SHARĀ'I` AL-ISLĀM

Fī Masā'il al-Ḥalāl wa'l-Ḥarām

By

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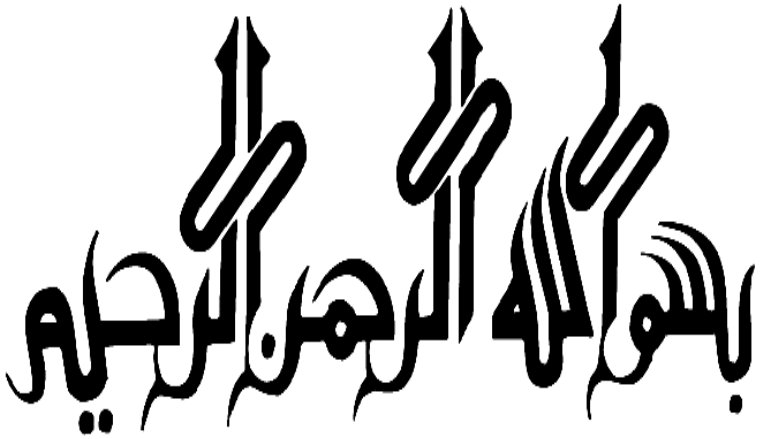

IN THE NAME OF ALLAH
THE BENEFICENT THE MERCIFUL

TABLE OF CONTENTS

THE CONTRACTS (*ʿUQŪD*)

It contains 15 books:

KITĀB AL-TIJĀRAH

CHAPTER ONE
MEANS OF EARNING

They are divided into: *Muḥarram* (Unlawful), *makrūh* (Reprehensible), and *Mubāḥ* (Permitted).

The unlawful means are of several kinds;

1st. *Najis* (impure) essences:

They include wine, liquor, beer, and every impure liquid (not liable to purification) except the oils used for *istiṣbāḥ* (lighting) in an open space. Unlawful are also: the *maytah* (dead animal), blood, droppings and urine of animals of non-eatable flesh. Some legists said: all kinds of urine are forbidden except urine of camels in particular. The first view is more predominant. Forbidden is also trading the swine and all its parts, and the dog-skin and whatever is made of it.

2nd. What is forbidden for the purpose intended by it: like musical instruments, such as the lute and pipe, and innovated worship skeletons, like cross, with anything that entices or leads to *ḥarām* (unlawful) act, like selling weapons to enemies of Islām, or letting for hire houses or ships for practicing forbidden and *ḥarām* acts, beside selling the grapes with the purpose of making liquor from it, or selling the timber-wood for making idol from it.

It is *makrūh* to sell all these things to someone who is able to make these *Muḥarramāt* from them.

3rd. Things not liable to utilization: like *musūkh* (disfigured) animals, whether be wild such as the ape and bear, with disagreement regarding the elephant but the more predominant view permits selling it for taking advantage from its bones, or marine animals, such as shrimps, frogs, turtles, and fish dead under water, beside all beasts of prey except cats. Also forbidden is trading with rapacious animals, whether the flying ones like falcon, or walking on land like the cheetah.

Some legists observe: It is permissible to sell all kinds of beasts of prey, for taking advantage from their skins or feathers, the view which is more predominant among the legists.

4th. What is unlawful by itself: like making incarnated paintings, (assuming forms), singing, supporting the oppressors in committing unlawful acts (sins),[1] wailing of a hired female mourner in vain (falsely),[2] preserving misleading books or inscribing them to protect them against obliteration, defaming the believers, learning sorcery, fortune-telling, tracking jugglery (conjury), gambling, double-crossing (cheating) with hiding the truth like mingling the milk with water and defrauding by hair-dresser (showing beauties of a woman that she does not have), and the man's adorning himself with forbidden means (like wearing bracelet or anklet).

5th. What should man do:

It is *ḥarām* to take wages for giving *ghusl* to the dead (corpses), providing them with *kafan* (shroud) and burying them. There are other things from which earning the living is *ḥarām*, to which I will refer later on, God-willing.

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[1] Such as inscribing for them, and bringing the oppressed to them and alike, not aiding them in lawful acts, like sewing. (*al-Rawḍah*, vol. III, p. 213).

[2] Like describing a deceased person with qualities he does not have. (*al-Rawḍah*, vol. III, p. 213).

A SUBSIDIARY ISSUE

Taking wages for offering the call to prayer (*adhān*) is *ḥarām*, but no objection is there to seek livelihood from the treasury (*bayt al-māl*), and leading the congregational prayer, or performing the *qaḍā'* of the *ṣalāt* of other people (details to be given later on).[1] No objection is there to take wages for concluding marriage contract for others.

THE *MAKRŪHĀT* (REPREHENSIBLE)

- That which is *makrūh* since it often leads to an unlawful or reprehensible act, such as money changing, selling the shrouds or food or slaves, and taking up slaughter and *naḥr* as a trade (profession).

- That which is *makrūh* due to its meanness, like weaving, cupping if accompanied with stipulation (of taking wages for practicing it), striking by the male (of animals).

- That which is *makrūh* due to admitting a doubt or suspicion: like earning of livelihood by little boys, and by that who does not avoid the *Muḥarramāt* in his dealings. Beside other *makrūhāt* to which I will refer later on.

All things other than these are allowable and permissible (*Mubāḥ*).

SUBSIDIARY ISSUES

1. It is not permissible to sell (trade with) any kind of dogs except the hound. There is disagreement regarding (selling of) the dog used for guarding the livestock (cattle), the farm or wall. Forbidding this is more predominant, and hiring them is

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[1] If one is assigned to lead the prayers by the *Imām* of the mosque, or due to absence of any other one to do the job, taking fees will be absolutely *ḥarām* since in this case, it will be *wājib* upon him, and taking fees for a duty is forbidden. But if it is not assigned on him (as a duty), and he does without it, it will not be permissible for him to take fees too. Otherwise, it is permissible. (*al-Masālik*, vol. III, p. 132).

permissible. If anyone of these dogs is killed by non-other than its owner, he is liable to *diyah* (blood-money).

2. Bribery[1] (taking a bribe) is forbidden, whether the sentence is passed in favor of its giver or against him, deservedly or falsely.

3. When a person deposits a sum of money with another person for spending it in a certain place, and the one to whom it is paid be of the same level; if it is specified for him where to spend it, he should act according to the specification. But if he (giver) does not specify the way of spending the money (distributing it in general), it will be permissible for the receiver to take a share equal to that of each one of those for whom the fund is allotted, no more.

4. *Wilāyah* (custody) if appointed by a just ruler is permissible, and it may become *wājib* exactly as when he is assigned by the original Imām, if it was not possible to repel (stop) the *munkar* (abomination) or enjoin to good (decency) but only through it (*wilāyah*).

But *wilāyah* is *ḥarām* if assigned by a tyrant ruler, when one fears committing an unlawful act. Nevertheless, it becomes *mustaḥabb* to accept it, when one feels safe from doing *ḥarām* and able to enjoin good and forbid evil. If one is coerced to accept the *wilāyah*, it is permissible for him to admit it with the intention of warding off little *harm*, with a bad grace (*karāhah*). But the *karāhah* (in accepting *wilāyah*) vanishes when it becomes necessary to ward off great detriment or danger, such as threat to life or property, or fear for (danger against) life of a number of believers.

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[1] Bribery: is the ruler's taking money for judgment, and there is unanimity among all schools of Islāmic Law on considering it *ḥarām*. Al-Imām al-Bāqir (a) is reported to have said: "It is atheism and denial to God and His Messenger."

It is forbidden for the *murtashī* (receiver of bribe) as well as for the giver, since this act leads to committing sin and aggression, except when the recovering of one's right depends on bribery. At that time, it will be *ḥarām* only for the bribe receiver (*al-Masālik*, vol. III, p. 136).

5. If the tyrant ruler coerces someone to accept *wilāyah,* it is permissible for him to submit and act according to his orders, in case he thinks himself incapable of delivering himself from his danger, except the cases when the commandments pertain to shedding of inviolable blood, as there is no *taqiyyah* (dissimulation) in such cases.

6. If the gifts presented by the tyrant ruler come to be known as unlawfully acquired by themselves, so they are considered *ḥarām*. (Otherwise, they are regarded lawful). If the receiver knows them to be *ḥarām*, he should return them to their owner. But if he knows not about their owner, or it was infeasible for him to recognize him (owner), he can give them in charity on his behalf. It is not permissible to return them to other than their owner, with presence of ability of finding their owner.

7. All the proceeds (crops) taken by the tyrant ruler under the name of *muqāsamah* (division), or the funds he takes in the name of *kharāj* (land-tax), and the cattle as *zakāt*, can be bought and accepted as gift (donation). It is not *wājib* upon the receiver to return them to their original owner, even though they are recognized by themselves.

CHAPTER TWO
DEED OF SALE, ITS CONDITIONS & MANNERS

The Contract: the '*aqd* (contract) is a term indicating transfer of ownership from an owner to another, with a specified and determined substitute. *Taqābuḍ* (taking delivery of) without uttering the terms of transaction is not valid and insufficient, even if done through signs indicating the will and intention of sale, whether it be little or much.

In case of presence of an excuse,[1] making a gesture can take the place of words.

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[1] Such as for one being dumb or inflected with tongue defect (stammering, defective utterance), for whom it is sufficient to make

The transaction of sale is not concluded but only with a verb in past tense. If one says: 'buy' (imperative), or 'I sell to you' (present tense), it is invalid even if acceptance (consent) is uttered by the second party of contract. So also, is the rule regarding the party announcing the consent (*qabūl*), that is: if he says: 'sell me' or: 'do you sell me' it is invalid, since this is similar more to demanding or inquiry than a contract of sale.

Is it a condition to advance the offer (*ījāb*) to consent (*qabūl*)? There is disagreement regarding this among the legists, and non-stipulation is a more predominant view among the legists. If the buyer takes hold of what he bought through an invalid contract, it will not be considered as owned by him (his property) and he will be responsible for it (its compensation).

CONDITIONS OF CONTRACT

Conditions for parties of contract, which are:

A) Full maturity, sanity and free will

Hence, it is not valid to buy from a boy (immature) or sell him anything, even if he was granted permission by his guardian (*walī*). And so also is the rule when he has reached the age of ten with sanity, as per a more predominant view. So also, is the insane, one in swoon, non-discriminating intoxicated person and one under duress (coerced), even if each one of them may approve of what he did after disappearance of his excuse, except the one that was under duress, as his words should be trusted.

If a captive slave sells or buys something without taking permission from his master, the transaction is not valid. But it becomes valid when he takes permission from his master. If someone orders him to buy himself from his master for him, it is not permissible for him according to the view of some

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understandable gesturing to conclude the sale transaction and approving it. The same rule is applied to writing on a paper, or a tablet, or a piece of wood, or earth … etc. (*al-Masālik*, vol. III, 152).

legists. But permissibility is a more predominant view among the legists.

Also it is a condition that the seller be the owner of the thing he wants to sell, or one entitled to sell on behalf of the owner, like the father, or paternal grandfather, or deputy, or *waṣī* (executor of a will), or ruler or his trustworthy.

If one sells another's property, this transaction is not concluded but with permission of its owner or his guardian (*walī*), as per the more predominant view among the legists.[1] His keeping silent with having knowledge of the transaction is insufficient, nor with his (owner) attending the transaction (*'aqd*).

If the owner has not given permission, he will have the right to take it away from the buyer. Thereat the buyer can claim from the seller the money he paid to him, with the expenses he lost out of transaction, or any compensation for hire fees or growth, if he was not aware that the owner of the property was not the seller, or when the seller claims that the owner has granted him permission.

In other than these cases, he has no right to claim the expenses he lost from the seller. Some legists said: No, he can claim the price though being aware of the usurpation. Also when one sells his own property and property of another, the sale of his property will be valid only, while the sale of the property of another one is dependent on permission of the owner. The price should be distributed through assessing both the properties first, and assessing one of them then, claiming his share of the price from the seller, if the owner has not granted him permission (to sell his property). If the purchaser intends to return them all, he

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[1] The *fuqahā'* have three views regarding this kind of contract:

- Some believing in its validity upon the whole, and the validity's dependence on permission (of the owner), as this case.

- Some believing in its invalidity upon the whole.

- Others believing in distinguishing between what is preceded with forbiddance from the owner to its conclusion, whose rule is voidness, and the contract that is not forbidden in advance, which is valid.

is entitled to do so. Also when one sells what he owns with what is not owned by a Muslim, or what has no owner like a slave with a freeman, or a sheep with a pig, or vinegar with wine.

The disposition by the father and paternal grandfather with the property of an immature child is valid as long as the boy has not attained puberty. But their guardianship (*wilāyah*) ceases as soon as he reaches puberty. It is permissible for them to undertake the role of the two parties of contract, as the father can sell a property of his son to another person, and for himself from his son, and for his son from himself.

The proxy (*wakīl*) is entitled to ratify a transaction on behalf of the one he represents, as long as he is alive and has a free hand. Is he (proxy) entitled to undertake the role of the two parties of the contract? Some legists said: Yes, he can, and others observed: No, he is not entitled to do so. Yet other legists said: it is permissible for him to do so only after informing his *muwakkil*, a view which is more predominant among the legists. And if he ratifies the transaction before notifying him (*muwakkil*), the deal will be contingent on permission of the *muwakkil*.

Disposition of the *waṣī* (executor of the will) is not accomplished but only after death of the testator. There is disagreement regarding his entitlement to undertake the role of the two parties of the contract, as in the case of a proxy. Some legists said: It is permissible for him to assess the property for himself (to buy for himself), and to borrow from one having *wilāyah* over his money, if he be a *walī*. The ruler and his trustee are entitled to command over that who is prohibited from disposition with respect to his property, either due to minority (*ṣighār*), or idiocy (*safah*), or insolvency (*iflās*), or insanity.

The other condition is that the purchaser should be Muslim when buying a Muslim slave. Some legists said: it is permissible even if he is a *kāfir* (disbeliever), but he should be forced to sell from a Muslim. The first view is more predominant among the legists.

If a disbeliever buys his Muslim father (slave), will it be valid? There is disagreement among the legists, and permissibility is more predominant among them, since the way is cleared through emancipation.

B) The Conditions for the Sold (mabī')

We have mentioned some of them in the first chapter. Herewith we add the following:

1. It is not valid to sell the freeman, with whatever has no use or benefit, like beetles, scorpions, refuses separated from man's body like hair, finger-nails and sweat or other perspirations except the milk.[1] Not valid also is the sale of what is not shared by Muslims before being taken into possession as pasture (herbage), water, fish and beasts before hunting them, and the forcibly conquered land. Some legists said: it is permissible to sell this land subject to relics (*athar*) of the disposing person.[2] There is disagreement regarding sale of Meccan houses, but prohibition is a more predominant view.

Concerning well water, it comes into possession of one who draws it out, and river water belongs to one digging it (river). So also, are all minerals extracted from the land, as they become property of land owner.

2. It should be common (*ṭilq*):

It is not valid to sell unalienable property (*waqf*), unless when leaving it leads to ruining it, due to dispute among its owners, and selling it be more beneficial (profitable), as per the more

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[1] That is: the woman's milk (in her breast), which is valid to sell and exchange, measured with usual measure, or duration, due to its great benefit. (*al-Rawḍah*, vol. III, p. 247, freely).

[2] Such as a building or a tree inside it (land). These things belong to him as long as the traces (relics) are there, and when they vanish the land will be returned to its origin. What is intended by this is the live (productive) land in time of conquest, as the barren land will be property of that who revives it, and it can be sold like other properties (*al-Rawḍah*).

predominant view. Not valid also is the sale of a mother of a son (bondmaid), except after death of her son, or her owner be short of affording for price of her manumission (the price with which he bought her). In regard of stipulating death of the owner there is disagreement among the legists. Also sale of mortgage is not valid except with permission of the mortgager.

The slave's reaping profit from his sale or his emancipation is not prohibited whether his reaping be deliberate or by mistake, with disagreement among the legists.

3. There should be ability to hand over the sold property. As it is not valid to sell the runaway (fugitive) alone, but selling him jointly with other salable properties. If acquiring him (fugitive) be not possible, the purchaser has no right to claim anything from the seller, and the price will be equitable to the joined sold thing.

It is valid to sell what is usually known of returning to its first place, like the pigeons and owned fish usually found in enclosed waters. In regard of selling what cannot be delivered but after a long time, there is disagreement among the legists. But the strong view held by most of legists is permissibility of sale with the buyer's having liberty of acceptance or refusal.

4. The price should be of known amount, kind and description. If one sells something by virtue of any of these, the sale is not valid. If the buyer receives it and it deteriorates, he will be liable for its price on the day of receiving. Some legists said: he will be liable for its highest price from the day of receipt to the day of its damage. If it diminishes, its equal compensation should be given to him. If it (the thing sold) increases (grows) at the hands of the buyer, he will be entitled to the value of the addition, even if it be not in kind.

5. The sold thing should be of known nature. It is not valid to sell what is measured, or weighed, or enumerated at random, though it can be seen like cactus, nor what is measured with an unknown measure.

It is permissible to buy a part of anything known with proportion (a half or one-third), and be a joint property, whether its parts are equal or differing.

It is not permissible to purchase a measured part of a thing, if it be not of equal parts, like a cubit of dress (clothing), or *jirib* of land, or a slave from among two or more slaves, or sheep from among a flock (herd). So also, when one sells a herd (a group) of sheep with accepting one or several sheep indefinitely. This is permissible in isomeric things, such as *qafiz* (snap) from a *kurr* (equal to 1200 Iraqi *riṭl*). It is also permissible even if it be of an unknown asset (origin), like sale of cup (*makkuk*) of *subrah* of unknown measure.

If enumerating what should be counted be impossible, it will be permissible to measure it and be considered according to its calculation. It is permissible to sell the dress and land with sighting only, even without measuring them. But if they be measured, it will be nearer to precaution, due to difference of purpose in this connection and impossibility of recognizing it through sighting. But viewing the thing sold can be a substitute for describing it, even if it be absent in time of purchase, except with elapse of a period in which the sold article customarily changes (in qualities). If change in quality is presupposed, the first state will be taken as the base. If the change is firm, he (the buyer) will have the option to buy or refuse. If they differ, the last word will be that of the buyer, with his oath, with disagreement among the legists.

If the taste or smell is intended, then it should be examined through tasting or smelling. It is permissible to buy it without this through description, as when a blind person buys visible estates. Is it valid to buy any article without examining or description, with taking its soundness as the basis? There is disagreement among the legists, but permissibility is a more predominant view and the buyer has the choice between refusal and *arsh* (demanding compensation), if it is found defective. The *arsh* becomes assigned when a defect is caused by the seller. No difference is considered here between the blind and one who can see.

So also, is the rule regarding what deteriorates through examining, like walnut, water-melon and eggs, which can be bought without knowing what is inside it. The buyer has right then to *arsh* through examining with the presence of defect, but not to refuse the deal. If the broken part be of no value, he can give the whole price.

It is not permissible to sell: *Ajam* fish even if it be possessed, due to ignoring it, and despite adding canes or other things to it, as per a more correct opinion; and so also the milk inside the udder, even when added to it what is milked from it. So also, are the skins, wools, soft hair and hair of cattle, even when other things are added to them. And so also is whatever inside their bellies, and when adding them to whatever covering their backs, with what the male fecundates (the produce of fecundation of a male of animal).

TWO SUBSIDIARY ISSUES

1. Musk is pure, and it is permissible to sell it inside its *fa'r* (udder) even without ripping it, but ripping it is more precautionary.

2. It is permissible to deduct whatever is liable to increase and decrease when placed inside receptacles and it is not permissible to place what increases except with mutual consent. It is permissible to sell it with the receptacles without placing.

MANNERS OF CONDUCT

It is *mustaḥabb* for the seller: to get acquainted with all rules of earning the living;[1] to reconcile between the buyers equitably; to cancel the sale for one seeking abrogation of sale; to recite the *shahādatayn* (two witnesses); to say *Allāhu-Akbar* (Allāh is great) while buying and to take for himself imperfectly and give *rajaḥān* (with the balance swaying on the buyer's part).

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[1] That is: rules and manners of earning, so as to discern and distinguish between the legal and illegal transactions, and be free (safe) from usury (*riba*). (*al-Rawḍah*, vol. III, p. 285).

It is *makrūh* (reprehensible) for the seller to praise the article he is selling, and for the buyer to find fault with the article the is buying; for the seller to swear by (the name of) God to the sale; to sell in a place where the fault can be concealed; to earn more profit (interest) from the believer except in case of need, and from one he promises to do kindness to (*iḥsān*); to offer articles for sale (trading) during the period extending from daybreak (dawn) until sunrise; to enter the market firstly (before others); to make *mubāya`ah* (title-deed) with the lowly or disabled people or the Kurds; to engage in measure or weighing if one has no full knowledge of this act; to cut from the price after concluding the contract of sale; to increase (claim more than the truth) in the commodity in time of proclaiming (for sale); for the believer to interfere in (plunge into) trading of another believer as per the more correct opinion; and for a present person to act as a proxy for an absent one; but some legists said: it is *ḥarām*, but the first view is more predominant among the legists.

TWO SUBSIDIARY ISSUES

1. Going to meet the caravan (of traders) is *makrūh*, and its limit is four parasangs when it is done deliberately. But it is not *makrūh* when done accidentally. The choice will not be confirmed for the seller except when exorbitant injustice is established. Its choice is immediate with capability, and some legists say: it is not exempted but only when brought to the ground, which is more predominant. And so also is the rule regarding the *najsh,* which is represented by increasing according to increase of the person with whom the seller agreed.

2. Monopoly is *makrūh*, and some legists said: it is *ḥarām* (forbidden). The second view is more correct, and predominant among the legists. Its *karāhah* is more emphasized in cases of: wheat, barley, dates, raisins, and cooking butter, with salt, according to view of some legists, on condition that the person preserves them with the purpose of making their prices rice increase and obtaining more profits, with absence of any other seller or spender. Other legists stipulated preserving them in time of dearness for three days, and for forty days in time of

cheapness. The monopolist should be forced to sell the goods he has monopolized without setting the prices for him. Some legists observed: certain prices should be set for him. The first view is more widely-held.

CHAPTER THREE
ON OPTION, ITS PARTS & RULES

Its Parts are five:

1st. Option of meeting (majlis)

The selling transaction is concluded with establishment of affirmation (*ījāb*) and acceptance (*qabūl*), and both the parties have the option to annul the sale as long as they are still in *majlis* (place of transaction). The option is not nullified by making a separation (screen) between them, and even when they be coerced to separate and they be unable to practice the option (to abrogation).

This option is nullified through: stipulation of annulling it in the sale transaction, separation of one of the parties of deal even with one step, and affirmation of both the parties or one of them and acceptance of the other. If one of them is put under obligation, his option will be nullified, not of the other party. If that one gives him the option and he keeps silent, the option is reserved for the silent one, and also for the other one. Some legists said: it (option) will be annulled. The first view is more predominant among the legists.

If the concluder (of sale) be one person (proxy, agent) on behalf of two persons, such as the father or grandfather, the option will be stable, unless its annulment is stipulated by him (concluder of contract), or he holds himself responsible for it on their behalf after the contract, or departs the place where the contract was concluded, as per a view of some legists.

2nd. Option of Animal (Ḥayawān)

Its condition in all is: three days for the purchaser in particular, not the seller as per the more widely-held view. It is nullified

through: stipulating its annulment in the contract; holding himself responsible after it (and by his causing some defect in it, like having sexual intercourse with the bondmaid or tearing the dress); his disposing with it, whether it be a binding disposal like sale, or not binding like donating before taking hold of it and making a will.

3rd. Option to Include Conditions

In *khayār al-sharṭ* the option is set according to what is stipulated by both of the parties (of sale contract) or one of them, but it should be set for a fixed period. It is not permissible if stipulated with a condition liable to increase and decrease, such as time of coming of the pilgrim (from Mecca). If this condition is stipulated, the sale will be invalid.

Every party of the contract has the right to stipulate the option for himself, for a foreigner and for himself with the foreigner. It is permissible to lay down a condition of conference (consulting some person on the contract and following his instructions), and to stipulate a certain period in which the seller can give back the price as he wills, and take back the sold article.

4th. Option of Fraud

If an article is bought by someone who has no experience, and then some wrong (*ghubn*) comes to light in the sale which is not usual, he (buyer) will have the option to annul the sale contract. This option is not invalidated through disposal (use of article) if it has not exceeded the limits of ownership, or its returning be not prevented by an obstacle like procreation (giving birth) by a bondmaid and emancipation, and no *arsh* is confirmed in it.

5th. Option to Postponement

Whoever sells a thing, but he neither receives the price, nor hands over the sold article, nor stipulates postponement of paying the price, the sale will be binding for three days. During this period the buyer may pay the price, or otherwise the seller is more entitled to (keep) the sold thing.

If the article (sold) becomes damaged during these three days or after them, the seller will be liable to compensation, as per a more correct view. If one buys something which deteriorates in the same day, he is required to pay the price before setting of night of that day, or otherwise he will not be entitled to take hold of the article.

The option to defect will be elaborated in Chapter 5, "Rules of Defects".

RULES OF OPTION

1. Option of Meeting: (*majlis*), which cannot be established for any contract except a sale transaction. Option to include conditions (*khayār al-sharṭ*) is affirmed in every contract except marriage and endowment (*waqf*) contracts, and so also those of *ibrā'* (acquittal), divorce and manumission, with presence of an uncommon narration to the contrary.

2. Disposal (usage)[1] annuls the option of condition, with the option to the three conditions. If the option was stipulated for the two parties of contract, and one of them disposes (the property), his option will become null and void. If one party of them gives permission and the other one disposes, the option of both of them will be annulled.

3. If the person having the option dies, his option will be shifted to the heir, of whatever kind it be. If he loses his sanity, his guardian will act on his behalf. When the excuse disappears, the guardian's right to dispose will not be abrogated. If the deceased be a permitted slave, the option will be set for his master (*mawlā*).

4. The article sold becomes in possession of the purchaser through the contract. Some legists said: it is possessed by contract and with expiration of the option. The first view is more predominant among the legists. If it (article) grows

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[1] Its rule is: what is usually considered as disposal, like wearing the dress for taking advantage of it, mounting the animal, employing the slave, and milking the sheep (ewe). (*al-Masālik*, vol. III, p. 212).

bigger, the growth (addition) will belong to the buyer. If the buyer revokes the contract, he can claim the price (of the article) from the seller, who will not be required to return the growth (addition).

5. If the sold article deteriorates before taking hold of it, the contract will be revoked, and its price should be returned to the purchaser. But if it deteriorates after taking hold of it and determination of the option, it will be considered as property of the buyer. If the deterioration occurs during the period of the option, without being a consequence of negligence (on the part of whichever of the parties) with the option being to the seller, the compensation for the damage should be taken from the buyer. But if the option be of the buyer, then the seller will be liable for compensation.

TWO SUBSIDIARY ISSUES

1. *Khayār al-sharṭ* becomes in force from the time of separation (of parties of contract). Some legists hold that it becomes enforceable from time of signing the contract, the view which is more predominant among the legists.

2. If one purchases two things, on one of which the condition of option (*sharṭ al-khayār*) has been assigned in itself, the sale is valid. But if it be dubious, the sale transaction will be null and void.

A COMPLEMENTARY OPTION: OPTION TO VIEWING

It is: to sell real estates without viewing, which is in need of the following:

- Stating the kind (genus, nature), with which it is meant: the term indicating the means that is common among real particles (single units), like wheat, or rice, or silk.

- To identify the description (quality): it is the term that identifies the components of that particle, like the *sarabah* in wheat, and *hadarah*, or *duqqah* (crumbled rice).

It is *wājib* to mention all the details and qualities which if not stated, the article sold will remain unknown for the buyer. The sale contract will be invalid in case of violating these two conditions, or one of them. But it is valid when they be stated in the contract, irrespective of whether the seller has seen it not the buyer, or vice versa, or both have not seen it, being satisfied with description given by another person. If the sold article appears to be as described, the sale will be binding, or otherwise the buyer will have the option either to revoke the transaction or approve of it. If the purchaser has seen it, other than the seller, the option will be given to the seller. In case both of them have not seen the article, the option is given to each one of them. If one buys a farm (estate) while having seen a portion of it with the remaining parts being described for him, the option will be to the buyer in the whole land, if it comes to be not as described.

CHAPTER FOUR
RULES OF CONTRACTS

FIRST: SALE IN CASH & ON CREDIT

Whoever buys any goods upon the whole, or stipulates payment in advance (cash), the price will fall due. And if he stipulates postponement in payment (on credit), the sale is valid. There should be a determined fixed duration for payment, without liability to any addition or deduction.

If he stipulates delay in payment without determining a certain period (*ajal*), or stipulating an unknown duration, such as home returning of a pilgrim, the sale transaction will be considered invalid.

If one sells something in cash, and with a higher price to a fixed term, the sale is considered null and void, according to the view held by some legists. But the reported narrations say: the seller will be entitled to the least of the two prices within the farthest of the two terms. If he sells something with this

condition, stipulating the payment in the farthest term, this condition will annul the sale.

If one stipulates delaying payment of the price for a determined term, and the seller purchases the article (sold) before setting in of time of payment, it will be valid whether being with addition or deduction, falling due or postponed, if he has not stipulated that[1] (stated it in the text of the contract) in time of sale. It is valid to buy the article with its equal price without any addition, when time of payment sets in. So also, when one buys it with a price not equal to its similar article, with addition or deduction, whether its payment has fallen due or been postponed. If one buys something with its equal price with addition or deduction, there are two different views, the most preponderant of which is permissibility.

One who buys something on credit (for a certain term), is not obliged to pay its price before falling due of payment even if the price is claimed from him. If he voluntarily pays it, it is not *wājib* upon the seller to take it. When the buyer offers the price to the seller when time of payment sets in, it will be *wājib* upon the seller to take it. If he refrains from taking it, and dies without negligence (naturally) or disposition on the part of the purchaser, the article will be considered as property of the seller, as per a more preponderant view. So also, when the seller sells the article *salaman* (*salafan*, on loan basis). So also, is every one having a claim, falling due or postponed and falls

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[1] With no difference, in invalidation with the stipulation, between the postponed (*mu'ajjal*) and other kinds of payment. By 'stipulating it in time of sale' it is meant stating the condition in the text of the contract. If this be in their mind but not stipulated by them, there is no objection to it.

If they stipulate it verbally before concluding the contract, it will be of no consequence if they were aware of the fact that no consideration is to be given to the condition made in advance. Otherwise, the contract is null and void, as if they have mentioned it in its text, since they have not ventured upon the contract except with the condition, which has not been fulfilled for them, when the contract will be nullified. (*al-Masālik*, vol. III, p. 224).

due, when he pays it but the other party refrains from taking it, where the compensation for the damage will be paid by its owner who is obliged to take hold of it in the way mentioned.

It is permissible to oversell the goods in cash and on credit, when the buyer is aware of the value (of the goods). It is not permissible to delay the (payment of) price of the sold article, or any of financial dues with a higher price. But it is permissible to accelerate the payment with decreasing the price. Whoever buys something on credit basis and intends to sell it with the aim of making profits, is required to mention the term (period of payment). If he sells without naming the term, the purchaser will have the option either to refuse the article or to take hold of it committed to what is stipulated in the contract. According to the reported view: the buyer is entitled to have the same term (*ajal*) as that granted to the seller.

SECOND: REQUIREMENTS FOR THE SOLD THING

The Regulation: the sale should be restricted to what is intended by the words used, lexicographically or customarily. Hence, when one sells an orchard, the sale includes all the trees and buildings inside it.

Also when one sells a house, the ground with all its constructions, upper and downward parts should be included in the sale, except when the upper part is separate in a way that is customarily considered outside the house; such as the case of separate and single houses. The doors and set up locks are to be included in the sale of the house, even if not mentioned by the seller. So also, all the timber-woods included in building the house, with the fixed pegs, and the ladder fixed to the construction in the form of stairs. There is disagreement regarding inclusion of the keys, but including them is more preponderant. The erected handmill is not included except when it is stipulated and stated as a condition in the contract.

If the house contains palm-trees or other trees, they are not included in the sale transaction. If the buyer claims them as real property, they may be included in the sale according to a view held by some legists. Other legists said: they are not considered

among the claims. But when it is stated 'with whatever the walls of the house encircle' or a similar expression, they (trees) should be included.

If the seller exempts a palm-tree (from sale), he is entitled to pass over to it, and go away from it, within the range of its palm leaf stalks ton the ground). The same rule is applied on the land sold while containing palm-trees or other trees. So also, when it contains any plants, whether having extended roots or not, but they should be kept intact until time of harvest.

If one sells a tree whose fruit has been grafted (pollinated-*mu'abbar*), the fruit will belong to the seller, as the term 'palm-tree' dose not include the fruit. This is in accordance with al-Imām Amīr al-Mu`minīn's (A) saying: "Whoever sells a pollinated palm-tree (*mu'abbar*) its fruit should be the seller's, except when the buyer stipulates (having) it in the contract". In that case it is *wājib* upon the buyer to keep the fruit in its place, according to the established usage. So also, when one buys a fruit, he is required to keep it in its place (origin), as per the established usage. If one sells an unpollinated tree, the ownership of its fruit will be transferred to the buyer, according to a verdict of the Companions (of the Prophet).

If the tree is transferred through a means other than a sale, the ownership of its fruit will be shifted to the carrier, irrespective of whether it be pollinated or not, or whether its transfer be made through exchange contract such as lease or marriage or other means like donation or similar means.

The pollination is achieved even when the tree cleaves (splits) by itself and be pollinated by pollens. It is considered in regard of fecundation of female plants, not in the male palm-tree, or other kinds of trees .To be restricted to the subject of contract, if one sells a tree, then its fruit will be the seller's by all means.

In all the cases, he is required to keep the fruit until time of ripening, and the buyer is not entitled to pick the fruit if it has already ripened, whether it being inside a calyx (outer covering) such as cotton and nut, or not being so, except when being stipulated by the buyer. And so also when what is

intended by the tree being its flowers, then it will be the seller's, whether they have flourished or not.

SUBSIDIARY ISSUES

1. If one sells pollinated trees with other ones unpollinated, the pollinated ones will be the seller's and the others the buyer's. So also, is the rule when one sells pollinated trees to someone and unpollinated ones to another one.

2. In keeping the fruit on the origins, the rule applied regarding it is the established usage followed concerning that fruit.

3. It is permissible to water the fruit and roots. It one of the parties of contract (buyer or seller) refrains from watering, he should be compelled to do so. If the watering harms any of them, the priority should be given to the advantage of the buyer, on condition that it does not exceed the extent of need. If they differ, they should refer to experts to settle the dispute between them.

4. The fossils found under the land and in the mines, should be included in the sale transaction of the land, since they are considered among its (land) parts. There is disagreement among the legists regarding this view.

THIRD: RULES OF DELIVERY

Concluding the contract in general requires delivering the article sold and paying its price. If they (seller and buyer) refrain from delivery and payment, they should be compelled. If one of them refrains, he should be forced to. Some legists observed: The first one to be compelled is the seller. The first view is more preponderant among the legists, whether the price is in kind or on credit. If the seller stipulates delaying the delivery a specific period, it is valid. Valid is also the buyer's stipulating postponement of price paying. It is also permissible for the seller to stipulate dwelling in the house, or riding the mount for a certain period.

Receiving the sold thing means *takhliyah* (removing any hindrance from handing over the thing to the buyer),

irrespective of whether it be immovable such as real estate, or movable and transferable like dress, jewelry or mount (animal). Some legists observed: it means grasping by hand, or measuring what can be measured, or using the mount in transport. The first view is more predominant among the legists. If the article sold deteriorates before delivering it to the purchaser, its substitute should be claimed from the seller. So also, when its value decreases due to a damage or alike, the buyer has an option to refuse the sale, or claim the indemnity from the seller, the view regarding which there is disagreement among the legists.

A SUPPLEMENTARY PART: SALE OF UNRECEIVED

It has several issues:

1st. It is *makrūh* to sell something bought before taking hold of it, if it be of what can be measured or weighed. Some legists said: it is impermissible if it be something eatable. The first view is more preponderant. In another narration the prohibition is restricted to sale of something with intention of gaining profit, but not for investiture. If one takes possession of something that he intends to sell, with a means other than purchase, such as inheritance or dowry of a woman, or *khul`* (woman's releasing herself from marriage tie), it is valid though he has not taken hold of it.

2nd. If one has some food stuff in obligation of another through a *salam* (loan in advance), and he owes to another one the same, when he orders his creditor to measure for himself from the other share, then it is *makrūh* according to our view. But it is unlawful as per what they claim, since he receives it in lieu of what belongs to him before being taken hold of by its owner.

So also, when one gives another one some money telling him to buy food with it, if he says to him: take it for me and then take it for yourself, the purchasing will be valid not the taking hold, as it is not permissible for him to undertake the role of the two parties of the contract but there is disagreement among the legists regarding it. If he says: buy for yourself, the purchase is not valid, and it cannot be determined for him through grasping.

3rd. If both the funds be a loan, or the fund with which the article is handed over be borrowed, the transaction will be valid definitely.

4th. If the buyer takes hold of the thing sold, and claims then its being deficient, when being not present in the time of measuring or weighing, his claim will be accepted regarding what he received with his taking an oath, if the seller has not shown an evidence. But if he has been present (during he measurement or weighing), then the laim of the seller with his oath will be accepted, and the buyer is required to give evidence.

5th. If one lends someone else some food in Iraq, claiming it from him at al-Madīnah, it is not *wājib* upon him to give it back. If he claims its value from him, it is not valid as per the view of some legists, since it is a sale of food to someone who is required to pay its price, before taking hold of it. It is *makrūh* according to the rule mentioned before. If it be a loan, then its substitute can be taken with price of Iraq. If it be usurped, paying its equal value (*mithl*) is not *wājib*, but paying the value with the price of Iraq is valid. But permissibility of claiming the equal value from the usurper wherever he be, with the present value in time of indigence and need.

6th. If one buys kind (*'ayn*) in exchange of kind, taking hold of one of them and selling it, when the other one spoils in its seller's hand, the first sale (deal) becomes null and void and there will be no way to return what is sold again, but rather the seller is required to give back its price to the buyer.

FOURTH: DISAGREEMENT BETWEEN SELLER AND BUYER

If the two parties of sale transaction buyer and seller determine the payment to be in cash, it will be *wājib* upon the buyer to pay the price in cash. If it be general (without specification), then the payment should be with the local currency of that country. Otherwise, the sale will be invalid. And so also is the weighing.

If they disagree, here are some points:

1. If they differ regarding amount of price, then the claim of the seller is accepted with his taking an oath, if the article sold is still there. But if it has been deteriorated, the saying of the buyer should be accepted with his oath.

2. If they differ regarding delay or acceleration in payment of the price, or in length of duration (*ajal*), or about stipulating taking a pledge from the seller until receiving the sold thing, or a bailer for him, then the seller's claim with his oath should be accepted.

3. If their disagreement be about the sold thing; with the seller's saying: I have sold you a dress, and the buyer says: rather they are two dresses, the seller's saying is accepted too. If the seller says: I sold you this dress, and the buyer says: rather it is that dress, there are two claims here, and they should be adjured and their claims will be null and void. If a dispute appears between the seller's heirs and buyer's heirs, the claim of the seller's heirs will be accepted regarding the sale, and of the buyer's heirs regarding the price.

4. If the seller says: I sell you (this thing) in exchange of a slave, and the buyer says: with a freeman; or the seller says: with vinegar, and the buyer says: with wine; or one saying: I cancel the sale before separation and the other denying this, then the word of one claiming the veracity of the contract will be accepted with his taking the oath, with asking the other to give an evidence (*bayyinah*).

FIFTH: CONDITIONS OF CONTRACT OF SALE

Its restriction: the condition should not lead to dubiety of the article sold, or the price, nor being contrary to the holy Book or the Prophetic Sunnah.

It is permissible to stipulate what is allowable, and within his capability, like shortening and sewing a garment. But it is not permissible to stipulate what is out of one's capacity, such as selling the plants on condition that he changes them to ears of corn, or the mature dates on condition he makes them dried dates. It is permissible to stipulate keeping it on its origin.

It is permissible to buy a slave on condition that he takes upon himself to manumit or dispose him or make him a *kitābī* (scriptural). If the buyer stipulates not being subjected to any loss, or not to manumit the female slave or not to copulate with her, the sale will be valid and the condition is void. If he stipulates in the sale transaction, that another person guarantees (be responsible for) portion of the price or whole of it, both the sale and condition are valid.

A SUBSIDIARY ISSUE

When one stipulates manumission in selling the slave, and he frees the slave, the sale becomes bound. But if he refrains from emancipating the slave, the seller will have the option of revoking the sale contract. If the slave dies before being liberated, the seller will have the option too (to annul the sale).

SIXTH: SUPPLEMENTS TO RULES OF CONTRACTS

Selling the cactus *(subrah*) is not valid, except with having knowledge of its measure (*kayl*) or weight. If one sells it, or a part of it as a joint property, with being ignorant of its amount, the sale is not valid. So also, when he says: "I sell you every *qafiz* of it with one dirham," or "I sell it to you on basis that the price of every *qafiz* is one dirham." But if he says: "I sell you one *qafiz* or two *qafiz* of it," it is valid.

Selling that whose sighting be sufficient, is permissible, like saying: "I sell you this land, or this yard jointly (*mushā'*)". If he says: "I sell it to you, every cubit with one dirham", it will not be valid except with having knowledge of the number of its cubits.

If one says: "I sell you ten cubits of it" with appointing their place, it will be valid. But if he has no knowledge of the position, the sale will be invalid, due to unawareness of the sold article, and incidence of divergence in its parts, contrary to the cactus.

If one sells a land to someone else, on condition that it is of certain *jurban*, and it comes to be less in area, the buyer will have the option to annul the sale transaction or to take it with

its equal share of the price. Some legists said: rather, he can take it with the whole price. The first view is more predominant. If its area appears to be bigger than what is stated (in the contract), the seller will be free either to cancel the sale or let the buyer make use of it with the total price. And so also is the rule regarding every commodity whose components are not equal.

If an isometric (of equivalent parts) article appears to be less in parts, the buyer will have the option to refuse the sale, or take the article with its equal share of the price.

It is valid to gather two different things in one contract, with one price: such as sale and *salaf* (loan), or lease and sale, or marriage and lease. The substitute should be divided among: value of article sold, the similar price and equal dowry (*mahr*). It is also permissible to sell the cooking butter altogether with its receptacle, like saying: I sell you this cooking butter with its receptacle, every *riṭl* for one dirham.

CHAPTER FIVE
RULES OF DEFECTS

Whoever buys any article, generally or on condition of being perfect, this will necessitate the articles being safe from defects and faults. If it comes out to be defective, prior to concluding the sale contract, the buyer will have the choice to revoke the contract or take the compensation for the defect (*arsh*).

The right to return the defective article is forfeited with discharging oneself from the defects,[1] and with having knowledge of the defect prior to concluding the contract, and

[1] Through saying: 'I sell you this (article) with whatever defect it has', or 'I am discharged of every defect it has', or any similar expression, in which no distinguishment is there between the defects, whether apparent or inward, known or unknown, and irrespective of whether the sold thing be an animal or other than it. (*Jawāhir al-Kalām*, vol. XXIII, p. 237).

with the buyer's deducting the choice of defect after the contract, and so also is the *arsh* (i.e. it is dropped in these three situations).

Also the right to return the defective article with causing a defect in it, like tearing the dress, irrespective of whether this be prior to or after the contract, and also with incidence of a fault after taking hold of the article, beside the *arsh* (demanding the compensation) being established for the buyer. If the incidence of the defect be prior to receipt, this will not prevent the returning of the defective article. If one intends to sell a defective article, it is more becoming proper for him to him to inform the buyer of the defect, or to discharge himself from all the defects in details. But it is permissible for him to discharge from the defects in general.

If one buys two different things in one transaction, becoming aware of a defect in one of them, it is not permissible for him to give back the defective article singly, but he has the choice to give back the two things or take the compensation. So also, when two persons buy one thing, they will have the choice to give it back, or keep it with taking the compensation. No one of them is entitled to give back his share alone without his partner.

If one copulates with his bondmaid, discovering then her having a defect, he will not have the right to give her back. If the defect be pregnancy, it will be permissible for him to return her,[1] with half tenth of her value as a compensation for locale of copulation. But it is not permissible to give back the slave woman after having sexual intercourse with her, but only after discovering her being pregnant.

KINDS OF DEFECTS

The defect: is whatever grows or becomes less in original nature of creation. The excess (addition) is like an additional

[1] According to the abundant manifest reports, indicating that selling the pregnant slave woman with the buyer's unawareness of her being pregnant, is invalid and void outright. This is because either she being a mother to give birth to a child, or she is not discharged (exempted) before selling her. (*al-Tawḍīḥ*, vol. III, p. 282).

finger, and deficiency is like an amputated organ. Imperfection in qualities includes losing the humor and temperament, whether it be chronic like the sickly person, or accidental like one-day fever.

Whatever permissible condition laid by the buyer to the seller and he breaks it, the choice will be established and proved, though lacking it does not constitute a defect, like stipulating curlness for the hair, *taʿshīr* for teeth, or penciling the eyebrows.

SUPPLEMENTARY ISSUES

1. If the seller says: "I sell you this thing with *barā'ah* (clearance from defects)", and the buyer denies this, his claim will be accepted with his taking an oath, if the seller has no evidence to bring forward.

2. If the buyer claims: "This defect was there when the commodity was in the seller's hands, and I have the right to give it back", but this is denied by the seller, his claim with an oath will be accepted, in case the buyer has neither an evidence nor an eye-witness to prove his claim.

3. The article sold should be assessed, both as sound and defective, with considering the proportion of defect to the value and deducting its equal percentage from the price (of the sound perfect article). If the experts differ regarding assessment of the article and its defect, the intermediate value will be taken as the basis.

4. If the buyer be aware of the defect but does not give back the article, this option (to cancel the sale) will remain in force except when he declares its nullification. He keeps to have the right to revoke the contract because of the defect in the sold article, irrespective of whether the second party of contract be present or absent.

5. If the defect is caused after concluding the contract but before taking hold of the article, the buyer will have the option to give it back, or claim the compensation from the seller, regarding which there is disagreement among the legists. If he

takes hold of some portion of it, and the other part be damaged, the rule applied is the same as if he has not received the article. Whatever befalls the animal after taking delivery and before expiry of duration of option, does not prevent giving it back in the three mentioned cases.

6. Abū Hammām has reported from al-Imām al-Riḍā (peace be upon him) to have said: "The slave can be given back for events of the year:[1] insanity, leprosy, and *judhām*". In another narration, reported by ʻAlī ibn Asbāṭ, that al-Imām al-Riḍā (A) said: "The year events are: madness, *judhām*, leprosy, and *qaran*[2] (*'afal*), and they give the buyer the right to annul the contract and give back the slave from the day he bought him if occurred during a full lunar year". In the same import comes the narration reported by Muḥammad ibn `Alī from al-Imām al-Riḍā (A) too.

A SUBSIDIARY ISSUE

This rule is applied forcibly when the defect is not caused deliberately. If the buyer causes some defect that changes the essence and nature of the thing or its quality, then the option to give it back will be dropped, with the right to claim the *arsh* (indemnity).

CHAPTER SIX
PROFITABILITY, MUWĀDA`AH & TAWLIYAH

MURĀBAḤAH (PROFITABILITY)

The Formula

It is to inform about one's capital and saying: I sell you this thing – with all proceedings – with so-and-so profit. The

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[1] That is: If these diseases inflict the slave in the period between selling him and completion of one year, the buyer will have the right to give him back, though the returning should not be done during the year since the option of defect is not immediate. (*al-Masālik,* vol. III, p. 305).

[2] *Al-Qarn* (*al-'afal*) means: the presence of a fleshy obstruction inside the vaginal passage that obstructs insertion (intercourse). (*Majma' al-Baḥrayn,* article of *qarn*).

amount of his capital and profit should be made public. In addition, he should mention the change rate and weight, if they differ.[1]

If the seller has not caused any damage to the article, nor made any change in it, then the formula used for price should be thus: I bought this thing with so-and-so price, or with its capital being so and so, or it is valued for me so and so, or it is for me with so and so value. If he has made in it any change necessitating addition (excess), he may say: Its capital is so and so, and I have made in it so and so. If another one has worked on it for a certain pay, he will be required to say: "it is estimated against me" or "it is on my account".

If one buys something with a certain price and claims indemnity from the seller for its defect, he should deduct the amount of indemnity (*arsh*) and inform about the remainder, by saying: My capital has so-and-so deduction (indemnity). If a slave commits a crime and be ransomed by his master, it is not permissible to add the ransom (*fidyah*) amount to his original price. If an offence is perpetrated against him, and he takes the *arsh* (indemnity) for the offence, this *arsh* should not be deducted from the price.[2] So also, is rule when a benefit is

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[1] In case there being several kinds of money with different rates of change and weights, such as when the change of one dinar be 10 dirhams and another be more. So also, is the weight. But if the ready money be of one kind (of the same rate of change and weight), he won't be in need of one of them. (*al-Masālik*, vol. III, p. 307).

[2] The difference between felony and defect lies in the fact that the indemnity for defect is established with the origin of the contract, as if it was exempted from the price, contrarily to indemnity for accidental felony, which constitutes another right, like young of cattle. It is not applied in the defect appearing after concluding the contract, and before taking hold of the article, or after it but during the respite of option, since all this becomes due in accordance with the text and requirement of the contract, being as if it was there in time of making the contract.

It is true, that if the felony causes any imperfection to the slave, his owner should inform about the fault. (*al-Masālik*, vol. III, p. 307)

received from it, such as the young of cattle and produce of a tree. It is *makrūh* to attribute the profit to the assets.

RULES OF PROFITABILITY

1. It is permissible for one who has sold a commodity to someone else, to buy it from him, after taking hold of it, with a higher or lower price, in cash or on credit. But this is *makrūh* if done before taking hold of the thing, if it be of isometric or weighed kind, as per a more correct opinion. It is not permissible for him to stipulate selling it in time of concluding the sale transaction. If that is intended by them but not stipulated by them in word, it will be *makrūh*. If one sells his slave as a commodity, and buys him then from him with a higher price, it is permissible for him to inform about the second price, if he has not stipulated giving him (slave) back. If he stipulates this, it will not be valid, since it is considered as a treachery.

2. If one sells a slave on basis of profitability and then his capital comes out to be insufficient, the buyer will have the choice either to give him back or take him with the (original) price. Some legists observed: he can take him with deducting the addition in price. If he says: I buy him with a higher price (than what he informed about), it will not be accepted of him even with establishing an evidence. The buyer is not required to make an oath, except when the seller alleges awareness of increase in price against him.

3. If the seller depreciates the article lower than its real price, it will be permissible for the buyer to inform about the original price. Some legists said: If this be (decreasing the price) be prior to the contract's being bound, it will be valid and it should be added to the price with informing about the remainder. If it be after the binding of the contract, it will be considered as a renewed donation, and it will be permissible for him (buyer) to inform about the original price.

4. For one buying goods in transaction, it is not permissible to sell some of them on profitability basis, irrespective of whether they be similar or different, and whether he has valued them or

set forth the price on them equally, selling the best of them, except after informing about it. So also, is the rule when he buys a pregnant mount, which gives birth, intending to sell it alone separate from its young.[1]

5. If one estimates for the broker a commodity, gaining profit from him or not, not stipulating sale for him, it will not be permissible for the broker to sell it on profitability basis, except after informing about the real situation.

The merchant (seller) is not obliged to pay in full, but he is entitled to take the profit,[2] while the broker should be given the similar wages, irrespective of whether the merchant has asked him to sell goods for him or the broker himself has volunteered to work for him.

THE TAWLIYAH (INVESTITURE)

Tawliyah is the owner's handing over the commodity to the broker, with the original capital without any addition, saying: I commit to your charge (*wallaytuka*) or I sell you (*bi'tuka*), or other similar expressions indicating transference of ownership.[3]

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[1] Since the price of the animal when it be pregnant in time of sale, covers the whole (the mount with its young), and the parts have no price. But this is not true in case of renewal of pregnancy, as the price then will be paid for the mother individually, like the renewed produce (fruit). (*al-Masālik*, vol. III, p. 312).

[2] Because it represents price of his own property that he has not transferred its ownership to the broker through any means of possession transference. (*al-Tawḍīḥ*, vol. II, p. 287).

[3] If it comes into effect through the expression: 'I sell you', and similar expressions considered in sale generally, he should complete it with stating the price, or with the words: "with what it has cost me" or alike.

If it comes into effect through the expression: 'I commit to your charge' he should mention the contract as the object of the verb, sufficing with it. But if he says: "I commit the commodity to your charge", this will imply division. (*al-Masālik*, Vol. III, pp. 313–314).

THE MUWĀDA`AH

Muwāda'ah is derived from the verb *wada'* (disparage, detract). If one says: I sell you this thing for a hundred dirhams with detracting one dirham from every ten (dirhams), then the price is 90. So also, he says: with detraction of the ten (i.e.: one from every ten dirhams). If one says: … with detracting one from every eleven dirhams, the price then will be ninety-one except a part from eleven parts of the dirham.

CHAPTER SEVEN
THE USURY

It is confirmed more in two cases:

1. Sale: with two descriptions: nature, and measure or weight.

2. Loan: with stipulating the interest.

The exposition of the first depends on certain conditions:

FIRST: EXPOSING THE NATURE (GENUS)

Its restriction includes: every two things called by a special term, such as the wheat with its like, and the rice with its like. Then it is permissible to sell the homogeneous by weight against weight, in cash, but it is not permissible with addition. It is not permissible to lend each one the other, as per a more predominant view. Receiving the money before dispersion is not permissible except in money changing.

If the two things differ in nature, resemblance and preferability in cash will be permissible, but there is disagreement among the legists regarding making a deal on credit, and prohibition is more precautionary.

The wheat and barley are one kind as regards the usury,[1] since the term 'food' is used for both of them. The produce of palm-trees is considered as one kind even if its sorts differ, and so also is the produce of grapes (orchard). It is *ḥarām* to make preference among products of one kind, like wheat with its flour, barley with its fine flour (*suwayq*), the treacle made of dates with the dates, and what is produced from the grapes with the grapes.

But it is permissible to sell the produce of two different materials, with the price of both of them and with price of one of them, on condition that the price is more than that of its similar kind

Kinds of meat differ according to names of animals. Meat of cow and that of buffalo are of one kind, since they both are labeled under cow meat (beef). Also meat of sheep and that of goats are of one kind, as they are both called with the name 'sheep.' So also, the camels, with all their species and classes, are considered as one kind (genus), and also the pigeons are considered as one genus.

The wild animal differs in genus from its tamed (domestic) one.

Kinds of milk (*albān*) follow the flesh of their producers in homogeneity and contradiction. It is not permissible to make preference between the milk extracted and flesh of its producer, such as the butter taken from the cow with its milk and *makhīḍ* and *aqit*.

Oils follow the material from which they are extracted. Hence the sesame oil is one genus, and so also is any oil added to it, like oil of violet or nenuphar (lily). The vinegars follow in rule the ingredients from which they are made. Thus grapes vinegar differs from treacle vinegar. It is permissible to make

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[1] By saying 'as regards usury' he intended to draw the attention to the fact that they (wheat and barley) are considered in other cases such as *zakāt* two substances generally, as they differ lexicographically and customarily. But in respect of usury, they are treated as one kind. (*al-Masālik*, vol. III, p. 318).

preference between them in cash, but on credit there is disagreement.

SECOND: CONSIDERING THE MEASURE AND WEIGHT

Usury is only considered in sale of what can be measured and weighed. The prohibition on usurious thing is removed through reducing them to the same level. If one sells what cannot be measured or weighed, on preference basis, it is permissible even if it be countable, like selling one dress with two dresses, or one egg with two eggs, in cash. But regarding selling them on credit there is disagreement among the legists, and the prohibition is more precautionary.

No usury is there on sale of water, due to non-stipulation of measure or weight in selling it. But it is considered in selling the weighed mud like the *Armanī* (Bole),[1] as per a more predominant view. The criterion worthy of regard here is the established usage according to law (*shar`*), as what is proved to be measured or weighed during the lifetime of the Prophet (S),[2] it should be taken as the basis dependable for new dealings. For things of unknown measure or weight, the basis will be the customary usage of that country. If countries differ regarding it, then the basis for every country will be the usage followed in it exclusively. Some legists said: it is more preponderant to follow the assessment, and prohibition is established in general.

The basis observed in equality is the time of purchase. It is permissible to sell (barter) uncooked meat with cured meat equally, and unripe dates with mature dates. So also, it is valid to sell wet wheat with dry wheat, since they are both of the same kind. Some legists observed: It is prohibited due to

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[1] Because it is known usually to be weighed. In the reported traditions, the *Armanī* is the mud of Dhu'l–Qarnayn's grave. (*al-Tawḍīḥ*, vol. II, p. 290).

[2] Four things are confirmed to be measured during the lifetime of the Prophet (S), which are: wheat, barley, dried dates and salt. Hence it is not permissible to barter some of them with the other except through measuring, even if they differ in weight. (*al-Masālik*, vol. III, p. 323).

incurrence of diminution out of dryness, or addition of unknown water parts.

Regarding bartering the mature dates with dried dates, there is disagreement among the legists, and the more preponderant view is prohibiting such sale, as per the most famous narration reported from the Prophet (S).[1]

A COMPLEMENT

It contains six issues:

1. No usury is there in dealing between a father and his son (exclusively), but it is permissible for any of them to take the surplus remained from the other one. Also no usury is there between a master and his slave, or between a man and his wife, or between a Muslim and a warring disbeliever. But it is considered in dealings between a Muslim and a *dhimmī* (a disbeliever enjoying Muslim protection), as per a more widely-held view.

2. It is not permissible to sell flesh of an animal with the animal itself, such as sheep meat with the sheep. But it is permissible to sell it with an animal of another genus, like the cow flesh (beef) with a sheep, but on condition that the flesh be ready-made.

3. It is permissible to sell (barter) a hen containing an egg with an empty hen, and to sell a sheep having milk inside its udder with another one not having milk.

