so acquired is, in the eye of the law, the right of the surety, on the principle already explained, of the property having vested in him in virtue of the receipt.—The author of this work observes, that in his opinion it is most laudable that the surety give the said profit to the debtor, although, in the eye of the law, this be not incumbent upon him: and such (according to one passage in the Jama Sagbeer) is the opinion of Haneefa upon this point.—The two disciples maintain that as such profit is the right of the surety, he ought not therefore to give it to the debtor: and this also is related as an opinion of Haneefa, as well as another, namely, that the surety ought to bestow it in charity.—The argument of the two disciples is that the profit, as having resulted from the property of the surety, becomes of consequence his right.—Haneefa, on the other hand, argues that, notwithstanding the existence of the property, there is still a degree of
of baseness in it, because it was in the power of the debtor to retake the Koor of wheat from the surety, and deliver it himself to the creditor; or, because, in delivering it to the surety, it is probable that he did it with a view that he should deliver it to the creditor. Now the baseness here operates in consequence of the thing to which it relates being definite; and the mode of purging such baseness is (according to one tradition) by devoting the profit in charity, or (according to another) by giving it to the debtor, as the baseness is occasioned by his right, and not by the right of the law.—This latter is the most authentic doctrine; but it prescribes only a laudable, and not an incumbent duty; for the right of the surety is clear.

If a person become bail, by desire of the principal, for a debt of one thousand dirms, and the principal afterwards desire him first to purchase on his account silks to the value of one thousand five hundred dirms, in the manner of an aynit, and then to resell the same, and discharge the debt by means of the price, and the surety act accordingly, the purchase so made is considered as on his own account, not on account of the principal, and he must, of consequence, sustain the loss arising from the aynit sale.—An aynit sale is where a merchant, for instance, having been solicited by a person for a loan of money, refuses the same, but offers to sell goods to the other on credit at an advanced price; as if he should charge fifteen dirms for what is worth only ten, and the other person agree to the same. This is termed an aynit or substantial sale, because it is a recession from a loan to a specific substance; (in other words, the merchant declines granting the loan required of him by the borrower, but agrees, in lieu thereof, to sell him the cloth, which is a specific substance;) and it is abominable, as being a recession from a loan of money, which is a laudable action, on a principle of avarice, which is a fordid quality.—With respect to the nature of the case in question, our doctors have disagreed. Some have asserted, that the direction given by the principal to the surety infers his [the principals] being responsible for any loss that may
may be sustained by the purchaser in consequence of the ayni sale, and that his direction in this particular is not a commission of agency; for this reason, that the order of the principal ("purchase filks as my account," implies this assumption of responsibility:—but a responsibility of this nature is invalid, since responsibility cannot hold except in an article in which the person who is responsible has some interest; and no person has any interest in the los in the present occasion. Others again say, that the direction in question amounts to a commission of agency: but that it is an invalid commission, as the filks to which it relates are not definite, neither is the price of them definite from an ignorance of how much it may exceed the amount of the debt.—The purchase of the filks is, in fact, considered as having been made on account of the surety, and the loss resulting from it falls entirely upon him, (not upon the principal,) since it was contracted by him.

Evidence cannot be heard in support of any claim against a surety which does not come within the description in the contract of bail.

If a person become bail on the part of another, for whatever may be proved to be due by him, or for whatever the Kasee may decree against him, and the debtor afterwards disappear, and a claimant offer to prove, by evidence, that the sum due to him is one thousand dirms, such evidence is not to be admitted; because here the bail is limited to whatever the Kasee may decree, as is evident from the expression "Whatever the Kasee may decree," and likewise from that of "Whatever may be proved to be due by him," since nothing can be proved but by the decree of the Kasee, and the claim in question has not this limitation:—it is therefore invalid, and accordingly the evidence in support of it cannot be heard.

A decree passed against a surety in the absence of the principal cannot affect the latter unless the bail were

If a person prefer a claim before the Kasee to this effect, "That an absenteew owes him a thousand dirms, and that a particular person present is, by desire of the debtor, bail for the same," and establish his assertion by testimony, in that case the Kasee must pass a decree against both the debtor and the surety.—If, however, the bail have
have been given *without* the desire of the debtor, the *Kāsee* must in that case decree the debt solely against the surety; and in this instance the evidence adduced by the claimant is admitted as sufficient, because the bail is *absolute*, and not *qualified*, as in the preceding case.—It is to be observed that the different decrees which the *Kāsee* gives in the case of *bail with* and *without*, the desire of the debtor, (that is, the decree against both, in the one case, and against the surety only in the other,) is founded on the difference which obtains in the nature of these two modes of bail;—for bail by desire of the debtor is a gratuitous deed in the origin, and a contract of exchange in the end; but bail *without* the desire of the debtor is a gratuitous deed both in its origin and its consequences.—Now where the claim relates to one only, the decree cannot be extended to the other. But if a decree should be passed relative to a surety by desire, it must necessarily include the principal, since the desire he expressed is a virtual acknowledgment of the existence of the debt.—It is otherwise with respect to a voluntary surety; for as the existence of the debt in that case is proved by his belief of it, in having undertaken the bail with regard to it, and not by any virtual acknowledgment of the debtor, the decree is therefore solely referred to him.—In the former case, (namely, that of bail by desire,) the surety is authorized to receive from the seller what he may have been obliged to pay on his account.—*Ziffer* maintains that he is not entitled to such compensation; because, having himself refused to pay, and having been compelled to it, he is of consequence in his own opinion oppressed; and it is not permitted to such as are oppressed to oppress others.—Our doctors, on the other hand, argue that whenever a refusal is undone by law, the opinion founded upon it becomes of consequence null.

If a person sell a house, and another become *Kafcel-be-l-dirk*, or *security against accident*, on his behalf, the security so given is a direct

* Dirk, signifies, properly, *any possible contingency*. *Kafcel-be-l-dirk*, therefore, means bail for what may happen.—In the present instance it alludes to the possibility of a claim being afterwards set up to the house by some other person, which, if substantiated, would annul the sale. declaration.
declaration of the house being the property of the seller.—If, therefore, the surety should afterwards prefer a claim of right to the house, such claim is inadmissible.—The reason of this is, that if the security be a condition of the sale, (as if the purchaser should have said, "I will buy the said house, provided a particular person will be security against any future claim to it," in that case the completion of the sale rests upon the agreement of the surety; and afterwards, when he prefers a claim of right to the house, he endeavours to destroy that which he had himself rendered complete:—if, on the other hand, the security should not be a condition of the sale, the surety, in that case, by agreeing to the bail, did, as it were, incite the buyer to the bargain, (since his desire of purchase was founded on the procurement of bail.)—The bail so given, therefore, is equivalent to a declaration of the right of property of the seller.

If, in the sale of a house, a person should attest the bill of sale, and put his seal to it, without giving any security, such testimony and affixture of seal is not an acknowledgment of the seller's right of property, and hence the witness may, if he please, afterwards claim the house, because attestation is neither a condition of sale, nor a declaration of the property of the seller, as it sometimes happens that men sell their own property, and sometimes that of others.—Besides, the witness may have made this attestation merely as a memorandum of the transaction; a supposition which the case of bail could not admit of.—Lawyers have remarked that if it be expressed, in the bill of sale, that "a certain person had sold such a house, which is his property, "by a complete and valid sale," and the person attest the writing to this effect, "Witness thereto," this is an acknowledgment and declaration of the seller's right of property.—If, on the other hand, he attest it thus, "Witness to the agreement of the buyer and seller," this is not a declaration of the seller's right of property.

SECTION.
SECTION.

Of ZAMINS, or GUARANTEES.

If an agent sell the cloths of his constituent, and hold himself responsible for the payment of the price to his constituent,—or, if a Manzrib sell the goods of his employer and hold himself responsible for the payment of the price,—the responsibility in either case is null: first, because surety or bail is an engagement compelling the undertaker to answer a claim; and as, in these cases, the agent and Manzrib are themselves the claimants for the price of the goods, it follows that if they were responsible for the same, they would be security on their own behalf, which is absurd:—and, secondly, because the goods remain in their hands in the nature of a trust; and trustees are not held by the law to be liable to responsibility.—If, therefore, they were held responsible, it would be contrary to the precepts of the law.—Hence the taking of security from them is null, in the same manner as a condition of responsibility is null with respect to a trustee or a borrower.

If two sharers in a slave sell him by one contract, and each of them be security to the other, on behalf of the buyer, for his payment of the proportion of the price due to that other, such security is null; because if the security were valid under a general copartnership in the price, it necessarily follows that each is in part security on behalf of himself, since every member of the slave is indefinitely shared between them;—or if, on the other hand, the security of each were valid with respect to the other's share in particular, this induces a division of a debt before the receipt of it, which is unlawful.—It is otherwise where two partners in a slave sell their shares by different contracts; as their security to each other, for the prices respectively due, is valid, since...
there is no partnership in this instance; because whatever is owing to each, respectively, in virtue of his particular contract, appertains solely to him, without any participation of the other;—whence it is that the purchaser is at liberty to accept the share of one of them only and to take possession of it, after the payment of the price; and also that he may take possession of the share of one of them only after paying to him his proportion, notwithstanding he may have purchased both shares.

If a person become security in behalf of another for tribute due by him, or for a nāwḍyeeb levied upon him, or for his kifṣmāt, all such securities are valid.—Security for tribute is valid, because tribute is in the nature of a debt, and may be a lawful subject of claim, as has been already explained: (in opposition to Zakīt, as that is a matter solely affecting him who pays it, in the manner of a gift, and of which his property alone can be the subject;—whence, after his death, it cannot be discharged out of his effects, unless prescribed in his will:)—and with respect to nāwḍyeeb, if it extend only to what is just, (such as exactions for digging a canal, for the wages of safe guards, for the equipment of an army to fight against the Infidels, for the release of Maffulman captives, or for the digging of a ditch, the mending of a fort, or the construction of a bridge,) the security is lawful in the opinion of the whole of our doctors.—But if nāwḍyeeb extend to exactions wrongfully imposed, that is, to such as tyrants extort from their subjects, (as in the present age,) in that case, concerning the validity of security for it, there is a difference of opinion amongst our modern doctors.—Sheikh Isām Alī is of the number of those who hold the security in this instance to be valid.—With respect to kifṣmāt, there is a difference of opinion concerning the meaning of the word.—Some allege that it signifies the same with nāwḍyeeb; whilst others define

* Nāwḍyeeb are all extraordinary aids beyond the established contributions, levied at the discretion of government to answer any particular emergency of the state.
it to be the same with Mowzifa Rāṣība, that is, fixed imposts which are exacted at stated periods, such as once in the month, or once in every two or three months.—Now nawūyeeb means the casual exactions made by the sovereign, which have no fixed or stated period. The law, however, is as above explained, with respect to both. If, therefore, the exaction be right, then the security for it is lawful, according to all our doctors; or if wrong, there is a disagreement with respect to the validity of the security.

If a person say to another, “I owe you a debt of one hundred dirms, payable a month hence,” and the other assert that the debt is immediately due, his assertion, as claimant, is to be credited.—But if a person should declare to another, “I am security to you, in being half of another, for a debt of one hundred dirms payable a month hence,” and the other assert that the debt is due immediately, the declaration of the surety is to be credited.—The difference between these two cases is, that in the former case the debtor makes an acknowledgment of the debt, and then claims his right to a suspension of payment for one month; whereas in the latter case the surety makes no acknowledgment of the debt, inasmuch as the obligation of the debt does not rest upon the bail or surety, as has been often before explained.—In fact, he has simply acknowledged a claim, to which he is responsible after the lapse of a month, which the claimant denies, asserting that he is answerable for such claim immediately;—and regard is paid, in law, to the affirmation of the defendant.—A clause of suspension, moreover, is merely an accidental property of a debt, and not an essential, whence it is that it cannot be proved unless it have been expressly stipulated.—The affirmation, therefore, of the person who denies the stipulation of such condition is creditable,—in the same manner as in the case of a condition of option, in sale.—Bail under a suspension, on the contrary, is one species of bail, in which the being suspended in its operation is an inherent quality, and not an accident; whence this species of suspension may be proved without
having been stipulated; as where, for instance, the debt due by the principal is a suspended debt. According to Shafei, the affirmation of the claimant is to be credited in either case; and the same is related as an opinion of Aboo Yooofa.

If a person purchase a female slave, and another warrant her to be the property of the seller*, and she afterwards prove to be the property of some other person, the purchaser is not entitled to exact the price from the surety, until the Kāzeen shall have first passed a decree against the seller for the restitution of the price;—because, according to the Zābir Rawbyet, the sale does not become null immediately on the proof of the subject of it being the property of another, but endures until the Kāzeen pass a decree in favour of the purchaser, directing the seller to return the price. Since, therefore, previous to the issuing the said decree, it is not incumbent on the principal (that is, the seller) to make restitution of the purchase money, so neither is it incumbent on the surety. It would be otherwise if the slave were proved to be free, and the Kāzeen pass a decree to that effect, for in such case the sale becomes null immediately on the issuing of such decree, since freedom is incapable of being the subject of sale, and the buyer would, therefore, be entitled to exact the purchase-money either from the surety or from the seller, without waiting for a decree of restitution from the Kāzeen.—It is related as an opinion of Aboo Yooofa, that sale becomes null immediately on the proof of the subject of it being the property of another; and that, consequently, the buyer has in such case a right to exact the price either from the surety or the seller, without waiting for the decree of the Kāzeen to that effect.

* Literally, “and another be bail against accident.”  † Arab. Zāmin be Obda.
[fulfilment] is of a comprehensive nature, as having a variety of meanings. I. It relates to the former bill of sale, which the seller received from the person who sold the slave to him; and this being the property of the seller, any security with respect to it is invalid. II. It relates to the contract and its rights. III. It relates to a warrant or security against accidents. And, IV. To option.—As, therefore, the term comprizes so many things, the particular application of it is dubious; and hence practice cannot take place upon it.—It is different with respect to the term dirk, for although that signify whatever may happen, yet the custom of mankind has restrained the application of it to one particular sense, namely, a security against any future claim; and Zimma-beil-dirk, or security against accident, is therefore valid.

If a person sell an article, and another be security to the purchaser for the release* of that article, such security is invalid, according to Hanefia, as the intention of it is the release of the article, and the delivery of it to the purchaser, which the security is not competent to perform.—The two disciples hold this to be valid, as in their opinion it is equivalent to a security against accident;—in other words, it imports an obligation to deliver to the purchaser either the article sold, the value, or the price;—and such being the case, it is valid of course.

* Arab. Khillā: meaning, the surrender of the article, by the seller, to the purchaser.
B A I L. Book XVIII.

C H A P. II.

Of Bail in which two are concerned.

If two men owe a debt in an equal degree, and each be security on behalf of the other, as where, for instance, two persons purchase a slave, jointly, and each is security on behalf of the other,—in this case, if either of them pay off a part, he has no right to make any claim on the other:—unless, however, the payment so made exceed a half of the whole debt, in which case he has a right to exact such excess from the other.—The reason of this is, that each of them is a principal with respect to one half of the debt, and a security with respect to the other half;—for what each owes in virtue of his being a principal is no bar to the obligation upon him as a security, the one being founded on debt, and the other on a claim, which is subordinate thereto.—Whatever payments, therefore, either of them may make are held to be in virtue of the former, namely, the debt, as far as that extends; and any excess is referred to the latter, namely, the security.

If two persons be bail for property in behalf of another,—in this way, that each surety, respectively, holds himself responsible for the other surety,—in this case, whatever either surety may pay, [in virtue of the bail,] whether the sum be great or small, he is entitled to exact the half of it from the other surety.—This proceeds upon a supposition that each of these two sureties, respectively, is bail for the whole property on the part of the principal, and likewise for the whole obligation on the part of his co-surety. Hence in each of the two sureties two bails are united; one on behalf of the principal, and one on behalf of the co-surety; and bail on behalf of a surety is lawful, in the same manner.
manner as on behalf of a principal, or as a transfer on behalf of a transferee; because the intention of a contract of bail is undertaking the obligation of a claim; and this end is answered by bail on behalf of a surety.—As, therefore, two bails are in this case united in each of the sureties, it follows that whatever payments are made by either of them are made, in an indefinite manner, on account of both; for the payment so made was purely in virtue of the bail; and each, with respect to the bail, stands in the same predicament; that is to say, neither has a superiority over the other.—(It is otherwise where each surety is a principal with respect to part of the debt, as in the first example; for in this case neither has a right to exact anything from the other on account of the payments he may make, unless such payments exceed the sum for which he is a principal, because the principal has a superiority.)—Now since, in the case in question, whatever payments either of the two may make are made indefinitely, on account of both, it follows that the person making such payments is intitled to exact the half of them from the other. And this induces no unnecessary revolution, because the intention of the contract, in the present instance, is that the parties be on a footing of perfect equality with respect to the bail, which can only be answered by the one party taking from the other the half of what he may have paid.—The other, therefore, is not entitled to retake it again from the person who has first paid, because this, if permitted, would destroy the equality already established.—(It is otherwise in the preceding case, for there each of the parties is a principal with respect to a portion of the debt, and consequently they are not on a footing of perfect equality with respect to the bail.)—When, however, one of the parties shall have taken the half from the other, then they are jointly entitled to exact the whole of what has been paid from the principal; since they paid the same on his behalf; the one making the payment immediately from himself, and the other doing it, as it were, by his substitute:—or the surety who paid is at liberty, if he please, to exact the whole of what he paid from the principal, because he was bail for the whole of the property by
by his desire.—If, in this instance, the creditor exempt one of the two sureties, he has a right to claim the whole from the other, because the exemption of a surety does not operate as an exemption in favour of the principal, and therefore the whole of the debt remains due by the latter; and the remaining surety being still bail for the whole of the property, it is consequently lawful to claim the whole from him.

If two partners by reciprocity dissolve their copartnership, and separate, whilst some of their debts still remain due, the creditors have in that case a right to claim the whole from whichever of them they please; because each of these partners is surety for the other, as has been already explained in treating of partnership.—Neither of the partners, moreover, has a right to make any claim upon the other for whatever payment he may have made to the creditors, unless such payment exceed the half of the debt, in which case he has a right to exact from him the payment of such excess, for the reason already explained, in discussing the case of reciprocal bail by two.

If a master constitute two of his slaves Mokātibī, by one contract, for a thousand dirms, (for instance) and each of them become bail for the other, in that case, whatever sum, from the whole amount covenanted to be paid by the master, is discharged by either, the half of that sum may be exacted from the other.—Analogy would suggest that the bail, in this instance, is not valid; because bail is valid only when opposed to a valid debt: and the consideration of Kitābat, or the degree of freedom bestowed upon a Mokātib, is not a valid debt, as has been already explained.—It is lawful, however, upon a favourable construction, by considering each of the slaves as a principal with respect to the obligation of the whole consideration of Kitābat, namely, a thousand dirms;—in other words, by considering each of them, respectively, as being responsible to the master for the payment of the whole; and, consequently, that upon his making payment of the
whole, the other obtains his freedom as a dependant,—in this way, that the freedom of both is suspended on their payment of one thousand dirms, and the master is at liberty to claim the said thousand from each of them; respectively, as a principal, not as a surety. Each, however, is considered as surety on behalf of the other, with respect to exacting a moiety of what he pays on account of the consideration of Kitábát.—(A particular explanation of this will hereafter be given in treating of Mokátsibs.)—From the explanation of the law in this case it appears that both slaves are equal with respect to the payment of the thousand dirms, which is the consideration of their Kitábát; and hence each is respectively entitled to take from the other a moiety of whatever part of the said thousand dirms he may pay.—If the master, in this case, should emancipate one of the slaves prior to his having made any payment on account of his Kitábát, in that case he becomes free; because his master, whose property he then was, chose to emancipate him.—He becomes likewise exempted from any obligation to pay his half of the consideration of Kitábát, because he acquiesced in that obligation merely as a means to obtain his freedom: but upon his becoming free in consequence of the emancipation of his master it exists no longer as a mean, and therefore ceases altogether.—The obligation, however, for the payment of an half, still continues incumbent upon the other, who remains a slave; because the whole amount of the consideration was opposed to the bondage of both; and the whole was considered as due from each, respectively, merely as a device, in order to render the bail of each in behalf of the other valid, and thereby to enable each to take from the other a moiety of what he pays.—But when the master emancipates one of them, there exists no further necessity for this device; whence the debt is then considered as opposed to them both, jointly. (not, in toto, to each respectively,) and is accordingly divided into two separate parts, of which one still continues due from him who remains a slave.—In taking this portion, the master is at liberty either to exact it from the freedman, in virtue of his being security, or from the slave, because of his being the principal.
principal.—If he take it from the freedman, the freedman is then entitled to retake it from the slave, because of his having paid it by his desire: but if he take it from the slave, he [the slave] is not entitled to take any thing from the freedman, because he merely pays a debt which he justly owes.

CHAP. III.

Of Bail by Freemen in behalf of Slaves, and by Slaves in behalf of Freemen.

If a person be surety in behalf of a slave, for some thing not claimable from the slave until after he recover his freedom, without specifying whether the thing in question is claimable immediately, or hereafter, in that case it is to be considered as immediately due;—that is to say, it is claimable immediately from the surety.—For instance, if an inhibited slave acknowledge his destruction of the property of any person,—or that he owes a debt which his master disavows,—or if, having married without the consent of his master, he should have had carnal connexion with the woman on the supposition of such marriage being valid, (in all which cases nothing could be exacted from the slave immediately, nor until he become free,) and a person be a surety for the compensation eventually claimable from the slave, he is liable to an immediate claim for it. The reason of this is, that the slave ought immediately to discharge the compensation, because there exists an evident cause of its obligation upon him, and a slave, in virtue of his being a man, is capable of being subject to obligation. He is, however, exempted from an immediate claim for the compensation,
compensation, because of his poverty, since everything he possesses is the property of his master, and his master is not assenting to the obligation. The surety, on the contrary, is not poor, and is therefore liable to the claim immediately, in the same manner as a person who becomes surety for an absentee or a pauper.—It is otherwise where a person becomes bail for a debt not immediately due, for there the surety also is not liable to an immediate claim, any more than the debtor, since the debt is suspended in its obligation to a future period by the consent of the creditor.—It is, however, to be observed that, in the case in question, the surety, on discharging the claim upon the slave, is not entitled to demand it from the slave until he shall have obtained his freedom; because the creditor had no right to demand it until that event; and the surety stands in the place of the creditor.

If a person advance a claim on an unprivileged slave, and another become surety for his person, and the slave afterwards die, the surety is in that case released from his engagement, because of the principal being released.—(The law is the same where the slave, in whose behalf bail for the person is given, is emancipated.)

If a person claim the right of property in a slave, and another become surety in behalf of the possessor of him, and the slave then die, and the claimant establish his right by witnesses, the surety is in that case responsible for the price;—because it was incumbent on the possessor to repel the claim, or, if he failed in so doing, to give the value for which the surety became answerable; and as the obligation, after the slave’s death, rests upon the principal, so also it now rests upon the surety.—It is otherwise in the preceding case; for there the obligation was merely to produce the person of the slave, which is cancelled by his death.
If a slave, who is not in debt, be surety for property in behalf of his master, or any other man, and be afterwards made free, and then pay the amount for which he was surety,—or, if a master become surety for property in behalf of his slave, whether he be indebted or not, and after emancipating him, pay the amount for which he stood security, in neither of these cases is either of the parties entitled to take anything from the other.—Ziffer maintains that in both these cases the parties have a right to recur to each other; that is, each is entitled to take from the other what he may have paid.—(it is here proper to remark that the reason for restricting the slave, in the first case, to one that is free from debt is, that if he were otherwise, he could not be surety for property in behalf of his master, since this would affect the right of his creditors.—The argument of Ziffer is that a ground of claim, (namely, bail by desire of the principal,) exists in both cases; and the bar to its operation (namely, slavery) is removed and done away.—The argument of our doctors is that the bail in these cases is not in the beginning a ground of claim, since neither can the master have a debt due to him by his slave, nor can the slave have a claim of debt upon his master.—Hence as no ground of claim existed in the beginning, it does not afterwards take place, in consequence of the removal of the bar to it, (namely, slavery;) for the law here is the same as where a person becomes surety for another without his desire, in which case the subsequent assent of the surety is of no effect.

Bail for the consideration of Kitâbat, whether the surety be a slave or a freeman, is not valid; because the consideration of Kitâbat is allowed to exist as an obligation merely from necessity, it being repugnant to reason, inasmuch as a master cannot have a claim of debt upon his slave; and in the case in question the Makâtib, or person who owes the consideration of Kitâbat, is supposed the slave of the claimant.—Hence the consideration of Kitâbat is not so fully established as to admit of bail for it,—because wherever a thing is established from necessity,
Chap. III. B A I L.

cessity, it is restricted entirely to the point of necessity. Besides, the debt of Kitâbat ceases entirely in case of the inability of the slave to discharge it; nor is it possible to revive it, by claiming it from the surety, because the meaning of bail is "the junction of one person to another person in relation to a claim."—As, therefore, the claim does not operate upon the principal, it of consequence ceases with regard to the surety; because it is a rule that a principal and his surety are both equally liable for the same claim.

A consideration, in lieu of emancipatory labour, resembles the consideration of Kitâbat, in the opinion of Haneefa, because, (according to him,) a slave that works out his freedom by labour is in the same predicament with a Mokâtib.
HAWALIT, in its literal sense, means a removal; and is derived from Tabool, which imports the removal of a thing from one place to another.—In the language of the law it signifies the removal or transfer of a debt, by way of security and corroboration, from the faith of the original debtor, to that of the person on whom it is transferred. The debtor or person who transfers the debt is termed Mobool: the transferee, or person upon whom the debt is transferred, Mobtal-ali bee, and the creditor, or transfer receiver, Mobtal.
Book XIX. TRANSFER OF DEBTS.

