A

DIGEST OF MOOHUMMUDAN LAW.

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ON THE

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

COMPILED AND TRANSLATED FROM

AUTHORITIES IN THE ORIGINAL ARABIC,

WITH

AN INTRODUCTION AND EXPLANATORY NOTES.

By NEIL B. E. BAILLIE,

MEMBER OF THE ROYAL ASIATIC SOCIETY,
ASSISTANT SECRETARY TO THE INDIAN LAW COMMISSION, AND FORMERLY GOVERNMENT PLEADER IN THE COURT OF SUDDER DEWANNY ADAWLUT, AND AN ATTORNEY OF THE SUPREME COURT OF JUDICATURE, AT FORT WILLIAM IN BENGAL.

LONDON:

SMITH, ELDER AND CO., 65, CORNHILL.

1865.

TO

THE RIGHT HONOURABLE

SIR EDWARD RYAN,

FIRST COMMISSIONER OF THE CIVIL SERVICE COMMISSION; AND FORMERLY CHIEF JUSTICE OF THE SUPREME COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL,

This Digest

IS MOST RESPECTFULLY DEDICATED.

PREFACE.

The volume which is here presented to the English reader is intended to exhibit the doctrines of the Hanifeea sect on all the subjects to which the Moohummudan Law is usually applied by British Courts of Justice in India. The founder and acknowledged head of the sect was Aboo Huneefa; but his two disciples, Aboo Yoosuf and Moohummud, attained to so great eminence as expounders of his doctrines, that they are usually styled his companions, and their opinions are quoted by his followers as of scarcely less authority than those of the master himself. The Hanifeea is the first, and by far the most numerous of the four Soonnee or orthodox schools of Moohummudan lawyers. Its doctrines are law in the Turkish Empire, and generally throughout the Mussulman countries of Asia, with the exception of Persia, where the Shia is the prevailing sect. The Moohummudan Sovereigns of India were Soonnees of the Hanifeea sect, and the Hanifeea code was the general law of the country, so long as it remained under the sway of Moohummudans. There are now, and probably have long been, a good many Shias in India; and to professing Shias the Imameea code has been administered by British courts of justice in matters of inheritance. It probably would, in like manner, be administered to them on the other subjects to which the Moohummudan Law is usually applied, if questions on these

matters should arise between Shias, and be brought for decision before the public tribunals. The Nuwab Viziers of Oude were of the Shia persuasion; yet, so long as they preserved a nominal allegiance to the Sovereigns of Delhi, the Hanifeea code remained the law of the province. Since the assumption of regal dignity by Ghazi-ood-deen Hyder, the Hanifeea has been gradually superseded by the Imameea code, which is now, I believe, administered by the British commissioners in Oude to Mussulmans of the province as the customary law of the place. This circumstance has so much increased its importance, that it was my intention to have added some supplementary chapters to this work, explanatory of the distinctive doctrines of the sect on all the most important points of law. But the work has already swelled to such a magnitude that I am obliged to postpone this part of my plan for the present.

This work is founded chiefly on the great digest of Moohummudan Law prepared by command of the Emperor Aurungzebe Alumgeer, and known as the *Futawa Alumgeeree*. For some account of it and the manner of its preparation, the reader is referred to the preliminary remarks to my treatise on the *Moohummudan Law of Sale*. It is sufficient to notice in this place that the *Futawa Alumgeeree* is a collection of the most authoritative *futawa*, or expositions of law, on all points that had been decided up to the time of its preparation. Having been compiled in India, and by the authority of a Mussulman sovereign, it is a pity that it was not adopted by the British Government as the standard authority for its courts of justice. It was, perhaps, thought too voluminous for translation; and the preference for that purpose was given to the *Hidayah*, which was first translated into Persian by learned natives of the country, and from the Persian language translated into English by Mr. Charles Hamilton. This adoption of the *Hidayah* has rendered it necessary to keep that work in view wherever it may seem to differ from the

authorities to which the compilers of the *Futawa Alumgeeree* have given the preference. I have not confined my use of it to these points, but have freely quoted from the *Hidayah* and its two celebrated commentaries, the *Kifayah* and *Inayah*, as well as other available authorities, wherever I thought it necessary for a more complete exposition of the law. The translation of the *Hidayah* is also sometimes, though more rarely, referred to under the title of the *Hedaya*, according to the spelling of the word in Mr. Hamilton's title-page.

The extracts of which the *Futawa Alumgeerce* is composed are always given in that work, so far as I have had opportunities of observing, in the words of the original writers. This is the case even when works like the *Hidayah* are quoted, which contain comments and arguments of the writer; though the *futwa*, or decision, is given without the comment or argument. Many of the cases are not likely to occur again, and may be omitted without breaking the continuity of the work, or impairing its general utility. In making my selections from it, I have followed the example of the compilers, in so much that I have seldom attempted to give the meaning of the original writers in my own language. I have preferred to allow them, as it were, to speak for themselves, and have adhered to literal translation as strictly as the different idioms of the Arabic and English languages would admit. My work may thus be deemed in the three first and eleventh books an abridged translation of the corresponding books of the *Futawa Alumgeeree*, with occasional extracts from other authorities. The other books are more in the nature of selections from the work generally, though in these also the corresponding books of the original digest have been followed as closely as possible. This has saved the necessity of reference to its pages, except where the extracts are not consecutive. The references to other authorities are perhaps more numerous in these parts of the work than in the books specially mentioned.

Even in parts of the work that may be thought more particularly my own, as in the preliminaries to some of the books, and the chapters on Invalid and Void Marriages, Nationality, the Origin of Slavery, Conditions, &c., I have avoided as much as possible speaking in my own person, and never without authority duly referred to; confining myself there, as elsewhere, to the task of translation, after I had made and arranged my extracts. The frequent occurrence of the personal pronouns with inverted commas refer to the sect or country of the original writer of the extract, or to his own opinion, not to the translator. Explanatory foot-notes have been subjoined to the text wherever they appeared to be necessary. Side-notes have also been added, which may, it is hoped, be of some advantage to the reader, not only by abridging the labour of reference, but also by serving as subdivisions of the larger sections of the work. In these an expression of the translator's opinion of the sense of the passage to which they are annexed, and of their connection with the context, is necessarily involved. But this cannot mislead the reader, as he has the text itself to refer to.

The same remark applies to the Introduction which has been prefixed to the work. All the statements of any importance which it contains are accompanied by references to the pages of the text on which they are founded; and the reader will do well to test them by actual comparison before he places any reliance on them as authorities. If duly followed up, they may serve, it is hoped, as guides to one who is quite unacquainted with the subject, by opening up for him, as it were, so many paths through an unknown country. To the ordinary Index, which has been arranged so as to form an analytical table of contents, an index of names and other Arabic words occurring in the text has been added. In writing these, no particular system has been strictly followed, though with Dr. Gilchrist I always give to the vowel *u* its sound in the word *us*, and adopt double *o* (*oo*)

to signify its other sound. In one respect I may offend the Arabic scholar. The plurals of nouns in that language, though regularly formed from their singulars, appear to one unacquainted with the language to be different words, and by using them I should have been obliged to double the number of foreign terms. To avoid this, no other way occurred to me than that of adopting the sign of the English plural (*s*). The singular word, however, is always given in the Index.

The work has been prepared without any assistance in the selection or translation of the materials of which it is composed; and as these had to be sought for through many a page of authorities in a difficult language, without the aid of anything deserving the name of an index, the circumstance will, it is hoped, have some weight with the candid reader in extenuation of the errors which, notwithstanding the utmost exertions of the author, it may still be found to contain. For these he is alone responsible. But the proof of every page as it passed through the press has been perused by his friend, Mr. William Macpherson, barrister-at-law, and formerly master in equity of the Supreme Court at Calcutta. To that gentleman the author takes this opportunity of offering his grateful acknowledgments; and knowing that his work has passed under the eye of one so familiar with the laws and procedure of all the courts of justice in India, he is enabled to present it with some degree of confidence to the public.