4. Division is considered a distinction of one of the two rights not a sale, so it is valid in every usurious transaction, even when one of the two parties takes the surplus. Division in measure and conjecture is permissible. If partnership in mature

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[1] Regarding the real reason for non-permissibility of selling mature dates with dried dates, the following text is reported: when the Prophet (S) was asked about this kind of sale, he (S) said: Does it become less if dried? They replied: Yes. He said: Then it is not permissible … (*al-Masālik*, vol. III, p. 324).

dates and dried dates is equal, and one of the two parties takes the mature dates, it will be valid.

5. It is permissible to sell a cup of wheat with another cup (*makkuk*), even if one of them contains chopped straw. So also, if one of them contains little dust, as it is customary to be mixed with it.

6. It is permissible to sell one dirham and one dīnār with two dirhams and two dīnārs, and each one of them can be spent on other than its kind. So also, is the rule when some commodity replaces the dīnār or the dirham. So also, when a *mudd* of dried dates with one dirham are bartered with two *mudds* or more with two dirhams or more.

Cleared from usury are the following cases: One selling his commodity to another with a kind different from its kind, buying the other commodity with the same price, and deducting then the regard of equality. So also, when a person donates his commodity to another one and that one donates it to him, or lends him and he lends his commodity to him, and they discharge each other from any loss. It is true also in case when someone sells something to another with granting him the addition. But all these deals should be done without stipulation.

THIRD: MONEY CHANGING

It is to sell prices with prices (gold and silver with money). The condition for validity of selling them – in addition to usurious dealing – is payment and receiving in one meeting. If the two parties disperse before receipt, the deal will be invalid, as per a more predominant view. If a part of money is received, the sale of that part will be valid exclusively. If they both depart the place (*majlis*) in an accompanying way, the deal will not be invalidated.

If one of the two parties deputes another person to receive for him, and the deputy receives before their dispersion, it will be valid. But if he receives after dispersion, it will be invalid. If one buys dirhams and buys by them dīnār before taking hold of the dirhams, the latter purchase will be invalid. If they disperse and leave the place, both the deals will be invalid.

If one owes another person some dirhams, buying by them dīnār, it will be valid even if they have not exchanged the payment and receipt. So also, is the rule when someone has some dīnār and lousy by them dirhams, since both the currencies are of one kind.

Preferability in one kind is not permissible even if they have paid and received the money, but it is permissible in two kinds. In *wujūb* of resemblance the following things are considered equal: the jewels and fractured, the good substance and bad one (adulterated). If the silver has unknown adulteration, it will not be permissible to sell it but with gold or a substance other than silver. So also is the gold. If the adulteration is known, it will be permissible to sell it with the same substance, with an increase proportionate to adulteration. The ore of (mineral of) silver cannot be sold (bartered) with silver, out of precaution, but it is permissible to sell it with gold. So also is the ore of gold. If both the ores be gathered in one transaction (sold together), selling them with gold and silver together will be permissible. It is permissible to sell the ore (essence) of lead and bronze with gold and silver together, even if it contains a little silver or gold, since the predominant substance is other than them (silver and gold).

It is permissible to take out the adulterated dirhams despite unawareness of amount of deceit, if they be in common use among people and of known rate of change. But if they be of unknown rate of change, spending them will not be permissible but after manifesting their rate of change.

CHAPTER EIGHT
SALE OF FRUITS; PRODUCE OF PALM-TREES, FRUITS, VEGETABLES AND OTHERS

PALM-TREES

It is not permissible to sell their fruit before their ripening, in general. There is disagreement among the legists regarding

permissibility of selling them after staying two years and more on the origin, and permissibility is more emphasized in reports. Selling their fruit after approaching to perfection and appearance of their fitness, throughout one year or two years, is permissible, provided that they be plucked or gathered, singly and jointly. It is not permissible to sell them before appearance of their goodness, in general, except when attaching to them something liable to sell, or on condition of plucking, or passage of two years and more. If they be sold within one year without fulfilling these three conditions, the sale will be invalid, as per the opinion of some legists. Others said: it is *makrūh*, and others observed: the condition of faultlessness should be observed. The first view (invalidity) is more widely-held by the *`ulamā'*. If they be sold with their roots, it will be valid absolutely.

The signs of appearance of fitness for the fruit are: their becoming yellow or red, or reaching a stage when it can be secure against blight. If some fruit of orchard approach perfection, it will be permissible to sell its produce as a whole. If the fruit of one orchard ripen, it is not permissible to sell the fruit of the other one, even if they be joined to them, the view regarding which there is disagreement among the legists.

THE TREES

It is not permissible to sell them until appearance of their goodness (perfection), whose limit is formation of their seeds, and no addition to this is stipulated, as per a more correct opinion. Regarding selling them at the age of two years and upwards before their breaking forth, there are two views, one saying: Yes, it is permissible, and the other: No, it is not permissible due to coming actualization of ignorance. So also, when something is joined to them before formation of seeds. If they are formed, it will be permissible to sell them with their roots and alone, whether they be projected like apples, apricots and grapes; or inside a rind (shell) necessary to preserve them, such as walnut in the lower shell, and the almonds. Or it may be inside a shell unneeded, like the upper shell of walnut, green broad-beans, oats and lentils, and so also is the *sunbul* (ear of

corn, spike), whether be projected like barley, or concealed like wheat, isolated and with its roots, standing and harvested.

THE VEGETABLES

Selling them before their breaking forth is not permissible. But it is permissible after their clustering in one gleaning or several gleanings (*laqaṭāt)*. So also is what can be plucked leaving behind some trace, such as *raḍbah* (*fiṣṣah* and *qaḍb*) and herbs, in one bundle or several ones. So also, is what can be brewed, like henna and strawberry. They can be sold alone and with their roots. If one sells the roots after springing forth of the fruits, the fruit will not be included in the sale except with making a condition, and the purchaser will be required to keep it on its origin until the time of its ripening. Whatever grows after purchasing will belong to the buyer.

SUPPLEMENTARY ISSUES

1. It is permissible to exclude the fruit of certain trees or palm-trees in themselves, and to exempt a common share, or known *riṭls* (pounds). If the produce becomes less, the proportionate amount should be deducted from the price.

2. If one sells what seems to be prefect, and be inflicted before taking hold of it, the indemnity should be taken from the seller, and so also is the rule when the fruit be spoiled by the seller. If a part of the fruit be inflicted, the buyer can take the faultless portion with its share of price. If the damage is caused by a foreigner (a third party), the purchaser will have the option to revoke the sale transaction or claiming the indemnity from the seller. If this damage is caused after taking hold of the fruit, the buyer will not have the right to claim any compensation from the seller, as per a more predominant view. If the buyer spoils the fruit while being in the seller's hand, the contract will be established (remain in force), and the deterioration will be considered as receiving.[1] So also, is the rule when one buys a bondmaid and manumits her before taking hold of her.

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[1] The buyer's spoiling the article sold while it be in the seller's hand,

3. It is permissible to sell the fruit with their roots through certain prices and exposing for sale. But it is not permissible to sell them with fruit of the same kind, which is called *muzābanah*. Some legists said: it is rather to sell the fruit on the tree with dried dates, even if they be laid down on ground,[1] the view which is more predominant among the legists. Is this permissible for other fruit trees than the palm-trees fruit? Some legists said: No, it is not permissible since it is not secure from usury. Also it is not permissible to sell the spike with the seeds of such trees in general, which is called *muḥāqalah* (dealing in futures). Other legists observed: rather, it is permissible to sell the spikes with seeds of their kind (genus) whatsoever, even if they be laid down on the ground (offered for sale), the view which is more widely-held among the legists.

4. It is permissible to sell the '*arāyā* with their *khars* as dried dates. The *'āriyyah* (sing of '*araya*) is a palm-tree grown inside one's house. Some lexicographers say: it may be grown in one's orchard, which is good. Is it permissible to sell it with its *khars* of dates? The answer is: No, it is not permissible as per a more correct opinion. It is not permissible to sell what is in excess of one tree. But it is permissible if one owns several houses in each of which there is one palm-tree. For selling it with dates it is not stipulated to pay and receive before separation, but acceleration is stipulated, so as preceding one into the other is not permissible. It is not *wājib* to make resemblance between the fruit of *khars* during dryness and its price, in accordance with the apparent reports in this regard. No *'āriyyah* is there but in palm-trees.

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includes both the cases whether being with the seller's permission or not. If it be with his permission then it is considered a receipt to which the rules of taking delivery are applied upon the whole. If it be without his permission as it is apparent it is considered a receiving considering transference of liability (*ḍamān*) to the buyer, though the other rules are not applied to it. (*al-Masālik*, vol. III, p. 362).

[1] That is: exchange them with dried dates or mature dates, though it be of other than them; be cut and laid down on the ground. (*al-Tawḍīḥ*, vol. II, p. 302).

5. It is permissible to sell the plant as *qasil* (cut down by force).[1] If the buyer has not cut it, the seller is entitled either to mow it or leave it and claim the rent of his land. So also, is the rule when one buys a palm-tree with stipulating its being cut down.

6. It is permissible to sell the fruit he has bought with an increase or deduction in the price, before and after taking hold of the fruit.

7. If one has choice between a palm-tree or a tree, accepting one of them with the share of the second party (seller) in return of a certain amount, it will be valid.

8. If one passes by some palm – trees or fruit trees or any plant accidentally, it is permissible for him to eat of them without corruption but it is not permissible for him to take anything of the fruit with him.

CHAPTER NINE
SALE OF ANIMALS (MAN AND OTHERS)

WHAT IS LIABLE TO POSSESSION (OF HUMANS)

Being an infidel by origin is a cause making enslavement of the *muḥārib* (warrior) and his offspring permissible, and making this applicable to his descendants even if converted from disbelief, unless the incidence of emancipating causes (manumission, or *kitābah*, or others). It is permissible to take possession of the *laqīṭ* (waif, foundling)[2] in abode of war, but not in abode of Islām (where he be free apparently). If he

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[1] That is: it be cut by force, when he stipulates cutting it before time of harvest, for using it as forage for animals. (*al-Rawḍah*, vol. III, p. 365).

[2] Because they, their properties, and their children are all *fay'* (belonging to Muslins and under their protection), except when there be among them a Muslim man from whom it is possible to produce this foundling (*laqīṭ*). (*al-Tawḍīḥ*, vol. II, p. 305).

attains maturity and acknowledges slavery, it will not be accepted of him as per view of some legists. Other legists said: it is accepted of him, which is more predominant among the legists.

It is valid for a man to take possession of all except eleven people, who are: fathers, mothers, grandfathers, grandmother how high so ever, sons, their children male and female how low so ever, sisters, maternal aunts, paternal aunts, brother's daughters and sister's daughters.

Do these people take possession of foster relatives? Some legists said: yes, they can, No, and others observed: No, they can't possess. The second view is more widely-held .It is *makrūh* for other than these to take possession of their relations like: brother, paternal and maternal uncle, and their children.

The woman can take possession of anyone except fathers how high so ever, and the sons how low so ever in consanguinity. Regarding the foster relations there is disagreement among the legists, but prohibiting it is more widely-held among them. If one of the spouses takes possession of the other, the ownership will be valid while the marriage contract will be invalid.

If one acknowledges slavery for himself, he will be considered as a slave if he be *mukallaf* (reached puberty) unknown to be free. No consideration is to be given to his desisting from slavery, even if the one for whom the acknowledgement was done be a disbeliever. So also, when one buys a slave who claims to be free, but the case differs here by that the claim of this slave is to be accepted with giving an evidence.

RULES OF PURCHASE

If any defect befalls the animal, after concluding the contract and before taking hold of it, the buyer will have the option either to return or keep it, with claiming indemnity from the seller for the defect, the view regarding which there is disagreement among the legists. If the defect befalls the animal after taking hold of it, or any harm inflicts it during the period of option given to the buyer, the indemnity should be taken

from the seller, on condition that the buyer has not caused this harm deliberately.

If the defect is caused by other than the buyer, it will not abolish the right to give back the sold animal granted to the buyer as principle of option. Regarding the right to claim indemnity from the seller there is disagreement among the legists, and the more predominant view says: it does not annul this right. If the defect is caused after expiry of period of option right given to the buyer, the right to give back the animal with the precedent defect will be cancelled.

If one sells a pregnant bondmaid, her child will belong to the seller (since it is not included in the sale), as per a more predominant view, except when the buyer stipulates including it in the sale. If one buys them (bondmaid with her embryo) and the fetus is miscarried before taking hold of the slave woman, the buyer will be required to return the share of the fetus from the price to the seller. The way followed here is thus: the bondmaid as pregnant and miscarried is valued, and the difference between the two prices should be returned to the seller.[1]

It is permissible to buy a portion of the animal in general, like half or a quarter of it. If one sells an animal excepting the head and skin, the sale deal will be valid, and the seller is considered a partner in proportion to the value of the parts he excluded, as per the narration reported by al-Sakūnī. So also, when two or more people take into partnership, and one of them stipulates excluding the head and skin for himself, as he will be considered a partner in proportion to amount of his capital.

If one says (to his partner): 'buy an animal with my share,' it is valid, and the sale is established for both of them, and each one of them will be liable to pay half the price. If one of the

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[1] Rather the bondmaid should be valued as pregnant and abortifacient, as this is more compatible to truth, contrary to the *hā'il* (menstruant), and due to ascertainment of discrepancy between them. That is because miscarriage for the bondmaid is considered a defect that may cause reduction in her value. (*al-Masālik*, vol. III, p. 379).

partners permits his partner to pay on his behalf, it is valid. If the animal (sold) is spoiled, both of them will be responsible for compensation, and one who has paid the price is entitled to claim from his partner, who ordered him to pay, the amount he has paid for him. If has said to him: the profit is for us and you are not liable to any loss, there is disagreement among the legists regarding it, and permissibility is more widely-held.

It is permissible for one intending to buy a slave woman to look at her face and charms. It is *mustaḥabb* for one who has bought a slave to change his name, feed him some sweetmeat and to give in charity something for him. It is *makrūh* to have sexual intercourse with a woman born as a result of fornication, both through taking possession of and sale contract, as per a more predominant view, and for the slave to see his price in the scales.

SUPPLEMENTARY ISSUES

1. The slave is not entitled to take possession of anything. Some legists said: he may possess the surplus of taxes (stipulated on him by his master), the view which is more confirmed in traditions, and the indemnity for felony as per the view of some legists.

2. If one buys a slave having some property, his property will be his master's, except when the buyer stipulates it. Some legists said: if the seller has no knowledge of it (property), it will belong to him, but if he be aware of it, it will belong to the buyer. The first view is more widely-held among the legists. If the slave says to the buyer: "buy me and I will be obliged to give you so-and-so (money)," he will not be responsible for payment even if he be bought by him. Some legists observed: If he owns some money in time of saying this, it will be incumbent upon him to give the buyer what he promised him. Otherwise, he is not bound to pay, the view which is more confirmed in reports.

3. If one buys a slave with his property, it will be permissible for him to possess them as a whole if the price be not of the same kind of the property. Also it is permissible if it be of the

same kind, but on condition it be not usurious. But if it be usurious and sold with a similar price, then an additional amount in return for the slave should be paid to the seller.

4. The bondmaid should be proved to be innocent[1] (discharged of pregnancy) before selling her, whether the owner has copulated with her within the period of one menstruation or 45 days, if a woman like her is known to menstruate but she has not discharged menses.

So also, it is *wājib* upon the buyer to investigate and make sure of her (bondmaid) state if he be unaware of it. But this investigation is not required when some trustworthy person asserts that he has verified her innocence. Also if this be for a woman at an age of one who does not menstruate due to youngness or old age, or being pregnant, or menstruating but only to an extent of her period of menses. It is not permissible to have sexual intercourse with a pregnant woman from the fore-part before passage of four months and ten days (after her pregnancy). Copulation with her after that is *makrūh*, and if one copulates with her, it is *mustaḥabb* for him (copulater) to retire (separate) from her. If he does not insulate from her, it will be *makrūh* for him to sell her child (after becoming pregnant out of this copulation), and it is *mustaḥabb* for him to set aside for her some share from his heritage.

5. Separation between children and their mothers, before their dispensation with them, is unlawful. Some legists said: it is *makrūh*, which is more predominant. Dispensation with (being in no need of) the mothers is achieved when the children reach the age of seven. Some legists said: The child's being in no need of sucking (the breast). The first view is more correct.

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[1] By *istibrā'* is meant: asking for discharge and acquittal of her womb from pregnancy, as if he endures all this period, he will discover her being pregnant or not, so as to avoid combination and confusion of genealogies (crossbreed). This is the philosophy of obligation of *istibrā'*; and hence the rule will be disproved for one not coming, due to non-application of reason … (*al-Masālik*, vol. III, p. 385).

6. If one copulates with a bondmaid and causes her to give birth to a child, thinking her to be his property or wife, and discovers then he is mistaken and she be the property of another person, the owner will be entitled to take her away, and the copulater will be liable to give out one- tenth of her value if she be virgin (*bikr*), or half tenth if she be *thayyib* (widow or divorcee). Some legists said: He is required to give the dowry of her equal. The first view is more widely-held among the legists. The child produce from this copulation is free, and his father is liable to pay out his value on the day when he was born alive, and he can claim from the seller what he has benefited from the child's value. Regarding returning what he has got as a dowry and wages (hire), there are two views: one saying he has to give it back since the seller has granted it to him without a substitute. Some legists said: No, he is not required to give it back due to obtaining a substitute in return for it.

7. It is permissible to take possession of whatever taken as spoil in abode of war, without taking permission from the Imām, during era of occultation, and also to copulate with the bondmaid. No difference here between what the Muslim takes as spoil or the non-Muslim, even if it contains a right belonging to the Imām or it be property of the Imām.[1]

8. If one pays to a slave, permitted by his master to trading, some money to buy with it a slave and free him, with performing the *ḥajj* for him with the remainder of the money, and he (slave) buys his father and gives him the remaining amount with which he undertakes the *ḥajj* acts… when a dispute happens between his master, the heirs of one who ordered to buy, and masters of the father, each one claiming: "he (slave) is bought with my money," some legists said: he should be returned to his masters as a slave, and then handed over to that who can give evidence (*bayyinah*), the view which is not confirmed by strong traditions. Other legists are of the opinion that: he should be restored to the master of the

[1] In the section of *khums* (one-fifth), it was stated that the Imams (peace be upon them) have considered dwelling places and women as public property for their *shī'ah* (followers). (*al-Tawḍīḥ*, vol. III, p. 313).

authorized slave, unless there being evidence, which is more correct.

9. If one buys a slave enjoying Muslim protection, and the seller offers him two slaves saying: choose one of them, when one of them runs away, some legists said: they will be both responsible for the loss, and the buyer will have the right to claim half the price from the seller. Then if he finds him, he can pick him; otherwise the existing one will be subject of sale, according to his exclusive right in them. It is better to say: the fugitive is guaranteed with his value, and the buyer is entitled to claim the slave enjoying Muslim protection. If he buys one of the two slaves (without specification), the contract will be invalid, and there is suspicion regarding it.

10. If one of the two parties of contract copulates with a bondmaid owned by both of them, he will not be liable to punishment if this be done by him by mistake, but the *ḥadd* should be executed when the copulation be done without mistake (*shubhah*), with deducting from it in proportionate to the share of that who has copulated.[1] And she (the bondmaid) will not be valued with the same copulation, as per a more correct opinion. If she becomes pregnant, the shares of partners will be valued according to value of the embryo, and the child

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[1] What is generally understood from texts (Qurʿānic Verses) and religious verdicts (*fatāwā*) that the *wājib* limit (punishment) here is flogging in particular, though he be immunized (married), as this limit is liable to partition.

The more preponderant view considers this as being not mere adultery, since he owns a part of her. Hence the rule regarding the child (born of this copulation) is to ascribe it to the copulater, (considers it as his son) even if he was aware of the prohibition, though the adulterer aware of his sin has no right to claim the child (born out of fornication).

But he (adulterer) is exempted from the *ḥadd* (punishment), due to the partner's share (in the bondmaid), as no *ḥadd* is imposed upon the father because of his share. Also no *ḥadd* is there upon him, even when all the share belongs to the child, as will be explained later on. (*al-Masālik*, vol. III, p. 398).

will be engendered as free, and his father will be liable to pay the value of their shares on the day when the child is born alive.

11. If one of the two authorized slaves buys the other from his master, he will be judged according to the contract of the preceding one. If both the purchases coincide at the same time, both the contracts (of purchase) will be considered invalid. In another narration, lots should be drawn between them, and in another one: the road should be measured and the right is to be given to the nearer one. The first view is more predominant among the legists.

12. Whoever buys a bondmaid who was stolen (captured) from abode of reconciliation, he will be required to return her to the seller and reclaim the price. If he dies, the price should be taken from his heir. If he has not left any heir, an endeavor should be exerted to arrange for her price. Some legists said: she will be considered as a *luqṭah* (a find). The more predominant view among the legists says that she should be handed over to the ruler.

CHAPTER TEN
THE SALAF[1]

It is of several sections:

1. THE *SALAM*

It is to buy a property insured for a certain term, with ready money (cash) or what comes under the same rule.[2] It is concluded by the term: *'aslamtu*' and *'aslaftu*' or other terms indicating the same meaning, and also by terms of sale and purchase. Is the sale contract concluded by using the term

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[1] *Salaf*: is a kind of sale in which the price should be paid as soon as possible, and the commodity is to be described precisely, for a determined time. (*al-Ṣiḥāḥ* of al-Jawāhiri, vol. IV, p. 1376).

[2] As if it be received by the seller before concluding the contract, or be pertaining to his obligation (debt). (*al-Tawḍīḥ*, vol. II, p. 317).

salam, such as saying: *'aslamtu'* (I handed) to you this dīnār in this book? The answer is: Yes, as per a more predominant view among the legists, considering the intention of the parties of contract.

It is permissible to sell (in *salaf*) the substitutes with the substitutes when they differ (or be similar but not usurious), and the substitutes with the prices; and also make *salaf* of prices in substitutes. But making *salaf* the prices in substitutes is not permissible.

2. CONDITIONS FOR SALAF

There are six conditions for *salaf*:

1&2. To mention the kind (genus) and description

Its rule is obligation of stating of whatever entails difference in price. In description it is not required to state the end (object), but it is sufficient to confine it to what the name contains exclusively. It is permissible to stipulate the good or bad quality for commodity, but it is not valid if one stipulates the best quality, due to its infeasibility. So also, when one stipulates the worst. It is more meritorious to permit such stipulation, due to possibility of getting rid of it. The expression indicating description should be commonly known by both parties of contract, manifest in the words used, so as to be referred to in case of incidence of any dispute between them.

If the thing sold be of those which cannot be described exactly, this kind of sale (*salam*) will not be valid for it, such as meat, whether raw or roasted, and bread, with disagreement regarding the leathers (hides). Some legists said: it is permissible with viewing, which is out of *salam*.

Salam is neither permissible for the made arrows, except for their sticks before carving them, nor for jewelry and pearls, since it is infeasible to count or measure them precisely, and due to difference in their prices and qualities. It is not permissible also in real estate and lands.

But *salam* is permissible in trading with vegetables, fruits, all kinds of plants, eggs, walnut, almond, all kinds of animals and human beings, milk, oils, fats, perfumes, clothes, beverages and medicines, their simple and compound ones if the amount of their components (drugs) be not doubtful, and also in two different kinds in one transaction.

Salaf is permissible in a milch sheep and it is not *wājib* to deliver that which contains milk. It is permissible in a sheep pregnant with a young, and some legists said: it is not permissible, since such a sheep is very rarely found. There is also disagreement regarding a pregnant bondmaid, due to unawareness of her being pregnant, and also regarding permissibility of *salaf* in cocoon.

3. Receiving the capital before separation is a condition for validity of the contract. If they (parties of contract) separate before receipt of the capital, the contract will be null and void. If a part of the price is received, the contract will be valid exclusively in the received capital, and invalid in the remainder. If one stipulates the price to be paid from a debt in his obligation, some legists said: this invalidates the contract since it will be considered a sale of a debt with its like. Others observed: it is *makrūh*, which is more predominant among the legists.

4. Estimating the *salam* by measure or weight in general. If they (parties of contract) resolve upon an unknown rock, or unknown measurement, it will not be valid even if it be specified, since it should be customarily known and followed by people. *Salaf* in dress through cubits is permissible, and also in every thing that can be measured by cubits. But regarding *salaf* in countable things the more predominant view is non-permissibility of such transaction. Also *salaf* is neither permissible for canes weighed in tons, nor for fire-wood in bundles, nor for shorn fleece, nor for water in water skins.[1]

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[1] The more predominant view in all this, is the difference in the amount of the mentioned measures, which obligates deception in concluding a *salaf* contract, contrary to the case when the water be sold with

Also the capital (fund) should be assessed by general measure, or usual weight. It is not permissible to be content with sighting it, and it is not valid to pay it in an unknown way, like a handful of dirhams or a *qubbah* of food.

5. Setting a specific term (*ajal*): If one (buyer) states an unspecific period, such as by saying: whenever I want; or a time liable to increase or decrease, such as home returning of a pilgrim (from Mecca), the contract will be null and void. If he buys the thing on basis of due payment, some legists said: this will invalidate the sale deal, and others observed: it is valid, which is more confirmed in reports, but on condition that the thing be of common existence in time of concluding the contract.

6. Existence of the thing should be predominant in time of its falling due, though being not present in time of concluding the contract. Also the term specified should be known for both parties of the contract. If one of them says: until Jumādā, or until Rabī', the nearest one of them should be borne in mind, and so also when saying: until Thursday or Friday. And one month in general should be understood to mean the period between two appearances of new moons, or thirty days.

If one says: until so-and-so month, it will fall due from the outset of night of new moon, according to customary usage. But if he says: until two months, then in the beginning of the month he should count two months through new moons. If he concludes the contract during (at any time of) the month, he should count from the third day in proportionate to the days passed from the month when the contract was concluded. Other legists said: he should complete it for thirty days, which is more widely-held among the legists. If he says: until Thursday, it will fall due in the first part of it. Mentioning the place of delivery is not a condition, as per a more correct opinion, even if there being provisions in carrying it (the article sold).

RULES OF SALAF

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sighting, as the viewing removes any fraud from it. (*al-Masālik*, vol. II, p. 414).

1. If one lends something to another, it will not be permissible for him to sell it before falling due of time of delivery. But it is permissible to sell it after this time even if he has not taken hold of it, to the one to whom he lent, but selling it to another one is *makrūh*. Also selling a part of it, or committing it or a part of it to another's charge is permissible. But *karāhah* vanishes when the buyer takes hold of it and sells it.

2. If the recipient pays the price without any description, and the deliverer accepts it, it will be valid and exonerating to the recipient, whether he has stipulated this for speeding up, or has not. If the article comes out to be exactly similar to its description, it will be *wājib* to take hold of it, or exonerate the receiver. If he refrains from taking it, it should be handed over to the ruler, if the recipient asks him to do so.[1] If he pays more than its attribute, accepting this addition will be *wājib*. But if he pays more than this, it is not *wājib* to accept the excess. But if he pays in other than its kind, he will not be exonerated except by mutual consent and agreement.

3. If one buys a *kurr* (equal to 1200 Iraqi *riṭl*) of food with one hundred dirhams, stipulating postponement of payment of fifty dirhams, the sale will be invalid completely as per view of some legists. But if he pays fifty and stipulates delaying the other fifty dirhams, from the debt he has in obligation of the recipient, the payment will be valid but the condition of paying from the debt is invalid, with disagreement among the legists.

4. If they stipulate a certain place for delivery, making a mutual consent then to deliver and receive it in another place, it will be permissible. If one of them refrains from this, it will not be obligatory to compel him to accept.

5. If the recipient takes hold of the article, it will be assigned for him, and the obligation of the deliverer will be cleared and

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[1] This be when ability is there to do so. But when it be infeasible, it should be separated between the article and its recipient, and he is to be declared innocent of responsibility when it deteriorates. So also, is the rule to apply when he receives it (commodity), if no way be there to force him to take it. (*al-Masālik*, vol. III, p. 425).

discharged. If he finds a defect in it and gives it back accordingly, his ownership of the article will vanish, and the right will return to the obligation faultlessly.

6. If he discovers a fault in the capital, the contract will be considered void if it is found to be of another kind (genus).[1] But if it comes out to be of the kind stated in the contract, he can claim the indemnity (*arsh*) if he wishes, or he is entitled to give it back.

7. If they differ regarding whether the receiving has been done before separation or after it? The words of that claiming validity of transaction should be accepted. If the seller says: I have received it and given it back to you before separation, his claim will be accepted with making an oath for observing with precaution the validity and veracity of the transaction.

8. If the term (*ajal*) of receiving falls due but delivery be delayed due to an impediment (obstacle),[2] and the seller demands the price after his separation, he (the buyer) will have the option either to cancel the contract or bearing patiently. If he receives a part of it, he will have the option in the remainder, and he has the right to revoke the transaction as a whole.

9. If one pays to the creditor (as *salaf*) as presentation with intention of its being *qaḍā'* (settlement of debt) without bargaining him, this will be considered with its value on the day of receiving.

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[1] As in the case when it comes out to be copper for instance while the contract be concluded on silver, the defect which invalidates the contract from origin, if all the property sold be thus. Otherwise, the percentage should be observed, when the buyer has the option to partition (separate calculation). (*Jawāhir al-Kalām*, vol. XXIV, P.332).

[2] By mentioning the impediment, he avoided the case when the delivery is delayed by free will of the buyer with the seller's offering it. In this case, he is not entitled to revoke the contract, since the delay is caused by his negligence and omission. (*al- Masālik*, vol. III, p. 430).

10. It is permissible to sell the debt after its setting in (not before that) to its debtor or any other person. If he sells it with present money (cash) or a guaranteed determined credit, it is valid in both the cases. If he stipulates its postponement, it is invalid according to view of some legists who consider it a sale of a loan with a loan. Other legists observed: it is *makrūh*, which is more predominant among the legists.

11. If one contracts a loan in something and stipulates another thing with the loan, it is valid. If he, for instance, contracts a loan in sheep, making a condition to wool of certain goats, it is valid as per view of some legists, and invalid according to view of others, which is more widely-held. If he stipulates that the dress be woven by a certain woman (in name), or the produce (crops) be of so-and-so kind, it is not *wājib* upon the debtor to fulfill this condition.

IQĀLAH (CANCELLATION)

It is a cancellation to the right of both the parties of the contract and others, and it is not permissible with an increase or decrease in the price. The right of cancellation becomes void by this (increase or decrease) due to non-observation of the condition.

Iqālah is valid in the contract as a whole, or in a part of it, whether it be a *salam* or any other kind.

THREE SUBSIDIARY ISSUES

1st. *Shufa`ah* (pre-emption) cannot be established through *iqālah*, since it is subject to the sale.

2nd. The wages of the broker (or weigher or porter) should not be deducted through *iqālah*, due to precedence of deservation.

3rd. If they exchange the right of *iqālah*, every compensation should be returned to its owner. If it be there, he can take it, and if not he will be responsible for its equal if it be of equalized kind; otherwise with its value. And another way is by guaranteeing the valuer with its similar kind.

THE LOAN

1. Its real state

It is a contract requiring affirmation, like saying: *aqraḍtuka* (I lent you), or what indicates the same meaning such as: you can make use of it, or get benefit from it, and you have to give back its substitute. And it requires also acceptance, which is the expression indicating approval of the affirmation, and it is not confined in a certain clause in itself.

The loan implies a pay (fee), stemming from aiding (in money) the needy voluntarily, and it is not restricted in compensation. If one stipulates any interest (profit), it will be *ḥarām* (unlawful), and will not benefit the estate. But if the creditor volunteers willfully to pay an addition to the assets or to the specifications, it will be valid and permissible. If he stipulates the faultless things instead of the defective ones, some legists said: it is permissible. And others observed: it is not lawful, which is more preponderant.

2. What is liable to lend

It is everything whose description and measure can be accurately assessed. Hence it is permissible to lend the gold, silver through weight, with wheat and barley through measure and weight, and bread in weight and number, according to the customary usage. Every substance having equivalent components will have its equal established in charge, like wheat, barley, gold and silver. Other than these (of equal parts) its value will be established in obligation in time of delivery. It is better to consider its counterpart as established in obligation.

It is permissible to give the bondmaids in loan. But is it permissible to lend the pearls? It is not permissible as per view of some legists. But if their value is insured (guaranteed), it will be permissible.

RULES OF LOAN

1. The loan is possessed through receiving not through dispensation (*taṣarruf*), since it is a part of property and so it is not conditional with it. Is the creditor entitled to regain it? Some legists said: Yes, even if the borrower feels aversion to this. Others observed: No, he is not entitled to this, the view which is more predominant among the legists, because the advantage of possession is having control over a property.

2. If one stipulates postponement in (paying back) the loan, it is not binding. So also, postponing the due loan is not binding.[1] There is a forsaken narration considering this as recommendable. No difference is observed in this regard between a *mahr* (dowry), or price of a sold thing or other than this. If one postpones the payment (of a loan) with some increase, neither the addition nor the postponement will be valid and established. But hastening (in payment) is valid with deducting a bit of the loan (with mutual consent).

3. When one be indebted to another person, and that creditor be absent temporarily, he is required to resolve upon paying it back as *qaḍā'*, and to set it aside when the creditor dies with recommending someone to reach it to his Lord or his heir when being sure of his death. If he fails to recognize him, he should do his best to find him. If he gives up all hope of finding him, he can give in charity the debt on his behalf, as per view of some legists.

4. The debt cannot be determined as property of its receiver except with taking hold of it. If he renders it as *muḍārabah* (near the debtor or another) before receiving it, it is invalid.

5. If a *dhimmī* (non-Muslim under Muslim's protection) sells (to a Muslim) what is unlawful to possess for Muslims, such as

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[1] By postponing the due loan it is not meant: the creditor's using an expression indicating it, without stating it in a contract as mentioned before, such as by saying: "I have respited you in this debt (postponed payment of debt) for so-and-so period".

The non-obligation in this case is quite clear, as it is not a binding contract but only a promise whose fulfillment is *mustaḥabb*. (*al-Masālik*, vol. III, p. 456).

wine or pig, paying its price to the Muslim as his right will be permissible. But it is not permissible if the seller be Muslim.

6. If two persons have debts in obligation of several people, agreeing to share these debts, whatever is got of these debts will be their own, and whatever is lost will be deducted from them both.

7. When one sells the debt with lower price, the debtor will not be bound to pay to the purchaser more than what he has spent, as per a narration in this connection.

DEBT OF SLAVE

It is not permissible for a slave to dispose by himself through lease, or purchase on credit, or other kinds of deals, or to sell or donate what he has in his possession, except with permission of his master, even if a sentence was given in his favor for possessing it.

So also, is the rule when his master permits him to buy for himself, since he has the right to copulate with the bought bondmaid, with devolution of lawfulness in his right, the view regarding which there is disagreement among the legists. If the owner (master) permits him to buy on credit, the loan will be incumbent upon the master, whether he keeps or sells him.

If he manumits him (slave), the slave will be liable to pay the debt as per a view of some legists. Others said: it will remain in obligation of the master. The second view is more widely-held among the legists. When the master dies, the debt should be taken out of his undivided legacy. If he has creditors, the slave's creditor will be considered as one of them.

If the owner gives him (slave) permission to trading, he should trade exclusively in the things permitted. If he permits him to trade in a certain amount, he (slave) will not be allowed to transgress this limit. If he permits him to buy, this will mean for him buying in cash. If he gives him freehand to buy on credit, the price will be taken from the master (*mawlā*). If the price deteriorates, the master will be liable to pay the compensation.

If the master gives the slave general permission to trade, this will not mean a permission to the slave owned by the permitted one, as disposal in another's properties needs an explicit and direct permission. If the master permits his slave to trade not to buy on credit, and he (slave) buys on credit causing damage to the property (article sold), the slave will be bound to pay the price (indemnity). Some legists said: an effort should be exerted to force him to pay the indemnity as soon as possible. If no permission is given to him to trade, nor to buy on credit, and he buys on credit with spoiling the property, the slave will be alone obliged to pay the price as a whole, not the master.

TWO SUBSIDIARY ISSUES

1. If slave borrows (buys on credit) or buys without permission (of his master), it will be invalid (depending on the owner's permission), and the real estate should be regained from him. If any damage is caused to the property, taking the compensation will depend on manumitting the slave and his being well-off.

2. If the slave buys on credit some property, which is seized by the master and deteriorates in his hand, the creditor (lender) will have the choice either to claim the indemnity from the master, or to wait for the slave until his emancipation and being well-off, and demand it from him.

CONCLUSION

The wages of the measurer and weigher should be paid by the seller, while the pay of the price receiver and weigher (broker) should be taken from the purchaser. The pay of the commodity seller is to be paid by that who ordered to sell it, and of the buyer is to be paid by that who ordered to purchase it. If he volunteers to do the work (freely), it will not be *wājib* to give him any wages, even if the owner permits that. If he sells and buys, the wages of what is sold should be taken from the one who ordered to sell it, and wages of purchase should be paid by that who has ordered to buy, with no possibility to be undertaken (paid) both by only one of them. If the commodity deteriorates while being in the broker's hand, he is not liable for compensation (payment of indemnity). But if this happens

because of misuse on his part, he will be responsible for payment.

If they differ regarding misuse, the claim of the broker will be accepted with his making an oath, if there be no evidence for misuse. So also, is the rule when the misuse is proved and they differ regarding the value.

KITĀB AL-RAHN
(MORTGAGE)

SECTION ONE
THE RAHN

It is a document deposited as a security for a debt of the mortgage, which requires offering and acceptance.

The offer (*ījāb*): is every word indicating holding in pledge, such as saying: *rahantuka* (I have given you in pledge), or this document is a security with you, or other expressions giving this exact meaning. If one be unable to utter these words, making a gesture will be sufficient. If he writes this expression by his hand, under the circumstance, and this meaning is known to be his intention, it is permissible and valid.

Acceptance (*qabūl*): is to accept and approve of that offer or proposal. Giving in pledge is valid when being on travel or at home (present in his hometown). Is receiving considered a condition for its validity? Some legists said: No, it is not a condition. Others observed: Yes, which is more correct. If he takes it without the mortgager's permission, it will not be valid. So also, is the rule when the mortgager permits to take it, but goes back on his word before receiving it. So also, when he utters the contract words, and then goes mad or swoons (loses consciousness) after that, or dies before receiving the *rahn*.

Permanence of receiving is not a condition, as when he reverts to the mortgager or disposes of the *rahn*, it will remain as pledge. If one gives in pledge what is in the mortgagee's hand, it will be binding, though it be taken by force (*maghṣūb*), since the receiving is realized in this case. If one gives in pledge something unseen (absent), it will not be considered as a mortgage, until the mortgagee, or his deputy be present at the time of pledging and receives the *rahn*. If the mortgager admits the receipt, the judgment will be against him, if he is not known

to be a liar. If he goes back on his word, his retreat is not accepted. But his claim will be accepted, if he alleges collusion or conspiracy on the part of the witness, and the mortgager should take on oath, as per a more predominant view. It is not permissible to deliver the common property (*mushā'*), except with the consent of his partner, irrespective of whether it be a movable or immovable property, as per a more predominant view.

SECTION TWO
CONDITIONS OF MORTGAGE

The mortgage should be a real owned estate, that can be handed over, received and sold, whether be jointly or individually owned.[1] If one gives in pledge a debt, it will not be valid. So also, if one mortgages an advantage, like dwelling in a house, and service of a slave.

There is disagreement regarding mortgaging the *mudabbir* (disposer), and its rule is: mortgaging his neck is considered abolition to his disposal (slave). But if he declares the mortgaging of his service, with sparing his disposal, some legists consider this as valid, in application of the narration containing the permissibility of selling his service. Other legists observed: it is not valid, due to infeasibility of sale of advantage alone, the view which is more widely-held among the legists.

If one gives in pledge something he owns not, it will not be valid, and it will be contingent on the owner's permission. So also, if he mortgages what he owns and what he does not own,

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[1] These are the provisions for mortgage as a whole, but they are not in a uniform manner, as ownership is a condition as essential as the other conditions for concluding the *rahn* deal validly. Otherwise, giving in pledge a property not owned is valid as will be referred to later on, but it is contingent on the owner's permission. But other conditions are essential in his view for validity of *rahn*. (*al-Masālik*, vol. IV, p. 20).

the case when the mortgage of what he owns is accepted, while the share of his partner will be contingent on his permission.

If a Muslim gives in pledge wine, it will not be valid, even though it be to a *dhimmī*. If a *dhimmī* gives liquor in pledge to a Muslim, it will not be valid too, even when he hands it over through a *dhimmī*, as per a more predominant view. If one gives in pledge the land of *kharāj* (on which land tax is imposed), it will not be valid, since it is not determined and assigned to anyone in himself. But it is valid to mortgage the buildings, tools and trees the land contains. If he mortgages something whose receiving is not possible, like a bird in the open air, or fish in the sea, its mortgage will be invalid. So also, if he mortgages what is valid to receive but he does not deliver.[1] So also, if he gives in pledge to a disbeliever a Muslim slave or a *muṣḥaf* (a copy of the Holy Qur`ān). Some legists said: it is valid, if delivered in the Muslim's hands, the view which is more widely-held among the legists. If one mortgages a *waqf* (endowment), it is invalid.

Mortgaging is valid when concluded in time of option, whether it be for the seller or the buyer, or both of them, due to transfer of ownership of the sold article through the same contract, as per a more predominant view. It is valid too to mortgage an apostate slave, even if his apostasy be instinctive, and the criminal by mistake. Regarding mortgage of a criminal on purpose, there is disagreement among the legists, and permissibility is more widely preponderant among the *`ulamā`*.

If one mortgages what is liable to deterioration sooner than the fixed term (*ajal*), it will be permissible if he stipulates selling it, otherwise it will be invalid. Some legists said: it is valid and its owner should be forced to sell it.

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[1] The bird should be tied with something not usually used for fettering it; and the fish when being in unrestricted water as taking it is infeasible in this case. (*al-Masālik*, vol. IV, p. 24).

SECTION THREE
THE DUE RIGHT

It is every debt established in one's obligation, like loan, and price of a sold article. It is not valid when its obligating cause has not taken place, like mortgage of what he buys on credit, and the price of what he buys. It is not valid too for that whose necessitating reason takes place but it be not buys established, like the *diyah* (atonement) before establishment of the offence. But it is permissible on installment of every lunar year after its falling due.[1] So also, is the *ju'ālah* (a contract of hiring) before giving it back, i.e. mortgaging its fund due to non-deserving of the hired person to whom the wages are allocated, before carrying out the work. But it is permissible after its recovery. Further mortgaging the wages of writing is not permissible. But the more preponderant view among the legists is permissibility. The mortgage becomes void in time of abrogation of the conditional writing.

Mortgage is not valid too if concluded on anything whose mortgage cannot be recovered in full, such as the lease pertained to the hired one like his service (work). But it is permissible if made for what is established into obligation (*dhimmah*), like work in general. If one deposits some property (*māl*) as security (mortgage) and buys on credit another property, making that mortgage for both of them, it is permissible and valid.

SECTION FOUR
THE MORTGAGER

The conditions necessary for concluding a mortgage contract are: full sanity (maturity) and permission to disposal, with free will, as it will not be valid if made with coercion. It is permissible for the guardian of a child (ward) to mortgage his

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[1] That is: the atonement for offence has to be discharged within three years, through three installments, with which the *rahn* be permissible. (*Jawāhir al-Kalām*, vol. XXV, p. 151.)

properties, if he be in need of buying on credit, with observing the interest, like intending to repairing his house which was ruined, or having properties he needs to expend some money to preserve them against damage or deficit. Hence he is required to mortgage some of his properties the keeping of which he thinks to be more profitable.

SECTION FIVE
THE MORTGAGE

He should fulfill the conditions of full sanity and free will (permission to disposition). The guardian of an orphan is entitled to receive the mortgage for him (orphan). But it is not permissible for him to lend his property to another one, except when this lending brings him (orphan) happiness and bliss, like selling his property with a higher price for a determined term. It is not permissible for him to advance his (orphan's) money as a loan, since this brings him no happiness. But if he fears for his (orphan's) property of drowning or burning or robbery and alike, then it will be permissible for him to advance his property as a loan and take the mortgage. If this be not possible, he should be satisfied with advancing his (orphan's) money as a loan with taking into consideration the apparent confidence, most likely.

If the mortgagee stipulates agency (deputation) for concluding a contract, for himself or other than him; or deposit the mortgage in the hand of a certain just person, it will be binding, and the mortgager will not be entitled to annul the agency (*wakālah*), with disagreement among the legists. But when the proxy dies, his agency will become null and void not the mortgage. If the mortgagee dies, his agency will not be transferred to the heir, except when he has stipulated this (in the contract). So also, is the rule when the proxy be other than him, or this be stipulated by the mortgagee. When the mortgagee dies, and the mortgage be unknown, it will be considered as a part of his assets (undivided heritage) until its exact amount be known by itself.

It is permissible for the mortgagee to purchase the mortgage. The mortgagee is more entitled to regain his loan from his

debtors, irrespective of whether the mortgager is alive or dead, as per the more widely-held view. If he be destitute of this, he can get from the surplus of his debtors.

The property deposited as pledge (*rahn*) is a trust in the mortgagee's hand, but he is not liable to compensate for any damage that may befall the *rahn*. Nothing of his right will be deducted unless it be damaged out of negligence on his part. If he disposes it by riding or dwelling or lease, he will be responsible for compensation, and he is bound to pay the fees (hire). If the mortgagee has a provision (*ma'ūnah*) like a mount, the mortgagee will bear all its expenses, with offsetting the compensation with the mortgager. Some legists observed: if he expends on it, he will be entitled to mount it, with claiming from the mortgager what he spent. It is permissible for the mortgagee to regain his debt from the property deposited to him if he fears denial by the heir despite his acknowledgement. But if he acknowledges of the *rahn,* claiming presence of a debt, the decision taken in this regard will not be in his favor, with asking him to present an evidence, and he is entitled to exact an oath from the heir if he claims his being aware of it.

If the mortgagee copulates with the bondmaid forcibly, he will be required to pay one-tenth of her value if she be *bikr* (virgin), or half a tenth if she be *thayyib* (not virgin). Some legists said: he will be liable to give the dowry of her like. But if she submits willingly, nothing is required of him.

If they (mortgager and mortgagee) deposit the *rahn* to a trustable person, this person is entitled to give it back to them, or hand it over to someone else having approval of both of them. It is not permissible for him to hand it over to the ruler in their presence, nor to another trustworthy without taking their permission. If he gives it to another one, he will be responsible for any damage or loss. If they hide themselves (mortgager and mortgagee), so as not to let the just person give the *rahn* back to them, in that case the trustee can hand it over to the ruler.

In case they be absent and he intends to hand it over to the ruler, or another trustworthy person, without a pressing need, it is not permissible for him. If he does so, he will be responsible

for compensation. So also, is the rule when one of them be absent. In case there be an impediment, he can hand it over to the ruler. But if he gives it to other than the ruler without his permission he will be responsible for compensation. If he lays it in the hands of two trustable persons, it will not be permissible for any one of them to dispose the *rahn* alone, even if it be with the permission of the other party (since the mortgager has not approved of trusteeship of one of them seclusively).

If the mortgagee or trustee sells the *rahn*, with the price being paid to the mortgager, and a defect is found then in the *rahn*, the buyer will not be entitled to claim the price from the mortgagee.

But when the mortgage falls due, the purchaser will have the right to claim the price from the mortgagee.[1] On death of the mortgagee, the mortgager will be entitled to abstain from delivering the *rahn* to his heir. But he can hand it over to some trustee upon whom they agree, or otherwise, the ruler may hand it over to someone with whom he is pleased. If the trustee betrays the trust, the ruler can deliver it to another trustee, if the mortgagee and owner disagree between themselves.

SECTION SIX
THE SUPPLEMENTARIES

FIRST: RULES RELATED TO MORTGAGER

It is not permissible for the mortgager to dispose of the mortgage through usage, or dwelling or lease. If he intends to

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[1] The difference between a defect and falling due of payment (*istiḥqāq*) lies in the fact that the defect does not invalidate the sale, but it (sale) is invalidated through abrogation by the purchaser from time of annulment. This is contrary to the setting in of the *rahn*, which invalidates the sale transaction outright, as the price will not come into possession of the mortgagee to take hold of it. Thereat, he can claim it from its holder, both the trustworthy and mortgagee. (*al-Masālik*, vol. IV, p. 44).

sell or donate it, this is contingent on the mortgagee's permission. There is disagreement among the legists regarding the validity of the manumission with the permission of the mortgager, and the more predominant view is prohibiting this, due to non-permissibility to ownership except with prior permission (mortgager's permission to manumission).

If the mortgager copulates with the bondmaid given to him in pledge making her pregnant, she will become the mother of his child, and the mortgage will not be invalidated. Can she be sold? Some legists said: No, she cannot be sold as long as the child is alive. Others observed: Yes, it is permissible to sell her, since the mortgagee's right is prior. The first view is more correct.

If the mortgager copulates with the mortgaged bondmaid with the mortgagee's permission, he will not be relieved of the *rahn* through copulation. If he permits him to sell her and he sells her, the mortgage will become null and void, and it is not *wājib* to make the price as mortgage. If the mortgager permits the mortgagee to sell the *rahn* before setting in of its term, it will not be permissible for the mortgagee to dispose of the price, except after its setting in. It is valid to dispose of the price after its falling due. If the term sets in but settlement of debt becomes infeasible, the mortgagee will be entitled to sell if he be a proxy. Otherwise he can bring the case before the ruler to force him to sell the *rahn*. If he refrains from this, he has the right to imprison him, and he can sell the *rahn* to him.[1]

SECOND: RULES RELATED TO THE MORTGAGE

The mortgage is binding on the side of the mortgager, who has no right to take it away except with discharging the debt, or relieving himself of it, or the mortgagee declaring cession of

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[1] This is the rule for the mortgagee to receive his due in full. Its purport is: if he be a proxy, he can sell the mortgaged property by himself in time of falling due of the debt, either with its origin or with expiration of its term, even if it has fallen due, when he be entitled to sell during the meeting held for concluding the *rahn*… (*al-Masālik*, vol. IV, p. 51).

his right in the mortgage. After that, the *rahn* will remain as a trust in the mortgagee's hand, who is not bound to deliver it except on request. If he stipulates the pledge to be something liable to sell if he doesn't fulfill the debt, it will not be valid. But if he usurps the property given in pledge to him and mortgages it then to someone else, it will be considered valid, with the liability being still there. So also, when what he has in his possession has come to him through invalid sale transaction. If he forfeits the liability of him, it is valid. Whatever benefit comes out of the pledge, belongs to the mortgager.

If a tree bears fruit, or a mount or a slave woman becomes pregnant after being given in pledge, the bearing (produce) will be considered as pledge like the origin, as per a more predominant view. If one has two mortgages in his hand (deposited to him) through two different debts, discharging one of them, it will not be permissible for him to retain the mortgage belonging to him through the other debt. So also, when there being two debts in his obligation, in one of which there is *rahn*, it will not be permissible for him to make it a mortgage in both of them, nor to transfer it to a renewed debt. If he gives in pledge another's property with his permission, he will be liable to compensate for any damage or deterioration befalling it or in case its restoration be infeasible. In case the mortgaged property be sold with a price higher than the price of its equal, he will be entitled to reclaim the amount with which the *rahn* is sold.

If one mortgages a palm-tree, its fruit (dates) will not be included in the *rahn*, even if it has not been trimmed (lopped). Also when one gives in pledge a land, neither the plants nor trees nor palm-trees will be included in the pledge. But they will be included when he says: "with its rights," the view regarding which there is disagreement among the legists, unless he declares to this. Also what is grown in the land after mortgaging it, whether grown by Allāh—*Subḥānahu*—or the mortgager or a foreigner, if the plant be not among the mortgaged trees?

Can the mortgager be forced to remove such plants? Some legists said: No, he is not required to do so, and others

observed: Yes, which is more predominant among the legists. If one mortgages what is picked up, like the cucumber, it will be valid when the right falls due before renewal of the second fruit. But if it is delayed to an extent obligating confusion of the mortgage that it be infeasible to distinguish, it will become invalid. But the more predominant view says that it does not become null and void. So also, is the rule regarding giving in pledge the lathe of what is turned to a lathe, and the piece clipped off.

If the mortgaged slave commits a crime deliberately, he will be responsible for the crime, and the victim will be more entitled to right. But if his perpetrating the crime be by mistake, it will remain as a *rahn* if the master redeems his mortgage. And if he delivers him, the victim will be entitled to take as much as the compensation for the crime be, and the rest will be considered as a pledge. If the crime takes up his value in all, the victim will be more entitled to take him than the mortgagee. If the mortgaged slave perpetrates a crime against his *mawlā* intentionally, he should be punished accordingly, but his mortgage is not redeemed.

If his crime be a murder of a person, killing him will be permissible. But if it be by mistake, his master will be entitled to nothing, and he will remain as a *rahn* (pledge). If his crime be against a person to be inherited by his owner, the owner will be entitled to *qiṣāṣ* (retaliation) that is established for the legator, or taking it away in mistake if the crime takes up his value, or releasing what can return for the crime if it fails to exhaust his value.

If the mortgaged property be damaged by someone, he will be responsible for paying its value, and it will be as a *rahn*. If it is damaged by the mortgagee, if he be a proxy in origin he will not be a proxy in the value, since it is not included in the contract.

If one mortgages some juice which turns to wine afterwards, the mortgage will be invalid. If it turns again to vinegar, it will return to the possession of the owner. If one gives in pledge liquor from a Muslim person, it will be his property, with

disagreement among the legists. So also, when he collects some spilled liquor. But it is not so if he usurps some juice.

If one mortgages an egg, which he incubates later on, and it turns to a chicken in his possession, both the ownership and mortgage will remain valid. So also, when one mortgages grains which he grows later on. If two persons mortgage a slave in common between them in return for a debt in their obligation, the share of each one of them will be a pledge for his debt. If he redeems it, his share will be free, though the share of the other one be kept intact.

THIRD: THE DISPUTE REGARDING IT

It includes several issues:

1. If one mortgages some joint property the grasping of which is disputed between the partner and the mortgagee, the ruler can take it away and let it for hire if it be liable to hire, dividing then the money received between them according to the shares of partnership. Otherwise, he can commit it to another's charge as he wishes.

2. When the mortgagee dies, the mortgage right will be transferred to the heir. If the mortgager abstains from intrusting it to him, he has the right to do so, and they can agree on someone who is known for them to be trustworthy. Otherwise the mortgager can commit it to the ruler's charge.

3. If the mortgagee causes any damage to the mortgaged property out of negligence, he will be responsible for paying its price on the day of its receiving. Some legists observed: Its price should be paid on the day of its perdition, and others said: with the highest price. If they differ regarding the price, the claim of the mortgager will be accepted. Other legists said: the saying of the mortgagee is to be admitted. The second view is more predominant among the legists.

4. If they (mortgager and mortgagee) differ regarding the *rahn*, the claim of the mortgager is to be approved. Some legists said: the claim to be accepted is that of the mortgagee, unless his

claim covers the price of the mortgaged property totally. The first view is more widely-held among the legists.

5. If they differ regarding some goods, one saying: this is a trust (*wadī'ah*), and the holder saying: it is a mortgage, the claim to be approved is that of the owner. Some legists said: the holder's claim is to be accepted. The first view is more correct.

6. If the mortgagee permits the mortgager to sell (the *rahn*) but then goes back on his word, and they differ after that, the mortgagee saying: I have retreated before the incidence of the sale, while the mortgager says: it is after the sale, the mortgagee's claim will be considered, preponderating the document side, since both the lawsuits are equivalent.

7. If they differ regarding with what the *rahn* should be sold, it should be in cash with the money current in that country, with forcing the abstainer to sell the *rahn*. If one of them demands a currency other than that used in the country where they be in time of sale, and they find this to be difficult, the ruler can send them back to the current money as it represents the means intended by the word money in general. If that country has two kinds of prevalent currencies, the sale can be done with the nearest one to right.

8. If one claims mortgage of something but the mortgager denies this thing claiming the *rahn* to be another thing, without presenting any evidence, the mortgage of the thing denied by the mortgagee will be considered null and void, and the mortgager takes an oath to the other, with their releasing themselves of the *rahn*.

9. If one is indebted to others two debts, one through mortgage, for which he pays to its creditor a sum of money and they differ regarding it, the claim of the payer will be accepted, since he has discerned with his *niyyah* (intention). If they differ regarding returning of the *rahn*, the mortgager's claim will be approved with his oath, if there be no evidence to present.

KITĀB AL-MUFALLAS
(ONE MADE BANKRUPT)

IDENTIFICATION AND PROVISIONS

1) Al-Muflis (insolvent, bankrupt)

He is the poor person whose choice of his property is lost and his money is left over.

Al-Mufallas: is that who has been made insolvent, i.e. prohibited or detained from disposition with respect to all or some of his properties.

2) *Ḥajr* (prohibition on his disposition) requires four conditions for fulfillment:

1. His debts should be confirmed by the ruler.

2. His money falls short of (repaying) his debts, and compensations for the debts to be counted as a part of his properties.

3. His debts should have fallen due.[1]

4. His creditors or some of them demand *ḥajr* (legal disability) against him. In case any signs of insolvency appear, the ruler will have no way to impose *ḥajr* on him, and so also when he himself asks for *ḥajr*.[2] If *ḥajr* is imposed on him, this will

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[1] If the debts be postponed (in credit), there is no way to impose prohibition on his (*muflis*) disposition, even if his property fails to cover and redeem his debts, since they are not entitled to claim repayment from him immediately. But discharging the debts becomes *wājib* upon one when claiming them from him be logical and legitimate … (*al-Masālik*, vol. IV, p. 87).

[2] This being the most widely-held view among the legists, as the *ḥajr* (legal disability) is a punishment, and growth and freedom contradict this, hence there is no way to resort to it except with a valid good reason. It can be achieved with a request made by the creditors. (*al-*

imply prohibiting him from dispositions, due to pertaining of creditors' right in his property, and distinguishing every creditor with his real estate and dividing of his properties among his creditors.