The transfer of a debt is lawful; because the prophet has said, "Whenever a person transfers his debt upon a rich man, and the creditor assents to the same, then let the claim be made upon the rich man;" and also, because the person upon whom the debt is transferred undertakes a thing which he is capable of performing; whence it is valid, in the same manner as bail.—It is to be observed, however, that transfer is restricted to debt; because it means an ideal removal; and an ideal removal, in law, applies to debt, and not to substance, which requires a sensible removal.

A contract of transfer is rendered valid by the consent of the creditor and transferee. The consent of the creditor is requisite, because the debt (the thing transferred) is his due; and mankind being of different dispositions with respect to the payment of debts, it is therefore necessary to obtain his consent.—The consent of the transferee is also requisite, because by the contract of transfer an obligation of debt is imposed upon him, and such obligation cannot be imposed without his consent.—The consent of the principal, on the contrary, is not requisite, because (as Mohammed observes in the Zeeadat) the engagement of the transferee to pay the debt is an act relative to himself, which is attended with a benefit to the principal, and is no way injurious to him, inasmuch as the transferee has no power of reverting to him, in case of having accepted the obligation without his desire.

When a contract of transfer is completed, the Mibool, or person who makes the transfer, is exempted from the obligation of the debt, because of the acquiescence of the transferee.—Ziffer has said that he is not exempted, because of the analogy which subsists between this case and that of bail; for they are both contracts of security or corroboration; and as, in the case of bail, the person who is bailed does not become exempted from the debt, so neither ought the transferrer in this case.—Our doctors, on the other hand, agree that Havalit literally means removal; and when a debt is removed from the
TRANSFER OF DEBTS. Book XIX.

faith of one person, it cannot afterwards remain upon it.—Bail, on the contrary, means a junction; and the intendment of it is, that the bailer unites his faith to that of the suretee with respect to the claim. Now the decrees of the law proceed according to the literal meaning; and the object of transfer, namely, corroboration, is obtained when a person that is rich and a fair dealer acquiesces in the obligation of the debt, as it is to be supposed that he will readily fulfil his obligation.

Objection.—If the debt shift from the faith of the debtor to that of the transferee, it would follow that there can be no compulsion on the creditor to receive payment from the debtor, where he offers to discharge the debt; in the same manner as a creditor is not compellable to receive payment of his debt from a stranger in a gratuitous manner.

Reply.—The creditor is compellable to receive payment of the debt from the debtor, if he offer to make payment, because the claim may eventually revert upon him, in case of the destruction of the debt; since if the transferee were to die insolvent, without having paid the debt, the claim would revert upon the transferrer, for reasons that will be shewn in the next case.—Hence, the payment of the transferrer cannot in every respect be considered as gratuitous, like that of a stranger.

The creditor is not entitled to make any claim upon the transferrer, excepting where, his right on the transferee being destroyed, he cannot otherwise obtain it; in which case the debt reverts upon the transferrer.—Shafei' alleges that the creditor has no right to make any claim for his due upon the transferrer, although his right be destroyed; because, in consequence of the transfer, the transferrer becomes exempted from the debt; and this exemption is absolute, and not restricted to the condition of payment from the transferee.—Hence the debt cannot revert upon the transferrer, except on account of some new cause; and none such is to be found in this case.—The argument
argument of our doctors is that, although the exemption be absolute, in the terms of the contract, yet it is restricted, in the sense, to the condition of the right being rendered to the creditor. The transfer is therefore dissolved in case of his right being destroyed; because the contract is capable of dissolution, and may be dissolved by the agreement of the parties. — The condition, moreover, of the safe delivery of the debt to the creditor, is equivalent to that of warranting the subject of a sale to be free from blemish; that is to say, such a warranty implicitly exists, as a condition, in every sale, although it be not specifically mentioned; and, in the same manner, the security of the debt exists, as a condition, in a contract of transfer, although not specified in it. — The destruction of the debt due to the creditor in a case of transfer is established, according to Hanefia, by one of two circumstances. I. Where the transferee denies the existence of the contract, upon oath, and the creditor cannot produce witnesses to prove it. II. Where the transferee dies poor. — In the event of either of these circumstances the debt is destroyed, since in neither case is it practicable for the creditor to receive payment from the transferee. — This is the true meaning of a destruction of the debt in a case of transfer. — The two disciples maintain that a destruction of the debt is occasioned by one of three circumstances. Of these, two are the same with those above recited; and the third is, — a declaration, by the magistrate, of the poverty of the transferee during his life-time. — This third circumstance is not admitted by Hanefia; because, according to his doctrine, poverty cannot be established by the decree of the magistrate, since property comes in the morning and goes in the evening; but, according to the two disciples, the decree of the magistrate establishes poverty.

If the transferee should demand, from the transferrer, the amount of what he has paid in virtue of the transfer made upon him, and the transferrer affirm that "he had made such transfer upon him, in exchange for a debt of the same amount which he owed him," the affirmation of the transferrer is not admissible, and he is bound to pay the demand of the transferee, because the

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The transferrer has a claim upon the debtor for whatever the trans- ferrer upon him.
TRANSFER OF DEBTS.  Book XIX.

reason of such demand, (namely, the actual payment of it by his desire) is established.—The transferrer, moreover, asserts a claim which the other denies; and the affirmation of the defendant is creditable.

Objection.—It would appear that the affirmation of the transferee is not to be credited, although he be the defendant; because he has acknowledged what he afterwards denies, inasmuch as his acceptance of the transfer is a virtual acknowledgment of the debt he owes to the transferrer.

Reply.—The acceptance of the transfer is not an acknowledgment of debt due to the transferrer, because contracts of transfer are sometimes made without the transferee's owing anything to the transferrer.

If a person, having deposited a thousand dœms with another, should afterwards make a transfer on it, (as if he were to desire his creditors to receive payment of his debt, from a deposit placed by him with such a person,) such transfer is valid, because the trustee is capable of discharging the debt from the deposit.—If, however, the deposit be destroyed, the transferee (who is otherwise a trustee) is in such case released from the engagement of transfer; because the transfer was restricted to the deposit, since the trustee engaged no further than the payment of the debt from the amount of the actual deposit.—It is otherwise with respect to a transfer restricted to usurped property; for if a person were to make a transfer on an usurper, on account of specific property usurped by him, and the said property be afterwards destroyed, the transfer so made does not become null: on the contrary, it is incumbent on the usurper to pay the creditor a similar,—or the value, in case the property in question had not been an article of which the unities were similar;—because, as a similar or the value is a representative of the thing itself, the property in this case is not held to have been destroyed.
Book XIX. TRANSFER OF DEBTS.

It is to be observed that transfers are sometimes restricted to debts due by the transferee to the transferrer;—and in all cases of such restricted transfers, the law invariably is that the transferrer has no right to make any claim upon the transferee, for the substance or the debt upon which he has made such transfer; because the right of the creditor is connected with it, in the same manner as that of a pawnholder is connected with the pawn; and also because, if such a right remained with the transferrer, the act of transfer (which is the right of the creditor) would be rendered null.—It is otherwise with respect to an absolute transfer; (that is, where a person simply says to his creditor "I have transferred the debt I owe you upon a particular person," without making any mention of debt being due to him, or of specific property of his being in the possession of that person, whether from deposit or usurpation;) for in this case the right of the creditor does not relate to the property of the transferrer, but rests entirely upon the faith of the transferee; and hence if the transferrer should receive payment of the substance or debt due to him from the transferee, still the transfer does not become null.

SIFITJA is abominable†; that is to say, the giving of a loan of any thing in such a manner as to exempt the lender from the danger of the road; as, for instance, where a person gives something by way of loan, instead of a deposit, to a merchant, in order that he may forward it to his friend at a distance.—The abomination in this case is founded on the loan being attended with profit, inasmuch as it exempts the lender from the danger of the road; and the prophet has prohibited our acquiring profit upon a loan.

† That is to say, it is disapproved, although not absolutely illegal. (See the meaning of the term abominable, p. 428.)
THE authority of a Kāzī is not valid, unless he possess the qualifications necessary to a witness; that is, unless he be free, sane, adult, a Musulman, and unconvicted of slander; because the rules with respect to jurisdiction are taken from those with respect to evidence, since both are analogous to authority; for authority signifies the passing or giving effect to a sentence or speech affecting another, either with or without his consent; and evidence and jurisdiction are both of this nature.
DUTIES OF THE KAZEE.

nature.—(The rules with respect to jurisdiction are here said to be "taken from those with respect to evidence," because, as the sentence of the Kazee is in conformity with the testimony of the witness, it follows that the evidence is, as it were, the principal, and the decree of the Kazee the consequent.)—As therefore, jurisdiction, like evidence, is analogous to authority, it follows that whoever possesses competency to be a witness is also competent to be a Kazee; and also, that the qualifications requisite to a witness are in the same manner requisite to a Kazee—and likewise, that an unjust* man is qualified to be a Kazee; whence if such a person be created a Kazee, it is valid, but still it is not admissible; in the same manner as holds with respect to evidence;—that is, if a Kazee accept the evidence of an unjust man, it is valid, in the opinion of all our doctors; but still it is not admissible to admit the testimony of such a person, since an unjust man is not deserving of credit.

If a Kazee be a just man at the time of his appointment, and afterwards, by taking of bribes, prove himself an unjust man, he does not by such conduct become discharged from his office,—but he is, nevertheless, deserving of a dismission.—This is the doctrine of the Zahir Rawdyet; and it has been adopted by modern lawyers.—Shafei maintains that an unjust man is incapable of the office of Kazee, in the same manner as (in his opinion) he is incompetent to give evidence.—It is related in the Nawadir, as an opinion of our three doctors, that an unjust man is incapable of discharging the duties of a Kazee.—Some of the moderns have also given it as their opinion that the appointment of a man originally unjust, to the office of Kazee, is valid; but that if, having been just at the time of his appointment, he afterwards be-

* Arab. Fásh.—In some instances the term applies merely to a person of loose character and indecorous behaviour. (See Vol. I. p. 74.) In the present instance, however, the character also includes want of integrity, as appears a little lower down.

He does not forfeit his office by misconduct.
come unjust, he stands discharged from his office; because, as the Sultan appointed him from a confidence in his integrity, it is to be presumed that he will not acquiesce in his discharge of the duty without integrity.

A question has arisen, whether an unjust man be capable of being a Moosite*; and on this subject different opinions have been given. Some have said that he is incapable of being a Moosite, because the giving of a Fitaṣa (or statement of the law applicable to any case) is connected with religion, and the word of an unjust man is not creditable in matters relative to religion. Others again have said, that an unjust man is capable of being a Moosite, because of the probability that he will toil and labour in the discharge of his duty, left the people charge him with his faults. The former, however, is the better opinion. Some have established it as a condition, that a Kāzeel be a Moosītabid†: the more approved doctrine is, however, that this is merely preferable, but not indispensable.

The appointment of an ignorant man to the office of Kāzeel is valid, according to our doctors. Shafeel maintains that it is not valid; for he argues that such appointment supposes a capability of issuing decrees, and of deciding between right and wrong; and these acts

* Moosite, an expounder of the law.—As the offices of Kāzeel and Moosite are frequently confounded by European writers, it may not be improper to remark, in this place, that the word Kāzeel (or Gadi) is derived from Kāži, signifying jurisdiction, and Moosite from Fitaṣa, meaning an application or statement of the law.—The Moosite, therefore, is the officer who expounds and applies the law to cases, and the Kāzeel the officer who gives it operation and effect.

† Moosītabid is the highest degree to which the learned in the law can attain, and was formerly conferred by the Madrasas, (or colleges); of which one of the first instances occurs in the life of Imam Refa, whom all the learned acknowledge as their superior.

cannot
cannot be performed without knowledge.—Our doctors, on the other hand, argue that a Kázeer's business may be to pass decrees merely on the opinions of others.—The object of his appointment, moreover, is to render to every subject his just rights; and this object is accomplished by passing decrees on the opinions of others.

It is incumbent on the Sultan to select for the office of Kázeer a person who is capable of discharging the duties of it, and passing decrees; and who is also in a superlative degree just and virtuous; for the prophet has said, “Whoever appoints a person to the discharge of any office, whilst there is another amongst his subjects more qualified for the same than the person so appointed, does surely commit an injury with respect to the rights of God, the Prophet, and the Mussulmans.”—It is to be observed that a Mofthábid means either a person who is in a high degree conversant with the Hadees or actions and traditional sayings of the prophet, and who has also a knowledge of the application of the law to cases; or one who has a deep knowledge of the application of the law to cases, and also some acquaintance with the Hadees. Some have said that he ought also to have a knowledge of the customs of mankind, as many of the laws are founded upon them.

There is no impropriety in selecting for the office of Kázeer a person who has a thorough confidence in his ability to discharge the duties of it; because the companions of the prophet accepted this appointment; and also, because the acceptance of it is a duty incumbent on mankind.

It is abominable to select a person for the office of Kázeer who suspects that he is incapable of fulfilling the duties of it, and who is not confident of being able to act with a strict regard to justice, because the selection of such a person is a cause of the propagation of evil.—Several of our doctors, however, have said that the acceptance of the office of Kázeer without compulsion is abominable, because the prophet has
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has said, "Whoever is appointed Kâzeo suffers the same torture with an "animal, whose throat is mangled, instead of being cut by a sharp "knife."—Many of the companions, moreover, declined this ap-

pointment; and Haneef persisted in refusing it, until the Sultan

caused him to be beaten in order to enforce his acceptance of it; but

he suffered with patience rather than accept the appointment. Many

others, in former times, have also declined this office.—Mohammed re-

mained thirty and odd days, or forty and odd days, in imprison-

ment, and then accepted the appointment.—In fact, the acceptance of the

office of Kâzeo, with an intention to maintain justice, is approved, al-

though it be more laudable to decline it; because it is a great undertak-

ing, and notwithstanding a person may have accepted it from an

opinion that he should have been able to maintain justice, yet he may

have erred in this opinion, and afterwards stand in need of the assist-

ance of others when such assistance is not to be had.—Hence it is most

laudable to decline it;—unless, however, there be no other person

so capable of discharging the duties of it, in which case the acceptance

of it is an incumbent duty, as it tends to preserve the rights of man-

kind, and to purge the world of injustice.

It becomes Mussulmans neither to covet the appointment of Kâzeo

in their hearts, nor to desire it with their tongues; because the pro-

phet has said, "Whoever seeks the appointment of Kâzeo shall be left "to himself; but to him who accepts it on compulsion, an angel shall de-

"scend and give directions;" and also, because whoever desires this

appointment shews a confidence in himself, which will preclude him

from instruction; and whoever, on the other hand, puts his trust in

God, will be secretly inspired with a knowledge of what is right in

the discharge of his office.

It is lawful to accept the office of Kâzeo from a tyrannical Sultan*,
in the same manner as from a just Sultan; because some of the com-

* The term tyrannical, when applied to a sovereign, generally signifies his being an usurper.

panions
panions accepted this office from Mosriah*, notwithstanding the right of government during his time remained with Alee; and also, because some of the followers† accepted it from Hijay‡, who was a tyrant.—
Hence the acceptance of the office of Kāzī from a tyrant is lawful;—provided, however, the tyrant do not put it out of the power of the Kāzī to render right to the people; for otherwise the acceptance of it would not be lawful, as the end of the appointment could not then be answered.

Whenever a person is appointed to the office of Kāzī, it is incumbent on him to demand the Druwān of the former Kāzī.—By the Druwān is meant the bags in which the records and other papers are kept; for those must be preserved to serve as vouchers on future occasions.—These bags, therefore, must always remain in the hands of the person possessing the judicial authority; and as the judicial authority rests, for the time being, with the person appointed to the office, he must therefore require them from the Kāzī who has been dismissed.—It is to be observed that the papers, in which such proceedings &c. are written, must necessarily be the property either of the public treasury, of the litigants, or of the dismissed Kāzī.—Still, however, in all these cases, the new-appointed Kāzī has a right to demand them from the late one:—in the first case, evidently; and in the second, because the litigants left the said papers in the hands of the late Kāzī, that he

* Mosriah, the son of Alee Sifwun. He had been originally appointed, by Othman, to the government of Syria; and suspecting Alee to be instrumental to the death of his patron Othman, (who was sometime after slain in an insurrection) refused to acknowledge him on his being elected to succeed Othman, and in the end obtained the Khaifat for himself, being the first Khaif of the house of Osmiah, commonly termed the Osmiah Khaifat.
† Arab. Tabayer.—A title given to those doctors, &c. who succeeded the Ilah, or companions of the prophet.
‡ Hijay Bin Yusufal Sāksiyya.—He had been originally appointed Governor of Arabian Irāk by Abdallāh, the 5th Khaif of the house of Osmiah, after which he defeated Abdalla bin Zabair, who had assumed the title.
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might act according to them; and as his power of action afterwards devolves upon the new Kássee, he is of course entitled to receive them; and also in the third case, because the late Kássee did not preserve them as property, but merely as the instruments of justice; and hence it is the same as if he had devoted them to the public.

It is requisite that the new Kássee send two Ameens*, in order to take possession of the bags of the Dewan in the presence of the late Kássee, or in the presence of his Ameen. It is also necessary that they ask and inquire of the late Kássee, which are the papers that register his proceedings? and which are those that establish guardians for the property of orphans? and that then the late Kássee arrange the several descriptions of papers in different bags, in order that no doubt may arise to the new Kássee.—It is to be observed, however, that this investigation is merely for the sake of knowledge, and not for the purpose of impeachment.

It is requisite that the new-appointed Kássee examine into the state of the prisoners, because this is one of the duties of his office.—Whoever of them makes an acknowledgment of right in favour of others, the new Kássee must render it obligatory upon him, as acknowledgment induces obligation on the acknowledger.—Whoever of them, on the contrary, makes a denial, the new Kássee must not credit the affirmation of the late Kássee with respect to him unless supported by evidence, because, in consequence of his dismission, his affirmation carries no more authority than that of any of the people in general; and the evidence of one person is not proof, more especially when such evidence relates to an action of his own.—If the late Kássee should not be able, in this last instance, to produce evidence, still the new one must not immediately release such prisoner; on the contrary,

* Anglois, trustees or confidants. It is the name of an office in the Kássee's court, in the manner of a register. It also signifies an inquisitor.
he must issue proclamation and use circumspection; that is, he must cause a person to proclaim, every day, that "the Kāzī directs that whosoever has any claim against such a prisoner do appear and be confronted with him."—If any person appear accordingly, and prefer a claim against the prisoner, the Kāzī must desire him to produce evidence:—but if no person appear, he must then release the prisoner, provided he see it advisable.—He must not, however, precipitate his imprisonment, before these precautions have been taken; because the imprisonment of him by the former Kāzī having been done apparently with reason, it is probable, if he should hastily release him, that the claimant against him might lose his right.

It is requisite that the new Kāzī examine into the deposits*, which the dismissed Kāzī may declare to be in the hands of particular persons, and also into the proceeds arising from the Wākî: [charitable appropriations] of Masulmans,—and that he act with these according to such evidence as may be established concerning them, or according to the acknowledgment of the person in whose hands are the deposits or the proceeds of Wākî, because evidence and acknowledgment are both proofs:—but he must not credit the affirmation of the late Kāzī;—unless the person in whose hands the property lies avow that "the said property was given in charge to him by the Kāzī;" in which case the new Kāzī may credit the affirmation of the old one with regard to such property, as it here appears, from the trustees acknowledgment, that the property in question had been in the possession of the dismissed Kāzī, whence it may be said to be still in his hands:—his affirmation, therefore, with respect to such property, must, in this case, be credited.—This proceeds on a supposition that the actual possessor had from the beginning acknowledged the dismissed Kāzī's consignment of the property to him: for

* Meaning, controverted property, held by the Kāzī until the issue of the suit or litigation, and which he delivers over to some person to keep, in the manner of trust.
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if he should first have declared "this property belongs to Zeyd," (for instance,) and afterwards, "the dismissed Kásee deposited this with "me," and the Kásee affirm it to be the property of some other than Zeyd, in this case he [the possessor] must give the property to Zeyd, in favour of whom he made the first acknowledgment, as his right is rendered preferable by such acknowledgment; and he must then give a compensation, also, to the dismissed Kásee, because of his having afterwards acknowledged that "the said property was in his custody;" —and the dismissed Kásee must give the compensation so received to the person in favour of whom he makes the affirmation.

It is requisite that the Kásee sit openly in a mosque for the execution of his office, in order that his place may not be uncertain to travellers or to the inhabitants of the town.—The Jüma mosque * is the most eligible place, if it be situated within the city, because it is the most notorious.—Shafei maintains that it is abominable for a Kásee to sit in a mosque for the execution of his duty, since polytheists are admitted into the court of the Kásee, and these are declared in the Koran to be šītb.—Moreover, women during their monthly courses may enter the court of the Kásee, but are not allowed admission into a mosque.—The arguments of our doctors on this point are twofold. First, the prophet has said "mosques are intended for the praise of "God and the passing of decrees;" and he moreover decided disputes between litigants in the place of his žettakîf [a particular penance] by which must be understood a mosque: besides, the Râfîdian Khâlis sat in mosques, for the purpose of hearing and deciding causes.—Secondly, the duty of a Kásee is of a pious nature, and is therefore performed in mosques in the same manner as prayers are offered there.

—in answer to Shafei, it is to be observed, that as the impurity of

* The Jüma mosque is the principal mosque in a town, where public prayer is read every Friday: in opposition to a Mâği, which signifies a smaller mosque, where public prayer is not read.
polytheists relates to their *faith* and not to their *externals*, they are not therefore prohibited from entering a mosque; and with respect to menstruous women, they have it in their power to give notice of their case to the Kāseer, who may then go out and meet them at the gate of the mosque, or depute some other for that purpose, as is done where the case is of a nature unfit for public discussion.

There is no impropriety in the Kāseer’s sitting in his own house to pass judgment; but it is requisite that he give orders for a free access to the people.

It is requisite that such people sit along with the Kāseer as were used to sit with him prior to his appointment to the office; because, if he were to sit alone in his house, he would thereby give rise to suspicion.

The Kāseer must not accept of any presents, excepting from relations allied to him within the prohibited degrees, or those from whom he was used to receive them prior to his appointment; neither of which can be esteemed to be on account of his office, the one being in consequence of relationship, and the other of old acquaintance.—Excepting these, therefore, he must not accept presents from any person, as these would be considered as given to him on account of his office, and such it is unlawful for him to enjoy.—If, also, his relation within the prohibited degrees, having a cause depending before him, should offer him a present, it is incumbent on him to refuse it.—So likewise, if any person accustomed to send him presents prior to his appointment should send him more than usual,—or if, having a suit before him, he should send him any presents whatever; in neither case is it lawful for him to accept them, since they would be considered as given to him in consequence of his office, and hence an abstinence from such is indispenisible.
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The Kāsēe must not accept of an invitation to any entertainment, excepting a general one; because a particular entertainment would be supposed to have been given on account of his office, and his acceptance of it would therefore render him liable to suspicion: in opposition to the case of a general one.—This ordinance, which has been adopted by the two Elders, applies equally to the feasts of relations and others.—It is related, as an opinion of Mohammed, that the Kāsēe may accept of an invitation to a feast from his relation, although it be a particular one, in the same manner as he is permitted to accept of presents from him.—It is to be observed that a particular entertainment means such as depends entirely on the presence of the Kāsēe; that is, such as would not take place in case of his absence; and a general one is the reverse.

It is fitting that the Kāsēe attend at funeral prayers; and also, that he visit the sick; for these are amongst the duties of a Mussulman, insomuch as the prophet, in enumerating six incumbent offices of the Mussulmans towards each other, mentioned funeral prayers and the visiting of the sick.—But it is requisite that, on these occasions, he make no unnecessary delay, nor permit any person to hold a conversation on the subject of his suit, lest he should thereby afford room for suspicion.

The Kāsēe must not give an entertainment to one of the parties in a suit without the other; because the prophet has prohibited this; and also, because it is of a suspicious nature.

When the two parties meet in the assembly of the Kāsēe, he must behave to both (in regard to making them sit down, and the like) with an equal degree of attention; because the prophet has said, "Let a strict equality be observed towards the parties in a suit with respect to their sitting down, or directing them, or looking towards them."
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The Kazee must not speak privately to either of the parties, or make signs towards him, to give him instructions or support his argu-
ment; for, besides giving rise to suspicion, he would thereby depress
the other party, who might be induced to forego his claim, from an
opinion that the Kazee was biased towards the other.

The Kazee must not smile in the face of one of the parties, be-
cause that will give him a confidence above the other; neither must
he give too much encouragement to either, as he would thereby de-
stroy the proper awe and respect due to his office.

It is abominable in the Kazee to prompt or instruct a witness, by
saying to him, (for instance) "Is not your evidence to this or to
"that effect?" Because assistance is thereby, in effect, given to one
of the parties; and it is therefore abominable, in the same manner, as
it would be to instruct either of the parties themselves.—Abū Tosaf
has said that instruction to a witness, on an occasion free from suspi-
cion, is laudable;—because a witness may sometimes be at a stand from
the awe with which he is struck in the assembly of the Kazee; and
in such case to encourage him, in order to give life to the right of his
party, is the same as the deputing of a person to compel the appear-
ance of the defendant in court, which is lawful, notwithstanding it
be an assistance to the plaintiff.—As, also, it is lawful to exact bail
from the defendant, although an assistance be thereby given to the
plaintiff; in the same manner it is lawful to give encouragement to a
witness, to preserve his right, although assistance be thereby offered
to one of the parties.