The following abbreviations occur throughout the work:—*Fut. Al.*, for *Futawa Alumgeeree*; *Fut. Ka. Kha.*, for the *Futawa of Kazee Khan*; *P. P. M. L.*, for *Principles and Precedents of Moohummudan Law*, by the late Sir W. Macnaghten, Bart.; *S. D. A.*, for *Sudder Dewanny Adawlut*; and *M. L. S.* and *M. L. I.* for treatises on the *Moohummudan Law of Sale* and *Moohummudan Law of Inheritance*, both by the author of the present work.

ERRATUM.

Page 96, line 6. Before "the specified dower," *read* "half of."

CONTENTS.

CONTENTS.

Book II.

OF FOSTERAGE.—(p. 193.)

Book III.

OF DIVORCE.—(p. 203.)

Book IV.

OF SLAVERY.

Book V.

OF PARENTAGE.

Book VI.

OF MAINTENANCE.

Book VII.

OF "SHOOFÂ" OR PRE-EMPTION.

Book VIII.

OF GIFT.

Book IX.

OF "WUKF," OR APPROPRIATION.

Book X.

OF WILLS.

Book XI.

OF "FURAIZ," OR INHERITANCE.

Book XII.

OF CLAIMS AND JUDICIAL PROCEEDINGS.

INTRODUCTION.

At the presidency towns in India, the Moohummudan Law is applicable by Act of Parliament, to all suits between Moohummudans, which relate to "their succession and inheritance," or to "matters of contract and dealing between them." And in the *Moofussul*, or country separated from or without the presidency towns, it is applicable under regulations of the local governments, to all suits between Moohummudans, "regarding succession, inheritance, marriage, caste, and all religious usages and institutions." In practice it is seldom applied in the presidency towns, except in cases of marriage and inheritance. In the *Moofussul*, Moohummudans are more in the habit of regulating their dealings with each other by their own law; and to disregard it when adjudicating on such dealings, would be inconsistent with "justice, equity, and good conscience," according to which the judges are expressly enjoined to act in cases for which there is no specific rule for their guidance. It has thus happened, that the *Moofussul* judges have been obliged to extend the operation of Moohummudan law beyond the cases to which it is strictly applicable, under the regulations of the local governments. The late Sir William Macnaghten, in his valuable work, entitled "Principles and Precedents of Moohummudan Law," arranged the cases in which it had been actually applied by these judges under the following heads:—Inheritance; sale; pre-emption; gifts; wills; marriage dower, divorce and parentage; guardians and minority; slavery; endowments; debts and securities; claims and judicial matters.

Many decisions on Moohummudan law have been pronounced by courts of justice in India, since the publication of Sir William Macnaghten's book; but none, so far as I am aware, that cannot be reduced under one or other of the same heads. His arrangement, therefore, may still be taken as sufficiently comprehensive to include all the subjects to which the Moohummudan law is actually applied by courts of justice in British India at the present time.

The "Precedents" in the work referred to are not the decisions of courts of justice, but *futawa* or opinions of their law officers, delivered in answer to questions propounded to them by the judges. They cannot therefore properly be said to be precedents in the same authoritative sense in which the word is applied to the decisions of courts of justice in England. The author himself has treated them rather as illustrations of his "Principles," which he has deduced from higher authorities. These are given in their original language, in an appendix to the work. The late Mr. H. H. Wilson, taking the like view of them, has omitted them altogether in a recent edition of the "Principles."

The authoritative part of the work is thus reduced to a very small compass. It occupies no more than ninety pages of small octavo in the last edition; and half of that space is devoted to the subject of inheritance alone. What remains for the other important subjects—including Marriage, Divorce, and Parentage, on which all courts of justice in British India are bound to administer the Moohummudan law in its integrity—is merely an outline of the law, and scarcely sufficient for elementary purposes. The only other work on Moohummudan law which was available at the time of Sir W. Macnaghten's publication, to the mere English reader, was Mr. Hamilton's translation of the *Hidayah*. Of that work Sir William Macnaghten remarked, that it is "of little utility as a work of reference to indicate the law on any particular point which may be submitted to judicial decision." To me it appears that something more is still required for that purpose—particularly as the office of Law Officer to the High Court has now been abolished. Many years ago I published a treatise on the Law of Inheritance, derived from the same

original authorities as the "Principles" of Sir William Macnaghten, but more in detail. Since then I have published another volume on the Moohummudan Law of Sale, composed of selections from the *Futawa Alumgeeree*, with occasional references to other authorities; and if that work had met with any encouragement, it was my intention to have continued my selections on the same plan, until all the other subjects enumerated by Sir William Macnaghten were exhausted. Not long after its publication, the first Royal Commission was issued for considering "the Reform of the Judicial Establishments, Judicial Procedure, and Laws of India;" and it did not seem improbable that the subject of the Moohummudan law might, at some period of their labours, come under the review of the Commissioners. But, in their second Report, they gave it as their "opinion, that no portion either of the Mohamedan law or of the Hindoo law ought to be enacted as such, in any form, by a British Legislature;" assigning as one of their reasons, that "a code of Mohamedan law, or a digest of any part of that law, would not be entitled to be regarded by Mohamedans as very law itself, but merely as an exposition of law which might possibly be incorrect." Concurring entirely in this opinion, I have reverted to my original intention, deeming the time more favourable, and have now prosecuted it to a completion; with this difference, that I have adhered more strictly to translation than I thought necessary when treating of Sale, much of the law of which has become obsolete in modern times, by the general employment of money as the medium of exchange.

On referring to the classification of Sir William Macnaghten, it will be seen that the cases in which the Moohummudan law has actually been applied in British India are connected with what may be termed the domestic relations of persons to each other, or with the transfer of property *inter vivos*, or from the dead to the living. The first and most important of the domestic relations is that of husband and wife; and it is treated of at adequate length in the three first books of the following work, under the three several heads of Marriage, Fosterage, and Divorce. Marriage is merely a civil contract, and differs in some other important respects from the same

contract in this country. A few of these may be noticed in this place. It confers no rights on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband; she retains the same powers of using and disposing of her property, of entering into all contracts regarding it, and of suing and being sued, without his consent or concurrence, as if she were still unmarried. She can even sue her husband himself, without the intervention of a trustee or next friend; and is in no respect under his legal guardianship. On the other hand, he is not liable for her debts, though he is bound to maintain her, and he may divorce her at any time, without assigning any reason. He may also have as many as four wives at one time. A practice prevails in India which operates as a considerable check on the exercise of these powers of the husband. It is usual for Mussulmans, even of the lowest orders, to settle very large dowers on their wives. These are seldom exacted so long as the parties live harmoniously together; but the whole dower is payable on divorce or other dissolution of marriage, and a large part of it is usually made exigible at any time, so that a wife is enabled to hold the dower *in terrorem* over her husband; and divorce and polygamy, though perfectly allowable by the law, are thus very much in the nature of luxuries, which are confined to the rich. The degrees of consanguinity and affinity within which marriage is prohibited are nearly the same as under the Mosaic law. But under the Moohummudan law affinity may be contracted by illicit intercourse (25), as well as by marriage, and, in some instances, by irregular desires, accompanied by the sight or touch of certain parts of the person (*ib.*) To these grounds of prohibition must be added some that are peculiar to the Moohummudan law. Thus, a man may not marry a woman related to him by fosterage (30), a prohibition which embraces not only the foster parents, but also all persons related to them within the prohibited degrees of consanguinity (193) and affinity (194). So also, a *Mooslim*, or man of the Mussulman religion, is prohibited from marrying an idolatress, or a fire-worshipper, though he may marry a Christian, or a Jewess (40); and a *Mooslimah*, or woman of the Mussulman religion, cannot lawfully be married to any