PROHIBITION OF DISPOSITION

Sometimes the debtor should be prohibited from disposition with respect to all or some of his properties, out of precaution for the benefit of his creditors. It is invalid for him to dispose of the properties he was prohibited from, whether this disposition be through exchange like sale and hiring, or other ways such as emancipation and donation. But if one admits to a previous debt it will be valid for him to dispose, sharing the creditors by the one for whom it was admitted. So also, when he acknowledges the receipt of a real estate given to that for whom it was admitted, but there is disagreement among the legists regarding this due to pertaining of the right of creditors to his real estates. If he says: "This property is *muḍārabah* (speculation) for an absent person," some legists said: his claim will be accepted with his making an oath and acknowledging what he has in possession. If he says: for a present person, and he trusts him, it should be given to him. But if he is made to lie to him, it should be divided among the creditors. If one buys something with option and he is made to declare bankruptcy with the option be preserved, he will have the permission to sell the property and annul this sale, since it is not an initiatory disposition. If he has some right and he receives less than it, his creditors will have the right to prevent him from doing this. If some person lends him some money after *ḥajr*, or sells him something on credit, his creditors are not to share in this and it will be a debt in his obligation. If he destroys some property after *ḥajr*, he will be liable to compensate, with the owner's speculating with the creditors. If he acknowledges receipt of some money in general, being ignorant of the reason, the one to whom the acknowledgement is made will not associate with creditors, since there is possibility of presence of something not

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Masālik, vol. IV, p. 88).

deserving the partnership. The postponed debts do not fall due through *ḥajr* but they fall due through death.

THE CREDITOR HAS RIGHT TO HIS REAL ESTATE

Whoever finds his real estate, he has the right to take it, even though nothing other than it was there. He has the right also to speculate his debt with his creditors, whether it has been a discharge or not, as per a more correct opinion. Regarding the deceased, his creditors are to be given equally from his heritage except when he wills his money to pay back the debts in his obligation (in case his bequest be as much as his debts and more), when it will be permissible for the estate owner to take it. Is the option to this immediate? Some legists said: Yes, it is immediate, but it is permissible to delay it. If he finds some of the sold thing to be sound, he can take what is present with his share of the price, speculating the rest along with the creditors. Also when he finds it (sold article) to have any fault or defect, requiring compensation (indemnity), he can speculate the indemnity of defect along with the creditors.

But if the defect be caused by Allāh, the Glorious, or by a crime perpetrated by the owner, the buyer will have the choice either to take it with its price or leave it.

If any separate growth appears, like produce (*walad*) or milk, the result will belong to the buyer, who will be entitled to take the origin with its price. If the result (growth) be joined like fatness or tallness, for which the price may increase, some legists observed: it belongs to the buyer since this growth follows the origin, the view regarding which there is disagreement among the *`ulamā`*. So also, is the rule when someone sells a palm-tree or its fruit before ripening, and it ripens after bankruptcy.

But if one buys grains (seeds), growing and reaping them, or an egg which he causes to incubate and produce a chicken, it will not be permissible for him to take the result (harvest or chicken) since it is not of his own real estate (capital). If one sells to another person a palm-tree which breaks forth, or one takes hold of a tree before trimming it, the result (spadix) will

not be included in the sale (since it is considered as a separate fruit).

The same is true when one sells a menstruant bondmaid who becomes pregnant afterwards, when the buyer declares bankruptcy then and the seller restores her, the gestation (*ḥaml*) will not be included in the sale (it should be kept until giving birth when the buyer takes it). If the tenant declares bankruptcy, the lesser is entitled to dissolve the contract of rent (lease), and he is not required to execute the contract, even if the creditors offer the rent.

If one buys a land and he plants trees in it or constructs something, declaring his bankruptcy then, the land owner will be more entitled to own these things (what is planted or built), but it is not permissible for him to remove the plants or edifices. Can he do so on expending the indemnity (*arsh*)? Some legists said: Yes, he is entitled to this, but a more predominant view among the legists is non-permissibility of this. Then the plants and buildings should be sold with giving to the owner the amount equal to the value of the land. If he refrains from taking it, the land has to be left for him with selling the plants and buildings alone.

If one buys oil and mixes it with its like, the seller's right in the origin (*'ayn*) will remain intact, and so also if he mixes it with another material since he has accepted lower than his right. If he mingles it with something better than it, some legists observed: the seller's right in the origin will be abolished, and he can speculate the price along with the creditors.

If one (buyer) weaves a yarn, or shortens a dress, or bakes the flour, the seller's right in the essence will remain intact, and the creditors will take what is resulted from work. If he dyes the dress he will become partner to the seller with value of tinting if the dress value is not decreased through tinting. If one contracts a loan in a property and the receiver declares bankruptcy after that, he has right to take his capital if it is still there according to view of some legists. Others said: he will have the option to speculate the price along with the creditors. Other legists observed: he has choice to speculate either the

original price or the value of the commodity, the view which is stronger and more predominant among the legists.

If one (buyer) copulates with a bondmaid causing her to give birth to a child and he declares bankruptcy afterwards, her owner can take her away and sell her. If he claims her price from him, it will be permissible to sell her with her own price (as a slave) without her child.[1]

If an offence is perpetrated against her by mistake, the creditors' claim will be taken from the *diyah*.[2] But if the offence be intentional, the owner will have the option either to requital (*qiṣāṣ*) or taking the *diyah* if it be offered to him. It is not assigned on him to accept the *diyah*, since it is considered as an earning which is not *wājib*. But if he has a house or a mount (animal), it will be *wājib* upon him to let it for rent. So also, when he owns a slave woman even if she has given birth to a child.

If some witness gives evidence in favor of the bankrupt to be having money, he will deserve if he swears on it. But if he abstains (from swearing) are the creditors required to swear? Some legists said: No, they are not required to swear, the view which is more predominant among the legists. Others observed: it is permissible for them to give an oath as giving an oath confirms the right of the creditors.

When the bankrupt dies, he will be relieved of the debts in his obligation, but his rights and claims from others are not discharged. The *mu`sir* (insolvent) should be respited (until being in ease), and it is neither permissible to put him under obligation nor to give him on hire. There is another obsolete view in this regard.

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[1] As he is free by all means, since he is born (produced) by her master, in time of her being in his possession. Hence no one has any authority over him. (*al-Masālik*, vol. IV, p. 117).

[2] Since she (bondmaid) is considered as his property, and he is not entitled to dispensation, as this is considered a disposition with respect to a property. (*al-Tawḍīḥ*, vol. II, p. 349).

DIVIDING THE BANKRUPT'S PROPERTIES

It is *mustaḥabb* to bring every commodity and exhibit it in its relevant market so as to increase the desire toward it and insure the attendance of the creditors for auction sake;

- to start to sell what is feared to deteriorate before other things, following it with the *rahn* (mortgage) due to distinguishment of the mortgagee with it;

- to depend on a summoner having the mutual consent of the creditors and bankrupt so as to ward off any charge (accusation); and if they differ and reach no agreement they have to refer to the ruler to determine the case and assign someone for this task.

In case one volunteering to sell is not found, nor any fees offered from *bayt al-māl* (the public treasury), these charges (*ujrah*) should be taken from the bankrupt's assets, since the sale is *wājib* upon him. It is not permissible to deliver the bankrupt's property except with taking the price, and if they find this to be difficult, they have to hand over and receive together (at the same time).

If an interest necessitates deferring the division, some legists said: It should be in entrusted to a trustworthy person out of precaution, or otherwise it should be made a trust since it is much needed when necessary.

It is not permissible to force the bankrupt to sell the house in which he is dwelling, but the surplus of his provisions can be sold beside the bondmaid serving him. If the ruler or his trust sells the bankrupt's property (*māl*) and some claim remains in his charge (demanded from him), the contract (of sale) should not be dissolved. If the bankrupt begs the purchaser to annul the contract, responding to his request is not *wājib* upon the buyer, but it is *mustaḥabb* for him. But the necessary expenses and apparel (clothes) for him and those under his (bankrupt) provision have to be borne by the buyer, following in this regard the customary usage until the day of dividing his property when his and family's maintenance of that day should be offered to him. If the bankrupt dies, providing for his shroud

has priority to the claims of the creditors, but it should be satisfied with its essentials and *wājib* acts alone.

THREE SUBSIDIARY ISSUES

1. When another creditor appears after dividing the bankrupt's properties by the ruler, this division should be cancelled and renewed with giving a share to this creditor.

2. If the bankrupt owes debts which have fallen due and postponed ones, his properties should be divided exclusively to cover the debts which fell due.

3. If the bankrupt's slave commits any crime, the victim will be more entitled to (take) the slave (as indemnity). But if his master intends to emancipate him, the creditors are entitled to prevent him from doing so.

DETAINING THE INSOLVENT

It is not permissible to detain or imprison the *muʿsir* (insolvent) despite declaring his insolvency. This is established through approval of the creditor or presenting an evidence. If they both feign ignorance of insolvency (be claimed by the indebted and denied by the creditor), and the indebtor is known to possess an apparent property, he should be ordered to deliver it. In case he abstains from this, the ruler will have the choice either to imprison him until when he be able to repay his debts, or sell his properties and dividing the proceeds among the creditors. If he has no apparent property and claims insolvency, it will be decided in his favor if he presents a convincing evidence. But if he offers no evidence and he is found to have some capital, or the origin of the claim (case) be a property, he should be detained until his insolvency be proved.

If a certain evidence testifies loss of his properties, it should be considered in taking any decision in his regard, and he is not required to make an oath, even if the evidence be not aware of his reality. But if it testifies his absolute insolvency, it will not be accepted except when it reveals his secret through assured companionship, and the creditors are entitled to exact an oath from him for warding off any potentiality. If he is known to

have no capital with claiming insolvency, his claim should be accepted and he is not required to present any evidence while the creditors are entitled to exact an oath from him. If his properties have been divided among the creditors, the *maḥjūr* (distrained person) should be released. Can *ḥajr* (interdiction) against him be taken away by merely his discharging his debt or it needs a decision to be taken by the ruler? It is more becoming to consider it to be taken away because of disappearance of the cause bringing it about.

KITĀB AL-ḤAJR
(LEGAL DISABILITY)

Ḥajr literally means *man* (to prohibit, refuse, prevent, deprive, detain). Legally it implies prohibiting the dispositions of a person with respect to all or some of his property.

SECTION ONE
CAUSES REQUIRING ḤAJR

They are six causes: minority (*ṣighār*), insanity (*junūn*), slavery (*riqq*), disease entailing death, insolvency (*iflās*), and idiocy (*safah*).

1. MINORITY

A minor is considered legally incapable unless he attains two attributes: maturity (*bulūgh*) and *rushd* (full sanity). Maturity can be discerned through:

- Growing of rough hair on the pubic region, irrespective of whether he being Muslim or polytheist.

- Discharge of semen, from which a child can be produced, from the ordinary location, howsoever. This is common for both males and females.

- Certain Age: it implies reaching the age of 15 years for males. In another narration: when a child reaches the age of ten with having discerning ability, or attaining stature of five spans, his will shall be considered valid, and all his dispositions become enforceable and liable to accountability and application of legal punishments (*ḥudūd*).

- Reaching the age of nine for females.

- Pregnancy and menstruations (*ḥayḍ*) are not considered signs of maturity, rather they may indicate antecedence of puberty (her being mature before these signs).

A SUBSIDIARY ISSUE

Concerning the *khunthā* (hermaphrodite), if his semen comes out from both of his crevices (*farjayn*), this should be considered a proof of maturity. But if semen is discharged from one of these outlets, he is not considered as mature. If he discharges menses from female *farj* (vulva) and emits semen from male crevice, this should be considered as a sign of puberty (*bulūgh*).

The second quality is *rushd* (consciousness), which means having full control over dispositions with respect to his properties. There is disagreement among the legists regarding *'adālah* (justice), whether it is considered a proof for *rushd* or not. In case both the qualities are not available together, the *ḥajr* will remain in force. So also, if *rushd* (sobriety) be not attained, even if that person be advanced in years. The *rushd* can be verified through testing the person by certain conducts ordinarily to be exercised by him, so as to recognize his capacity to conclude sale transactions and title-deeds, and taking precaution against misleading and delusion. Also the girl's *rushd* can be tested through her guarding against extravagance, and paying attention to spinning and weaving (sewing and tailoring) for instance, if she be competent to do such works or similar suitable acts.

Rushd (reason) of adult (men) can be proved by testimony (witness) of men and that of women by testimony of men and women (two men for men and four women for women) for averting hardship of exclusiveness and limitation.

2. IDIOCY (*SAFAH*)

An idiot is one who cannot manage and expend his property properly, irrespective of whether he has all the qualities necessary for proper management but is negligent and does not apply them or lacks these qualities. That is he is negligent and extravagant in a way he repeatedly performs acts of negligence

and extravagance.[1] If he sells something in this state, the sale is not valid, and the same is true when he donates or acknowledges some property.

But valid are: his divorcing (his wife), *ẓihār* (a husband telling his wife: You are to me like the back of my mother), *khul'* (a kind of divorce), admitting a lineage (*nasab*), and any act entailing retribution (*qiṣāṣ*), as what necessitates the *ḥajr* is safeguarding the property against any loss. It is not permissible to give him the substitute for *khul'* (consideration paid by the wife to release herself from marriage tie).

If another person deputes him to sell or donate something for him, it is valid as idiocy does not deprive him of ability to disposition with respect to his property. If the guardian allows him (*safīh*) to conclude a marriage contract for him, it is valid of him, and also if he sells something with the guardian's permission, to avert any deceit.

3. SLAVERY

A slave is legally unable and prohibited from disposition with respect to all of his property except with permission taken from his master.[2]

4. DISEASE

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[1] By this it is meant: The acts which are ordinarily not performed by mature sane people like: destroying the properties, bearing exorbitant defraud or injustice in deals, expending the money on unlawful things (*Muḥarramāt*), and spending one`s wealth on buying costly foods that do not fit him in accordance with his time, country, honor and lowliness. Likewise is the purchasing of splendid goods, furniture and clothes. (*al-Masālik*, vol. IV, p. 152).

[2] There is no difference in preventing his dispositions without permission of his master, between believing in his ownership or non-ownership. Excepted from prohibition on his dispositions is the divorce which is permissible for him with permission of his master, even when he feels aversion to it, as the "divorce is in the hand of that who has the lead." (*al-Masālik*, vol. IV, p. 155).

The patient is prohibited from making a will to more than one-third of his money, unless with permission from his heirs. There is a difference of opinion regarding prohibiting him from disposition with respect to executed donations (contributions) that exceed one-third (of his properties), but prohibition is more predominant among the legists.

5. INSANITY

An insane person is prohibited from all dispositions, irrespective of whether his insanity is permanent or recurring. Where it is uncertain whether a particular disposition belongs to the period of sanity, it will not become binding, because sanity is a condition for the validity of an agreement, and an uncertainty regarding it amounts to an uncertainty concerning the existence of the contract itself not its validity, consequently its very basis is negated. The ruler applicable to an insane person is also applied to a person in state of unconsciousness and intoxication.

6. INSOLVENCY

All the details concerning *ḥajr* on the *muflis* (insolvent) can be seen in the chapter "Kitāb al-Mufallas".

SECTION TWO
RULES OF ḤAJR

1. The *ḥajr* on the insolvent's dispositions cannot be proved but only when he is declared legally incapable by the judge. There is a difference of opinion regarding *ḥajr* on a *safīh* (idiot), in a state of idiocy. The more predominant view says that it cannot be proved through this. So also, it cannot be lifted but only through a decision by a judge.

2. If the insolvent is declared incapable and prohibited from disposing his wealth, every sale deal he concludes will be invalid. If the article sold be still there, the seller is entitled to return it. If it is destroyed and he receives it with its owner's permission, it will be considered as a damaged property, even if

prohibition (*ḥajr*) on him is released. If he destroys another person's property entrusted to him as a trust (*wadīʿah*), he will not be liable to compensation as per a more correct opinion.[1]

3. If he returns to extravagance after lifting the prohibition on his dispositions (*ḥajr*), the *ḥajr* should be applied to him. If it vanishes, the prohibition on his dispositions should be lifted. If it recurs, the *ḥajr* shall be imposed on him again, and so on and so forth.

4. The guardian of a minor and insane with regard to their property is their father and paternal grandfather. In case they be absent, the guardianship will be committed to the executor of the will, and if he be not there the judge will take charge of it.

In regard of the idiot and insolvent, the guardianship is undertaken by the judge to the exclusion of the father and paternal grandfather.

5. If the insolvent assumes *iḥrām* for an obligatory *ḥajj*, he should not be prevented from its necessary requirements needed to perform the duty of *ḥajj*. If his assuming the *iḥrām* be voluntary not out of obligation, it will not be permissible to prohibit him from traveling provided the necessary expenses of his travel and residence exist. So also, if he be able to work and earn the money he needs to meet the expenses of travel. If this condition be not fulfilled by him, his guardian can sanction him to do so.

6. If he swears, his oath has to be ratified. If he be false to his oath, he should atone with fasting, the view regarding which there is a difference of opinion among the legists.

7. If retaliation (*qiṣāṣ*) be obligatory to be applied for him (insolvent), he is entitled to pardon. But if a *diyah* (blood-

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[1] Non-liability lies in the depositor's misuse and extravagance in regard of his depositing his property, as God the Most High has forbidden from this when He said: "And do not give away your property which Allāh has made for you a (means of) support to the weak of understanding;" so he will be considered like one throwing away his property into the sea. … (*al-Masālik*, vol. IV, p. 160).

money) be *wājib* to be given to him, it is not permissible for him to pardon.

8. The boy should be tested before attaining puberty. The view regarding the validity of a sale transaction concluded by him is: it is not permissible or valid.

KITĀB AL-ḌAMĀN
(LIABILITY)

Liability (*Ḍamān*): is a contract legislated for guaranteeing a property or insuring one's life. To guarantee a property may be made by one who is indebted to that for whom the property is guaranteed, and by that who is not indebted.

It consists of three parts:

PART ONE

Liability for property by one who is not indebted to that for whom the property is guaranteed, which is called liability through a general promise. It has three debates:

FIRST: ON THE GUARANTOR

The conditions necessary for validity of his liability are: mental maturity and full authority to disposition with respect to the property. Liability of a child and insane person is not valid, and liability of a slave is not valid except with permission of his master (*mawlā*). What he is liable for will be established in his obligation not in his earnings (as it is considered of his master's property), unless he stipulates it in the liability with his master's permission. Also when he makes a condition that the liability be claimed from a certain property.[1]

Being aware of that to whom liability is made or the one for whom liability is made is not a condition for validity of *ḍamān*. Other legists believe in its being a condition. The first view is

[1] That is: the bailer stipulates his bail to be taken from a certain property of his estates, when the bail be valid and obligation of discharge be limited in it, as per the tradition reported from the Prophet (S): The believers are bound to (fulfill) their conditions (*al-Masālik*, vol. IV, p. 177).

more predominant among the legists. But it is a must that the person for whom one is liable should be distinguished to the guarantor, with what the intention to be liable for be valid. The consent of the guaranteed one is a condition for validity of liability, and no consideration is to be paid to consent of one for whom the bail is gone, as liability is like administration of justice. If he denies (consent) after liability is made, it will not be invalidated, as per a more correct opinion.

When liability is made, the property will be transferred to the bailer's obligation with relieving the insured person of its responsibility, and claiming from him be dropped. If the one to whom liability is made discharges that for whom liability is made of the responsibility, the bailer will not be acquitted, according to a widely-held opinion. The condition for its validity is *malā'ah* (possessing what can discharge the insured right) on the part of the bailer, or being aware of insolvency (the beneficiary's awareness of the bailer's insolvency in time of liability).

But if he guarantees (be liable for) and his insolvency is proved afterwards, the guaranteed person will be entitled to nullify the surety, and claim his right from the one for whom liability is made. The postponed liability is permissible by consensus agreement among the legists, but regarding the present (due) liability there is a difference of opinion among the legists, and permissibility is more widely-held. If the property be presently payable and one guarantees it as a postponed one, it will be accepted and he will be relieved of being claimed by that for whose benefit surety is made, and the bailer claims not but after the due term (*ajal*). When the bailer dies, the surety will fall due and it should be taken from his legacy. If the debt be postponed for a time, and one guarantees it to a period exceeding that term, it is valid, and the bailer will claim it from that for whom liability is made what he paid if he guaranteed with his permission, even if he has discharged without his permission. But he will not be entitled to claim it if he insures without his permission, even if he has discharged with his permission. The liability is concluded through a letter written by the bailer, provided that it be attached to the indicative evidence, not alone.

SECOND: THE INSURED RIGHT

It is every property established into charge (*dhimmah*), whether it be stable like sale after taking delivery and expiation of option (*khayār*), or subject to nullity like the price during period of option after receiving the price. If it be prior to it, its surety for the seller will not be valid. So also, is the non-binding debt but which will turn to be binding, like the *ju'ālah* money (a type of hiring) before fulfilling the condition stipulated in the contract, and money of race (competition) and *rimāyah* (shooting), with disagreement among the legists.

Is it valid to be liable for proceeds of *kitābah*?

Some legists said: No, it is not valid since it is not obligatory and is not liable to revert to compulsion. Others observed: It is better to consider it permissible due to its being as a debt in the charge of the slave, as if when one guarantees for him a property other than that of *kitābah* (a bond of freedom granted to a slave).

It is valid to be liable for the past and present maintenance (*nafaqah*) of the wife as it is established in the husband's obligation (*dhimmah*) and *wājib* upon him, not the future one. But there is a difference of opinion regarding liability for insured real estates, like usurpation, and what is received through invalid sale, but permissibility is more predominant among the legists.

Being liable for trusts like *muḍārabah* (speculation) and deposit is not valid since they are not guaranteed in origin. But it is permissible to guarantee it by someone, and he be guaranteed by another one and so on until reaching several bailers. Knowing the amount of money is not a condition, and if one guarantees what one owes (without identification), it will be valid as per a more correct opinion. It requires for establishing the evidence that it was confirmed in his charge in time of liability, not what is found in a book, nor what the insured one admits, nor what is sworn by that for whom the liability is made, with refuting the oath. But insuring what is testified by

evidence is not valid, as its confirmation in the charge in time of liability cannot be known.

THIRD: SUPPLEMENTS

They include some subsidiary issues:

1. If one bears responsibility of the price, he will be required to attain to it, in every place where nullity of sale is proved cent per cent.[1] But when the annulment is renewed through oral agreement, or deterioration of the sold article before taking delivery of it, the bailer will not be responsible and he will claim its price from the seller. So also, when the buyer annuls the sale due to a precedent fault. But if he demands the indemnity (*arsh*), he can claim it from the bailer, as its becoming due is established when concluding the contract, but there is a difference of opinion regarding this.

2. If the sold property appears to be due (to be delivered to the claimant) the buyer can claim its price from the bailer. But if a part of it comes out to be due, he can claim the price of that part in particular, having the choice regarding the rest of the property. If he revokes the deal he will claim from the seller what he paid in return for the due part.

3. If a bailer guarantees for the buyer to make good whatever he originates like constructing or planting, it will not be valid, as it is liability for something whose surety is not *wājib*. So also, if the seller guarantees it. But a more preponderant view among the legists is permissibility of this surety since it is binding through the contract itself.

4. If one has a property (as a debt) in obligation of two persons, every one of whom guarantees what the other one owes, the debt owed by each one of them will be transferred to the obligation of the other one. If one of them clears what he has

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[1] Like violating a condition or making an invalid condition such as stipulating the sale to be contingent upon committing a *Muḥarram* (forbidden deed), such as drinking wine for instance. (*al-Rawḍah*, vol. IV, p. 123, the text and the margin).

insured, his liability will be cast off, while the other one will remain liable for the property he guaranteed for him. If the creditor discharges one of them from his debt, his liability for the property will be cast off alone not of his partner.

5. When the insured person accepts from the bailer a portion of the debt or discharges him of some of it, he will not be entitled to claim from the third party (one for whom liability is made) more than what he has delivered. If the bailer pays a substitute property instead of liability fund (cash), he can claim from the insured person the least of two values: value of commodity and value of debt.

6. If one be liable for one dīnār for another person with his permission, and he gives it to the bailer, he will be considered as having fulfilled his liability. If the bailer says to the debtor: give it to the creditor and he delivers it to him, both of them will be relieved of liability. If the insured person pays to the creditor without the bailer's permission, the bailer and debtor will be considered as relieved.

7. If one be liable with the debtor's permission and he pays what he insured while the creditor denies taking delivery, his claim will be accepted with his taking an oath. If the debtor gives witness in favor of the bailer, his testimony will be admitted with refuting the charge, as per the view regarding transference of money. In case his witness be not approved and the creditor swears that he has not received the surety, he will be entitled to claim it from the bailer again, who can claim from the debtor (insured) what he has paid first. If the debtor gives no testimony, the bailer can claim what he has paid lately.

8. If a sick person be liable for another in state of illness when he dies of his illness, the amount should be taken out from a third of his heritage, as per the most correct opinion.

9. If the debt be postponed and he be liable for it as a due debt, it is not valid. So also, if it be determined to be discharged after two months and he be liable for it for one month, it will not be valid, as the branch cannot be given preponderance to the origin, but there is a difference of opinion regarding this.

PART TWO
THE MONEY-ORDER (*ḤAWĀLAH*) ITS CONTRACT, ITS CONDITIONS AND RULES

1. Money-order: is a contract legislated for remitting money, from one's obligation to another's obligation (*dhimmah)* engaged in the same contract.

Its Conditions: The conditions required for validity of contract of remittance are: the consent of the drawer, the drawee and the *muḥtāl* (the indebted who is demanded to pay back his debt). With fulfillment of these conditions the money will be transferred to the drawee's obligation, and the drawer will be relieved even if not be acquitted by the *muḥtāl*, as per a more correct opinion.

It is valid to transfer to a non-indebted person, but this is more possible through liability. If he transfers the money to the *māliyy*, he is not bound to accept it. But if he accepts it, it will be binding, and he is not entitled to claim it again even when he becomes poor. If he accepts the remittance out of ignorance of the drawer's situation, and he comes out then to be insolvent (in distress) exactly when remittance be due, he will be entitled to revoke the contract and claim his right from the drawer. If he remits what he owes, and the drawee transfers the debt through it, it is valid. So also, when the remittance be extensive. If the drawer settles the debt after the remittance, he can claim it from the drawee if it be on his request. But if he volunteers to do so, he will not be entitled to claim it from the drawee, who will be acquitted from the debt.

The amount of money should be certainly known and established in the obligation as a condition for validity of the contract, whether there be an equal such as food, or having no like such as the slave and dress.

The two properties should be equal in kind and description, to avert control over the drawee, as he is not required but to pay the equal of what he owes, with disagreement among the legists. If he transfers it to the drawee who accepts and pays it,

claiming then what he has paid, when the drawer claims having a debt in his (drawee's) charge while the drawee denies it, his (drawee's) claim will be accepted with his taking an oath, and he can claim it from the drawer.

Transferring the fund of *kitābah* (a bond of freedom granted to a slave) is valid after descent of stars. But doing so before this is not valid. If his (slaver's) master sells him a commodity, and he transfers its price to him, it is valid. If the *mukātab* has a debt in obligation of a foreigner, and he transfers to him the fund of *kitābah*, it will be permissible since it is *wājib* to deliver it.

RULES OF REMITTANCE

They include several issues:

1. If one says: *aḥaltuka ʻalayh* (I refer you to him), and he takes delivery of it (remittance), while the drawer says: I meant *wakālah* (deputation, proxy), and the *muḥtāl* says: No, you have referred me to what you owe me, the drawer's claim will be accepted since he is more aware of the words he uses, with a difference of opinion among the scholars. But if he has not taken delivery and they differ regarding its being remittance or deputation, and the drawer says: I depute you, and the second party says: Rather you have referred me to what you owe me, the drawer's claim will be accepted certainly. If the supposition be reversed, the *muḥtāl's* claim will be approved.

2. If one has a debt in obligation of two persons, each of whom be surety of the other, with having a debt in obligation of the other, and he refers him to both of them, it will be valid, even if kindness is observed in claiming.

3. If the buyer refers the seller with the price, and he gives back the sold commodity due to the previous defect, he can claim the remittance since it pursues the sale transaction, with disagreement among the legists. If the seller has not taken delivery of the property, it will remain in the drawee's obligation to the benefit of the buyer. But if the seller receives it, the drawee will be relived and the buyer can recover it from the seller. But if the seller refers a foreigner to the buyer with

the price, and the buyer revokes the sale due to a fault or an incidental event, the money-order will not be annulled, since it has become dependent upon other than the two parties of the deal. In case the annulment of sale is confirmed, the remittance will be considered null and void in both the situations.

PART THREE
KAFĀLAH (WARRANT)

Kafālah: is to make one stand surety, i.e. to take upon oneself to bring the bailed out person whenever the demander of bail asks for him. It requires consent of the warrantor and warranted person, not the one for whom the bail is made. It is valid in both the cases as due and postponed, as per a more predominant view. But with uttering it in general it becomes urgent.

If one stipulates a term for it, it should be declared and known. One to whom the warrant is undertaken is entitled to demand the warrantor to bring him the warranted person urgently, if the warrant be general or urgent, and after the term if it be postponed for a definite time. If he (bailer) hands him (guaranteed) over duly and perfectly (in the time and place determined before), he will be relieved of *kafālah*. But if the warrantor refrains from handing over the guaranteed person, the ruler will be entitled to detain him until when he brings him or redeems what he (debtor) owes. If the bailer says: "If I don't bring him I take upon myself to pay so-and-so", he is not bound but to bring and hand him over not the money. If he (*kafīl*) says: if I don't bring him I undertake to pay so-and-so for so-and-so time, it will be obligatory upon him to pay the sum of money he made a condition.

One who emancipates a debtor from the creditor's hands forcibly, will be responsible for fetching him (debtor) or settling what he owes. If the debtor (*gharīm*) be a killer, it will be *wājib* upon the bailer to fetch him or pay the *diyah* (blood-money). The guaranteed person should be specified in person, as when one says: I warrant one of these two persons, I it is not valid. Also when one says: I free on bail Zayd or 'Amr, and

also when saying: I warrant Zayd, and in case I fail to fetch him I will warrant 'Amr.

SUBSIDIARY ISSUES

1. If the warrantor fetches the debtor before the appointed term, taking delivery of him is *wājib*, if this does not cause him any harm. The more predominant view is: it is not *wājib* to take delivery of him. If he delivers him while he (creditor) being forbidden from taking delivery of him through superior force, the bailer will not be acquitted from liability. If he (debtor) be imprisoned by the ruler, taking delivery of him is *wājib* since he is capable of recovering his right. But the case is not the same if he be imprisoned by a tyrant.

2. If the guaranteed person be absent and the bail be due (to be paid presently), the bailer should be given a respite to an extent enough for traveling (going) to him and fetching him. If the bail be postponed, bringing the debtor can be delayed until after setting in of the bail.

3. If the bailer takes upon himself to deliver him (warranted) generally, he should take him to the country where the contract is concluded. If he appoints a place, he is bound to hand him (debtor) in that place and if he delivers him in another place he will not be acquitted of liability. Some legists said: If he takes no trouble to transfer him to the place of delivery or if taking delivery of him entails no loss for him, it is *wājib* to take delivery of him, with a difference of opinion among the legists.

4. If they come to terms regarding the *kafālah*, and the warrantor says: You have no right over him, the claim of the creditor will be accepted as the bail necessitates establishment of a right.

5. If two men bail out one man and one of them delivers him (warranted), the other one will not be relieved of liability. But it is good to consider him acquitted of liability. If one bails out two persons, and he delivers one of them to the creditor, he will not be cleared from the other (as if he discharges the debt of one of them he will not be cleared from the debt of the other).

6. If the guaranteed person dies, the guarantor will be considered as relieved of *kafālah*. So also, when the guaranteed person comes and surrenders himself.

7. If the guarantor be liabled out by another bailer, and the bailers be reachable, it is valid.

8. The *kafālah* of the *mukātab* (a slave freed by a bond of freedom) is not valid, with disagreement among the legists.

9. If one bails out with his head, or face, (or heart, or liver or any organ without which life is not possible) it is valid, since this may be deemed to represent the whole body according to customary usage. But if one limits the bail to the hand or leg alone, it will not be valid, as it is not possible to fetch what he bailed out exclusively, and this will not represent the whole.

KITĀB AL-ṢULḤ

Ṣulḥ (concordat): is a contract legislated for settling a quarrel, and not a branch of another origin, though it denotes its meaning. It is valid with confession and with denial, except for what legalizes the unlawful (*ḥarām*) or forbids the lawful (*ḥalāl*). It is also valid with both the lexicographers' knowledge of the subject of dispute and with their ignorance of it, whether it be a debt or in kind.

It is binding and enforceable for both the parties of the contract, with fulfillment of its full conditions, unless when they agree to annul it. It is valid also when the two partners stipulate the profit and loss to be borne by one of them, and the other has his own capital.

If both the parties have two dirhams which are claimed by one of them, and one of which is claimed by the other one, one dirham and a half will be given to the claimant of two of them and the rest will be given to the other. So also, if one deposits two dirhams and another person one dirham with someone else, and the three dirhams be mixed when one of them is destroyed.

If someone has a dress of twenty dirhams and another one a dress of thirty dirhams, and they differ regarding which one belongs to each of them, if one of them gives the other the option he will treat him with equity. But if they find it difficult to settle the matter, the two dresses should be sold and their price be divided between them, giving the owner of the dress of twenty dirhams two shares out of five and the other three shares. If one of the two substitutes appears to be due, the *ṣulḥ* contract will be invalidated. The *ṣulḥ* is valid for exchange of a real estate or advantage, and an advantage. If a person reconciles another one with dirhams against dīnār or against dirhams, it will be valid and it is not considered a ramification of the sale. What is considered in money changing cannot be considered in *ṣulḥ* (concordat), as per a more predominant view among the scholars.

If one destroys another's dress of one dirham and he reconciles him with two dirhams, it is valid as per a more correct opinion, since the *ṣulḥ* is made for the dress not for the dirhams. If one lays a claim to a house which is denied by the one dwelling in it, and the denier reconciles him with dwelling in the house for one year, it will be valid and none of them will be entitled to go back on his word (as it is a binding contract and not a branch). So also, is the rule if he acknowledges the other's ownership to the house, and he reconciles him on it. Some legists said: he has the right to revoke the contract as it is a branch to the simple loan (*'āriyah*). The first view is more widely held. If two persons lay claim to a house under authority of a third one, through a cause necessitating partnership like inheritance, and the defendant accepts the claim of one of them reconciling him to half the house with a substitute: if this be with its owner's permission, the *ṣulḥ* to half the house is valid, and the compensation between them is approved. But if it be without his (owner's) permission, the *ṣulḥ* to his right which is a quarter only is valid, while it is invalid in the partner's share, which is the other one-fourth. In case both of them lay claim to have the house, without introducing evidence necessitating partnership, they will not be entitled to share what is acknowledged for one of them.

If one of them lays claim to half the house and the other one reconciles him with watering his plants or trees with his own water, it is not permissible according to view of some legists, as the substitute being water which is an unknown material. Another opinion says: it is permissible to sell the drinking water. But if he reconciles him on making the water flow to his house-top (terrace) or courtyard, it will be valid after being acquainted with the source from which the water is flowing. If the defendant says: he has reconciled me on it, it will not be considered as an acknowledgement since it will be valid with denial. But if he says: sell to me or put it in my possession, it will be regarded as an admission (*iqrār*).

A COMPLEMENTARY

When the mount rider and its bridle holder be in dispute with one another, the claim of the rider is to be accepted with his

making an oath. Some scholars observed: They are equally considered as owners of the animal. The first view is stronger. But if they be in dispute with one another about a dress, when the bigger part be held by one of them, both of them are considered equal in their claim. So also, is the rule when they dispute regarding a slave when one of them owns the clothes he is wearing.

If they be in dispute about a camel while one of them has some load on its back, the preponderance should be given to his claim. If the dispute be on a room which being at the top of the house of one of them while its door rises from the other's room, the claim of the house owner has to be preponderated.

KITĀB AL-SHIRKAH

It has several parts:

PART ONE
ITS DIVISIONS

Shirkah (partnership): It means association of two or more persons in one business, joint interest or property. The joint property may be a kind (*'ayn*) or advantage or a right. The cause of partnership may be inheritance or a contract or mixing or possession. The more predominant view regarding possession (*hiyazah*) is to single out every and each one to have free hand in what he has acquired. But if they pull out a tree, or ladle water at once, this results in partnership. Also when two properties mixed together in an indiscriminative way, the partnership will be realized, irrespective of whether the mixing be voluntary or accidental.

This is established when two properties be similar in nature and qualities, whether they be prices (gold and silver) or offers. But in case the property having no match, like a garment, wood or slave, the joint ownership cannot be achieved through mixing but rather through inheritance or any contract entailing transference of ownership like purchasing and *istīhāb* (asking to donate). If one intends partnership in a property having no like, each one of the two should sell his share in what he owns with his share in the other's property.

Partnership is not valid in businesses like tailoring and weaving. But when two persons be employed by another for a hire (wages), and that person pays to them one thing instead of their wages, the joint ownership (*shirkah*) will be concluded in that thing. Also it is not valid in repute or notability, nor in authorization (*mufāwaḍah*) partnership, but it is valid in properties alone. Both the partners equally share the profit and loss accrued through the deal. If one of them has a greater share in the property, he should be given profits equivalent to his

capital, and also the deduction from his capital due to the loss should be more than his partner.

If a condition is laid to give one of them an addition in profit despite evenness in their properties or in profit making and loss with dissimilarity in their funds, the partnership will be invalidated. That is: the condition and disposition contingent upon it will become null and void, and every one of them may take the interest of his money with the wages for his equal work, after placing an amount equal to his investing with his fund. Some legists observed: both the partnership and the condition will be valid. The first view is more widely-held among the scholars. This is applied when both of them place in business some estate. But if the money user be one of them and the increase is stipulated for that very person, it will be valid and it will be similar more to taking on loan.

When the estate be jointly owned, it is not permissible for any partner to dispose freely of his fund except with taking permission from the other partners. If permission is given to one of the partners, he will have free hand to dispose exclusively of the property (fund) permitted to him out of the other partners. But if he is given full authority and general permission, he will be free to dispose of the money as he wills. If travel to a certain destination is determined for him, it will not be permissible for him to use the money to travel to another destination. Or if he is given permission to invest his estate in a certain business (trade), it will not be permissible for him to use it in other than this trade. If one of the two partners gives permission to the other (authorization to full disposition), it will be permissible for him to dispose of the money, even if they do that thing separately. If they stipulate collective disposition, it is not permissible for any one of them to dispose alone. If one permitted to disposition transgresses the limit determined for him, he will be liable for compensation. Every one of the partners is entitled to go back on his permission and claim from his partner the division, as it (permission) is not binding. It is not permissible for any of them to demand estimation of the capital, but rather they can divide the present real estate, unless they have agreed upon the sale.

It is not valid for the partners to stipulate a certain time in future for start of their partnership, and every one of them is entitled to go back on his word whenever he likes. The partner is not liable to compensate for what he has destroyed due to its being a trust committed to him, except when the destruction is caused to the inseparate property out of transgression to the bounds or ignorance on his part to safeguard it. His claim with taking an oath should be accepted in regard of destruction, irrespective of whether his claim be an apparent cause like drowning and burning, or a hidden cause like stealing. So also, is the rule when he claims with an oath that he was betrayed or the property be misused by another person. The permission to disposition becomes invalid in case of insanity of the partner and his death (or losing consciousness and *ḥajr* on the idiot and insolvent).

PART TWO
DIVISION

It constitutes distinguishing the right from other than it and not a sale, whether it contains refutation or not. It does not become valid but through agreement and consent of the partners. When dividing that which does not entail damage, the abstainer should be forced with the partner's requesting the division, and it can be fulfilled through reassessing the shares and casting lots.

If one of the partners intends selection, the division is valid, but it is not permissible to force the abstainer to accept it. Dividing those things whose dividing causes damage like jewels, sword and narrow bracelets, is not permissible even with the partners' coming to terms regarding the division.

The *waqf* (endowment) cannot be divided since the right is not restrictedly distinguished for the share – holders. If one certain real estate be dedicated (devoted) as a *waqf,* dividing it will be valid since it represents distinction to the *waqf* from other than it.

PART THREE
SUBSIDIARY ISSUES

1. If one hands over a mount (animal) and another one a *rāwiyah* (irrigating animal) to a water-carrier, stipulating partnership in the shares produced out of employing these two in the work, the *shirkah* (partnership) will not be concluded, and the produce should be given to the water-carrier who will be liable to pay the equal hire of the mount (*dābbah*) and *rāwiyah*.

2. If one gets a *ṣayd* (game), or cuts fire-wood, or cuts the grass with the intention (*niyyah*) that it belongs to him and to others, this *niyyah* has no effect and all the produce will be his own exclusively. Does the procurer need possession intention to take possession of a public property? Some legists said: No, he does not need such *niyyah*; but there is a difference of opinion among the legists.

3. If two persons have equal amount of money and one of them authorizes his partner to dispose of the whole estate on condition the profit (obtained from investing this fund) be divided into two halves, this will not be considered as lending since no partnership is perceived for one dealing with the estate gains of the orderer. Also no partnership is concluded with mixing the properties, but this (mixed estates) is considered a merchandise (estate sent with someone to trade with it voluntarily).

4. If any of the two partners buys a commodity, while the other party claims that he has purchased if for both of them, and that one denies this claim, the buyer's claim should be accepted with his taking an oath, since he has discerned with his intention (*niyyah*). If the buyer claim he has bought it for both of them while the partner denies this claim, the buyer's claim has to be admitted too for the same mentioned reason.

5. If one of the partners sells a commodity jointly owned by them both (while he has authority to take delivery of the article) and the buyer claims his handing over the price to the seller when the partner believes his claim, the buyer will be relieved

of his right with accepting his testimony against the receiver in respect of the other half which is the seller's share, due to his being acquitted of the charge with that amount. If the buyer claims his delivering the price to the partner and this claim be admitted by the seller, the buyer will not be exempted from anything of the price, since the seller's share has not been delivered to him or his deputy, and the partner denies it, when his claim will be accepted with his taking an oath. Some legists said: the seller's testimony has to be accepted. But denial in both the cases (seller's testimony in the latter and the partner's in the former) is more widely held among the scholars.

6. If two persons sell two slaves – each one of them to the other singly – in a deal with one price despite the difference in their value, it will be valid according to the opinion of some legists. Others observed: it is invalid since the deal is considered as two separate contracts when the price of each one be unknown. But if the two slaves be owned by both of them or one of them, it will be permissible (due to disappearance of the obstacle). So also, when every one of them has a *qiffiz* of wheat singly and they both sell them in one deal, since the price would be divided between them equally.

7. As mentioned before the partnership of bodies is invalid, hence if work wages of one of them be distinguished from his partner's wages, it will belong to him seclusively. If their wages be not singled out, their earnings should be divided proportionate to the wages paid for an equal work to theirs and every one of them be given wages similar to his equal work.

8. If the two partners sell a commodity in one deal and one of them receives a portion of his claims, the other partner can share him in this part.

9. If one is hired for gathering fore-wood or cutting the grass or hunting for a specified period, the hiring will be valid and the hirer would be entitled to take possession of the produce of that work in that stated period. But if he is hired to hunt some animal in itself, the hiring is not valid due to non-certainty of fulfilling this condition most likely.

KITĀB AL-MUḌĀRABAH
(SPECULATION)

It requires exposition of four points:

FIRST: The contract (of financial transaction): It is permissible for every party of the contract to revoke it irrespective of whether the property is changed into cash (dirhams or dīnār) or exposed to an accident. If a certain term is stipulated for it, it will not be binding. But if he (speculator) says to his partner: "If one year passes don't buy any more but just sell," it will be valid since this is in fact the exigency required by the contract. But it is not so if he says: … but on condition that I have no authority to forbid you, as this being contrary to the exigency of the contract.

If the speculator makes a condition to the one employing his capital not to buy but from Zayd or not to sell but to 'Amr for instance, it is valid. So also, is the rule when he says to him: on condition that you don't purchase but so-and-so garment, or the fruit of so-and-so orchard, with no difference whether the commodity to which he refers is available or rarely found. If he stipulates to buy (with his speculated money) an origin (root) in whose growth they share, like trees or sheep, it will be invalid as dispositions of the capital being the exigency required by the speculation contract, but there is disagreement among the legists.

If the speculator permits the dealer to dispose freely of his capital, he (dealer) will have full authority over the capital as the owner, such as displaying spreading, folding and obtaining the cloth, receiving the price, depositing it in the cash box, and hiring the servicemen who are customarily hired, like the broker, weigher and porter acting according to the customary usage. If he hires a broker, he will be liable to provide for the wages, but when he undertakes the work of the porter by himself, he will be entitled to take its wages.

It is permissible for the dealer to expend from the capital for the journey expense in full (the trip made for business) as per a more predominant view among the legists. But if he has some fund other than the speculated capital, payment by installments is a famous opinion widely-held by the scholars. If the capital owner happens to meet on a journey a traveler and he takes away the fund from him, the expenses of return journey shall be taken out of his own property.

The dealer (with the speculated capital) is entitled to purchase the defective article, revoke the deal due to a defect and take the indemnity (compensation for defect), from the seller. Giving general permission requires selling for cash with an equal price, from the currency of that country. If he violates this permission, his sale will be invalid except with the owner's permission. So also, he has to purchase with the real estate (capital). If he buys on credit, the sale is invalid but with the owner's permission. If he buys on credit without the owner's permission, without naming the owner, he will be obliged to pay the price apparently.

When the speculator (with his capital) orders the dealer to travel to a specified destination and he (dealer) travels to other than this direction, or he orders him to buy a certain thing and he buys another thing, the dealer will be liable for compensation. If he gains some profit out of such a deal, the profit should be divided between them, according to the condition.

The death of each one of two parties of contract (of speculation) entails abolition of the speculation, since it is an agency (*wakālah*) in the letter and in the sense.

SECOND: THE LOAN FUND

It should be in kind, and in the form of dirhams or dīnār, but regarding its being in silver there is a difference of opinion among the legists. It is invalid if done with Fills, or with counterfeit banknotes or with goods (other than the two kinds of money-*naqdayn*). If one gives a fishing tool, like a net, to someone else with a share in it, and the latter catches fish with

it, the fisher (hunter) will be more entitled to take the game (*ṣayd*) and he is required to pay to the net owner its fare. Lending a joint property is valid, but on condition that it be of certain distinguished amount, and sighting is not sufficient. Some legists said: It is valid with ignorance of quantity of the (lent) property, and the claim of the dealer is to be accepted, even when there being a dispute regarding its amount.

If one brings two kinds of properties and says to the dealer: I lend you whichever you like of these two properties, the loan deal will not be concluded. If he takes out of loan fund an amount that he is unable to settle and pay back, he will be responsible for it. If he has some fund (or property) in the hand of some usurper, and he concludes a loan deal with him on it, it is valid and the liability will not be abolished. If the usurper of the fund purchases something with this money and he pays it to the seller, he will be considered guiltless since he has settled his debt with the permission of the creditor.

If he has a debt into obligation of another, it is not permissible for him to make it as *muḍārabah* (speculation) but only after taking hold of it. So also, when he authorizes the dealer to take his debt from the debtor, if he has not renewed the contract.

SUBSIDIARY ISSUES

- If the speculator says to the dealer: Sell this commodity and if its price becomes cash it will be as a loan advanced to you, it will be invalid as the fund (commodity price) is not possessed on concluding the transaction.

- When the capital owner dies while the capital still contains some commodity, and the heir acknowledges it, it will be invalid as loan since the original capital has become null and void and it is invalid to commence the loan with a commodity (*mataʿ*).

- If they (speculator and dealer) differ regarding the amount of the capital, the claim of the dealer will be accepted with his taking an oath, since it is a difference regarding something received.

- If the dealer mixes the loan fund with his fund without the owner's permission, in an indiscriminated way, he will be responsible for it, since it is an illegitimate disposal (as the loan fund is a trust [*amānah*] whose mixing is not permissible as in the case of a deposit).

THIRD: THE PROFIT

The share in profits becomes binding with laying a condition without the wages, as per a more correct opinion, and the profit should be altogether common (joint property between them). If the speculator says to the dealer: "Take it as a loan on condition that the profit belongs to me," the transaction is void. It is permissible for him to make it as a commodity, in view of the sense, but there is difference of opinion among the legists regarding this view. Also there is disagreement in regard of his saying: "… and the profit is yours." But if he says: "Take it (fund) and trade with it but the profit is mine," it will be considered an article of merchandise. If he says: "… the profit is yours" it will be considered as a loan.

If one of them lays a condition to have a share in the profit and the rest to be divided between them, it will be void due to uncertainty of acquiring a profit, and hence no partnership is fulfilled out of this condition. If the speculator says: Take in on condition that you take half the profit, it is valid. It is valid also if he says: You trade with this fund on condition that we share the profit, when the profit be divided equally between them. If he says: Trade with this fund on condition that half of the profit be yours, it is valid. But if he says: "… on condition that half the profit be mine," and be content with this, it will be invalid since he has not specified a share for the dealer.

It is valid too if he stipulates a share of the profit to his slave, irrespective of whether the slave has performed any work or not. If he stipulates a share for a foreigner working for him, it is valid, but if he (foreigner) be not working the condition will be void. There is a different view regarding this. If he says: half its profit be yours, or the profit of its half (fund) be yours, it will be valid. Also it is valid to say to two dealers: … half the profit be yours, and they share the profit equally. If he prefers

one of them in the profit, it is valid too, even if the work performed by both of them be the same. If they differ regarding the dealer's share, the claim of the owner will be the criterion with his taking an oath. If one gives a loan while being in the last illness (*maraḍ al-mawt*) with stipulating a profit, it is valid and the dealer can take his share.

If the dealer says: "I have gained so-and-so profit" and goes back on his word, his withdrawal is not accepted. So also, is the rule when he claims a mistake to have occurred. But when he says: I gained so-and-so profit and then lost it, or says: and then the profit is spoiled, his claim should be accepted. The dealer is entitled to take possession of his share in the profit when it comes into view, and it is contingent on its existence when turning into cash (two kinds of currency).

FOURTH: COMPLEMENTARY ISSUES

1. The dealer (agent in business) is trustworthy and not responsible for the property deteriorated in his possession except when this damage be caused through negligence or fraud (abuse of confidence) on his part. His claim regarding the damaged property has to be accepted, but there is a difference of opinion among the legists regarding approving of his claim regarding giving back the deteriorated commodity, the strongest of which is not accepting his claim.

2. If one buys that who is freed (slave) on the account of the capitalist (like his father or alike), it is valid if this deal be with his permission (the freed person) and he will be manumitted. If something of the fund paid for his (slave) price is left over, the surplus will be considered as a loan. In case a surplus remains after buying the slave, the capital owner will be responsible for providing for the dealer's share from the remainder, and the more predominant view is his wages. If the purchase be without his permission (slave) and the purchasing be made with the very fund itself, the deal is void. If the purchasing be on credit, it will be considered on the part of the dealer, unless he refers to the capital owner by name.

3. If the fund be owned by a woman and the dealer buys her husband with it, the marriage contract will be invalidated if the purchasing be with her permission (since ownership and marriage cannot be kept together). But if it be without her permission, the purchasing will be valid according to view of some legists. Other legists observed: The purchasing will be void as this will do harm to her. The second view is more predominant among the legists.

4. When the dealer (agent) buys his father with the lent money (who will be freed by this purchasing), his share in the profit will be released, and the manumitted one (his slave father) has to labor and endeavor to collect the rest of his value, irrespective of whether the dealer be affluent or in hard circumstances (insolvent).

5. It is valid for the owner to annul the transaction, with being required to give the dealer the equal wages up to that time. If the fund contains some goods (other than currency), he will be entitled to sell according to opinion of some scholars, while the more famous view being interdiction. If the owner compels him (to sell), it will be *wājib* upon him to change the fund into coins (cash) according to view of some legists, but the more widely-held view says it is not *wājib*. If it be a loan without interest (*salaf*), he will be required to collect it. So also, if the fund owner dies while the fund contains goods, the dealer will have the right to sell (the property) except when the heir keeps him from so doing. There is another view regarding this.

6. If the dealer concludes a loan contract with another person, if with the owner's permission stipulating the profit to be divided between the second agent and the fund owner, it is valid. But it is not valid if he stipulates a part of the profit to himself since he has no role to play in this transaction. If this loan is advanced without the owner's permission, the second loan deal will be void. If he gains some profit, half of it should be given to the owner, and the second half be handed over to the first agent who will be liable to give the second agent his due wages. Some legists observed: The second half has to be given to the owner too, because the first agent has not executed any work.

Others said: The profit has to be given to both the agents, with the second agent's claiming half the wages from the first one.

7. If the fund owner says: I have advanced to him some fund as a loan, while the agent denies this, and the claimant establishes evidence while the agent claims corruption of the property, the agent will be liable for compensation. So also, is the rule if he claims to have a deposit or other kinds of charges in his hands. But if his reply be: I don't owe him anything, or alike expression, he will not be responsible for it.

8. If the loan fund is deteriorated wholly or partially after placing it in business, the value of the damaged part should be deducted from the profit. So also, if it is subject to damage before placing it in business, but there is a difference of opinion among the scholars regarding this.

9. If two persons conclude a loan contract with one person stipulating to allot for him half the profit from both of them, with making preference in the second half despite equality in their shares of fund, this contract will be null and void due to voidness of its condition. But there is disagreement among the scholars concerning this view.

10. If the dealer buys a slave for the sake of making a loan deal, and the price becomes spoiled (before taking delivery of him), some scholars observed: The owner is always liable for his price and everything will be considered as his capital. Others said: If the owner has allowed the dealer to buy on credit, it will be valid; otherwise it is invalid and no one of them will be responsible for the price.

11. If the value of the profit becomes cash, when one of the two parties of deal (loan) requests division, it will be valid if they come to terms. But if the owner abstains from dividing, it is not permissible for the other one to compel him to do so. If they divide the profit when the capital remains with the agent who loses it in the business, he will be required to return to the owner the least of the two businesses, with the owner's taking into account the amount of loss.

12. It is not valid for the fund owner to purchase from the agent anything of the loan fund through *shuf'ah* (right of preemption), nor to buy from his serf, but he is entitled to buy from the *mukātab* (a slave granted a bond of freedom).

13. If one pays a loan fund to another person laying a condition to take for him a merchandise, it will be invalid since the agent is not required to place the loan in a business for which he deserves no wages according to opinion of some scholars. Others observed: The loan is valid but the condition is void, and rather if one believes in their validity it will be better.

14. If the loan fund be a hundred and he loses ten, when the owner takes another ten, and the agent places the rest in business and gains some profit out if it, the capital will be 89 minus 9, since the amount taken out of the fund is counted of the capital, and it is considered as the assets. Hence the fund will be estimated at 90. If the amount of loss – which is 10 – be divided on 90, the share of the taken ten will be one dīnār and one ninth, which will be detracted from the capital.

15. It is not permissible for the dealer (*muḍārib*) to buy a bondmaid to copulate with her, even with taking permission of the owner. Some legists said: It is permissible when the owner gives permission. But if he sanctions her for him after purchasing, it is valid.

16. When the dealer dies while having in possession some speculation fund, if its owner in himself is recognized he will be more entitled to it. But if he be unknown, it will be divided equally among them. If its being speculation is unknown, it is counted as a legacy.

KITĀB AL-MUZĀRA'AH

Muzāra'ah means lending a land on a condition of receiving a fixed proportion of its produce (a kind of Islāmic transaction).

Its from of conclusion is to say: "*zāra'tuka*" (I lend you this land to grow it), or "plant this land" (cultivate this land), or "*sallamtuhā ilayka*" (I hand over this land to you), with its condition for a determined period, with taking a fixed proportion of its produce. It is a binding contract not liable to cancellation but through oral agreement, and is not invalidated with death of any one of the parties of the contract.

CONDITIONS OF MUZāRA'AH

First: The growth should be jointly owned by both of them (two parties of contract), with no difference whether they be equal in its shares or having preference in it. If one of them lays a condition to take a certain proportion of it, it is invalid, and so also if any of them specifies for himself a certain kind of plant other than his partner. If one of them lays a condition to have a certain amount of the produce with dividing the surplus between them, it will be invalid, due to possibility of not obtaining any surplus or addition. But if one of them lays down a condition to the other to set aside something other than the produce for himself in addition to his share, it will be valid according to some legists, and be invalid according to others, but the first view is more correct.

It is reprehensible to let the land for growing wheat or barley in return for its produce, and prohibition is more predominant. Also it is *makrūh* to let the land for a hire exceeding the amount of hire he paid for renting it, unless he has created or caused some innovation in it, or he lets it in return for some other kind than it.

Second: Determining the period, and it is valid to stipulate a fixed period by days or months. If one restricts his condition to determining the crops planted in the land without specifying the period, it has two different views.

A. It is valid, as for every plant there is a fixed term, so it can be based upon the customary usage like the loan.

B. It is void, since it is a binding contract similar to lease (contract of rent), where determining the period is stipulated for averting any deception or fraud, as the term of the plant is not accurate. The second view is more predominant among the legists.

If the period elapses while the plant be still there, the owner will be entitled to remove it, as per the more widely- held opinion, irrespective of whether this being caused by the farmer such as misuse (negligence), or by God the Glorious like delay of water or weather vagaries.

If they come to terms regarding preserving the plants, it is permissible through giving an indemnity or without it. But if the owner lays down a condition to take compensation, he should appoint the additional period to make it binding. If a delay in executing the contract is stipulated in the contract, and it remains until after the specified period, the contract will be invalidated according to the view obligating stipulation of determining a certain period. If he abandons cultivation until after passage of the stipulated period, he will be required to pay the equal wages. If he takes it on hire, paying the rent will be compulsory on it.

Third: The land should be liable to cultivation (fertile), such as access to water source like a river or well or spring or factory. If this source of water ceases to supply the land, the farmer will have the choice to revoke the contract and return it since it will become useless, in case he has rented the land for cultivation (*muzāraʿah*), when he is required to pay the rent for the passed period and claim from the owner the wages for the remaining period.

If he concludes the contract of *muzara`ah* in general (without limitation), he can grow whatever he likes. But when he specifies the kind of plantation, it will be impermissible for him to transgress the limitation. If he grows in this state some more harmful plant, the land owner will have the right to take the equal rent if he wishes, or to take the specified produce with the

indemnity (compensation for harm). But it is permissible for him do so if he grows something less harmful. If he lends the land to another person for cultivation while it has no source of water, with the farmer's knowledge, the farmer has no choice to revoke the deal. But he will have this right when he has no knowledge of this defect. If he rents it in general (upon the whole), without stipulating cultivation, he will have no right to annul the transaction, as the land may be utilized for other purposes and ways other than cultivation. So also, when the owner stipulates cultivation for a land situated in a country where cultivation depends on raining.