The Kazee must not give judgment when he is hungry or thirsty,
because such situations diminish the intellect and understanding of the
person affected by them. Neither must he give judgment when he
is in a passion, or when he has filled his stomach with food, because
the
the prophet has said "Let not the magistrate decide between disputants " when he is angry or full."

A young Kāzee ought to satisfy his passion with his wife before he sits in the court, that he may not be attracted by the view of women that may be present there.

SECTION.

Of Imprisonment.

When a claimant establishes his right before the Kāzee, and demands of him the imprisonment of his debtor, the Kāzee must not precipitately comply, but must first order the debtor to render the right; after which, if he should attempt to delay, the Kāzee may imprison him.—This is related in Kadooree; and it proceeds on the principle, that imprisonment is the punishment of delay;—whence it is necessary first to order him to restore the right to its owner, that his delay may be made apparent.—This is where the right is established by the debtor's acknowledgment; for in that case the non-payment on the first demand is not construed into delay; because it is possible that the debtor expects a respite, and therefore has not brought the money along with him. But if he should delay after the decree of the Kāzee, he must then be imprisoned, as his delay is then evident.—Where, on the other hand; the right is established by evidence, the defendant must be imprisoned immediately on the establishment of it; because his denial, which occasioned the necessity of proof by evidence, furnishes a sufficient argument of his intention to delay.
If a defendant, after the decree of the Kāzēe against him, delay the payment in a case where the debt due was contracted for some equivalent, (as in the case of goods purchased for a price, or of money, or of goods borrowed on promise of a return,) the Kāzēe must immediately imprison him, because the property he received is a proof of his being possessed of wealth.—In the same manner, the Kāzēe must imprison a refractory defendant who has undertaken an obligation in virtue of some contract, such as marriage or bail, because his voluntary engagement in an obligation is an argument of his possession of wealth, since no one is supposed to undertake what he is not competent to fulfil.—If, also, in this case, he plead poverty, this plea is nevertheless rejected, and the plaintiff’s assertion (of his being possessed of wealth) credited.—It is to be observed, that the obligation contracted from marriage, as here mentioned, relates only to the Mihr Modjal, or prompt dower, and not to the Mihr Mowjil, or deferred dower, because an engagement to pay a future debt does not argue the possession of wealth.—In cases, also, of debt of any other description, (such as a compensation for usurped property, amercement for crime, the consideration of Kitābat, compensation for the freedom of a partnership slave, the maintenance of a wife, and so forth,) the Kāzēe must not imprison the defendant when he pleads poverty; because none of these acts indicate the possession of wealth, and therefore his declaration of poverty must be credited.—If, however, the plaintiff prove that he is possessed of wealth, the Kāzēe must in that case imprison the debtor, under any of the above circumstances.—The distinctions here stated are from the Zābir Ruwāyet.—It is said, by other authorities, that the assertion of the plaintiff must be credited in every case of debt; that is, whether the debt be contracted in exchange for an equivalent, or voluntarily engaged for by the party; because poverty is the original state of man, and wealth merely supervenient, and thus the natural condition of man is an argument of the truth of the defendant’s declaration of poverty.—There is also another tradition, that the defendant’s declaration of poverty is
is creditable in every case of debt, excepting such as is contracted in exchange for an equivalent.

If a wife demand her subsistence from her husband, and he plead poverty, his declaration, corroborated by an oath, is to be credited.—In the same manner, if a person emancipate his share in a partnership slave, and his partner demand a compensation for his share, and he plead poverty, his declaration is to be credited.

Objection.—These two cases are conformable to the two last quoted traditions: but they are repugnant to the doctrine of the Zabir Rawbyet; for although, in virtue of the marriage in the one case, and the emancipation of the joint slave in the other, there exists in both a voluntary engagement of responsibility, which indicates the possession of wealth, still his declaration of poverty is nevertheless declared to be creditable.

Reply.—Subsistence to a wife is not an absolute debt, (that is, such as can be rendered void only by payment or exemption,) for it becomes void, according to all our doctors, without payment or exemption, in case of death.—In the same manner also, compensation for freedom is not an absolute debt, according to Hanefa, being in his opinion the same as the consideration of Kitabat;—and the doctrine of the Zabir Rawbyet alludes only to absolute debts.

In a case where the defendant pleads poverty, and the plaintiff proves, by evidence, his possession of wealth, the Kesee must imprison him [the defendant] for two or three months; after which it is requisite that he make an investigation into his circumstances; and if, upon such investigation, the people say he is wealthy, let him be continued in confinement:—but if they say he is poor, let him be released; because he stands in need of an allowance of time to enable him to acquire wealth; and the continuance of his imprisonment is, in such case, an oppression.—In Kadoore's abridgement, it is related that he is to be released from confinement, but that the plaintiff is not to be prohibited from using importunity with him.—The case of importunity will be more fully
fully discussed hereafter in treating of Hijr.—The period of imprisonment is fixed at two or three months, for this reason, that as the imprisonment is inflicted on account of contumacy, in the debtor's withholding payment of the debt, notwithstanding the Khazz's order, the Khazz must therefore imprison him until such time as he reveal his property, in case he have any concealed; and as it is requisite that the term be of some duration, to the end that this advantage may be obtained from it, Mohammed has therefore fixed it at the period above-mentioned.—Other authorities fix it at one month, at five months, and at six months.—In fact, this is a point which must be left to the discretion of the Khazz; because the conditions of men are various in regard to their endurance of the hardships of imprisonment, some being capable of bearing it longer than others; and hence the necessity of leaving it to the Khazz to act as he may deem best.—If the debtor prove his poverty by witnesses, prior to the expiration of the prescribed period*, in that case there are two traditions. According to one, the witnesses are to be credited: but according to the other their evidence is not to be admitted.—Many of our modern doctors follow the latter opinion.—It is related, in the Jama Saybeer, that if a person make an acknowledgment of debt before the Khazz, he [the Khazz] must in such case imprison him, and must then make enquiry of the people into his circumstances. If it appear that he is rich, he must in that case continue his imprisonment: but if his poverty be made apparent, he must release him.—The compiler of the Hedaya remarks that this alludes to a person who, having at one time made an acknowledgment of debt to the Khazz, or to some other, afterwards discovers an intention of delay; for otherwise it would differ from the doctrine of Khazz, before quoted, in which it is expressly declared that the Khazz ought not immediately to imprison a debtor after acknowledgment.

* This is an apparent contradiction to what immediately precedes concerning the discretionary power of the Khazz with respect to the period of imprisonment.—It is, however, merely a continuation of the doctrine of Mohammed, who has prescribed a term.
A husband may be imprisoned for the maintenance of his wife, because in withholding it he is guilty of oppression: but a father cannot be imprisoned for a debt due to his son, because imprisonment is a species of severity, which a son has no right to be the cause of inflicting on his father; in the same manner as in cases of retaliation or punishment.—If, however, a father withhold maintenance from an infant son, who has no property of his own, he must be imprisoned; because this tends to preserve the life of the child; and also because there is no other remedy, since maintenance (in opposition to debt) is annulled by the lapse of time, and therefore it is necessary to prevent its destruction for the future.

CHAP. II.

Of Letters from one Kāzī to another.

A letter from one Kāzī to another is admissible relative to all rights except punishment and retaliation, provided it be authenticated by evidence exhibited before the Kāzī to whom it is addressed, for which there is an absolute necessity, as will be shewn hereafter.

If witnesses exhibit evidence, before a Kāzī, against a defendant, the subject of the suit being at a distance, the Kāzī may pass a decree upon such testimony, because it establishes proof. The decree so made is written down, and this writing is termed a Sīdjīl or record, and
is not considered as the letter of one Kāzī to another.——If, however, the evidence be given in the absence of the defendant, the Kāzī must not pass a decree, it being unlawful to do so in the absence of the person whom it affects; but he must take down the evidence in writing, in order that the Kāzī to whom such writing shall be addressed may use it as evidence.——This writing is termed Kiṭb-Ḥawāzī, or the letter of one Kāzī to another, and is a transcript of real evidence.——It is to be observed that the transmission of letters of one Kāzī to another is restricted to several conditions, which will hereafter be explained; and the legality of it is founded on its necessity, since it may often be impossible for the plaintiff to bring the defendant and the evidences together in the same place, because of the distance of their abodes.——Hence the letter of one Kāzī to another is, as it were, the evidence of evidence, or a branch from the trunk.——It is also to be observed that the term right, above used, comprehends debts, and also marriage dowers, portions of heirs, usurpations, contested deposits, or Mazārib stock denied by the manager; because all these are equivalent to debt, and are capable of ascertainment by description, without the necessity of actual exhibition.——Letters from one Kāzī to another are also admissible in the case of immovable property, because it is capable of ascertainment by a description of its boundaries:——but they are not admissible with regard to moveable property, because, in that case, there is a necessity for actual exhibition.——It is related as an opinion of Aboo ʿOof, that letters from one Kāzī to another are admissible with respect to a male slave, but not with respect to a female, because the probability of elopement is stronger in the one than the other.——It is also related as an opinion of his, that they are admissible with respect to both male and female slaves, but that particular conditions are requisite to esta-

* This case supposes the thing in dispute to be situated in the jurisdiction of a different Kāzī from him before whom the parties bring their suit; and the decree which in this case the Kāzī gives being written down, is carried to the other Kāzī, who is bound to see it enforced.
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Blith their admissibility, which will be explained in their proper place.
—It is related as an opinion of Mohammed, that the letters of a Káziee are admissible with respect to every species of movable property; and this opinion has been adopted by our modern doctors.

The testimony requisite to authenticate it.

The letters of Káziee are not admissible, unless authenticated by the testimony of two men, or of one man and two women; because there is a similarity between all letters, and it is therefore necessary to establish their authenticity by complete proof,—that is by evidence.
—The grounds of this is, that these letters are binding in their nature, and therefore require to be completely proved.—It is otherwise with respect to the letters of Híresees [Infidel aliens] to the Índes, soliciting protection; for these require not to be proved by evidence, since they not binding in their nature, inasmuch as it rests with the Índes to grant the protection or not at his pleasure.—It is also otherwise with respect to the message of a Káziee to a Maszkees [purgator of witnesses.] or with respect to the message of a purgator to the Káziee, for such a message has no force, considered as the message of a purgator, but merely as being a corroboration of the testimony of witnesses.

It is incumbent on the Káziee to read his letter in the presence of the witnesses who are to authenticate it, or to explain the contents of it to them, that they may have a knowledge thereof; because evidence cannot be given without knowledge. Afterwards he must close the letter, and affix his seal to it in their presence, and then confine it over to them, that they may have a security against any possibility of alteration in it.—This is according to Haneefá and Mohammed; and the reason is, that a knowledge of the subject of the letter, and an evidence of the affixture of the seal, are indispensable requisites; and in the same manner a remembrance of the contents is also requisite; whence it is that the Káziee must furnish them with an open copy of the letter, with which they may refresh their memory.—It is however related, as the last opinion of Aboo Yoosuf, that no one of these particulars
particulars is requisite, it being sufficient to attest that this is the letter and this the seal of the Kázeé; and it is also reported, from him, that the affixture of the seal is not necessary.—Hence it appears that, after his attaining the dignity of Kázeé, he considered this matter as of little consequence; and his opinion is of great weight, since those that only bear are not so competent to determine as those that see.—Shimsal-Ayma has adopted the opinion of Aboo Yousof.

When a letter from a Kázeé arrives, the Kázeé to whom it is addressed ought not to receive it unless in the presence of the defendant; because such letter is equivalent to an exhibition of evidence, the presence of the defendant is therefore indispensible.—It is otherwise with respect to the other Kázeé’s hearing the evidence, because that is done merely with a view to transmit it, and not to pass sentence upon it.

When the witnesses bring the letter to the Kázeé to whom it is addressed, let him first look at the seal of it, and after hearing their testimony, (that “this is the letter of a particular Kázeé,”—that “he delivered it to them in his court of judgment,”—that “he read it in their presence,”—and, that “he affixed his seal to it before them,”) let him then open and read it in the presence of the defendant, and pass a decree agreeably to the contents.—This is according to Haneefa and Mohammed.—Aboo Yousaf has said it is sufficient for the witnesses to attest that “this is the letter and seal of such a Kázeé.”—In the Kadooeree, the proof of the integrity of the witnesses prior to the opening of the letter is not made a condition.—The better opinion, however, is that it is a necessary condition; and the same has been declared by Kbaaf’; for this reason, that there may eventually be a necessity to recur to other evidence, in case of a want of proof of the integrity of those that brought it; and it would be impossible for any others to give their testimony unless the seal still remained upon it: it is therefore absolutely necessary that the Kázeé defer
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defer breaking the seal of the letter until the integrity of the bearers be proved.

One Kâzee must not accept a letter from another, unless the Kâzee that wrote it be, at the time, still fixed and established in his office.—If, therefore, prior to the receipt of the letter, the Kâzee that wrote it should have died, or have been dismissed from his office, or have become disqualified from the duties of it, from apostacy or insanity, or from having suffered punishment for slander,—the Kâzee to whom the letter is addressed must then reject it; because the author of it being at that period reduced to the level of the people, any information from him, independent of what relates to himself, or mutually to them both, is not admissible.—So likewise, if the Kâzee to whom the letter is addressed should have died, another Kâzee must not open it, unless the address run in this manner, “To the son of —— Kâzee of the ‘city of —— or to whatever Kâzee it may concern, this letter,”—in which case another Kâzee may receive it, because he is comprehended in the address from the specification of his office and city.—If the address, however, be merely, “To whatever Kâzee it may concern,” he is not entitled to open it, from the uncertainty of the address.

If the defendant die previous to the arrival of the letter with the Kâzee, judgment must be passed upon it in presence of his heir, as being his representative.

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

SECTION
A woman may execute the duties of a Ḫāzī in every case except punishment or retaliation, in conformity with the rule that the evidence of a woman is admissible in every case except in cases of punishment or retaliation; for the rules of jurisdiction are derived from the rules of evidence, as was before stated.

It is not permitted to a Ḫāzī to appoint a deputy, unless he have received a special power from the Imām to that effect; for although he have been himself appointed to the office of Ḫāzī, yet he has not been empowered to confer such appointment on another.—Hence, in the same manner as it is unlawful for an agent to appoint an agent unless with the permission of his constituent, so is it unlawful for a Ḫāzī to appoint a deputy unless by the authority of the Imām.—It is otherwise with respect to a person appointed to read the Friday’s prayers; for he may appoint a deputy to act for him, since if any delay should happen in the performance of this service, the prayers would become void and null, as the period for them is fixed: the appointment of a person to read these prayers, therefore, is virtually an argument of his being empowered to appoint a deputy to act for him, with a view to prevent the nullity of the service:—contrary to jurisdiction, which not depending on a fixed period, is not therefore defeated by delay.

If a Ḫāzī, not having power to appoint a deputy, should nevertheless appoint one, and the said deputy, either in presence of the Ḫāzī, or in his absence but with his approbation, pass a decree; the decree so passed is valid;—in the same manner as where the agent of an agent performs any act in the presence of the agent, or with his consent, in which case such act is valid.—The ground of this is that the decree.
cree being passed in the presence of the Káizee, or with his approba-
tion, and the act being performed in the presence of the agent, or with
his approbation, the judgment and reflection of the Káizee himself is
therefore exercised in the case of the decree passed by his deputy,—
and the judgment and reflection of the agent in the case of the deed
done by his agent,—which is what was required.

If he appoint
a deputy, by
authority, he
cannot after-
wards dismiss
him.

If the Imám give authority to the Káizee to appoint whomsoever
he pleased his agent, the person whom he appoints becomes in that
case the deputy of the Sultan; and the Káizee is not entitled to dismiss
him.

He must main-
tain and en-
force the
equal decrees
of every other
Káizee.

It is incumbent upon every Káizee to maintain and enforce the
decree of another Káizee, unless such decree be repugnant to the doc-
trine of the Korán, or of the Sonna, or of the opinions of our doctors;
in other words, unless it be a decision unsupported by authority.—
It is related, in the Jama Sagheer, that if a Káizee passes a decree in a
matter concerning which different opinions have been given, and be
afterwards succeeded by another Káizee of a different opinion with re-
spect to that matter, the latter Káizee must nevertheless enforce the
decree so made; for it is a rule that when a Káizee passes a decree in
a doubtful case, the decree is executed accordingly; nor is it permitted
to a succeeding Káizee to rescind it, because although the succeeding
Káizee be equal in point of judgment to his predecessor, still the judg-
ment of the predecessor is in this instance allowed a superiority, be-
cause of its having been exercised in passing the decree; and there-
fore it cannot be affected by the judgment of his successor, which is
deemed inferior from its not having been exercised.

His determina-
tion in a
doubtful case
is valid, al-
though it be
repugnant to

If a Káizee, in a doubtful case, determine contrary to his tenets,
from having forgotten the principles of his sect, such decree must ne-
evertheless be enforced, according to Hanefia.—If, on the contrary, he
passes such decree knowingly, and not through forgetfulness, there are
in
in that case two opinions recorded.—According to one, the decree
must be enforced in that instance also, because the error in it is un cer-
tain.—In the opinion of the two disciples the decree must not be
enforced in either case; that is, whether the error be wilful, or pro-
ceed from forgetfulness: and this is the approved exposition.—By a
doubtful case is meant one in regard to which there is no particular
ordinance, either by the word of God, or by the prophet, and con-
cerning which, consequently, different opinions have been supported
by the companions and their followers.—Where a great number, how-
ever, have concurred, and only a few have differed, it is not considered
as a doubtful case.

Every thing of which the illegality is decreed by the Kāzeē from
apparent circumstances, that is to say, from the testimony of wit-
nesses, although in reality such testimony be false, is nevertheless ipso
facto unlawful.—* This is according to Hanaesa: and he is also of the
same opinion where the Kāzeē decrees the legality of a thing; pro-
vided, however, that the claim of the plaintiff be founded on some
determinate plea, such as purcbafe, lease, or marriage,—as if, for in-
fstance, he should claim a female slave by asserting that he had pur-
cbafed her.

The Kāzeē must not pass a decree against an absentee unless in the
presence of his representative.—Shafēē maintains that it is lawful for
a Kāzeē to pass a decree against an absentee; because, upon the esta-
blishment of proof by testimony, the right in the judgment of the
Kāzeē becomes evident.—The arguments of our doctors upon this
point are twofold.—First, the passing of a decree on the testimony of
witnesses is with a view to put an end to contention; and as conten-

* For instance, if two people declare that there is a drop of wine in a particular vessel
of water, and the Kāzeē in consequence decree it to be unlawful, it must be considered as
such, although the falsity of their declaration be afterwards proved.
tion supposes a refusal on the part of the defendant, it follows that as his absence precludes the possibility of his refusal, no contention can have existed. Secondly, the absence of the defendant admits of two suppositions, namely, that (if present) he would either have acknowledged the claim, or denied it: if the former, the Kāzee must have passed a decree upon that ground; or, if the latter, upon testimony. Now decrees passed on those different grounds are of a distinct nature, since that which is founded on testimony is binding on all men, whereas the other is not.—Where, therefore, the defendant is absent, it becomes a matter of doubt with the Kāzee what kind of decree he ought to pass; and hence it is requisite that he suspend it until the arrival of the defendant, when the nature of the decree he ought to pass will be ascertained.

If a defendant, having first denied the claim, should afterwards disappear, in that case also the Kāzee must suspend his proceedings during his absence, because it is requisite that the denial exist at the time of passing the decree, which is not the case in the present instance.—The opinion of Aboo Yoosuf, on this case, is different.—It is to be observed that the representative of an absentee is either one appointed by himself to act for him, (such as an agent,) or one appointed by law, (such as an executor nominated by the Kāzee,) or, lastly, one who stands as virtual representative, by the claim which the plaintiff prefers against the absentee being also a cause of claim against some person present. This last may occur in various modes; and the following may serve for an example.—A person establishes, by testimony, his right to a house in the possession of a particular person, in virtue of his having purchased it from an absentee, who was at that time the proprietor of it, and from whom the present possessor has usurped it;—in which case, if the possessor deny all this, and the plaintiff establish it by evidence, the Kāzee may pass a decree relating both to the absentee and the person present; nor would the denial of the sale by the absentee, if he should afterwards return, be credited,
credited, because the purchase of the house from its proprietor is the cause of that which the plaintiff claims from the person present, namely, the right of property in the house. In such case, therefore, the person present stands as the agent for the absentee, and his denial is consequently equivalent to that of the absentee.—The ground of this is that the plaintiff is not capable of proving his claim against the person present, unless he first establish it against the absentee. The person present is therefore considered as the representative of the absentee; and hence the decree of the Kāzée against the person present stands as a decree against the absentee.—Where, however, the claim of the plaintiff upon the absentee is the condition of something which he claims against the person present, the latter is not in that case considered as the representative of the absentee. A full discussion of this is to be found in the ḫāma.

It is lawful for a Kāzée to lend the property of orphans, keeping a record of it in writing; because such loan is advantageous for the orphans, since it tends to preserve and secure their property; and the Kāzée has the power of enforcing the restitution of it.—An executor, on the contrary, is responsible for the property he lends, as is also a father, because neither of them has the power of enforcing a restitution of it.

The Kāzée may lend the property of orphans.
CHAP. III.

Of Arbitration.

If two persons appoint an arbitrator, and express their satisfaction with the award pronounced by him, such award is valid; because, as these persons have a power with respect to themselves, they consequently possess a right to appoint an arbitrator between them, and his award is therefore binding upon them.—This is where the person so appointed possesses the qualifications of a Kāzī; for as he stands in that relation to the other two, it is therefore requisite that he be competent to discharge the function of a Kāzī.

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

If an unjust man be appointed an arbitrator, it is valid, because of the validity of his appointment to the office of Kāzī, as has been already explained.

If two men appoint another an arbitrator, still it is lawful for either of them to recede before he gives his award, because as the arbitrator has received his powers from them, he cannot exert those powers without their consent. The award, however, when given, is binding upon them, as the power of the arbitrator over them was established by their own agreement.

* Arab. Tabkum.  † Arab. Hakam.
If the parties refer the award of the arbitrator to the Kázee; and it be conformable to his opinion, he must cause it to be carried into execution, because it would be useless to annul it, and then pass a similar decree.—But if it be contrary to his opinion, he must annul it, as the award of an arbitrator is not binding on the Kázee, since he did not authorize it.

The appointment of an arbitrator is not valid in cases where punishment or retaliation is incurred; because the party has no power over his own blood, and is therefore not capable of assigning it to others. Lawyers have observed that the particular exception of retaliation and punishment affords an argument of the legality of arbitration in all other contested questions, such as divorce, marriage, and the like. This is approved. Still, however, there is a necessity for a ratification of the award in these cases by a decree of the Kázee, in order that a controul being maintained over mankind, their presumption may be restrained, for otherwise men would continually settle their differences by a private reference, without regard to the Law.

If, in a case of homicide from error, the slayer and the heir of the deceased appoint an arbitrator, and he award a fine of blood to be paid by the tribe of the slayer, such award is of no effect; in other words, the heir is not entitled to exact such fine from the tribe in virtue of the award, for it has no force over them, as they did not authorize the arbitrator.—If, also, the arbitrator award the fine to be paid by the slayer, the Kázee must annul it, as being contrary to the Law, which prescribes the fine to be paid by the tribe;—excepting, however, where the fact is proved by the confession of the slayer; for in that case the tribe are not liable to the fine.

An arbitrator is empowered to hear the witnesses of the plaintiff, and he may examine witnesses.
and also to pass an award upon the denial or acknowledgment of the parties, because this is agreeable to the law.

If an arbitrator give information to the Kásee of the acknowledge-ment of one of the parties, or of the integrity of the witnesses, at a time when both the parties continue to adhere to his award, such in-formation must be credited, and the Kásee must not afterwards credit the denial of either of the parties, as the arbitrator’s authority still continues unshaken.—If, on the other hand, he give information to the Kásee relative to his award,—(that is, if the parties dispute con-cerning his award,—one of them saying that “it was to such or such effect,” and the other denying this, and the arbitrator inform the Kásee that “he has awarded so and so,”)—his information must not be credited, since in such case his authority no longer endures.

Any award passed in fa-vour of a pa-arent, child, or wife, is null.

The determination of every person acting in the capacity of a judge (whether he be a Kásee or an arbitrator) in favour of his fa-ther, his mother, his child, or his wife, is null and void, because evidence in favour of any of these relations being unlawful on account of the suspicion which it sug-gests, a determination in their favour is also unlawful, for the same reason.—A determination, however, against any of these relations is valid, because evidence against them is accepted, since it is liable to no suspicion.

Joint arbitra-tors must act conjunctive-ly.

If two persons be appointed arbitrators, it is incumbent upon them to act conjunctively in giving a determination, as this is a matter which requires wisdom and judgment.

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section.
S E C T I O N.

MISCELLANEOUS CASES relative to JUDICIAL DECISIONS.