one who is not of her own faith (42). A difference of *Dár*, or nationality, may also be classed among the prohibitions of marriage; for, if one of a married pair should happen to change his or her nationality, the marriage between them would be at an end (183). For this and other purposes generally, nations or peoples are held to differ only as they are or are not the subjects of a Mussulman state. Among those who are not the subjects of a Mussulman state, difference of allegiance is recognized as a further difference of countries; but the effect of this distinction is confined to questions of inheritance (698). Moreover, though a Mussulman is allowed to have as many as four wives, he cannot lawfully have two women at the same time who are so related to each other by consanguinity or affinity, that if one of them were a male, marriage between them would be prohibited (31). This objection does not apply to his having the women in succession (32); for a Mussulman is not prohibited from marrying the sister of his deceased or divorced wife. Though fosterage is treated of in a separate book for the sake of convenience, the relation has no effect on the condition of the parties between whom it subsists, except that it prevents them from intermarrying.

The principal incidents of marriage are the wife's rights to dower and maintenance, the husband's rights to conjugal intercourse and matrimonial restraint, the legitimacy of children conceived (391), not merely born, during the subsistence of the contract, and the mutual rights of the parties to share in the property of each other at death. The last incident belongs exclusively to valid marriages (684). The right to dower is opposed to that of conjugal intercourse, and the right to maintenance opposed to that of matrimonial restraint. Hence, a woman is not obliged to surrender her person until she has received payment of so much of her dower as is immediately exigible by the terms of the contract (124), and is not entitled to maintenance except while she submits herself to personal restraint (438). Dower, though not the consideration of the contract, is yet due without any special agreement, such dower being termed "dower of the like," or "the proper dower" (91). But when any dower has been

specified by the contract, it supersedes the proper dower (93), which in that case comes into operation only on the failure of the specified dower. When dower is expressly mentioned in the contract, it is usual to divide it into two parts, which are termed *mooujjul*, or prompt, and *moowujjul*, or deferred; the prompt being immediately exigible, while the deferred is not payable till the dissolution of the marriage (92).

Marriage, like other contracts, is constituted by *éejab o kubool*, or declaration and acceptance (4). But some conditions are required for its legality; and an illegal, or invalid marriage, though after consummation similar in some of its effects to one that is valid (157), does not confer any inheritable rights on either of the parties to the property of each other (684). This seems to be true, not only of contracts that are invalid *ab initio*, but of such also as are rendered so by subsequent acts of either of the parties, as, for instance, by the wife's having carnal intercourse, even against her will, with the son of her husband (279), which would render future intercourse with himself unlawful, and so invalidates the marriage. Where a contract is merely invalid, the legitimacy of children conceived during its subsistence is not affected (157). But when the parties are so nearly related to each other by consanguinity, affinity, or fosterage, that sexual intercourse between them is universally allowed to be unlawful, the contract is altogether futile, or void as to all its effects, according to Aboo Yoosuf and Moohummud, and in their opinion the paternity of the offspring is not established from the husband, or in other words, the children conceived during its subsistence are illegitimate (150). This distinction was denied by Aboo Huneefa, who was of opinion that in all contracts there is such a semblance of legality as saves the marriage from being utterly futile. According to him, therefore, wherever there is a subsisting contract of marriage, the children conceived under it must always be held to be the offspring of the husband (154), unless expressly repudiated by him in the solemn form known as *lián*, or imprecation. There is some reason for giving the preference to the opinion of Aboo Huneefa, particularly in

India where it was adopted by the compilers of the *Futawa Alumgeer*, who appear to have entirely ignored the distinction between invalid and void marriages (155).

With regard to the dissolution of marriage during the lives of the parties, this is termed *firkut*, or separation; and there are thirteen different kinds of it, or ways in which it may be effected. Of these, seven require the decree of a judge, six do not (203). Separation for a change of nationality, or for apostasy from *Islam*, belong to the second class; and, as soon as one of these occurrences takes place on the part of one of a married pair, the marriage between them is *ipso facto* at an end (182, 183). A change to *Islam* belongs to the first class; and when one of a married pair embraces the faith, and the other is within the jurisdiction of a Moohummudan judge, their marriage cannot be dissolved until *Islam* has been formally presented to, and rejected by the other (180). Invalid marriages belong to the second class; but though the intervention of the judge is not necessary to set them aside, it is his duty to separate the parties (156) when the illegality of their connection is brought to his notice, and after consummation the marriage cannot be otherwise dissolved without a formal relinquishment by speech. This may be made by either of the parties in the presence of the other. But there is some reason to doubt whether a relinquishment pronounced by one of the parties in the absence of the other, would be valid unless communicated to the other (156).

A *firkut*, or separation, which comes from the side of the wife without any cause for it on the part of the husband (53), or, more generally, every separation of a wife from her husband for a cause not originating in him, is a cancellation of the marriage; while every separation for a cause originating in the husband is termed a *tulák*, or divorce (203). Cancellations differ from divorces in so far that, if a cancellation takes place before the marriage has been consummated, the wife is not entitled to any part of the dower; whereas, though a divorce should take place before consummation, she is entitled to a half of the specified dower, or a present, if none has been specified (96).

Separations for causes not originating in the husband are noticed incidentally as occasion for mentioning them has occurred. Thus, separations under the option of puberty, or for inequality, or insufficiency of dower, which are separations on the side of the wife, are noticed in the fourth and fifth chapters of the first book, in connection with the subjects of guardians and equality. And separations on account of an original invalidity in the marriage, which is a cause in which both the husband and wife participate, are mentioned in the eighth chapter of the same book in connection with invalid marriages. All being cancellations of the original contract, it will be found that in none of them has the wife any right to dower, unless the marriage has been consummated (53, 67, 156).

Separations for causes originating in the husband, or divorce in its different kinds, forms the subject of the third book. Of these there is one kind of so much more frequent occurrence than the rest, that the term *talâk* is sometimes restricted to it, and the first six chapters of the book are devoted to this kind alone. This class comprises all separations which require the use of certain appropriate language to effect them. And to distinguish them from all other separations originating in the husband, I have given them the name of Repudiation.

Repudiation, or *talâk* in this restricted sense, is either revocable or irrevocable. A revocable repudiation may be revoked at any time until the expiration of the *iddut* or probationary term, usually about three months, prescribed by the law for ascertaining if a woman is pregnant (285); on the expiration of that term the repudiation becomes irrevocable and divorce is complete (205). A repudiation may, however, be made at once irrevocable by the force of the peculiar expressions employed, or by pronouncing it three times. A triple repudiation is not only irrevocable, but has this further consequence, that it prevents the parties from re-marrying, until the woman has been intermediately married to another husband, and the marriage has been actually consummated; (290), a consequence which in some degree accounts for the strictness with which verbal repudiations are construed.

The words by which repudiation may be given are either plain and express, or ambiguous. The former take effect by the mere force of the expressions, but unless repeated induce only a single repudiation. The latter require intention on the part of the person employing them (212); which is generally determined by the state of mind in which they are uttered (228); and the repudiation effected by them is with a few exceptions irrevocable (230).

Repudiation may not only be pronounced by the husband himself, but the power to repudiate may be commited to the wife, or to a third party. The commission is termed *Tufweez*, and is of three kinds, *Ikhtiyar*, *Amr-bu-yud*, and *Musheeut* (236).