If he rents for cultivation purpose a land to which the flow of water cannot be ceased, it is not permissible because of inability to take advantage of it. But it is permissible when the hirer consents to this. Rather prohibiting such a transaction is more preponderant due to having no knowledge of the nature of the land. If the flow of water to the land be little to the extent enough for growing certain plants (crops), it will be permissible (to lend such land). If ceasing the water from reaching the land be gradual, lending this land for cultivation will not be permissible due to non- awareness of time of utilization.

If the lessor stipulates planting (*ghars*) and cultivation, he will be required to specify the amount and measure of each of them due to dissimilarity of their disadvantages. So also, is the rule when he stipulates in lending the land two kinds of growing or planting differing in their disadvantage.

A SUBSIDIARY ISSUE

If one takes on hire a land for a certain period, in order to plant in it crops that stay often (survive) until after the stipulated term, it will be *wājib* upon the lessor to keep the crops planted in the land or remove them with paying the compensation (indemnity, *arsh*) according to view of some legists. Other scholars observed: He is entitled to uproot these plants as in the case when the lessee plants crops that remain until after the fixed period. The former view is more predominant among the legists.

THE RULES OF MUZāRAʿAH

1. If one of them shares with a piece of land alone and the other with seeds, labor and elements of work, the transaction will be valid with the word '*muzāraʿah*.' So also, if one of them shares with through a land and seeds and the other with labor, or one with a land and labor and the other with seeds, as per the generality in concluding the contract of *muzāraʿah*. If the word '*ijārah*' (renting, letting) is used, it will be invalid as the substitute is unknown in this case. But it is permissible to let it for hire for an insured determined amount of money on credit, or an appointed fund from a source other than the land.

2. If they be in dispute with one another regarding the space of time, the claim of that denying any addition in produce should be accepted with his taking an oath. So also, when they quarrel regarding amount of proportion (share), where the claim of that contributing with seeds should be accepted. If each one of them establishes an evidence (proving his claim), the priority should be given to the agent's evidence. Some scholars said: The dispute can be settled by drawing lots. The first view is more preponderant.

3. If they be in dispute, when the farmer says: You have lent it to me, while the lessor (land owner) denies this claiming to get a certain proportion of the produce or giving the land on hire (renting), without establishing any evidence, the claim of land owner (denying the lending) will be given priority, and the equal wages should be given to him, with the farmer's taking an oath. Some scholars observed: Drawing lots is to be followed. The former view is more widely-held. The farmer (lessee) is entitled to keep the plant until time of its reaping (picking), as he is authorized to disposition of it (to grow it). But when he says: You have usurped my right in it, the owner can take an oath and he will be entitled to remove the plant with claiming the equal rent (*ujrah*) and indemnity (*arsh*) of the land if any damage be caused to it with filling and effacing the holes (if it be used for planting).

4. The farmer is authorized to enter into partnership with another one, and to conclude a *muzāraʾah* transaction on the

lent land with another person, without need to take permission of the owner. But if the owner stipulates growing the land himself, his permission to do so will be obligatory, and any partnership (or transaction) will not be permissible but only with his permission.

5. The land-tax and land provisions should be provided by the land owner, except when stipulated by the owner in the contract to be paid by the farmer.

6. Wherever the *muzāraʿah* transaction is decided and deemed to be null and void, the land owner is liable to pay the equal wages (*ujrat al-mithl*).

7. It is permissible for the land owner to conjecture the share allotted to the grower, and the latter has the choice to accept or refuse and return it. If he accepts the share distinguished for him, its establishment in his obligation will be contingent on soundness and faultlessness of the land and plants. If the plants grown in the land be deteriorated as a result of a heavenly or an earthly plague or blight, he will be liable to nothing.

KITĀB AL-MUSĀQĀT

Musāqāt is an Islāmic transaction or agreement under which one gives to the other his fruit trees for care and both share the profit, letting a farm. Or it is a deal on immovable assets in return for a share of their produce and fruit.

It consists of several sections:

SECTION ONE
THE CONTRACT

The *Musāqāt* transaction is created by using the words: *sāqaytuka* (I have made *Musāqāt* deal with you), or *'āmaltuka* (I have dealt with you), or *sallamtu ilayka* (I have delivered to you), or alike expressions. It requires declaration of affirmation and *qabūl* (acceptance) to make it a binding contract.

It is binding like the contract of lease, and is valid if concluded before appearance of the fruit. There is a difference of opinion among the legists regarding its validity if concluded after appearance of the fruit, and a more predominant view is permissibility of such a deal on condition that some business, though little, be secured for the workman with which he can produce more fruit.

This contract is not abolished with death of the *musāqī* (owner of fruit trees), nor with the death of the worker, as per a more correct opinion.

SECTION TWO
THE PROPERTY GIVEN FOR *MUSĀQĀT*

It is every immovable asset (*aṣl*, origin) having a fruit of which an advantage can be taken when kept in its place. Hence the *Musāqāt* transaction is valid if created on: palm-trees, grapes, fruit trees, and every plant (tree) having no fruit but bearing

leafs of benefit like mulberry and henna (lawsonia), with disagreement among the scholars.

Concluding a *Musāqāt* transaction on a *wadiyy* (the tree bush before planting), or unstable trees is not valid, if made confinely on the agreement subject. But if the owner creates the *Musāqāt* deal on a planted tree bush for a period in which similar trees bear fruit most likely, it will be valid even if it has not borne fruit through this period. If the specified period be insufficient for attaining this goal most of the time, or the probability be the same for both the cases, the transaction will not be valid.

SECTION THREE
THE PERIOD OF CONTRACT

It requires two conditions:

- It should be assessed in a space of time not liable to increase and diminution (not contingent on a future event like returning of a pilgrim or reaping of the crops).

- The trees (given for *Musāqāt*) should be of those that most likely bear fruit.

SECTION FOUR
THE LABOR

To labor and set in the *Musāqāt* in general necessitate from the workman exerting efforts and labor resulting in increasing the growth of the fruit, like reclaiming the land through ploughing and digging, reforming the *ajajin* (the holes in which water accumulates), uprooting the weeds detrimental to the roots (of trees), pruning the palm-leaf stalks, watering the land, pollinating the plants, using the sprinkler, straightening the fruit, *liqāt* (picking up the fruit in due time), reclaiming the locality of *tashmīs* (exposure to sun rays), carrying the fruit to this place and preserving them. Also the trees owner has to take upon himself to construct a wall, with carrying out all the

works necessary for supplying and erecting the water-wheel or noria (*dāliyah*) and creating the river for watering the trees, with supplying the material needed for pollination.

Some legists said: These things should be prepared by the workman, as with them the pollination can be performed. If the trees owner stipulates any of these things to be prepared by the workman, after specifying it by name he is bound to do so. If the workman lays down a condition requesting from the trees owner to carry out the work required from him, the *Musāqāt* transaction will be invalidated since the profit does not become due but through work and labor. If the workman spares a bit of his labor in return for a share from the profit stipulating the rest on the trees owner, it will be permissible. It is permissible for him to request from the owner to let his lad to work for him (workman), as this act is joining a property to another one.

But if he stipulates that the lad (servant) works in the workman's special real estate, it is not valid, with a difference of opinion among the legists, and permissibility is more predominant. So also, if he stipulates that the owner pays to him the wages of the hired workers (servants), or to exclude their wages, it is valid.

SECTION FIVE
THE PROFIT

A portion of the produce should be excluded jointly for the workman. If he refrains from mentioning the amount of his share, the *Musāqāt* deal becomes void. So also, it is invalid when one of them stipulates taking all the fruit singly, or to take a certain amount of the produce or the surplus left after dividing the shares between them. Also if he stipulates to single out for himself certain number of ritls (pounds, 453 gms), with giving the laborer the remainder, or vice versa, or to have certain palm-trees by themselves and the rest to be given to the laborer, it will be invalid.

It is permissible to separate every kind of trees with a share contrary to the share of the other kind (of trees), if the workman

has knowledge of the amount of every kind. If he (owner) stipulates to take a share from the immovable origin (trees) beside the proportion excluded from the growth, it is invalid as what the *Musāqāt* transaction requires is excluding a proportion from the profit, but there is a difference of opinion among the scholars.

If the owner concludes the *Musāqāt* with the workman on half the produce provided that he waters the trees with the sprinkler, or on a third of the produce if he waters with flowing the water on it, the *Musāqāt* will be invalid as the proportion is not determined in this case, with disagreement among the legists.

It is *makrūh* (reprehensible) for the land owner to lay down a condition, beside the proportion, to take a portion of gold or silver from the laborer, but it is *wājib* to fulfill this condition. But it is not bound when the fruit deteriorates.

SECTION SIX
RULES OF MUSĀQĀT

1. Wherever the *Musāqāt* becomes void, the laborer will be entitled to the equal wages, with giving the fruit to the owner.

2. If the owner takes on hire a laborer for work, with a proportion of the produce, it is permissible if it be after appearance of its goodness. If it be before this and after breaking forth of the fruit, it will be invalid on condition the fruit be picked up, and he has taken the worker on hire with the fruit totally. If the owner hires the worker with some portion of the produce, it will be invalid due to impossibility of delivery according to view of some legists, but permissibility is more predominant.

3. If the owner says: *sāqaytuka* (I have made a *Musāqāt* deal with you) in this orchard with so-and-so proportion, on condition that I make the *Musāqāt* with you on the other one with so-and-so proportion, such *Musāqāt* is invalid according to opinion of some legists, but permissible as per a more correct opinion.

4. If the (roots of) trees be owned by two persons who say to someone else: *sāqaynāka* (we have made a *Musāqāt* transaction with you) on condition that you take half the share of so-and-so (one of them) and one third of the share of the other, it is valid provided that the laborer be aware of the share of each one of them. But if he has no knowledge of their shares, the *Musāqāt* will be invalid, since the proportion is unknown.

5. If the laborer flees away, the *Musāqāt* transaction will not become void. If someone else volunteers to do the work for him, or the ruler pays to him from the treasury (*bayt al-māl*) a sum of money enough to take on hire someone to work on his behalf, then he has no choice but to accept. If this be infeasible, he will be entitled to annul the transaction due to impracticability of fulfilling the work. If he does not revoke the deal and referring to the ruler be impossible, he will have the right to call to witness someone to give evidence that he shall take on hire another one to do the work on his behalf, and claim from him the proportion, with disagreement among the legists. If that one gives no evidence, he will not be entitled to claim the dues.

6. If the owner claims or charges the laborer with dishonesty or robbery or having spoilt the crops out of negligence and misuse, while the latter denies these charges, his (owner) claim will be accepted with his taking an oath. With supposing confirmation of the treachery is he required to revoke the deal or take on hire someone else to work for him, with the proceeds taken from the fruit trees? The preponderant view in this connection says that he is not required to relinquish his share in the profit, and the owner is entitled to discharge him of other rights. In case the owner brings a trustworthy person to work beside him, he will be liable to pay his wages from his own.

7. If the owner makes a *Musāqāt* transaction with a field hand on the origins (trees) which come out to be due, the *Musāqāt* deal will become void, and the fruit should be given to the beneficiary, with the *musāqī* (dealer) being liable to pay the wages of the laborer not the beneficiary (*mustahiqq*). If they divide the fruit, which become spoiled then, the owner will have the option to claim from the usurper to make up for the

fruit as a whole, and the laborer can claim his wages from the usurper. Or the owner claims from the *musāqī* (the other party of a *Musāqāt* transaction) and the laborer the fruit each of them has reaped. Some legists observed: He (owner) has the right to claim from the laborer all the produce if he likes, as he is considered an invader to another's rights. The first view is more widely- held among the legists, unless when supposing the laborer to be aware of it.

8. It is not valid for the laborer to make a *Musāqāt* transaction with another person, since the *Musāqāt* is valid only when concluded on a tree (*aṣl*) owned by the *musāqī*.

9. The land-tax has to be paid by the owner, except when stipulated in the contract to be taken from the laborer or both the owner and laborer.

10. Possession of the profit is fulfilled through appearance of the fruit, and *zakāt* becomes *wājib* on each one of them when its share reaches the limit of full *nisab*.

A COMPLEMENT

When someone delivers a piece of land to another person for planting it, on condition that what he plants be divided into two shares between them, the *mughārasah* transaction will be void and the plant will belong to its owner. The land owner will have the option to remove the plants, and he is entitled to take the rent (for his land) due to losing that which the permission was given on account of, and he will be liable to pay the indemnity for the shortage caused by the uprooting.

If he pays the value (of plants) so as to take possession of the *ghars* (plants), the planter will not be obliged to transfer the ownership to him. So also, when the planter pays to the owner the rent (of the land), the land owner will not be required to keep the trees (planted in the land), as each one of them has full authority over his property.

KITĀB AL-WADĪ`AH
(THE DEPOSIT)

It consists of three parts:

FIRST: THE CONTRACT

It is deputation in preservation, and requires declaration and acceptance. It is created by uttering any expression indicating its meaning, and the verb indicating acceptance is sufficient (*qabiltu*). That means: it is necessary that there be two concurrent decisions.

If the depositor commits to another's keeping a trust, the depositary (one to whom something is entrusted) will not be bound to preserve it if he has not accepted it. So also, when he is coerced to take delivery of it, it will not be considered as a deposit, and he will not be liable for it if he causes any damage to it out of negligence or carelessness. If one is entrusted something which he accepts as *wadī'ah*, it will be *wājib* upon him to preserve it. But he will not be responsible for indemnity (compensation for damage) if it becomes spoilt without negligence or misuse on his part, or if taken away from him forcibly. If he be able to pay the compensation, it will be *wājib* upon him to pay, and if he abstains from payment, he will be liable for it. Sustaining enormous loss, like jurh (wound) and taking a property or fund, is not obligatory.

If he denies it (the deposit) and is asked wrongfully to make an oath, it is permissible for him to take an oath out of dissimulation (claiming some name or time or kind contrary to the deposit entrusted to him).

Deposit is a contract requiring two concurrent decisions of its two parties (declaration and acceptance). It becomes void with decease and losing sanity of any of the two parties, when it will be a trust (a legal trust, since his keeping to it is without its owner's permission, but he is not liable for it as the lawgiver has given him permission to keep it).

The deposit should be preserved in its customary and suitable place, such as clothes and books be kept in a case or trunk, a mount (*dābbah* mule or horse) in a stable, a sheep in a *mar`ah* (pasturage) and so on and so forth. But when an animal (*dābbah*) is deposited to someone, he is bound to provide drinking water and forage for it, irrespective of whether the depositor demands him to do so or not. It is permissible for him to water the animal himself or by his servant, following the habit (established usage). But taking it out of his house for this purpose is not permissible except in emergency cases like inability to water or feed it inside his house, or alike reasons. When the owner says to him (depositary): Don't feed it, or: Don't water it, accepting such order is not permissible, and rather it is *wājib* upon the depositary to water and feed it. But if he falls short of this duty in this state, he is considered as having sinned, when he will not be liable for it, since the owner has exempted him of liability through forbidding him as if he has ordered him to throw his money into the sea.

If the depositor specifies for the depositary the place of preservation, the latter is required to keep the mount in that place. If he moves it to another place, he will be responsible for it, except when he transfers it to a better place according to view of some legists. It is not permissible for him to remove it to a worse place, even if that be out of cautiousness, except when he fears any harm to befall it if be kept in that place. If he says to him: "Do not move it from this fortress," the latter (depositary) will be responsible for it if he moves it in any way, unless he fears any harm to befall it, even if he says to him: though it may be spoilt.

The deposit of a child or an insane person is not valid, and the receiver will be liable for it (if he accepts it) and he will not be exempted from liability when he returns it to them, but only when he returns it to the individual guardian of each of them, or the general guardian if this one is not present. It is not valid also to commit to their keeping any deposit. If a person deposits something with an insane (or a child) with the knowledge of his insanity (or disability of disposition) and the insane personally destroys it out of negligence in preserving it, he will not be

liable, because in this situation the depositor himself has been negligent and at fault.

When the depositary feels his death hour to have come, it is *wājib* upon him to make it known. If he doesn't announce it and the heirs deny the deposit, their claim will be accepted without requiring them to take an oath, except when a claim made against them to be aware of the deposit. It is *wājib* upon this depositary to return the deposit to the depositor on his request, even if he be a disbeliever, except if the depositor be a usurper to it, where he should be interdicted from it: If he dies and the deposit be demanded by his heir, denying it will be *wājib* and returning it to the one from whom it is usurped, if he is known. But if he be unknown, the deposit should be introduced to the people with enough information for one year. If its owner be not recognized after this year, it will be permissible to give it in charity on behalf of the owner, and the giver will be liable for it if its owner abhors this. If the usurper mixes it with his property and deposits them altogether to someone else, the depositary can return his property and take away from him the other thing if distinguishing the two properties be possible for him. If discriminating them be not possible, returning both of them to the usurper will be *wājib*.

SECOND: CAUSES REQUIRING LIABILITY

They are on two parts: Misuse and Transgression

Part One: Misuse (Tafrīṭ)

To misuse the animal means to throw it down in an unfortified place, or to give up watering the mount or providing it with its fodder, or to spread the garb that needs spreading, or to deposit it not on compulsion and without taking permission, or to travel with it on that state despite presence of risk of road or even its safety, and casting the cloths in places where they be subject to putridity and rottenness. So also, is the rule when he forsakes watering or feeding the mount for a period in which it usually cannot endure and put up with when it dies because of this carelessness.

Part Two: Violating the Rights

It implies wearing the dress (deposited), or mounting the animal (horse or mule), or taking it out of its fortress for taking advantage of it by the depositary. But if he makes intention to take advantage, he will not be liable for it just for determining on utilization. If it (deposit) is claimed from him and he refrains from giving it back despite being able to do so, he will be liable for it. So also, when he denies the deposit but an evidence is established against him or he confesses afterwards (having received it), when he will be liable for it. He will be liable for it also when he mixes the deposit with his properties in an indiscriminative way, or when one deposits with him a property (or fund) in a sealed sack which he unfolds. So also, is the rule when someone entrusts to him two sacks and he mixes them. Also when he orders him to let the deposit (mount) for hire to a lighter cargo but he lets it for hire to a heavier burden, or he tells him to hire it to a simpler load but he hires it to a more tiresome one, like cotton and iron.

If the owner keeps the mounts in a locked fortress and entrusts them to someone, who opens the lock and takes away some of them, he (depositary) will be liable for all of them. But if they were not kept in a closed fortress, or be kept in a fortress belonging to the depositary who takes away some of them, he will be liable for that number in particular. If he returns some substitute for them, this will not relieve him of liability. If he returns the substitutes and mixes them with the rest (of animals), he will be liable for what he has taken away. In case he returns the substitutes and mixes them with the other deposited mounts in an indiscriminative way, he will be liable for all of them.

THIRD: SUBSIDIARY ISSUES

1. It is permissible for the depositary to take the deposit (mount) with him on travel if he fears its deterioration when kept in its residence, and he is not liable for it in that case. But traveling with the deposit with presence of fear of harm is not permissible. If he travels in this case, he will be liable for it.

2. The depositary cannot be exempted from liability but only by returning the deposit to the owner, or his deputy (proxy). If they are not found, he can return it to the ruler with presence of an excuse. But he will be liable for it when having no excuse to present (for not returning it to the owner). If the ruler is not present and there was apprehension for its (deposit) becoming spoiled, entrusting it to a trustworthy person is permissible. But if it deteriorates in this state he will not be liable for it.

3. If the depositary be able to hand it over to the ruler but commits it to a trustworthy person, he will be liable for it.

4. If he intends to travel and buries the deposit, (for preserving it), he will be liable for it, except when he fears *mu'ajalah* (precipitancy), which means hurriedness of thieves to steal it or speeding up the company of the deposit.

5. If he returns the deposit to its fortress after misusing it, he will not be relieved of liability. But he will be discharged of responsibility when the owner renews the contract of confidence with him, or acquits him of liability. If the depositary is coerced to deliver it to other than the owner, he can hand it over without being liable for it.

6. If he denies (having received) the deposit, or confesses to having taken delivery of it and claims its being destroyed, or returning it without presenting an evidence, his claim has to be accepted but the owner has right to exact an oath from him, as per a more correct opinion. But if he delivers it to another person (not the owner) claiming to have taken permission from the owner who denies giving him permission, then the owner's claim will be accepted with his taking an oath. But if the owner believes his claim to have taken permission, he will not be liable for it even if he omits calling to witness, as per the predominant view among the legists.

7. If the owner establishes an evidence to having entrusted the deposit to him after the depositary's denial, and the latter admits to it but claims its becoming spoiled before denial, his claim is not heeded since he owes liability according to contract of deposit. But heeding his claim and approving of his evidence is something good.

8. If he specifies for the mount a fortress which is too far away of him, it will be *wājib* upon him to hasten towards it according to the established usage. If he delays and lingers in this act though being able to do it, he will be liable for it. If he gives the deposited mount to his wife to keep it in a fortress, he will be liable for it.

9. If he confesses to having received the deposit and dies then, with the origin of the deposit being unknown, it should be taken from his undivided legacy. If he has creditors and his legacy falls short of redeeming all of his debts to them, the depositor will be required to divide the deposit into shares among them, with a difference of opinion among the scholars.

10. If someone has a deposit in his possession which is claimed by two persons, he can deliver it to that one whose claim he believes to be true. If the claim of both of them seems to be false in his view, or he claims to be ignorant of its true owner, it (deposit) should be kept in his possession until its real owner is identified. If they both claim or one of them claims his awareness of veracity of the allegation, he will be liable to make an oath.

11. If the depositary misuses the deposit and they differ regarding the worth (of the deposit), the owner's claim with his taking an oath will be accepted. Some legists said: The debtor's claim has to be accepted with his making an oath.

12. When the depositor dies, the deposit should be handed over to the heir. If there being many heirs, it should be given to all of them or to that who represents them (their deputy, or guardian, or executor or the ruler). If he delivers it to some of them in particular, he will be liable for the shares of the rest of them.

KITĀB AL-ʻĀRIYAH
(SIMPLE LOAN)

It is a contract in which one lends or furnishes another person something or an advantage on condition of the thing being returned. It is concluded and created by using any word signifying explicitly a permission to take advantage of the thing lent. It is not binding for each party of the contract (it is permissible for each party to annul it whenever he likes).

It is on four parts:

PART ONE: THE LENDER

He should have fulfilled conditions of adulthood, and sanity and be invested with full power. Hence the lending of an undiscerning child and an insane person is not valid. But if the guardian (*walī*) of the child gives him permission, he is entitled to dispose of the thing lent, with observing the interest. As it is not valid for him to manage the loan for himself, his guardianship over another dispositions is not valid.

PART TWO: THE BORROWER

He is entitled to take advantage of the lent property. He is not liable for any defect caused to the property or any loss resulted from using the thing lent without violation or transgression, except when this liability be stipulated in the *ʻāriyah* contract.

It is not permissible for a *muḥrim* (one assuming *iḥrām* for *ḥajj*) to borrow a game (*ṣayd*) from a *muḥill* (one relieved of state of *iḥrām*), since hunting of land animals is prohibited for him. If he catches the game, he will be liable for it, even if this condition is not laid down to him in the contract. If the game be in the *muḥrim's* possession, it is permissible for the non-*muḥrim* to borrow it from him, since the *muḥrim's* ownership to it is expropriated of him through *iḥrām*, as when he takes from the game what is not liable to be owned.

If he borrows it from a usurper, unknowingly, the usurper will be liable for it and the owner is entitled to force the borrower to return the advantage he got out of the thing lent to him with claiming from the usurper the compensation, since he has permitted him to receive without recompense. The point of view is only to attach the liability to the usurper. So also, is the rule when the property be damaged in the borrower's possession. But if he be aware of its being usurped, he will be liable for it, without claiming anything from the usurper. The usurper will have the right to claim from the borrower the lent property when he pays the fine.

PART THREE: THE LENT PROPERTY

It is every material of which an advantage can be taken with keeping its origin in its form, such as a dress or a mount. Borrowing a land for using it for cultivation, planting (*ghars*) and construction is valid, but the borrower should restrict his utilization to the permitted purpose. Some legists said: It is permissible for him to use it for other lawful purposes without causing any damage or loss to the land, like borrowing a land for planting but using it for growing (*zar`*). The first view is more widely-held among the legists.

Also it is permissible to borrow every beneficial animal, such as the male of any large quadruped (*faḥl al-dhirāb*), the dog, cat, or the slave for serving, or a bondwoman even if the borrower be alien to her (having no blood relation with her). It is permissible to borrow a she-sheep for milking, which is called the *minḥah* (the she-sheep borrowed for that purpose).

It is not permissible to copulate with the bondmaid borrowed through *'āriyah* contract, and deeming this lawful by using the word *ibāḥah* (considering her public property) is not a predominant view among the legists, but permissibility is more widely-held. It is valid to lend anything generally (upon the whole, without specification) and for a determined period, with the owner's having the right to cancel the contract. If the owner (lender) allows the borrower to construct or plant anything in the land and orders him afterwards to remove what he constructed or planted, responding to this request is *wājib* upon

the borrower. So also, in respect of planting even before its becoming ripe, as per a more correct opinion but the permitter is required to pay the indemnity, and he is not entitled to order the borrower to remove without paying the indemnity.

If one lends another a land for burying his dead, he (lender) will not be entitled to coerce the borrower to pull out or uproot the dead (from the land). Further the borrower has the right to enter the land and sit in the shade of its trees. If he lends him a wall for laying down a piece of wood on it and asks him to remove it then, he has the right to do so except when the ends of the wood be fixed to the borrower's construction, in a way removing the wood entails destruction of the construction or forcing the borrower to remove his trunks from his own real estate, and there is a difference of opinion among the legists regarding this. If the lender gives the borrower permission to plant a tree which is uprooted afterwards, it is permissible for him to plant another one, acting according to the prior permission. Some scholars said: He (borrower) is required to take permission of the lender anew, the view which is more predominant among the legists. It is not permissible to lend or give on hire a property that is already lent, except with taking permission from the owner, since the benefits are not owned by the borrower though he is entitled to receive his due in full.

PART FOUR: ESSENTIAL RULES FOR `ĀRIYAH

There are certain sub-issues in this regard:

1. The *'āriyah* is a trust in the borrower's hand, which is not guaranteed but only when being misused by the keeper, or broken by him or when liability is stipulated in the contract. But it should be guaranteed when being gold or silver even if liability is not stipulated in the contract, except when dropping the liability is stipulated in the contract.

2. The borrower will be relieved of liability when he returns the lent property to its owner or his deputy. But if he returns it (the mount) to its fortress, this will not discharge him of the liability. If he borrows an animal for a certain distance, and

goes beyond the limit, he will be liable for it. If he returns it to the prior distance, he will not be discharged of liability.

3. It is permissible for the borrower to sell the plants and constructions he brought into existence in the borrowed land, whether to the lender or to other people, as per a more correct opinion.

4. If the winds or floods carry some seeds to someone's land they grow in that land, the land and owner has the right to remove the plants without being liable for giving the indemnity (*arsh*), as in the case where tree branches come forth into his own land.

5. If the borrowed thing diminishes through usage and deteriorates then, while he has stipulated guaranteeing it (in the contract), he will be liable for its value in time of deterioration, since this decrease is not guaranteed.

6. If the rider of the mount says to the owner: 'You have lent it to me', and the owner says: 'I have let it to you on hire', the rider's claim will be accepted, since the owner is claiming the hiring. Some legists observed: The consideration should be given to the owner's claim in not lending the animal (horse). If he swears on it, the rider's claim should be disregarded, with requiring him to pay the equivalent wages not the wages mentioned in the contract. This view is more predominant. If they disagree with each other after concluding the contract and before taking advantage of the lent object, the rider's claim will be considered and accepted, since the owner is claiming presence of a contract and the borrower is denying it.

7. If one borrows something to make use of it in a certain purpose and he takes advantage of it in another purpose, he will be liable for it. If he is supposed to take wages for this work, the equivalent wages should be given to him.

8. If the borrower denies the lending (*'āriyah*), trust in him will be vanished and he is required to liability with confirmation of the lending in his obligation.

9. When the borrower claims deterioration of the lent thing, his claim has to be accepted with his taking an oath. But if he claims returning the thing lent to him (to the owner), the owner's claim (in not receiving) has to be accepted with his making an oath.

10. If he misuses in regard of the thing lent to him, he will be responsible for paying its value in time of destroying it, when there being no equal to it. Some legists observed: He should pay the highest value in time of destruction. The former view is more correct. In case they differ regarding the value of the lent thing, the borrower's claim will be accepted, while some legists observed: The owner's claim has to be accepted. The first opinion is more predominant among the legists.

KITĀB AL-IJĀRAH
(HIRE OR RENT)

It has four chapters:

CHAPTER ONE: THE CONTRACT

It results in giving possession of an advantage in return of a certain substitute. The condition for its validity lies in presence of two concurrent decisions: declaration and acceptance. The express word used for creating it is: *ājartuka* (I have given on hire to you) and the word *mallaktuka* (I have given you possession of so-and-so).

If the owner says: "I have given you possession of this house (*mallaktuka*) for one year" for instance, it is valid. So also, if he says: 'I have lent you this house', since the intention of making use and advantage is signified by such words. It is not valid if he says: I sell you this house, but he intends rent. Also when he says: 'I sell you dwelling in it for one year', since the word 'sell' signifies transference of ownership of real estates, the view regarding which there is a disagreement among the legists.

The contract of *ijārah* (rent) is a binding contract, that cannot be revoked except through mutual declaration, or means requiring abrogation of the contract. It cannot be annulled through sale, or excuse, however the utilization be possible. The more famous view held by the legists says: it is abrogated by death. Some legists observed: It (rent contract) is not annulled by decease of the lessor, but with death of the lessee. Other legists said: It cannot be annulled by death of each of them. The latter view is more widely-held by the legists. It is valid to let for rent that whose lending is valid. To let for rent a joint property, such as the divided properties, is valid. The rented property is a trust that cannot be guaranteed by the borrower be only when it being misused by him or its bounds be transgressed. There is a difference of opinion among the legists regarding stipulation of guaranteeing it in other than

these cases, but deeming such stipulation as invalid is more predominant among the legists.

The lease contract does not imply the meeting option (*khayār al-majlis*). If the option is stipulated for one or both of them, it will be valid, irrespective of whether the rent be specific, such as to take on hire this slave or rent that house, or on credit like to take on hire a slave to build a wall for him for example.

CHAPTER TWO: CONDITIONS OF IJāRAH

They are six:

1. Sanity with complete control and ability to dispose of the property are necessary conditions for both the parties of the contract. If an insane person or a non-discerning child lets for rent (a house or any other thing), his rent is not valid. So also, is the rent by a discerning child except with his guardian's permission, with disagreement among the legists regarding it.

2. The amount of rent should be known in weight or measure, if it be of measured or weighed things, so as to avert any deception or cheating. Some legists said: sighting the property (or real estate) is sufficient and good. The *ujrah* (rent amount) will be possessed through the same contract, and speeding it up (paying it in time) is *wājib* with *iṭlāq* (generality of the contract) and stipulating the payment in advance.

Stipulating postponement of payment of rent is valid, on condition that the time of payment be determined and fixed. If the lessor discovers a defect in the rented estate prior to receipt, he will have the option to either abrogate the contract of rent (lease) or demand compensation (indemnity) from the lessee, if the rent be guaranteed. But if the rent be fixed and appointed, the lessor will be entitled to cancel the lease or demand the indemnity (*arsh*). If the lessee becomes bankrupt and unable to pay the rent, the lessor has the option to nullify the contract if he wills so.

It is not permissible for the lessor to let for rent a house or inn (hotel) or the laborer with a rent more than that with which he has rented or hired it, except when letting for rent the house in

return for other than the kind of rent, or when he makes changes and improvements in the house in return for the difference in the payment (rent). So also, when he dwells in a part of the house, it is not permissible for him to let for rent the rest of it for a higher rent, while both the parts be of the same nature, but it is permissible when the other part (rented) be more splendid.

If he takes on hire a porter to carry some goods for him to some destination, with a certain pay in a determined time, it will be permissible for him to deduct from his (the porter's) pay when he remises about his work. If one stipulates subtraction of the pay when the hired person fails to fulfill the work entrusted to him, it is invalid and the hired will be entitled to the equivalent pay.

If the lessor says to the lessee: I have let for rent to you (this house) with so-and-so *ujrah* each month, it will be valid for one month and he will be entitled to the equivalent rent for the extra period when dwelling in the house. Some legists said: It will become void due to ignorance of the rent. The first view is more predominant among the legists.

3. The advantage should be possessed, either through ownership of the real estate or separately. The lessee has the right to let for rent the thing he has rented, to another person, except when a condition is laid to him to obtain the advantage himself. If he lays such a condition and delivers the rented property to another person, he will be liable for it. If the lessee (or anyone other than the owner) lets for rent the rented estate voluntarily, such a lease contract will be invalid according to a view of some legists. Other scholars said: It is contingent upon permission of the owner, which is better.

4. The advantage should be specified, either by valuating the work, like the known tailoring of the dress, or by estimating the period such as dwelling the house, or doing some work on a mule for a certain period of time. If he valuates the period and work, as when one hires someone to sew a dress in so-and-so time, it will be invalid since fulfillment of the work in full may

not coincide during the period specified, with disagreement among the legists.

A special (personal) *ajīr* (employee) is that who is hired or employed to do some work for a certain period, and it is not permissible for him to work for other than the hirer but with his permission. But this is permissible for him in case he be jointly hired, i.e. one who is hired to do a certain work without determining any period for his work. The ownership of the advantage and the *ujrah* (wages) is transferred through the contract.

Is jointing the period of rent to the contract a condition for validity of a contract? The answer is: Yes, according to a view of some legists. Others observed: If he concludes the contract generally (without specification), it will be invalid, while some legists said: *iṭlāq* (generalization) requires connection. The latter view is more predominant among the legists. If the period specified be one month later to the date of the contract, the contract will be void, but the more predominant view is permissibility.

If the lessee delivers the rented property to the lessor, and some time elapses during which an advantage can be got from this estate, the lessee will be liable to pay the rent. So also, when he rents a house but never dwells in it during the period mentioned in the contract, or when he rents it for some purpose (plucking his tooth for example) without attaining that object during the beneficial period, he will be liable to pay the rent in full. But if the pain vanishes immediately after concluding the contract, he will not be liable to pay the rent.

If one hires something which deteriorates before taking hold of it, or immediately after receiving it, the lease will become void. But when the rented thing deteriorates after elapse of a considerable period, or cancellation of the contract is renewed, the lease will be valid in respect of the past period but void in regard of the remaining period, with returning a portion of the rent in lieu of the period transgressed in the contract.

Specifying the load laid on the back of the mule (*dābbah*) is a must, either by seeing or valuing it with measure or weight, or

any way with which the ignorance is removed. Mentioning the load without description is not sufficient, nor an undefined rider, due to realization of divergence in lightness and heaviness. It is necessary to designate the length, width and height of the load, and disclose whether it is uncovered or covered, with stating the nature of its cover. Also when one hires a mule for carrying some load, he is required to specify the load by witnessing or stating its nature, quality and quantity. Further, mentioning the loaded tools is not sufficient unless their quantity and nature be specified. It is not sufficient to stipulate loading the food unless it be specified. If the load (food) deteriorates, he has no right to load any other goods, unless he stipulates that.

If one hires a mount, he should confine himself to seeing it. If seeing it be infeasible, specifying its kind, description and its sex (male or female) will be necessary, if it be hired for mounting. If it be hired for loading, this condition will be dropped. The mount hirer is required to prepare all the essential tools needed for mounting the *dābbah*, like a saddle, pack-saddle with its tool, belt (saddle-girth) and the reins. There is a difference of opinion regarding holding and fastening the braces (suspenders), but considering this as necessary is a more predominant view.

If he hires it for revolving the wheel, he is required to view it (the animal), due to difference in conditions of transport. In case the hiring of the animal be for agriculture, especially for cultivating a certain known area, eye-witnessing or describing the land rented for this purpose will be necessary and obligatory. If hiring the animal be for work for a certain period, specifying the period is sufficient. Also in case of hiring a mount for making a journey for a specific distance, it will be necessary to designate the time of starting on the journey, whether it be day or might, except when an established usage be there in this connection, whence it should be usually followed.

It is permissible for two persons to hire a camel or any other animal for succession (i.e. riding it in turn), and the criterion followed in this alternation will be the established usage. If one hires a mount and he carries away with it to a distance over and

above the custom, or flogs (whips) it more than usual, or draws the reins of it without necessity, he will be liable for it. It is not valid to let for rent a real estate but with specification through sighting or pointing to a certain designated place, described in a way with which any ignorance or uncertainty can be removed. It is invalid also to give it for rent on credit, as this implies deceit and fraud, contrary to hiring a tailor for tailoring and a weaver for weaving. If one rents a property for a certain period, he is required to specify the maker (whether being a tailor or weaver), to avert any fraud accruing from dissimilarity among them in their trade and profession.

If one hires a workman for sinking a well, it is obligatory on him to specify the dimensions of the land, as regards its depth and width. If he digs it and the land or some of it demolishes, the laborer is not required to remove it (driller) but the owner has the option to do so. If the lessee digs a part of the rented land but fails dig the remaining parts, either due to land ruggedness or the employee's sickness or any other reason, the digging of the land and the part dug of it should be valued and the rent of the dug part proportionate to the whole rented land should be claimed from the *ajīr* (workman). There is another view based on a forsaken narration.

Hiring a woman for breast-feeding a baby is permissible on condition it be for a fixed period with the husband's permission. If the husband gives no permission, it will be invalid according to opinion of some legists and valid according to view of others. But permitting such an act despite the husband's refusal, if the fosterage does not deny him his right, is more widely-held among the legists. Seeing the child, for whose fostering the woman is hired, is a must but there is a difference of opinion among the legists regarding laying down a condition to specify the place in which she feeds the infant. The contract becomes void with decease of the infant or wet-nurse. Does it become void with its father's death? There are two views in this regard: Some legists believe in invalidation of hire contract with death of the lessor and the lessee. Another group of legists believe in non-voidness of such a contract. If one hires something for a limited period, distributing the wages (by installments) on its parts will not be *wājib* upon the hirer,

irrespective of whether the period be short or too long. It is permissible to rent a land for constructing a mosque out of it. It is also permissible to hire dirhams and dīnār if an advantage can be acquired out of them with keeping their essence intact according to the (Islāmic) rules.

5. The advantage and usage should be legitimate (*Mubāḥ*), as if one lets a house to another person for making liquor (the forbidden wine) in it, or a shop for selling a forbidden tool in it, or a servant for carrying an intoxicant for him (lessee), the lease will be invalid. Some legists said: The lease contract is valid while the owner is considered as having committed a sin, since it is possible to utilize the place for lawful and legitimate purposes. The former view is more predominant among the legists, as this condition is not stated in the contract. Is it permissible to rent a decorated wall for pleasure? Some legists replied: Yes, but a difference of opinion is there among the legists.

6. The advantage should be liable to deliver to the lessee. If one lets for hire a runaway slave, it will be invalid, even with joining to him another thing, with disagreement among the legists. If the owner (lessor) interdicts the lessee from reaching the slave, the *ujrah* will be subtracted. There is a difference of opinion among the legists regarding the lessee's being entitled to keep the contract in force and claim form the lessor the difference in the rent, but giving him this right is a more correct view held by the legists.

If an oppressor hinders the lessee from taking hold of the slave, he (lessee) will have the option to either cancel the contract or claim from the oppressor *ujrat al-mithl* (equivalent wages). But if this prevention be after taking hold of the slave, the lease will not be invalidated and he will have the right to claim the *ujrah* from the oppressor.

If the house rented to another person is dilapidated, the lessee will have the right to annul the lease, unless its owner rebuilds the house and returns it to the lessee, but there is a difference of opinion among the legists regarding it. If the lessor goes to extremes in returning it (house) when the lessee annuls

contract, he can claim from the lessor what is left over of the rent if he has already delivered it to him.

CHAPTER THREE: RULES OF LEASE

1. When the lessee discovers a defect in the rented estate (property), he will have the option either to revoke the lease or accept to pay the rent without any deduction, even if the defect be to an extent which causes loss of a part of the advantage of the house (rented property).

2. If the lessee trespasses the bounds in the rented property, he will be liable for its value in time of violation (as he is considered then as a usurper to the property). If they (lessor and lessee) differ regarding the value, the owner's claim will be considered as the basis in case the rented property be a mount (horse or mule). Some legists observed: The lessee's claim is accepted by all means.

3. Whoever accepts some business, it will not be permissible for him to entrust it to another person with lower wages as per the most famous opinion held by the legists, except when he makes some improvements and changes that worthy of the additional wages. It is not permissible for him too to commit it (work) to another one except with the owner's permission. If he commits it to another one without the owner's permission, he will be liable for it.

4. It is *wājib* upon the lessee to water and feed the animal (*dābbah*) he hired for work. If he neglects this duty he will be liable for it.

5. When the craftsman spoils the material he is working on, he will be liable for it, even if he be so skillful in his profession, like the tailor who burns or tears the dress, or the cupper (*ḥajjām*) who perpetrates a crime in his cupping, or the circumciser who mistakenly slashes the glans penis while doing his job, or goes beyond the limit of circumcision. So also, is the veterinary surgeon who treats with injustice the hoof (of the horse) or kills the horse when slashing it to let its blood shed (blood-letting), or commits what does harm to the horse, even if he takes precautions and exerts himself in his work. But if the

thing (or animal) given to the craftsman becomes spoiled in his hand without negligence or transgression on his part, he will not be liable for it as per the most correct opinion. So also, are the sailor and the muleteer, who will not be liable for any damage except that which is spoiled out of negligence and misuse, as per a more predominant view among the legists.

6. One who hires a servant for accomplishing and carrying out some of his needs, he will be responsible for his expenses, except when he stipulates on the servant (*ajīr*) to bear his expenditure.

7. If one takes on hire a slave of his own who vitiates, his master will be required to pay the indemnity for the property he has destroyed. So also, is the rule when he lets himself for hire with his master's permission.

8. Owner of a bath-house is not liable for any damage, except when he neglects in preserving the property committed to his keeping or destroys it.

9. If the owner (lessor) deducts the wages (*ujrah*) after its becoming due on credit, it is valid. But if he deducts the stipulated determined advantage, it will not be subtracted since discharging (*ibrā'*) does not cover but what is on credit.

10. If one lets for hire his slave and manumits him then, the hire will not be invalidated but the advantage stipulated in the contract should be taken in full, and the slave is not entitled to claim the equivalent wages, usually taken, for his work from his master after manumission. If a guardian of a minor lets for hire a boy for a period during which his attaining to maturity can be perceived, the hire in respect of the certain thing will be void but valid in respect of the probability, even if attaining puberty occurs in it. Is the child entitled to revoke the hire contract after attaining puberty? Some legists said: Yes, he has the right to do so, but a difference of opinion is there among the scholars.

11. If one takes over a laborer for doing some business for him, but he dies, the receiver will not be liable for him irrespective of whether he (employee) be young or old, a freeman or a slave.

12. If one hands over an article to another person for processing it or doing some work with it, he will be required to pay him the equivalent wages usually given to such servicemen if he be of those usually hired for such works, like the washerman and bleacher. But in case he be not among those usually hired for such works, and the service be of those ones which usually require wages, he has the option to demand the *ujrah* for his service, as he is more aware of his real intention. In case the service be of those for which no wages have to be paid, the claim of its performer has to be neglected.

13. The lessor is required to discharge the fees for the advantage taken of the materials used in the work, like a thread in tailoring or a pencil in writing. The key is included in the house rent, since utilizing the house cannot be fulfilled but by it.

CHAPTER FOUR: DISPUTE

It implies some issues:

1. If the lessor and lessee quarrel regarding the rent itself, the owner's claim should be the basis with his taking an oath. So also, if they are in dispute regarding the measure (size) of the rented property, or returning the rented estate. But if their disagreement be about the amount of the rent, the lessee's claim has to be accepted.

2. If the workman, or sailor or muleteer claims perdition or entire loss for the property rented to him, and the owner denies this, they will be required to present an evidence, and in case they fail to give an evidence they will be considered liable for it. Some legists said: Their claim has to be accepted with taking an oath, since they are considered as guardians and trustworthy (over the property rented to them). The second view is more predominant among the legists. So also, if the owner claims negligence and misuse on the part of the lessees (workman or muleteer … etc) and they deny this.

3. If the tailor makes an outer garment out of the cloth given to him, when the owner says: I have ordered you to make a shirt out of the cloth, the owner's claim will be the basis with his

taking an oath. Some legists observed: The tailor's claim is to be accepted. The first opinion is more correct. If the tailor intends to undo the sewing of the garment, he has no right to do so if the threads be taken from the garment or from the owner. Besides he will not be entitled to take wages for his work, as the work he has done was without permission of the owner.

KITĀB AL-WAKĀLAH
(DEPUTATION)

It includes several sections:

SECTION ONE: THE CONTRACT

It is to depute someone or appoint a representative or send him to transact business for another. This act requires a declaration indicating the intention of deputation, by using the word: *wakkaltuka* (I have appointed you as my deputy), or *isatanbtuka* (I made you my representative), or alike words. If the other side (deputy) says: You have deputed me (*wakkaltanī*) and the first party says: Yes, I do, or makes a gesture indicating a positive reply, it will be sufficient for *ījāb* (a decision to create deputation).

The acceptance (*qabūl*) is created by using the word "*qabiltu*" (I accept), or *raḍītu*, or alike words, or it may be created through act, such as when one says: *wakkaltuka* (I have authorized you) in selling transaction and the deputy sells the property given to him. If acceptance is delayed for a while after declaration (*ījāb*), its validity is not dispraised, as the absent person can be deputed and acceptance is delayed.

But the essential condition for its validity is to fulfill it in its time, and making it contingent on an expected occurrence or renewed time is not valid. Rather if the deputation is made unconditional (not dependent upon contingency) and delaying the disposition is stipulated in the contract, it is valid. If one deputes another person in purchasing a slave, he is required to describe him and mention all his characteristics so as to avoid any deceiving or fraud in the sale transaction. But if he appoints him as a representative generally, it will be invalid according to opinion of some legists, while permissibility of such deputation is more predominant among the scholars.

The contract of deputation is permissible from both the sides (two parties), that is: the deputy is entitled to depose himself

(of deputy post) in the presence of the *muwakkil* (appointer of an agent) or his absence, and the *muwakkil* has the option to dismiss the agent on condition he informs him of his intention (to depose him). If he abstains from informing him (agent) of deposing, the agent will not be considered as deposed. Some legists said: If informing the agent of deposition becomes infeasible and the *muwakkil* brings witness, the agent will be deposed by declaring deposition and bringing witness. The former view is more predominant among the legists.

If the proxy disposes with respect to the property before being informed of his deposition by the *muwakkil*, his disposition will be counted on behalf of the *muwakkil*. If one appoints an agent to take the *qiṣāṣ* (requital, penalty) and deposes him immediately after that, but the agent inflicts the punishment before being informed of deposition by the *muwakkil*, the *qiṣāṣ* (requital) will be considered as being inflicted and fulfilled. The deputation (*wakālah*) becomes void with decease, insanity and swoon, of each one of them. The agent's deputation becomes void by imposing *ḥajr* (legal disability, prohibition) on the *muwakkil*, with respect to what the *ḥajr* prohibits from all dispositions regarding some or all of the property. But the deputation does not become void by sleep on the part of the agent even if it lasts for a long time.

The *wakālah* becomes void with deterioration of the property for which the deputation is concluded, such as death of the slave for whose sale the agent is deputed, or decease of the woman for whose divorce one is deputed (or destruction of the property given to the deputy). So also, is the rule when the *muwakkil* fulfils the task for which the deputation is made, such as when he deputes someone for selling a slave and he sells him.

Deposing the deputy (*`azl*) is created by using the word: "*`azaltuka*" (I have deposed you), or "I have abrogated your agency (*`azaltu niyābatuka*), or "*fasakhtu*" or "*abṭaltu*" or "*naqaḍtu*" (I have cancelled your agency), or other words having the same meaning. Making a general deputy requires purchasing with the equivalent price (*thaman al-mithl*), by the circulated currency of that country (in which the deputation

contract is concluded) and in cash, with buying the sound property not the defective one. If the agent contradicts these conditions or one of them, his *wakālah* will be contingent upon the owner's permission.

If the deputy sells the property given to him for a certain price, the amount of which be denied by the owner to have given permission, his (owner) claim be accepted with his taking an oath, and he is entitled to recover the property from the agent if it be still there, or its equal or price if it be destroyed. Some legists observed: The broker is required to complete and confirm the claim on which the owner swore, but this view is not so predominant among the scholars. If the agent and the buyer come to terms regarding the price (of the property) and the agent hands over the commodity to the buyer which becomes spoilt in his hand, the owner can claim its price from whoever he wishes. In case he claims the price from the buyer, the latter has no right to claim it from the agent due to his confirming the permission given to him (agent). But if the owner claims the price from the agent, the latter will be entitled to claim from the buyer the least of both its price and what he has paid as a fine.

Concluding a sale agency contract in general (without specification) requires delivering the sold property as this being one of obligations of such a contract. Also generality in deputation for purchase necessitates permission in handing over the price, but permission in selling transaction does not require taking hold of the price, since he is not trusted in receiving the price. The agent has the option to return the property to the owner when discovering a defect in it, as this being to the benefit of the contract in the owner's presence or absence (since the owner has authorized the agent and granted him full authority in respect to the contract). If the *muwakkil* (owner) prohibits the agent from disposition with respect to the property, the agent will have no option to contradict his order.

SECTION TWO: CONDITIONS FOR VALID DEPUTATION

Positions where Agency is Invalid

It is invalid to depute another person for performing the acts that the law-giver ordered the *mukallaf* (adult person) to perform by himself, such as: purification (*ṭahārah*) with ability to perform it (though it is permissible to depute one in washing the body organs in exigency), obligatory prayers when alive, with *ṣawm* (fasting), *i`tikāf* (seclusion in mosques for worship), obligatory *ḥajj* (*wājib*) when ability to perform it is available, oath, vow (*nadhr*), *ghaṣb* (usurpation), division among wives (*qasm*) as it implies *istimtā`* (having sexual intercourse), ẓihār and li`ān, passing the `iddah (period during which a wife has to disdain from marriage due to divorce or death of her husband), *jināyah* (felony), *iltiqāṭ* (gleaning), *iḥtiṭāb* (wood cutting) and *iḥtishāsh* (gathering the grass and weeds) and establishing the testimony (*shahādah*) except the witness given to confirm another one's witness (to certify one's being a witness).

PLACES WHERE DEPUTATION IS VALID

It is valid to appoint someone as a deputy (*wakīl*) in performing acts not needing direct conducting by self such as: selling, receiving the price, *rahn* (mortgage), *ṣulḥ* (composition), *ḥawālah* (money-order), *ḍamān* (surety), partnership, representation (*wakālah*), *'āriyah* (simple loan), using the right of pre-emption, *ibrā'* (acquittal), deposit (*wadī'ah*), dividing the charities, concluding a marriage bond, enacting a dowry, *khul`* (divorce granted at wife's request against compensation), divorce, receiving the requital in full, receiving the *diyah* (blood-money), *jihād* (holy war) according to view of some legists, receiving the *ḥudūd* in general, affirming the punishments issued by people not those ordained by God the Glorious, holding race and shooting competitions, manumission, *kitābah* (a bond of freedom granted to a slave), *tadbīr* (disposal), filing a case in a court, and confirming the arguments (pleas) and rights.

There are two opinions regarding deputation to transact all businesses, few and many, one saying: it is invalid due to potentiality of loss. The other opinion says: it is permissible and the possibility of loss is driven and warded considering the convenience and interest, but this view is far from subject of supposition (his being agent in everything). But if the owner puts into another's charge all his properties and assets, it will be valid since it is contingent upon interest (*maṣlaḥah*).

SECTION THREE: THE MUWAKKIL

The necessary conditions for creating a deputation are: *bulūgh* (full maturity), sanity and having free-will to disposition of properties and assets committed to his charge, of those regarding which the deputation is valid. Hence it is not valid to depute a child of a discerning age (*mumayyiz*) or younger. If he attains the age of fourteen, it will be permissible to commit into his charge the acts with respect of which he can dispose, such as testament (*waṣiyyah*), charitable act and divorce, according to a narration. Also it will be permissible for him to appoint as a substitute another person to fulfill these transactions. Further it is not valid to appoint an insane person as a deputy to transact business. If insanity befalls him after being appointed as a deputy, his agency will become void. The *mukātab* (a slave granted a bond of freedom) is entitled to appoint an agent to work for him, as he has full authority over dispositions with respect to his earnings.

The serf slave (*qinn*) is not entitled to assign an agent for him, except with his master's permission. If another person assigns him as an agent to buy himself from his master (owner), it is valid. But one appointed as a deputy has no right to appoint a deputy for his *muwakkil* except with his permission. If a captive slave (*mamlūk*) has authorization to carry on commercial transactions, it will be permissible for him to put into another's charge the transactions or works that can customarily be entrusted to others, since he is considered like that who is authorized to fulfill that work. But it is not permissible for him to put into another's charge other than this very transaction (business), since this is contingent on an explicit and direct permission from his master. He is entitled to commit to another

person the transactions or dispositions which are permitted to him without any need to take permission from his owner (*mawlā*), and for which the agency is valid such as divorce.

For one prohibited from all dispositions with respect to his properties (*maḥjūr `alayh*), he is entitled to assign a deputy to transact the businesses which he has ability to dispose, such as divorce, *khul`* (divorce granted at the wife's request against compensation) and alike deeds. It is not permissible for the *muḥrim* (one assuming *iḥrām* for *ḥajj*) to contract marriage for himself or on behalf of another, or purchase a *ṣayd* (hunted animal). The father and grandfather are entitled to appoint a deputy to transact businesses on behalf of their minor (child). Assigning a deputy to transact the divorce on behalf of an absent person according to a unanimous view held by the legists, and on behalf of a present person as per a more correct opinion.

If the *muwakkil* says (to another person): "Do whatever you like," it will indicate the permission to deputation (*tawkīl*), since it is empowering and giving mastery over things and dispositions under his will. It is *mustaḥabb* (recommended) for the agent (*wakīl*) to have full perception (knowledge) of the thing put into his charge, acquainted with the language which he uses in conversation and argument. The ruler is duty-bound to assign an agent or a guardian for the idiots (*sufaha'*) to manage their affairs and carry on the tribunal procedures on their behalf. It is *makrūh* (reprehensible) for manly notable people to conduct the litigations and contests at law by themselves.

SECTION FOUR: THE DEPUTY (*WAKĪL*)

The conditions necessary for the *wakīl* (deputy) are: *bulūgh* (adulthood) and full sanity (*`aql*), irrespective of whether he be *fāsiq* (debauchee) or *kāfir* (impious) or apostate (*murtadd*). If a Muslim person apostatizes, this will not entail voidness of his deputation, as apostasy does not interdict deputation in its elementary stage and constantly. All the acts and dispositions that can be fulfilled in person and for which deputation is permissible, can be put into another's charge. Hence it is valid

to deputize one prohibited from dispositions (*maḥjūr ʿalayh*) due to extravagance (*tabdhīr*) or insolvency (*iflās*). But it is not valid to depute a *muḥrim* (one assuming *iḥrām* for *ḥajj*), to undertake the acts or duties forbidden for the *muḥrim*, like purchasing the game (*ṣayd*) or hunting or catching it, and contracting marriage for himself or on behalf of another. It is valid for a woman to undertake divorce on behalf of another woman. But there is a difference of opinion among the legists regarding charging her with divorcing herself, while most of them believe in voidness of such deputation. Deputing a woman in contracting marriage is valid, as the words used for creating divorce by her are binding and enforceable in view of the Shiite *`ulamā*'.

To depute a slave with his master's permission is valid, and it is permissible for his owner to put into his charge manumitting and freeing his self. Condition of *`adālah* (justice) for validity of marriage contracted by a guardian (*walī*) or deputy. It is not permissible to depute a *dhimmī* to transact business with a Muslim on behalf of both a Muslim and a *dhimmī*, as per a more predominant opinion among the legists. Can a Muslim be deputed to transact business on behalf of a *dhimmī* with another Muslim? There is disagreement among the legists regarding it, but permissibility with aversion is a more predominant view held by them. It is permissible for a *dhimmī* to transact business on behalf of another *dhimmī*. The agent is entitled to conduct only the dispositions permitted for him and what the customary usage usually acknowledges for him. If the *muwakkil* orders his deputy to sell a commodity for one dīnār on credit, and he sells it for two dīnār in cash, it will be valid. So also, it is valid if he sells it for one dīnār in cash, except when there being a legal real objective behind postponement of payment. But it will be invalid if he orders the *wakīl* to sell the property in cash and he sells it on credit, even if he sells it for a price higher than what the owner specified for him (agent). It will be valid when the agent sells the article for an equivalent price (*thaman al-mithl*) in case the owner has ordered to sell the article in general (without specifying any price), since the purpose lies in acquiring the price.

It is invalid too if the agent sells the article to other than that to whom the owner (*muwakkil*) has ordered to sell, even if the price is doubled, as the objectives and interests differ regarding the rivals. Also if he orders the agent to buy with the corporeal property (*`ayn al-mal*) but he buys on credit, or vice versa, since it is an unauthorized and not permitted disposition, regarding which the purposes differ. When the deputy buys something, the purchasing is counted as being conducted by the *muwakkil* and the thing bought will not be included among properties of the agent, since if it is counted as his own property, the *wakīl* will be required to have his father and son freed on his part if he buys them, with emancipating the *muwakkil's* father and son. When a Muslim deputes a *dhimmī* to purchase wine, it will be invalid.

Every position where the purchase becomes null and void on behalf of the *muwakkil*, will not be binding on the part of each of them *(muwakkil* and agent), if he (*muwakkil*) has denominated it in the contract (of agency). If he has not named it when concluding the contract, the judgment regarding it will be passed against the agent apparently. So also, is the rule when the *muwakkil* denies the deputation. But in case the agent cancels or invalidates the agency, then the judgment will be in his favor, apparently and inwardly. If he be rightful in his claim, the purchase will be considered on behalf of the *muwakkil* inwardly. The way of deliverance lies in the *muwakkil's* saying: If it be my own I have sold it through the agent, when his selling transaction be valid, and this does not mean making the sale depend upon a contingency or a condition, and they settle the account by counterclaiming.