In a house, of which the upper story belongs to one man, and the under story to another, the proprietor of the under story is not entitled to drive in a nail, or to make a window, without the permission of the proprietor of the upper story.—This is the doctrine of Haneefa. The two disciples hold that the proprietor of the under story may do any act whatever with respect to it, provided no injury result to the upper story. The same disagreement also subsists with regard to the proprietor of the upper story building upon that foundation. Some of our lawyers remark that the doctrine ascribed to the two disciples is only an explanation of that of Haneefa, and that, in reality, there exists no disagreement between them.—Others again say that, according to the two disciples, there is a perfect freedom;—in other words, either of the proprietors is at full liberty to do whatever act he pleases with relation to his property; for property, in its very nature, implies a perfect freedom with regard to it, restrictions upon it being merely supervenient, and fixed in order to prevent any detriment to another. Hence if the detriment be only doubtful, and not inevitable, the proprietor cannot lawfully be restrained from acting upon his own property: According to Haneefa, on the other hand, there is a restriction;—in other words, neither of the proprietors is permitted to do any acts with regard to their respective property without the permission of the other, because such acts affect a place with which the right of another is connected, and that right is sacred from any act of his, in the same manner as the right of a mortgager or a lesee.—Besides, the freedom and absoluteness of the property to its owner is here supervenient, since it depends on the consent of another: So long, therefore,
therefore, as that consent is doubtful, the original restriction operates. In these cases, moreover, the detriment is not eventual, but is in some degree certain; since the driving in of a nail or wedge, or the breaking of the wall to make a window, tends to weaken the edifice, whence these acts are prohibited.

If there be a long lane, parallel to which, either on the right or left, runs another long lane, not a thoroughfare, (that is, not open at both ends,) it is not permitted to any of the inhabitants of the first lane to make a door to open into the second lane; because the object of making a door is to obtain a passage to and fro; and the second lane is not free to the inhabitants of the first, since not being a thoroughfare, the right of passage through it belongs only to the inhabitants of it.—Some have said that it is perfectly lawful for any of the inhabitants of the first lane to open a door into the second; because the opening of a door is nothing more than the breaking of a wall by its proprietor, which is lawful; but that the prohibition against passing to and fro nevertheless remains in force. The authentic doctrine however is, that the opening of a door, in such case, is unlawful; because after the door is opened it will be difficult to prevent a continual thoroughfare; and also, because there is a possibility that after some time the right of passage might be claimed by the person who made the door, and the very circumstance of the door might be pleaded as a proof of his right. If, however, the second lane be not long, but short, the inhabitants of the first lane have a right to open doors into it; because they have a right of passage through it, since on account of its shortness it is considered as a court, in which all have a right of participating, whence it is that they have all an equal claim of Sophia in case of the sale of any of the houses in it.

If a person vaguely claim something belonging to a house, and the proprietor of the house deny his right to any thing, but afterwards
wards compound with him for his claim, such composition is valid; for although the article in dispute was not known, yet a composition with a known article for one that is unknown is lawful, according to our doctors, since as the article compounded for merely drops, the uncertainty concerning it can never create strife;—for uncertainty, in a matter which drops, leaves no room for contention, as this cannot occur but in cases of uncertainty respecting things the delivery of which is required.

If a person claim a house in the possession of another, on the plea that "the possessor had, at a former period, made a gift of it to him," and upon being required to produce evidence, should then say "he denied the gift, and I therefore bought the house from him," and produce witnesses, and they attest the purchase, but state the date of it to be antecedent to the gift, such testimony is not admissible, because of its differing from the assertion of the claimant with respect to the date of the deeds;—whereas, if they were to attest the purchase as having been made posterior to the gift, their testimony would in that case be admitted, because of its conformity to the claimant's plea. If, on the other hand, he plead a gift, and then bring witnesses to prove the purchase previous to the gift, without mentioning the denial of the gift by the donor, in this instance also the evidence is not admissible.—This is mentioned in various copies of the Jams Sagheer; and the reason of it is that the claim of the house, in virtue of a gift, is an acknowledgment of its being the property of the giver; but from which the claimant afterwards recedes by declaring that he had purchased it prior to the gift, which is a contradiction.—It is otherwise in the former case; for there the purchase is declared to be posterior to the gift; and a declaration to this effect, so far from denying the property to have existed in the donor at the time of the gift, is rather a confirmation of it.
If a person possessed of a female slave say to another "you purchased this slave from me, and have not paid me the price," and the other deny the sale, and the possessor of the slave determine in his own mind to drop the suit, and of consequence refrain from any further contention with the other, he may then lawfully cohabit with her, since the denial of the purchaser annuls the sale in the same manner as where both parties deny it.

Objection.—How can the sale be annulled by the mere determination of the seller in his own mind to relinquish the suit, since no contracts can be annulled by the mere determination to annul them; whence it is that, in a sale with an option, if the possessor of the option determine to annul it, still the annulment does not take place immediately on the forming of such resolution?

Reply.—In the case in question the sale does not become null merely by the determination, but because of the determination being joined to a conduct that manifests it, such as the detention of the slave in the proprietor's possession, his carrying her away from the place of contention to his own house, and his using her as a servant.

If a person acknowledge that he had received ten dirms from another, but afterwards assert that they were Zeyfs, or bad, in that case his declaration must be credited; because bad dirms, although of an inferior value, are nevertheless of the species of dirms, whence if, in a Sisf sale, a person take possession of bad ones in exchange for good, it is valid. As, moreover, a receipt of dirms is not restricted to good ones, it does not follow, from his acknowledgment of the seizin, that the dirms were good; and such being the case, his declaration must be credited, because he denies the receipt of good dirms, which is his right.—It would be otherwise if he were to declare that "he had received ten good dirms," or that "he had received his right," or "the price of his wares," or "a discharge of his claims," and afterwards to allege that the dirms were bad; for in neither of these cases
cases would his declaration be credited; because in the first case he expressly acknowledges the receipt of good dirms; and in the three following he makes such acknowledgment by implication, and therefore his subsequent declaration to the contrary, being considered as a prevarication, is not credited *.

If one person say to another "I owe you one thousand dirms," and the other reply "you do not owe me any thing," but afterwards, in the same meeting, say "you owe me one thousand dirms," in that case he is not entitled to any thing unless he adduce proof, or the debtor verify his assertion; because the debtor's acknowledgment was virtually annulled by his denial; and his subsequent assertion of course becomes a claim de novo, which therefore requires either to be proved, or to be verified by the debtor. It is otherwise where a person says to another "you bought certain goods from me," and that other denies; for he might nevertheless afterwards, without prevarication, confirm the declaration of the person in question in the same meeting; because in a contract of sale one of the parties only cannot annul it; in the same manner as one of them is incapable of making it.—The reason of this is that the acknowledgment of a contract of sale is the right of the buyer and seller jointly, and therefore the contract is not annulled by the denial of the purchaser only: the confirmation of the purchaser, therefore, after his denial, is valid, since his denial did not occasion an annulment.—A person, on the contrary, in whose favour an acknowledgment is made, may of himself annul such acknowledgment by a rejection of it; and his subsequent assertion corresponding with the acknowledgment is not a corroboration of it, because the acknowledgment did not then exist; it having been virtually done away by his rejection of it.—Hence the sub-

* Here follows an account of the different gradations of dirms from good to bad, which is omitted in the translation, as it will hereafter be fully explained in its proper place.
sequent assertion is a claim *de novo*, which consequently requires either proof by witnesses, or the verification of the debtor.

If a person make a claim upon another, and that other declare that he never owed him any thing, and the plaintiff prove, by witnesses, that the defendant owes him one thousand dircns, and the defendant, on the other hand, prove by witnesses that he has paid the same, in that case the evidence of the defendant must be credited: and in the same manner also, the evidence of the defendant must be credited, in case it tend to establish his having obtained a release or discharge of the claim.—*Ziffer* maintains that the evidence of the defendant must not be credited, since payment is a branch of obligation, and the defendant having denied the existence of the obligation at any period, is therefore evidently guilty of prevarication. Our doctors, on the other hand, argue that a consistency with regard to the denial and the proof is here possible, because unjust debts are sometimes paid to avoid litigation, and releases from them are likewise sometimes given. Sometimes, also, a defendant, after denying the validity of the claim, compounds with the plaintiff; and in such case he is bound to pay the composition, notwithstanding the debt for which it was made may have been unjust.—If the defendant declare, "I owe you nothing," in that case also his evidence, to the effect above recited, is creditable, because of its perfect conformity with the assertion that "he owes him nothing," which evidently means *at that time*, in as much as he proves that he had afterwards paid it to him.—But if he were to say "I never owed you any thing, and I do not know you,"—the evidence he might afterwards produce of his having paid the debt, or of his having obtained a release from it, would not be credited; because the contradiction between his assertion and the evidence cannot in this case be reconciled, since no man enters into the business of giving or receiving with one of whom he has no knowledge.—*Kadooree* remarks that in this case also the evidence must be credited, because the contradiction that subsists is not wholly
wholly irreconcilable, in as much as women who are kept concealed often transact business mediately through others, without knowing the person with whom the business is concluded; and it also often happens that men of rank, when a mob assemble at their door and make a noise, desire their agents to give them some money to pacify them.

If a person declare that "he has purchased a female slave from another," and that other deny that he had ever sold her to him, and the purchaser having proved his assertion by witnesses, an additional finger be discovered on the hand of the slave, and the seller prove by evidence that the purchaser had exempted him from responsibility for every defect, in that case the testimony of the seller must be rejected, since he is evidently guilty of prevarication. This is the doctrine of the Zábir Rawáyet. It is related, as an opinion of Aboo Yoosaf, that the evidence of the seller must be credited, because of the analogy of this case to that of debt, as before explained, in which it was shown that there was a possibility of reconciling the contradiction; for a reconciliation of the contradiction is also possible in this case, by supposing the seller to have been an agent for another, on which supposition the declaration of the proprietor, that "he had not sold the "slave," would have been true, and his subsequent plea, of having been exempted from a responsibility for defects, would also have been valid. Thus the apparent contradiction is capable of reconciliation. The ground on which the Zábir Rawáyet proceeds is, that the plea of having been exempted from a warranty against defects is an acknowledgment of the existence of the sate, which he had before denied, and hence it necessarily follows that he prevaricated.—It is otherwise in the case of debt, for in that case the payment is no argument of the respondent's acknowledging the existence of it, since (as has been before explained) unjust debts are often paid to avoid strife.
A deed  suspended, in its effect, upon the will of God, is null.

If a person, having acknowledged a debt to another, should subscribe a deed to that effect, and at the conclusion of it insert the following sentence, "Whoever produces this deed of acknowledgment, and claims the thing recited therein, is proprietor thereof, if it please God,"—or, if a person, having sold something to another, should at the end of the bill of sale insert the following sentence, "If any person shall hereafter claim the property of the subject of the sale, in that case I am answerable for the same, if it please God,"—in both these cases the deeds are of no effect; whence, in the first case, the acknowledgment is null, and in the second, the sale is invalid. The two disciples hold that in the former case the debt is binding, and in the latter case the sale is valid; because in their opinion the condition "if it please God" applies, not to the general purport of the deed, but merely (in the former instance) to the expression "Whoever produces this deed of acknowledgment," and so forth,—or (in the latter) to the expression "If any person shall hereafter claim," and so forth; because the design, in drawing up deeds of acknowledgment and of sale is merely to corroborate and confirm the act; and if the expression in question had a reference to the whole deed, this design would be defeated. Hanefi, on the contrary, being of opinion that this condition applies to the whole of the deed, therefore holds it to be invalid*.—It is to be observed that if a blank be left at the end of a bill of sale or deed of acknowledgment, and the words "if it please God" be afterwards written, our lawyers are of opinion that the clause does not affect the bill or the deed, because the blank, in either case, marks the conclusion.

* The arguments both of the two disciples and of Hanefi are more fully detailed in the original; but as they relate to principles proper to the Arabic language, the translator has given only the substance of them.
CHAP. IV.

THE KAZEE.

CHAP. IV.

Of the Decrees of a Kazee relative to Inheritance.

If a christian die, and his widow appear before the Kazee as a Musf-land, and declare that "she had become so since the death of her husband," and the heirs declare that she had become so before his death, their declaration must be credited. Ziffer is of opinion that the declaration of the widow must be credited; because the change of her religion, as being a supervenient circumstance, must be referred to the nearest possible period. The arguments of our doctors are, that as the cause of her exclusion from inheritance, founded on difference of faith, exists in the present, it must therefore be considered as extant in the preterite, from the argument of the present;—in the same manner as an argument is derived from the present, in a case relative to the running of the water course of a mill;—that is to say, if a dispute arise between the lessor and lessee of a water-mill, the former ascertaining that the stream had run from the period of the lease till the present without interruption, and the latter denying this, in that case, if the stream be running at the period of contention, the assertion of the lessor must be credited, but if otherwise, that of the lessee. As, moreover, an argument drawn from apparent circumstances is proof sufficient to set aside the claim of a plaintiff, it follows that the argument in question suffices, on behalf of the heirs, to defeat the plea of the widow.—With respect to what Ziffer objects, it is to be observed that he has regard to the argument of apparent circumstances, for establishing the claim of the wife upon her husband's estate, and
DUTIES OF

an argument of this nature does not suffice as proof to establish a right although it would suffice to annul one.

If a Muslim, whose wife was once a Christian, should die, and the widow appear before the Khasa as a Muslim, and declare that she had embraced the faith prior to the death of her husband, and the heirs assert the contrary,—in this case also the assertion of the heirs must be credited, for no regard is paid, in this instance, to any argument derived from present circumstances, (as in the case of the water-mill,) since such an argument is not capable of establishing a claim, and the widow is here the claimant of her husband's property. With respect to the heirs, on the contrary, they are repellents of the claim; and probability is an argument in their favour, since the Islamif of the widow is supervenient, and is therefore an argument against her.

If a person who had deposited four thousand dirhams in the hands of another should die, and the trustee acknowledge a certain person to be the son of the deceased, and his true and only heir, he is bound to pay to that person the four thousand dirhams which he held in trust; because in this case he makes an acknowledgment that what he retains in trust is the right of the heir, and consequently it is the same as if, during the life of the person from whom he received the deposit, he had acknowledged that it was his right. It is otherwise where a trustee makes an acknowledgment that a certain person has been appointed an agent for seizin by the proprietor, or that such an one has purchased the deposit from the proprietor; for in that case he could not be desired to deliver up the deposit, because this acknowledgment proves the actual existence of the depositor, since it shews him to be still living. His acknowledgment, therefore, of the agency or the purchase, is an acknowledgment affecting the property of another: but this cannot be objected to an acknowledgment made by a trustee after the death of the proprietor, for upon that event the property devolves upon the heirs.—
CHAP. IV.  THE KAZEE.

It is otherwise where a debtor acknowledges that a certain person has been appointed agent for seizin by his creditor; for the acknowledgement here relates to his own property, in as much as he pays the debt by means of his own property, and the agent receives the same; and hence, after such acknowledgment, he becomes bound to pay it.—If the trustee, after making an acknowledgment in favour of the son and heir, in the manner above related, should again make an acknowledgment in favour of another son, and the one first acknowledged deny the same, in that case he [the trustee] is bound to pay the whole to that one; because after such acknowledgment became binding (in the manner already explained) his tenure of the property was no longer valid; and hence his subsequent acknowledgment in favour of the other son is an acknowledgment with respect to the absolute property of the first son, and is consequently invalid,—in the same manner as holds where the first son is notorious;—and also, because, as at the time when he [the trustee] made the acknowledgment in favour of the first son, no other son appeared to assert his right, the acknowledgment was therefore valid; but as the first son is present to deny the acknowledgment afterwards made in favour of the second son, that acknowledgment is therefore invalid.

When a division is made of the effects of a deceased person between his heirs and creditors, the Kázee must not require security either from the heirs or the creditors, as a precaution in case of the appearance of more heirs or more creditors, for this would be oppression, as being a deviation from common practice. This is according to Haneefa. The two disciples maintain that he must require security.—This disagreement relates to a case where the debt of the creditors and the right of inheritance is proved by evidence, and where they severally declare that they know of no other debtors or heirs than themselves.—The reasoning adduced by the two disciples in support of their opinion is, that the Kázee is the conservator of the rights of the absent; and it is most probable that some of the creditors
or heirs may be absent, since death is often sudden, and may happen at a time when they are not all present; and as the taking of security is on this account an advisable precaution, the Khazz must therefore take this precaution, in the same manner as he exacts security when he delivers a trove, or a fugitive slave, to the owner, or when he awards maintenance to a wife from the estate of her absent husband. The arguments of Haneefa upon this point are twofold.—First, the right of those that are present is established with certainty in case of there being no absent heirs, and is apparently established in the mean time, even if there be absent heirs; and as it is incumbent on the Khazz to act according to what is apparent to him, he must not suspend his proceedings in favour of those that are present, by exacting security for the rights of the absent, whose actual existence is uncertain;—in the same manner as where a person establishes the purchase of any thing in the hands of another,—or a debt due to him by a slave; that is, if a person prove a right by purchase to a thing in the possession of another, it is the duty of the Khazz immediately to order it to be delivered to him without exacting security, although another may eventually appear and claim it in virtue of a prior purchase;—and in the same manner, if a person prove a debt due to him by a slave, the Khazz must order the slave to be sold, to the end that payment may be made from the price, without exacting any security, although there be a possibility of another creditor afterwards appearing.—Secondly, the principal is unknown, and security is invalid if the principal be not clearly pointed out,—as where, for instance, a person says to several debtors "I am bail for one of you," in which case the security is invalid, because the actual principal is not signified, notwithstanding there be a certainty of his existence. In the case in question, therefore, the security is invalid a fortiori, since even the existence of the principal is uncertain.—It is otherwise in the case of decreeing maintenance to the wife of an absentee from the effects of her husband, because her right being known and established, the person in favour of whom the security is given is not uncertain.—With re-
spect to the case of a fugitive slave, or a trove property, there are two traditions.—Concerning those, however, there is also a difference of opinion.—Some have said that if the Kásee give a trove property to the proprietor, on his describing the marks, or a fugitive slave to his master, on the acknowledgment of the slave that "the said person is his matter," it is incumbent upon him, in either case, to take security.—And all our doctors coincide in this opinion; because the right of the receiver is not proved, whence it is in the power of the Kásee, if he please, to withhold the slave from the person in question altogether.

If a person prove, by evidence, that a house then in the possession of another had been left between him and his brother, who is absent, in that case one half of the house must be given to him, and the other half left in the hands of the person who has possession; and no security must be exacted from him.—This is according to Hanoea.—The two disciples are of opinion that if the possessor deny the right, the share of the absent brother must be put into the hands of a trustee until his return; but if he acknowledge the right, it must then be left in his possession;—for they argue that a denier, as being an opponent, cannot be trusted with the property; whereas it may be entrusted to an acknowledger, as he is a friend and confidant.—The argument of Hanoea is that the decree of the Kásee, awarding that "the deceased left "the house to his heirs," is a decree merely in favour of the deceased; for inheritance cannot take place unless the property of the person through whom it devolves be proved; and as there is a probability of the deceased having constituted the possessor trustee, it follows that the house cannot be taken from him; as holds in the case of his acknowledging it.—In regard to his denial, it is virtually annulled by the decree of the Kásee; and there is a probability of his not denying the right again, because the dispute in question has become known both to himself and the Kásee.—If the claim, in the case in question, relate to movable property, some have said that the article is to be taken from
from the possessor, according to all our doctors; because there is a necessity for the conservation of it; and this is answered in the best manner by the taking of it from the possessor, who, on account of his denial of the right of the other, may convert it to his own use, either from opposition, or from a belief of its being his own right: but when the Kāzee takes it from him, and deposits it with a trustee, the probability is that the trustee, from his integrity, will take care of it. The case is different with respect to immoveable property, for that is preserved in itself; whence it is that an executor, although he have power to sell the moveables of an absent heir, arrived at the age of maturity, yet cannot do so with regard to his immoveable property.—Others, however, have said that the same difference of opinion subsists with regard to moveable as obtains with respect to immoveable property.—It is to be observed that the opinion of Haneefa, that the half ought to be left in the hands of the possessor, is the most authentic, because there is a necessity for conservation, and this is answered in the best possible manner by putting it in the hands of one who is responsible in case of its loss, since it is likely that he will be most careful of it.—The possessor, moreover, is responsible in consequence of his denial, whereas a trustee is not.—With respect to what is further said, that “no security must be exacted,” it proceeds on this principle, that the exacting of bail is an occasion of litigation and contention; and it is the duty of the Kāzee to prevent these,—not to excite them.—If, in the case in question, the absentee return, there is no necessity for again producing evidence, because he is entitled to the half in virtue of the Kāzee’s decree in favour of the heir that was present; for any one of the heirs of a deceased person stands as litigant on the part of all the others, with respect to any thing due to or by the deceased, whether it be debt or substance; since the decree of the Kāzee, in such case, is in reality either in favour of or against the deceased; and any one of the heirs may stand as his representative with respect to such decree.—It is otherwise with respect to taking possession of the portion due to another from the estate of a person deceased;
Chap. IV. The Kazeel.

ceased; that is to say, a part of the heirs, although they be litigants on behalf of another heir, cannot, however, take possession of his portion on his behalf, because a person, in taking possession, acts for himself, and is therefore incapable of acting in it, as agent, for another. Hence the person predecesor is not entitled to receive any other portion than his own; in the same manner as where an heir claims a debt due to the deceased, and the Kazeel passes a decree in his favour; in which case the heir, although he stood as litigant in behalf of the other heirs, is yet not entitled to receive their shares of the debt.

Objection.—If one heir be litigant in behalf of the other, it would follow that each creditor is entitled to have recourse to him for payment of his demand; whereas, according to law, each is only obliged to pay his own share.

Reply.—The creditors are entitled to have recourse to one of several heirs only in a case where all the effects are in the hands of that heir. This is what is stated in the Jama Kabeer; and the reason of it is that although any one of the heirs may act as plaintiff in a cause on behalf of the others, yet he cannot act as defendant on their behalf, unless the whole of the effects be in his possession.

If a person say, "I devote my property in alms to the distressed," in that case the word property, thus generally used, is construed to mean that part of his property which is subject to Zakat; whereas, if a person say "I bequeath the third of my property," the term property is in that case construed to apply to his property of every description. This distinction is according to a favourable construction.—Analogy would suggest, in the former instance also, that the whole property is understood; and this opinion has been followed by Zisser; because the term property [Med] applies to and includes property of every description, in a case of alms-gift, in the same manner as in a case of bequest. The reasons for a more favourable construction of the law in this particular are twofold.—First, as obligation imposed by a person upon himself
himself is analogous to an obligation imposed by God; in other words, if a person impose any obligation on himself, it is valid only with respect to those articles concerning which God has imposed obligations upon mankind: an obligation of alms, therefore, imposed by a person upon himself, takes effect only with respect to such property as God has imposed alms upon.—Bequest, on the contrary, resembles inheritance, as the legatee succeeds to the property of the deceased in the manner of an heir; and hence a bequest of property is not restricted to any particular description of property.—Secondly, from his mode of expression it is reasonable to suppose that he undertakes to bestow in alms that part of his property only which is superfluous, and beyond the occasion of his wants; and this is the part on which Zakat is imposed. Bequest, on the contrary, as it takes place at a time when the testator is free from want, is considered as extending to the whole of his property.—It is to be observed that the speaker's declaration "I devote my property in alms, &c." includes also his Abooeree lands, according to Aboo Yooaf, because lands of this description is subject to the obligation of alms, agreeably to his tenets, that, in tithe, the consideration of alms is predominant.—According to Mohammed, on the contrary, his Abooeree land is not included, because, agreeably to his tenets, the consideration of support to the state is predominant in tithe. His Kbirjee, or tribute lands, are however not included, according to all our doctors, because tribute is designed purely as a support to the state, and alms are no consideration in it.

If a person say "I devote my possessions [Milk] in alms to the distressed," there is in that case a difference of opinion. Some have said that this must be construed to mean the whole of his property; because the term here used [Milk] is of a more general nature than the term Milk used in the former case:—the occasion, moreover, of restricting the application, in that instance, to such property as is subject to Zakat, is purely because of Milk being the term used on that occasion in the Koran; and such being the case, the term Milk must therefore
therefore be explained in its common acceptation. Others, again, have said that the terms Milk and Mil import the same thing in effect; and this is the better opinion; since both terms imply that part of his property which exceeds his wants, as was before mentioned; and that is the part of his property subject to Zakat. If, however, a person have no other property besides what he obliges himself to bestow in alms, he must in that case reserve a sufficiency for his own subsistence, and bestow the remainder; and afterwards, upon his acquiring more property, bestow a part of it adequate to what he had before reserved. With respect to a sufficiency for subsistence, Mohammedi has not determined the quantity, because of the different conditions of men. Some have said that a person is to reserve only one day's subsistence, in case of his being an artisan or labourer; one month's subsistence, in case he possesses houses and shops let out upon lease; one year's subsistence, in case he possesses immoveable property of lands; and so on.—in proportion to the length of time of receiving the income of his property; and on this principle a merchant is to reserve as much as may suffice till the probable return of his property.

If a person be appointed executor to another, and he be not informed of that circumstance, but nevertheless sell some part of the effects of the deceased; the appointment becomes confirmed, and the sale is valid; whereas sale by an agent, on the contrary, is not valid, unless he be informed of his agency.—This distinction is according to the Zabir Rawbeyet. Aboe Yosef is of opinion that the sale by the executor is also invalid, because an executor is, in fact, a person appointed to act as agent after the death of the testator, and must therefore be considered in the same light with an agent before death.—The reason of the distinction, as stated in the Zabir Rawbeyet, is that the office of an executor is to represent, not to act as agent; for it refers to a period when the appointment of agency would be null. The acts of an executor, therefore, do not rest upon his knowledge of the testator's will any more than the acts of an heir;—in other words, if an heir
heir were to sell some part of the effects of the deceased, not knowing
that he was dead, the sale would be good; and so also of sale by an
executor.—Agency, on the contrary, is merely a delegation, since in
the case of agency the power and authority of the constituent still en-
dure: the acts of an agent, therefore, rest upon his knowledge of his
appointment.—The ground of this is, that in resting the acts of agents
upon a knowledge of their appointments there is no injury to the con-
stituent, since he is himself capable of performing such acts; whereas,
if the acts of an executor were suspended on his knowledge of his ap-
pointment, an injury would result to his constituent, who is himself
incapable of performing such acts.