Repudiation may also be contingent, or, as it is termed by Moohummudan lawyers, may be suspended on a condition (257). This being a species of *yumeen*, or oath, I have found it necessary to digress a little into the subject of *yumeen* generally, as a preliminary to the chapter on Repudiation with a Condition.

The *yumeen* is of two kinds—by God, and without God. The *yumeen* by God, or an oath in its most proper sense, may be used to confirm an affirmation, or a denial, or an engagement. The oath to confirm an affirmation has no place in Moohummudan law, as witnesses are not required to swear. The oath to confirm a denial is the defendant's oath, which will come under consideration in connection with claims in the last book. The oath to confirm an engagement, as for instance to do or refrain from something, is not legally obligatory on the swearer, though the breach of it must be expiated (259). Much less then, it would seem, is a mere promise obligatory; and I have met with several passages in the *Hidayah* or its commentaries, where a mere promise is treated as nugatory, though I have forgotten the references.

The *yumeen* without God is the *shurt o juza*, or condition and consequence, and it is constituted by the use of the conditional particles if, when, &c.; as when a man has said to his wife, "If thou enterest the mansion thou art repudiated." To make a good *yumeen* of this kind, the condition must be something in the future that may or may not happen, that is,

is possible, but not certain; and there must be nothing to prevent the consequence from taking effect immediately on the occurrence of the condition. If the condition is actually in existence, there is no *yumeen*, but an acceleration of the consequence. Thus, when a man has said to his wife, "If there is a heaven above us, thou art repudiated," repudiation takes place on the instant (266). Again, if the condition is impossible, there is no *yumeen*, but here the consequence never takes place. Thus, when a man has said to his wife, "If a camel enter the eye of a needle, thou art repudiated," there is no repudiation (*ib.*) To secure the following of the consequence on the occurrence of the condition, it is necessary that the power to induce the consequence should continue in force up to the time of the occurrence. Thus, if a man should say to his wife, "If thou enterest the mansion thou art repudiated," and his power to repudiate were entirely exhausted before the occurrence took place, there would be no repudiation (265). Further, it is necessary that the consequence should be an act that may legally be made dependent on a condition, for if it is not so there is no *yumeen*. Agency, or a licence to trade, is not such an act (257); nor is gift (507); nor is *wukf*, or appropriation (556); nor *ruját*, or retention of a repudiated wife (287). In short, it is stated generally in the *Inayah* that the *yumeen* by *shurt* and *juza* is restricted to emancipation, repudiation, and *zihar*, which is only another kind of repudiation (258). And the *Futawa Alumgeerce* so far agrees with this that the only applications of it given in that digest are to emancipation and repudiation. A contingent gift is void (540), and as bequest is in the nature of a gift deferred till the death of the testator (614), it may perhaps be inferred that a bequest in the same circumstances, and indeed any other act that cannot be legally made dependent on a condition, would, if so made, be void also.

The rules for the proper construction of the *shurt* and *juza*, which are grammatical rather than legal, form the subject of the fourth chapter of the third book. The remaining chapters of the book are occupied with *ruját*, or the retention of a repudiated wife, and the means of again legalizing her to her husband; *eela*, *khoolá*, *zihar*, and impo-

tency, which are the other kinds of divorce for causes proceeding from the husband; *iddut*, or the probationary period already alluded to, during which it is unlawful for a divorced woman or a widow to enter into another marriage; and *hidad*, or the behaviour in respect of adorning her person, which is becoming to her during that period.

Next to the relation between husband and wife is the relation of parent and child. But as the legal constitution of this relation, or parentage, is founded on the relation of master and slave, as well as on that of husband and wife, slavery comes next in order after marriage, and forms the subject of the fourth book. Domestic service, as distinguishable from the general contract of hiring, is hardly known to the Moohummudan law, except in the form of slavery; and I have thought it right to go a little further into the subject than was absolutely necessary as a basis of parentage, though I have not entered into detail to the extent that would have been required, if the Indian Legislature had not passed an act by which slavery has been abolished in almost everything but name. Like sale, it is constantly referred to in treating of other branches of the law; and this circumstance has rendered some explanation of its origin and general conditions almost unavoidable. Parentage, or the constitution of the relation between parent and child, is treated of in the fifth book; and what else relates to them will be found under the heads of guardians in chapter fourth of the first book, maintenance in the sixth book, and the powers of executors in the tenth book. The period of minority is so short under the Moohummudan law, being terminated by puberty in both sexes, that there is not so much to be said of the relation between guardian and ward in Mussulman as in other countries, for instance in England, where minority continues till the age of twenty-one years complete. Of guardians there seem to be two kinds—the lineal and the testamentary guardian. The powers and duties of the former are limited to the marriage of his ward, and those of the latter to the care of his person and property. The testamentary guardian does not appear to be distinguished from the ordinary executor, and some mention of his powers and duties will accordingly be found in the eighth chapter of

the tenth book. No executor has authority to contract a minor in marriage, unless he happens to be the lineal guardian also (47). Under the general head of maintenance will be found the duties in that respect of husbands to their wives, parents to their children, masters to their slaves, and relatives within the prohibited degrees to each other. This book concludes all that appeared to me to be necessary on the first branch of our subject, or the law of domestic relations.

With regard to the second branch, or the law relating to the transfer of property, property may be transferred *inter vivos* by sale or gift, and from the dead to the living by testate and intestate succession; while it may be settled, without transfer, for charitable and other purposes, by *wukf* or appropriation. Sale has been so fully treated of in the volume before mentioned, that anything further on the subject in this work might be deemed superfluous. But, consequent on sale, and in immediate connection with it, is pre-emption,—a right so congenial to the habits of the people of India, that it is constantly asserted by Hindoos as well as Moohummudans, and has been recognized by British courts of justice in India, as part of the customary law of the country. It has, accordingly, been treated of at considerable length in the seventh book, before proceeding to the other modes of transfer. These follow in the eighth, ninth, tenth, and eleventh books respectively.

Gift, which is the first in the list, is defined to be "the conferring of a right of property without an exchange" (507). This may be done either by actual transfer, which is termed *tumleek*, or by extinction of the donor's right, which is termed *iskat* (508). When gift operates by way of transfer, it is not complete without possession, and is in general resumable. When it operates by way of extinction of right, it does not even require acceptance (522), and cannot be resumed (527). For perfect possession, it is necessary that it be taken with the permission of the donor, either express or implied (513), and that the subject of the gift be separated from and emptied of the property and rights of the donor (512). When the gift is of a thing that may be divided without impairing any of its uses, it is further necessary that the subject of it should not be *mooshaà*, or confused with the property of another, by

being held in co-partnership with the donor or a third party (515). When an undivided share of a thing, as a half, or a third, or a fourth, is the subject of gift, there is confusion both on the side of the donor and of the donee, and the gift is unlawful or invalid without any difference of opinion. When two or more persons are jointly possessed of a thing that is susceptible of partition, and combine in making a gift of the whole of it to one person, there is confusion only on the side of the donors, and all are agreed that the gift is lawful. Where, again, one person being the proprietor of the whole of a thing makes a gift of it to two or more persons, either equally, or a half to one and a third to another, &c., there is confusion on the side of the donees only, and though the gift is valid according to the two disciples, it is invalid according to Aboo Huneefa. But it is expressly said that the gift is not void, and that it avails to the establishment of property in the donees by possession (516). If so, it would seem that when anything has occurred to prevent the revocation of the gift, it cannot be resumed. The death of the donor is a circumstance that has that effect (525). Yet a gift of the kind last described was set aside by the Sudder Dewanny Adawlut of Calcutta (*Reports*, vol. iv., p. 210), though it had never been revoked by the donor, and she was then dead. There is some reason, however, for thinking that the decision was founded on imperfect information as to the law, since no allusion was made in the *futwa* of the law officers to the distinction above mentioned, nor to any difference of opinion between Aboo Huneefa and his disciples on the point.