If one appoints two agents with stipulating their presence together, it will not be permissible for any of them to conduct alone some disposition with respect to the property. So also, is the rule when he generalizes in his deputation. In case one of the agents dies, the agency will become void and the ruler will not have the option to appoint another agent (trustee) and join him to the alive one. But if the *muwakkil* stipulates acting alone (*infirād*), it will be permissible for each one of them to act alone without any need to consult his partner or take his opinion. If one deputes his wife or a slave of another's own,

divorcing his wife then and freeing the slave then, the deputation will not be invalidated. But if he authorizes his slave to have a free hand in his property, and manumits him, his authorization will become void, since it is not the same as deputation (*wakālah*), but rather it is merely a permission relevant to the property.

If one deputes a person to litigate (in the court) for him, this will not mean an authorization to take or receive some claim, since it may happen that some unfaithful or dishonest man be assigned as agent. Also if one be charged with the receiving of some money but the debtor (*gharīm*) denies the debt, this agency will not mean an authorization to prosecute or condemn the debtor as the deputy may not be accepted as an arbitrator in this case (litigation).

A Subsidiary Issue

If one says: I charge you with receiving my claim from so-and-so, who (debtor) dies, then the agent will not be entitled to claim it from the theirs. But if one says to his deputy: I commit to your charge (*wakkaltuka*) the receiving of my right (claim) which is in charge of so-and-so, the agent will be entitled to claim that debt from the person named by the *muwakkil*.

If one is charged with an invalid sale, he will not be entitled to be charged with a valid sale. So also, if he is charged with the purchase of a defective commodity. If one is indebted to another person, and the creditor charges him with the sale of some property by that amount of money in his charge, it will be valid. The debtor's liability for the debt will be cast off by delivering the amount he got to the seller (owner).

SECTION FIVE: CONFIRMATORIES OF DEPUTATION

The agency cannot be confirmed or enforced by the deputy's mere claim or the creditor's approval, but an evidence (*bayyinah*) should be established to its confirmation, which has to be given by two (adult) men. It is neither confirmed by witness of two women, nor by one man and two women, nor by one man and an oath-taking (by God), as per a widely-held

opinion. If one witness (man) gives evidence in favor of *wakālah* (assigning an agent) at a certain date, and another one certifies it on another day, their testimonies will be accepted in accordance with the established usage observed in bearing witnesses, as gathering all the witnesses in one place may be difficult. So also, when one of the witnesses gives evidence to the agency being made by using non-Arabic words, and the other one Arabic words, both the evidences will be approved, as both of them indicate one meaning. If they differ regarding the words used in concluding the contract of deputation, one certifying that the *muwakkil* said: *wakkaltuka (*I appoint you as my agent), while the other witness certifies that he said: *istanabtuka* (I make you my deputy), their testimonies will not be approved since it is an evidence given in favor of two contracts, as the form of each one of the contracts contradicts the other, with a difference of opinion among the legists, as this goes back to the fact that they both gave evidences at two different times. But if they abandon the problem of words used by the *muwakkil* and concentrate only on ambiguity of meaning, it is valid even though their expressions differ. When the ruler comes to know of the agency, he can give his decision for it according to his knowledge.

A Subsidiary Issue

When one claims to be charged by another person who is absent, with receiving the debt he demands from some debtor.

If a debtor denies the debt claimed by someone claiming to be charged by an absent person with taking a right he demands from his debtor, he is not required to make an oath. But if the debtor believes the deputy's claim, and what he owes to the *muwakkil* be a real estate (*`ayn*), it will not be permissible to order him to deliver it (to the agent). In case the debtor hands it over to the agent, the owner will be entitled to recover the property, and if it becomes spoilt he will have the option to compel whomever of them he likes, with denying the agency of the claimant, and none of them will be entitled to claim indemnity from the other. So also, is the rule when the claim be a debt, with disagreement among the legists. In this case if the debtor gives back what he owes to the agent, the owner will not

have the option to claim it from the agent, as he (agent) has not taken away his (owner) real estate, as this is not assigned as a right except by taking hold of it by the owner or his deputy, and it refutes each of the two kinds of debt.

The debtor (*gharīm*) has the option to claim his right from the agent when the real estate be intact (not spoilt), or be damaged out of negligence on the deputy's part. But the agent is not required to make good or put right what has become spoilt without misuse or negligence on his part. Wherever the debtor is required to deliver the property in his possession when acknowledging (having) it, he is required to make an oath when denying it.

SECTION SIX: SUPPLEMENTARIES

It includes several issues:

1. The deputy (*wakīl*) is a trustworthy person, who is not liable for the thing destroyed when being in his hands, except with misuse or negligence or improper management (violation) on his part.

2. When the *muwakkil* permits his agent to take a deputy for him, both the agents (the one assigned by him and the other who is assigned by the agent) will be considered as proxies for him, and their agency will become void with his death. But it is neither invalidated by death of each one of them, nor with deposition of each of them by the other. In case he takes him as an agent for himself, he will have the option to depose him. When the *muwakkil* or the first agent dies, the agency of both of them will become void.

3. The agent has to deliver what he has in his possession to the *muwakkil* at his request and absence of any excuse. If he refrains from delivery without a legal excuse, he will be liable for it. But when there being a reasonable excuse, he will not be liable (for compensation), and when the excuse disappears and he delays the delivery of the property, he will be liable for it. If he claims damage of the property before abstaining from delivery, or claims returning the property before demanding it,

his claim will not be accepted even with his establishing an evidence. Some legists observed: his claim can be accepted.

4. Where one has in his possession or his charge something belonging to another person, he is entitled to abstain from delivering it until the owner or creditor certifies receiving the money. No difference is there in this connection between what the agent's claim in returning has to be accepted and the property regarding which the claim of returning is not accepted but with establishing an evidence, to avert any denial entailing liability for compensation or making an oath. Other legists distinguish between these two kinds of properties, obligating delivery for the first group (regarding which the claim of returning is accepted) and permitting refrainment for the second group (regarding which the claim of returning is not accepted) except with presenting an evidence. The former view is more predominant among the legists.

5. If one charged with depositing fails to give evidence against the depositor, he will not be liable for it (deposit). If he be deputed to settle a debt but fails to acknowledge the receiving of the money, he will be responsible for it, the view regarding which there is a difference of opinion among the legists.

6. When the agent destroys or maltreats the *muwakkil's* property or fund committed to his charge, he will be liable for it, but his agency does not become void due to this violation as this behavior on his part is not contradictory to the contract of deputation. If the agent sells the property which he used improperly or infringed, and delivers it to the buyer, his liability for it will be cast off, since it is considered a legal permitted delivery, having the same enforcement as the taking hold by the owner.

7. If the *muwakkil* (property owner) authorizes his deputy to sell his property from himself and he does so (agent), it is valid, with disagreement among the legists. So also, is the rule with respect to concluding a marriage contract (*nikāḥ*).

SECTION SEVEN: DISPUTE OVER AGENCY

It implies several issues:

1. It the *muwakkil* and agent differ regarding the deputation (*wakālah*) itself (whether being concluded or not), the claim of one denying it has to be approved, as it is considered the basis. If their dispute be over the damage or loss caused to the property subject of agency, the deputy's claim will be the basis as he is a trusty guardian over the property. Establishing an evidence to prove the defect (damage) in the property may be infeasible most likely, hence the agent's claim is admitted in order to avoid liability for a difficult or say impossible responsibility. If they differ regarding misuse or negligence (on the part of the deputy), the claim of one denying it will be the basis, according to the tradition (*ḥadīth*) reported from the Prophet (S): "The claimant is liable to establish an evidence and the denier is liable to make an oath."

2. If their disagreement be about giving the money (or property) to the *muwakkil* (owner), he will be required to establish an evidence since it is him who claims, in case the contract of deputation be contingent upon hiring in return for wages (*ju`ālah*). If the contract be other than hiring, the deputy's claim will be the basis as in the case of *wadī`ah* (deposit) according to a more widely-held opinion among the legists. Others said: the owner's claim has to be considered the basis, the view which is more correct.

The executor (*waṣī*) is entitled to expend (out of the legacy) and his claim regarding expenditure, due to infeasibility of establishing an evidence against him, without delivering the property (*māl*) to the legatee.

The same rule is applied to father, grandfather, the ruler and his trustee with respect to an orphan, if he denies receipt on attaining puberty and adulthood. So also, is the rule in regard of the partner and speculator (*muḍārib*) in financial transactions and everyone into whose hands comes some stray or a find (*dāllah*).

3. When the agent claims having authority to disposition with respect of a property, and the *muwakkil* denies having deputed him, such as by saying: I have sold (*bi`tu*) or I have received (*qabaḍtu*), the agent's claim will be the basis, since he has

admitted what he is entitled to do. It is not objectionable also to consider the owner's claim as the basis, but the first view is more correct.

4. If one purchases a commodity, claiming his being an agent working on behalf of another person who denies this agency, the denier's claim will be the basis with his making an oath. The purchaser is required to pay the price, irrespective of whether his purchase be in cash or on credit, except when he has maintained and stated when concluding the contract that he is buying this so-and-so article for that person (*muwakkil*).

If the agent says: "I have purchased for you," but the *muwakkil* denies this; or the agent says: "I have bought for myself," and the *muwakkil* says: "Rather you have bought for me," here the claim to be considered the basis will be that of the deputy since he has discerned with his intention.

5. In case the agent concludes a marriage contract on behalf of his *muwakkil*, but the latter denies his agency without establishing any evidence, the *muwakkil's* claim will be the basis with his taking an oath, and the agent will be required and bound to pay to the woman her *mahr* (dowry). Some legists observed: he is liable to give her half the *mahr*, while others said: the marriage contract should be deemed null and void apparently, and the *muwakkil* has to divorce her in case he feels assured of the agent's honesty and sincerity, with giving the woman half her *mahr*. The second view is stronger (since she is considered his wife in fact – to be honest to himself – and disowning her and subjecting her to marry other than him, is an unlawful and prohibited act).

6. When someone takes an agent to purchase a slave for him, and he (agent) buys a slave with one hundred when the *muwakkil* says: You have bought him with eighty (dīnār), the agent's claim is considered the basis since he is a trustworthy confident person. Some legists say: It is better to consider the *muwakkil's* claim as the basis since he is the one who pays the price of the slave (*ghārim*).

7. When the agent buys something for his deputer, the seller will have the option to demand payment from either the agent

or the *muwakkil*. The more predominant view among the legists confines the demand to be from the *muwakkil* not the agent despite being aware of the deputation, and to demand it from the agent when being ignorant of this rule.

8. If the seller demands his right (price of what he sold) from the agent, and the indebted one who is charged to pay him says: "You are not entitled to demand anything from me," his claim should be disregarded and not considered as the basis since he is denying a manifest agency. If the seller says to the agent: "The *muwakkil* has deposed you," the agent is not required to take on oath except when the seller claims to be sure of deposing him. So also, if he claims that the *muwakkil* has discharged him of the debt.

9. The witness given by the deputy in favor of his *muwakkil* in regard of what he has no authority over, has to be accepted. If he is deposed, his testimony as a whole in favor of his deputer will be admitted, unless he has established with it or started the dispute and argumentation.

10. If one charges another person with the receiving of his debt from his debtor, and the agent acknowledges the receipt of the claim and be trusted by the debtor (*gharīm*) but denied by the *muwakkil*, the *muwakkil's* claim will be admitted, but there is a difference of opinion among the legists regarding it. But if he orders him (agent) to sell a commodity, deliver it and receive its price, and the article becomes spoilt without misuse when the agent acknowledges the receipt, and his claim be believed by the buyer but denied by the *muwakkil*, here the deputy's claim will be the basis, since the allegation here is against him that he has delivered the sold article without receiving its price, and as if he is claiming something necessitating liability, while there being an allegation against the debtor, and the difference between the two allegations has to be considered.

If the commodity sold by the agent comes out to be defective, the buyer can return it to the agent not the not been *muwakkil*, since his receiving of the price has not been confirmed yet. But returning the article to the *muwakkil* is a more correct opinion.

KITĀB AL-WAQF
ITS CONTRACT, CONDITIONS & COMPLEMENTS

WAQF CONTRACT

The word '*waqf*' literally means to detain and prevent the *aṣl* (real estate). In the context of the Sharī`ah it implies a form of gift in which the corpus is detained and the usufruct is set free, for common usage. The only word used for creating the *waqf* is '*waqaftu*' the meaning of "detention" of the corpus is its prevention from being inherited, sold, gifted, mortgaged, rented or lent … etc.

But to say *'ḥarramtu*' (I have prohibited) or '*taṣaddaqtu*' (I have given in charity), is not considered as *waqf* except when it be accompanied with an indicating context (*qarīnah*). As to dedication of the usufruct, it means its devotion to the purpose mentioned by the *wāqif* (donor) without any pecuniary return, as if he intends to devote it for *waqf* without an indication, he will be judged according to his intention. If he confesses that he intended that purpose, his confession will be the basis for knowing his real *niyyah*.

There is consensus among all the schools of *fiqh* that a *waqf* is created by using the word '*waqaftu*' (I have made a *waqf*), because it explicitly signifies the intention of *waqf* without needing any further clarification. They differ regarding the creation of *waqf* by the use of such words as '*ḥabastu*' (I have detained) or '*sabbaltu*' (I have donated as charity), with some believing in its being a *waqf* even without any indication or clarification, as per the *ḥadīth* reported from the Prophet (S): "He has detained the origin and *sabbala* (donated as charity) the fruit." Other scholars observed: Using these words does not create a *waqf* except by mentioning an indicating declaration (*qarīnah*), as this is not understood to be a resolute determination, but only through *iṭlāq* (generalization). The second view is more correct.

Delivery is a necessary condition for the deed of *waqf* to become binding, though not for its validity. Therefore, if a *wāqif* dedicates his property by way of *waqf* without delivering possession, he is entitled to revoke it, but when created it will be binding and irrevocable if it is created at a time during which the *wāqif* has good health. Validity of the *waqf* made by one during death illness is contingent upon permission of the heirs, otherwise it will be considered as a part of one-third of his legacy like the gift and favoritism (*muḥābāt*) in selling. Some legists said: it will be taken out of his undivided heritage. The former view is more correct.

If a person in death illness makes a *waqf*, donates, sets free, sells and takes one's side but the heirs do not permit this, it will not be valid but only when it is taken out from his bequeathable third. If it exceeds this limit the consent of the heirs is necessary regarding the excess as it will be taken out from the share of the first one of them and the second until covering the limit of one-third, and the excess will be void. So also, if he makes several wills. If the foremost of heirs is unknown, some legists observed: it (*waqf*) should be divided among them all proportionately to their shares. Others said: it is better to cast lots among them.

If a she-sheep is made a *waqf*, her wool and milk will be included in the *waqf* except when they being excluded by the *wāqif*, in consideration of customary usage (*`urf*), as if he has sold it (since they are advantages excluded out of the real existence of the sheep subject of the *waqf* declaration).

ESSENTIAL CONDITIONS OF WAQF

They are on four parts:

Part One: Conditions of the Mawqūf

The *mawqūf* property should fulfill all the conditions required of a saleable commodity, that it should be a determinable article (*`ayn*) owned by the *wāqif*, that can be used as long as it exists, and its delivering be possible. Therefore the *waqf* of a receivable debt or an unspecified property, such as when the

owner says: 'I make a *waqf* of a horse or a field or a house of my property' without specification, is not valid. It is valid to make a *waqf* of an immovable property (*`iqār*), clothes, furniture and all tools that can be used for lawful purposes, and every thing having a usufruct which can be utilized lawfully without being consumed. Hence that which cannot be utilized except by consuming it (e.g. eatables) will not be valid as a *waqf*.

It is valid also to make a *waqf* of movable properties, such as animals, implements and utensils, for they can be utilized, except that which cannot be owned by a Muslim, such as swine, or that which cannot be delivered such as a fugitive.

Is it valid to make a *waqf* of dīnār and dirhams? Some legists consider this as invalid, since they cannot be utilized but by disposition with respect to them (i.e. they are perishable). Others observed: it is valid as a usufruct and an advantage may be supposed for them without being consumed (like using them as ornament and for decoration).

There is no doubt prior to donation the *waqf* property should be owned by the *wāqif*, as a person cannot make *waqf* of a property that he does not own. But it will be valid when permission of the owner is them, since it will be like a resumed *waqf*. It is valid to make *waqf* of a joint (*mushā`*) property, and to take hold of it as in a sale deal.

Conditions of the Wāqif

The necessary conditions for the *wāqif* are: *bulūgh* (adulthood), full sanity and authority to disposition of property. The schools differ regarding a *waqf* made by a child of ten years, some considering such *waqf* as valid, but most of them oppose this view, as prohibition on dispositions (*ḥajr*) is restricted only to that who has not attained maturity and adulthood.

It is permissible for the *wāqif* to stipulate the right of supervision for himself and for another person. If he does not appoint a supervisor, this duty will be transferred to the beneficiaries (*mawqūf `alayhim*), since he is entitled to the proceeds of the *waqf* property and its usufruct.

Conditions of the Beneficiary

The following requirements must be fulfilled by the beneficiary:

1. He should exist at the time of the creation of *waqf*. If he does not exist, such as when a *waqf* is created for a child to be born later, it is considered as invalid. When the beneficiary ceases to exist after having existed at the time of the creation of *waqf,* the *waqf* is valid (as when a person creates a *waqf* for his existing children and their future descendants). Regarding a *waqf* in favor of a fetus, some legists consider it invalid, because a fetus is incapable of owning property until it is born alive. Some others consider the *waqf* created for the existing children as valid. The first view is more correct.

2. He should be capable of owning property. Hence when a *waqf* is created for that who is incapable of owning property and then for that who has capability to own property, it will be valid according to the view of some scholars. But most of them oppose this view and consider it as invalid. Also it is invalid to make *waqf* for a slave, and the *waqf*, when created, will not be counted in favor of his owner (*mawlā*) since the *wāqif* has not referred to him when creating the *waqf*.

3. The purpose of the *waqf* should not be sinful (as it would be when made for a brothel, or a gambling club). As to *waqf* made in favor of a non-Muslim, such as a *dhimmī*, there is consensus about its validity, even when he be a foreigner (not of the relations). But to create a *waqf* in favor of a *ḥarb*ī is not valid even if he be a uterine relation, while creating it in favor of a *dhimmī* is valid though he is not a relation.

4. The beneficiary should be specifically known. Thus a *waqf* created in favor of an unidentified man or woman will be void.

It is valid to create *waqf* of public utilities such as mosques, bridges, sanatoriums, etc. as the *waqf* is in fact for the Muslims, but it is actually a *waqf* in favor of the people who benefit from them.

It is invalid to make *waqf* in favor of churches, synagogues, aiding or supporting the adulterers or highwayman or wine-imbibers (drunkards). Invalid is also to create a *waqf* for inscribing what is nowadays called the Torah or Bible (the New Testament), since they have been misinterpreted and perverted (*muḥarraf*). But making *waqf* for them by a disbeliever (*kāfir*) is valid.

When some Muslim person creates a *waqf* in favor of the poor, the purpose intended by him will be understood to be for the Muslim poor people exclusively. The same is true regarding the disbeliever, as when he creates a *waqf* for the poor, it will be understood to mean the poor like him, i.e. disbelievers. If a disbeliever makes a *waqf* for Muslims, it will be spent on those performing prayers toward the *qiblah*. If he makes it for the believers, it will be spent for the Twelvers (*Ithnā-ʿAshariyyah*), and some schools say: it should be spent for abstinent from major sins. The first opinion is more correct.

If he dedicates the *waqf* for the Shīʿah, it is to be taken to mean the Imāmiyyah and Jārūdiyyah, not any other Zaydī group. Thus if he describes the beneficiaries with a certain attribution (*nisbah*), it will include all those known with this epithet. Hence if his *waqf* be created in favor of the Imāmiyyah, it will be spent for the benefit of the Twelvers. If it be made for the Zaydiyyah it will be meant for the benefit of those believing in the Imāmate of Zayd ibn ʿAlī (A), and so also if he refers to the beneficiaries with their lineage to their father, it will be made for the benefit of everyone related to this father through genealogy, like the word 'Hāshimites' which is used for descendants of Hāshim, and Ṭālibites for descendants of Abū Ṭālib. Both the males and females share kinship through the father, in accordance with the customary usage. If a *waqf* is created in favor of *wāqif's* neighbors, the established usage will be followed in this connection. Some schools say: it is better to make a *waqf* in favor of the neighboring houses to a distance of forty cubits at the most. Some others believed it to be up to forty houses from each side of his (*wāqif's*) house, but this view is obsolete.

If a *wāqif* makes a *waqf* for public benefit (*maṣlaḥah*) whose trace becomes obliterated the *waqf* dedicated for it has to be used for charitable purposes. If one makes a *waqf* in favor of charitable purposes in general, it should be used for the benefit of the poor and destitute, beside other benefits with which God's good-pleasure is sought.

It is permissible to make a *waqf* in favor of a non-Muslim, such as a *dhimmī*, since the *waqf* means transference of possession and authority over the *waqf* property to the beneficiary, like considering something as public property. Some schools observed: It is not valid, since the intention to seek God's good-pleasure (*niyyat al-qurbah*) is a condition for its validity except when making it in favor of one of the parents. Others said: It is valid if created in favor of relatives and kinsmen. The former view is more preponderant. There is a difference of opinion among the scholars regarding creating a *waqf* in favor of a *ḥarbī*, but invalidity of such *waqf* is more preponderant. If one makes a *waqf* without specifying the purpose, the *waqf* will be void. Also the beneficiary should be specifically known, as a *waqf* created in favor of an unidentified person, like when the *wāqif* says: I make a *waqf* in favor of one of these two persons, or one of these two places, or one of these two sects, all will be void. When one makes a *waqf* in favor of his children or brothers or relatives in general, he is required to distribute it among the males and females, and the closer and farther in kinship with observing evenness in distribution, except when he stipulates a certain order or specification or preference. If one makes a *waqf* in favor of his paternal and maternal uncles, it is to be divided among them all equally.

If one creates a *waqf* in favor of the nearest residuaries to him, who are the parents and children how low so ever, then the grandparents and their brothers how low so ever, and then paternal and maternal uncles as per categories in inheritance, but their shares in the *waqf* are equal except when the *wāqif* specifies some preferences in deservedness.

CONDITIONS OF THE WAQF

They are four: perpetuity and continuity, *tanjīz*, delivery of possession, and transference of ownership.

1. Perpetuity and Continuity

A *waqf* is valid only when the *wāqif* intends it to be perpetual and continuous, as if he limits its period of operation, such as when he makes *waqf* for 10 years for instance, or makes it to depend on a certain contingency, it will not be considered a *waqf* in its true sense.

If a *waqf* is made for an object which is liable to expiry (such as a *waqf* made for one's living children, or others who are bound to cease existing), and moreover presuming its validity, upon whom will it devolve after the expiry of its object, some legists said: it will become void. Others observed: The *waqf* is valid and will presume until expiry of the objects specified by the *wāqif*, a view which is more preponderant. After their expiry it will devolve on the heirs of the *wāqif*, and some legists said: on the heirs of the beneficiaries (*mawqūf ʿalayhim*), but the former view is more correct.

2. Al-Tanjīz

It means making the *waqf* as unconditionally operational, which is *wājib* for its validity. Hence to make a *waqf* contingent on a future event, such as when one says: when such and such a time comes, or so-and-so (Zayd) comes back, my house will become a *waqf*, it will be invalid.

3. Delivery of Possession

Delivery of possession implies the owner's relinquishment of his authority over the property and its transfer to the purpose for which it has been donated. Delivery is a necessary condition for the deed of *waqf* to become binding, as when one creates a *waqf* and he dies before possession has been taken, the *waqf* becomes void and the property assigned for *waqf* will be considered as his heritage. If a *waqf* is made for a private purpose, such as for the benefit of the *wāqif's* minor children, it will not become binding unless they take possession of it with his permission, because the *wāqif's* possession as their guardian amounts to their having taken possession. And so also is the rule regarding the paternal grandfather, but there is a difference

of opinion regarding the executor of the will (*waṣī*), while most of the legists consider it as valid.

It is not valid for a *wāqif* to create *waqf* for the benefit of his own person or to include himself among the beneficiaries, because there is no sense in a person transferring his property to himself. So also, is it invalid when he creates a *waqf* for the benefit of his own person and then for another person. Some legists observed: the *waqf* made for his own benefit is invalid, but that one created for another one is valid. The former view is more correct. Also when he creates a *waqf* for the benefit of another person and includes a condition requiring the payment of his debts and the provision of his maintenance from the proceeds of the *waqf*, the *waqf* and the condition are both void. If he makes a *waqf* in favor of the poor and he later becomes poor himself, or in favor of the *fuqahā`* and he later becomes a *Faqīh* himself, it will be valid for him to share them with the usufruct and proceeds of the *waqf*. If he includes a condition requiring returning of the *waqf* property to him on his need, the condition is valid but the *waqf* will become void, and it will be considered as *ḥabs* (detention) and the usufruct donated by him for a particular object will return to him, and it will be returned to his heirs after his death. If a *waqf* lays a condition entitling him to exclude from the beneficiaries of the *waqf* whomever he wishes, both the condition and *waqf* are void. But if he lays a condition that he may include those who would be born in future among the beneficiaries, it is valid, irrespective of whether the *waqf* is in favor of his own children or those of someone else. But if he lays a condition to transfer the usufruct of the *waqf* property to those who would be born later on, the condition is invalid and the *waqf* becomes void, as it is a condition contrary to the purpose of *waqf*. Some legists said: If he makes a *waqf* in favor of his minor children, it is valid for him to include others among beneficiaries of the proceeds of the *waqf*, though he has not laid such a condition when creating the *waqf*, but this view is not so widely-held by most of the legists.

Delivery of possession is considered binding when fulfilled in respect of the first beneficiaries, and it is not binding in respect of other parties of the *waqf*. If one creates a *waqf* in favor of the

poor or *fuqahā`*, he is required to assign a *qayyim* (custodian) to take possession of the donated property. If a *wāqif* makes a *waqf* for public benefit (*maṣlaḥah*), his creating the *waqf* is sufficient to make it binding without the necessity of acceptance, and taking possession of the donated property (benefit) will be fulfilled by the *mutawalli*. If one makes a *waqf* for a mosque, the *waqf* will not become binding until prayers are offered in it even by one person. And if he makes a *waqf* for a graveyard, it will not become binding until someone is buried in the donated plot of land. If he dedicates his property for prayers in case of a mosque, or burial in case of a graveyard without uttering the word of creating a *waqf*, it will be considered among his possessed properties. And so also is the rule when he dedicates his property by way of *waqf* without delivering possession, it will not become binding as a *waqf* and he is entitled to revoke it.

Supplementary Issues

1. After creating a *waqf*, the ownership of the *wāqif* ceases and it is transferred from him to the beneficiaries, as the usufruct of the property is still in the *waqf*, and preventing the sale of the *waqf* property does not contradict it, as in the case of a mother of children (bondwoman).

2. If one makes a *waqf* of a captive slave, his maintenance will be provided from his earning, irrespective of whether he has stipulated this or not. If he be unable to earn his living, the beneficiaries will be responsible for provision of his maintenance.

3. If one creates a *waqf* with the only intention of seeking God's good-pleasure (*fī-sabīl Allāh*), it will be applied to purposes where spiritual reward (*thawāb*) can be acquired such as warriors, *ḥajj*, *`umrah* (shorter pilgrimage), or constructing mosques or bridges. So also, when he says: *Fī sabīl-Allāh* (for seeking God's good-pleasure), or for acquiring spiritual reward (*thawāb*), or for *khayr* (goodness of people), it becomes operative and the proceeds of the *waqf* (benefit) should not be divided into three thirds.

4. If he creates a *waqf* in favor of the sons of his sons, this will include children of sons and children of daughters, males and females, and they will equally share the benefit. If he says: I make a *waqf* for those children having relation to me, the children of daughters are not included. If one makes a *waqf* in favor of his children, this will include his grandchildren but not the son's children, and some legists said: The word 'children' (*awlād*) includes both male and female grandchildren. The first view is more correct, as a grandchild (*walad al-walad*) is not understood of the word 'children'. But if he says: for my children and my grandchildren, this will include both the sexes of children and grandchildren.

5. Dilapidation of the mosque, or the village or locale of the mosque made as *waqf*, cannot transfer its ownership to the possession of the *wāqif*, and the courtyard is included in the *waqf*. If a flood washes away a corpse of a dead person until all hope for finding it is lost, the shroud (*kafan*) will be considered among the heritage and will return to the heirs.

6. If the house made as *waqf* dilapidates, the courtyard will not be excluded from the *waqf*, and its sale is not valid. If the beneficiaries contend in argument regarding this house, in a way that its dilapidation is feared, this is considered a justifying cause to sell it. If neither quarrel falls out not its (house) dilapidation is feared, but rather its sale be of more benefit for them (beneficiaries), its sale will be valid.

7. If one makes a *waqf* in favor of the poor, it will be applied to the poor nationals of the country in which he lives and all those residing in it. So also, if he makes a *waqf* in favor of the Alavites. Also in case he creates *waqf* for dispersed children of a father, it will be applied to those who are present in the locality where *waqf* is created, with no need to go after the non-existent ones to avoid its hardship and difficulty. It is not permissible for the beneficiary (*mawqūf `alayh*) to copulate with the bondmaid made as *waqf* since he is not entitled individually to own her. If he has sexual intercourse with her and causes her to beget a child, the issue (child) will be free and the copulater is liable to nothing since he cannot impose fine on himself. Will she be considered a mother of son (his

legitimate wife)? Some legists said: Yes, and she will be manumitted with his death, with taking his value from his undivided heritage in favor of his heirs among his descendants, but a difference of opinion is there among the legists. It is permissible to give the *mawqūf* bondmaid in marriage, on conditions that her dowry (*mahr*) be delivered to the custodians (*arbāb*) of the *waqf* since it is an interest (proceeds) like a house rent. If a freeman copulates with her by mistake (*shubhah*), the child is considered free, and the copulater will be required to pay his price to the beneficiaries. But if the *wāqif* has sexual intercourse with her, he will be treated as an alien to her.

KITĀB AL-ṢADAQĀT
(CHARITIES)

The charity (*ṣadaqah*) is a contract requiring declaration (*ījāb*), acceptance and delivery of possession. If the recipient takes delivery of it (*ṣadaqah*) without the donator's consent, the authority over the property will not transfer to him. The intention to seek God's good-pleasure (*niyyat al-qurbah*) is a necessary condition for creating the charity. After taking delivery of the property donated, it will not be permissible for the donator to go back on his word as per a more correct opinion, as the purpose intended by it being acquiring spiritual reward which is achieved. Hence it is considered as a compensated charity.

The obligatory charity is forbidden for Banū-Hāshim, except when paid by a Hāshimite or other than him in case of exigency, and there is no objection to the *mandūb* charity for them.

Subsidiary Issues

1. It is not permissible for everyone to reclaim the charity from its recipient after taking delivery of it, irrespective of whether he has been recompensed for it or not, and whether he has delivered it to a uterine relation or to an alien, as per a more correct opinion.

2. It is permissible to give *ṣadaqah* to a non-Muslim such as a *dhimmī*, in accordance with this declaration of God Almighty:

"God does not forbid you respecting those who have not waged war against you on account of your religion and have not driven you forth from your homes, that you show them kindness and deal with them justly …" (60: 8)

3. The charity given secretly is more meritorious than that one paid openly, except if it is feared that the giver be accused of leaving out benevolence and kindness, when he be obliged to

make it known (pay it openly) to ward off any charge that may be leveled against him.

KITĀB AL-SUKNĀ WA'L-ḤABS

Suknā (inhabiting): is a contract requiring declaration, acceptance and delivery of possession. It signifies giving authority over usufruct and making use of the property (real estate) while its ownership remains for the owner. The words used for creating it differ according to the purposes intended by the owner, for example: if it is connected to life, the word, '*`umra*' will be used for creating it, and for inhabiting the word '*suknā*' is used. If it be connected to a certain period the word '*ruqbā*' will be used, which is derived from either '*irtiqāb*' (anticipation) or from neck of the property.

The word used for the contract is: '*askantuka*' (I make you dwell), or '*a`martuka*' or '*arqabtuka*' (or any other words indicating the same meaning) this house or this land or this dwelling-place, 'for your life' or 'my life' or for a certain period determined by the owner. After uttering these words the contract becomes binding through taking delivery of the thing mentioned in the contract. Some other legists said: It will not become binding, and others observed: It becomes binding if his intention be seeking God's good-pleasure (*qurbah*). The first opinion is more preponderant among the legists.

If the owner says: "You are entitled to dwell this house until as long as you are alive or present (*mā baqīt* or *mā ḥayīyt*)," it will be valid, and the house will return to the owner who made the latter dwell it after the dweller's death, as per a more correct opinion. If he says: "When you die it will return to me" it will return definitely. If he says: "*A`martuka* (I make you inhabit) this house, for you and your descendants," it will be *`umra* (populating) and authority over the house will not transfer to the *mu`mar*, and it will be as if he has not mentioned the descendants (as per a more correct opinion). If he specifies a certain period for dwelling, it will be binding through taking delivery of the house, and it will not be permissible for him to revoke the contract but only after expiry of this period. So also,

if he makes it for all lifetime of the owner, it will not return even when the *mu`mar* dies, whose properties will be transferred to his heirs even with the death of the owner.

If he does not specify the period for inhabiting the house, he will be entitled to revoke it whenever he wishes. It is valid to populate all the real estates that are liable to be made as *waqf*, like a house or a slave or furniture. It is not invalidated through sale, but the *mu`mar* (inhabitant) should fulfill the conditions laid for him in the contract.

Iṭlāq (generality) in creating the dwelling (*suknā*) requires from the second party to inhabit the house himself with his wife and children, and it is not permissible for him to make other than these to share the house with him except when this be stipulated before in the contract. Also it is not permissible for him to let the house for rent, nor to let any other person to dwell it except with prior permission of the lodger.

If one detains his horse for God's sake (*fī sabīl Allāh*), or his slave at the service of a house or a mosque, it will be binding, and changing his decision (intention) will be impermissible for him as long as the thing dedicated as *waqf* (horse or slave) survives and be present. But if he detains (*ḥabasa*) something for someone else without specifying any time, and he (detainer) dies, the detained thing will become a legacy. Also if he specifies a certain period which expires, the detained thing will be an inheritance for the detainer's heirs.

WILL AND BEQUEST
(KITĀB AL-WAṢĀYĀ)

It includes the following parts

FIRST: THE WILL (*WAṣIYYAH*)

It is a gift of property or its benefit subject to the death of the testator. A will is valid irrespective of its being made in a state of health or during the last illness. It requires a testator (*mūṣī*), a legatee (*muṣā lahu*), a bequeathed property (*muṣā bihi*) and the pronouncement (*ṣīghah*) of bequest.

A will requires declaration (*ījāb*) and acceptance (*qabūl*). *ījāb*: is every word or statement conveying the intention of gratuitous transfer (of property or its benefit) after the death of the testator, such as when one says: "Give this thing to so-and-so after my death" or "Hand it over to so-and-so after my death." If a testator says: "I make a will in favor of so-and-so," the words indicate testamentary intention, without needing the condition 'after death' to be specified. But if he says: (addressing an executor of will): "Give it" or: "Hand it over to so-and-so" or when he says: "I make so-and-so the owner of such and such a thing" it is necessary to specify the condition 'after death', because without this consideration his words do not prove the intention of making a will.

By uttering these words the ownership of the property will transfer to the legatee after the death of the testator, and acceptance by the legatee, but it will not transfer by death only without the acceptance as per a more preponderant view. If the legatee accepts the bequest during the life of the testator, he is entitled to decline it after his death (testator). Also if he refuses the bequest during the testator's life, he is entitled to accept it after his death, because his acceptance and refusal have no effect during the life of the testator, for ownership does not materialize during such time. It is valid if he accepts it before his death (testator), but to accept it after his death is more binding, even if the acceptance is delayed until passage of a

long time after death, unless he refuses it. If the legatee refuses after death and before acceptance, the will will become void, and so also when he refuses it after taking delivery of it (property) and before the acceptance. If he declines it after death and acceptance but before taking delivery (*qabḍ*) of it, some legists said: it will become void, and others believe in its non-voidness which is more predominant among the legists.

But if he accepts and takes delivery of it and then refuses it, it will not become void according to a unanimous opinion of all schools of thought, as the ownership materializes and is established in this case. If he refuses a part of the bequest and accepts a part of it, only the part accepted by him will be valid. If the legatee dies before acceptance, his heirs will take place and play his role in accepting (or rejecting) the bequest.

A will made for a non-benevolent cause or an offence is not valid, hence if one makes a will to spend his wealth after his death on churches or synagogues, or on inscription of what is called nowadays a Torah or Bible (perverted one) or to support a tyrant, his will will become void. A will is a valid contract if made by the testator as long as he is alive, whether it be regarding some property or *wilāyah* (guardianship). Revocation of a will by the testator may take place by a word or a deed incompatible to the will, such as one's bequeathing an article and then consuming, gifting or selling it, or charging someone with selling it, the cases which are considered a revocation to the will. Also if the testator disposes of the property in a way that the property becomes completely different of what it used to be before, this will entail voidness of the will. So also, if he bequeaths some food and then he grinds it, or some flour and he kneads or bakes it, or bequeaths some oil and then mixes it with some better oil or some food and blends it then with another kind of food so as it be indiscriminate. But if he bequeaths some bread and then breaks it into fragments or crumbs, it is not considered a revocation.

SECOND: THE TESTATOR

The essential conditions that to be fulfilled by a testator are full sanity (maturity) and freewill. Hence the will of a lunatic in the

state of insanity and the will of an undiscerning child under ten years are not valid. The schools differ regarding the will of a discerning child (*mumayyiz*), but a more predominant view among them is: The will of a child of ten complete years is valid if it be made for a good and benevolent cause, such as to make it in favor of his relatives or alike, and not otherwise. Some legists say: The will of a child of eight years is valid, but this opinion is not predominant among the legists.

If a testator inflicts injury upon himself with an intention of suicide and then makes a will and dies, his will is void. But if he first makes a will and then commits suicide, his will is valid. The will made by a guardian on behalf of the children under his wardship is not valid except if made by the father, or paternal grandfather. Also the will made by the mother on behalf of her children or her guardianship over them is not valid. If she bequeaths in their favor some assets and appoints an executor, the bequest is only valid up to one-third of the legacy, and it is operational only after the payment of the debts of the decedent or his release from them.

THIRD: THE LEGACY

1. Will subject

It is either a property (in kind) or benefit. It is necessary that the bequest be capable of being owned, such as a property, house and the benefits ensuing from them. Therefore the bequest of a thing which cannot be owned customarily like anything of no benefit such as insects, or husk or shell of nut, or legally e.g. wine, swine (or a wild dog) where the testator is a Muslim, is not valid, because transfer of ownership is implicit in the concept of bequest and when it is not present there remains no subject for the bequest. A gratuitous bequest is operative only up to one-third of the testator's estate in the event of having an heir irrespective of the bequest being made in illness or good health. As per consensus, any excess over one-third requires permission of the heir. Therefore if there be several heirs and some of them give permission and others refuse, the will will be executed by disposition of the excess over one-third from the share of the willing heirs. The

permission of an heir will not become effective unless he be a sane and mature adult, and it is operational only after death of the testator. There are two different opinions regarding its effectiveness before death, the most preponderant of which being: it is binding upon the heir. If it becomes operational after death it will be considered a permission to the deed of the testator, not as a gift from the heir to the legatee. Accordingly, it neither requires possession nor other rules applicable to a gift apply to it.

The will made by the testator should be acted upon when it contains nothing illegal or contradictory to the Islāmic Law (Sharī`ah). The one-third will be determined at the time of the testator's death, not at the time of the distribution of the estate. If the testator bequeaths something while being well-off in time of making the will and he turns poor at time of death, no consideration is to be given to his affluence. So also, if he be poor at time of making the will and he becomes affluent at time of death, what will be considered is the time of his affluence. If one makes a will and then be killed by a murderer or injured by someone, his will will be valid and should be taken out of the one-third of his legacy after payment of his *diyah* (blood-money) and indemnity for his wounds.

If one makes a will in favor of a specific person charging him with speculation (*muḍārabah*) with all of his legacy or a part of it on condition that the executor distributes the proceeds of this speculation equally between him and his (testator) heirs, it will be valid and binding. It may be stipulated that the bequeathed amount be equivalent to his third of the legacy or less than it. The former view is confirmed by many traditions reported from the Infallible Imāms (A). If the decedent is liable for payment of any *wājib* expiation (*kaffārah*) like payment of *zakāt* or to perform the compulsory *ḥajj* or other *wājib* duties of monetary nature, these will be taken from his whole estate, not from a third of it, irrespective of his having willed to this effect or not, because these duties are related directly to God (*ḥaqq Allāh*), and as mentioned in the traditions have greater right to be fulfilled. If the decedent has made a provision for their fulfillment in his will and has determined their expenses from a third of his estate, his word will be acted upon, in consideration

of the heirs. If the bequeathable third is insufficient for meeting all the provisions or if he makes many wills exceeding his bequeathable third, and the heirs do not permit the excess, the *wājib* provisions will be given precedence from his whole estate, and the other (non-*wājib*) provisions will be met from the third. If the wills are of equal weight and be non-*wājib* provisions, the precedence will be given to the first and then the second until covering all the third. If one bequeaths a third in favor of a person, one-fourth in favor of another, and one-sixth for another one but the heirs do not permit, then only the first one will be given the amount bequeathed for him and the other wills will be considered void. If a testator bequeaths his third in favor of a person, and then bequeaths the same third in favor of another, the whole amount will be given to the second, because the second will implies abandonment of the earlier one. If the first person is not distinguished or known, lots should be drawn to determine which one is to be given the third.

If a testator bequeaths a specific thing in favor of a person, and then bequeaths the same thing in favor of another, while that thing exceeds his bequeathable third and the heirs do not permit the excess, the amount will be distributed between the two up to the one-third. If he bequeaths a specific thing in favor of a person, and then bequeaths another thing to another one, the precedence will be given to the first one and then the second will be given his diminished share.

If he bequeaths half of his whole estate (wealth) in favor of a person and the heirs permit but then claim: We thought it to be little, no consideration is to be given to their claim and they should make an oath for the excess, with a difference of opinion among the legists. The thing bequeathed when being something specific and its value be to the extent of a third of the testator's assets, the legatee will become its owner on the testator's death, and the heirs are not entitled to object. If the testator bequeaths one-third of his assets jointly, the legatee will be entitled to take one-third of every thing bequeathed. But if the testator has assets not present or debts (receivable) and the subject of bequest be more than one-third of what the heirs possess, the heirs are entitled to resist the legatee and stop him from taking more than a third of the total estate into possession, especially

where the assets not present are in danger of perishing or when it is infeasible to reclaim them. When the thing not present earlier turns up, the legatee is entitled to the remaining part of the bequest to the extent of a third of the entire present assets. But if nothing turns up, the rest of the legacy is for the heirs.

If the subject of bequest includes lawful (*ḥalāl*) and unlawful provisions, the testator's intention has to be considered to the lawful purpose in view of the Muslim's abstaining from unlawful and prohibited practices as prescribed by Islām, such as when he bequeaths one lute of his lutes (when he possesses a musical instrument [lute], a bow, a stick and a ceiling wood).

The schools differ concerning a testator who bequeaths the only lute he owns, some believing in invalidity of this will and others say: it is valid and its prohibition aspect vanishes. But if the thing bequeathed be of no usufruct but an unlawful (*ḥarām*) one, the will will become void. To bequeath domestic (owned) dogs like a hunting dog, livestock a wall and plants, is valid.

2. The Ambiguous Will

If one bequeaths a part (a portion) of his assets, there are two opinions regarding it, the most reliable of which is one-tenth, and in another narration it is one-seventh of the third. If it be a share, it will be one-eighth, and if it be a thing, it will be one-sixth. If one bequeaths his assets in favor of several purposes and the executor forgets one of them, he is entitled to spend it on benevolent and charitable causes. Some legists said: it will be turned into an inheritance. If he bequeaths a specific sword (to be given to someone) while it being inside its sheath, both the sheath and ornament (*ḥilyah*) will be included in the will. So also, if he bequeaths a trunk with clothes inside it, or a ship with commodities aboard it, or a case with cloth inside it, the receptacle and its contents will be included in the will.

If a testator makes a will to exclude some of his children from the beneficiaries of his heritage, it is invalid. There are two views regarding whether his pronouncing the exclusion is sufficient for abolition, one saying it is invalid, and the other considering it executable as the case where one bequeaths all

his assets in favor of his family and kins except his sons, when it should be executed from his bequeathable third and the executor's share be taken from the remainder, according to the obligatory duty (*farīḍah*).

If a testator uses vague words in his will for which the law has no interpretation, his heirs will be referred to determine their meaning. Thus if he says: "Give him (so-and-so) a share from my property," or "a part" or "a portion of it" or "a little of it" or "much of it" or similar terms which do not denote any fixed quantity either lexically, or legally or customarily, the heirs will give anything considered as having value. Some legists observed: If he says: "Give him too much or abundantly", he should be given 80 dirhams as in the case of a *nadhr* (vow). Others said: This interpretation is related solely to *nadhr* restrictively to place of transference. It is more meritorious to bequeath less than one-third of the assets, such as to bequeath one-fourth is better than a third and one-fifth is even preferable to one-fourth.

A Subsidiary Issue

If the legatee specifies something claiming that the testator has meant it by the words he used when making the will, but the testator denies this, the heir's claim will be approved after his making an oath, if he claims his (testator's) being aware of this matter. Otherwise, he is not required to take an oath.

Rules of Will

If a testator makes many wills conflicting to one another (such as when he says: "One-third of my estate is for Zayd", and says later, "One-third is for Khālid") the latter will will be acted upon, and the former one is ignored. The schools concur regarding the validity of a will made in favor of a fetus, provided it is born alive. Bequest is similar to inheritance and there is consensus (*ijmā`*) that afterborn children inherit and have capacity to own bequests as well. It is necessary for the fetus to exist at the time of making the will, and knowledge of its existence is acquired if its mother has a husband capable of intercourse with her and it is born alive within a period of less

than six months from the date of the bequest, when the will in its favor will be valid. But if it is born after six months or more, e.g. ten months from the date of the bequest, it will not receive anything from the legacy because of the possibility of its being conceived after the time of the bequest. This opinion is based on the invalidity of a bequest in favor of one not in existence.

If a person makes a will in favor of a fetus and then twins, a boy and a girl, are born, the legacy will be distributed between them equally.

If he says when making the will: If she gives birth to a male, then give it such and such of my assets (after death), and if it be a female give it such and such and then twins, a boy and a girl, are born, nothing will be given to them.

It is valid to bequeath what is conceived by a bondwoman or borne by a tree. The schools concur regarding the validity of a bequest of benefit, like the lease of a house, the right to reside in it, an orchard's produce, a goat's milk, a slave's service, and other such benefits which accrue in course of time, irrespective of the testator's restricting the benefit to a specific period or his bequeathing it perpetually.

If the bequest of the benefit is not perpetual, the calculation of its value is easy because the article or property will retain its own value after subtracting the value of the benefit. Thus it will be deducted from a third of the estate if it can bear it; otherwise, the legatee will be entitled to the benefit to the extent of a third of the legacy. If he bequeaths his slave's service for a specific period, his (slave's) maintenance will be provided by the heirs because it is subordinate to the estate, and the legatee will be entitled to dispose of the benefit. Further the heirs will be entitled to disposition of the captive slave, such as selling or manumitting or other dispositions, and by this the legatee's right does not become void. If a testator bequeaths a specific thing to every heir equal to each heir's share of the legacy, the will is valid and it will be executed if there is no favoritism involved, because there is no clash of interests of the heirs, and the heirs will have the option to choose whatever they like of the legacy. But if he says: "Give so and so my

bow", and he has only one bow, then his will will be executed in that very bow, whatever its nature may be.

Probating a Will

The schools concur that a will concerning a property or its benefit can be proved and established by testimony of two males, or a male along with two female witnesses from among *`ādil* (just) Muslims. The testimony of Ahl al-Kitāb is valid and accepted in the case of a will, only when necessary and when no Muslim *`ādil* is available, in particular. Ownership of a property is proved by the evidence of one witness along with an oath, or one male witness along with two females.

The right to one-fourth of a bequeathed property is proved by the evidence of a single woman; to a half by the evidence of two women, to three-fourths by the evidence of three women, and to the whole property by four women witnesses, with *`adālah* being essential in all the cases, according to some authentic traditions reported from Ahl al-Bayt (A) in this regard.

This was as regards the bequest of a property or its benefit. Concerning the nomination of an executor, it is not proved except by the evidence of two male *`ādil* Muslims. Hence, as per consensus, the evidence of women (or Ahl al-Kitāb) both individually and jointly with men, or a single male witness along with an oath, will not be accepted.

If a *waṣī* (executor) makes an acknowledgment of the decedent's liability regarding some property or debt, his acknowledgment is not executable against the heirs, minor or major, because it is regarding another's dues. If the issue is raised in the court, the *waṣī* will be considered a witness, requiring to fulfill all the qualifications for a competent witness, provided he is not himself a party to the case. If he be charged with extracting or clearing a certain amount (*māl*) and he gives witness in favor of the decedent for what that amount of fund can bring forth from the bequeathable third, his evidence will not be accepted.

FOURTH: THE LEGATEE

The essential condition for validity of the will is existence of the legatee, as it is not valid to bequeath some property or its benefit in favor of a non-existent or absent person. Hence it is not valid to make a will in favor of a deceased or one supposed or thought to be existent and he comes out to be dead at the time of making the will. So also, if a testator bequeaths his properties in favor of an unborn fetus which is still conceived by a certain woman, or for the present children of so-and-so person (not present).

It is valid to make a will in favor of a foreigner (non-relative), or an heir, or a *dhimmī* (a non-Muslim living under protection of an Islāmic state) even if he has no kinship to the testator. Some scholars believe in non-permissibility of such a will, distinguishing the permissibility of making the will for uterine relations solely. The former opinion is more preponderant. There is disagreement among the schools of thought regarding making a will in favor of a *ḥarbī* (a non-Muslim who does not pay *jizyah*), but the most predominant view is non-validity of such a will.

To make a will in favor of a captive slave owned by a non-relative, or his sustainer, or his conditional *mukātab* or that one who has not redeemed or discharged anything of the bond of his *kitābah* even when permission from his owner be taken, is not valid. But to make a will in favor of the testator's captive slave, his sustainer, his *mukātab* and his children's mother, is valid.

If a testator bequeaths his assets in favor of the mother of his children, his will is valid and enforceable from a third of his estate. Concerning her setting free from the bequest or from her son's share there are two views: one saying that she is set free from her son's share, and she is entitled to make a will. The other opinion says: She is manumitted from the bequest, because no inheritance is there but after making a will.

Generality (*iṭlāq*) in making a will requires distribution of the bequeathed property or benefits equally among the heirs. If one bequeaths his property in favor of his children who include

males and females, the legacy will be distributed among them by equal shares. Likewise, if a testator bequeaths his assets in favor of maternal uncles and aunts, or paternal uncles and aunts, or his maternal uncles and paternal uncles, whereat the legacy will be distributed among them equally as per a more correct opinion. But if he (testator) makes favoritism to one or some of them in particular, his will is valid and should be acted upon. When the bequest is made in favor of consanguine relations of the testator, the precedence is to be given to those known of having uterine kinship to him as per the customary usage (*`urf*). Some schools observed: Precedence is given to everyone related to him through lineage, up to his last father and mother through bond of Islām, but no evidence is there to probate and establish this view.

If a testator makes a will in favor of his people (*qawm*), his legacy will be distributed among speakers of his mother tongue. If he bequeaths his assets in favor of his household, it will include the children, fathers and grandfathers altogether. If he says: "Give my assets (after my death) to my clan (tribe)," his legacy will be given to the closest ones to him from among his kins through lineage (*nasab*). If he bequeaths it for his neighbors, his legacy will be given to those inhabiting the houses adjacent to his house up to a distance of 40 cubits from every side.

It is valid to make a will in favor of a fetus whose existence is certain and surely known to be there, and it will be established more when it is born alive. But if it is born dead, the will becomes void, and if it is born alive and dies then the bequest will be given to its heirs. If a Muslim testator bequeaths his assets in favor of the poor (in general), his legacy will be given to the poor among followers of his creed (Muslims). If the testator be a disbeliever, his bequest will be given to disbelievers among inhabitants of his region. If the legatee dies before the testator, the will becomes void. Some legists said: It becomes void when the testator revokes it, irrespective of whether his revoking the will be before the legatee's death or after that. If the testator does not revoke the will, the heirs of the legatee will take his place and play his role in accepting or rejecting the bequest. Thus if they do not reject the bequest, the

legacy will be solely their property, which they will distribute between themselves in the form of an inheritance, without it being incumbent upon them to pay from this bequest the debts of the decedent or to comply with his will in regard to the bequest. If the legatee dies and leaves no heir to inherit him, the bequest will be transferred to the testator's heirs. If the testator says: Give so-and-so (person) such and such thing without specifying the cause or purpose for which the bequest is made, it will be *wājib* to give the legatee the property bequeathed in his favor to dispose of it in whatever way he desires.

If a testator makes a will to expend his wealth for public benefit to seek God's good-pleasure, it is valid and it should be spent on purposes in which spiritual reward can be acquired (such as for the poor and destitute, or mosques or schools … etc). Some legists believe in restricting the expenditure on warriors. The former view is more correct. It is *mustaḥabb* (recommended) to make the will in favor of relations and kins, irrespective of whether they be heirs or not. If one bequeaths his wealth in favor of his nearer relations, his legacy will be distributed among his consanguine kins and residuaries according to the categories of his inheritance, and no one is to be given anything except after giving the nearer in kinship his/her due share.

FIFTH: APPOINTMENT OF AN EXECUTOR (*WIṢĀYAH*)

Al-Wiṣāyah is an undertaking by a person to execute the will of another after his death, such as clearing his debts, pursuing his debtors, care and maintenance of his children, and other such functions. Requirements for an executor (*waṣī*) are:

1. He should be a *mukallaf*, i.e. a sane adult, since a lunatic and a minor do not have authority over themselves, so there is no question of their exercising authority over the affairs of others. Concerning *`adālah* as a condition to be fulfilled by the *waṣī* there are two opinions: One saying it is *wājib* that the *waṣī* be an *`ādil* person. The other view, which is more preponderant among the schools of law says: It is sufficient that he be trustworthy and truthful, because *`adālah* is a means here and not an end, and when the executor strives to fulfill the provisions of the will, as is *wājib* for him, the purpose is

achieved. Most of the Sunni legists believe in *`adālah* to be an essential condition to be fulfilled by the *waṣī*, arguing that *wiṣāyah* is entrusting property of children or their alike among the poor or those who are not observed by owners of wealth and properties, to someone who is supposed to be just in disposition of this property. Hence a dishonest (*fāsiq*) person is not competent to be entrusted the property of others, though he may be qualified to act as a proxy (*wakīl*). If one appoints an *`ādil* person as a *waṣī* to execute his will, but he turns *fāsiq* after the testator's death, the will becomes void as per a more predominant view among the legists, because confidence in him accrued from the supposition that he be honest and truthful, and when he proves to be deprived of such attribute, his *wiṣāyah* will be void and the judge can depose him and appoint another person to act as a *waṣī*.

To appoint a captive slave as executor is not valid except with permission of his master (*mawlā*), since his benefits (services) are possessed by his *mawlā*. Also it is not valid for a child to act as an executor individually, though valid if he acts together with an adult, but the minor is not entitled to dispose the property until attaining majority, when he will join him in its execution. If a testator appoints two persons to execute his will, one being a minor, the adult will execute the will individually until the minor attains majority, and then he will join him in its execution, while the adult will not be entitled to act individually. If the minor dies or loses consciousness, the adult will be entitled to execute the will individually without being objected by the judge since the deceased has appointed him an executor for his will. If the adult executes the will and the minor attains majority, his acts of execution of the will are valid and enforceable unless he has done something contradicting the requirements of the will.

The other condition that to be fulfilled by a *waṣī* is his being a Muslim. Thus it is not valid for a Muslim to appoint a non-Muslim as executor even if he be a uterine relation. But it is permissible when a non-Muslim appoints a non-Muslim as executor. It is valid to appoint a woman as executor when she fulfils all the requirements necessary for a *waṣī*. A testator is entitled to appoint two (or more) executors. If he categorically

mentions that each one of them is independent in his dispositions, his word will be acted upon. Similarly, if he categorically mentions that both should act together, then neither of them will have independence of individual action. If he does not specify anything concerning their acting individually or jointly, both will have no power to act individually. So if they quarrel and disagree, the judge will compel them to agreement, and if he is unable to do so, he will replace both of them. Some legists said: If they quarrel and each one of them refuses the acting individually of his counterpart, each of the two is free to act individually concerning the dispositions and things the doing of which is inevitable and any delay in it is harmful such as: shrouding of the deceased, buying necessary food and clothing for the minor heirs (orphans), and pursual of legal proceedings initiated for or against the decedent, and other things of the kind. It is not permissible for them to divide the bequeathed property between them to dispose of it. If one of the two executors becomes sick or anything occurs to him which annuls his appointment as an executor, the judge will appoint a trustworthy person as his counterpart, because the testator was not satisfied with the individual supervision of the surviving executor. But if one of them dies or turns dishonest, there will be no need to appoint a new co-executor to act along the surviving one who will be entitled to act individually, because the judge has no authority where an executor is present, but there is a difference of opinion regarding this.

If he categorically mentions that both the executors should act together and each one can act individually, the acts of execution of the will by each one of them are valid and enforceable even if he acts individually. Also it will be permissible for them to divide the bequeathed property equally between them, and each one of them disposes of his share independently of his co-executor, and this is permissible for each of them before the division.

The executor is entitled to reject his appointment by announcing his refusal and informing the testator as long as he is alive. If the testator dies before the executor's rejection to his appointment as *waṣī*, or after the refusal by the *waṣī* but before

being informed by the executor of the rejection, this refusal is not accepted and the will will be binding upon the testator.

If the executor fails or be incapable of executing the will for any reason, the judge can appoint another person to cooperate with him. If he breaches the conditions of *wiṣāyah* or his condition changes in a manner annulling his appointment, it will be *wājib* upon the judge to remove him and appoint a trustworthy capable person to execute the will in place of him. If anything suffers damage at the hands of the *waṣī*, he is not liable for it unless he has violated or neglected his duty, because the *waṣī* is a trustee.