An agent's appointment may be estab-
lised by any casual in-
formation;

If a man appoint another his agent, and, a person having
brought him intelligence of this*, he immediately, upon the receipt
of it, performs some act, (such as sale for instance,) in that case the
act is valid, whether the informant be free or a slave, of mature age
or otherwise, an unjust or just man; because a simple information of
his appointment establishes his right to act, although it be no way
binding upon him.

but his dis-
mise cannot
be established
unless duly
attested.

The dismissal of an agent is not established until it be attested to
the agent by two persons of unknown character, or by one just man.
This is the doctrine of Haneesa. The two disciples have said that the
law, in this case, is the same as in the preceding; for as the dismis-
sion and appointment of agents are concerns of frequent occurrence,
the notification of one person is therefore sufficient. The arguments
of Haneesa are that the simple notification of dismissal is binding, as
being a cause of the agent’s desisting from action, and inducing respon-
sibility for the property in his possession. The notification in question,

* By a person is here to be understood a person not deputed by the constituent, but
one who having casually heard of the appointment brings information of it to the
agent.

therefore,
therefore, is in one shape evidence, and consequently requires one of the two conditions of evidence, namely number [of the witnesses] or integrity; in other words, it requires to be attested by one just person, or by two persons of unknown character. It is otherwise with respect to the ratification of an appointment of agency, since that is no way binding, as has been already mentioned.—It is also otherwise where the dismission is notified by a messenger from the constituent, because the word of a message-bearer is equivalent to that of the sender of it, from necessity, and in that case, therefore, the attestation of one just man or two unknown men is not required.—The same difference of opinion obtains in cases of information conveyed to a master of the crime of his slave,—to the Shafeec of the sale of a house,—to a virgin of her marriage,—or to Mussulman converts in a hostile country, who have not yet taken refuge in the Mussulman territory, of particular ordinances in regard to religion. Thus if an unjust person inform a master that a particular slave belonging to him had committed a crime, and the master afterwards fell or emancipate the said slave, it is not in that case incumbent upon him to pay the atonement, unless the notification of the crime be attested by one just man, or by two men of unknown character, according to Haneefa: contrary to the opinion of the two disciples.—In the same manner also, if an unjust person notify the sale of a house to the Shafeec, or person having the right of pre-emption over it, and the Shafeec should not thereupon put in his claim of Shafja, still, according to Haneefa, his right is not avoided; whereas, according to the two disciples, it is forfeited. So also, if an unjust person notify her marriage to a virgin, and she thereupon remain silent, such silence, according to Haneefa, is not an assent; but according to the two disciples it is.—So likewise, if an unjust man inform an absent Mussulman of new ordinances in respect to religion, and he should not conform accordingly, Haneefa holds that he is not in that case guilty of any offence; whereas the two disciples are of opinion that he is.
If a Klauee, or Ameen appointed by him, sell the slave of a certain person, in order to discharge the demands of his creditors, and the money, after the receipt, be lost or destroyed in the hands of the Klauee, or his Ameen, and the slave be then proved to have been the property of some other person, in that case neither the Klauee nor his Ameen is responsible for the loss; because if Klaues were subject to such responsibility, no one would accept of the appointment; and the rights of the people would consequentlly be destroyed.—The Klauee, therefore, not being responsible for the loss, the purchaser is entitled to an indemnification from the creditors on whose account the sale was made, because of the impracticability of his being indemnised by the party with whom he made the bargain.—In the same manner as where an incapable infant or an inhibited slave appoints an agent for sale, who accordingly sells something on his behalf, and, the price being lost after he had received it, a right to the thing sold is proved by another; for in that case the claim is made on the constituent, and not the agent, although he be the party with whom the bargain was made.

If the loss be incurred by an executor, acting under the Klauee’s orders, the executor is indemnified by the creditors:

If a Klauee command an executor, whom he himself had appointed, to sell a slave to satisfy the creditors of a deceased person, and the executor in obedience to this order accordingly sell the slave, and the slave afterwards prove the right of another, or die previous to his being delivered to the purchaser, and the price in the mean time be lost after it had been received by the executor,—the purchaser must in that case receive an indemnification from the executor, not from the Klauee; because, having been appointed by the Klauee to act as executor to the deceased, he is therefore a representative of the deceased, and not of the Klauee; and hence, in the same manner as the deceased would have been responsible under such circumstances, in case he had himself made the sale during his lifetime, so also is the executor for

• Meaning an infant so young as to be incapable of acting for himself.
the sale made after his death. The purchaser, therefore, is entitled to exact the price from the executor; and he, again, is entitled to indemnify himself from the creditors, since he acted in the business of the sale on their behalf.—If, however, any more property of the deceased be afterwards discovered, the creditors are entitled to receive from it the payment of their debts, which are still held to remain in force.—Lawyers have also said that the creditors are, on their part, entitled to receive an indemnification from the estate for the compensation they made through the executor, to the purchaser, since they incurred that loss in behalf of the deceased.

An infant heir, on whose account any thing is sold from the estate of a deceased person, is considered in the light of a creditor; in other words, if an infant heir stand in need of selling something, and the executor accordingly make such sale for him, and the subject of the sale afterwards prove the right of another,—in that case the purchaser is entitled to a compensation from the executor, and the executor from the heir.—If, on the other hand, the Ameen of the Khaser fell any thing in behalf of an heir which afterwards proves the right of another; the proprietor is in that case entitled to receive a compensation directly from the heir, provided he be an adult; but if the heir be an infant, the Khaser must appoint a person for the discharge of the debt from his property.

**SECTION.**

If a Khaser say to a person "I have sentenced a certain man to be stoned; do you therefore stone him;"—or, "I have sentenced such a man to have his hand cut off; do you therefore cut it off;"—or, "I have sentenced this person to be scourged; do you therefore scourge him;"

Any person may execute a punishment by the Khaser's directions.
"him;"—it is lawful for that person to act according to the Kāzī's orders.—This is the doctrine of the Zābir Rawāyet.—It is related of Mohammed, that he receed from this doctrine, and gave it as his opinion that the Kāzī's directions, as here stated, are not to be obeyed unless his sentence be attested by one just man; because there is a possibility of his being in an error; and if that should appear after the performance of any of these acts, it would be impossible to repair the injury thereby occasioned.—From this it would appear that the letters of one Kāzī to another are not valid:—and our modern doctors greatly approve of this opinion, because many Kāzīs of the present age are loose and irregular: they, however, admit the validity of letters from one Kāzī to another on the ground of necessity.—The arguments of the Zābir Rawāyet upon this point are twofold.—First, the Kāzī here gives information of a matter which he is competent to order; because it was in his power to have ordered the execution of the sentence immediately; hence, as he is liable to no suspicion, he ought to be credited.—Secondly, obedience to a magistrate in authority, such as the Kāzī, is declared to be an incumbent duty; and as obedience to him is manifested in a belief of his word, it is therefore incumbent to believe him.—Besides, Imām Aboo Mansoor Matirady has said, "If a Kāzī be learned and just, believe and obey him, as there is then no reason to suspect him.—If, on the other hand, he be just but ignorant, it is then requisite to make enquiry of him concerning the case; and if, after a full investigation, it shall appear that his sentence was legally founded, in that case (and not otherwise) he must be believed.—If, on the contrary, he be learned but unjust in his conduct, or ignorant and unjust, his orders must not be obeyed, unless the person to whom he addresses himself discover the reason that prompted them."

Cf. of a dis. pased decree, after a Kāzī's dismission

If a dismissed Kāzī say to a person "I have taken one thousand dirms from you, and paid it to another, according to a decree which I passed to that effect;" and the person in question deny this, and asert
assert that the Kāzee had taken it from him unjustly, still the declaration of the Kāzee must be credited, and consequently he is not responsible for the said sum. In the same manner also, if a dismissed Kāzee say to a person "I passed a just sentence of amputation against you," and the other assert that it was unjust, the word of the Kāzee must be credited. The law here proceeds on the supposition that in both these cases the persons acknowledge that the decrees were passed at a time when he was actually Kāzee; and the reason of it is, that after such acknowledgment on their part, probability is an argument in favour of the Kāzee; because the probability is that no Kāzee will pass an unjust decree. Neither is it necessary to extract an oath from the Kāzee in either of these cases, because an oath is never put to a Kāzee, and both the persons in question acknowledge that he was actually Kāzee when he passed these decrees.—It is to be observed that if the person who, in the first case, by order of the Kāzee, took the money, or who, in the second case, cut off the hand,—should severally declare that they had done so by order of the Kāzee, they are not responsible for the consequences, since the Kāzee was in office when he gave these orders, and the restitution of the property to its owner was an approved act on the part of the Kāzee, in the same manner as if he had made the restitution in the presence of the defendant.—If, on the other hand, the person assert that the Kāzee had issued such orders either antecedent to his appointment or after his dismission, then also the declaration of the Kāzee must be credited, because he has referred the decree to a period which exempts him from responsibility. His declaration, therefore, is credited; in the same manner as where a person subject to periodical madness at fixed and certain times, having divorced his wife or emancipated his slave, afterwards declares that "he did these during his madness;"—which is credited; whence the divorce or emancipation are rendered void.—In this case, however, if the executioner of amputation, or the receiver of the money, acknowledge these deeds, they become responsible for them, because they themselves acknowledge the performance of acts, which induce responsibility,
DUTIES OF

responsibility; since the authority under which they acted is doubtful; for the assertion of the Kāz̄ee is credited in these instances merely to procure an exemption to himself from responsibility, and not to procure it to others. It is otherwise in the first case, where these acts are allowed to have been performed in virtue of an order from him when he was actually Kāz̄ee.—All this proceeds on a supposition that the money no longer remains in the hands of the person who had received it in virtue of the Kāz̄ee’s decree: for if the money be still in the possession of the receiver, and he coincide with the Kāz̄ee concerning the amount, it must in this case be taken from him, whether the person from whom it was originally taken confirm the Kāz̄ee’s allegation, that “he had paid the money to that person whilst he was in office,” or whether he plead that he [the Kāz̄ee] had taken and paid it whilst he was not in office; because as the receiver here in fact acknowledges that the money had formerly been in the possession of this person, his plea of having become proprietor of the money cannot be admitted but upon proof; and the mere allegation of the dismissed Kāz̄ee is not proof, since after dismissal he becomes as a common person.

HEDĀYA.
HE D A R A.

BOOK XXI.

Of SHAHADIT, or EVIDENCE.

Chap. I. Introductory.
Chap. II. Of the Acceptance and Rejection of Evidence.
Chap. III. Of the Disagreement of Witnesses in their Testimony.
Chap. IV. Of Evidence relative to Inheritance.
Chap. V. Of the Attestation of Evidence.

CHAP. I.

It is incumbent * upon witnesses to bear testimony, nor is it lawful for them to conceal it, when the party concerned demands it from them; because God says, in the Koran, "Let not wit-

* Arab Furx; meaning an ordained duty, and therefore indispensable.

Evidence is incumbent upon the requisition of the party concerned;

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In cases inducing corporal punishment, witnesses are at liberty either to give or withhold their testimony as they please; because in such case they are distracted between two laudable actions; namely, the establishment of the punishment, and the preservation of the criminal's character: the concealment of vice is, moreover, preferable; because the prophet said to a person that had borne testimony, "Verily it would have been better for you, if you had concealed it;"—and also, because he elsewhere said, "Whoever conceals the vices of his "brother Mussulman shall have a veil drawn over his own crimes in "the two worlds by God."—Besides, it has been inculcated both by the prophet and his companions as commendable to assist in the prevention of corporal punishment; and this is an evident argument for the concealment of such evidence as tends to establish it. It is incumbent, however, in the case of theft, to bear evidence to the property, by testifying that "a certain person took such property," in order to preserve the right of the proprietor: but the word taken must be used instead of stolen, to the end that the crime may be kept concealed: besides, if the word stolen were used, the thief would be rendered liable to amputation; and as, where amputation is incurred, there is no responsibility for the property, the proprietor's right would be destroyed.

Evidence is of several kinds. The evidence required in a case of wiboredom is that of four men; and the testimony of a woman in such case is not admitted; because...
Zibra says, "in the time of the prophet and his two immediate suces-
cessors it was an invariable rule to exclude the evidence of women
in all cases inducing punishment or retaliation;" and also, because
the testimony of women involves a degree of doubt, as it is merely a
substitute for evidence, being accepted only where the testimony of
men cannot be had; and therefore it is not admitted in any matter
liable to drop from the existence of a doubt.—The evidence required
in other criminal cases is that of two men, according to the text of the
Koran; and the testimony of women is not admitted, on the strength
of the tradition of Zibra above quoted.—In all other cases the evidence
required is that of two men, or of one man and two women, whether
the case relate to property, or to other rights, such as marriage, di-
vorce, agency, executorship, or the like.—Shafei has said that the
evidence of one man and two women cannot be admitted, excepting
in cases that relate to property, or its dependencies, such as htre,
bail, and so forth; because the evidence of women is originally in-
admissible on account of their defect of understanding, their want of
memory, and incapacity of governing, whence it is that their evidence
is not admitted in criminal cases.

Objection.—Since, according to Shafei, the evidence of women
is originally invalid, it would follow that their evidence alone is not
admissible even in a case of property; whereas the evidence of four
women alone is, in his opinion, admissible in such case.

Reply.—The evidence of four alone is necessarily admissible in
cases of property, because of their frequent occurrence:—contrary to
the mode of proceeding with respect to marriage, (for instance,) which being a matter of greater importance and more rare occurrence
than mere matters of property, cannot therefore be classed with
them.

—The reasoning of our doctors is that the evidence of women is
originally valid; because evidence is founded upon three circumstances,
namely, sight, memory, and a capability of communication; for by
means of the first the witness acquires knowledge; by means of the
second
second be retains such knowledge; and by means of the third he is enabled to impart it to the Kāzee; and all these three circumstances exist in a woman; (whence it is that her communication of a tradition or of a message is valid:) and with respect to their want of memory, it is capable of remedy by the junction of another; that is, by substituting two women in the room of one man; and the defect of memory being thus supplied, there remains only the doubt of substitution; whence it is that their evidence is not admitted in any matter liable to drop from the existent of a doubt, namely, retaliation or punishment: in opposition to marriage, and so forth, as those may be proved notwithstanding a doubt, whence the evidence of women is admitted in those instances.

Objection.—As the evidence of two women is admitted in the room of that of one man, it would follow that the evidence of four women alone ought to be admitted in cases of property and other rights; whereas it is otherwise.

Reply.—Such is the suggestion of analogy. The evidence of four women alone, however, is not accepted, (contrary to what analogy would suggest,) because if it were, there would be frequent occasions for their appearance in public, in order to give evidence; whereas their privacy is the most laudable.

The evidence of one woman is admitted in cases of bīth, (as where one woman, for instance, declares that "a certain woman "brought forth a certain child.") In the same manner also, the evidence of one woman is sufficient with respect to virginity, or with respect to the defects of that part of a woman which is concealed from man.—The principle of the law, in these cases, is derived from a traditional saying of the prophet, "The evidence of women is valid with "respect to such things as it is not fitting for man to behold."—Shafei holds the evidence of four women to be a necessary condition in such cases. The foregoing tradition, however, is a proof against him; and another proof against him is that, in the cases in question, the necessity
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Cessively of male evidence is remitted, and female evidence credited, because the ocular examination of a woman, in these cases, is less indecent than that of a man: and hence also, as the sight of two or three persons is more indecent than that of one, the evidence of more than one woman is not insisted on as a condition in those instances. It is to be remarked, however, that if two or three women give evidence in such cases, it is a commendable caution, because the evidence may be of an obligatory tendency.—The law with respect to the evidence of women in cases of birth has been fully set forth in the book of divorce, treating of the establishment of parentage*, where it is said, that "if a man marry a woman, and she bring forth a child at a period of six months, or more, after her marriage, and the husband deny the parentage, in that case the evidence of one woman is sufficient to establish it:"—and there are also other examples recited to the same effect.—The law with respect to the evidence of a woman in cases of virginity, is that if a woman complain of the impotency of her husband, and assert that her virginity still exists, and another woman bear evidence of the same, in that case one year must be suffered to elapse, and then a separation must be effected between the husband and wife†; because virginity is a real entity, and the existence of it has here been attested by evidence.—The same rule also holds where a person purchases a female slave on condition of her being a virgin, and afterwards desires to return her, because of her being a woman: for if, in that case, another woman should examine into her condition, and then declare her to be a virgin, her evidence must be credited, as virginity is an entity, and the existence of it is here proved by evidence:—or if, on the contrary, she declare her to be a woman, her muliebrity (which is a defect) is established in virtue of such declaration, and the plea of the purchaser holds good: whence the seller is required to take an oath, that such defect did not exist.

* See vol. I. p. 382.

† That is, provided he shew no proof of virility in the interim. (See vol. I. p. 354.)
into his character in such a manner as to give the opposite party an opportunity to scorn him; because the prophet (according to a tradition related by Omar) has said, "All Mussulmans are just with respect to evidence, excepting such as have been punished for slander; and also, because the probable character of all that profess the religion of Islam is an abstinence from every thing prohibited by that religion; and here it is necessary to rest satisfied with probability, as the attainment of certainty is impracticable. — In cases, however, inducing retaliation or punishment, mere probability is not sufficient; and therefore a purgation of the witnesses must be made; for punishment and retaliation are cases in which all possible pretexts of prevention are to be fought: it is therefore requisite that, in such cases, the character of the witnesses be strictly investigated: — moreover, doubt is preventative in those instances.

If, however, their probity be questioned, a purgation is required.

If the defendant throw a reproach on the witnesses, it is in that case incumbent on the Kāsī to institute an enquiry into their character; because, in the same manner as it is probable that a Mussulman abstains from falsehood, as being a thing prohibited in the religion he professes, so also is it probable that one Mussulman will not unjustly reproach another: — here, therefore, is a conflict between two probabilities; and hence the necessity of the enquiry of the Kāsī into the character of the witnesses, that he may discover which of the probabilities preponderates. — It is related as an opinion of Aboo Toofa and Mohammed, that a scrutiny must be made, with regard to the witnesses, both openly and privately, in all cases whatever; since the decree of the Kāsī rests upon proof, and proof rests upon the integrity of the witnesses. Besides, an enquiry into the integrity of the witnesses tends to preserve the decree of the Kāsī from annulment; because if he should pass a decree upon the probable character of the witnesses, and their falsehood should afterwards be discovered, the said decree would be rendered null. — Several have alleged that this disagreement between Haneefa and the two disciples is founded on the
difference of the times. In the present age, however, decrees are passed in this particular according to the doctrine of the two disciples. —A secret purgation is made by a Kázeé writing a letter, privately, to a Muzzkee, or purgator, (that is, a person whose business it is to enquire into the characters of others,) and describing to him the family and countenances of the witnesses, and likewise their place of abode; and the purgator, in like manner, returning his answer privately to the Kázeé, left if it were known to the plaintiff, he might attempt to injure him. In an open purgation it is requisite that the Kázeé summon together the purgator and the witnesses, and hear the examination himself.—During the first age (that is, in the time of the prophet and his companions) an open purgation was practised; but in the present times a secret one is adopted, in order to avoid quarrels and contentions between the purgator and the witnesses; for it is related as an opinion of Móbbammed that an open purgation tends to sedition and contention. Some have said that it is requisite that the purgator report the witnesses not only to be just, but also free; for a slave may be just, but his testimony is nevertheless invalid. Others have said that his report of the integrity of the witness is sufficient; for his freedom is established [in probability] by his abode in a Mussulman country;—and this is approved.

It is to be observed that, according to that doctrine which maintains the necessity of the Kázeé’s purgation of the witnesses, whether the defendant challenge their probity or not,—the justification of them by the defendant is not of any weight; in other words, if he declare the witnesses of the plaintiff to be upright men, yet his word is not credited; and such is the doctrine of the Záhir Rawdyet, from Abú Yoosaf and Móbbammed. It is also related, as their opinion, that the justification of the witnesses by the defendant is valid; under this condition, however, (according to Móbbammed,) that there be also another justification; for he holds that two are always required, one being in no case sufficient.—The reasoning on which the doctrine of
the Zabir Rawjet proceeds in this particular, is that the defendant is, in the conception of the plaintiff and his witnesses, a liar, and his denial of the claim unjust and unfounded, but in which he nevertheless perseveres. He is therefore incapable of appearing as a purgator, since a purgator must be a person of integrity, according to all.—This proceeds on the supposition of the defendant having declared the witnesses to be just men, but that in the delivery of their testimony they had committed an error; or that they had been overpowered by forgetfulness. If, however, he declare that "they have spoken truth," or that "they are just men and true speakers," this amounts to an acknowledgment of the plaintiff's right, and the Kazeex must in such case pass a decree against him,—not on account of his purgation of the witnesses, but of his acknowledgment.

One purgator is sufficient, and two are superfluous, according to Haneefa and Aboo Yoosaf. Mohammed, on the contrary, maintains that purgation is not valid unless performed by two.—A similar disagreement subsists between them, with respect both to the messenger who goes to the purgator on the part of the Kazeex, and also the interpreter employed to explain and interpret the deposition of the witnesses.—The argument of Mohammed is, that as the power of the Kazeex to pass a decree is founded upon the evidence of the probity of the witnesses, and as the evidence of their probity is founded upon purgation, it follows that plurality is in this instance requisite, in the same manner as probity,—or as, in cases inducing punishment, it is required that the witnesses be males.—The argument of Haneefa and Aboo Yoosaf is that purgation is not considered in the nature of evidence; whence neither the assembly of the Kazeex, nor the use of the phrase Shabadit, are required as conditions with regard to it. Besides, the necessity of a plurality in evidence is a mere matter of religion,—in other words, is founded on a passage in the Koran, in opposition to analogy; for the truth of any assertion obtains an ascendency from the declaration of one just person, so far as relates to practice, as is evident from this circumstance,
circumstance, that many of the traditionary precepts which it is necessary to follow, have been delivered by one man;—and as the necessity of a plurality in evidence is contrary to analogy, the establishment of such necessity in purgation, by inference from that rule, would be absurd.

As the qualifications requisite to a witness are not required in a purgator, a slave is capable of being a purgator in a secret purgation. In an open purgation, however, the purgator must, according to all our doctors, be possessed of the qualifications necessary to a witness, because of what is recorded by Khałif, that "an open purgation is restricted to the assembly of the Kāzī."—Lawyers have observed, also, that in the purgation of witnesses to whoredom four purgators are necessary, according to Mḥammed.

SECTION.

The things which witnesses retain, and bear testimony of, are of two kinds.—The first are those which produce effect in themselves; such as sale, acknowledgment, usurpation, murder, and the sentence of a judge; in all of which the effect results from the things themselves; and consequently, whenever a person hears or sees any thing of importance relating to these matters, he may lawfully give evidence of it, without its being demanded from him; because in these cases, immediately upon his hearing or seeing, he becomes acquainted with a circumstance which occasions effect in itself, and there is therefore no need of such evidence being demanded from him.—In such case, also, it is requisite that he deliver his testimony thus, "I give evidence that a certain person bought, &c." and not, "evidence is of two kinds—that which occasions effect in itself,
"dence has been demanded from me, &c." because this latter mode of delivery is false. If, however, a person from without a door, or from behind a curtain, hear any thing spoken by another that is within, in that case he is not entitled to give evidence of the same; and if he should attest it, the Kázee must not accept it, because it is illegal, since, as voices are often similar, they cannot be distinguished with certainty. But if, having first entered into the house, he discover that there is only one person within, and having then retired, and sat without the door, he hear that person make an acknowledgment, he may then lawfully attest the same, because in such case he acquires certain knowledge.—The second kind of things to which evidence relates, are those which do not occasion effect in themselves; such as testimony *, which does not occasion effect in itself; because, as it is merely information, it admits the supposition of being either true or false; and such things as are doubtful are not decisive proof.—Upon testimony being given, therefore, the hearer does not immediately know that the right is proved; and consequently, if one person hear another give evidence of something, he is not empowered to give evidence of the same, unless the witness desire him to attest his evidence; because evidence does not occasion effect in itself, nor until it be removed to the assembly of the Kázee.—Besides, as the attestation of the evidence of another is an overt act with respect to that other, it is requisite that the other previously appoint this person his deputy; and in the case in question this is not supposed.—In the same manner, also, if a person hear another desire a third person to attest his evidence, it is not lawful for him in such case to give evidence of the same, because the original witness appointed another, and not him, his deputy for that purpose.

* Meaning testimony to evidence given by another.
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unless he otherwise recollect to have witnessed the said bill; since hand writings are often similar. — Some have said that this is the doctrine of Haneefa; but that the two disciples are of a different opinion. — Others, again, have said that all are agreed in its being unlawful to give the attestation merely on the sight of the signature; and that the only case of this kind in which there is a disagreement is that with respect to a Kāzee; for if he should discover, in his Dewan, or records, the evidence of any one, or a decree of his own, he may, in such case, (according to the two disciples) pass a decree agreeably thereto, notwithstanding he have forgot the circumstance; because the records of the Kāzee, being kept under his seal, are therefore secured against alterations, and consequently afford certain knowledge. — It is otherwise with respect to bills of sale or the like, because these, as being kept in the hands of others, are not secured against alterations. — In the same manner, also, if a person recollect the place in which his evidence had been taken, without remembering the affair to which it related, it is the same as his seeing his signature without remembering his subscription of it, and therefore he is not permitted to attest it: — and the same rule obtains where people in whom he places credit say to him, “you and we did formerly jointly attest such particular matter.”