Before delivery any gift may be revoked, but after delivery, gifts to relatives within the prohibited degrees, or between husband and wife, do not admit of revocation (524, 525). Other gifts may in general be revoked, unless there is some special cause to prevent it. Of the causes that prevent the revocation of gifts, one in particular may be noticed, because it has given a name to a device for effecting a gift of *moosháà*, or an undivided share in property susceptible of partition. It consists in giving an *iwuz* or exchange for the gift. This may be entirely an afterthought, or may have been stipulated

for in the first transaction (532); which in that case is termed a *heba ba shurt ool iwuz* (534), or a gift with a condition for an *iwuz* or exchange. In both cases the *iwuz* is itself a gift, and is valid only when it is something that can lawfully be made the subject of gift. Up to possession, too, the *iwuz* may be revoked, but after that, neither the original gift nor the *iwuz* or exchange for it is resumable. In the second case, there is a further effect, which is that, after possession of the *iwuz*, the two transactions combine, and form an exchange of property for property, which is a sale (*ib.*) But if the exchange is in the original transaction, as when one thing is given in exchange for another, there is a sale from the beginning, as sale may be contracted by the word *give* as well as by the word *sell*. And the transaction, which is termed *heba-bil-iwuz*, has thus become a device in India for giving effect to the gift of *moosháá* in a thing susceptible of partition (122), which may be lawfully sold, though it cannot be made the subject of gift.

It has been already remarked, that a gift cannot be contingent or suspended on a condition, but it may be made subject to a condition. The original word *shurt*, which is the same in both cases, is thus employed in two distinct senses in the Moohummudan law. In the one it corresponds to the *conditio*, in the other to the *modus* of the civil law. The distinction between them is, that in the first case the condition being essentially future, as already observed, the act, which is made dependent on it, is necessarily suspended until the occurrence of the condition, while in the second case the act, which is made subject to the condition, takes effect immediately, with an obligation on the person benefited by it to fulfil the condition. A condition in this sense may be *fasid*, that is, invalid or illegal, or it may be not so. Any condition inconsistent with the nature of the transaction to which it is annexed, is clearly invalid, as, for instance, a condition in sale or gift of any advantage to the subject of the contract, when there is a person entitled to assert it. But the effect of the illegal condition on the two contracts is different. In the case of sale the contract is overpowered by the condition, and invalidated by it

(*M. L. S.*, 199); while in the case of gift, the contract throws off the condition, and remains unaffected by it, the condition itself being void (538). In like manner, marriage is unaffected by an invalid condition, the condition being inoperative (19). If the condition is not invalid, it would seem that it must be observed in gift (538), and probably also in other transactions. What are valid or invalid conditions, must be ascertained from a consideration of the particular transactions to which they are attached. But perhaps it may be safe to say, generally, that wherever a condition is inconsistent with something that is requisite to the validity of a transaction to which it is attached, it must itself be invalid, and that where there is no such inconsistency, the condition will generally be valid. What are these requisites will be found in the first or leading chapter of the different books of the following work; and what conditions are valid will also in general be found in some of the subsequent chapters of each book. It may be observed, that what is requisite to a contract or its validity is also termed *shurt*, or condition. This is a third meaning of the word as it occurs in the following pages. And there is even a fourth sense in which the word is employed in Moohummudan law; all deeds or legal documents, such as bills of sale, bonds, &c., being termed *shuroot*, which is a plural of the word *shurt*.

The next head after gift under this branch of our subject is *wukf*, or appropriation. The original word means, literally, *stoppage*, or *detention*, but, as defined in law, it is "a devoting or appropriating of the profits, or usufruct, of property, in charity on the poor, or other good objects" (549). The property itself is supposed to remain vested in the appropriator, according to one opinion (*ib.*), while, by another, though the appropriator's right abates, it is supposed to abate in favour of Almighty God, and does not pass to a human substitute (550). Appropriation may be constituted by words *inter vivos*, or by bequest. But when it is constituted by bequest, the property which is the subject of it must not exceed one-third of the testator's estate, unless the excess is assented to by the heirs (550). The proper subjects of appropriation are lands, houses, and shops, or immoveable

property generally, and any moveables that may be attached to it. Moveables, with a few exceptions, cannot by themselves be made the subjects of appropriation (561). With regard to its objects, two conditions are required. There must be some connection between them and the appropriator; and they must be of such a nature that, taken together, they can never fail. The poor are held to answer both these conditions, because they are supposed to be connected with everybody, and because "there will always be poor in the land." According to Aboo Huneefa and Moohummud, it is necessary that a perpetual succession of objects should be mentioned in the act of appropriation. But this was not required by Aboo Yoosuf, who held that the poor are always to be implied when other objects fail. And his opinion has been preferred, and is said to be valid (558).

One class of appropriations I have designated by the name of "settlements," to distinguish them from "endowments;" which have hitherto been supposed by English writers to be the only proper objects of appropriation. These are appropriations by a person for the benefit of himself, his children, kindred, or neighbours. Thus, a man may settle his land "on himself, and *after* him, on such an one, and *then* upon the poor;" or he may settle it "upon himself, and upon such an one" (567). In the former case, the parties indicated take in succession; in the latter, they take simultaneously. Nor does it make any difference, though some of them should follow the others in the order of nature. Thus, if one should say, "My land is settled on my child, and child of my child," the two generations participate in the produce (570). So, also, if he should say, "upon my child, and child of my child, and child of the child of my child," the produce is to be expended on his children for ever, so long as there are any descendants; the nearer and more remote being alike, unless the appropriator has said, "The nearer is nearer," or, "on my child, then after on the child of my child," or "generation after generation" (571). There is, however, a distinction between the two cases, which it is proper to notice. In the first, where only two generations are mentioned, "none below them are included" (570); while in the

second, where three generations are mentioned, the produce is to be expended on his children for ever, so long as there are any descendants (571). A similar consequence seems to follow where the settlement is "on children;" for there it is said that "all generations are included on account of the general character of the name" (*ib.*) But there is this distinction between the last case and the other two cases, that, in the latter, the participation is simultaneous, unless there are words of succession, while, in the case of a settlement "on children," the whole is to the first generation, while any remains, and so on to the second, third, and fourth, apparently though no words of succession should be employed.

With regard to testate succession, a person cannot dispose of more than a third of his property by will when he has any heir. When he has none besides the public treasury, he may dispose of the whole. To the extent of a third, the heirs have an inchoate interest in his estate from the commencement of any disease that terminates in death. It follows, therefore, that any gratuitous act of a sick person which affects his property, is not valid beyond a third of his whole estate unless he recovers from his illness, or the excess is allowed by his heirs (543). Marriage is not a gratuitous act, and may be contracted in death-illness. But in that case the dower must not exceed the proper dower (640, 684). In like manner a man may repudiate his wife irrevocably during his death-illness (277). But she is entitled to her share of his property at death, unless he survives the expiration of her *iddut* (278). So, also, any act of one of a married pair that invalidates their marriage, is treated as an evasion of the other's right of inheritance, if done in death-illness, and without the other's instigation or participation (279). Acknowledgment of debt is not a gratuitous act; and though a debt should rest on no better foundation than a death-bed acknowledgment, it is valid as against heirs and legatees, but is postponed to debts of health, and debts of sickness that have been incurred for known and sufficient reasons, or can be established by other evidence than such acknowledgment (684).