If the *waṣī* has some claim from the decedent, he is entitled to redeem it from the property or wealth committed to him without any need to take permission from the judge, if he has no argument. Some legists observed: It is permissible for him to do so in any situation. There is a difference of opinion regarding the buying by the *waṣī* of something from the bequest for himself from himself (as a *waṣī*), and the most preponderant view says: It is valid for him to do so if he observes equity (*`adl*) in pricing the thing he purchases. An executor is not entitled to hand over the job of executing the will to another without the prior permission of the testator. But if the testator neither gives him (*waṣī*) permission nor prevents him from appointing another *waṣī*, there are two views in this regard the more preponderant of which is non-permissibility of such act with handing over the job of appointing a *waṣī* to the judge. So also, if a person dies intestate, the judge will appoint an executor for him. But if it be not possible to refer to a judge, a reliable and trustworthy person from among Muslims may take charge of the affairs of his estate, taking care to do what is good and beneficial, especially in matters which may not be delayed. It is the judge's duty to later on endorse these dispositions, and he may not invalidate them, but there is a difference of opinion among the legists regarding this.

If a testator appoints a foreigner (non-relative) as a *waṣī* to take charge of the affairs and bequest of his children while having an alive father, his appointment of such a *waṣī* is not valid and the orphan's grandfather will be entitled to *wilāyah* over affairs

of the children (grandsons) not the *waṣī*. Some legists observed: This *wiṣāyah* is valid and the executor is entitled to a third of the legacy and to take care of the matters that may not be delayed like payment of the testator's debts and clear the claims against him.

The testator should specify the subject of will (*mūṣā bihi*), and when he appoints a *waṣī* to take charge of that subject, the *waṣī* will exercise his authority over that thing only and he is not entitled to dispose of any other thing, acting exactly like a proxy (*wakīl*).

Three Subsidiary Issues

1. The requirements considered for a *waṣī* are observed at time of making the will, and some legists said: They are considered at the time of the testator's death. If a minor is appointed as a *waṣī* (executor) and he attains majority before the testator's death, his acts of execution of the will are valid and enforceable. The same is true regarding freedom in dispositions and sanity, i.e. if an incapable *waṣī* becomes capable of executing the will or an insane one retains his sanity before the testator's death, appointing him as a *waṣī* is valid and his acts are enforceable.

2. It is valid for a testator to appoint an executor to take charge of the affairs of those over whom he has legal guardianship (*wilāyah*) such as the children how low so ever on condition they be minor. If he appoints a *waṣī* to exercise authority over the mature sane adults, or over his father or relatives, the will (*wiṣāyah*) is not operational or executable over them. If one appoints a *waṣī* to take charge of the wealth he left for them (adults, his father and relatives), the *waṣī* will not be entitled to any dispositions even with respect to the third of the legacy, but he is free to act concerning the monetary affairs such as clearance of liabilities (*ḥuqūq*) on behalf of the testator like payment of the debts and due alms.

3. It is permissible for the *waṣī* taking charge of the heritage left for an orphan to take the equivalent wages usually paid for his taking care of the affairs of estate. Some scholars said: He

is entitled to an amount sufficient for him, while others believe it to be the least of the two. The first opinion is more preponderant among the legists.

SIXTH: APPENDICES

It implies several issues:

1. If a testator bequeaths in favor of a foreigner (non-heir) a share of his estate equal to his son's share while he has only one son, his legacy will be distributed between them equally, i.e. the legatee will take half the bequest. If the heir does not give permission, he will be entitled to the whole one-third of the legacy. If the testator has two sons, his bequeathed estate will be distributed between them and the legatee equally, that is: every one will take one-third of it. And if the testator has three sons, one-fourth of the bequest will be given to the legatee. The rule applied here is: The legatee will be considered as one of the heirs if the testator has bequeathed a specific thing to every heir equal to each heir's share of the legacy, without any favoritism. But if their shares differ, the legatee will be given a share equal to the least share bequeathed by the testator, unless he says: "Give him an amount equal to the biggest share of my legacy", where his word should be acted upon.

If the testator says: "Give him (legatee) a share equal to my daughter's share", he will be given half the legacy as per the view held by the Imāmiyyah, if the testator has no heir other than this daughter. If she does not give permission to give the legatee that amount bequeathed by the testator, he will be entitled to only a third of the legacy. If the testator has two daughters, only a third of the legacy will be given to the legatee, as the heritage in our view (Imāmiyyah school) belongs to the two daughters not the other relations, as the legatee is categorized here as a third daughter.

When a testator having three half sisters (maternal) and three half brothers (paternal), bequeaths for a non-heir a share of his estate equal to each heir's share, his will is valid and the legatee should be treated as another heir. Thus one-tenth of the

legacy will be given to the legatee, three-tenth to the three sisters, and six-tenth to the brothers (two-tenth for each one). If the testator has a wife and a daughter and he says: Give him (legatee) a share equal to my daughter's, he will be given seven shares contingent upon the heirs' permission, with giving seven shares to the daughter and two to the wife. If she is given one share out of fifteen, it will be more meritorious. If he has four wives and one daughter and he bequeaths for a non-heir an amount equal to each wife's share, his bequeathed estate will be divided into 32 shares, distributing one-eighth among his four wives equally, with giving the legatee an amount equal to each wife's share, and 27 shares to the daughter.

2. The schools differ concerning a testator who bequeaths for a non-heir his son's share of his legacy, some observing: Such a will is not valid because it is a will with its deserving. Other legists said: The will is valid and executable as if he has bequeathed for him a portion equal to his son's share in the bequest. The second view is more preponderant. If the testator has a murderer son and he bequeaths for a non-heir a part of his legacy equal to his son's share, his will is valid and executable, according to a view held by some legists. Other scholars said: It is not valid since such a son has no share in the legacy, the view which is more predominant.

3. If the testator bequeaths for a non-heir a portion of his estate twice as much as his son's share, his word should be acted upon and the legatee will be given two-fold of the son's share. If he says: "Give him two double of my son's share", the legatee will be given four-fold, and some legists said: he will be given three-fold, a view which is more preponderant, acting in accordance with something determined. So also, is it when he says: "Give him two-fold of double of my son's share".

4. If a testator bequeaths his one-third of the legacy in favor of the poor while having scattered properties, his will is valid and can be executed by distributing the properties he owns in every country among the poor of that country. It is permissible also to expend all his bequeathed assets and properties among the poor inhabiting his country. His whole legacy can be given to the poor present in his country without any need to search for the

absent ones. Is it necessary to give them every three and upwards? Some legists observed: Yes, it is *wājib* to do so, a view which is more correct, acting upon his word. Also if he says: Set free several slaves with my legacy, it will be *wājib* to emancipate three slaves and upwards, unless the one-third of the testator's estate be insufficient for meeting all the expenses required for buying and manumitting these slaves.

5. If a testator bequeaths a specific slave to some one and the whole third of his estate to another one, and then the slave suffers a damage before handing him over to the one for whom he is bequeathed, the other legatee will be entitled to complete the third of estate, after pricing the slave when being in good health, since he has intended to give a complementary gift of a healthy slave. If the bequeathed slave dies before the testator, the will becomes void, and the other legatee will be given the excess of the value of the healthy slave. If his value exhausts the bequeathable third, the will for the second legatee will be void since no subject remains for him.

6. If a testator bequeaths in favor of some person his slave father (legatee), and he accepts the bequest while suffering from an alarming sickness, the bond of his freedom will be taken from the testator's undivided legacy as per a consensus among the schools. This is due to the fact that what is taken from his own estate is considered among his one-third, and in this case he has not taken out anything but he has taken its possession through acceptance and the father is manumitted in consequence of his son's taking possession of him.

7. If a testator bequeaths a house in favor of someone else and it dilapidates and turns to an empty land, when the testator dies, the will will become void, because the house will be reckoned nonexistent as if it has not been there, with a difference of opinion among the schools.

8. If a testator says: "Give such and such an amount of my estate to Zayd and give such and such a thing to the poor", half the legacy will be given to Zayd. Some legists said: One-fourth of the legacy will be given to Zayd. The first view is more predominant among the schools.

POWERS OF DISPOSITION OF AN ILL PERSON

They are of two kinds: Contingent & Completed.

Those dispositions of an ill person that are contingent upon his death are bequests, and the rules applicable to them are those mentioned before concerning valid wills, because there is no difference between a will made during a state of health or illness, provided the ill person is mentally sound and completely conscious and aware.

By an ailing person is meant one whose death follows his illness, in a manner that the illness creates apprehension in the minds of people that his life is at an end. If an ill person disposes his wealth without making it contingent upon his death, it will be seen whether his disposition is for his own use, such as his buying an expensive dress, enjoying food and drink, spending on medicine and for improving his health, where all these dispositions are considered valid. If he disposes it impartially, such as when he sells, rents or exchanges his possessions for a real consideration, these transactions of his are enforceable from his estate and the heirs are not entitled to dispute it because they don't lose anything as its consequence. If he disposes in a complete form and his dispositions include acts of favor, such as when he gives a gift or alms, or relinquishes a debt, or pardons a crime entailing damages, or sells for less than its actual price or buys at a higher price, or creates a *waqf*, or makes other such dispositions which entail financial loss for the heirs, such dispositions will be operational from a third of his estate, which means that its enforcement is delayed until his death. Some legists said: Such dispositions are operational from his undivided estate. If he recovers from his illness, it will be enforceable on his part and his heirs too. But if he dies in his illness and a third of his estate covers his completed gratuitous acts, they are enforceable from the very beginning, and if the third falls short of them, such dispositions in excess of the third are invalid without the heirs' permission. The illnesses that create apprehensions in the minds of people that this person's life is at an end include: tuberculosis, hectic fever, blood ejection, melancholic and bloody tumors, stinking and sebaceous diarrhea or black human excrement which

bubbles up on the ground, and other such diseases. But those sicknesses which are known to be liable to recovery such as one-day fever, toothache, eye pain, slight headache, pustule, tongue scalding, dysentery, septic fever and phlegm swelling, are not considered alarming and the dispositions made by one suffering from them are valid and enforceable as if made by a healthy person.

Some legists observed: The dispositions of an ill person are valid and enforceable irrespective of whether he dies in the illness he suffers from or his sickness be not alarming. But those dispositions made by one in time of shooting at war, or a woman when travailing in childbirth, or in time of waves crowding, are excluded of this rule since the word 'sickness' cannot be used for them.

Some Necessary Points and Issues

1. If the testator's dispositions include acts of favor, such as when he gives a gift or alms, or relinquishes a debt, such dispositions will be operational from a third of his estate if it be sufficient for meeting these provisions. If the third falls short of them, the first among them will be enforced first and so on until exhausting the whole third of his estate, on a first-come-first basis.

2. Dispositions enjoy precedence over a will if one-third of the estate falls short of meeting both of them together, except when the will involves the setting free of a slave, in which case a will takes precedence over completed gifts.

3. If he sells a *kurr* of food whose value is 6 dīnār with a bad one of 3 dīnār, his favoritism here is considered half his legacy and is enforced from a third of his estate. If the one-sixth of the legacy be returned to the heirs, it will be considered as usury. The rule applicable here is a third of the heirs' *kurr* be returned to them and the same to the buyer, when two-thirds of the *kurr* will remain for the heirs whose worth is 2 dīnār, and two-thirds for the buyer valuing 4 dīnār, of which two dīnār which represent the third of six dīnār, will remain as an excess for him.

4. If the ailing testator sells a captive slave who is worth two hundred dīnār for one hundred and receives the price with delivering the slave to the buyer, the deal of sale is bound. If he dies and this sale be rejected by the heirs, only half the sale will be valid in return for the amount paid which represents three shares out of six, with two-sixths through favoritism (*muḥābāt*) which are two shares that represent a third of the six. Thus the sale of five-sixths of the slave will be valid while the sale of the excess which is one-sixth is invalid, and the buyer can claim it from the heirs. The buyer in this case will have the option either to accept the deal or revoke it because of the partiality made in the transaction. If he spends the substitute for the one-sixth, the heirs will have the choice either to reject or accept this transaction, since their right of disposition is restricted to the real estate (*`ayn*).

5. If one during his last illness sets free a bondwoman and then he marries her and consummates marriage with her (has sexual intercourse), both the setting free and marriage contract will be valid, and she will be entitled to inherit from him if her manumission is enforced from his third of estate. If this is not enforced from the third, then the rule applicable to completed dispositions will be applied here.

6. If one in his last illness sets free his captive bondwoman whose value is equal to a third of his legacy and he names the other third as a dowry for her, consummates the marriage with her and dies then, the marriage will be valid but the named dowry (*musammā*) is invalid since it exceeds his one-third in the legacy and she is entitled to inherit from him. There is a difference of opinion among the legists regarding enforcement of *mahr al-mithl* from his legacy, and some of them believe in validity of all his dispositions and acts.

KITĀB AL-NIKĀḤ
(MARRIAGE)

PART ONE: PERMANENT MARRIAGE

1. THE MARRIAGE CONTRACT AND ITS CONDITIONS:

Nikāḥ is recommended (*mustaḥabb*) for every one, men and women, desiring for it, and for that who has no longing for marriage with a difference of opinion among the legists regarding the latter. But its recommendation is more widely-held according to the traditions reported from the Prophet (S): "Get married (*tanākaḥū*) and multiply by generation". And the *ḥadīth*: "The more wicked among your dead are the bachelors (unmarried)". And the *ḥadīth*: "No good is imparted on any man after Islām better than a true Muslim wife who pleases him on seeing her, yields to his wishes on ordering her and observes his nights in her self and his property during his absence".

Seven things are recommended for everyone intending marriage and one thing is *makrūh* for him.

The *mustaḥabb* things are:

- To choose the woman who meet four qualifications: to be of noble birth (her parents be virtuous and faithful), virgin, capable of giving birth and chaste (*`afīfah*).

- Not to be content with prettiness or fortune, as they may not be available.

- To perform two-*rak`ah* prayers followed by the known supplication in this form: "Oh God, I intend to get married, I implore Thee to destine for me a woman who preserved her chastity, be the most precautious in guarding herself and my wealth, the most abundant in livelihood and the greatest in blessing," or any other supplication. Other *mustaḥabb* acts in this regard include calling to witness at the time of concluding

the marriage contract, to make known the marriage contract, to engage the girl before concluding the marriage contract and to consummate the marriage at night. It is *makrūh* (not recommendable) to consummate the marriage when the moon being in the scorpion (star).

2. ETIQUETTE OF SECLUSION WITH A WOMAN

First: It is *mustaḥabb* for one intending to consummate the marriage (enter into his wife) to perform a two-*rak`ah* prayer and recite a certain supplication. Besides when he asks her to approach him, he should demand from her to offer a two-*rak`ah* prayer and recite the supplication known in this regard. Both the husband and wife should be pure and the husband is required to place his hand on his wife's forepart of the head on her approaching him, saying: "O God, I have married her on Your Book, with Your trust I have taken her and I have deemed lawful her vagina with Your words. If You destine for her to conceive of a child (for me), make it an upright Muslim and never create it a partner to Satan". It is recommended too to consummate the marriage (*dukhūl*) at night, to pronounce the name of Allāh on having the sexual intercourse with asking God the Almighty to make me blessed with a righteous male child.

Further, it is *mustaḥabb* to give a banquet during wedding (nuptial) procession, for one day or two days, inviting the believers to it, but responding to this invitation is not *wājib,* rather it is *mustaḥabb*.

For one attending the feast, it is recommended to eat of the food presented even when one observing a recommended fast (*mandūb*). Eating of what is scattered in wedding parties is permissible, but taking such things out of the place is not permitted except with prior permission of those charged with undertaking the wedding ceremonies, either through uttering words or presence of a certifying witness. Can one take the possession of the thing he picks up? The more widely-held view among the legists says that the ownership is achieved through taking.

Second: Copulation is *makrūh* (not recommended) in eight situations: on night of lunar eclipse, day of solar eclipse, at time of meridian (when the sun crosses the meridian line, *zawāl*), at sunset until disappearance of evening twilight, during waning of the moon (*maḥāq*), after daybreak (dawn) until sunrise, at the first night of every month except the month of Ramaḍān, at night of middle of every month, during travel in case no water be available for washing his body (*ghusl*), in time of blowing of black and yellow wind, and the earthquake. It is *makrūh* also to copulate naked and after having a venereal (wet) dream and before performing *ghusl* (ritual bath) or ablution, but no objection is there to copulate several times without performing the ritual bath in between, on condition that the *ghusl* be performed in the end.

Other *makrūh* (reprehensible) practices during copulation include: to copulate while there being someone able to look at them, to look at the woman's vagina in time of copulation (coition) or any other time, to have sexual intercourse while turning the face toward the *qiblah* or turning the back to it, to copulate aboard the ship and to speak during intercourse on other than God's remembrance (invocation).

Third: Supplementary Issues, which are three:

(1) Looking at the woman:

It is permissible for one intending to ask the woman's hand for marriage to look at her face without any need to take her permission. The permissibility to eye the proposed woman is limited to her face and hands (palms), and the man is entitled to retreat and repeat the looking at her for several times and to look at her while standing and walking. There is a tradition (*ḥadīth*) in this regard which permits for the wooer to look at the hair, charms (*maḥāsin*) and body of the woman from over the clothes. Likewise, it is permissible to look at the bondmaid whom one intends to buy, at her hair and charms. It is permissible too to look at Ahl al-Dhimmah (unbelievers enjoying protection of the Islāmic State), and to gaze at their hairs, since they are considered as bondmaids, but such sighting is not permissible if it be for satisfying one's pleasure or *rībah*

(suspicion). It is permissible for a man, be old or young, handsome or ugly, to look at all the body organs of another man (naked) except his privy parts, unless his looking be out of suspicion or pleasure-seeking. So also, is the case in respect of women.

The husband can look at his wife's body (naked), internal and external parts, and the body of prohibited female relations (*maḥārim*), except the privy parts. So also, it is permissible for the wife to look at her husband's body, its internal and external parts except the privy parts. But it is not permissible for any man (adult) to look at a strange (non-relative) woman outright, except when necessary, but he can look at her face and palms of the hands with aversion (*karāhah*) for only one time, and reiterating the glance is not allowed for him. The same rule is applied to the woman.

This looking is permissible only in exigency cases, such as when he intends to give witness against the woman (in the court for instance). In such cases the onlooker should confine his looking at the parts of her body at which the gazing is necessary to designate her disease for curing it and warding off the harm, where no objection there being to look at the privy parts.

Two Subsidiary Issues:

(a) Is it permissible for a castrated person to look at his woman owner or a foreign woman? Some legists said: Yes it is permissible, and others consider this looking as impermissible. The second view is more correct and preponderant taking the generality of prohibition into consideration. By the woman whom the night hands own (*milk al-yamīn*), who is excepted in the Qur`ānic Verse (23:6) it is meant the bondmaids.

(b) It is not permissible for a blind man to listen to the voice of a strange woman since it is regarded as *`awrah* (a shame or a private part). Also it is not permissible for this woman (non-relative) to look at a blind man as he is considered on the same level of one able to see in respect of the prohibition applied to such looking.

(2) Some rules concerning this section:

(a) Regarding the sexual intercourse from the posterior part (anus, *dubur*) there are two different views, one of which is permissibility of such intercourse which is more widely-held among the companions but with strong aversion and repugnance (*karāhah*).

(b) Regarding insulation, i.e. ejaculation of semen outside the vagina during copulation, when having sexual intercourse with a freewoman (not bondmaid) is prohibited if done without being stipulated in the contract of marriage and without taking the wife's permission, according to a view of some legists who obligate payment of ten dīnār as blood-money (*diyah*) for the semen. Other legists observed: It is *makrūh* with obligation of payment of *diyah*, the view which is more predominant among the legists.

(c) It is not permissible for any man to abandon or leave off copulation with his wife for a period extending more than four months.

(d) Consummating the marriage (having sexual intercourse) with a girl before her reaching the age of nine is prohibited (*Muḥarram*). If one goes into (copulates with) such a girl, she will not be considered as *ḥarām* for him, as per the most correct opinion. But if he deprives her of her virginity (*afḍā*, which means making the urethra and menses canals as one way by removing the barrier separating them), she will be considered *ḥarām* for him and she will remain under his support and maintenance.

(e) It is *makrūh* for the traveler to copulate with his wife at night.

(3) Characteristics of the Prophet (S):

They are 15 traits: Of them those ones practiced in regard of marriage (*nikāḥ*) which are:

- exceeding four wives through marriage contract, with observing confidence in his equity among them to the exclusion of the others;

- contracting a marriage by using words indicating donation (*hibah*), where he is not bound to pay any *mahr*, neither before consummation (*dukhūl*) nor after it;

- to take into consideration the option of choice for his wives between submitting to his will and being separated from him;

- forbidding marriage contract with bondmaids,

- prohibiting the exchanging and substituting of his wives (by divorcing one of them and marrying another one instead);

- prohibiting taking more wives, until this habit was abrogated by the Qur`ānic Verse: "O Prophet! surely We have made lawful to you your wives whom you have given their dowries…" (33:50).

The other habits and traits of the Prophet (S) which are outside the realm of marriage include:

- obligation of performing tooth brushing (*saw*), the night prayer (*wart*), sacrificing a sheep (or alike) and keeping awakening all the night for worship and prayers;

- prohibiting (taking of) the obligatory (*wājib*) charities (*ṣadaqah*) for himself and his household (as per the Prophetic *ḥadīth*: "We are a household (*Ahl bayt*) for whom the prescribed charity is *ḥarām*," for safeguarding his noble status against people's filthiness), but there is disagreement regarding the *mandūb* (recommended) charity and his (S) right in it;

- forbidding eye betrayal, that is to make signs with eyes as slandering.

It is permitted for him to continue fasting (*ṣawm*), and he was distinguished with the trait that only his eyes sleep not his heart, and he can see what is behind him in the same way as he sees what is in front of him. These were the most visible and obvious traits and merits that the Prophet (S) enjoyed.

Two Subsidiary Issues

(a) Wives of the Prophet Muhammad (S) are *ḥarām* (forbidden) for other people after his death. Hence in case he (S) dies and

leaves behind a wife with whom he consummated marriage (copulated), this wife would be forbidden (*ḥarām*) for all men as per a unanimous view of all the schools of thought. The same rule is applied to that wife with whom the marriage has not been consummated, as per a more predominant view among the legists.

But if he separates from his wife through revocation of marriage contract or divorce, there is a difference of opinion among the legists and the most predominant view among them says that she becomes *ḥarām* for other men acting in accordance with the customary usage. This prohibition on marrying the Prophet's wives (after his demise) is not due to naming them mothers (of believers) nor due to calling him (S) the father, but it is a particular characteristic for him (S) that his wives be forbidden for others after his death as per the holy verse: "… and it does not behoove you that you should give trouble to the Apostle of Allāh, nor that you should marry his wives after him ever..." (33:53).

(b) Some *fuqahā`* claim that it is not *wājib* upon the Prophet (S) to divide (alternate in nights of sleeping with) between his wives according to Almighty's saying: "You may put off whom you please of them, and you may take to you whom you please…" (33:51). But this claim is weak since this verse implies a probability that may repel its indication, that is: it is probable that the Divine Will in adjournment being pertained to those women who gave (offered) themselves to the Prophet (S), i.e. the *wahaibat*.

PART TWO: THE MARRIAGE CONTRACT

- ITS FORMULA AND RULES

Marriage is performed by the recital of a marriage contract which contains an offer (*ījāb*) made by the bride (or her deputy such as her guardian or agent [*wakīl*]) and a corresponding acceptance by the groom (or his deputy). A mere agreement without the recital of the contract does not amount to marriage.

All the schools of fiqh agree that a marriage contract is valid when recited by the bride by employing the words: *zawwajtu* or *ankaḥtu* (both meaning, I gave in marriage) or the words: *zawwajtuki* or *ankaḥtuki* by her deputy (and there is disagreement regarding the word *matta`tuki*) and accepted by the groom or his deputy with the words, *qabiltu al-tazwīj* (I have accepted the marriage) or *qabiltu al-nikāḥ*, or similar words. It may be concluded by uttering the word *qabiltu* alone. The contract is valid only when recited in the past tense by using words indicating expressly conclusion of contract of marriage in particular to the certain event and guarding against any expression indicating *ibāḥah*. It is valid also when the word used be in the imperative tense belonging to the roots of *al-zawāj* and *al-nikāḥ*, such as: *zawwijnīhā* (marry her to me) and the bride's deputy (*wakīl*) says: *zawwajtuka.* If the word used by the groom be in the future tense like: *atazawwajuki* and the corresponding acceptance by the bride be: *zawwajtuka*, it will be valid but it should be followed by expression of acceptance (*qabiltu*). In a narration reported that Abān ibn Taghlib was asked concerning the temporary marriage (*mut`ah*) by using the words '*atazawwajuki mut`atan*' by the groom and the bride saying: Yes, he replied: It is valid and she will become your wife.

If the guardian (*walī*) or wife says: *matta`tuka* (I gave in *mut`ah* myself to you) with so and so, without specifying the period, the marriage will be concluded permanently. This is taken as an indication to conclude a permanent marriage by using a word indicating *tamattu`*. It is not necessary that the word used for acceptance be compatible to the word used for offer (*ījāb*), but it is valid to use a word for offer different from that used for acceptance. Hence if the bride's *wakīl* says (to the groom): *zawwajtuka* (I gave you in marriage), and the groom says: *qabiltu al-nikāḥ*; or the agent says: *ankaḥtuka*, and the groom says: *qabiltu al-tazwīj*, it will be valid.

If the agent says: You have given your daughter in marriage to so and so, and the father says: Yes, when the groom says: *qabiltu* (I have accepted), it is valid since the word 'Yes' implies repeating the question though he has not reiterated the same word, but there is a difference of opinion among the

legists regarding it. It is not a condition that the offer precedes the acceptance, but if the groom says: *tazawwajtu* and the guardian says: *zawwajtuka* (I gave you in marriage), it will be valid. It is not permissible to use other than these two words (belonging to the roots of *zawāj* and *nikāḥ*) and to use their interpretation in any language other than the Arabic, except when it is impossible to recite it in Arabic. The schools of law differ as regards the validity of the contract when so recited despite the possibility of its being recited in Arabic.

If one of the two parties of the contract (bride and groom) is incapable of uttering these words (in Arabic), every one of them can use any word of which he/she is capable and conveys the meaning of marriage. If both or one of them be dumb and incapable of talking at all, the incapable one can convey his/her intention to marry by signs and gestures. The marriage contract is not concluded or valid when recited by using words other than those derived from the roots *al-zawāj* and *al-nikāḥ*, such as: *bay`* (selling), *hibah* (donation), *tamlīk* (transference of ownership), and *ijārah* (renting), irrespective of whether the *mahr* (dowry) be mentioned or not.

RULES AND CONDITIONS OF MARRIAGE

1. Sanity and adulthood (*bulūgh*) are necessary qualities for both the parties to the contract. Hence, the contract concluded by words uttered by a child (immature) whether for offer or acceptance, or by the insane person is not valid. As regards the intoxicated person who has lost his senses, there is a difference of opinion regarding validity of the marriage contracted by him, but the preponderant view among the scholars deems such a contract as invalid, except when he regains his consciousness where the contract concluded by him will be valid. In a tradition reported in this regard: if a drunkard woman gives herself in marriage to some man and she recovers her consciousness and accepts the marriage contract or the groom consummates the marriage with her (*dakhala bihā*) and she then regains consciousness and acknowledges the marriage, the contract will be established and valid.

2. A sane girl of full age, on maturing, is fully competent to decide her contractual and non-contractual affairs which include marriage. Therefore, it is valid for her to contract marriage directly or by appointing a deputy (by making an offer or giving her acceptance) regardless of presence of a guardian. Further presence of two witnesses is not a condition for validity of any kind of marriage contracts (concluded by mature sane man and woman). It is valid also for a bride and a groom or their guardians to contract marriage privately. If both the parties (of marriage contract) conspire to keep the contract a secret, this does not invalidate the contract.

3. In case the guardian exercises *wilāyah* with respect to marriage and turns insane or loses his consciousness after that, the offer made by him will be invalidated. If he accepts the contract of marriage after that, this will be considered as nonsense. So also, if the acceptance precedes his losing the senses, as if the guardian exercises his *wilāyah* after turning insane, his decision is considered as nonsense and of no effect. The same is true in regard of transacting a sale deal.

4. It is valid to stipulate the option (to include conditions) with respect to the dower (*ṣadāq*) in particular. This stipulation does not invalidate or annul the marriage contract.

5. If a man acknowledges having married a woman and she accepts his claim, or the woman claims so and the man approves of her claim, their marriage will be regarded as proved on the face of it and as regards inheritance. If one of them acknowledges the marriage alone, the burden of proof will lie on the claimant not the other party.

6. If a man has several daughters and he gives one of them in marriage to some person, without specifying her by name but intends her by his intention, and they (father and groom) differ regarding whom is meant by the father's words: "I marry you to one of these daughters", the contract will not be valid if the groom has not seen the daughters and identified his bride from among them. But if he has seen them and been ascertained of the daughter meant by the father, then the father's word will be accepted and taken as a basis since it is he who has full

authority (*wilāyah*) over his daughters and he is bound to hand over to the groom the daughter he intended when establishing the contract, which will be valid.

7. It is necessary for validity of marriage contract to single out and distinguish the bride from other women by signs or name or a certain quality (description). Hence, if one says: "I marry you to one of my two daughters (without specification), the contract will be invalid.

8. When a man claims having married a woman and her sister claims having been married to him, where every one of them establishes an evidence to prove the claim, it should be seen: if he has consummated the marriage with the woman claiming her being married to him, her evidence should be preponderated to his evidence (the man claiming having married her sister), since he is seen to be believing her claim through his behavior. So also, if she precedes him in establishing the evidence. In case of absence of these two cases, the precedence will be given to his evidence over hers.

9. If a man concludes a marriage contract with a woman when another man claims having married her, the latter's claim should be neglected unless he gives an evidence proving his claim.

10. If a captive slave concludes a marriage contract with a captive bondwoman, and his master gives him permission then to buy her for him, the marriage contract will remain intact if he buys her for his owner. But if he purchases this slave woman (his wife) for himself with his owner's permission, or his master gives possession of her to him after purchasing her, the marriage contract will become void if we believe in possibility of a slave's taking possession of things. Otherwise, the contract will not be invalidated. If a part of him is freed and he buys his wife, their marriage contract will become null and void, irrespective of whether he has purchased her by his own money or by a sum of money owned by both of them jointly.

THE GUARDIANS OF MARRIAGE CONTRACT:

It comprises two sections:

First: The authority with respect to the marriage of a sane major female ward (*wilāyah*) is solely distinguished for: the father, paternal grandfather how high so ever, *mawlā* (master of a slave), *waṣī* (executor of will) and the ruler (*ḥākim*). Is presence of the father necessary when the grandfather exercises his authority (*wilāyah*) with respect to marriage (of his granddaughter)? Some legists observed: Yes, it is necessary, basing their view upon a non-strong narration. But most of the scholars believe in the non-necessity of presence of the father. *Wilāyah* with respect to the marriage of the minor female ward is for the father and paternal grandfather, even when her virginity is lost either through having sexual intercourse or any other means, and she is not competent to decide her contractual or non-contractual affairs even after attaining puberty (*bulūgh*), according to a more widely-held view in this connection. Also if the father or grandfather contracts marriage for his minor son (or grandson), he (son) will be bound to fulfill the contract and observe it, and he will not be competent to decide his affairs even when he reaches maturity and full sanity (*rushd*), as per a more famous opinion. There are differing views regarding the father's authority with respect to the marriage of the full sane and mature maiden (*rashīdah*), the most predominant of which is: she is fully competent to decide her contractual and non-contractual affairs which include permanent and temporary marriage without any authority to be granted to her father or grandfather. If one of them gives her in marriage, such contract is contingent on her consent to be binding. Some scholars (of other schools of law) are of the view that the mature maiden is fully competent to contract a permanent marriage not the temporary one, and some others believe in the reverse, i.e. her being competent to contract only the temporary marriage. Other scholars consider her incompetent to contract both permanent and temporary marriage. There is another narration which indicates her being competent to share them in the *wilāyah* over the contractual and non-contractual affairs to the extent that it be not permissible for them to decide with respect to her contract to her exclusion. But if the guardian (the father) does her wrong by marrying her to a person not equal to her without her consent, in that case she will be entitled to contract

marriage for herself, even forcefully according to a unanimously-held view among the legists.

They (father and grandfather) have no authority over the *thayyib* (a girl who has had sexual intercourse) on maturing and reaching full sanity (*rushd*), nor over the mature sane male. Their authority is established over all these when being insane, and the insane wards will not have the option or authority when recovering their senses and sanity. The slave owner (*mawlā*) is entitled to give in marriage his captive female slave (*mamlūkah*) minor or major, sane or insane, and she has no option to choose for herself with his presence. The same rule is applied to a male slave.

No authority (*wilāyah*) is granted to the *ḥakīm* with respect to the marriage of a male ward or a sane male of full age (*rashīd*), but he has authority over a male who has attained puberty but not full sanity (*rushd*), or that one who has lost his sanity anew, if the marriage be for his good and benefit. Also the *waṣī* (executor of a will) has no authority with respect to the marriage of the inheritors even if the testator has committed to him this charge in his will, but he is entitled to marry the insane mature ward, if there be a pressing need to marry him. It is not permissible for one under a legal disability (*maḥjūr ʿalayh*) because of extravagance (*tabdhīr*) and lavishness to contract marriage for himself if he is not obliged to marry. If he contracts marriage in this state, the contract is invalid. In case he be obliged and feels needy to marriage, the judge can give him permission to contract marriage, whether directly by determining and specifying a wife for him or giving him a general permission. If he hastens to contract marriage before taking the permission, in such a situation his contract will be valid, but if he increases in amount of dower (*mahr*) the excess will be invalid.

SECOND: SUPPLEMENTARY ISSUES

1. If a sane mature girl be granted a general authority to contract marriage for herself, the guardian will have no authority over her nor any night to give her in marriage except with her prior consent. If she gives him authority to marry her

to himself, the contract will be invalid, since it is *wājib* that the *walī* takes the responsibility of concluding the contract, which would not conclude if the woman recites it, though it is essential that she consents, but permissibility of such marriage is more preponderant. If her grandfather gives her in marriage to his other son's son (her cousin), or if her father gives her in marriage to the man who gave him authority and *wakālah* to marry him, the contract will be valid.

2. If the guardian gives in marriage the sane mature girl (under his *wilāyah*) for less than a proper dower (*mahr al-mithl*), she will have the right to object as per a more correct opinion, with disagreement among the legists.

3. The word 'woman' in the marriage contract is considered if she be mature and having full sanity (*rushd*), where she will be fully competent to decide her contractual and non-contractual affairs which include marriage (regardless of her being a maiden or *thayyib).* Therefore, it is valid for her to contract for herself or on behalf of others, directly or by appointing a deputy, by making an offer or giving her acceptance.

4. The marriage contract is contingent on the bride's consent as per a more predominant view. If a minor female ward be married by other than her father or grandfather, whether being a relative or not, the contract is not concluded but with her consent or giving permission (acceptance) after the contract, even if he be her brother or uncle. With respect to the marriage of a maiden (*bikr*), her keeping silent is sufficient to indicate her consent when marriage is offered to her, but with respect to a *thayyib*, her uttering words of consent is necessary. In case of a female captive slave, marrying her is contingent on her owner's permission. With respect to a minor female ward, her father or grandfather's permission is sufficient for marrying her.

5. If the guardian be a disbeliever, no authority should be granted to him. If the father be a disbeliever, then the authority (*wilāyah*) over the female ward should be granted to the grandfather in particular. The same rule is applied when the father becomes insane or loses his consciousness (swoons). But

if the excuse disappears, i.e. the father's regaining his sanity or consciousness, the *wilāyah* will be regranted to him. If the father exercises his authority and chooses a person as a groom for his ward daughter, and her grandfather chooses another one, the contract concluded before the other will be valid and the latter is void. If they differ and quarrel regarding the husband, the precedence should be given to the groom chosen by the grandfather. If they conclude the marriage contract at one time, the contract concluded by the grandfather will be established as valid not that concluded by the father.

6. If the guardian gives in marriage his female minor ward to some male who is insane or castrated, it will be valid, but she will have the right to choose on maturing. So also, is the rule when the guardian marries a child (immature boy) to a girl suffering from one of the defects (*`uyūb*) necessitating dissolution of marriage contract (insanity, leprosy, leucoderma, blindness, *ratq*, *qarn*, *`afal* and *ifḍā'*). If the guardian gives her in marriage to a captive male slave, she will not have the authority or choice on maturing. And so also if he marries a boy (immature), while some scholars are of the view that marrying a boy is prohibited, because marrying a bondmaid is conditional on fearing from *`anat* (constraint) while no fear is there with respect to the boy.

7. It is not permissible to give a slave woman in marriage except with prior permission of her owner, though her owner be a woman, in both the cases the permanent and temporary marriage. Some scholars are of the opinion that she is authorized to contract morganatic marriage (*mut`ah*) for herself without permission of her owner (a woman). The first view is more correct.

8. If the father and paternal grandfather give their minor wards (male or female) in marriage, they will be required to conclude a contract. If one of them dies, the other one will inherit him. If their marriage contract be concluded by other than their father and grandfather when one of them (minor wards) dies before maturity, the contract will become void, and neither *mahr* is required nor is inheritance granted. But if one of the minors attains maturity and agrees to it, the contract will be binding on

his side. If this one (the mature) dies, the other's share should be taken out from his heritage. If he attains puberty and gives permission, he should be adjured that his giving the permission was not for the sake of inheritance when he can inherit. If the one who has not permitted dies, the contract and inheritance will be void.

9. If the *mawlā* (master) authorizes his captive slave to conclude a marriage contract, it will be valid and the generality in permission will necessitate paying the proper dower (*mahr al-mithl*). If he gives more than *mahr al-mithl*, he will be liable for the excess which he should follow up on being set free, with his master's being required to pay the *mahr*. Some scholars observed: The *mahr* should be taken from his (slave's) earning, but the former view is more predominant among the legists. So also, is the rule regarding the *nafaqah* (maintenance, alimony).

10. The slave's owner (*mawlā*) is not entitled to compel his captive slave, who is freed partially, to get married.

11. The authority with respect to the captive female slave owned by a minor male under guardianship of a competent *walī* is granted to this guardian, whose contracting marriage on her behalf will be binding and her minor owner under his *wilāyah* is not entitled to dissolve this contract on relieving of the *wilāyah* over him. It is *mustaḥabb* for a woman, a maiden or *thayyib*:

- to take her father's permission when giving consent for marriage contract,

- to appoint her brother a deputy to contract marriage on her behalf in case of not having a father and grandfather, and to depute her elder brother when having more than one brother,

- to prefer the groom chosen by her elder brother when her elder and younger brother each chooses some person as husband for her.

Three Subsidiary Issues

1. If both of her brothers give her in marriage to two men, the precedence should be given to the contract concluded prior to the other. If she has already consummated the marriage with the

latter one, the child produced will be considered as his son and he will be bound to pay her full *mahr*, with returning her to the former one. If both the contracts be concluded in one meeting, some legists give priority to the contract concluded by the elder brother, which is an arbitrariness. If she has not given permission to them both, she will have the right to accept whichever contract she likes, but it is more proper for her to give consent to the elder's contract. The precedence should be given generally to that one with whom she has consummated the marriage before taking permission.

2. The mother has no authority on her son, but if she contracts marriage on his behalf which he accepts, the contract will be binding on him. If he abhors this contract, she will be liable for paying the *mahr*, a view regarding which there is a difference of opinion among the legists. It may be conceived as per what she claims to be deputed for.

3. If a non-relative concludes a marriage on behalf of a woman, and the husband says: the concluder of the marriage contract has married you without your permission, while she says: Rather I have given my consent. In this case, the precedence is to be given to her claim with her taking an oath, since she is claiming veracity of the contract.

THE PROHIBITED DEGREES OF FEMALE RELATIONS

There are six causes for prohibiting marriage contract:

First: Consanguinity (Nasab): The schools concur that the female relatives with whom marriage is prohibited are of seven kinds:

1. Mother how high so ever, which includes paternal and maternal grandmothers.

2. Daughters including granddaughters of daughter and son how low so ever.

3. Sisters, both full and half, with their daughters.

4. Paternal aunts, which includes father and grandfather's paternal aunts, with grandfather's sisters how high so ever.

5. Maternal aunts, which includes father and grandfather's maternal aunts how high so ever.

6. Brother's daughters, both paternal and maternal brothers, how low so ever.

7. Sister's daughters how low so ever.

The same degrees among men are prohibited for women thus: father how high so ever, the son, paternal and maternal uncle how high so ever.

Three Subsidiary Issues

1. Consanguinity can be established through valid marriage and intercourse by mistake (*shubhah*), but it is not established through fornication (*zinā*). When fornication is proved, the child born of it shall not inherit from the father because no legal lineal bond is established between them. Regarding prohibition of matrimonial relationship between the child and its father, the more widely-held view among the legists says: establishment of maternal relationship with the child (male or female) is *ḥarām*, since an illegitimate child is after all an offspring, both literally and by general acceptance. Consequently, whatever is *ḥarām* between fathers and children is also *ḥarām* for the illegitimate child and its father.

2. When a wife is divorced and an intercourse by mistake (*shubhah*) is committed with her, and a child is produced out of this intercourse, it should be seen: if giving birth happened within less than six months after the copulation by the divorcer, it will be attributed to the divorcer. But in case it be produced within less than six months after the latter's intercourse and the maximum period of gestation for the divorcer, it will not be attributed to any of them. If it is presumed to be produced by one of them, lots should be drawn to determine its origin, with disagreement among the legists, but the preponderant view says: it is to be attributed to the latter. The decision (*ḥukm*) concerning the milk (fosterage) is subject to *nasab*.

3. When a man accuses his wife of adultery or denies the paternity of her child, and she denies the charge (but he has no

proof to offer), the child will be considered as not produced by him but the fosterage (*laban*) is considered his. If he acknowledges paternity after that, the child will be attributed to him again, despite the fact that he does not inherit the child.

MILK BE RESULT OF NIKāḥ:

Fosterage (Ridā`), its Conditions & Rules

Establishment of prohibitive relationship is contingent on certain conditions:

1. It is necessary that the woman's milk be the result of lawful sexual relations, and if it secrets without marriage or as a result of a pregnancy due to adultery, the prohibition does not come into effect. There is a difference of opinion regarding intercourse by mistake, but most of the legists count it to be like the valid intercourse. If he divorces her while she is pregnant or lactiferous, the prohibition comes into effect if she breast-feeds a child as if she still has conjugal relation to her husband, even though she marries another and has intercourse with him, and becomes pregnant. But if the milk ceases secreting out and returns then at a time where it could be thought to be the result of intercourse by the second husband, it will be attributed to him to the exclusion of the former. If it continues in secreting out until the woman gives birth to a child out of the latter's intercourse, the milk that secreted out before the first delivery will belong to the former husband, and the milk secreted out after the delivery will be the latter's.

2. Quantity of milk: The prohibitive relationship is not realized unless the child is sucked one day and one night in a manner that his exclusive diet during this period be the milk of that woman without any other food, or is breast-fed fully fifteen times uninterrupted by breast-feeding by another woman. The reason given for the above-mentioned quantity is that it leads to the growth of flesh and hardens the bones. Some schools of law believe in times of non-establishment of prohibitive relationship if the times of breast-feeding be less than fifteen. The three conditions necessary for realizing the prohibition are: the breast-feeding be full and complete in one time, the number

of breast-feedings be fifteen, and the child having sucked milk from the breast. The *`urf* (customary usage) is the criterion to be followed in measuring and assessing the breast-feeding (*rad`ah*). It is necessary that the child be breast-fed in an uninterrupted manner by one woman as if it sucks milk from some woman and be breast-fed by another, the breast-feeding of the former will be considered effectless and void. If several women alternate in breast-feeding the child, the prohibitive relationship will not be established unless it be breast-fed fifteen full uninterrupted times.

The husband of that woman (who breast-fed the child) will not become the foster-father of the breast-fed child in case it be breast-fed by several women. Also his father does not become grandfather of that child nor the woman who breast-fed it as its mother. It is necessary that the child should have sucked milk from the breast for realizing the legal meaning of fosterage. Hence, if it is dropped in its mouth, or the child drinks it in a manner other than direct sucking, like reaching it to the child's stomach through injection or alike manners, the prohibitive relationship would not be established. Also the milk should be in its ordinary state and not turned cheese or any other state. It is necessary that the woman (feeding the child) be alive at the time of breast-feeding, as if the child sucks a few feedings from her breast when alive and completes the necessary breast-feeding after she dies, the prohibitive relationship would not be established, since by her death she is considered to be out of application of these rules.

3. Its period to be two years: The period mentioned by the scholars for breast-feeding is up to two years of the age of the child, as per a *ḥadīth* reported from the Imām (A): "No breast-feeding is to be established after weaning." observed in respect of a lactiferous woman's child as per a more correct opinion. If her own child's age exceeds two years and she breast-feeds a child of less than two years, the prohibitive relationship would be established. If the child sucks less than fifteen breast-feedings with one time and it completes the minimum necessary after completing two years, this will not lead to establishment of the prohibitive relationship. So also, when it completes two years of age without being fed to the full, i.e. completing the

minimum feedings. But the prohibitive relationship would be established when reaching the age of two years.

4. Milk be result of intercourse by one man, as if a woman breast-feeds with milk which is the result of sexual intercourse by one man a hundred children, the prohibitive relationship would be established between them. Also if a man marries and consummates marriage with ten women and each one of these women breast-feeds one child or more, matrimonial relationship between them all will be *ḥarām*. If two women breast-feed two children (male and female) with the milk that be the result of sexual relations with two men, no prohibitive relationship would be established between them. There is another narration regarding this issue, which is obsolete. The children of this lactiferous woman (foster-mother) will become *ḥarām* due to consanguinity for those ones who breast-fed from her. It is not permissible to take a disbelieving woman to breast-feed the children of a Muslim man (that is by contracting permanent marriage with her, but taking a *dhimmī* woman as a wet-muse (to breast-feed the child) is permissible only she should be forbidden from imbibing wine and eating the pork. It is *makrūh* to hand over the child to her to carry it to her house. The *karāhah* becomes more emphatic in case of taking a magian (magus) woman to breast-feed a child of a Muslim. It is *makrūh* also to ask her to breast-feed our children if her turning lactiferous be the result of a pregnancy due to adultery. It is said also that if her master (*mawlā*) discharges her from his bond, her milk will turn lawful (*Mubāḥ*) and the *karāhah* in her breast-feeding will disappear, but this view is abnormal. It is *mustaḥabb* to choose for breast-feeding a sane, Muslim, chaste and pure woman.

RULES OF FOSTERAGE

1. When the prohibitive breast-feeding is performed, the prohibitive relationship will come into effect between the lactiferous woman and her fornicator and the sucking child, that is: as a result of breast-feeding she becomes its foster-mother, the man (who had sexual intercourse with her) becomes its foster-father, their fathers its grandfathers, their mothers its grandmothers, their children its brothers and sisters, their

brothers and sisters its uncles and aunts (both maternal and paternal).

2. The children attributed to the male (a man who had sexual intercourse with the woman who gave birth to them) due to birth or fosterage become *ḥarām* for the child who has sucked milk from this woman's breast. So also, is every child attributed to this lactiferous woman by sonship through birth how low so ever. But those children attributed to her by sonship due to fosterage do not become *ḥarām* for him.

3. The prohibitive relationship is established between the foster-father and children of *ṣāḥib al-laban* (the husband of that woman), due to birth or breast-feeding, and also the children of his lactiferous wife through birth since they have become as his children (foster-children). Can he marry his children who have not sucked this milk to the children of this lactiferous woman and the children of the man who copulated with her? Some legists consider this as unlawful but most of them believe in the permissibility of such a matrimonial relationship. But if a woman breast-feeds a son of some people with a daughter of others, no prohibitive relationship is established between the brothers and daughters of each one the other since neither consanguinity nor fosterage is established between them.

4. The prohibitive (*ḥarām*) fosterage causes the prohibition of marriage precedently and invalidates it lately. The tradition which says: "that which becomes *ḥarām* due to consanguinity becomes *ḥarām* due to fosterage," should be applied here. If a man contracts marriage to a suckling female who will be breast-fed by a woman whose breast-feeding invalidates the marriage contract to a minor girl, like his mother or grandmother or sister or his stepmother or brother's wife, the marriage contract will become void if the wet-nurse's milk be of them. If the suckling female crawls up to her and sucks from her breast, without her knowledge (nurse), she will not be entitled to her *mahr* due to voidness of the contract with which the dower be established. If the breast-feeder volunteers to breast-feed her, some legists are of the opinion that the suckling female will be entitled to half the *mahr* since it is an annulment taking place before consummation of the marriage. In this case it will not be

dropped since it is not caused by the wife, and the husband has the right to claim from the woman who breast-fed her what he has paid if she meant dissolution of the contract, but there is disagreement among the scholars regarding claiming the whole *mahr*, basing their argument on the doubt in securing the advantage of a portion. If he has two wives one being old and the other being a nursling infant who will be breast-fed by the old one (his other wife), both of them will be permanently *ḥarām* for him if he has consummated the marriage with the old wife. Otherwise, only the old wife will be *ḥarām* for him. The old wife will be entitled to her *mahr* if her husband has consummated the marriage with her, or otherwise she is not entitled to any thing since the dissolution to the contract is demanded by her. But the suckling wife is entitled to her full *mahr* due to dissolving the contract of both of them altogether, while some legists give him the right to claim the *mahr* from the old wife. If the old wife breast-feeds his other two suckling wives, all of them, the old and suckling wives will become *ḥarām* for him if he has consummated the marriage with the old wife. Otherwise, only the old wife will be *ḥarām* for him.

If a man has two full mature wives with another suckling one, who will be breast-fed by one of those wives and then by the other one, only the former breast-feeder and the suckling wife will be *ḥarām* for him not the second one, since she has breast-fed her (the suckling one) while she being his foster-daughter. Some legists said: the second wife will be also *ḥarām* for him, since she has become the mother of that girl who became his wife, the view which is more predominant among the scholars. In all these cases the contracts of all the wives would be dissolved due to establishment of prohibitive combining in marriage. If he divorces one of his mature wives who will breast-feed his suckling wife, both of them will become *ḥarām* for him.

5. If a man has a bondmaid with whom he copulates and she breast-feeds his suckling wife, both of them become *ḥarām* for him while he being bound to pay the *mahr* of the suckling wife without having the right to claim it from the bondmaid, since no claim is established for the *mawlā* (slave owner) in charge of his captive slave (*mamlūk*). Rather, this night will be given to

him when his copulation with her be through a contract and she will be liable for the *mahr* of the suckling wife, but there is a difference of opinion among the legists regarding this. If we believe in obligation of claiming the *mahr* (from the bondmaid), we should not believe in possibility of selling the bondwoman with it, but she will be subordinated through it when she be set free.

6. When two men have two wives, one minor (suckling) and the other being old (major), and each one of them divorces his wife and contracts marriage with the other (woman) when the old wife breast-feeds the suckling one, the suckling one will be *ḥarām* for that man who has consummated marriage with the old woman.

7. If the groom says (regarding the bride): 'This is my foster-sister', or 'my (foster-) daughter' in a reasonable and acceptable way, it should be seen: if his claim is presented before conclusion of the contract, she would become *ḥarām* for him on the face of the issue. But if he claims so after concluding the contract with establishing an evidence, his claim will be valid. If the claim is laid by him before consummation of the marriage, no *mahr* is required of him, but if it be after the consummation, the wife will be entitled to the specific *mahr* (*al-mahr al-musammā*). If he fails to establish an evidence and his claim be denied by the wife (bride), he will be liable to pay her *mahr* in full on consummating the marriage with her, and half the *mahr* if he has not consummated the marriage, as per a very famous opinion. If the wife denies his claim after concluding the contract, her claim against him will not be accepted except with establishing an evidence. If it be before conclusion of the contract, she will be judged according to her declared acknowledgment.

8. The testimony given in favor of fosterage is not admitted but only when presented in details, due to possibility of disagreement regarding the prohibitive conditions and the witness's basing his argument on his personal belief. For giving a testimony regarding fosterage by a witness, it is sufficient for him to see the child sucking from the woman's breast in the ordinary way until it turns the back upon.

9. When a major woman gets married to a minor (child) and dissolves the contract then due to a defect found in him or because she was a captive slave and be set free or any other reason, and gets married then to a major man and breast-feeds the first husband (child) with the milk resulted from intercourse with the second husband, she will become *ḥarām* for the second husband since she has been his (foster-)son's wife, and for the child since she has been his foster-father's wife.

10. If a man contracts marriage between his suckling son and his suckling niece, and his grandmother comes and breast-feeds one of them, the marriage contract will be dissolved since if the suckling be the male (groom) then he is either a paternal or maternal uncle of his wife, and if the suckling be the female (bride), then she is either a paternal or maternal aunt.

THIRD: AFFINITY (MUṢĀHARAH)

Affinity is the relationship between a man and a woman which forbids marriage between them. It is established through valid copulation (marriage consummation), but there is a doubt regarding its establishment through adultery, intercourse by mistake, looking and touching with a sexual intent. It includes the following four issues.

The Valid Marriage

On consummating the marriage contract with a woman or copulating with her through possession of a bondwoman, the wife's mother how high so ever and her daughters how low so ever whether their birth precedes the copulation or comes after it, even if she be not in his guardianship, will be forbidden for the copulater. Also the husband's (copulater) father how high so ever and his sons how low so ever will be permanently forbidden for the woman with whom the intercourse is performed. On merely conclusion of the contract without intercourse, only the wife will be forbidden for the husband's father and sons, and the wife's daughter will not be forbidden for the husband individually but in view of combining together. That it is permissible for him, if he divorces that wife before sexual intercourse (or before looking at or touching her with a

sexual intent), to marry her daughter. Does the mother become forbidden for him by the same contract (with the daughter)? There are two views in this regard, the more famous and predominant of which is: she becomes *ḥarām* for him with this contract.

The father's captive female slave (*mamlūkah*) is not forbidden for his son merely on taking possession of her, nor the son's captive bondmaid is forbidden for the father. If each of them copulates with his captive bondmaid, she will be forbidden for the other (without doubt). It is not permissible for each one of them to copulate with the other's slave woman except through a contract or taking possession of (*milk*) or *ibāḥah* (permitting). It is permissible for the father to assess the value of the bondmaid owned by his son, if he be a minor, and copulates with her on taking possession of her. If one of them takes the initiative and copulates with the captive bondmaid without suspicion, he will be considered as adulterer, but no *ḥadd* (punishment) is be applied against one having intercourse by mistake. If the father's captive bondmaid becomes pregnant due to sexual contact by mistake with his son, her child will be set free and the son is not required to pay any indemnity (its value). But the case differs when the son's captive bondmaid becomes pregnant due to an intercourse by the father, where the child is not set free and it will be *wājib* upon the father to set it (child) free, unless it be a female.

If the father establishes sexual contact with his son's wife due to a mistake or false impression, this wife will not become forbidden for the son due to precedence of lawfulness. Some scholars believe in her being forbidden for the son because of the establishment of sexual contact between her and the father who will be liable to pay her *mahr* in full. If the son establishes sexual contact with her anew, he will be liable to pay double her *mahr* if we believe in establishment of prohibitive relationship as a result of sexual intercourse by mistake or due to a false impression that they are lawfully wedded. If we believe in non-establishment of prohibitive relationship due to intercourse by mistake, which is a more correct view, then only the former *mahr* is required (of the father). As a consequence of affinity (*muṣāharah*) forbiddance of wife's sister, that is,

combining two sisters in marriage with the wife except with her prior permission, where it would become valid.

If the niece is the first to be married, it is permissible for him to marry her paternal or maternal aunt even if the niece does not grant permission for this marriage. But if the paternal or maternal aunt has been first married, the marriage with her niece is permissible only by her permission, and if he contracts this marriage without the aunt's permission, the contract is invalid and the aunt has the option either to grant permission for this marriage or dissolve it, or dissolve the contract concluded with the niece without divorce, or to retire from her husband. The former view is more correct.

Fornication (Zinā)

The fornication committed accidentally does not establish the prohibitive relationship (*ḥurmah*), such as when a man contracts marriage with a woman, and commits fornication then with her mother or daughter, or commits sodomy with her brother or son or father, or commits fornication with the captive bondmaid of his father with whom copulation is made or his son's captive bondmaid, all this will not establish the prohibitive relationship with the wife who was first married. If the fornication is committed before contracting the marriage, the paternal and maternal female cousin will become forbidden for the fornicator if he has committed fornication with the mother of each of them, as per a very famous opinion. Does fornication with other than these women establish affinity prohibitive relationship like the legitimate sexual contact? There are two different views regarding this, one of which says: this fornication establishes the prohibitive relationship, which is more predominant among the scholars, and the other says that it does not establish prohibition.

Concerning intercourse by mistake, some legists consider it as the valid marriage in establishing the affinity prohibitive relationship, but a difference of opinion is there among the legists, and most of them believe in non-establishment of prohibitive relationship due to intercourse by mistake, but it includes also the *nasab* (consanguinity).

The prohibitive relationship is not established by looking at the face and touching the hand of the bondmaid, which are permitted for other than her owner, do not establish the prohibition due to looking at the woman's privy parts (vulva), caressing her with sexual emotion, and touching the inside body parts with sexual intent, there is a difference of opinion as to whether these acts which are not permitted for other than the owner establish prohibition or not.

The opinion which is more widely-held by the scholars says: these acts result in *karāhiyyah* (aversion, hatred). Those legists who believe in establishment of prohibitive relationship due to these acts, confine this prohibition for father of the toucher and looker and his son in particular to the exclusion of the mother of the girl who is touched or looked at, and their daughters. The rule applied to fosterage in all these cases is the same applied to *nasab* (lineage).

TWO POINTS RELATED TO PROHIBITION

(I) Six Issues of Prohibition on Combining:

1. If one combines in marriage two sisters, the contract concluded first will be valid and the contract of the second wife is void. If he marries both of them in one contract, some legists believe in voidness of their marriage. Others are of the opinion that he has the option to choose whoever he likes, as per a narration reported in this regard, but the former view is more predominant among the legists and the narration is weak.