It is not lawful for a person to give evidence to such things as he has not actually seen, excepting in the cases of birth, death, marriage, cohabitation, and the jurisdiction of a Kāzee, to all of which he may lawfully bear testimony on creditable bearsfay. — This proceeds upon a favourable construction. — Analogy would suggest that it is not lawful for him to give evidence in those cases also; because evidence is founded entirely on sight, from which knowledge is derived; and as no certain knowledge can be acquired without sight, it follows that evidence, in the cases above excepted, is not valid unless founded upon sight. — The reason for a more favourable construction, in this particular, is that these events are of such a nature as admit the privacy only of a few: 

Evidence cannot be given on bearsfay, except to such matters as admit the privacy only of a few.
few:—thus birth (for instance) is an event at which none is present but the midwife; the authority of the Kazee is founded on the appointment of the Sultan, which is seen only by the Vizier, or at most a few others; marriages and deaths are seen by but few; and cohabitation by none. All these, however, are acts from which originate many important concerns. If, therefore, the reality of these things were not admitted upon hearsay evidence, many inconveniences would result: in opposition to cases of sale, or the like, where privacy is not required.—It is to be observed that it is requisite, in these cases, that the information have been received from two just men, or from one just man and two women.—Some have advanced that in cases of death the information of one man or one woman is sufficient, because death is not seen by many, since as it occasions horror the sight of it is avoided.

When a person, in any of the above cases, gives evidence from creditable hearsay, it is requisite that he give it in an absolute manner, by saying, for instance, "I bear testimony that A. is the son of B." and not, "I bear testimony so and so, because I have heard it,"—for in that case the Kazee cannot accept it;—in the same manner as if a person, having seen a thing in the hands of A. were to say, "This thing is the property of A."—in which case his testimony is valid: but if he should state that "he gives evidence because he has seen the thing in the possession of A." the Kazee could not accept his testimony.—So also, if a person see another sitting in the court of justice, deciding in a suit between plaintiff and defendant, it is lawful for him to give evidence that "that person was a Kazee:"—or, if a person see a man and woman dwelling in the same house, and conducting themselves towards one another in the manner of husband and wife, he may lawfully give evidence of their being husband and wife; in the same manner as it is lawful for a person who sees a melon in the hand of another to give evidence that it is the property of that person.
If a person say that he was present at the burial of another, or that he had read the funeral service over him, this amounts to the same as an actual sight of the death, insomuch that if he should explain to the Kālsee the principle on which he gives his evidence, it will still be valid.

What is above advanced, that "it is not lawful for a person to give evidence to such things as he has not actually seen, excepting in the cases of birth, death, marriage, cohabitation, and the jural diction of a Kālsee," is taken from Kadooree; and from these particular exceptions it may be inferred that hearsay evidence is unlawful in every other instance, such as Willa, charitable appropriations, and so forth.—It is indeed related, as the last opinion of Aboo Yoosaf, that evidence from hearsay is lawful in a case of Willa; because Willa is equivalent to relation by consanguinity, as the prophet has said "Willa is a connection like consanguinity."—It is also related, as the opinion of Mohammed, that hearsay evidence is lawful in a case of appropriation; for as appropriation continues to operate for a long period of time, the laws with respect to it would be rendered null if hearsay evidence were not admitted to prove it.—Our doctors, however, argue that Willa is founded upon a relinquishment of right of property; and as, in bearing evidence to that, actual sight is required, it follows that it is in the same manner required with respect to a matter derived therefrom, namely, Willa.—With respect to charitable appropriations, on the contrary, hearsay evidence must be admitted so far as regards the appropriation itself, (such as where the witness says, "I attest this to be a wakf:) but it is not admitted with respect to any conditional restrictions imposed by the appropriator; for although the appropriation itself be notorious, yet the conditions of it are not so.

If a person see any article, (excepting an adult male or female slave,) in the hands of another, he may in such case lawfully attest its A right of property may be attached.
its being the property of that other, because possession argues property, since in all causes of property, such as purchase, sale, or the like, possession is the argument of its existence.—For instance; if a person sell any thing, his possession is an argument of the legality of the sale; and in the same manner, also, the right of property is established in a purchase from the possession of the seller, and the right of property in an heir, from the possession of him from whom he inherits.—Hence, in giving evidence of a thing being the property of another, it is sufficient to have seen it in his possession.—It is recorded from Abu Yoosof, that besides the sight of the possession, it is requisite that the witness verily believe the article to be the property of the possessor, insomuch that if he do not really think so he cannot lawfully attest on the possessor's behalf.—Several of our doctors also remark that this explanation applies to the opinion of Mohammed, above related, respecting the legality of attesting marriage, birth, and cohabitation on hearsay;—that is, that it is lawful for a person to attest any of these incidents upon hearsay, provided he believe it in his own mind, but not otherwise.—Shafei has said that possession, together with transaction*, argues property; (and many of the Hanefite doctors are also of this opinion;) because possession being of two kinds, namely, either in virtue of trust or of right of property, does not argue right of property unless when united with the performance of acts.—Our doctors, on the other hand, argue that transaction is also of two kinds; one, in virtue of delegation, and the other in virtue of original authority;—and hence the junction of transaction to possession leaves still a doubt in regard to the property.—In short, if a probable argument be adopted, possession is then sufficient; but if a certain one be required, possession, even when joined to transaction, could not be sufficient.—It is to be observed that the case here treated of admits of four statements. 1. Where a person sees both the proprietor and the

* Arab. Teferrif; meaning (in this place) any act of mastery performed with respect to the property in question, such as letting it out to hire, for instance.
property, and is acquainted with both,—that is, with the countenance and the family of the proprietor, and with the boundaries of the property, which he sees him possess without strife; and afterwards sees the same thing in the possession of another; and the first proprietor appears to claim it;—in which case it is lawful for him to give evidence of its being the property of the first person, because of his having seen it in his possession. II. Where he sees the property, and its limits, but not the proprietor;—and here also it is lawful for him to give evidence of the property, (upon a favourable construction of the law) because the proprietor is known, so far as regards his family, from hearsay.—III. Where he neither sees the proprietor nor the property;—and, IV. Where he sees the proprietor but not the property; in both of which cases it is unlawful to give evidence with regard to the right of property.

If a person see a slave, male or female, in the possession of another, and know the said person to be a slave, he may lawfully give evidence to such slave being the property of that other;—for a slave not being his own master, and of consequence not entitled to go where he pleases, is apparently the property of that person in whose hands he remains. So also, if he should not know the person seen in the possession of another to be a slave, and being an infant, it should be incapable of explaining its own condition, he may in that case lawfully give evidence of its being the property of the possessor; for an infant is not its own master.—But if the person seen be arrived at the age of maturity,—that is to say, be capable of explaining his condition,—and he should not know whether he is a slave or not, then it is not lawful to give evidence of his being the property of the possessor, simply on the sight of the possession.—This is the reason of the exception, in the preceding case, of a slave arrived at the age of maturity; and the ground of it is that persons arrived at the age of maturity are in a manner in their own possession; and therefore the possession of another, which indicates the right of property of that other, is not to be dis-
covered from the simple fight.—It is related as an opinion of Haneefa, that even in this case evidence to the right of property may lawfully be given: but what has been before related is the most authentic doctrine.

CHAPTER II.

Of the Acceptance and Rejection of Evidence.

The evidence of a blind man is not admissible.—Zifzer maintains that the evidence of a blind man is admissible with respect to matters in which hearsay prevails; (and there is also one report of the doctrine of Haneefa to the same effect;) because in such matters hearing only is required, and in the hearing of a blind man there is no defect.—Aboo Toodaf and Shafeii have said that the evidence of a blind man in these matters is lawful, provided he was possessed of sight at the time of their occurrence; for by means of that he acquires a certain knowledge, which he is afterwards, notwithstanding his want of sight, capable of communicating, as that depends entirely on the tongue, which in a blind man is not defective; and it is in his power to shew his knowledge of the person with regard to whom he gives the evidence, by a description of his birth and family.—Our doctors, on the other hand, argue that in the delivery of evidence there is a necessity to distinguish between the persons for and against whom it is given; and a blind man is incapable of doing this otherwise than by the voice; and this is attended with a doubt; which may be avoided, by the party producing a witness possessed of sight.—With respect to the assertion of Shafeii and Aboo Toodaf, that "it is in his power to shew " his knowledge of the person with regard to whom he gives the evidence
“evidence by a description of his birth and family,” it may be replied that this mode has been instituted for a definition of the absent, not of the present.—In short, in the same manner as the evidence of a blind man is inadmissible in cases relative to retaliation or punishments, so also is it inadmissible in all other cases whatever.

If a person, having given evidence, should afterwards become blind previous to the passing of the decree, in that case (according to Haneefa and Mobammed,) it is not lawful for the Kázee to pass a decree thereupon; for the existence of the competency of the witnesses at the time of passing the decree is a necessary condition, as the validity of the evidence, at that time, constitutes the proof; and in the case here supposed the evidence has at that period become null. This case is therefore the same as if a witness, after having given evidence, should either become insane, dumb, or unjust, in any of which cases the Kázee could not pass a decree upon the evidence so given.—It is otherwise where the witnesses, having given their evidence, either disappear or die; for in that case the Kázee may lawfully pass a decree upon it, because the competency of evidence is not annulled, but rather concluded, and rendered complete, by death; and absence does not destroy this competency.

The testimony of any person who is property,—that is to say, a slave, male or female,—is not admissible; because testimony is of an authoritative nature; and as a slave has no authority over his own person, it follows that he can have no authority over others, a fortiori.

The testimony of a person that has been punished for slander is inadmissible, even though he should afterwards have repented; because God has said, in the Koran,—“But as to those who accuse married persons of whoredom, and produce not four witnesses of the fact, scourge them with fourscore stripes,
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"STRIKES, AND RECEIVE NOT THEIR TESTIMONY FOR EVER; "FOR SUCH ARE INFAMOUS PREVARICATORS,—EXCEPTING THOSE "WHO SHALL AFTERWARDS REPENT."—The rejection of his evidence, moreover, is included as a part of the punishment prescribed for the crime, as this tends to prevent the commission of it in future; and as the rejection of his evidence is a part of the punishment, this effect must evidently remain after his repentance, on the same principle as the punishment itself is not remitted although he repent. It is otherwise with respect to a person punished for any other crime; for the evidence of such a person is admissible after repentance, since the rejection of it, in regard to his, proceeded from the stigma attached to his offence, which is done away by repentance.—According to Shafeei the evidence of a person punished for slander is admissible, provided he have afterwards repented, because God, in enjoining the rejection of the evidence of such, has particularly excepted penitents.—Our doctors, on the other hand, argue that the exception in the divine ordinance relates to that part of it which declares slanderers to be infamous prevaricators, and not to that part which declares them to be incompetent as witnesses. Penitence, therefore, removes the stigma from the character of such a person, but does not restore his competency to give evidence.

If an infidel, who had suffered punishment for slander, should afterwards become a Mussulman, his evidence is then admissible; for although, on account of the said punishment, he had lost the degree in which he was before qualified to give evidence, (that is, in all matters that related to his own sect,) yet by his conversion to the Mussulman faith he acquires a new competency in regard to evidence, (namely, competency to give evidence relative to Mussulmans,) which he did not possess before, and which is not affected by any matter that happened prior to the circumstance which gave birth to it.—It is otherwise with respect to a slave, who, having suffered punishment for slander, afterwards becomes free; for his testimony is not admissible after
after emancipation; because in his former condition of slavery he did not possess, in any degree, ability to give evidence, and consequently the punishment was incomplete, since it was impossible to subject him to any greater degree of discredit than what was before imposed on him: the credit, therefore, which he would otherwise have acquired afterwards in virtue of his emancipation, is taken from him in order to complete the prescribed punishment.

Testimony in favour of a son or grandson, or in favour of a father or grandfather, is not admissible; because the prophet has so ordained.—Besides, as there is a kind of communion of benefits between these degrees of kindred, it follows that their testimony in matters relative to each other is in some degree a testimony in favour of themselves, and is therefore liable to suspicion.

The prophet has said, "We are not to credit the evidence of a wife concerning her husband, or of a husband concerning his wife; or of a slave concerning his master; or of a master concerning his slave; or,Lastly, of a birer concerning his bireling.—The author of

Evidence is not admitted in favour of relations within the degree of parentage.

• This doctrine of the inadmissibility of the evidence of husband and wife in favour of each other prevails only amongst the Sowut, [the followers of Omar,] and has given rise to much contention with the Shiyas, [the followers of Ali], who maintain the opposite doctrine.—The origin of their disagreement on this occasion is thus related.—The prophet in the course of his wars having been presented with the village of Fatheh by some Christians, who saw the impossibility of restoring his power, determined to have divided it amongst his companions, as was his usual practice in regard to the spoils taken in war. He was afterwards, however, induced to give it to his daughter Fatima, in consequence of a revelation he received from heaven, enjoining him not to give out of his family what had been freely conferred on him.—After his death it was treated of by his successor Abu Bekr; and when Fatima claimed it in consequence of the gift of her father, and produced her husband Ali, and her two sons, as witnesses, her claim was rejected by Abu Bekr, on the grounds of the testimony of relations in that degree having been declared inadmissible by the prophet. This tradition, thus quoted by Abu Bekr, has ever since amongst the Sowut occasioned the inadmissibility of the evidence of husband and wife.
of this work observes that by the term biver [Ajeer] as used in this place, is to be understood (according to the explanation of the lawyers) a select scholar who considers an injury to his teacher as an injury to himself.—Others have said that it is understood to mean a person who lets out any thing by lease for a month or a year; for as, at the time of giving evidence, he is entitled to the rent, in return for the usufruct enjoyed by the other, a suspicion arises of his having constituted this person his tenant merely with a view to procure his evidence.—With respect to the evidence of a husband and wife concerning each other, Shafii maintains that it is admissible; because the property of each is distinct and separate; and also because distinct seizins are made, by each, of their respective property; whence it is that realization is executed upon either for the murther of the other,—and also, that either may be imprisoned for a debt due to the other.—Besides, the benefit which they mutually derive from each other's property is of no account, because the existence of such benefit is of an involuted nature;—in the same manner as the evidence of a creditor in favour of his indigent debitor is admissible, notwithstanding he derive a benefit from it, as this benefit is of an involuted nature.—The arguments of our doctors upon this point are twofold. First, the traditionary precept of the prophet above quoted. Secondely, the benefit which, from custom, the husband and wife derive from the property of each other, which occasions their testimony in favour of each other to be, in a manner, testimony in favour of themselves, and consequently liable to suspicion.—It is otherwise with respect to the testimony of a creditor in favour of his indigent debitor, because he has no power over the wife in favour of each other. The Shafis, however, (who follow a contrary doctrine) maintain that this pretended precept of the prophet was purposely forged by the Khaif to defraud Faima of her right; and in support of this opinion they argue that if such a precept had existed, it could not have been unknown to Me; and that if he had known of it, he never would in such case have appeared as a witnes in favour of his wife.

* That is to say, is interwoven with, and necessarily arises from, the particular circumstances of their relative situation.
property of the debtor, whereas a husband and wife have such power from usage and custom.

The testimony of a master in favour of his slave is not admissible; because of the tradition above quoted; and also because, if the slave be not indebted to any person, such testimony is in every respect in favour of himself;—or if, on the other hand, he be indebted, still the testimony of the master is in some respect in favour of himself, as the matter remains in suspense; for if the master should choose to pay the debts, the testimony would be completely relative to himself, whereas it would not be so in any degree in case he should permit the slave to be sold in liquidation of the debt;—and as it is not known which mode he may follow, the testimony is therefore considered to be in some respect relative to himself.—It is to be observed that the evidence of a master in favour of his Mulkib is not admissible, for the reason here stated.

The testimony of one partner in favour of another, in a matter relative to their joint property, is not admissible; because it is in some degree in favour of himself.—The testimony, however, of partners, in favour of each other, in matters not relating to their joint property, is admissible, because in it there is no room for suspicion.

Testimony in favour of a brother or an uncle is admissible, because the property and the immunities of these classes of relations are separate, and each has no power over that of the other.

The testimony of women that lament or sing is not admissible, because they are guilty of forbidden actions, inasmuch as the prophet has prohibited these two species of noise.—(It is to be observed that this case alludes to a woman who laments for the adversity of others, not for her own, and who hires herself out for that purpose.)
THE testimony of a person who is continually intoxicated is inadmissible, because of his commission of a prohibited act.—In the same manner, also, the testimony of a person who amuses himself with birds, such as pigeons or hawks, is inadmissible; because such amusement engenders forgetfulness; and also because, in the practice of it, he sees the nudities of strange women, he having occasion to sit on the top of his house to fly these birds.—In some copies, instead of the amusement of Teyoor or birds, that of Tamboor *, or musical instruments, is written, which alludes to public singers; and the testimony of a public singer is not admissible, because he is the occasion of assembling a number of people to commit a prohibited action †.

THE testimony of a person who has committed a great crime, such as induces punishment, is not admissible, because in consequence of such crime he is unjust.

THE testimony of a person who goes naked into the public bath is inadmissible, because of his committing a prohibited action, in the exposure of his nakedness.

THE testimony of a person who receives usury is inadmissible; and so, also, of one who plays for a stake at dice, or cheifs,—because gaming in that manner is ranked in the number of great crimes;—and in the same manner, also, the evidence of a person who omits his prayers, from an attention to these games, is not admissible.—It is to be observed, however, that simple playing at cheifs without a stake is

* In the Arabic and Persian, the words Teyoor and Tamboor are written exactly similar; and as they can only be distinguished from each other by the proper position of the diacritical points, they are therefore very liable to be confounded by the frequent omission of these points.

† Namely, listening to music.
not destructive of credit, since such play does not induce a want of integrity, because all our Imāms are not agreed in its illegality, Mālik and Shafēi having declared it to be lawful.—It is recorded in the Mahfoṣt, that the evidence of an usurer is inadmissible only in case of his being so in a notorious degree; because mankind often make invalid contracts; and these are, in some degree, usurious.

The evidence of a person guilty of base and low actions, such as making water or eating his victuals on the high road, is not admissible; because where a man is not restrained, by a sense of shame, from such actions as these, he exposes himself to a suspicion that he will not refrain from falsehood.

The evidence of a person who openly inveighs against the companions of the prophet and their disciples is not admissible, because of his apparent want of integrity.—It is otherwise, however, where a person conceals his sentiments in regard to them, because in such case the want of integrity is not apparent.

The evidence of the sect of Ḥāwa* (that is, such as are not Soonis) is admissible; excepting, however, the tribe of Khatabia, whose evidence is inadmissible, for reasons that will be hereafter explained.—Shafēi maintains that the evidence of no tribe whatever of the sect of Ḥāwa is admissible, because the heterodox tenets they profess argue the highest degree of depravity.—Our doctors, on the other hand, argue that although their tenets be in reality wrong, yet their adherence to them implies probity, since they have been led to embrace

* Anglice, the air; a derivative appellation given by the Soonis to the Shīpa.—Hazw, also, is used to express the sensual passions, whence the term Abl Ḥızva signifies sensualists, or epicureans.
them from an opinion of their being right; and there is, moreover, reason to think that they will abstain from falsehood, because it is prohibited in every religion. Hence the case is the same as if a person should eat of an animal which had not been slain according to the prescribed form of Zabbab, because of its being lawful amongst his sect. It is otherwise where the baseness proceeds from the actions, not from the belief.—With respect to the sect of Khetabia, it is to be observed that they are in a high degree heretics; and amongst them it is lawful to bear positive testimony to a circumstance on the grounds of another having sworn it to them. Some have said that it is an incumbent duty upon that sect to give evidence in favour of each other, whence their testimony is not free from suspicion.

THE testimony of Zimmees with respect to each other is admissible, notwithstanding they be of different religions.—Malik and Shafei have said that their evidence is absolutely inadmissible, because, as infidels are unjust *, it is requisite to be slow in believing any thing they may advance, God having said (in the Koran) "When an unjust person tells you any thing, be slow in believing him;"—whence it is that the evidence of an infidel is not admitted concerning a Mussulman; and consequently, that an infidel stands (in this particular) in the same predicament with an apostate.—The arguments of our doctors upon this point are twofold.—First, it is related of the prophet, that he permitted and held lawful the testimony of some Christians concerning others of their sect.—Secondly, an infidel having power over himself, and his minor children, is on that account qualified to be a witness with regard to his own sect; and the depravity which proceeds from his faith is not destructive of this qualification, because he is supposed to abstain from every thing prohibited in his own religion, and falsehood is prohibited in every religion. It is otherwise with respect to an apostate, as he possesses no power.

* Arab. Fehed; meaning, in this place, degenerate or depraved.
evidence. either over his own person, or over that of another; and it is also otherwise with respect to a Zimmee in relation to a Mussulman, because a Zimmee has no power over the person of a Mussulman.—Besides, a Zimmee may be suspected of inventing falsehoods against a Mussulman, from the hatred he bears to him on account of the superiority of the Mussulmans over him.

Objection.—In the same manner as there subsists an enmity between Mussulmans and Zimmees, so also is there an enmity between the followers of other religions, such as the Jews, the Christians, and the Magians; it would follow, therefore, that amongst these the testimony of those of one religion cannot be admitted with relation to others of a different religion;—whereas it hath been declared admissible.

Reply.—Although the religions of these be different, yet none of them being under subjection to another, so as to engender reciprocal hatred, there is no cause to suspect that they will invent falsehoods against each other.

The testimony of an infidel Moostamin with relation to a Zimmee is not admissible, because he has no power over the person of a Zimmee, as the latter is a fixed resident in the Mussulman territory. The evidence of a Zimmee, however, is admissible with respect to an infidel Moostamin, in the same manner as the evidence of Mussulmans with relation to them is valid.

The testimony of one Moostamin is admissible with respect to another Moostamin, provided he be of the same country. If, however, they be of different countries (such as a native of Rassia and of Turkey) their testimonies with respect to each other are not admissible; because this difference precludes the operation of their power over each other; whence it is that they cannot inherit of each other.
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Evidence

Book XXI.

The testimony of him whose virtues exceed his vices, and who is not guilty of great crimes, is admissible, notwithstanding he may occasionally be guilty of venial crimes. — What is here advanced is an explanation of the degree of integrity to which regard is paid in bearing evidence: and this explanation is approved; for innocence with respect to great crimes, and a preponderance of virtue over vice, must necessarily be deemed sufficient, on this principle, that if any occasional commission of smaller crimes were destructive of testimony, the door of evidence would be shut, whilst the preservation of the rights of mankind requires that it should be kept open.

The testimony of an Acklif (that is, of one who has omitted circumcision on account of old age, or for some other sufficient reason) is admissible, because the omission of this ceremony is not destructive of justice; — excepting where it arises from a contempt of religion, or of the authority of the oral law by which it is enjoined, for in that case integrity no longer remains.

The testimony of an eunuch is admissible, because Omar accepted the testimony of Alkia, who was an eunuch; and also, because he has been deprived of one of his members by violence, and therefore stands in the same predicament with one who has been mutilated.

The testimony of a bastard is valid, because he is innocent with respect to the immorality of his parents. Imam Malik maintains that the testimony of a bastard is not to be admitted with respect to ushore-dom, as it may naturally be supposed he wishes as many others as possible reduced to the same level with himself, and his testimony in a matter of this kind is therefore liable to suspicion. — Our doctors, however, argue that the present question relates merely to the point of integrity; and if a bastard be a just man, there is no reason to suspect him of such a wish.

The
THE testimony of a hermaphrodite is admissible, because such a person is either a man or a woman, and the evidence of both is admissible.

The testimony of a governor on the part of the sultan is admissible, according to a majority of the Hanefite doctors, provided he do not enforce oppression; but if he act oppressively his testimony is not admissible. Some have said that in the latter case also his testimony is admissible, provided he be himself a man of generosity and character, and be not guilty of boasting and vain talk; because it is in such case natural to suppose that a regard for his reputation will prevent his afflicting a falsehood; and the dignity of his character will deter any one from offering him a bribe.

Where two brothers attest that their father had appointed a particular person to be his executor, if that person also claim the same, their testimony is valid, upon a favourable construction—but not if he deny the appointment.—Analogy would suggest that their testimony is not valid in either case;—(and a case where two legatees attest that the testator had appointed a particular person his executor,—or where two debtors or creditors of the deceased attest the same,—or where two executors attest the junction of a third person with them in the executorship,—is subject to the same analogy;)—because their evidence is in some degree advantageous to the witnesses themselves, in as much as the advantage to be derived from it results to them also. The reason for a more favourable construction in this particular is that as it is the duty of the Kāzee to appoint an executor where it is required, and where the death of the person is notorious, the evidence in question is admissible, inasmuch as it exempts the Kāzee from this trouble, and not because it establishes the proof of any thing.—It is therefore a substitute for the cast of a die, which saves the trouble of election.
Objection.—Where there are two executors, there is no occasion for the Kâzzâ’s appointment of a third, and therefore the appointment of a third, upon such a ground, is unwarrantable.

Reply.—The two executors having acknowledged that the deceased had joined a third person with them, the Kâzzâ is therefore required to confirm him, since, in consequence of such acknowledgement they cannot act without him.

It is to be observed that where the debtors of the deceased attest the executorship of a particular person, their evidence is admissible, whether the death of the other be notorious or not, because such evidence is an acknowledgment affecting themselves; and the debtors of the creditor is therefore established with respect to them, because of their acknowledgment.