Bequests are valid as far as a third of the testator's property, whether made orally or in writing; and the presence of

witnesses is not required in either case as a necessary formality. They are constituted by the words, "I have bequeathed," or by any other words commonly used for the purpose (613); but are not completed so as to vest an interest in the legatee without his acceptance after the death of the testator (614). Any person who is free, sane and adult, whether man or woman, is competent to make a bequest (617). And it may be added that a married woman is equally competent to do so with one that is unmarried. So also a bequest may be made to any one, even to a child in the womb (617). But a bequest to a slave is a bequest to his master (365); and a bequest to an heir of the testator, or to one who becomes his slayer, though only by misadventure, is not valid without the assent of the heirs expressed after the testator's death (615). The individual or individuals to whom a bequest is made may be specially indicated, as by name or otherwise, or only referred to by a general description. In the former case it is necessary that they be in existence at the time of the bequest; in the latter case it is sufficient if they are in existence at the time of the testator's death. Thus, a bequest to a child in the womb is valid only if he is born within six months from the time of the bequest (617); while a bequest to "the sons of such an one," who has no son at the time of the bequest, is valid, and takes effect in favour of any who are subsequently born to him before the death of the testator (634).

Anything that is property may be the subject of bequest, though it does not actually belong to the testator, or even if it is not in existence at the time of making his will (614). And the substance of a thing may be bequeathed to one person, and its usufruct, as the produce of land, or the service of a slave, may be bequeathed to another (653), or the usufruct alone may be bequeathed (652), while the substance passes to the heirs. The usufruct may be bequeathed for a limited time, or indefinitely; and when the bequest of it is indefinite, the legatee is entitled to its enjoyment during his life, though the profits should exceed a third of the testator's property (654). Of one kind of usufruct, that is of produce, a bequest may be made to unknown persons, as to the poor generally (656); but it does not appear that any succession of poor persons is intended. And though it is said that an usufruct of any kind may be

bequeathed for ever, in the manner of a *wukf* or appropriation (652), it is explained to be for the legatee's lifetime. There is therefore nothing to show that, by words of bequest, the usufruct of things, any more than their substance, can be granted beyond the lives of persons in existence at the time of the testator's death. I say by words of bequest, because there seems to be no doubt that it may be effected by words of *wukf*, or appropriation, occurring in a will; for it is expressly said that *wukf* or appropriation may be suspended or made dependent upon death, as, when a person has said, "when I die I have appropriated my mansion to such a purpose," and that the appropriation is valid and obligatory on the heirs (550). It may, however, be observed, in passing, that this is not inconsistent with what has been said before, that emancipation and repudiation are the only acts that can be suspended on a condition; for here, properly speaking, there is no suspension, in the legal sense of the word, the condition (death) being an event that must certainly happen.

An executor may be appointed by words of bequest or agency, and acceptance seems to be necessary in both cases (613, 622.) But it is not necessary that the acceptance should be after the testator's death, as in the case of an ordinary bequest; for the acceptance may be during his life (666). If an executor sells any part of the testator's property after his death, that is equivalent to acceptance. And an executor who has once accepted cannot withdraw from the office after the testator's death (666); though he may be relieved of it by the judge, if he believes himself unfit or overburdened with business (667), and he may be removed by the judge for malversation (669).

An executor may take possession of the whole of his testator's rights and property, and of the property of any other persons that was in deposit with him at the time of his death (673). He may also exact and receive payment of debts due to him (*ib.*), give directions for his funeral (670), and pay debts and legacies. But if he pays a debt without proof, or pays one creditor in preference to another without the authority of the judge, he is responsible to the other creditors (679); though he may sell a part of the estate to a creditor in exchange for his debt (680). For the payment of

debts and legacies an executor may sell the whole of his testator's moveable property, and also so much of the *akár*, or immoveable property, as may be required for the purpose. According to Aboo Huneefa, he may sell the surplus of the immoveable property also; but on that point there was a difference of opinion between him and his disciples (679). Yet it would seem that if he actually makes sale of *akar* for the payment of debts, the sale is lawful, though he should have other property in his hands adequate to the purpose (677). The executor may also do whatever is further required for the conservation of his testator's property. But with the powers before mentioned, his proper functions as executor cease. Still he is the representative of his testator, and may do in that capacity with respect to the remainder of the property after payment of debts and legacies, which now belongs to his heirs, whatever the testator himself might have done with respect to the property of the same persons had he been alive. In this way the powers of a father's executor exceed those of a mother's, or any other relative's, and while the powers of a father's executor appear to extend over the whole property of the heirs, whether derived from the father or not, those of a mother's executor seem to be restricted to the property derived from her (678). When there are two or more executors, one cannot take possession of the property or deposits of the deceased, or receive payment of his debts, or apparently dispose of any part of his property beyond the purchase of what may be necessary for his funeral, without the concurrence of the other, though he may make delivery of specific bequests, and pay debts out of assets of the same description as the debts (670). And if one of them should happen to die, his powers do not pass to the survivor, who is incompetent to act alone without the authority of the judge (671).

Of the rules regarding intestate succession or inheritance it is proper to observe, in the first place, that they make no distinction between moveable and immoveable property, and do not recognize the rights of representation and primogeniture. So that a person who would be an heir of another, if he survived him, does not transmit any right to his own heirs or representatives, if he dies before the other. But a preference is so far allowed to the male over the female sex,

that the share of a male is usually double that of a female in the same circumstances (687).

There are three kinds of heirs; *zuvoo'l furaiz*, or sharers, *usubát*, or agnates, and *zuvoo'l urham*, or uterine relatives. The sharers and agnates commonly succeed together; but, as it is only the surplus after satisfying the shares that passes to the agnates, they have been from that circumstance styled "residuaries." In like manner, as it is only when there is neither sharer nor residuary, that there is any room for the succession of the uterine relatives, they have been from that circumstance styled "distant kindred." It is so seldom that the distant kindred can have any interest in a succession, that they may be left out of consideration in this place.

The sharers are twelve in number; of whom four are males, viz., the husband, the father, the grandfather, and the half-brother by the mother; and eight are females, viz., the wife, the daughter, son's daughter, the mother, the grandmother, the full sister, and the half sister on the father or the mother's side (686). The shares or portions of the estate to which these parties may be respectively entitled, are given in detail in the second chapter of the eleventh book. The residuaries are of two kinds; by descent, and for special cause. The former, of whom only it is necessary to take notice in this place, are the residuary in his own right, the residuary by another, and the residuary with another (691). The first, who is by far the most important, is defined to be "every male into whose line of relation to the deceased no female enters;" and residuaries of this kind are, first, the lineal descendants, or sons and sons' sons how low soever, then the lineal ascendants, or father and father's fathers how high soever; and, finally, the lineal collaterals and their descendants in the same way, and without any apparent limit (692), the full blood being always preferred to the half; but the half if nearer in degree being preferred to the full when more remote (691).

Of the heirs before mentioned, that is, the sharers and the residuaries by descent, there is an inner circle immediately connected with the deceased, who are never entirely excluded from the succession, though their portions are liable to reduction in some cases. These are the husband or wife, the

father, mother, son, and daughter (695). Of heirs beyond the circle, the grandfather and grandmother are merely substitutes for the father and mother (687, 688,) and the remainder are entirely excluded whenever there is a relative within the circle, through whom they are connected with the deceased, or one nearer in degree to him than themselves. These rules, however, are subject to some qualification (693).

When the persons who are entitled to participate in the deceased's succession have been ascertained, the estate is to be divided into so many equal parts as will admit of each person taking his share in a proportionate number of the parts without a fraction. The number of parts into which the estate must be divided, is termed the extractor or divisor of the case. The shares are expressed in fractions, and the denominator of the fraction by which each share is expressed, is the extractor of that share, when it stands alone. But when there are several shares, the lowest sum divisible without a fraction by all the shares is the extractor (708). This rule may suffice when there is only one person entitled to each portion; but when there are several persons entitled to the same portion, it must be equally divided between them, and for that purpose the original extractor must be multiplied by the number of persons, and the product will be the extractor of the case (709). Or, if there is a common measure between the number of parts in which the portion is expressed, and the persons among whom they are to be divided, the original extractor must be multiplied by the quotient of the number of persons divided by the common measure, in order that the fractions may be kept in their lowest terms. The details of these operations are given in the eighth chapter on the computations of shares, in the eleventh book. But a few examples may be given in this place, and they will further serve to illustrate the manner in which the residuaries of different kinds combine with the sharers, and an estate is distributed when there are heirs of different descriptions entitled to participate in it.