2. If a man copulates with a bondmaid through ownership (*milk*) and marries her sister then, the marriage contract is valid and the first copulated one through ownership will be forbidden for him, as long as the second wife has conjugal relation with him. If a man has two bondmaids and he copulates with them both, some legists are of the opinion that the first bondmaid will be *ḥarām* for him until the second one is relieved of his (bond of) possession. Other scholars observed: if the copulation be practiced out of his ignorance (*jahl*), the first bondmaid would not be forbidden for him, but if it be with his knowledge the former one would be forbidden for him until the second one is

relieved of his possession, not for returning to the first one (to resume the sexual relations with her). If he takes out (sells) the second one in this state for restoring the first one, the former bondmaid will not be lawful for him. The more preponderant view is: the second bondmaid will be forbidden for him in both the cases not the first one.

3. It is not permissible for a freeman to contract marriage with a bondmaid except with fulfillment of two conditions:

- being unable to afford for the *mahr* (dower) and maintenance (meaning his being able to provide for *mahr* and maintenance of a freewoman and copulate with her).

- fearing the *`anat*, which means hardship and having trouble because of forsaking copulation.

Some legists are of the opinion that such marriage (between a freeman and a bondmaid) is *makrūh* with absence of these two conditions, the view which is more predominant among the *`ulamā*. It is not permissible for the former one (not capable to afford for *mahr* and *nafaqah* of a freewoman) but to copulate with only one bondmaid as the *`anat* can be removed by copulation with her. Some legists consider copulation with two bondmaids as permissible confining the exclusion to subject of concurrence.

4. It is not permissible for a bondman to marry more than two freewoman.

5. It is not permissible to combine in marriage a bondmaid and a freewoman except with her permission, and if a man contracts such marriage, the contract is void. Some scholars are of the opinion that the freewoman will have the night to dissolve or accept this contract, or her contract. The former view is more predominant among the legists.

But in case a man combines in marriage a freewoman to a bondmaid, the contract is valid and the freewoman has the free will to accept or refuse her contract if she has no knowledge of the fact. If he combines in marriage both of them by one

contract, only the contract of the freeman will be valid not that concluded with the bondmaid.

6. If a man consummates marriage with a girl who has not reached the age of nine and deprives her of virginity, any sexual contact between them will be forbidden but the conjugal relations between them will stay as it is. But she will not be *ḥarām* for him if he does not deflower her of virginity.

II) Rules of Prohibition of Intercourse:

1. He who marries and establishes sexual contact with a woman with having knowledge of her observing the *`iddah* period (as a result of a revocable divorce), she would become *ḥarām* for him permanently. If he be unaware of her undergoing the *`iddah* period and the prohibition *(Taḥrīm*) and consummates the marriage with her, she would be *ḥarām* for him too. But if he does not consummate the marriage, that marriage contract will be invalid and it will be rightful for him to resume it.

2. When a man consummates the marriage with a woman while she is undergoing the *`iddah* period and she becomes pregnant, the child born of this intercourse will be attributed to him if he be ignorant of her undergoing the *`iddah* period, and when the child is born within six months or more of time of consummation with her. In this case, they should be separated from each other and the husband is bound to pay the specified *mahr* (*musammā*), and she will be considered as having completed the *`iddah* period for her first husband with being required to resume another period for the second one. Some scholars consider one *`iddah* period as sufficient. Further, she will be entitled to her full *mahr* from her first husband and another *mahr* from the latter if she has no knowledge of the prohibition, but she is not entitled to any *mahr* if she be aware of the prohibition.

3. Committing fornication with a woman does not make her *ḥarām* for him, i.e. to contract marriage with her after fornication is valid even if she is known of committing adultery, as per the tradition: "A *ḥarām* does not illegitimate a *ḥalāl*." The same rule is applied when his wife commits

adultery and even if she insists on this act. He who commits fornication with a woman or establishes sexual contact with her (by mistake) while that woman is either married or is observing the *`iddah* period as a result of a revocable divorce, she would become *ḥarām* for him permanently, i.e. it is *ḥarām* for him to marry her even if she separates from her husband as per a widely-held opinion.

4. He who commits sodomy with a boy and practices *īqāb* with him (inserts his organ into the boy's rear part), it will be forbidden for him to marry the boy's mother and sister, but they will not be *ḥarām* for him if their marriage contract be concluded before that sodomy.

5. If a *muḥrim* for *ḥajj* or *`umrah* concludes marriage with a woman with the knowledge of the prohibition during the state of *iḥrām*, she will become permanently *ḥarām* for him. But if the marriage is performed without the knowledge of the prohibition during the state of *iḥrām*, the marriage is void but she would not become *ḥarām* for him.

6. It is not permissible to contract marriage with a married woman except after separation from her husband (due to his death or as a result of divorce), and marriage with a woman undergoing *`iddah* is not permissible except after expiry of her *`iddah* period.

FOURTH: NUMBER OF WIVES:

It comprises the following issues:

1. It is permissible for a man to have four wives at a time in a permanent contract, but having a fifth wife or more is forbidden for him. It is not permissible for a man to have more than two bondmaids among these four wives in a permanent marriage contract. When a slave has four bondmaids in permanent marriage contracts, or two freewomen or one freewoman and two bondmaids, having more wives (by permanent contract) is *ḥarām* for him. It is permissible for every one of these men to conclude temporary marriage contract with any number of women seeming good to him, and also through *milk al-yamīn* (what the night hands possess).

2. When a man gives one of his (four) wives revocable divorce, it is not permissible for him to marry another until the expiry of her *`iddah* period. But if it be an irrevocable divorce it is permissible for him to marry his irrevocably divorced wife's sister during his wife's *`iddah* (because an irrevocable divorce breaks the marital bond) with *karāhah* due to separation between a woman and her sister.

3. If a man gives one of his four wives an irrevocable divorce and marries two other women, only the contract of that one first married will be valid. But if they both be married at a coincident time, both the contracts would be void. Some scholars believe in his having the night to choose whoever he likes, but this *riwāyah* is weak.

4. If a man divorces his wife for the third time having resumed conjugal relations twice earlier, she will become *ḥarām* for him and will not become *ḥalāl* for him again unless she marries another husband, even if she was married to a freeman. This requires that she observes the *`iddah* after her third divorce and after the completion of this period consummates a permanent marriage with another man. If a woman is divorced nine times in the *ṭalāq al-`iddah* form, which means that she consummates a permanent marriage with two men among these nine divorces (three divorces for three times), she becomes *ḥarām* permanently for the first husband.

FIFTH: LI'ĀN

When a man accuses his wife of adultery or denies the paternity of her child, and she denies the charge while he has no proof to offer, it is permissible for him to pronounce *li'ān* against her. Most of the legists are of the opinion that it is *wājib* for the two to separate after the *li'ān* and the wife's becoming *ḥarām* permanently for him even if he denies his own accusation. So also, when a man accuses his deaf and dumb wife of adultery in a way entailing to pronouncement of *li'ān* when she being innocent of this accusation. A tradition is reported in this regard by Abū Baṣīr that "Abū-`Abd Allāh (al-Imām al-Ṣādiq [A]) was asked once about a man accusing his wife of adultery while she is deaf and dumb, when he (A) said: If the wife has

an evidence to offer before the Imām, her husband is punished with the *ḥadd* and it is *wājib* to separate between them with her becoming forbidden permanently for him. But if she has no proof to offer, she will become *ḥarām* for him as long as he lives together (cohabits) with her and he will not be considered as having sinned against her.

This reason (*liʿān*) will be elaborated in detail in the chapter *Kitāb al-liʿān*.

SIXTH: DIFFERENCE OF RELIGION

It comprises several issues:

A. Which Woman Should be Married

It is not permissible for a male Muslim to marry a woman who does not possess a revealed scripture (other than Ahl al-Kitāb). The schools of law concur that a Muslim man can marry a woman belonging to the Ahl al-Kitāb, which implies Christians and Jews. But it is not permissible for a Muslim woman to marry a man belonging to Ahl al-Kitāb. Regarding prohibiting marriage of a Muslim man with a female belonging to Ahl al-Kitāb from among the Jews and Christians, there are two views, the most famous of which says: permanent marriage with her is forbidden but temporary (*muʿajjal*) marriage and *milk al-yamīn* (what the night hands possess) is permissible. The same rule is applied to the Zoroastrians (*Majūs*) as there is agreement among the schools that it is not permissible for a male Muslim to marry a woman belonging to those who do not possess a quasi-revealed scripture or those who worship idols. By 'quasi-scripture' is meant a scripture which is said to have originally existed, as in the case of the Zoroastrians, but was changed, causing it to be lifted from them.

If one of the spouses (husband or wife) apostatizes before consummation of the marriage, the contract will be dissolved at once, with dropping the *mahr* in full if the apostasy be on the woman's side and half the *mahr* if it be on the man's side. But if one of them apostatizes after the consummation, the dissolution of the contract will be contingent upon the expiry of

the *`iddah* period irrespective of whoever be the apostate, with no need to deduct any thing of the *mahr* due to its establishment through consummation of the marriage. When the husband apostatizes innately, the contract will be dissolved presently, even if his apostasy be after consummation of the marriage since his conversion is not accepted.

When the husband of the woman belonging to Ahl al-Kitāb embraces Islām, his contract will remain as it is, regardless of whether his professing Islām be before consummation of the marriage or after it. If the wife professes Islām before consummation of the marriage, the contract is dissolved at once and no *mahr* is required from the husband. If it be after the consummation, the dissolution of the contract will be contingent upon the expiry of the *`iddah* period.

Some scholars are of the opinion that: if the husband be under protection of the Islāmic State (Ahl al-Dhimmah) his marriage (with a Muslim woman) is valid but he is neither allowed to consummate marriage with his wife at night nor to have privacy with her during daytime. The former view is more correct.

Concerning those who possess neither a revealed nor a quasi-revealed scripture (other than Ahl al-Kitāb), embracing Islām by each one of the spouses will entail immediate dissolution of the marriage. But if it be after the consummation, the dissolution of the contract will be contingent on the expiry of the *`iddah* period. If the *dhimmī's* wife converts to another creed followed by the disbelievers, the contract will be dissolved at once, even when she converts to her original religion, according to the principle that no religion other than Islām is approved of her.

If a *dhimmī* man professes Islām while having more than four wives with whom he consummated permanent marriage, it will be permissible for him to keep four freewomen under bond of marriage or two bondmaids and two freewomen. But if he be a captive slave, it will be permissible for him to keep two freewomen or one freewoman and two slave women as wives, and separate the other ones. If the number of wives does not

exceed the legitimately permitted number, their contract of marriage will be established.

It is not permissible for a Muslim man to force his *dhimmī* wife to perform the ritual bath (*ghusl*) irrespective of whether it be *ghusl* for menses or *janābah* (major ritual impurity) as having sexual intercourse with her is valid without such *ghusl*. But if she has some defects such as emitting strong offensive smell or having repugnant long finger-nails, he will be entitled to order her to remove these defects. He has also the night to prevent her from going out toward the churches and synagogues, leaving his house at all, drinking any intoxicant, eating pork and utilizing all *najis* (impure) things.

B. Manner of choosing the wife

The words used for marriage with a female belonging to Ahl al-Kitāb should indicate keeping in possession (*imsāk*) such as saying: *ikhtartuki* (I have selected you), or *amsaktuki* (I have grasped you in my possession) and alike words. If the man contracts marriage by using these words (indicating choice), the contract of those first to be chosen will be established while the contract of the rest is void. If a man says to those (women) constituting the excess to the four (permitted number of wives): "I have chosen separation from you (*ikhtartu firāqakunna*)," they will be relieved of his bond of marriage, while the marriage contract of the others (first four ones) will be established. If he says to one of them: 'I have divorced you (*ṭallaqtuki*),' her marriage contract would be valid and she will be considered as divorced from among the first four wives (since addressing her with the word of divorce indicates that he has chosen her as a wife and is divorcing her if the conditions of divorce are fulfilled). If he divorces four of them at a time, this will mean establishment of their marriage contract and divorcing them to the exclusion of the others as the word of divorce (*ṭalāq*) is not addressed but to the wife, since its subject of matter is breaking the marital bond. The words used for *ẓihār* (the husband telling his wife: You are to me like the back of my mother), and *īlā'* (the husband's swearing in God's name to refrain from having sex with his wife) do not indicate intention

of *ikhtiyār* (choosing a woman as a wife) since they can be addressed to other than the wife.

He can establish his choice by act, like copulating with the woman he chose as wife, since this act indicates selecting her from among other women. If he has sexual intercourse with four of them, this will establish the marriage contract with them and cause the separation for the other women. When he caresses or touches one of them with sexual emotion, this act can be taken to mean a sexual selection to this woman in particular as a wife, exactly like revocation to the divorce and restoration of the divorcee and her marital status (*raj`ah*).

C. Legal Effects Proceeding From Difference of Religion

1. When a *dhimmī* man marries a woman and her daughter and embraces Islām after consummating marriage with them or with the mother, both the woman and her daughter will be forbidden for him. But when the marriage is not consummated with any of them, the contract of the mother would become void not of the daughter, with no option being given to him to select one of them. Some scholars believe in his having the night to choose, but the former view is more predominant. The same rule is applied when a *dhimmī* man professes Islām after consummating the marriage with a bondwoman and her daughter, where both of them will be *ḥarām* for him. When he consummates marriage with any one of them, he will have the right to select one of them. But if he professes Islām while combining in marriage two sisters, it will be permissible for him to select one of them even if he has consummated the marriage with both of them. So also, is the rule when he professes Islām while having marital relations with a woman and her paternal or maternal aunt, when any of them does not permit the combining in marriage. But this combining becomes valid when the wife's paternal or maternal aunt gives consent. The same rule is applied when he professes Islām while combining in marriage a freewoman and a bondwoman.

2. When an idolater (pagan, *mushrik*) professes Islām while having under his bond of marriage one freewoman and three bondmaids (through marriage contract), who embrace Islām

with him, he will have the choice to select two bondmaids besides the freewoman on condition that she consents. If a freeman professes Islām while having four bondmaids as wives through contract, he is required to choose only two of them and separate from the others. But if they be freewomen, his contract of marriage with all of them would be established. The same rule is applied when they profess Islām before expiry of the *`iddah* period. If they be more than four in number and some of them profess Islām, he will have the option either to select these ones (who professed Islām) or to keep himself in waiting, to see if they join him or some of them not exceeding four in number, their marriage contract would be established. If they exceed four in number, he can select only four from among them. If he chooses those four who embraced Islām before the others, he will have no option in the other ones, even if they join him before expiry of the *`iddah* period.

3. When a slave man professes Islām while having four free idolatresses (pagans) as wives and two of them profess Islām with him, when he be set free then and the other two join him, he will be entitled to select only two of them, since with them the legally permitted number would be complemented. If all of them (four pagan wives) profess Islām and he is set free then and professes Islām, or they profess Islām after his setting free and embracing Islām during the *`iddah* period, his marriage contract with them will be established as it contains the freedom that legitimates the four wives, but there is doubt regarding distinction.

4. Difference of religion is a dissolution to marriage contract not a divorce. If the wife be following another religion (other than Islām) before consummation of marriage, she will not be entitled to her *mahr*. But if the husband be of Ahl al-Kitāb, only half the *mahr* will be deducted as per a famous opinion. If it the apostasy occurs after consummation of marriage, the contract would be established, and no deduction to the *mahr* is required due to its incidence. If the *mahr* be invalid, *mahr al-mithl* will be *wājib* upon the husband on consummation. But if it be before the consummation, the wife will be entitled to half the *mahr* if the revocation to the contract *(faskh)* be made by the husband. If a certain *mahr* is not specified by him in this state, the wife

shall be entitled to receive *al-mut`ah* (which is a gift given by the husband to his wife at the time of divorce) like a divorcee, but there is a difference of opinion among the scholars regarding it. When a man belonging to Ahl al-Kitāb (*dhimmī*) professes Islām after the consummation while he has specified the *mahr* in an invalid form, i.e. in terms of liquor or swine, and his wife has not received it, there are three different views regarding it. Some of the jurists said that she is not entitled to any *mahr*. Others entitle her to mahr al-mithl. Same said: It is *wājib* on the husband to pay the price of the liquor to those who deem it lawful. The latter view is more correct.

5. If a Muslim husband apostatizes after consummating the marriage, having sexual intercourse with his Muslim wife will be *ḥarām* for him, and it will be contingent on expiry of her *`iddah* period. If he copulates with her by mistake with keeping on his disbelief until the expiry of the *`iddah* period, some scholars observed: He will be required to pay two *mahrs*, the original *mahr* stipulated in the contract and another one for intercourse by mistake, with raising a doubt regarding this rule, since she is considered to be his wife if his apostasy was not inborn (born disbeliever).

6. When a man professes Islām while having four pagan wives with whom the marriage has been consummated, it is *ḥarām* for him to marry another one or the sister of one of his wives, until the completion of the *`iddah* period of that one divorced by him despite their keeping on paganism (since the marital bond between them is not broken at all so as to opt for returning during the *`iddah* period, where they can restore the conjugal relations in the *`iddah* of a revocable divorce when it be *ḥarām* for the divorcer to marry a fifth woman or the divorcee's sister). If a pagan woman professes Islām when her pagan husband marries her sister before professing Islām, while her *`iddah* period comes to an end with his keeping on paganism, the contract of the second wife will be valid. But if they both profess Islām before expiry of the *`iddah* period of the first wife, he will have the option to choose one of them, as if he has married the first wife while she being a non-Muslim.

7. If a pagan husband professes Islām and apostatizes then, while his wife's *`iddah* comes to an end with state of disbelief, the marital bond between them will be dissolved. But if she acknowledges Islām during her *`iddah* period and he converts (returns) to Islām in the *`iddah*, he will be better entitled to restore her. If she completes her *`iddah* while he is still a pagan, he will have no night to restore her.

8. When one of his four (pagan) wives dies after their professing Islām, before his exerting his free will to select her, this will not cause his choosing her to be void. If he selects her, he will have the night to inherit her. Also he has the choice when all of his wives die, and if he chooses four from among them, he will be entitled to inherit them as the *ikhtiyār* does not mean a resumption to a marriage contract, but it is a specification to the validly contracted wife. If he and his wives die, some legists said: the choice (*khayār*) becomes void, and others prescribe drawing lots since they include inheritors and testators (inherited) among them. If the husband dies before them (his wives), they should observe the *`iddah* (keep themselves in waiting for four months and ten days), since among them there are some upon whom observing the *`iddah* is *wājib*, and since no distinction is made among them so they are required to undergo the *`iddah* to the maximum term, out of precaution. That is because every one of them may be his wife or may not be, hence the pregnant divorcee observes the *`iddah* due to the death of her husband until childbirth (as per the holy verse: "and as for pregnant women, their term shall end with delivery". While the menstruating divorcee will observe the maximum term of *`iddah* for divorce and death (of her husband).

9. If he professes Islām along with his wives, he will be required to provide for their maintenance in all until he selects four from among them, where he will be relieved of the maintenance of the others since they are considered his wives. The same rule is applied when all or some of them (wives) profess Islām while he maintains his disbelief. When he refrains from paying the maintenance, they (wives) will be entitled to demand it for the present and past (cohabitation and conjugal relations) irrespective of whether he has professed Islām or is

still maintaining the disbelief. But they are not entitled to any *nafaqah* when he professes Islām alone to their exclusion since *istimatā`* (sexual intercourse) with them is not fulfilled. If the two spouses differ regarding who has first professed Islām, the husband's word will be accepted in consonance with the elemental (instinctive) innocence. When the husband dies, only four of his wives will inherit him, but since they are not distinguished or specified by names, his heritage should be allotted and dedicated specifically for all of them until they compromise and agree on dividing it (among them). Most of the jurists preponderate drawing lots among them or *tashrīk* (giving all of them equal shares). If he dies before their professing Islām, nothing of his heritage will be devoted for them, as it is not permissible for a non-Muslim to inherit a Muslim. Some legists are of the opinion that the wife who professed Islām before the division is entitled to inherit from her husband.

10. In accordance with a tradition reported by `Ammār al-Sabāṭī that al-Imām al-Ṣādiq (A) said: "Divorcing a wife is the worst act done by the man, and it is equal to apostasy. If he restores her while being in her *`iddah*, she will be his wife through the first marriage contract. But if he returns to her after her completing the *`iddah* period, and being married to another man, his return would not be effected as he is not entitled to restore her in this case."

Supplementary Issues to Contract

They are seven points:

1. *Kafā'ah* (equality) is a necessary condition in marriage contract. It means that the man be an 'equal' of the woman in certain things, particularly in religion (Islām). Is equality in faith (*īmān*) a condition for marriage? There are two views in this regard, the most predominant of which considers *kafā'ah* in Islām as sufficient, though there is strong emphasis on equality in faith. Most of the scholars require equality of men, because it is not something disapprovable for a man to marry a woman lower in status as against a woman doing the same, as it is the woman who takes and learns from her husband's religion.

It is not permissible (*ḥarām*) to give a female in marriage to a *nāṣibi* man who declares openly his animosity (hostility) against Ahl al-Bayt (A) as his practice is known to be against and out of Islām. Regarding the condition of capability to provide for maintenance (*nafaqah*) for the wife there are two opinions, one saying: Yes, it is a condition in marriage. The other view, which is more widely-held by the scholars, says: No, it is not a condition. If the husband becomes incapable of providing for his wife's maintenance after marriage, does this give her the night to dissolve the contract? There are two views regarding this, the more predominant of which says: She will not be entitled to such dissolution. It is permissible to marry a freewoman to a bondman, an Arab female to a non-Arab male, and a Hāshimite woman (belonging to Banū-Hāshim) to a non-Hāshimite man, and vice versa. Also marrying a notable religious woman to a workman of low profession (such as a cupper), is possible. When someone, whose faith and capability of maintenance are known to all, comes with a proposal (to marry), then responding to his proposal is *wājib* (upon Muslims), even if he be of lower lineage. If the female's guardian refrains from marrying him, he will be considered as a disobedient to God's commandments. If the husband claims (when proposing) to be belonging to a certain well-known tribe but it is discovered afterwards that he belongs to another tribe, the wife will be entitled to dissolve the contract. Other scholars do not give her this night. The latter view is more correct.

It is *makrūh* (not recommendable) to give a woman in marriage to a man known of *fisq* (debauchery) and it is more emphatic in regard of a man known of drinking wine. Also it is *makrūh* to marry a believing female to a male known of opposing Islām (*mukhālif*), but no objection is there to marry a woman to *mustaḍ`af* (oppressed, poor) who is not known of antagonism (to religion).

2. When a man marries a woman and finds her to have committed fornication (*zinā*), while this has not been revealed to him, he will neither be entitled to annul the contract nor to claim the *mahr* from her guardian. Some legists are of the opinion that he has the night to claim the *mahr* while she has

the right to take her *ṣadāq* for the sexual contact he established with her, but this view is obsolete.

3. It is not permissible to woo a woman undergoing the *`iddah* period as a result of a revocable divorce, since she still enjoys the rights of a wife. But asking the hand of a wife who has been divorced thrice whether by her first husband (after being married to another man and divorced by him) or other than him, is permissible on condition that this wooing is not declared openly. Concerning a wife who is divorced nine times in the *ṭalāq al-`iddah* form, and being married twice to two other men (other than her first husband), she becomes *ḥarām* permanently for her first husband. It is not permissible for him to ask her hand anew but this is permissible for another man, on condition that it is not made during her *`iddah* period. But for a woman undergoing the *`iddah* period as a result of an irrevocable divorce whether through khal` or dissolution of contract, her husband or another man can declare proposal to marry her. The formula of proposal is thus: *'rubba rāghibin fīkī* (there may be one desiring for you)' or *'ḥarīṣin `alayki* (covetous for you)' or other alike expressions indicating the same meaning. It is *wājib* that the offer be made by using only the words that conventionally convey the meaning of marriage (*nikāḥ*), like saying: I would marry you on completing your *`iddah.* When he makes the proposal to marriage during her *`iddah* period (where it is impermissible to marry her), consummating the marriage with her on her completing the *`iddah* period, she will not be *ḥarām* for him.

4. If a man proposes to marry some woman and she accepts his proposal, it will be *ḥarām* for another man to ask her hand. If that man marries a woman, the contract (of the first man) will be valid.

5. When the woman who was divorced thrice lays down a condition on contracting marriage with her by another man, that the new marriage contract should be annulled after consummating the marriage with the second husband, this contract will become void. Some legists observed: the condition laid down by her is invalid (while the contract stays as it is). If she stipulates a condition that she has the option to divorce

herself, after contracting marriage with the second husband, the contract would be valid while the condition is void. When he consummates marriage with her, she will be entitled to *mahr al-mithl.* If this condition is not included in the contract but only intended by the husband, the wife or the guardian (*walī*), this will not cause voidness to the contract. Wherever the contract is said to be valid, the wife will become *ḥalāl* for the divorcer after consummation of the marriage with the second husband (*muḥallil*), being divorced from him and expiry of her *`iddah* of this divorce. Wherever it is said to be invalid, she will not become *ḥalāl* for him (divorcer), as mere copulation is not sufficient to make her *ḥalāl* (for the first husband) unless it be a result of a valid contract.

6. A marriage contracted in a *shighār* form is null and void. The *shighār* marriage means marriage of two women to two men on condition that the *mahr* of each one be consummation of the marriage with the other. If each one of the guardians (of the minor females) marries the female under his guardianship to a male from the other party, specifying a certain *mahr* for each one, both the marriage contracts are valid. If each of them marries his minor girl to the other, stipulating to marry him the other minor maiden with a specified *mahr*, both the contracts are valid but the *mahr* is void because he has stipulated a *tazwīj* (marrying him a maiden) beside the *mahr*, which is not binding. And since it is not valid to include an option (*khayār*) in the marriage contract, hence the wife will be entitled to *mahr al-mithl*, but there is a difference of opinion among the *fuqahā`* regarding this view. The same rule is applicable when the guardian gives in marriage his minor female to a man with laying a condition that the husband gives him in marriage so and so woman, without specifying any *mahr*.

A subsidiary issue

If a man says to another: I give you in marriage (*zawwajtuka*) my daughter on condition that you give me in marriage your daughter and the marriage with my daughter be the *mahr* of your daughter, his daughter's marriage contract would be valid while that marriage contract of the addressee's daughter is null and void. But if he says: "… on condition that consummation of

your daughter's marriage be the *mahr* of my daughter," the contract of his daughter becomes void while the marriage contract of the addressee's daughter would be valid.

7. It is *makrūh* to contract marriage with the midwife if she has brought him (man intending to marry her) up (fostered him), and also with her daughter. It is *makrūh* also for a man to marry his son to the daughter of his wife from another husband, if she has begotten her after separating from him within a period sufficient for marrying another man and conceiving a child as a result of establishing sexual contact with him and giving birth to a child. But no objection is there to marry him to the daughter (of his wife from another husband) that was born before consummation of the marriage of her mother with the second husband (the son's father). Also it is *makrūh* for a man to marry the woman who was a fellow wife (rival wife) with his mother before (marrying) his father, and also an adulteress before her declaring repentance (*Tawbah*).

PART TWO
TEMPORARY MARRIAGE
(AL-NIKĀḤ AL-MUNQAṬI`)

It is permissible according to the Islāmic religion due to establishment of its legitimacy and absence of any impediment in the way of performing its contract.

PILLARS AND RULES OF MUT`AH

I) THE FOUR PILLARS (ARKĀN) OF MUT`AH:

First: The formula (ṣīghah)

Since it is a contract, the *mut`ah* requires a declaration and an acceptance as prescribed in the Sharī`ah for concluding such contract. And as in permanent marriage, the declaration is the prerequisite of the woman. The words used for *ījāb* (declaration) are of the roots: *al-zawāj, al-tamattu`* and *al-nikāḥ* in this way: *zawwajtuka*, *matta`tuka*, and *ankaḥtuka* (I have given you in marriage and in *mut`ah* which means

enjoyment), whichever is used, the contract will be established. But a marriage contract is not concluded when using words indicating *tamlīk* (giving possession), or *hibah* (giving as a gift) or *ijārah* (renting) with such expressions: 'I have given you in-possession,' 'I have given you as a gift,' 'I have rented to you' and 'I have lent to you.'

The acceptance (*qabūl*) is made by the man after the woman has made her declaration, and his words must demonstrate that he is satisfied with the declaration. For example, he may say: 'I have accepted the *zawāj*' or the '*nikāḥ*' or 'the *mut`ah*', in the past or perfect tense. It is valid also if he says only: *qabiltu* (I have accepted) or *'raḍītu*' (I have agreed). If the groom starts before the bride by saying: *'tazawwajtuki*' (I have married you) and the bride responds by saying: *'zawwajtuka*,' the contract is valid and sound. The formula of the contract must be recited in the past tense (or perfect) to be valid, as when the groom says: *'aqbalu'* (I accept) or *'arḍā'* (I agree) intending the contracting of the marriage, the contract is invalid. Some legists observed: if he says: *'atazawwajuki*' (I marry you) for so and so period,' for such and such a *mahr*, with the intention of contracting the marriage, and the bride says: *'zawwajtuka'* (I have given myself in marriage to you), the contract will be valid. It is valid also if she says: 'Yes'.

Second: The persons (al-mahall)

A man can conclude a contract of *mut`ah* only with a Muslim woman or a female belonging to Ahl al-Kitāb (people of the Book), Like a Jew or Christian or Majian (majus), as per a more widely-held opinion. It is not permissible to engage in temporary marriage with an unbeliever woman or enemy of the Household of the Prophet (Ahl al-Bayt) such as a follower of the Khawārij. A Muslim woman cannot marry a non-Muslim man.

If the man has a free permanent wife, he cannot contract a *mut`ah* with a slave woman without his wife's permission. Should he do so, the contract is invalid or in abeyance pending her permission. If the slave be owned by someone else, the *mut`ah* cannot be contracted without her master's permission. A

man is not permitted to marry the daughter of his sister-in-law or brother-in-law without his wife's permission. Should a contract be concluded without her permission it is invalid or in abeyance until she gives her permission. With these two exceptions, the relatives to whom marriage is not permitted are the some as in permanent marriage.

It is recommended that a Muslim man concludes a temporary marriage only with a chaste Muslim woman (one who has never committed fornication and follows the Sharī`ah in her activities). If someone makes an accusation against a woman, it is recommended that before concluding the contract of *mut`ah* with her, the man inquires from her about her situation, i.e. as to whether or not she has a husband and whether or not she is a chaste. But asking is not a condition for validity of the contract.

It is reprehensible for a man to conclude a marriage of *mut`ah* with a fornicatress. If a man should contract a temporary marriage with a fornicatress, it is his duty to command her not to perform adultery. But this is not a necessary condition of the marriage, by reason of the 'principle of correctness' as applied to the Muslim's act. It is also reprehensible, without any exceptions, to contract a temporary marriage with a virgin (by reason of the words of al-Imām Ja`far al-Ṣādiq (A) in reply to a question put to him by Abū-Sa`īd al-Qammāṭ: "A virgin maiden is inviting me to herself (to marry her) in private away of her parents' knowledge, shall I do so? He (A) replied: Yes, you can do this, but you should guard against (keep away of) locale of vagina (keep away of vaginal intercourse with her), and it is not *ḥarām*. If a contract should nevertheless be concluded, it is not permissible for the man to consummate the marriage, unless the marriage took place with the permission of her father (a condition almost impossible to imagine in Muslim society).

Three Subsidiary Issues

1. When a polytheist man professes Islām while having a wife belonging to the People of the Book by a temporary contract, the marriage contract with her stays as it is, even if he has more than one such wife. In case she precedes him in professing Islām, the validity of her temporary contract with him will be in

abeyance pending until expiry of her *`iddah* period, if he has consummated the marriage with her. If the *`iddah* period expires before the husband's embracing Islām, the contract becomes null and void. But if he follows her in professing Islām before expiry of her *`iddah*, he is more entitled to her as long as the term permitted for him is there. If this term (*ajal*) expires before his professing Islām, he will have no night in her.

2. If his wife be of those who possess neither a revealed nor a quasi-revealed scripture (or those who worship idols, fire, sun, or stars) or non-believers who do not believe in Allāh, and one of them believes in Islām after consummating the marriage, the dissolution of the contract will be contingent on expiry of her *`iddah* period, and the marital bond between them will be broken with expiry or the *ajal* (term) or completion of the *`iddah* period, whichever occurs first before his professing Islām will entail to annulment of the marriage contract between them.

3. If a man, who has two wives, a free and a slave, professes Islām, the contract (of *mut`ah*) with the freewoman will be established while that one with the bondwoman will be contingent on prior permission of the freewoman.

Third: The Dower (Mahr)

It is a necessary condition for a temporary marriage in particular, without which the contract becomes null and void. Hence, the contract should mention a dower of known property, whether in cash or kind, whose amount is safe from increase or decrease. In order to gain knowledge of the property, it is sufficient for the woman to see it, and it is necessary that it actually be weighed, measured, or counted, whatever the case may require. As for goods which are not present, it is sufficient that the dower be described in such a manner that the woman's ignorance be removed, i.e. that it be described exactly as it is. There is no condition or requirement concerning the amount of the dower except that the two sides come to an agreement over articles which may properly be exchanged, even if they are no

more than a few grains of wheat. If the dower is not mentioned, the contract is unanimously held to be invalid.

The woman may ask for the whole amount of the dower at the beginning of the marriage, in this case, the man may not take back anything of the dower under any circumstances, unless for some reason the contract should have been invalid from the beginning.

In a situation where a contract is concluded, but before the beginning of the time period (*ajal*) the man decides not to go through with the marriage but to give back to the woman the contracted time, she will be entitled to one-half the *mahr*. The situation is similar to divorce before consummation in permanent marriage. But when he consummates the marriage, he is required to pay the whole dower on condition that the contracted time be fulfilled. So in this respect, the reason that one-half the dower is held back is that the marriage was not consummated. On the other hand, there is the question of what exactly necessitates that the dower be paid. In permanent marriage the key element is consummation, but temporary marriage is different from it because of the time period which must be taken into account, as the amount of dower has to be specified according to the time fulfilled by the wife. If, of her own free will, the temporary wife should separate from her husband before the end of time period, the man reduces the *mahr* in proportion to the amount of time by which the time of *mut`ah* has been reduced, on condition that he has not already paid her the full dower.

If it should become apparent that the contract is invalid because the woman already has a husband, or because she should be observing a waiting period as the result of a previous marriage, or she is forbidden to the man by family relationship such as her being his wife's sister or mother, or any other reason, then one of the following courses of action should be taken: If the marriage has already been consummated and she be ignorant of the fact that the contract was invalid at the time of intercourse, then she should be given the normal dower. Here the reasoning is that the intercourse has to be honored and the compensation

be given. Since the contract is invalid, the 'specified dower' is nullified, hence the normal dower must be paid.

If it becomes apparent that the contract is invalid before the marriage is consummated, the woman receives no dower, as only a valid contract or having sexual intercourse warrants payment of the dower. If the marriage has been consummated and the woman was aware of the contract's invalidity, she can have no claim to a dower for fornication.

In all the three above cases if the man has already given the woman the whole dower, she must return part or all of it as soon as the invalidity of the contract becomes apparent. If she no longer possesses the amount which must be returned, she is liable for it, no matter how it may have left her hands, whether, for example, she has spent it or it was stolen.

If the woman dies during period of *mut`ah*, even if it be before consummation, her dower may in no way be lessened, exactly as in permanent marriage.

Fourth: The Time Period (Ajal):

The term (*ajal*) is a necessary condition in contract of *mut`ah*, as if it is not specified in time of concluding the contract, it will be concluded permanently. It must be delineated in a manner which allows no possibility of increase or decrease. A temporary marriage must be stipulated thing for a stipulated period. If its time is specified for less than a full day, it is valid on condition that manifest event such as sunset or *zawāl* be mentioned as an indication to the end of time of contract. It is permissible for the agreed upon time period either to be joined to the moment of concluding the contract or to be postponed. The situation here is the same as with a contract concluded for purposes of rental, since the woman takes on certain legal characteristics of rented property.

As for the possibility of postponing the beginning of *mut`ah* contract, this is conditional upon the stipulation of the day and month in which it is to begin. For example, if the man states that the contract will be for one month but fails to stipulate exactly when that month is to begin, the contract is invalid

because the time is not stated. But if the contract be non-conditional without any mention of postponement, then the marriage begins as soon as the contract is concluded, since, according to the transaction has taken place. If the stipulated period is not mentioned in the text of the contract, the marriage cannot take place and the contract is invalid as *mut`ah* but it will be concluded as permanent, as a contract follows the intentions of those who conclude it. There will be no *mut`ah* without two things: a stipulated period and a stated dowry. If the man, while concluding the contract, says: for one time or two times, without stating a fixed period, it is invalidated as *mut`ah* and be transformed to a permanent marriage. There is a weak opinion held by some scholars, permitting such a stipulation and requiring the man to abstain from looking at her after fulfillment of his condition, but this view is obsolete nowadays. If he concludes the contract in this way, it will be concluded as a permanent marriage, but if he states a specified term it will be concluded as a valid *mut`ah* contract.

II) THE STATUTES (AḤKĀM) OF MUT'AH:

They are eight:

1. The *mut`ah* contract is valid when both the time period and dower are stated and specified, when concluding it. If the man fails to fulfill the *mahr* with mentioning the time period, the contract becomes null and void. But if only the time period is not fulfilled, the *mut`ah* contract will be transformed to a permanent one.

2. It is permissible for one or more conditions to be mentioned in the contract of *mut`ah*, so long as they are legitimate. A condition must be accompanied by a declaration and an acceptance. Fulfilling the condition then becomes necessary since it is part of the contract. As for conditions not mentioned in the text of the contract itself, but stated before or after the contract, their fulfillment is not obligatory. Reiterating the condition mentioned in the contract after its conclusion is not a condition. Some scholars consider this a necessary condition, but their opinion is not so widely-held.

3. A sane girl of full age, a maturing, is fully competent to decide her contractual affairs and contracts a *mut`ah* marriage for herself, regardless of her being a maiden or *thayyib* (a girl who has had sexual intercourse), and her guardian has no night to object (or prevent) this marriage, as per a more famous opinion.

4. It is permissible for the man to stipulate as a condition a particular time for meeting (having sexual intercourse with) his temporary wife, such as daytime or night-time. It is also permissible for a given number of sexual acts for a given period to be stipulated, as for example, during one day or over the whole period of the marriage. These are legitimate conditions and in no way contradict the requirements of the contract.

5. It is permissible to perform coitus interruptus (*`azl*) even if it is not mentioned as a condition in the contract, and it needs no permission of the woman (as per the ḥadīth: "semen belongs to the man, he may expend it as he wishes.") That is due to the fact that the basic aim of *mut`ah* is enjoyment, not the production of offspring. If the woman becomes pregnant, the child belongs to the husband, even if he has performed coitus interruptus. This status applies to every legitimate act of sexual intercourse, as per the saying: "The child belongs to the bed" which is of general application. If the man should deny the child, then it does not belong to him, and the sworn allegation (*li'ān*) required in permanent marriage is not necessary in this marriage.

6. By a consensus of the *`ulamā*, there is no divorce in *mut`ah* marriage, and the man and woman become separated from each other through expiration of the time period, or else by the man's returning the remaining time to the woman. Also in *mut`ah* marriage there is neither *īla'* (forswearing or oath taken by the husband to refrain from having sex with his wife), nor sworn allegation (*li'ān*), nor *ẓihār* (a husband telling his wife: "you are to me like the back of my mother.") But the majority of the scholars hold that *ẓihār* can take place in *mut`ah*.

7. According to the most widely-held view, there is no inheritance between husband and wife in *mut`ah* unless it

should be specifically mentioned as a condition in the contract. One of the spouses may be named heir to the other, in which case the inheritance is one-sided, or it may be stipulated that if either spouse should die, the other will inherit. If no such conditions are mentioned, there is no inheritance. If they should stipulate the condition of inheritance in the contract (of *mut`ah*), they must hold fast to this condition. Some legists are of the opinion that: It does not become binding since it cannot be established unless it be stipulated for a non-heir as in the case where each of them stipulates it for a stranger (non-relative). The former view is more predominant among the scholars.

8. In *mut`ah* there is a waiting period (*`iddah*) which must be observed after the term of marriage has expired or the man has returned the remainder of the period to the woman. It consists of two menstrual periods, provided she menstruates. If she does not menstruate but has not reached the menopausal age, then the *`iddah* period to be observed by her should be forty-five days. If the husband should die, the wife must observe a waiting period of four months and ten days, if she be menstruating, even if the marriage has not been consummated.

The waiting period of a slave woman whose husband has died is two months and five days, if she menstruates. If the wife should be pregnant, her waiting period will be either the usual one (for a wife whose husband has died) of four months and ten days, or the time it takes to give birth, whichever of the two is longer.

III) MARRIAGE CONTRACT WITH SLAVES

It is established either by taking possession or concluding a contract.

First: Conclusion of a Contract

It is of two types: permanent and temporary (*munqaṭi`*).

Supplementary Issues

1. It is not permissible for a bondman nor for a bond woman to contract marriage for themselves, except with prior permission

of his/her master. If any of them contracts marriage without the master's permission, the validity of the contract will depend upon the owner's permission. Some scholars said: The owner's permission is like a resumed contract. Others are of the opinion that: the contract is null and void in both the cases and the permission is cancelled. Another view permits such contract for the bondman only not the bondwoman. The first view is more correct. When the owner (master) gives permission, the contract will be valid and he is liable to pay the *mahr* of his owned bondman and the maintenance of his wife while he is entitled to take the *mahr* of his captive slave woman. If each of them (bondman and bondwoman) be owned by one master or more, and some of them give permission, the contract will not be established but with the consent of the other owners, or their permission after concluding the contract, as per a more correct opinion.

2. If both the parents be slaves, the child produced by them will be a slave too. If they be both owned by one master, the child produced (through marriage consummated by them) will be attributed to this owner. If the spouses (slaves) be captive slaves for two owners, the child produced by them will be attributed in two equal shares to both the owners. If one of the owners stipulates when contracting marriage of their captive slaves to have the child for himself, or stipulates an excess to his share, the condition is binding and should be fulfilled (as per the *ḥadīth*: "The Muslims are bound to fulfill their conditions.") If one of the spouses be free, the child should be attributed to him/her, irrespective of whether it be the father or mother, except when the master stipulates to enslave the child, where his condition be binding as per a widely-held view.

3. If a freeman marries a slave woman without her master's permission and consummates the marriage with her before taking consent (from her owner), being aware of unlawfulness of this act, he will be an adulterer liable to legal punishment (*ḥadd*). If she surrenders willingly to his request, (intercourse) then she will not be entitled to any *mahr* if it be with her knowledge of prohibition on this act. If a child is produced by such copulation, it would be a slave for the mother's master. If the husband be ignorant of the prohibition on such act, or

performs this copulation by mistake thinking it to be (lawful, then no *ḥadd* is to be applied against him, and paying the dower will be *wājib* upon him. Further, the child produced due to this copulation will be free but its father would be required to pay its value to the mother's master from the day when it was born alive. So also, when he contracts marriage with her on the basis that she be free as claimed by her, he will be liable to pay her *mahr*. Some scholars are of the opinion that: he has to pay one-tenth if she was *thayyib*, the view which is more predominant among the legists. If he has already paid her the dower, he is entitled to reclaim and restore the part left of the *mahr* from her, while the child she brought as a result of intercourse with him is considered a slave, and the husband be liable to set them (his wife and child) free by paying their values, requiring her master to return them to him. If he has no money to pay, he should endeavor and do his best to collect that much of money enough to release them.

If he refrains from so doing, is the Imām (ruler) obliged to ransom them? Some legists consider the ruler to be duty bound to do so, basing their argument on a feeble tradition. Other scholars observed: It is not *wājib* on the father as it is him who has caused the separation. Those who believe in *wujūb* of the ransom upon the ruler say that he should take the amount of ransom out of *sahm al-riqāb* (share of ransom of slaves).

4. When the *mawlā* (slave's owner) contracts marriage between his slave man and slave woman, it is recommended for him to give his bondwoman a sum of money of his own. If he dies, the option (*khayār*) to confirm the contract or annul it will be transferred to the heirs to the exclusion of the captive bondwoman.

5. When a slave man marries a freewoman, having the knowledge of non-permission of such marriage, the wife will not be entitled to a dower nor to *nafaqah* (support), if she being aware of prohibition on such marriage. Besides, the children she produces of this marriage would be captive slaves. If she be ignorant of the prohibition, they will be free and paying their ransom (prices) will not be *wājib* upon her, while her slave husband is bound to pay her *mahr* if he has consummated

marriage with her, and it should be claimed from him on emancipation.

6. If a bondman marries a bondwoman owned by other than his master, the child produced of this marriage will be attributed to them irrespective of whether their masters give permission or not. If only one of the two masters gives permission, the child will be attributed to that master who has not given permission. If a bondman commits fornication with another master's slave woman, the child born of this fornication will be attributed to the bondwoman's master.

7. If a bondman marries a bondwoman owned by two partners, purchasing then the share of one of them in her, the marriage contract will become void and copulating with her becomes forbidden for him. If the other partner ratifies the contract after the purchase, this will not validate the contract according to an opinion held by some scholars. Other legists are of the opinion that copulation with her becomes permissible for him through this ratification, but this view is weak. If the first master (whose share in the bondwoman is bought by the bondman) makes her lawful for him (to copulate with), she becomes *ḥalāl* for him as per a confirmed tradition reported in this regard. Some jurists hold a contrary view and say that: she does not become lawful for him because the cause of permissibility cannot be divided into parts. So also, is the rule when he takes in his possession half of her and the other half is free, where it is not permissible for him to copulate with her neither due to taking possession of her nor through permanent marriage contract. If he contracts a *muhayā'ah* (a kind of time hiring contract) with her, some legists observed: It would be permissible for him to conclude a temporary marriage with her in the time distinguished for her. This opinion is confirmed by many narrations but there is a difference of opinion among the *fuqahā*' regarding it.

Supplementary Issues

They are three: Manumission, Sale and Divorce.

1. Manumission (*`itq*): The slave woman is entitled to dissolve her marriage contract on being manumitted, irrespective of whether she be married to a freeman or a slave. Some companions believe in a difference between these two cases, but the option given to this wife is immediate.

But in case the slave man is manumitted, he will not have the night to annul the contract, nor his master, nor his wife whether she be free or slave, as she has given consent to marry him as a slave. If a master marries his captive slave man to his slave woman, and sets free the bondwoman or both of them, the slave woman will be entitled to annul the contract. The same rule is applied when they (slave man and woman) be owned by two masters and they be manumitted at one time.

It is permissible for him (master) to make the manumission of the slave woman as her dower (*ṣadāq*), when their contract would be established on condition that the word used for contracting the marriage precedes the manumission, such as by saying to her: I have married you and manumitted you and made your manumission as your *mahr*. Because if the manumission precedes the contracting, she becomes entitled to either accept the marriage or refuse it. Some jurists said: this precedence is not a condition for validity of the contract, because the uninterrupted speech is similar to one complete sentence, and it is preferable. Some legists believe in necessity of the manumission being performed before the marriage since the bondwoman's vagina is lawful and allowable for her owner only, and it does not become legitimate (*Mubāḥ*) through a marriage contract with presence of ownership. The former view is more predominant.

The slave woman who has given birth to a child is not manumitted except by death of her master, with an amount taken from her child's share. If this share fails short of covering this amount, she will be entitled to the remainder, and her child is not required to acquire it. Some legists believe in obligation of this endeavoring on the part of her child. The former view is more correct. If her child dies while his father is alive, selling her will be permissible and she returns to slavery. Also it is permissible to sell her despite presence of her child's ransom in

the price of her freedom, if her master has none other than her. Some scholars said: It is permissible to sell her after death of her master with his debts, even if these debts be not a price for her, where the debts exhaust his legacy as a whole in a way nothing is left over of his legacy. If her price be a debt and the owner marries her making manumitting her as her *mahr*, causing her to give birth to a child and becoming bankrupt due to offering her price and dying then, it would be permissible to sell her in return for the debt. Does her child return to slavery? Some legists, basing their argument on a narration reported from Hushām ibn Sālim, give an affirmative reply, but the most preponderant view says: Neither the manumission nor the marriage will become void, nor the child returns as a slave since the freedom is fulfilled for both of them (mother and child).

Sale of a Slave

Selling a bondwoman by her owner has the rule of divorce, and the buyer will have the option either to confirm the marriage contract or dissolve it, and his choice is immediate. If he comes to know about this choice but does not annul the marriage, the contract will be binding on him. The same rule is applied in case of a slave man when having a bondwoman as wife. When selling him while having a free wife, the buyer will have the choice either to accept or refuse, as per a weak narration. If they both be owned by one master who sells them to two persons, each one of the buyers will have the choice (*khayār*) to accept or refuse. So also, is the rule when they be bought by one person.

Also, when the owner sells one of them, the option will be granted to both the buyer and the seller, whose marriage contract will not be established except with consent of both the parties of the deal. In case their marriage produces children, these children will be attributed to the masters of their parents.

Three Subsidiary Issues

If a person gives in marriage his slave woman to another man, he will be the owner of her *mahr* since it will be established in

his possession. If he sells her before consummation of marriage, she will be entitled to nothing due to dissolution of the contract through which the dower is established in the husband's charge. If the buyer gives permission, he will be entitled to the *mahr*, as his permission is like a resumed contract. But if he sells her after consummation of marriage, the *mahr* will be his night, regardless of whether the second one permits or annuls the deal, since it (dower) has come into possession of the first one.

2. When someone marries his captive bondman to a freewoman and sells him before consummation of marriage, the buyer will have the night to annul the contract, while his master be liable to pay half the *mahr*.

3. If a man sells a bondwoman claiming then her being pregnant because of having sexual intercourse with him, while the buyer denies this claim, his (the owner) word about invalidity of the sale transaction will not be accepted but his claim regarding parentage of the child is accepted as it is an acknowledgment causing no detriment to others, the view regarding which there is a difference of opinion among the legists.

Divorce

If a slave man marries a free or a slave woman owned by another master, with his master's permission, the master will not have the night to force him to divorce her or prevent him from marriage. If a person gives in marriage his bondwoman to his bondman, this marriage will be a valid contract not an *ibāḥah* (general permission for common use), and the option to divorce will be granted to the master, who is entitled to separate between them without using expression of divorce, such as by saying: I have dissolved your marriage contract, or he can order one of them to retire and separate from the other. Does such word have the same effect and rule of divorce? Some jurists observed: Yes, it has the effect of divorce even if he repeats it for two times, when returning to her after the first revocable divorce (*raj`ah*), and after divorcing her for the third time she becomes *ḥarām* for him and he cannot remarry her unless she marries another person through a valid *nikāḥ*

(*muḥallil*). Other legists said: It is considered a *faskh* (dissolution) to the marriage contract, the view which is more predominant among the scholars.

If the husband (slave man) divorces this slave woman and she is sold by her owner after that, she will be required to complete her *ʿiddah* period. Should the buyer demand from her an extra period in addition to the *ʿiddah* period as acquittal of obligation (*istibrāʾ*)? Some legists said: Yes, he should do so, because these two rules differ from each other and interweaving them is against the established usage. Other legists hold a contrary view believing that he is not required to perform *istibrāʾ* since she has been already relieved of obligation, the view which is more correct.

SECOND: TAKING POSSESSION

It is of two kinds:

First: Milk al-Raqabah

It is permissible for a man to copulate with the slave women that have become his own property without usufruct (*milk al-raqabah*), and he can combine more than four women at a time. It is permissible for him to combine in his property a woman and her mother, but when he copulates with one of them, the other one will be forbidden for him by herself. Also it is permissible for him to combine as his property a slave woman and her sister through possession. When he has sexual intercourse with one of these two captive slave women, the other one will be *ḥarām* for him collectively, (i.e. at the same time). If he sells one of them, the other one will be *ḥalāl* for him.

It is permissible for a son to take possession of a slave woman with whom his father has copulated, and also for a father to buy the bondwoman with whom his son has copulated. But it is *ḥarām* for each one of them to copulate with that slave woman with whom the other has copulated in herself (*ʿaynan*).

Copulation with the captive slave woman who is given in marriage to another man, is *ḥarām* for her owner, until she

separates from her husband (through divorce or death) and completes her *`iddah* period if she be of those women who are required to undergo a waiting period. The master (*mawlā*) is not entitled to annul her marriage contract, but he can sell her where the buyer has the option in his hand. Also it is not permissible for him to look at those parts of her body which are forbidden to look at for other than the owner.

It is not permissible for him also to copulate with a bondwoman jointly owned by him and another person, and the buyer is not allowed to copulate with a bondwoman except after acquiring her relief (*istibrā`*). If she has a husband who permits the buyer to marriage with her, he will not have the night to annul the marriage contract. So also, if he has knowledge of this fact but does not object except when she separates from her husband and undergoes the *`iddah* period of his divorce, if she be among those women who usually undergo *`iddah*. If the husband does not permit the buyer to marry the bondwoman, she will not be required to observe a waiting period, and *istibrā'* is sufficient for permitting copulation with her. It is permissible to buy the married women who have been taken captives in war, beside their daughters and those women taken prisoners by the deviated people from among them.

Supplementary Issues

1. For a man who takes possession of a bondwoman through any means of taking possession, having sexual intercourse with her is *ḥarām* until she relieves herself by one menstruation. If her menstruation delays while there being women of her age usually menstruate, she will be required to observe a waiting period of forty-five days.

She is exempted of this requirement when being bought (possessed) by someone while being menstruant except the period of her menses. So also, is the rule if she be owned by a just person who tells of her being relieved (*istibrā'*). So also, if she be owned by a woman, or a woman who reached the age of menopause, or a pregnant with aversion.

2. If a man takes possession of a bondwoman and sets her free he will be entitled to contract marriage with her and copulates with her without *istibrā'*, but *istibrā'* is better. If he copulates with her before manumission, it will not be permissible for other than him to contract marriage with her except after her completing the *`iddah* period, which is three (lunar) months if this does not precede her purities (of menses).

Second: Usufruct Possession

It is of two parts: the formula (*ṣīghah*) and rule.

A. The Formula (ṣīghah):

This possession can be effected by using such words as: "I have made copulation with her *ḥalāl* for you" or "I have absolved you of charge of copulation with her".

Using words indicating *'āriyah* (loan) does not make copulation with her lawful, but there are two views regarding using words of *ibāḥah* (general permission for common use) as to be effective here, and the more predominant view is permissibility.

If he uses words indicating *hibah* (donation) like "*wahabtuka wat'aha*" or "*sawwaghtuka*" (permitted for you copulation with her) or "*mallaktuka*" (I have given possession of her to you), and intends by these words *ibāḥah* (permission), he will be required to permit such copulation. But if he be content with words of *taḥlil* (deeming lawful) he would mean prevention. Is it a marriage contract or giving possession of usufruct? There is a difference of opinion among the jurists, because of guarding the vagina off *istimtā`* (sexual intercourse) without a contract or taking possession (*tamalluk*). The latter view is more correct.

Regarding making copulation with his captive slave woman as lawful for his captive slave man there are two different views: One of them is forbiddance (*man`*) which is supported by the fact that it is a form of *tamlīk* (giving in possession), while the slave is far from *tamlīk*.

The second view is permissibility when he specifies for him the bondwoman with whom he can copulate. This view is supported

by the fact that it is a type of *ibāḥah* (permission for common use) and the captive bondman is qualified for *ibāḥah*. The latter view is more correct.

B. The Rule (ḥukm):

There are three issues in this regard:

1. It should be content with the limit indicated by the word used and what the actual situation testifies to be under his disposal. Hence, if the master permits only kissing, he should be content with this only. So also, if only touching is permitted for him, he will not be entitled to copulate with her. But if the master permits copulation for him, all other forms of enjoyment will be lawful for him. If only her service is permitted for him, he cannot copulate with her. Likewise, if he permits copulation for him, he cannot employ her to serve him. If he copulates with her without permission, he is considered as having sinned and will be required to give compensation for vaginal intercourse, and the child produced of this copulation will be a captive slave for her master.

2. The child produced by a bondwoman with whom copulation was permitted by her master is considered as free. Also if the master stipulates freedom by the word of *ibāḥah*, the child would be free and no way is there on the father. If he does not (lay such a condition, some legists observed: setting free the child by (paying) its price will be *wājib* upon the father. Others are of the opinion that: releasing the child is not *wājib* upon the father, the view which is more correct.

3. No objection is there to copulating with the bondwoman while there being another person in the house, and also it is permissible for a man to sleep between two slave women. But this thing is not permissible in respect of a freewoman. It is *makrūh* (reprehensible) to establish sexual contact with a prostitute or with a daughter born of fornication (*zinā*).

SUPPLEMENTARY ISSUES TO MARRIAGE

Section one: Defects Justifying Dissolution of Marriage

There are two kinds of defects (*`uyūb*) which justify dissolution of the marriage, some related to the man and others related to the woman.

First: Defects of the Man

1. Insanity: Discovering the husband's being insane, whether permanent or periodic, gives the wife the night to annul the marriage. Also, she has such night if the husband becomes insane after marriage but before consummation or after marriage and its consummation. It may be stipulated that the husband who has become insane anew after marriage should not regain his sanity during times of obligatory prayers (where the wife has no night to annul the marriage).

2. *Al-Khiṣā'*: It means castration, either by the removal or by the crushing of both testicles, the case for which the term *al-wijā'* is used also. It, if present before the consummation of marriage, gives the wife the immediate night to annul the contract. If this defect occurs after the consummation of marriage, some legists said: the night to annul the marriage will result too, but this view is not authentic or predominant among scholars.

Concerning *al-jabb*, which means state of mutilation of the male organ, there is a difference of opinion resulting from holding fast to requirements of the contract. But most of the scholars give the wife the full night to annul the marriage because her husband is proved to be unable to copulate due to failure to erection and ejaculation, on condition that his organ is removed totally in a manner that nothing of it is left, even to the extent of glans penis, to penetrate and copulate with. If it occurs after marriage, this will not give the wife the night to annul the contract, but some scholars hold an opposite opinion. If the husband comes out to be *khunthā* (hermaphrodite, male and female together), the wife will not have the night to annul the marriage according to opinion of some jurists. Others give

her this night, despite presence of ability of copulation in respect of the husband.