If two brothers bear testimony that their absent father had appointed Zeyd an agent for the receipt of debts due to him at Koofa, their evidence is inadmissible, whether Zeyd claim the said agency or not;—for the Kâzzâ has no power of himself to appoint an agent in behalf of an absentee; and the evidence is not in this instance sufficient to warrant it, since it is liable to suspicion.

If a defendant reproach a witness with a thing which would impeach his legal integrity, but which does not involve any of the rights of the spiritual or temporal Law, and produce evidence in support of his assertion, the Kâzzâ must not hear them, nor pass a decree of the injustice of the witnesses; because this injustice is a thing of a nature which comes not within the jurisdiction of the Kâzzâ, inasmuch as it is not permanent, being removable by repentance.—Besides, the evidence adduced in this case tends to lay open faults*:—now the concealment of faults is incumbent, and the manifestation of them

* By faults is here understood venial trespasses, such as might destroy the legal integrity of a witness, but which do not amount to crime.
prohibited: as, therefore, a witness, in giving evidence to this effect, is himself guilty of irregularity, his testimony cannot be heard; for the manifestation of faults is admitted only where it tends to maintain the rights of others; and that is only in such cases as fall within the jurisdiction of the Kāzee;—but the case in question is not of that nature; and therefore the evidence cannot be admitted.—If, however, witnesses were to give evidence that the plaintiff had himself acknowledged the irregularity of the witness, the evidence would in that case be valid; because acknowledgment is a thing which falls within the jurisdiction of the Kāzee.

If a defendant bring witnesses to prove that the plaintiff had hired his witnesses for ten dirms (for instance,) such evidence must not be admitted; because, although it tend to prove something more than a mere irregularity, yet the defendant not being a regular adversary of the plaintiff in regard to this matter, has no right to establish it by evidence, since, with respect to this point, he is as it were a stranger.—If, however, the defendant be a regular adversary,—(as if, for instance, he should assert that the plaintiff had hired his witnesses to give evidence for ten dirms from property which he [the defendant] had put in his hands,)—in that case the evidence he produces in support of his allegation must be admitted; because the defendant is in this instance a regular adversary of the plaintiff in a matter of property; and the proof in regard to the property necessarily involves the proof of the reproach.—In the same manner also, the evidence adduced by the defendant is admitted where he asserts that he had “compounded with the witnesses for a certain sum of money that they should withhold their testimony in support of such unfounded claim,—and that, having accordingly paid the stipulated sum, they had nevertheless given their evidence, and he therefore prefers a claim for the sum paid to them;”—for here the proof with respect to the claim would also establish the proof of the reproach. Lawyers have observed that as the testimony of witnesses is admitted with respect
spect to any thing that falls within the jurisdiction of the Kasree, it
follows that if the defendant bring witnesses to prove that the witness
of the plaintiff is a slave, or that he has been punished for slander, or
that he is a drunkard, or a slanderer, or a partner of the plaintiff,—
in all these cases the evidence so adduced must be admitted.

If a person give evidence, and before moving from the place, or,
the Kasree passing a decree upon it, declare that "he had given a part
of his evidence under the influence of apprehension," still, if he be
a person of character *, the deposed matter to which he adheres must
be credited.—The term apprehension†, as here used, implies that a fault
has been committed, either by withholding part of the evidence which
it was incumbent to have mentioned, or by reciting, from forgetfulness,
something that was false.—The reason of admitting the evidence,
in this case, is because the apprehension probably arose from
the awe excited by the assembly of the Kasree; which is excused pro-
vided the person be just, and that he rectify his error in time.—It is
otherwise where a person separates from the assembly of the Kasree,
and afterwards returns and says, "I have omitted part of my evidence
from apprehension;" for in that case his evidence would not be ad-
mitted; because there is reason to suspect a collusion with the plaintiff,
which requires that caution be used; and also, because although any
addition or diminution, after the delivery of the evidence, be accepted,
and either added to, or deducted from, the original evidence, pro-
vided they be made in the same meeting, still this is not allowed in
case of their being made at a different meeting. The same rule also
holds with regard to the mistakes of a witness in explaining the
boundaries of a house;—as if he should say (for instance) the east in-
stead of the west; or in explaining genealogy, as if he should say (for
instance) "Mohammed, the son of Ahmad," instead of "the son of

* Arab. Addil: literally, a just person; (in opposition to Fâtil.)
† Arab. Tâkaham.

"Ale."
“ALEX.”—It is to be observed that the exposition of the law, in this case, applies only to the addition, by the witness, of some circumstance which may be in its nature doubtful; for if it should be in no respect doubtful, then he may at any time afterwards, whether at the same meeting or not, lawfully add it to his evidence.—Thus if a witness omit the use of the word Shabādit, or the like, and afterwards declare this omission, it is in that case admitted, whether it be at the same meeting or not,—provided he be a just man.—It has been related, as an opinion of Hanefī and Aboo Yoosuf, that whatever addition or diminution a witness may make after the delivery of his evidence, shall in every case be admitted, although it be at a different meeting,—provided the witness be a just man.—But the first doctrine is the most authentic, and decrees pass accordingly.

CHAP. III.

Of the Disagreement of Witnesses in their Testimony.

WHERE the evidence adduced by a claimant is conformable to the claim, it is worthy of credit; but not where it is repugnant to it; because, in matters concerning the rights of the individual, the priority of the claim is requisite to the admission of evidence; and this exists in the former instance, but not in the latter, since in the former the object of evidence (namely, a verification of the claim) is answered,—whereas in the latter the evidence tends to a falsification of the claim.
of it, and it is therefore the same as if no evidence at all were produced.

The concurrence of the witnesses, in words and meaning, is requisite, according to Haneefa. — If, therefore, one witness bear testimony to one thousand dirms being due, and the other to two thousand, no credit is to be given to either. — The two disciples are of opinion that the evidence is to be credited to the amount of one thousand dirms: and a similar disagreement also subsists in a case where one witness attests one divorce, and the other two or three divorces. — The arguments of the two disciples are that the witnesses agree in the smallest amount, (such as in one thousand dirms, or in one divorce;) and one of them, besides his agreement in this amount, attests an additional quantity. — Their evidence, therefore, must be admitted in the degree in which they concur; and the testimony of one, so far as it relates to the excess only, must be rejected. — The reasoning of Haneefa is that the witnesses differ in words, and consequently in meaning, since meaning is extracted from words. Thus two thousand (for instance) can never be construed to mean one thousand, as the terms are essentially different. — In the case in question, therefore, the one thousand, and the two thousand, respectively, are attested by only one witness; and the case is consequently the same as if their testimony had related to different articles, — as if one were to attest dirms, and the other deernars, for instance.

If a person claim a debt of one thousand five hundred dirms, and one of his witnesses bear testimony to one thousand, and the other to one thousand five hundred, in that case the testimony must be credited.

To exemplify this case, — suppose a person were to claim the right of property in a house, on the plea of his having purchased it; and his witness attest the right of property from its having been given to him; — in that case the evidence so given would be rejected.
in the amount of one thousand dirms; for the witnesses concur in that amount, both in words and meaning, as one thousand is mentioned by both, and five hundred is an additional part of the speech, which adds force to the former part, instead of destroying it. — Analogous to this is one divorce and one divorce and an half; or one hundred dirms and one hundred and fifty dirms; that is to say, in both these cases the evidence is admitted in the least degree, namely, in the degree of one divorce, and to the amount of one hundred dirms. — It would be otherwise if one witness should attest ten dirms, and the other fifteen; because this is similar to the attestation of one thousand and two thousand, the effect of which has been before stated.

In a case where one witness attests one thousand dirms, and the other one thousand five hundred, and the claimant expressly declares that only one thousand dirms is due to him; the testimony for one thousand five hundred is null, as being falsified by the claimant. — The effect is also the same where the claimant alleges one thousand dirms, and one of the witnesses attests one thousand, and the other one thousand five hundred; for here also the claimant falsifies the testimony of one of his witnesses, inasmuch as his claim is different from it. A conformity, therefore, between the claim and the evidence is indispensably necessary: and hence, if the claimant should say “my original claim was one thousand five hundred dirms, but I received five hundred,” or “I exempted the debtor from five

* The difference between this and the preceding case turns entirely on the terms in which the testimony is delivered; for in the case here considered the witnesses, in mentioning one thousand five hundred, mentions the term one thousand, which so far coincides with the testimony of the other witnesses; — whereas, in the former instance, the witnesses coincide only in the term thousand, which is not perfectly definite.

† Consequently the claimant must produce another witness, as two are required to establish his claim.
"hundred;" in that case each of the above mentioned testimonies would be credited, because of their conformity with the claim.

If two persons give evidence to a debt of one thousand dirms, and one of them afterwards declare that the debtor had paid five hundred dirms of it, still the evidence of one thousand dirms being due must be credited, and that of the five hundred having been paid must be rejected.—The reason of this is, that both witnesses agree in the debt of one thousand dirms, whereas one witness only attests the payment of five hundred dirms; and as two witnesses are requisite to establish proof, the testimony in the first instance is therefore admitted as proof; and the additional declaration (of one thousand dirms having been paid) is rejected.—It is related as an opinion of Aboo Yaseef that in this case the claimant is entitled only to five hundred dirms, because the sum of the testimony of the witness who attests the payment of five hundred dirms is, that the debt in fact amounts only to five hundred. The above explanation, however, is a full refutation of this opinion. It is to be observed that when the witness is informed of any partial discharge of the debt, (as in the case, for instance, of five hundred out of the thousand,) he must not bear testimony to the debt of one thousand until the creditor make an acknowledgment of the receipt of five hundred; for otherwise he would be considered as aiding the injustice of the creditor.—In the Jama Sagbeer it is related, that if two persons attest a debt of one thousand dirms due by Omar to Zeyd, and one of them afterwards bear testimony to Omar having paid five hundred of it, and the claimant deny the same,—in that case their evidence of the debt, in which they both agree, must be credited; and the single testimony of one, with regard to the payment, must be rejected.—Fabbwe reports it as an opinion of our doctors, that the evidence to the debt is not to be credited; (and Zisser has adopted this opinion;) because the claimant contradicts the testimony of the payment.—To this, however, it is answered, that although the claimant do contradict this latter testimony, yet he does not contradicthe first
Chap. III.  Evidence.

First evidence, which is established in its validity by the concurrence of two.

If two persons bear testimony that a certain person had killed Zeyd, on the festival of the sacrifice, at Mecca; and two others bear testimony that the said person had killed Zeyd, on the same day, at Kosa; in such case, if all these witnesses be assembled at the same time, in the presence of the Kaze, the whole of their testimonies must be rejected; because, of the evidence of the two parties, it is undoubtedly certain that that of one of them must be false, and there is no criterion to ascertain to which the preference belongs.—If, on the contrary, the evidence of one of these parties precede that of the other, and the Kaze in consequence pass sentence, and afterward two others exhibit evidence of a different nature, in that case the Kaze must not admit the evidence of the latter, because the first evidence, in virtue of the issue of the decree consequent upon it, acquires a superiority over the latter, which prevents its annulment.

If two persons attest the theft of a cow, but differ in regard to the colour of it, their evidence is nevertheless valid, and the hand of the thief must in consequence be cut off.—If, on the contrary, one of the witnesses declare the animal to be a cow, and the other allege that it is a bull, their evidence, in such case, is not admissible, and the hand of the thief must not be cut off.—This is the doctrine of Haneefah. The two disciples maintain that the thief is not to suffer mutilation in either case. Some have said that this disagreement proceeds on the supposition of the attested colours being in some degree similar, such as red and black, and not where they differ completely, such as black and white. Others again have said that it subsists in all cases where the witnesses differ with respect to the colour. The reasoning of the two disciples is, that the theft of a black cow is different from that of a white cow; in other words, they are two distinct animals; and hence...
the due quantity of evidence (namely, that of two witnesses) does not appear with respect to either allegation of theft.—It is therefore the same as if two persons were to testify that a certain person had usurped the cow of such a person, but to disagree with respect to the colour of the cow;—in which case the evidence of both would be rejected; and so also in the present instance, a fortiori, because the penalty annexed to theft (namely, amputation) is of a most grievous nature. Hence a difference of the witnesses with respect to the colour is the same as a difference with respect to the gender.—The argument of Hanesse is, that in a case of difference between the witnesses concerning the colour of the animal, it is possible to reconcile the contradiction by supposing the witnesses to have viewed the cow from a distance, and in the night-time, since thefts are most commonly perpetrated at that season;—and colours are of a deceptive nature:—cattle, moreover, are often pyle-balled; and it is therefore possible that the cow may be black on one side, which was seen by one of the witnesses, and white on the other side, which was seen by the other witness.—It is otherwise in a case of usurpation, since that most commonly happens in the day-time, and consequently the fact is most probably seen in the light, and near at hand. It is also otherwise with respect to the sex of the animal, since two sexes cannot unite in the same creature. Besides, a knowledge of the sex requires a close inspection, and hence the case does not admit of uncertainty.

If one person attest that Zeyd had purchased a slave for one thousand dirms, and another that he had purchased the said slave for fifteen hundred dirms, in that case the evidence of both is null; because the object of the evidence is to establish a cause of property, namely, the contract of sale; but the mention of two prices necessarily implies the existence of two contracts; and the proof of either of these is defective, as there is only one witness to each. This case proceeds on the supposition of the buyer being the plaintiff; but the effect is the same in case of the claim having been made by the seller;—and it matters
matters not whether, of the two sums attested, the plaintiff claim the largest or the smallest; because the proof is defective on either supposition, for the reason already explained.—The same rule also holds with respect to a contract of Kitābat; that is, where a Mokātib and his master disagree with respect to the amount of the ransom or consideration of Kitābat, and the two witnesses likewise disagree in their testimony, the evidence, in such case, is null, since the object of it (namely, the establishment of the contract of Kitābat) is defective, for the reasons already explained;—and this, whether the master or the slave be the plaintiff. It is also the same with respect to Khooola, manumission for a compensation, and composition for wilful murder, provided the claim be preferred by the wife, the slave, or the murderer;—because in all these cases the object of the evidence is the same, (namely, the establishment of the existence of a contract,) and is defeated by any disagreement of the witnesses.—But if, in any of these cases, the claim be preferred by the opposite party, it then becomes equivalent to a case of debt, and the law takes place accordingly.—Thus, if the claim be for one thousand five hundred dirms, and one of the witnesses declare it to be one thousand, and the other one thousand five hundred, in that case, according to all our doctors, a decree must be given for one thousand dirms.—If, on the contrary, the claim be for two thousand dirms, and one witness attest to one thousand, and the other two thousand, in that case nothing can be decreed, according to Haneefa; whereas, according to the two disciples, one thousand must be decreed.—The principle on which these cases resemble debt is, that the pardon for murder, the freedom of a slave, or the divorce of a wife, is established by the acknowledgment of the person to whom each of these rights appertain.—Hence, in such case, his claim of debt only remains, and there is no occasion for the proof of the contract.—In the case of a pledge, if one witness attest that it was pawned for one thousand dirms, and the other that it was pawned for one thousand five hundred, and the claim be preferred by the pawnor, the evidence is in that case inadmissible; because the pawnor has no advantage
advantage in preferring such a claim, since he cannot resume his pawn
until he pay the debt opposed to it.—His claim, therefore, is not re-
garded; and such being the case, the evidence he adduces is, as it
were, evidence without a claim; and evidence without a claim is in-
admissible.—If, on the contrary, the claim be preferred by the pawn-
holder, it is the same as a claim for debt.—In a case of hire, if one
witness testifies to one thousand dirms, and the other to one thousand
five hundred, then, provided this difference happen at the beginning
of the term of hire, it is analogous to a similar difference concerning a
sale; but if it happen after the expiration of the term, and the claim
be preferred by the hirer, it is a claim of debt.—In a case of marriage,
if one of two witnesses testifies to a dower of one thousand dirms, and
the other to a dower of fifteen hundred, the dower is established in the
amount of one thousand dirms, according to Haneefa, whether the
claim be preferred by the husband or wife, and whether it be for the
smallest or greatest of the attested sums. This is according to a favou-
able construction. The two disciples, arguing from analogy, main-
tain that the evidence is totally inadmissible.—(It is, however, re-
corded in the Amulee, that the opinion of Aboo Yoosuf, in this instance,
accords with that of Haneefa.)—The reasoning of the two disciples,
in support of their opinion, is that the disagreement of the witnesses
with regard to the amount of the portion is in fact a disagreement with
regard to the marriage contract, since the object of both is the estab-
lishment of a cause, namely, the said contract;—the disagreement in
this instance, therefore, is analogous to a similar disagreement with
regard to sale.—The reason for a more favourable construction of the
law in this particular, as adopted by Haneefa, is that property, in
the case of marriage, is merely a subordinate point, the original object
of it being to legalize generation, to unite the sexes, and to endow
the man with a right in the woman's person. Now as there is no dif-
ference whatever upon these points, they are accordingly established in
the first instance; and if any disagreement then occur concerning the
subordinate or dependant point, the smallest sum attested is decreed,
since to that amount both witnesses agree.—What is here advanced, that the case is the same "whether the claim be for the smallest or for the greatest attested sum."—is approved.—Some of the learned have said, that the difference of opinion between Hanefi and the two disciples proceeds only on the supposition of the claim having been preferred by the woman: for that, in case of the claim being made by the husband, they are all agreed in regard to the inadmissibility of the evidence; since his object can only be the establishment of the contract, whilst the object of the woman is the property.—Others again have said that this difference of opinion obtains in either case; and this is approved.

CHAP. IV.

Of Evidence relative to Inheritance.

It is a rule, that if an inheritor's * right of property in any thing be proven, still a decree cannot pass in favour of the heirs, until proof be adduced of the death of the inheritor, and of their right of heritage.—This rule obtains with Hanefi and Mohammed. Aboo Toosf main-

* Meaning, the person from whom inheritance is derived. The translator is aware that this term is not sanctioned by authority, Ancestor being the phrase generally used in our law-books.—The nature of the Muffalimn laws of inheritance, however, renders it necessary to adopt some term of more general import, since, according to these, inheritance may either ascend or descend.—The translator, therefore, has adopted this term, both in order to avoid the inconvenience of a perpetual paraphrasis, and also because it literally expresses the sense of the Arabic term Maouris, signifying "inherited from."

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EVIDENCE.

It suffices that the witnesses attest either the property or possession of the inheritor at the time of his decease.

... the right of the heirs, before inheritance can take effect.

tains that the thing must be immediately decreed to the heir; for he alleges that the property of the heir is, in fact, the property of the inheritor, and consequently that evidence to the inheritor's right of property in any thing is, in fact, evidence to his heir's right of property in that thing.—Haneefa and Mobammed, on the contrary, allege that the right of the heir is inchoate and extant de novo, with respect to all the rules to which the inherited property is subject; (whence it is that a course of abstinence is enjoined upon an heir, with regard to an inherited female slave,—and likewise, that whatever a poor inheritor may have received by way of charity is lawful to his rich heir;) and the right of an heir being inchoate and extant de novo, it is indispensable, in such case, that the witnesses bear testimony to the shifting of the right from the inheritor to the heir,—in other words, that they attest the inheritor to have died, and to have left the article in question as an inheritance to his heirs.—They deem it sufficient, however, in order to prove the shifting of the right of property, that the witnesses attest that "the thing in question was the property of the inheritor at the period of his death;" for then the shifting is established from necessity;—and in the same manner, it suffices if they attest that "it was in the keeping and possession of the inheritor at the time of his death;" for although the possession of an article may have been in virtue of a deposit, or of usurpation, yet the possession at death, in either case, is in fact a possession in virtue of the right, because of the obligation of responsibility which then takes place:—in a case of usurpation evidently; and also in a case of deposit, because of the death of the trustee without any explanation;—in other words, if a trustee should die, without explaining that a particular thing in his possession is the deposit of a particular person, it occasions responsibility, because the trustee, in dying without explaining the case, was most certainly guilty of a want of care of the deposit; and a want of care of a deposit is a transgression with respect to the deposit, which.

* See Deposit.
indicates responsibility.—Evidence, therefore, of a thing being in the possession of a certain person at his death, is equivalent to evidence of its being his property.

Having thus explained the tenets of each of our doctors upon this subject, it follows that if witnesses were to give evidence that a particular house was in the possession of a certain man at his death, the evidence so given must be admitted with respect to the claimant being the heir of the deceased. In the same manner also, the testimony of witnesses must be admitted, where a person adduces evidence to prove that a particular house, in the possession of a certain person, was the property of his father, and that his father had lent it, or had delivered it in deposit to the person then possessing it. In this case, therefore, the said person is entitled to take the house from the present occupier, without being required to prove, by witnesses, that his father had died, and that the said house had been left to him in inheritance.—This, according to the tenets of Aboo Yosof, is evident:—and so also according to the tenets of Haneefa and Mohammed; because in the case in question it has been shewn, by the testimony of witnesses, that the father was in possession at the time of his death, inasmuch as the possession of a borrower or trustee is equivalent to his own possession; and on this account there is no necessity for proving the shifting of the property to the heir, since that is a consequence of the proof of the possession, as has been already explained.—It is to be observed that the law is the same where, under these circumstances, the claimant affords the possession of the other to have been in virtue of a lease; because the possession of a lessee is equivalent to the possession of the lessor.

If a person claim a right of property to a house in the possession of another, and the testimony of the witnesses produced by him should run in this manner, "we testify that the said house was in the possession of the claimant one month ago,"—such evidence must not be admitted.
admitted.—This is the doctrine of the Zābir Rawbyet.—It is related as an opinion of Aboo Rofaṣ, that the evidence, in this case, is admissible; because possession is an object in the same manner as property; and as the testimony of the witnesses would have been accepted, in case they had said that the house in question was the property of the claimant one month ago, it follows that it must be admitted in this case also.—Besides, if the witnesses had deposed that the other had taken the house from the hands or possession of the claimant, their evidence would have been admitted; and the claimant would, in consequence, have been put in possession of the house. The doctrine of the Zābir Rawbyet, in this particular, has been adopted by Haneefah and Mōbāmmēd: and the arguments in support of it are twofold.—First, the seizin of the present possessor is actually seen with the eye; whereas that of the claimant, which formerly existed, is only heard from the tongue of the witnesses; and knowledge from barefay can never be put in competition with that from actual sight.—Secondly, the evidence, in this case, relates to a matter of uncertainty; since the former seizin of the claimant, not being definitely known, admits of three suppositions, as it may have existed in virtue either of right of property, of deposit, or of usurpation;—and where the point is of so uncertain a nature, it is impossible to pass a decree upon the possession.—It is otherwise where the witnesses attest the right of property, as that admits not of various suppositions;—or, where they attest that the house had been taken from the claimant; because this is a matter of certainty, of which the law is known, namely, the obligation of restitution, or of replacing the thing, as it formerly stood, in the possession of the claimant.

If the possessor of the house should himself acknowledge the former possession of the claimant, in that case a decree must pass for restoring the claimant to his possession; for the uncertainty with regard to the subject of an acknowledgment is no bar to the validity of the acknowledgment itself.
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EVIDENCE.

If two persons attest the acknowledgment of the defendant, that the thing in his possession had formerly been in the possession of the claimant, the article in question must in that case be restored to the claimant; because, although the subject of the acknowledgment be a matter involved in uncertainty, yet the evidence here relates, not to it, but to the acknowledgment itself, which is a matter of certainty;—and the uncertainty in the subject of it is no bar to the decree of the Kánes, since he may afterwards desire the acknowledger to explain the nature of the uncertainty.

CHAP. V.

Of the Attestation of Evidence.

An attestation of evidence is admissible in all such rights as do not drop in consequence of a doubt; because there is a necessity for this, since it may happen that a witness, from various causes, (such as sickness,) may not be able to give his evidence in person; whence, if an attestation of his evidence were not admissible, the rights of mankind would often be destroyed. There is, however, a degree of doubt attending it; because the secondary witness, in such case, is merely a substitute for the primary witness;—and if there be many gradations between him and the primary, the suspicion of falsehood becomes still stronger.—There is, moreover, a possibility of avoiding this expedient, by desiring the party to produce, independant of the witness whose attendance is impracticable, some other who is also a primary witness.
witness.—An attestation of evidence, therefore, is never admitted where it tends to establish a matter which is repelled by the existence of a doubt, such as punishment or retaliation.

The attestation of two men with regard to the evidence of two others is valid. Sbeči maintains that the evidence of four men is necessary to authenticate that of two men; because, in his opinion, two secondary witnesses are equivalent to one principal, in the same manner as two women are equivalent to one man. The arguments of our doctors in support of their doctrine upon this point, are twofold.—First, Alice has declared that an attestation of the evidence of one man is not admissible unless attested by two. Secondly, the stating the evidence of a principal or original witness is included in the number of rights. If, therefore, two men testify to the evidence of a principal witness, and afterwards testify to the evidence of another principal witness, both evidences are valid; nor is it required that the evidence of each principal witness should be testified by two separate secondary witnesses.

But the evidence of each must be attested by the two respectively.

The attestation of one person to the evidence of one witness is not admissible, because of the opinion of Alice, as before quoted.—Mālik admits the attestation of one person to the evidence of one witness. The precept of Alice, however, is in proof against him. Besides, the evidence of one principal witness is included amongst the number of rights, and therefore requires to be proved by two witnesses.