Thus, let us suppose, in the first place, that the deceased has left a husband, a daughter, and a father. In such a case the share of the husband is reduced to a fourth (689), that of the daughter is a half (687), that of the father a

sixth (686), and the extractor being twelve (708), the estate is to be divided into that number of parts. The husband takes a fourth or three of the parts, the daughter a half or six of them, and the father a sixth or two of them, as a sharer; and since there is no son, the father is the "residuary in his own right," and takes the remaining share in that capacity. Next, let us suppose that the heirs are the same parties, with the addition of a son. That circumstance does not further affect the husband or the father; but if the daughter's share remained the same as before, the son would have only one share, while the law requires that he shall have double the share of a daughter (687). To meet this exigency, the share of the daughter is merged in or added to the residue, which thus becomes seven parts of the whole. But seven cannot be equally divided without a fraction in the requisite proportions between the son and daughter; and the original extractor twelve must be raised to thirty-six (12×3), which will be found to divide equally among them all. The husband takes his fourth or nine parts (3×3), the father his sixth or six parts (2×3), and the residue or twenty-one parts is divided between the son and daughter, in the proportion of two to one, or fourteen parts to the former and seven to the latter. The daughter in this case is an example of the "residuary by another," being made a residuary by the male who is parallel to her (692). Let us now vary the case by leaving out the father and the son, and substituting for them a brother and sister. The original division into twelve parts will now suffice. The husband and daughter take their shares, or three and six parts respectively, as in the first case, and the remaining three are divisible without a fraction in the due proportion between the brother and sister, the former taking two, and the latter one of them. Once more let us again vary the case, by putting a paternal uncle in the place of the brother, and leaving all the other parties as before. Here the paternal uncle is the "residuary in his own right," but sisters (full, or half by the father,) are residuaries with daughters or son's daughters (693); and when there are residuaries of different kinds, a preference is given to the residuary who is nearer in blood to the deceased (694). The paternal uncle is accordingly excluded, and the three shares,

which in the last case were divided between the brother and sister, are now taken by the sister alone, who is thus an example of "the residuary with another" (693).

Of the impediments to inheritance, it is only necessary to observe in this place, that the "difference of religion," which is one of them, may be original or supervenient. If supervenient, and occasioned by apostacy from the Mussulman faith, it is, perhaps, merged in the higher disqualification (700), and so removed in India by an act of the local legislature (701). But if original, the disqualification is left untouched by that act; and, though an apostate in that country may not be prevented from inheriting to his Mussulman relatives, the benefit would not extend to his children, who, if brought up in his new faith, must, it would seem, be excluded by difference of religion.

Before leaving the subject of inheritance, I may remark that this digest is not intended to supersede the treatise on the same subject alluded to in the early part of this introduction, except in so far as regards the powers of executors and parentage. These matters are more fully treated in the present than in the former work. But as regards inheritance, the former enters more into details than the present, and is, therefore, better adapted to beginners; while, for scholars, it has the further advantage of being accompanied by extracts from the original authorities. The law as stated in both is substantially the same. But it is derived from different sources; the *Sirajiyyah*, and its commentary the *Shureefeea*, on which the former treatise is exclusively founded, never being once quoted, so far as I recollect, in the book of inheritance, contained in the *Futawa Alumgeeree*, from which alone my selections on that subject in the present work have been taken.

The twelfth book on the subject of claims and judicial matters completes the work. I have endeavoured to confine myself to so much of the Moohummudan system of procedure as seemed to be necessary for elucidating other parts of the law. More would have been out of place in a work of this kind, as the Moohummudan law of procedure has long been superseded both at the presidency towns and in the *Moofussul*.

Evidence holds a doubtful place between substantive law

and procedure. In some cases it seems clearly to belong to substantive law; as, for instance, in the law of parentage, where the testimony of one female witness is sufficient to establish the maternity of a child, or in the English law of treason, where two witnesses are required to each overt act. But cases of this kind are in the nature of exceptions; and whenever a rule is of general application, it seems to belong more rightly to the branch of procedure than to that of substantive law. This distinction, however, has not always been observed. I have therefore found it necessary, when treating of parentage, to digress a little into the general law of evidence, though, with the exception of the single case of maternity, the rules which are there referred to are all of general application.

To the book of claims I have appended some examples of judicial proceedings, which are apparently the forms that were in use in India in the reign of the Emperor Aurungzebe Alumgeer. They not only serve to illustrate the law of procedure, including that of evidence, but also show that both were in actual operation at that time. A brief summary of the whole, though at the risk of repeating what has been said elsewhere, may not be an improper conclusion to these remarks, as serving to explain some allusions that are of frequent occurrence throughout the work, and will meet the reader very early in his progress.

The procedure in Moohummudan courts of justice is very simple. The parties appear in person before the judge, and the plaintiff states his case orally (727). This must be done in such terms as sufficiently to indicate the subject of claim, the cause of liability, and, if the cause be complicated, the conditions which are necessary to its validity (730). If the statement is satisfactory on these points, the claim is pronounced to be valid, and the defendant must answer by yea or nay. If it is not valid, he is not obliged to answer (728). If the defendant denies the claim, the judge then says to the plaintiff, "Have you any proofs?" If he says "No," he is told that he is entitled to the oath of the defendant; and if he require it, the defendant is called upon to confirm his denial by his oath, with the alternative of judgment being pronounced against him if he refuse (734). If the plaintiff has witnesses he produces them, and requests that they may

be examined. Whereupon, the judge directs their evidence to be taken down on separate slips of paper. After which the depositions are read to the witnesses by an officer termed the *Sahib-Mujlis*, or associate of the judge, and they are required to repeat the words of testimony *verbatim* after the judge himself. When this has been done, the proceedings are reduced to writing in the form of a *muhzur* (754). After this, if the judge is satisfied that the witnesses are just or righteous persons, he accepts their testimony, and then gives the defendant an opportunity of offering any *dufá* or plea he may have in avoidance of the claim, such as satisfaction or release. If he has none, judgment is pronounced against him; and the whole proceedings, including a repetition of the *muhzur*, are recorded in what is termed a *sijil* (756).

When the defendant has a plea in avoidance the same course is to be followed. The parties now, as it were, change places, and the defendant is termed the claimant, and the plaintiff the defendant in avoidance. The plea must be consistent with the denial, or it will be rejected (740). If admitted, the plaintiff must answer by yea or nay; and if the answer is in the negative, the defendant must prove his plea; or, in default of proof, he may call on the plaintiff to confirm his denial by his oath, under the penalty of judgment being given against him if he refuse. The proceedings are reduced to writing as before in the form of a *muhzur* and *sijil* in avoidance (758, 759), in the same way as on the original claim. The case does not always stop here; for the plaintiff may reply, and then the same course is to be followed as on the original claim and avoidance.

Such appears to have been the ordinary course of judicial proceedings in India while the country was subject to Mussulman rule. But it might have been shortened by the defendant's adducing his plea in avoidance at once, instead of first denying the claim. This would, of course, render proof on the original claim unnecessary, and confine proceedings to the plea. Sometimes the answer might raise a new issue, and each party might tender proof (750, 751). Here a question would arise, whose proof, or rather whose issue, should be preferred. Some rules for determining the preference will be found in the sixth chapter of the twelfth book.