3. *Al-`Anān* (Impotence): *al-`Anān* is a disease which renders a man incapable of sexual intercourse in a way he fails to penetrate his organ into the wife's organ (forepart). This defect gives the wife the night to dissolve the marriage, even if it occurs anew after the contact, on condition that he be incapable of having intercourse with his wife for one time and becomes incapable of intercourse then, or he be capable of having intercourse with other women despite being incapable of intercourse with her (his wife), she will not have the night to dissolve the marriage, as per a more correct view. The same rule is applied when he be capable of copulation with her from the rear part (anus) but be incapable of intercourse form the forepart (*qabūl*). Therefore, on his inability being limited to his wife and not other women, the night of dissolving the marriage does not accrue, because the source of this night is a rule which gives the power of dissolution to the wife of an impotent man, and one capable of intercourse with other women is not considered impotent in the true sense of the word.

Second: The Defects of the Woman

They are seven: insanity, leucoderma, leprosy, *qaran*, *ifḍā'*, lameness and blindness.

1. Insanity: It means derangement of intellect (lunacy). Insanity of one spouse gives the other the night to annul the marriage. This night is not established in respect of the transient absence of mind (*saḥw*) or temporary (accidental) swoon (losing the senses, *ighmā'*), but it is established when insanity is proved.

2. Leucoderma (*judhām*): It is a disease where all body organs become dry and the flesh scatters and falls off the body. Neither intense of burning, nor protuberance of the face, nor roundness of the eye can fulfill this condition.

3. Leprosy (baraṣ): It is a foul coetaneous disease characterized by dusky red or livid (white) tubercles on the face and extremities. It is among the defects that give the husband (not the wife) the night to annul the marriage on condition that it be

antecedent to the marriage without the husband's knowledge. This night does not exist for the wife if her husband suffers from any of these two diseases (leucoderma and leprosy).

4. Al-Qaran: It is said to be like *al-`afal*. Some other legists believe it to mean: the presence of a horn-like protrusion inside the vaginal passage, which hinders the intercourse. The first view is more correct (i.e. like *al-`afal*, which means a fleshy obstruct in the vaginal passage). If it does not obstruct the intercourse, it does not give rise to a legal night to the husband to dissolve the marriage, due to ability of having sexual intercourse despite its presence. Some jurists state that the husband, if he wishes, can annul the marriage contract when he finds this defect in the wife according to the meaning understood from the traditions reported in this regard.

5. Al-Ifḍā': means the condition of merging of anal and vaginal passages.

6. Lemeness: Some legists are of the opinion that the husband, if he wishes, can annul the marriage contract when he finds visible lameness in the wife after conclusion of the contract if he had no knowledge of it before, especially when it reaches the extent of infirmity.

7. Blindness: In the same manner, the husband has the night to dissolve the marriage contract when he finds blindness in his wife after conclusion of the contract if he had no knowledge of it before.

Some scholars add to these defects another one: *al-ratq*, which means the presence of obstruction in the vaginal opening making intercourse difficult. If it obstructs intercourse and be incurable, or be capable of being cured but she does not cure it, the husband will have the night to annul the marriage. Only these defects give the husband the night to annul the marriage contract and nothing except them can give him such night.

Rules of Defects:

1. The defects found in the woman before conclusion of the contract give the husband the night to dissolve the contract.

Any defect occurring after conclusion of the contract but before consummation of marriage does not give rise to such night, with disagreement among the legists regarding it.

2. The choice of annulling the marriage exists so long as it is exercised immediately. Therefore, if the man or the woman, on knowing the defect, does not initiate the proceedings for annulling the marriage, the contract will be binding. So also, is the option to annulling the marriage in a case of deception (*tadlīs*).

3. Annulling the marriage due to a defect (found in the wife) has not the same effect as divorce. Hence it does not result to payment of half the *mahr* and is not considered among the three divorces.

4. The annulment of marriage, in all its forms whether made by the husband or the wife, does not depend on the judge. He has only the power to grant a probationary period in the case of impotence (*`anan*) of the husband, where the wife alone has the night to annul the marriage on expiry of this period and in capability of having sexual intercourse (by the husband).

5. If the two spouses differ regarding the presence of the defect, the word of that denying its presence would be accepted, where no evidence can be established.

6. If the husband chooses to annul the contract on finding a defect in his wife, she will not be entitled to receive any *mahr* if marriage has not been consummated. On the marriage being annulled after consummation, she will receive the *mahr al-mithl* as it is established in the husband's charge through consummation, and is not cancelled by dissolving the contract, when the husband can claim this amount from the deceiver. On the marriage being annulled by the wife before consummation, she will not be entitled to receive any *mahr* except in case where the husband suffers from impotence (*`anan*). If it be after consummation, she will receive the prescribed *mahr* (*al-musammā*). The same rule applies if the dissolution occurs due to the husband's suffering from castration (*al-khiṣā'*), the case where she be entitled to receive the full *mahr* if the marriage has been consummated.

7. Impotence cannot be proved but through the husband's confession or presence of an evidence confirming his confession. If he does not confess, while the woman pleads his impotence and he denies the charge, his word will be accepted with his taking an oath, and the burden of proof will rest on her to prove his impotence. On proving his impotence while he claims to have sexual intercourse with his wife, his word will be accepted on his making an oath. Some legists are of the opinion that: if the husband claims having intercourse from the forepart and she be maiden, she will be referred to female specialists to determine her present condition, and their opinion will be acted upon. If he claims to have sexual intercourse with another woman, or to have intercourse with her from the posterior (*dubur*), his word will be accepted with taking an oath.

8. On proving the husband's impotence, she will be granted the option of remaining with him or setting forth a complaint against him in the court, when the judge will give him a lunar year's time from the date of the complaint. If he copulates with her during this period or copulates with another woman, then she will not be granted the option to dissolve the contract. Otherwise, she will have the night to annul and be entitled to receive half the *mahr*.

Deceit (Tadlīs)

It consists of several issues:

1. When a man marries a woman after it has been understood that she is free, and then finds her to be a slave, he will be entitled to annul the marriage even if he has consummated marriage with her. Some scholars said: the marriage contract becomes void, but the first opinion is more correct. If the marriage is annulled before consummation, she will not be entitled to receive any *mahr*, but if it be after consummation, she will receive her full *mahr*. Other jurists observed: Her master will be entitled to one-tenth or half the tenth of the *mahr* while her *al-mahr al-musammā* will be dropped. The former view is more correct, and the husband will claim the amount of the *mahr*. From the deceiver in accordance with the rule "the

deceived will level his claim against the deceiver." If her master be the deceiver regarding her, some legists said: it will be valid, and she will become free according to his visible confession. If the words used by the master do not indicate manumission, she will not be manumitted, and will not be entitled to receive any *mahr*. If she deceives when concluding the contract, the vagina indemnity will be given to her master while the husband can claim this amount from her on her manumitting. If he had paid her the *mahr*, he can restore from her what is left of it, when she be liable to compensate for what is lost of it.

2. When a woman be married to a man after it has been understood that he is free, and then finds him to be a captive slave, she will be entitled to dissolve the marriage, whether before consummation or after it. If she chooses to annul the contract before consummation of marriage, she will not be entitled to receive any *mahr*, but if it be after consummation, she will receive the *mahr al-mithl*.

3. When a person marries a man's daughter after it is understood that she is a daughter of a freewoman and then finds her to be a daughter of a bondwoman, he will be entitled to dissolve the marriage. The preponderant view here is: the choice is established for him when this merit has been included as a condition or a quality in the contract and not mentioned in the negotiations previous to the marriage. If he dissolves the contract before consummation of marriage, no *mahr* is to be given to her, but if it be after consummation, she will receive her full *mahr*, and the husband will claim this amount from the deceiver, whether it be her father or another person.

4. If a person gives to another in marriage his daughter who is brought of his free wife but he hands him over another daughter of a slave wife, the husband is entitled to return her and she will be entitled to receive the *mahr al-mithl* if marriage has been consummated. The husband can claim this amount (*of mahr*) from the deceiver who handed her over to him and the daughter with whom the marriage is contracted should be returned to him. The same rule applies wherever a woman brought to him other than that one with whom the marriage was

contracted while he thinks her to be his wife, whether she be lower or upper in status.

5. When a person marries a girl with her virginity being included as a condition in the contract, and then finds her to be otherwise (to be a *thayyib*), he will not be entitled to dissolve the marriage, unless it is proved that her loss of virginity preceded the contract, since it can occur again through a hidden cause or means. But he has the night to partly reduce her *mahr*. This reduction will be proportional to the difference between the *mahr* of her like if a virgin and if not a virgin (*thayyib*), according to customary usage and the habit followed in this regard.

6. When a person concludes a contract of *mut`ah* (temporary marriage) with a woman and he then finds her to be one of the people of the book (Ahl al-Kitāb), he will neither be entitled to dissolve the contract without giving her back the time period, nor to partly reduce her *mahr*. But if her being a Muslim has been included as a condition in the contract and he then finds her to be otherwise, he will be entitled to annul the marriage.

7. If two men marry two women and the wife of one of them is brought to the other who has sexual intercourse with her, each one of the wives will be entitled to receive *mahr al-mithl* from the person who copulated with her. Then each wife will be returned to her husband who will be liable to give her the *mahr* mentioned in the contract (*al-musammā*). But the husband is not entitled to consummate marriage with her until after expiry of *`iddah* period due to intercourse with the other husband. If both the wives die during the waiting period, or their husbands die, each one of them (who survived) will inherit his own wife and she will inherit him.

8. In every case where a decision to annul the contract is issued, the wife will be entitled to receive her *mahr al-mithl* not *al-musammā* if marriage has been consummated with her. Wherever the contract is judged to be valid, she will receive her *al-mahr al-musammā* on consummation of marriage with her, though the contract is annulled afterwards. Some jurists are of the opinion that: If the marriage is annulled due to a defect that

preceded the consummation, the husband will be liable to pay *mahr al-mithl*, irrespective of whether presence of this defect be before the contract or after it. The first view is more correct.

SECTION TWO: AL-MAHR

It includes some issues:

First: The valid mahr

It is one of the pecuniary nights of a wife, whether be real estate (*`ayn*) or usufruct (established in the Qur`ān and the Sunnah).

It is valid that *mahr* be specified in terms of currency and usufruct (advantage) or service of free people such as teaching a profession, or a chapter (*Sūrah*) of the Qur`ān and every other permitted and lawful business. Also it is valid to specify the *mahr* in terms of the husband's hiring himself for a determined period. But some legists believe in non-validity of such *mahr*, according to a non-authentic narration.

Among the conditions is the being *ḥalāl* of the *mahr* and its being valued in terms of a commodity whose transaction is considered legal by the Islāmic Sharī`ah. Therefore, if it is mentioned in terms of liquor, or swine or anything else whose ownership is invalid, the contract shall be invalid.

If the *mahr* of a *dhimmī* man and a woman belonging to Ahl al-Kitāb be specified in terms of liquor or swine, it is valid since the ownership of such things is valid for them. If they both profess Islām, or one of them embraces Islām before taking hold of this *mahr*, he/she will be required to pay its value because the thing specified as *mahr* has come out of his/her ownership on professing Islām.

If both the spouses be Muslims or the husband be a Muslim and the *mahr* be specified in terms of liquor or swine, the contract shall be invalid as per a view held by some jurists. Others are of the opinion that: the contract is valid if consummated and the *mahr al-mithl* shall be payable to her. Others said: only the

value of liquor shall be payable. The second opinion (*mahr al-mithl*) is more correct.

There is no limited amount for *mahr*, as it can be agreed by the couple and specified by them though it may be low, unless it be to an extent unliable to assess like a grain of wheat. Also no maximum limit is specified for *mahr*, but some legists observed: it should not exceed the customary *mahr* established in the Sunnah. If it exceeds this amount, the excess should be returned to the wife, but this view is not so authentic. It is sufficient for the *mahr* to be liable to sighting if present. It is necessary that the weight and value of the *mahr* be known, either exactly or approximately like: a particular stock of food or a particular piece of gold. If it be totally vague, so that its value be unascertainable in any manner, the contract is valid and the *mahr* is void. It is permissible for a man to marry two or more women with one *mahr*, and it can be equally divided among them. Some legists said: it can be paid in installments proportionate to the *mahr al-mithl* of their likes, the view which is more correct.

If it is specified in terms of a servant without sighting or description, an intermediate servant should be arranged for the wife. The same rule applies when she is married for a house, in general, as her *mahr*. If she is married for the Book of Allāh (Qur`ān) and Sunnah of His Prophet (S) without specifying a certain *mahr* for her, her *mahr* shall be five hundred *dirhams*. If a husband specifies a *mahr* for his wife with a certain thing for her father, only her *mahr* would be binding while what is specified for her father is void. If he specifies a certain *mahr* for her on condition that she give her father a portion of it, the *mahr* will be valid and the condition is binding, contrary to the former case.

It is necessary that the *mahr* be known and specified in a manner leaving no doubt or ambiguity, such as when it is specified in terms of teaching her a Qur`ānic chapter, mentioning the *Sūrah* by name will be *wājib* upon him (husband). If it be vague, the *mahr* will be void and the *mahr al-mithl* shall be payable on consummation of marriage. If the *mahr* is specified in terms of a receptacle of vinegar, and it is

known later to be liquor, the value of liquor should be given to her as per the opinion of those who deem it lawful. But most of the legists are of the opinion that the value of vinegar should be paid to her. The same rule is applied when she is married for a slave as her *mahr* and later it is known to be free. If a woman is married for a thing as her *mahr* secretly and another *mahr* publicly, the first *mahr* shall be payable.

The *mahr* is a debt in the husband's charge, i.e. he is liable to pay it when requested. Hence, when it be destroyed before delivering it, the husband shall be liable for it on the time of deterioration or loss, as per a more widely-held view. If the wife finds a defect in the *mahr* commodity, she is entitled to refuse and return it. If the thing given as *mahr* becomes defective after conclusion of the contract, she will have the choice either to accept it or take its value, according to some legists. Others are of the opinion that: she will not be entitled to receive the value of the commodity specified as *mahr* but she can take it with the compensation for the loss or defect. The wife has the night to abstain from surrendering herself to the husband until receiving her full *mahr*, irrespective of whether the husband be affluent or in hard circumstances. Does she have such night after marriage has been consummated? Some legists said: Yes, she is rightful to do so. Others are of the opinion that such choice is not granted to her, which is more predominant among the scholars since having sexual intercourse has become binding through the marriage contract.

It is *mustaḥabb* to specify the least possible *mahr*. It is *makrūh* to specify an amount for *mahr* exceeding the *mahr al-Sunnah* which is five hundred dirhams. Also it is not recommendable for the husband to consummate marriage before paying to his wife her *mahr* or part of it or anything else as a gift.

2nd. Authorization (Tafwīḍ)

It is of two parts: vaginal authorization and *mahr* authorization.

A. The vaginal authorization

It is established through abstaining from mentioning any *mahr* when concluding the contract, such as by saying (by the wife's

deputy): I have given in marriage so and so woman to you (*zawwajtuka*), or the woman's saying: *'zawwajtuka nafsi'* (I have given myself in marriage to you) and the groom's saying: *'qabiltu'* (I have accepted) without specifying any *mahr*.

It includes several issues:

1. *Mahr* is not an essential ingredient (*rukn*) of a marriage contract, as price is in a contract of sale. On the contrary, *mahr* is only one of the effects of a marriage contract, and even without its stipulation, the contract is valid. This *mahr al-mithl* shall be payable on consummation (when *mahr* was not specified) and if he divorces her before the consummation of marriage, she shall not be entitled to any *mahr*, but will receive *al-mutʿah*, which is a gift given by the husband to his wife (at the time of divorce) in accordance with his status. Neither *mahr* nor *mutʿah* is payable if any of the two dies before consummation of marriage. *Mahr al-mithl* does not become *wājib* through the contract but through consummation.

2. There is no fixed way of determining *mahr al-mithl* in the Sharīʿah. It is estimated by those who know her status, descent, prettiness by those aspects which influence the increase or decrease of *mahr*. But this *mahr* shall not exceed the *mahr al-Sunnah*, which is equal to five hundred dirhams. The *mutʿah* is estimated according to the husband's financial state and capability. No woman is entitled to receive the *mutʿah* except that one who is divorced without specifying a certain *mahr* for her and with whom marriage was not consummated.

3. If the couple mutually agree after concluding the contract on the *mahr* being prescribed, it will be valid, since they are entitled to this night, whether it be equal to *mahr al-mithl* or more or less than it, and irrespective of whether they be aware or unaware of it, or one of them be aware and the other be unaware. Because the prescription of *mahr* is made for them initially on concluding the contract, so it is prescribed for them in the end.

4. If one marries his captive slave woman and then buys her, the marriage will be void and she will neither be entitled to receive the *mahr* nor the *mutʿah*.

5. Authorization is established only in respect of a full mature sane woman not a minor or an idiot old woman. If a minor girl be married to a man by her guardian (*walī*) without specifying *mahr al-mithl* for her, or mentioning any *mahr* in the contract, the contract is valid and she will be entitled to *mahr al-mithl* through the same contract. But there is a difference of opinion among the legists regarding this rule, resulting from the fact that the guardian exercises his authority for the minor's advantage. Hence granting him full authority depending on his competence in taking the proper decision for the minor's advantage, is valid, the view which is more correct. If, according to the first estimation, her husband divorces her before consummation of marriage, she will be entitled to receive half *mahr al-mithl*, while *mut`ah* is payable to her when her husband be chosen by the guardian. It is permissible for a master to give in marriage his bondwoman on his authority since he is the only one who is entitled to receive her *mahr*.

6. If the master gives his bondwoman in marriage as her full authorized proxy and then sells her, the prescribed *mahr* would be paid by her husband to her second master if he has permitted her marriage. If the first master has manumitted her before consummation of marriage, and she has accepted the marriage, she will be exclusively entitled to receive her full *mahr*.

B. Authorization to Mahr

The *mahr* can be mentioned in general in the contract and its specification be entrusted to one of the spouses. If the judge (ruler) be the husband, it will not be estimated with a decreased or increased amount, and it is permissible for him to give a judgment as he wishes. If the judgment is entrusted to her, it will not be estimated for a less amount but for an increased amount, but her judgment is not enforceable in respect of the excess of *mahr al-Sunnah* which is five hundred dirhams. If the husband divorces his wife before consummation of marriage and before the judgment, one who is charged with judgeship will be obligated to judge, and she will be entitled to half the *mahr*. If she be the judge, she will be entitled to half the *mahr* if her judgment does not exceed the *mahr al-sunnah*. If the judge dies before issuing any decision and before

consummation of marriage, no *mahr* would be payable to her but she shall receive the *mut`ah* according to some scholars. Others do not entitle her to any of them (*mahr* and *mut`ah*). The first view is more predominant among the legists.

Conditions and Rules of Mahr

1. If the husband consummates marriage before delivering the *mahr* to his wife, he will be liable for it, and he will not be relieved of it through consummation, irrespective of whether her stay with him be long or short, and whether she demands it or not. The consummation consequential to payment of the *mahr*, is intercourse from the forepart or posterior, and it does not become *wājib* through *khalwah* (privacy or retirement by the couple). Some legists said: the mere enjoyment of privacy (*khalwah*) by the couple has no effect on *mahr* nor any other consequence. The first view is more predominant among the jurists.

2. If no *mahr* is specified in the contract and the husband gives the wife something as a present and consummates marriage with her, that present will be considered as her *mahr* and she will not be entitled to demand her *mahr* after consummation, unless she has stipulated this before consummation. But the *mahr* prescribed in the contract is other than this.

3. If the husband, not having paid anything to the wife whose *mahr* has been specified, divorces her before consummating the marriage, he shall pay her half the *mahr*. But if he has paid the entire *mahr*, half of it shall be returned if it still exists, and the equivalent of it in cash or kind if it has perished. If it has no equivalent, then half of its value. If its value differs at the time of concluding the contract and the time of taking delivery of it, the least of the two values shall be paid by the wife. If the thing delivered be defective or damaged, like one-eyedness of the mount (*dābbah*) or forgetfulness of the handicraft (taught to the wife as *mahr*), he will be entitled to half the value of the defectless thing given as *mahr*, and he should not be forced to take half its equivalent in kind, but there is disagreement among the jurists regarding this. If the animal given as *mahr* grows such as by becoming older or fatter, half its value before the

growth is payable to the husband, and the wife cannot be forced to pay it in kind, as per a more correct opinion. If he has given her a pregnant animal, he will be entitled to half the value or both the animal and what it conceives inside. If the *mahr* be teaching her a trade, and the husband divorces her before consummation, she will be entitled to receive half the tuition fees of teaching. If he has taught her this trade, half the tuition fees shall be returned to him. If her *mahr* be teaching her a *Sūrah* of the Qur`ān, he can teach her half the *Sūrah* from behind a veil, with a difference of opinion among the legists.

4. If the wife acquits her husband of liability to pay her *mahr* and he divorces her before consummation of marriage, he will be entitled to demand half the *mahr*. The same rule applies when he divorces her in the form of *khul`* (a form of divorce in which the wife releases herself from marriage tie by paying consideration to the husband) with the total amount of the *mahr*.

5. If the husband gives his wife a fugitive slave with something else as a substitute for *mahr*, and divorces her before consummation of marriage, he will be entitled to claim half the prescribed *mahr* (*musammā*) not the substitute. If he has given her a commodity or real estate, he will not be entitled but to half the prescribed *mahr*.

6. If her *mahr* be *tadbīr* (disposal) and is divorced as *mudabbarah*, this *mahr* will be divided equally between them, and when he dies she will be released of the marriage tie. Some legists observed: The *tadbīr* becomes void by making it a *mahr*, as if she has been bequeathed, and this view is more correct.

7. If the husband lays a condition in the contract which contradicts the Sharī`ah, such as when he says: "I marry you on condition that I will never combine in marriage another woman with you" or on condition that I never take a mistress," the condition becomes void while the contract and *mahr* are valid. Also, if he stipulates deferment of payment of the *mahr* at a certain date, but he does not fulfill this condition, the contract becomes null and void, and he will be liable to pay the *mahr* with the condition being void. If he stipulates not to deprive her

of virginity, the condition is binding. If she gives him permission after that, it will be permissible for him to have intercourse with her, acting according to generality of a narration reported in this connection. Some legists limit the obligation to fulfill such condition in temporary marriage, a view which represents an arbitrary judgment.

8. If he stipulates a condition that she should not leave her country (as long as she be under bend or marriage with him), this condition is binding, as per a more authentic narration. If he stipulates for her a certain *mahr* when he takes her to his hometown, and a lower amount if she refuses to come out with him, and he takes her out to a polytheist country, responding to his demand is not *wājib* while the excess be payable to her. If he takes her out to a Muslim country, the condition will be binding.

9. If the husband gives his wife a revocable divorce, marries her again during her waiting period (*`iddah*) and divorces her before consummation of marriage, she will be entitled to receive half the stipulated *mahr*.

10. If the wife relinquishes half her *mahr* to her husband as a joint property (*mushā`*), and be divorced by him before consummation, he will be entitled to receive the remainder but he has no night to claim anything from her irrespective of whether her *mahr* be a debt (in cash) or in kind, for disposing her relinquishment (*hibah*) of her night due from him.

11. If the *mahr* be specified in terms of two slaves, and one of them dies, the husband has the night to claim half the present one (his value) and half the value of the deceased one.

12. If he includes a condition to have the option to consummate the marriage (*nikāḥ*), the contract becomes void. There is a difference of opinion among the legists regarding this rule, resulting from establishment of the marital bond due to presence of its necessitating requirement and non-liability to including any option (*khayār*), or considering non-consent to the contract, due to its contingency on condition. If he lays a condition to have the option to *mahr*, the condition and *mahr* and contract will be valid.

13. The wife takes possession of the *mahr* through the marriage contract, and she is entitled to dispose it before receiving it as per a more correct opinion. On divorcing her, half the *mahr* will be returned to the husband and the other half remains for her. If she relinquishes her night, all the *mahr* shall be returned to the husband (on divorce). The same rule applies when the person having the legal authority to marriage, who is the father or paternal grandfather in this case, relinquishes this night to *mahr*. Some jurists said: It is permissible for the person granted authority and deputed by the wife to conclude the contract on her behalf to relinquish her night to *mahr*. Also her father and paternal grandfather are permitted to relinquish a part of the *mahr* not all of it. But such authority to relinquish the night to *mahr* is not granted to the husband's guardian (*walī*) on divorcing his wife, since this *walī* is appointed to act in the husband's favor and no benefit is there in relinquishment. The part of *mahr* relinquished by each one of the spouses does not come out of his/her possession through mere relinquishment, because it is a gift (*hibah*) whose ownership cannot be transferred but through taking delivery (*qabḍ*) of it. But if it be a debt in the husband's charge, or be spoiled in the wife's hand, the relinquishment will suffice for the guarantor or one liable for the *mahr*, as it is considered as an acquittal to him that needs no acceptance, as per the most correct opinion. But one liable to give this amount is not acquitted through relinquishment, unless he delivers it.

14. In case the payment of *mahr* be deferred (*mu'ajjal*), she is not entitled to abstain from receiving it. If she abstains and it falls due, does she have such night? Some legists give her such night, while others hold an opposite view arguing: she is not entitled to abstaining due to establishment of obligation of delivery before falling due of its payment, the view which is more correct.

15. If the *mahr* be specified in terms of a piece of silver, which the wife, on receiving, gets it made as utensil, and he divorces her before consummation of marriage, she will have the choice either to deliver half it in kind or half its value, as it is not *wājib* upon her to spend the quality (*sifah*). If her *mahr* be specified in terms of a dress but she sews it as a shirt, the

husband, on divorcing her, will not be entitled to take it, and he has the night to claim from her half its value, since the state of silver does not change through *siyāghah* while the dress does.

16. If the *mahr* be specified in terms of teaching the wife a Qur`ānic *Sūrah*, its limit will be making her able to independently recite that *Sūrah*, and her following his articulation is not sufficient. If she learns how to recite a verse of the *Sūrah* and forgets it on teaching her the next one, it is not *wājib* upon the husband to re-teach her the former verse. If this teaching be made by another person, the tuition fees shall be payable to her, as the case when he specifies a certain *mahr* for her but fails to pay it.

17. It is permissible for the husband to combine marriage and sale deal in one contract, distributing the substitute between the price and *mahr al-mithl*. If she has one dīnār and says to him: I have given myself in marriage to you, and sell this dīnār for one dīnār, the sale deal is invalid as it is a kind of usury, while the *mahr* becomes void and the marriage contract is valid. But all of them are valid when the kind used in sale differs.

Subsidiary Issues

1. If the marriage contract is concluded with specification of *mahr* in terms of a slave whom she manumits after taking hold of him, and the husband divorces her before consummation of marriage, she will be required to pay back half the slave's value.

2. If the girl's guardian (*walī*) gives her in marriage without *mahr al-mithl*, her *mahr* would be void and she will be entitled to *mahr al-mithl* according to option of some legists. Other scholars are of the opinion that *al-mahr al-musammā* shall be payable to her.

3. If a woman is married for a certain *mahr* whose weight (a commodity) be vague, and this commodity deteriorates before taking hold of it, and the husband be discharged of it by the wife, it will be valid. Also if the marriage is contracted for an invalid *mahr* and *mahr al-mithl* be established for the wife when she acquits the husband of all or part of it, it will be valid

though she has no knowledge of the amount of the *mahr*, because it is a relinquishment of a night. If the wife discharges her husband of *mahr al-mithl* before consummation of marriage, it is invalid since it has not become due yet (not payable to her).

A. Supplementary Issue

If a person marries his minor son to a maiden, the son will be liable to pay the *mahr* if he is well-to-do. If he be in hard circumstances, his father will be liable to afford for the *mahr*. If the father dies, the *mahr* should be taken out of his undivided legacy, irrespective of whether his son has reached the age of maturing (*bulūgh*) and become well-off, or the father dies before this. If the *mahr* is paid by the father when the minor son attains puberty and divorces his wife before consummating marriage with her, half the *mahr* shall be payable to the son to the exclusion of the father, as payment of the *mahr* has the same rule of donation to him.

If a father pays the *mahr* on behalf of his major sane son voluntarily, and the son divorces his wife, half the *mahr* shall be payable to the son and the father has no night to take it away of him, for the same reason we referred to for the minor. But there is disagreement among the legists regarding both the issues.

DISAGREEMENT BETWEEN THE SPOUSES

The spouses may differ regarding consummation of marriage, or specification of *mahr*, its value, its receipt by the wife, or as to whether that which was received was given as a present or as *mahr*. Here we have the following issues:

1. If they differ regarding the fact of stipulation of *mahr*, the husband's word shall be accepted with his taking an oath. But no problem is there if the refutation of a valid *mahr* stipulated prior to the contract appears before consummation of marriage due to possibility of contracting the marriage without stipulating any *mahr*. But if they differ after consummation of marriage, with the wife claiming that the *mahr* has been

specified and the husband refuting it with taking an oath after her failure to prove the stipulation, the husband's word shall be accepted, due to the primary acquittal. In this case, the wife shall receive *mahr al-mithl* on condition that it does not exceed the amount she claims as having been specified. Thus if the *mahr* be specified in terms of even one grain of rice, it will be valid, since the probability is established and the excess is unknown. If they differ regarding its amount, or description, the husband's claim shall be accepted. But if they disagree regarding the actual payment of *mahr*, with the wife denying its receipt and the husband claiming to have paid it without presenting any evidence, the wife's word shall be accepted with her taking an oath, because she challenges his claim who shall have to furnish proof.

When both admit that she has received something and the wife claims that it was a present, while the husband claims it to have been *mahr*, his word shall be accepted because he knows his own intention. Therefore, he shall take an oath and it is for her to furnish proof that it was a present.

2. If the spouses, after enjoying seclusion (*khalwah*), differ regarding consummation with the wife claiming it to have occurred (seeking to establish her night to full *mahr* and maintenance) and the husband denying it, the burden of proof rests on the husband. If the wife claims occurrence of consummation from the forepart (*qabūl*) while she being maiden, and the husband refutes, the wife's word shall be accepted and the burden of proof will rest on the husband, because it is she who actually contests the reduction of half her *mahr*. Otherwise, if he denies consummation, his word shall be accepted on oath, because seclusion has no effect and does not prove occurrence of consummation. Some legists said: The wife's word shall be accepted in accordance with the generally known evidence that seclusion of a man and woman in a place where they are secure from observation by others and where there is no impediment to intercourse, may prove copulation. The first opinion is more correct.

3. If the marriage contract is concluded with the *mahr* being teaching the wife a certain *Sūrah* of the Qur`ān or a certain

handicraft, and the wife claims that he has taught her other than the specified *Sūrah* or trade, her word shall be accepted as she is denying the claim of her husband who shall have to furnish proof.

4. If the wife establishes an evidence that her husband has married her twice through two separate contracts, while the husband claims his having reiterated one contract, the wife's word shall be accepted since this judgment on its face is in her favor. Shall he be liable to pay two dowers? Some legists said: Yes, he is bound to pay two *mahrs* as required by two marriage contracts. Others are of the opinion that: he will be required to pay one *mahr* and a half. The former view is more correct.

SECTION THREE: QASM, DISOBEDIENCE & SHIQĀQ

1. Qasm (Distribution):

For every spouse there is a night that should be fulfilled by the other spouse. As maintenance which includes clothing, food, drink and housing be *wājib* upon the husband, also the wife is duty-bound to surrender to consummation and conjugal society beside avoiding all the acts or behaviors annoying and disturbing the husband. Equal division among the wives is obligatory on the husband, irrespective of whether he be a freeman or a slave, and whether he is impotent or castrated. And even if he be insane, where his guardian will make the division for him. Some legists said: Division is not *wājib* upon the husband until he himself begins it, the view which is more correct.

Hence, one who has one wife, is entitled to spend one night with her from among four nights and he has night to spend the other three nights with whomever he wishes. So on, for one having two wives, two nights, and for one having three wives three nights are permitted and he is free to spend the extra (surplus) wherever he likes. If he has four wives, he is required to spend one night (sleep) with each one of them, in a way that it is not lawful for him to disturb this division in sleeping with them, unless he has an excuse or be on travel or taking their permission in respect of the night of each one in particular.

When a man contracts marriage with four women at a time, he should set them in proper order by drawing lots among them for specifying the nights of sleeping with them. Some legists observed: He is entitled to start sleep with whomever he likes and continue with the other three one by one in order. The latter view is more correct. To lie with each wife is *wājib* on the husband and not the copulation. This obligation is determined for night not daytime, and some legists observed: He can spend the night with her and stay with her until the next morning, a view which is more predominant among the legists.

When he combines in marriage a bondwoman and a free one or more, he has to sleep one night with the slave woman and two nights with the free one. A woman belonging to Ahl al-Kitāb is on a par with a slave woman in respect of division. If one has two wives, one Muslim and the other from Ahl al-Kitāb, the Muslim wife has night to two nights and the kitābī one to one night. If one of them be a Muslim slave woman and the other a *dhimmī* freewoman, they will be treated equally. For the slave woman with whom copulation is made due to taking possession of, whether be one or more, no night of division is granted.

The maiden (*bikr*) is entitled to seven nights for consummation while the *thayyib* (a girl who has had sexual intercourse) be to three nights. On travel, the division among the wives is of no use.

It is *mustaḥabb* for the husband to draw lots among his wives on intending to accompany one of them with him. Division between a bondwoman and a free one, is not contingent upon permission of the slave's owner, as there is no interest for him in it. It is *mustaḥabb* for the husband to deal equally with the wives in respect of expenditure, open-facedness, copulation, keeping to be with the wife with whom he spent the night, and giving her permission to attend funeral ceremonies of her father and mother. He is entitled to prevent her from paying a visit to her father or mother, and going out of his house but for fulfilling a necessary and dutiful night.

2. Nushūz (Disobedience)

It means refusal of surrender and conjugal society whether it be on the side of the husband or the wife. When the wife shows the husband a sign of unwillingness to surrender, such as: frowning her face or showing her displeasure or restlessness toward his demands, or changing her habit in entertainment, it will be permissible for the husband to desert her at bed after admonishing her. The form of desertion is thus: he can turn his back to her at bed, and some legists observed: He has to retire her bed. The former view is confirmed by traditions. It is not permissible for him to beat her in this case. But if she denies him her sexual company without any valid reason and refuses to surrender herself to him to fulfill his night to intercourse, he will be entitled to beat her even if her disobedience be for the first time. But this beating should be to an extent through which her obedience and submission can be acquired and secured, and not be so severe that causes her a bloody cut. In case the husband denies her his sexual company and refuses her this night of conjugal society without any valid reason or excuse, she will be entitled to claim her nights to maintenance and division and the judge can order and force him to give her nights. She has the option to relinquish some of her nights, which include division (*qismah*) and maintenance, for gaining his favor and affection. It is lawful for the husband to accept this relinquishment.

3. Shiqāq

The word *'shiqāq'* is derived from *'shiqq'*, which means every one of the spouses is in a split separate from the other party. When disobedience (*nushūz*) is feared to lead to *shiqāq* (separation) between the spouses, the judge shall send an arbiter (*ḥakam*) from the husband's family and another one representing the wife's family (*ahl*) to settle the matter and reconcile the couple. It is permissible to appoint the arbiters from among other people than their families and relatives. If they agree on a compromise solution, it will be acted upon, but if they decide separation (divorce) between them, it will not be valid but with the husband's consent to divorce, and the wife's consent to relinquish her night (consideration) if the divorce be in the form of *khul`*.

Two Subsidiary Issues

1. Every decision taken by the arbiters will be binding if it be reasonable. Otherwise, the spouses are entitled to reverse the judgment.

2. If the husband denies the wife some of her nights or marries another woman besides her, and she pays him a consideration (*badhl*) to divorce her in the form of *khul`*, it will be valid and is not considered as compulsion or coercion (*ikrah*).

SECTION FOUR: RULES OF CHILDREN

First: Lineage of children:

Children of permanent wives, and children of intercourse by mistake (*shubhah*).

1. Lineage of children of a permanent wife:

The children resulted through intercourse with a wife married by a permanent contract are to be attributed to her husband on fulfillment of three conditions:

- consummation of marriage,
- passing of a period of six months, since the time of intercourse,
- its birth is not exceeding the maximum period of gestation which is nine months, as per the most widely-held view.

Some legists believe it to be ten months, and some others a year. If marriage has not been consummated with the wife, the child given birth by her will not be attributed to the husband.

There are certain rules for this child:

1. When within six months of her marriage a woman gives birth to a child, it will not be attributed to her husband. So also, if they agree to elapse of a period exceeding nine or ten months since intercourse, or this can be proved through the husband's absence for a period exceeding the maximum period of

gestation. In such a state it is not permissible for the husband to consider the child his legitimate offspring.

If a strange person commits fornication with a married woman, the child resulted from this fornication shall be attributed to the bed owner (fornicator) and he can never disown it except by pronouncing *li'ān* against him, as the fornicator is not entitled to claim parentage of the child produced as a result of fornication.

2. When the couple differs regarding occurrence of consummation, or the period of conjugal relationship and giving birth to a child (she claiming the period to be six months or more, and he denying it, claiming the period to be shorter than six months and denying the child to be his), the husband's word shall be accepted on oath. On consummation and elapse of the minimum period of gestation (six months), it will not be permissible for him to deny the parentage of the child as this indicates accusing the wife of adultery. If he denies the child, it will not be denied but after pronouncing *li'ān* against him.

3. When a husband divorces his wife after intercourse and she, after observing the *`iddah*, gives birth to a child within a period extending from separation until the expiry of a maximum period of gestation, the child shall be attributed to him, on condition that she has not consummated marriage with another husband or another man has had intercourse by mistake with her.

4. If a man commits fornication with a woman causing her to become pregnant, and then marries her, the child resulted from this fornication shall not be attributed to him. The same rule applies when fornication be committed with a bondwoman who becomes pregnant and be bought then by the fornicator (the child will not be his).

5. On admitting consummation of marriage, it becomes bound on the husband to accept parentage of the child and its giving birth by his wife. If he, in this case, denies the child, his claim shall not be accepted but by pronouncing *li'ān* against him. If they differ regarding the period of conjugal society, and he divorces her after having intercourse with her, and she, after observing the *`iddah*, marries another (or he sells his captive

slave woman after intercourse and the buyer copulates with her) and gives birth to a child within six months, the child will be attributed to the former husband. If six months or more – but not exceeding the maximum period of gestation – have elapsed after her intercourse with the second husband (or owner in case of the bondwoman), the child shall be attributed to the second husband.

Child of Intercourse by Mistake (shubhah)

Shubhah is a mistake which leads a man to have intercourse with a woman *ḥarām* to him, as a result of his ignorance of her being such or his believing it to be lawful to copulate with her but later the opposite is discovered. In all such cases of mistake, the legality of lineage is established between the child born of this intercourse and the man who has had intercourse with its mother. If he refuses to recognize the child as his, his refusal shall not be accepted and the child will be compulsorily attributed to him. If a man copulates with a foreign woman thinking her to be his wife or captive slave mistakenly, the child born out of this intercourse shall be attributed to him. The same rule applies when he copulates with another person's captive slave woman by mistake. But in respect of the bondwoman, he will be liable to pay the value of the child on the day it was born alive, because it is the time of its transformation.

If a person marries a woman thinking her to be unmarried, or to be divorced or her husband being dead, discovering then that her husband is still alive and has not divorced her, this woman shall be returned to the former husband after observing her *`iddah* period for the second husband. The child born after that (after elapse of more than six months since her intercourse with the second husband) will be attributed to the second husband irrespective of whether she has pleaded to a court and brought a judge's order to attribute the child to the former husband, or bases her claim on a testimony presented by witnesses or information given by a reporter.

RULES OF CHILDBIRTH

Sunan of Childbirth

The Obligatory Sunan in Childbirth:

The procedures and operation of childbirth should be conducted by women to the exclusion of men, except the case where no woman obstetrician is available and only a male obstetrician is accessible. No objection is there to presence of the husband in the place where operation of childbirth is conducted despite presence of women.

The *mandūb* (recommended) acts for childbirth are:

- to bath the new-born child.

- to recite *adhān* (call to prayers) in its night ear.

- to recite *iqāmah* in its left ear.

- to perform *taḥnīk* for it by Euphrates water, and soil (*turbah*) of al-Imām al-Ḥusayn (A), and if such water be not accessible then sweet water can be used. If only salty water is available some dates or honey can be added to it.

- to give it one of good favorable names, the best of which those indicating slavery to Allāh the Glorious, followed by names of prophets and Infallible Imāms (A).

- to give him a nickname (*kunyah*, pen-name) to avoid any defaming or slander (*nabz*).

According to a narration, it is *mustaḥabb* to give the child the name on the seventh day of its birth.

The *makrūh* acts are:

- to give it a nickname of Abū al-Qāsim if its name be Muḥammad,
- to give it names like: Ḥakam, Ḥakīm, Khālid, Ḥārith, Mālik or Ḍirār.

The *sunan* of the seventh day:

- shaving the male child's head,

- to perform circumcision to the male child,

- to pierce the two ears of female child,

- to sacrifice a sheep as *`aqīqah*, and give a banquet.

FOSTERAGE

Breast-feeding the child is not *wājib* on the mother, and she is entitled to demand fees for this breast-feeding. The father is entitled to hire the mother for feeding their child in case he gives her irrevocable divorce. Some legists said: such hiring is invalid if she is still under marital bond with him. But permissibility of such hiring is more predominant among the legists.

The father is liable to pay fees for breast-feeding if the child has no money to pay, and the mother has the option to breast-feed it by herself or by another woman, and she is entitled to receive wages for breast-feeding. The master (*mawlā*) has the night to compel his captive bondwoman to breast-feed his child. The maximum period of suckling is two complete (lunar) years, and to be content with twenty-one months is permissible. To minimize this period to less than 21 months is not permissible, and this decrease is considered as something unfair. Increasing the period of suckling by one or two months is permissible, but the father cannot be compelled to pay the fees of this extra period. The child's mother is more entitled to breast-feed her child if she demands what is usually demanded by mothers. If she demands more than usual, the father will be entitled to take the child away and hands it over to another woman. If a stranger woman volunteers to breast-feed the child and its mother accepts this volunteering, the mother is more entitled to the child. If she refuses this volunteering, the father is entitled to hand the child to the volunteering woman.

If the father claims presence of a volunteering breast-feeder while the mother denies this, the father's word shall be

accepted because by this he wards off obligation of payment of recompense for breast-feeding. But there is disagreement among the legists regarding this claim. It is *mustaḥabb* and preferable that the child be breast-fed by its mother.

CUSTODY (AL-ḤAḌĀNAH)

Custody has no connection with guardianship (*wilāyah*) over the ward, and it is limited to care of a child for its upbringing and protection for a period of time during which it requires care of women. Custody is the night of the mother exclusively throughout the whole period of fosterage, if she be free and Muslim, and no difference is there if the child be male or female. The night of custody is not granted to a bondwoman or a non-Muslim.

On separation (divorce) the father is more entitled to keep the male child for 2 years, and the mother is more entitled to the girl until she reaches the age of 7, or 9 according to some legists. Others are of the opinion that: The custody for a girl lies with the mother until the girl is married. The former view is more correct. After this, the custody shall lie with the father. The night of custody of the boy and girl shall be transferred from the mother to the father when she gets married to another man. On the father's death, the mother is more entitled to act as the custodian than the *waṣī* (executor of will). Also, if the father be a non-Muslim or a captive slave, the custody of the child shall be transferred to the mother even if she has married another man. On his manumission, he will be entitled to night of custody like a freeman.

If the parents are not there, the custody of the child will lie with the paternal grandfather, and if he is not there nor has an executor, the child's custody will lie with its relatives according to order of inheritance, the nearer taking precedence over the remote (as per the verse 75 of (*Sūrah al-Anfāl*).

If there is more than one relative of the same class, such as the maternal and paternal aunts, the precedence is given to the paternal aunt since she has a bigger share in inheritance. The

same rule applies when the maternal and paternal grandmothers are present. When a grandmother and sisters are there, precedence is given to the grandmother because she is a mother. If paternal and maternal aunts are present, the matter will be decided by drawing lots in the event of contention and dispute. The person in whose name the lot is drawn becomes entitled to act as the custodian until his/her death or until forgoing his/her night.

Supplementary Issues to Custody

1. If the mother demands recompense for breast-feeding her child higher than what here likes claim, the father can hand the child to a stranger woman to breast-feed it. Regarding the mother's night of custody, there is a difference of opinion among the legists, but most of them believe in non-entitlement of the mother to custody in such case.

2. When the boy reaches the age of 15 and attains maturity, the parents will lose the night to custody over the son and he will have the choice to live with whomever he chooses of them.

3. If the mother is divorced and marries another person, related or unrelated to the child, her night to custody shall terminate. If the divorce be revocable, the night to custody remains with the mother. But if she is given an irrevocable divorce, the night to custody will not revert to her, but most of the jurists entitle her to this night even when the divorce be irrevocable (*ba'in*).

The Right to Maintenance

Only three causes make maintenance *wājib*:

Marital Bond, Kinship and Taking Possession of a Bondwoman

Conditions for Wujūb of Maintenance

1. The marriage contract should be permanent.

2. Full surrender and submission of the wife to the husband, which means enjoyment of privacy or refinement by the couple in a manner not specified for a certain place or time. If she surrenders at a certain particular time not another, or in a

particular place in itself, where there is no impediment to intercourse, this does not mean *tamkīn* (full surrender). Most of the scholars believe in the *wujūb* of maintenance on the husband being contingent upon *tamkīn* (full surrender) by the wife.

Subsidiary Issues For Submission

1. The wife should not be a minor unfit for intercourse, irrespective of whether the husband be a major capable of it or a minor, even if she be liable to sociability or enjoyment other than intercourse, since such *mut`ah* is not so desired by men.

2. If the wife be a major capable of intercourse while the husband be a minor and incapable of it, some legists said: Maintenance is not *wājib* because the sole granting of access from her side has no effect while there exists a natural disability in the husband, and a minor husband is free of obligations (*ghayr mukallaf*). But most of the scholars believe in *wujūb* of maintenance because the hindrance is from the husband's side not the wife.

3. If the wife is sick or suffers from *al-ratq* or *al-qarn*, her maintenance does not cease because she is fit for sociability (*istimtā`*) other than vaginal intercourse, and the hindrance be from his side.

4. If the wife leaves her husband's home with his permission, she shall be entitled to maintenance, regardless of her going out be for performing an obligatory or recommendable or licit act. Also if she goes out for performing the obligatory Hajj pilgrimage without his permission, her maintenance shall not cease. But if she leaves the husband's home for performing a *mandūb* (recommended) or *mubāḥ* (lawful) act, her maintenance shall cease. If she performs a prayer or fasting or seclusion in the mosque (*i`tikāf*) with his permission, or an obligatory duty, her maintenance shall not cease even if it be without his permission. So also, if the act performed by her be recommended, since he can revoke it.

5. If she persists on her act contrary to his order, she will be considered disobedient and not entitled to any maintenance.

The wife who is revocably divorced is entitled to maintenance like the wife who is still not divorced. But the maintenance and housing for the wife irrevocably divorced shall cease, irrespective of whether she is divorced or her marriage contract is annulled. But when a wife is divorced while being pregnant, she will be entitled to maintenance and housing until childbirth. The maintenance is for the child not the mother.

The benefit turns up in the following issues:

For the freeman when he marries a bondwoman and her owner stipulates slavery of her children.

For a bondman who marries a bondwoman or a freewoman, and his master (*mawlā*) stipulates enslaving of his children.

A pregnant widow, for whom there are two views:

One which is more widely-held by the legists saying: A woman observing the *ʿiddah* following her husband's death is not entitled to maintenance, whether she be pregnant or not. The other view says: Her maintenance shall be taken from her child's share (of maintenance). The maintenance is established for the wife irrespective of whether she be a Muslim, or a *dhimmī* (of Ahl al-Kitāb) or a slave.

Determination of Maintenance: The Wife's maintenance is *wājib* and fixed in accordance with her requirements of food, clothing, housing, servants and cosmetics used by women of her standing among her townspeople. Some legists consider the husband's not the wife's financial status as the criterion for determining the maintenance.

Here by the financial status of the wife is meant the status of her family and its standard of living. For determination of food there is disagreement among the legists, some determining it in one *mudd* for the wife of humble status and that of a high social status, whether he be well-off or indigent. Others have not fixed her maintenance and are content with satiating her hunger (sustenance), a view which is more predominant among the legists.

Whatever the case, it is necessary that the financial condition of the husband be taken into consideration. Here it becomes clear that providing a servant and expenses of serving require that two things be taken into consideration: the husband's condition and the custom prevailing among her likes. Therefore, if she demands more than that, the husband is not obliged to comply, irrespective of his financial condition, and if she demands what her likes generally require, it is compulsory that the husband meets her demands if he is well-off, but not if his means are straitened. When providing a servant becomes compulsory due to her being of those women who depend on servants for doing house works, the husband will have the choice either to pay the expenses of her servant if she has one, or buy or hire a servant for her or serving her himself. She is not entitled to choose any of these alternatives.

In regard of clothing and housing it is fixed in accordance with her requirements and the customs followed by women of her standing among her townspeople. She has the night to demand an independent home for them without any other person (of his or her relatives).

Supplementary Issues

1. If the wife says: "I myself do the house works and the expenses for the servant have to be given to me (as recompense for work)," responding to her demand is not *wājib*. If she starts to work without the husband's permission, she will not be entitled to claim any recompense.

2. The wife takes possession of the daily maintenance on surrendering herself to her husband. If the husband abstains from delivering her the maintenance while that day during which he has intercourse with her expires, he shall be liable to pay the maintenance of that day and the following days though it has not been determined or ordered by the judge. If the husband pays to her maintenance for a certain period, which expires with her submission to him (*tamkīn*), this maintenance shall become of her property.

If he pays her maintenance of a certain period and divorces her before expiry of this period, he is entitled to reclaim from her an amount proportionate to maintenance of the remaining period (during which he has not enjoyed conjugal society with her), except the amount specified for the day of divorce. But in regard of the clothing (apparel) he is entitled to restore it unless the period fixed for it diminishes.

3. When the husband consummates marriage with his wife who continues to live together with him, eating and drinking with him as usual, she will not be entitled to demand from him any recompense for the period she spent with him as a messmate. If one marries a woman but does not consummate marriage with her, when some period elapses without her claiming any maintenance from him, she will not be entitled to the maintenance, according to the view saying that obedience (*tamkīn*) by the wife to the husband makes maintenance *wājib* upon him or it is a condition for its obligation, because there is no surety that she does not deny him access when he demands it.

A Subsidiary Issue for Submission

- When the husband disappears and the wife appears before the court and declares her obedience and willingness to live with him, the judge will then order the husband to present himself to inform him of her willingness. If he presents himself, or sends a deputy for him, or sends her maintenance to her, it suffices. But if he does not fulfill any of these alternatives, the judge shall allow a period of time sufficient for the issuance of a notification and the reception of his reply or for his sending of her maintenance, he will not issue any order during this period. After the expiry of this period, he shall issue orders. If, for instance, such a period is two months, he shall order payment of maintenance beginning from the date of expiry of the two months. Or if the wife informs the husband of her state without the mediation of the judge and proves it, it shall also suffice. Then she shall be entitled to maintenance from that date. If a wife is divorced while she is disobedient, she will not be entitled to maintenance. If she is undergoing the *ʿiddah* of a revocable divorce and turns disobedient during this period, her

maintenance shall cease but on her reverting to obedience, it shall resume from the date of his knowledge of her becoming obedient.

If the wife apostatizes, her maintenance ceases. If she reverts to Islām while he disappears, her maintenance shall revert on her conversion to Islām as the apostasy that caused the maintenance to cease has disappeared.

4. When the irrevocably divorced wife claims to be pregnant, she shall be entitled to day-to-day maintenance, on proving her pregnancy. Otherwise, the maintenance can be reclaimed from her. Some legists observed: the pregnant wife separated from her husband is not entitled to maintenance, but others entitle her to maintenance since it is for the child not the wife.

When the husband pronounces the *li'ān* against his wife (by accusing her of adultery or denying paternity of her child) and they separate while she being pregnant, she will not be entitled to maintenance since the child is denied by the husband. The same rule applies when he divorces her and she is found to be pregnant, when the husband denies paternity of the child and pronounces the *li'ān* against his wife. But if he confesses after the *li'ān* that he has lied and accepts paternity of her child, he shall be liable to pay the maintenance since it is one of the child's nights.

5. The captive bondman (*mamlūk*) is liable to pay maintenance of his wife, if he is not earning his livelihood (*muktasib*), and every day a part of him will be sold proportionate to the amount he is obliged to pay. Some legists said: It will be considered as a debt in his charge, and others are of the opinion that his master is liable to pay the maintenance as the contract was concluded with his permission, which is preponderant by the legists.

6. If a husband gives his pregnant wife a revocable divorce, and she claims that occurrence of divorce is after childbirth when he denies this, her word shall be accepted on oath. And he shall be ordered to separate from her to oblige him to confess, and she shall be entitled to maintenance due to continuity of her marital bond with him.

7. If a wife owes a debt to her husband, can he adjust this debt against her present or future maintenance? The legists observed: If she is financially well-off and yet refuses to repay the debt, it is permissible for him to adjust if from her day-to-day maintenance, which means that he considers her debt to him as her maintenance for each day, separately. But if she be financially straitened, he cannot do so, because any payment towards debt should be from what exceeds her daily expenditures.

8. Precedence in paying the maintenance is given to the wife over the relatives, hence the husband is liable to maintain her of the surplus left after providing his essential needs. Then he can provide his relatives with the surplus left after providing his wife with her *wājib* maintenance, as it is a substitutive maintenance which remains in one's liability.

MAINTENANCE OF RELATIVES

The Relatives Entitled to Maintenance

It is *wājib* for sons to maintain their fathers and mothers, how high so ever, and it is *wājib* for fathers to maintain their sons and daughters how low so ever. The obligation of maintenance does not transcend these two main lineal classes to include others, such as brothers and paternal and maternal uncles, but maintaining them is *mustaḥabb* and it becomes more emphatic in respect of those who are entitled to inherit among them.

Conditions for Wujūb of Maintenance

1. The person to be maintained must be in need of maintenance. Therefore, maintaining a person who is not needy is not *wājib*. A person who can earn his livelihood, but does not do so, is considered as well-off. If one who was earlier making his livelihood by engaging in a trade that suited his condition and status later neglects to do so, his maintenance is not *wājib* upon anyone, irrespective of whether it is the father or mother or the son. Maintenance for a needy person is *wājib* even if he be libertine or a non-Muslim. But maintenance of a captive bondman (*mamlūk*) is only *wājib* upon his master.

2. That the maintainer be well-off, and the only condition here is the presence of the actual ability to maintain or presence of ability to earn. The maintenance is the surplus over the daily expenditure of oneself and one's wife, as the maintenance of descendants and ascendants belongs to the same category. Hence, the maintenance of the parents and children is the surplus over daily expenditure of one's own and one's wife.

3. There is no fixed determination of maintenance, but it is necessary that maintenance paid to a relative be sufficient to cover his/her essential needs, such as food, clothing and housing, because it has been made *wājib* to protect life and to provide its needs. Thus it is to be determined in accordance with the needs.

4. Need is presumed unless there is proof to the contrary. If one claiming maintenance pleads indigence, his word will be accepted on oath, and the person from whom it is claimed is burdened to disprove the claim of the claimant. It is not *wājib* to arrange for the marriage of a person whose maintenance is *wājib*, irrespective of whether he is father or son. Similarly, it is not *wājib* for a son to maintain his father's wife if she is not his mother, or for a father to maintain his son's wife, because the canonical proofs (*adillah*) which make maintenance *wājib* include neither the father's wife nor the son's, and an obligation is assumed to be non-existent until proved.

5. Past maintenance of relatives will not be payable if the judge had not determined it the spirit of mutual assistance and fulfillment of need being the reason behind it, it cannot be made good for past time. If the judge orders maintenance to be borrowed and the relative entitled to receive it does so, it is *wājib* for the maintainer to clear this debt. But if he does not order such borrowing, or orders but it is not borrowed, the maintenance will be void.

Supplementary Issues

1. The child's maintenance is *wājib* on the father. If the father is dead or indigent, his child's maintenance will lie upon the paternal grandfather and if he is dead or indigent, the mother

will be liable for maintenance. After her, her father and mother along with the child's paternal grandmother will share equally in the maintenance of the grandchild if they are financially capable. But if only some of them are well-off, the maintenance will lie only on those who are such.

2. If a person has father and mother, and the surplus over his daily expenditure and his wife be sufficient for one of them, they will be entitled to it equally. So also, if he has father and a son. But if he has father and a grandfather, or mother and a grandmother, the nearest in relationship will be given precedence.

3. If an indigent person has well-off father and a grandfather, his maintenance is *wājib* on his father in particular. If he has a well-to-do son and father, they will contribute to his maintenance equally.

4. If the person from whom the *wājib* maintenance is claimed pleads indigence or refrains from paying it, the judge can compel him to pay. If he abstains from payment, the judge is entitled to imprison him. Where the person claiming indigence owns known assets, it is permissible for the judge to order taking out of his property and spending it as maintenance. If he has real estates or chattels or personal properties, it is permissible to sell them and provide the maintenance since this night is similar to a debt.

Maintenance of a Captive Slave

Maintenance of slaves and animals is *wājib* on their owner. In regard of a bondman and bondwoman, their master has the choice either to maintain them from his own or from their earnings. No determination is there for their maintenance, but it is necessary that it be sufficient to cover his/her essential needs, such as food, clothing and housing (sustenance and support). Such maintenance will be fixed in accordance with the requirements that are usually met for captive slaves owned by a master of his standing among his townspeople. If he abstains from providing the maintenance, he will be compelled to sell him/her or pay the maintenance.

It is permissible for the master to transact a deal with his captive slave, by imposing a tax on him, and giving him the surplus if he accepts it. If the surplus be sufficient to cover all his requirements, it will suffice and otherwise the master (*mawlā*) will be liable to complete the maintenance. It is not permissible for the master to impose on the slave that tax of whose meeting his earning falls short, or the surplus of which be insufficient to cover his maintenance, unless the master undertakes the providence of the maintenance.

The maintenance of owned animals (livestock), whether be eatable or not, is *wājib* upon their owner, who is liable to provide them with their requirements of food (fodder) and pasturage. If the owner abstains from fulfilling these requirements, he shall be compelled to sell or slaughter them if they be among sacrificial animals, or to maintain them. If they have young (result), their milk can be spared for him.