It is requisite that the principal witness desire the secondary to bear testimony to his evidence, after the following manner,—"Bear testimony to my evidence, which is, that A. the son of B. has made an acknowledgment before me to a particular effect, and has desired me to attest the said acknowledgment." The reason of this is that the secondary witness is a deputy of the principal, and it is therefore necessary
necessary that he appoint him his agent, and desire him to bear evidence in the manner above related.—It is also requisite that the principal give his evidence to the secondary, in the same manner as he would have done in the assembly of the Kāzī, in order that he [the secondary] may report the same literally, in that assembly.—It is to be observed, however, that if the principal should not mention that “A. the son of B. had called him to witness his acknowledgment,” still his attestation is valid; because whoever hears another make an acknowledgment may lawfully give evidence of the same, although the acknowledgment should not have desired him to bear testimony.

It is requisite that a secondary witness deliver his testimony in the following manner:—“Zeyd has called upon me to attest his evidence that Omar has made an acknowledgment before him to a particular effect, and that he had desired him to bear testimony to his evidence of the said acknowledgment.”—All this is required, because it is necessary that a secondary witness recite the substance of the evidence of the principal, and specify that he had called upon him to bear testimony to it.

If Omar hear Zeyd assert that a particular person had desired him to bear testimony to some circumstance, it is not in that case lawful for Omar to attest the said evidence of Zeyd, unless Zeyd should have particularly called upon him to attest the same; because, in the attestation of evidence, that of having been called upon to attest it is a necessary condition. This is according to all our doctors:—according to Mohammed, because, in his opinion, the decree of the Kāzī passes on the strength of both evidences; that is, of the principal and the secondary; and also because both of them are liable, in an equal degree, to the penalty in case of a recension from their evidence:—and according to Hanėfa and Aboo Taqaf, because, in their opinion, a repetition of the evidence of the principal witness before the Kāzī is necessary.
The attestation of evidence is not admissible excepting where the principal witnesses have died, or have departed to a distance of three days journey or upwards; or are so sick as to be unable to attend at the assembly of the Kāzee. — The reason of this is that the attestation of evidence is admissible only from necessity; and this necessity exists only where the principal witnesses are unable to give their testimony personally, which inability exists in all these cases. — It is to be observed, that, in case of the absence of the principal witnesses, the distance must be estimated by the time requisite to travel it; because the incapability of appearing to give evidence is founded on the distance, which the law estimates from the length of time. It is related, as an opinion of Aboo Yosaf, that if the absent person be at a place so situated as that, having occasion to appear in the assembly of the Kāzee in the morning, he could not return to his family that day, in that case it is lawful to accept, for the preservation of the rights of mankind, an attestation of his evidence. Lawyers, however, remark that the former doctrine is the most authentic, as in this latter case there is no great inconvenience; and Aboo Leys has also given this exposition upon the point.

The justification of the original witnesses by the secondary is admitted, because they are capable of being purgators. — In the same manner also, the justification of one witness by another witness is valid, for the like reason; and also because the effect of it is advantageous to him, since the Kāzee will in consequence of it pass a decree. It is likewise to be observed, that this degree of advantage does not subject a just man to any degree of suspicion; in the same manner as he lies not under any suspicion from the delivery of his own evidence. A just man indeed cannot possibly lie under suspicion from his justification.
cation of another witness, because his testimony is credible in itself, although that of the other be rejected.

If secondary witnesses remain silent with respect to the justification of the principal witnesses, it is valid; that is to say, the testimony of the principal witnesses, as recited by them, must be admitted; and the Kāzée must scrutinize into their characters from others. This is according to Aboo Yooasf. Mohammed has said that in this case the original evidence, as recited by the secondary witnesses, must not be admitted; because the validity of evidence is founded entirely on the probity of the witnesses; and it consequently follows, that unless the secondary witnesses explain the probity of the principals, their testimony repeated by them cannot be received as valid evidence. The reasoning of Aboo Yooasf is, that the business of secondary witnesses is merely to recite the evidence of the principals, and not to exhibit a justification of them, since it may often happen that they are ignorant of the probity of the principals. Besides, after they have recited their evidence, it is the business of the Kāzée to examine into their probity, in the same manner as if they were actually present.

If the principals deny the evidence recited on their part by the secondaries, the evidence of the secondaries must not be admitted, because of the want of proof, from the contradiction which subsists between them and the principals.

If two men bear testimony to the evidence of two others, to this effect, that "a certain woman, the daughter of a native of Samarcand, " has made an acknowledgment of one thousand dirms in favour of "Zeyd,"—and these secondary witnesses further declare, that the principals had informed them, that they knew the person of the woman,—and the plaintiff produce a woman, and the secondary witnesses declare that "they do not know whether she is the woman in "question or not,"—in that case the plaintiff must be desired to pro-

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duce two witnesses to testify the woman's identity; for here the evidence of the witnesses tends to prove the claim upon an uncertain person, whereas the plaintiff claims his right from a person specific and present; and hence a doubt arises, to remove which it is requisite to ascertain the person.—Analogous to this is a case where two witnesses bear testimony to the evidence of two others, that "a certain person sold a piece of ground circumscribed by particular boundaries, and the price is due by the purchaser;"—for here it is requisite to produce two other witnesses to attest that the said ground, circumscribed by the said boundaries, had been delivered over to the purchaser, who is the defendant;—and in the same manner also, it is requisite to produce two other witnesses, in case the defendant deny that the boundaries of the ground he had purchased are the same with those described in the evidence of the witnesses; to the end that these additional witnesses may bear evidence that those boundaries were the same with those of the ground in the possession of the purchaser.—

The law is exactly the same with regard to the letters of one Kásee to another;—as where one Kásee writes to another, that "two witnesses have given evidence that a debt of one thousand dirims is due to a certain person, the son of a certain person, of a certain family, by the daughter of a certain person of a certain family, and that he must pass a decree for the said daughter's payment of the said sum;" for here, if the plaintiff, after delivering the letter to the Kásee to whom it is addressed, produce a woman, the Kásee, before he passes the decree, must desire him to bring two witnesses to attest that she is the same woman as described in the letter of the other Kásee.—It is to be observed that if, in either of these cases, (namely, attestation of evidence, or of the letters of one Kásee to another,) in the specification of the family of the woman, the witnesses make use of the term Tameemia, it is not valid; it being necessary to specify some nearer and more particular branch to which the woman is related, in order that a particular knowledge may be acquired, which cannot be done in case of the specification of so general a branch as that of Tameemia, whole
who are innumerable. — It is the opinion of some that
the word Farghānīd implies a general, and Auzchāndīd a particular
family. — Some, also, think that the words Samarcandia or Bokhāria
are general; and some have said that the reference to a small lane is
particular, and to a street or city general. — It is to be observed that,
according to the Zābir Rawdāyat, the opinion of Ḥanefī and Mūḥāmed
(in opposition to that of Aboo Yōsaf) is that description is ren-
dered complete by the specification of the grandfather; but that the
specification of the particular family (which is termed Fakbīs*) is
equivalent to the mention of the grandfather; since it is the name of
a distant progenitor, which is equivalent to a nearer one.

SECTION.

Ḥanefī is of opinion that a false witness must be stigmatized†,
but not chastized with blows. The two disciples are of opinion that
he must be scourged and confined; and this is also the opinion of Saqfī.
The arguments of the two disciples upon this point are twofold.—
First, it is related of Omar, that he caused a false witness to be
scourged with forty stripes, and to have his face blackened with the
foot of a pot. Secondly, false testimony is a great crime, of which
the evil results to others; and as no stated punishment has been or-
dained for it in the law, it must therefore be punished by Ṭanīt,
or discretionery correction. The arguments of Ḥanefī are also two-

* To understand the whole of this passage, it is proper to remark that of tribes among
the Arabicus there are six degrees, I. Sabaib, II. Kabara, III. Fandia, IV. Omeda,
V. Batu, VI. Fakbis; — in which last are included the nearest kindred. (Richardson’s
Dictionary.)

† Arab. Ṭanīt, from taht-bær, which literally signifies apparging in public; a mode
of punishment somewhat similar to the stocks or pillory.
fold.—First, *Shirreeb* stigmatized a false witness, but did not scourge him. Secondly, prevention of the crime in future may be effected by stigmatizing, and it ought therefore to be adopted as sufficient; for were beating or scourging enjoined in such cases, it might operate to the concealment of the crime, and the consequent destruction of the rights of others;—in other words, as being a grievous punishment, the fear of it might deter false witnesses from a confession of their falsehood. With regard to the relation concerning *Omar*, it evidently alludes to the infliction of punishment on a criminal, as appears by the number of stripes, (namely forty,) and the blackening of the countenance.

**Mode of stigmatizing a false witness.**

The mode of stigmatizing a false witness, as prescribed by *Shirreeb*, is this.—If the witness be a sojourner in any public street or market-place, let him be sent to that street or market-place; or, if otherwise, let him be sent to his own tribe or kindred, after the evening prayers, (as they are generally assembled in greater numbers at that time than any other;)—and let the stigmatizer inform the people that "*Kâzeer Shirreeb* salutes them, and informs them, that he " has detected this person in giving false evidence; that they must " therefore beware of him themselves, and likewise desir[e] others to "beware of him." *Shinsal Ayma* has said that a false witness ought also to be *stigmatized*, according to the two disciples; and that the degree of correction and imprisonment ought (according to them) to be left to the discretion of the *Kâzeer.*—(The nature of discretionary correction has been already explained under the head of *Punishments*.) It is related in the *Jama Sagheer* that if two witnesses confess that they have given false evidence, they must not be scourged. The two disciples maintain that they are to be scourged at the discretion of the *Kâzeer.*

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**Hedâya.**
BOOK XXII.

Of Retraction of Evidence.

If witnesses retract their testimony prior to the Kásee passing any decree, it becomes void; (that is to say, the Kásee must not pass any decree upon it;) for the right of the claimant cannot be established but by the decree of the Kásee; and the Kásee cannot pass a decree upon contradictory testimony:—and in this case the witnesses are not liable to make atonement, since they have not occasioned any injury to either of the parties. If, on the contrary, the Kásee passes a decree, and the witnesses afterwards retract their testimony, the decree is not thereby rendered void; because, although the first allegation on which the decree passed be contradicted by the latter, and although the first
and the last in point of credit stand upon an equal footing, yet the first, because of the sentence of the Káce having passed in conformity to it, acquires a superiority which prevents its annulment. — In this case, however, the witnesses are bound to atone for the injury they may have occasioned by their false testimony; for they themselves acknowledge a thing which is the cause of responsibility; and contradiction is no bar to the validity of acknowledgment, as shall be hereafter explained.

The retracation of evidence is not valid, unless it be made in the presence of the Káce; because, being a destruction of evidence, it must consequently be restricted to that place which is particularly appointed for the reception of evidence,—namely the assembly of the Káce,—(that is to say, of any Káce whatever.)—Besides, retracation of false evidence resembles repentance of a crime; and repentance of a crime, if committed privately, must be performed privately, and, if committed openly, must be performed openly. — As, therefore, retracation of evidence is not valid, unless made in the assembly of the Káce, it follows that if the defendant should aver that the witnesses had retracated their testimony some where out of the assembly of the Káce, and should either require that an oath to this effect be administered to them in the assembly of the Káce, or offer to produce witnesses there to prove his assertion, yet neither would the oath be administered to those witnesses, nor would the evidence he offers to produce be accepted, since the plea on which he proceeds (namely, an invalid retracation) is of no effect. If, on the contrary, his plea be of an effectual nature, (as if he should assert that the witnesses had retracated their testimony before a certain Káce, who had in consequence passed a decree for their making reparation,) the evidence he offers must be admitted, because he in this instance grounds his plea upon a valid retracation.
If two witnesses bear testimony that a particular sum is due by a
certain person to another, and the Kāsee accordingly pass a decree for
the payment of it, and the witnesses afterwards retract their evidence,
they are in that case responsible to that person for the sum decreed
against him; for whoever, by a transgression, performs an act destruc-
tive of another's property, becomes responsible for the same; (in the
same manner as the digger of a well on the high road*); — and in this
case the witnesses have been guilty of a transgression in giving false
evidence, which occasioned the loss of the defendant's property.—
Shafei maintains that they are not responsible; for they, in fact, only
produce the cause of the destruction, and that is not regarded where
those are present who actually worked the destruction, namely (in the
present instance) the Kāsee and the plaintiff.—In reply to this, our
doctors argue that to impose the responsibility, in the case in question,
upon the actual operator of the destruction (namely the Kāsee) is im-
pacticable; because, in passing the decree, he acted as it were from
necessity; and also, because, if a Kāsee were thus liable to responsi-
bility, no one would accept the office of Kāsee, from an apprehension
of being subject to such penalties.—In the same manner also, it is im-
pacticable to exact the compensation from the plaintiff, because the
decree of the Kāsee takes effect independant of him. In this case,
therefore, regard is necessarily had to the producer of the cause.—It is
to be observed, however, that the witnesses do not become responsible
unless the plaintiff obtain possession of the property in question, whe-
ther it be substance or debt; because the destruction of it is not es-
ablished until after the seizin of the plaintiff; and also because the de-
ffendant is not, until then, subjected to any thing except the mere ob-
ligation of debt, whereas what he is to take from the witnesses is ac-
tual substance; and it is not lawful to take substance as a compensation

* If a person dig a well in the high road (where no person is entitled to dig a well,
and which is of course a transgression) he is liable to a fine for any accident which may
happen by people falling into it, &c. This is fully explained in treating of Fines.

for
for the mere obligation of a debt, since compensation can only be made in a similar, and there is no similarity between debt and substance.—If, in the case in question, only one of the witnesses retract his evidence, he becomes responsible for a half of the property: for it is a rule that where part of the witnesses retract, the right shall remain established so far as relates to the remaining witnesses.—Hence if three persons give evidence concerning property, and one of them afterwards retract his testimony, he is not subject to any responsibility, because the whole of the right remains established in virtue of the two remaining witnesses. The reason of this is that the right of the claimant is established because of the complete proof, namely, the testimony of two witnesses. If, however, another of those three witnesses afterwards retract his evidence, the two receding witnesses are in that case responsible for one half of the property, since, in virtue of the existence of one witness, one half of the right remains in force.

If one man and two women give evidence, and one of the women afterwards retract her testimony, she is liable for one fourth of the right; because, in consequence of the existing evidence of one man and one woman, three fourths of it still remain in force. If, also, both the women retract their testimony, they are responsible for an half, since in virtue of the existing testimony of one man an half of the right still remains in force.

If one man and ten women give evidence, and eight of the women afterwards retract, those eight are not liable to any compensation, since the remaining evidence furnishes complete proof. If, on the contrary, nine of the women retract, those nine are responsible for a fourth, since the remaining evidence of one man and one woman establishes three fourths of the right.—If, in the case in question, the whole of the witnesses retract, the man is in that case responsible for one sixth of the right, and the ten women for five sixths, according to Hannefa. Aboo Yoosaf holds that the man is liable for an half, and the ten
ten women for an half; because, although they greatly exceed in
point of number, yet they are in fact only equivalent to one man,
since their evidence is not admissible unless it be in conjunction with
that of a man. Haneefa, on the other hand, argues that the evidence
of every two women is equivalent to that of one man; because the
prophet, on account of the weakness of their understanding, has or-
dained that the evidence of two women shall be equivalent to that of
one man. Hence, in the case in question, it is the same as if six men
had given evidence and had afterwards retracted it.—If the ten women
retract, and not the man, they are responsible for an half of the right,
according to all our doctors, in conformity with the rule before-
mentioned.

If two men and one woman give evidence in a matter of property,
and all of them afterwards retract, the whole of the responsibility
rests on the two men, and none on the woman, because one woman
is no more than half of a witness, whence the law regards not her in
this case, inasmuch as no effect results from the mere part of a
cause.

If two witnesses give evidence concerning a woman, of her being
married on a Mibh Misb, or proper dower*, and afterwards retract their
testimony, they are not bound to make any compensation†; and so
likewise, if they testify to any thing short of the proper dower; be-
cause the advantage to be derived from the woman's person is not an
article of value where it is lost to her by false evidence; for compen-
sation, in case of the destruction of any thing, implies the return of a
similar; and there is no similarity between substantial property and the
communal enjoyment.

* This case supposes that the woman claims a stipulated dower, greater than her proper
dower, and that the husband endeavours to refit her claim by evidence.

† That is, they are not to compensate for the difference

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In two witnesses give evidence concerning a man, of his having married a woman on a proper dower, and afterwards retract the same, still they are not bound to make any compensation, although by their testimony they have destroyed the property of that man; because the destruction in this instance is attended with an equivalent, inasmuch as the connubial enjoyment is considered as an article of value, whenever it becomes the right of any one; and destruction attended with a consideration or equivalent, is the same, in effect, as no destruction. The ground of this is that responsibility is founded upon similarity. Now there is no similarity between destruction with an exchange and destruction without an exchange. If, therefore, in the case in question, a compensation were taken from the witnesses, it would be a destruction of their property without any thing in return.—If, however, the witnesses were to testify to any amount beyond the proper dower, and afterwards retract, they are in that case responsible for the excess, as having destroyed that much without any consideration in return.

If two witnesses bear evidence to a sale for a price tantamount to, or greater than, the value of the thing sold, and afterwards retract, they are not in that case liable to any compensation; since destruction attended with an equivalent is, in effect, no destruction.—If, on the contrary, they should give evidence of the sale for a price less than the value, they are in that case responsible for the deficiency of value, because, in that amount, they have occasioned a destruction without any equivalent. The law here applies equally to sale with or without an option to the seller; because, in the case of an option, the cause of right of property is the original sale, and not the determination of the option.—The effect, therefore, is referred to the sale, upon the determination of the option; and hence the destruction is referred to the evidence of the sale.
If two witnesses give evidence of a man having divorced his wife prior to consummation, and afterwards retract, they are in that case responsible for a moiety of the dower; because they have established upon that man a thing which stood within the possibility of dropping; (in other words, which might perhaps have been altogether cancelled, by the wife apostatizing from the faith, or admitting the son of her husband to carnal connexion*); and also, because separation prior to the consummation is equivalent to an annulment of the marriage, and therefore annuls the whole of the dower, as has been already explained†; but afterwards the half of the dower is established de novo, in the manner of a Madat or present‡, and hence the said half is rendered due by the testimony of the witnesses.

If witnesses attest that a certain person had emancipated his slave, and afterwards retract their testimony, they are in that case responsible to the person in question for the value of the said slave, because of their having destroyed his property in the slave without any equivalent in return.—The right of Willa, moreover, with respect to the slave, rests with that person and with the witnesses; because as the emancipation of the slave is not, on account of their responsibility, ascribed to their testimony, it follows that the Willa does not go to them.

If two witnesses hear evidence against a person, in a case of retaliation for murder, and then retract their testimony after the person has been put to death, they are in that case bound to pay a Deeyat, or fine of blood, but are not to suffer death by way of retaliation. Shaefi maintains that they are to suffer death, since they were the efficient cause of death, inasmuch as the retaliation was executed on the strength of their evidence; and they therefore resemble a Mokrib, or compeller, (in other words, they compel the commission of murder;)—nay, they are still more criminal than a Mokrib, inasmuch as the avenger of blood

in a case of murder, is aided in bringing the murderer to justice; whereas a person under compulsion is prohibited, by the law, from putting to death*. The reasoning of our doctors is, that the witnesses, in this case, cannot be considered either as actual perpetrators, or as instrumental causes of the bloodshed; for nothing can be considered as a cause except such a thing as presses upon, and joins to, the agent; and the testimony of the witnesses cannot be considered in this light, since, notwithstanding they furnish legal grounds for the retaliation, yet pardon and forgiveness being benevolent acts, the probable consequence is that the avenger of blood will pardon the person against whom they bore evidence. It is otherwise in a case of compulsion; for the person compelled is induced to execute the murder with a view to save his own life, which the compeller threatens to take from him in case of his refusal; whereas, in the case in question, there is no compulsion on the avenger of blood to execute the retaliation; on the contrary, he is at free liberty either to pardon the other, or to execute the retaliation; and where a man acts from free liberty, and not from any necessity, the cause of his actions cannot be ascribed to the witnesses: at least, it must be allowed that there is a doubt with respect to their being the cause; and the existence of a doubt is preventive of retaliation. The Deeyat, or fine of blood, however, takes place; because that is a matter of property, and, as such, may be established, notwithstanding any doubt which may happen to attend it.

If secondary witnesses † retract their evidence, they are responsible; since the destruction of the defendant's property is referred to them, because of their giving evidence in the assembly of the Khizee.

* This will be more fully and clearly understood by a reference to the article Ishab, or Compulsion.

† Meaning, witnesses who attest the evidence of other witnesses. (See Chap. V. of the preceding book.)
If, on the other hand, the primary witnesses retract, alleging that they had not authorized the secondary witnesses to attest their evidence, they are not responsible, since they deny the evidence which occasioned the destruction of the property of the defendant. In this case, moreover, the decree of the Kāzee, occasioned by this testimony, is not rendered null, since the denial of the primary witnesses is susceptible of doubt, (that is, it may either be false or true,) and the decree of the Kāzee cannot be reversed by a dubious circumstance; in the same manner as it cannot be reversed by the retraction of evidence, after it has passed on the strength of that evidence.—It is otherwise where the primary witnesses make the denial prior to the passing of a decree; because in that case the Kāzee would not pass the decree on the strength of the evidence of the secondary witnesses.—If, however, the primary witnesses avow that they had authorized the evidence of the secondary witnesses, but that they had committed an error in so doing, they are in that case responsible for the loss that may have been occasioned.—This is according to Mohammed.—The two elders are of opinion that, even in this case, the primary witnesses do not become responsible; since the decree of the Kāzee passed upon the evidence of the secondary witnesses, from the necessity under which the Kāzee lies of proceeding on the proof before him, which in this case is the evidence of the secondary witnesses.—The reasoning of Mohammed is that the secondary witnesses do only repeat the evidence of the principals; and hence it becomes in effect the same as if the principal witnesses were themselves present.

If both the primary and the secondary witnesses retract their evidence, the two Elders are in that case of opinion that compensation is due only by the secondary witnesses, because of the decree having passed on their evidence. Mohammed, on the contrary, is of opinion that the defendant has the option of taking the compensation either from the principal or the secondary witnesses; because (according to the doctrine of the two disciples) the decree passed on the evidence of the secondaries,
secondary, or (according to his own doctrine) it passes on the evidence of the principals; and hence the defendant has the option of taking the compensation from whomsoever of the two he pleases:—but as originality and dependancy are of different natures, it is not permitted to unite both the principals and the secondaries in the payment of the compensation; that is to say, the defendant cannot take it from both.

Ir, in the above case, the secondary witnesses assert that the primary witnesses had either been guilty of falsehood, or had committed an error in their evidence, the Kasr must not attend to this assertion, because his decree, as having passed and issued, cannot be affected by any assertion of theirs. And in this case the secondary witnesses are not liable to any compensation, since they have not retracted their own evidence, but have merely repeated the evidence of the principal witnesses, notwithstanding they had retracted it.

Ir purgators recede from their justification, they become responsible, according to Hanësf. —The two disciples are of opinion that they do not become responsible, because they have merely performed a generous action in behalf of the witnesses, and therefore resemble witnesses who bear evidence to the marriage of a person accused of whoredom, and who, in case of retracting their evidence after the stoning of the person to whom it related, do not become responsible for the sin of blood. —The reasoning of Hanësf is that justification is the cause of credit given to witnesses, inasmuch as the Kasr proceeds not upon the evidence itself, but upon the justification of it. —Hence the justification is, in effect, the moving cause of the decree. —It is otherwise with witnesses to the marriage of a person accused of whoredom, because in that instance the circumstance of the accused being a married person is particularly essential to induce lapisation.

If two witnesses give evidence of a *Yameen* (or suspension on a condition) of divorce or emancipation, and two other witnesses give evidence that the condition had taken place, and both parties afterwards retract their evidence, compensation is in that case due only by the witnesses who attested the deed of *Yameen*, which is the cause of the damage, and not by those who attested the occurrence of the event on which the divorce or emancipation was suspended; because the decree of the *Kāzī* proceeded on the evidence to the deed, and not on the evidence to the condition.—If only the witnesses to the occurrence of the condition retract, there exists in that case a difference of opinion amongst the *Haneefite* doctors.—It is to be observed that by the *divorce* here mentioned is to be understood divorce before consummation; for in a case of divorce subsequent to consummation neither party of the witnesses are liable to make compensation, because the wife’s right to her dower is established by the consummation *.


END OF THE SECOND VOLUME.
ERRATA in the SECOND VOLUME.

Page 12, line 17, for "of blessings," r. "of the blessings."
26, (note,) — frictus, r. fricen.
31, (note,) — Copulato, r. Copulator.
36, line 18, — suspensio, r. suspicion.
48, (note,) — Morakker, r. Moraker.
50, line 5, — sentenced, r. sentence.
76, — 30, — Ἰάφιτς, r. Ἰάφιτς.
83, — 8, — "or (larceny, namely," — r. "or Larceny, (namely," —
84, — 20, — airm, r. airm.
—, — 30, — corroborated, r. corroboration.
108, — 3, — included, r. included.
132, — 6, — off, r. of.
163, — 1, — Indem, r. Indem.
166, — 1, — Indem, r. Indem.
210, — 27, — obtained, r. obtains.
236, — 12, — person, r. power.
296, — 6, — "manner in the," r. "manner as in the" —
435, — 29, — lesser, r. lefier.
451, — 14, — whether, r. whither.
452, — 2, — strangers, r. stranger.
484, — 19, in "form of the price," dele of.
492, — 24, — relates, r. exists.
503, (title Chap. X.) for other, r. others.
508, — 13, — fell, r. fell.
541, — 10, — opinion, r. option.
564, (last note,) for copper, r. silver.
607, line 23, for Mabel, r. Mabel.
690, (note,) for depraved, r. depraved.
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