In these cases "the word" is said to be "with" the other party, or, as his word may require to be supported by his oath, "the word and oath" are said to be "with him" (749).

All evidence, according to the Moohummudan law, must be positive and direct to the point at issue; the law rejecting circumstantial evidence altogether. In all but a few cases, it is necessary that the witnesses should have actually seen what they attest (415). In these exceptional cases, they are allowed to give their testimony, if they have been informed of the facts to which they testify by trustworthy persons (425), or have seen other collateral facts from which those in question may be legally inferred (421). But in all cases they must make the evidence their own, by positively asserting the fact in issue, and must refrain from saying that they testify to it because they have been informed of it, or because they have seen the other facts from which their inference is drawn; statements, either of which would vitiate the testimony, and oblige the judge to reject it (426). Further, it is required that the witnesses shall be what the law terms just or righteous persons, and free from bias, by interest or relationship. They are not sworn (414), nor subjected to cross-examination. But if the character of a witness is objected to, it must be carefully investigated by the judge, and certified to by professional purgators; though, if not objected to, the mere profession of the Mussulman faith is usually deemed to be a sufficient warranty of character. To be a Mooslim is essential to the character of justice or righteousness. Hence, none but Mooslims can be received as witnesses against a Mooslim (417); though there is a relaxation of the general rule in the case of unbelievers, who, being in this respect all of one religion in the eye of the law, are freely received as witnesses for or against each other. It is further necessary that there should in general be at least two male, or one male and two female, witnesses to the fact in dispute (418), and that their testimony should agree in words as well as meaning; that is, that they should concur in attesting the same thing in the same or synonymous language (417). Finally, evidence is received only to the affirmative of each issue, whether the claim, the avoidance, or the reply. The judge is thus relieved from the perplexity of having to decide between conflicting testimonies. But when the evidence has

all the characteristics required by law, it is absolutely binding on the judge, who must receive and act upon the assertion of the witnesses, in the same way as a judge in England is bound to do on the verdict of a jury (414).

These are the leading principles of what was the law of evidence in India for centuries before any part of it passed under British rule. Their effects may still, I think, be traced in the testimony which forms the common staple of *Moofussul* evidence. It is usually direct to the point at issue; and the witnesses, on either side, agree with each other in stating the facts nearly in the same words, and with only such trifling variations as may be required to account for their different means of knowledge. Being bare of circumstances, the evidence presents few points for contradiction, and is rarely shaken in cross examination. Yet it is very generally believed to be false, and little or no credit is ever given to it by the judges. Its character, however, seems never to change, and is probably the same at the present day as it has always been since the establishment of English courts of justice in India. How shall we account for this? Few facts admit of direct proof, and the people of India know little or nothing of circumstantial evidence, by which alone the deficiencies of positive evidence can be legitimately supplied. But any number of witnesses can easily be found to any fact that it is necessary to establish, provided that no regard is had to their character, and an oath is the only test of truth. This appears to me to be the rationale of the whole matter, though I cannot pursue the subject farther here, as it is foreign to the purpose of this Introduction. But I beg respectfully to offer what has been said for the consideration of those who, as legislators or judges, may have anything to do with the administration of justice in India.

A DIGEST

OF

MOOHUMMUDAN LAW.

BOOK I.

OF MARRIAGE.[1]

PRELIMINARY.

What intercourse of the sexes is unlawful. Intercourse without semblance of legality is *zina*.

THE intercourse of a man with a woman, who is neither his wife nor his slave, is unlawful, and prohibited absolutely.[2] When there is neither the reality nor the semblance of either of these relations between the parties, their intercourse is termed *zina*, and subjects them both to *hudd*,[3] or a specific punishment for vindicating the rights of Almighty God.[4] The *hudd* of *zina* is stoning to death, if the offending party be a *Moohsun*, and scourging if not, with a hundred

[1] *Nikáh*. This is the proper and distinctive name of marriage, though in Bengal it is restricted to what is deemed an inferior kind of marriage, in opposition to *shadee*, which properly means *joy* or *festivity*, but is commonly applied to the first or principal marriage, usually celebrated with festivities and a good deal of expense.

[2] *Hidayah*, vol. ii. p. 586.

[3] *Fat. Al.*, vol. ii. p. 202.

[4] *Hedaya*, vol. ii. p. 1.

stripes for one who is free, and fifty for a slave.[1] A *Moohsun* is a person who is free, sane, adult, a *Mooslim*, and married by a valid contract that has been actually consummated, to one in whom the same qualities are combined.[2] A *Mooslim* is a believer in the unity of God, and the divine mission of Moohummud.

Semblances are of three kinds.

Knowledge of illegality is a condition essential to the infliction of *hudd*.[3] The punishment, therefore, cannot be inflicted when there is a semblance of right,[4] and it is waived in some cases where the semblance is only imaginary. Semblance is thus of several kinds. First, semblance in the fact, or *shoobh fee'l fiúl*, also termed *shoobh ishtibáh*, or semblance of assumption; which is, when a person supposes that something is a proof of right which is not so in reality; as, for instance, when he imagines that the slave of his wife is lawful to him, because he may make use of her services. But the benefit of this kind of semblance is allowed only with reference to the person who supposes it to exist, and he must claim that he thought the intercourse to be lawful. If he do so, he is exempted from the *hudd;* but otherwise it must be inflicted, because the intercourse is in reality *zina*. Secondly, semblance in the subject, or *shoobh fee'l muhull*, also termed *shoobh hookmee*, because there is some actual proof of lawful right in the woman, though connection with her may, for some reason, be prohibited. Regard is, therefore, to be had to this semblance with reference to all persons, and its establishment is not dependent on the conception of the offender and his claim of legality, for the connection is not positively *zina*. Third, semblance in the contract, or *shoobh fee'l ákd;* and wherever a contract of marriage has taken place, whether it be lawful or unlawful, and whether the illegality be one on which all are agreed, or with respect to which there is some difference

[1] *Hedaya*, vol. ii. pp. 8, 10, 12. It is hardly necessary to say that these provisions of the criminal law are not enforced in the British territories.

[2] *Fut. Al.*, vol. ii. p. 204-5. [3] *Ibid*, p. 206; *Hidayah*, vol. ii. p. 586.
[4] *Fut. Al.*, vol. ii. p. 208.

of opinion, and whether the party be aware of the illegality or not, he is not liable to the *hudd*, according to Aboo Huneefa; but, according to his two disciples, when the marriage is one that is generally admitted to be unlawful there is no *shoobh* or semblance of right, and the party is liable to the *hudd* if he was aware that there is none, though otherwise he would be exempted. It follows, therefore, that in the opinion of Aboo Huneefa, connection under any contract of marriage is not *zina;* and that in the opinion of his disciples, whenever a contract of marriage is universally allowed to be unlawful, connection under it is *zina.*[1]

The offspring of a connection where the man has no right nor semblance of right in the woman, by marriage or slavery, is termed *wulud-ooz-zina*, or child of *zina*, and is necessarily illegitimate.

The offspring of *zina* is illegitimate.

[1] *Fut. Al.*, vol. ii. p. 208-9. *Hidayah and Kifayah*, vol. ii. p. 586; and see *Hedaya*, vol. ii. p. 18, and following.

CHAPTER I.

DEFINITION, CONSTITUTION, CONDITIONS, AND LEGAL EFFECTS OF MARRIAGE.

Definition.

MARRIAGE is a contract which has for its design or object the right of enjoyment, and the procreation of children.[1] But it was also instituted for the solace of life, and is one of the prime or original necessities of man.[2] It is therefore lawful in extreme old age after hope of offspring has ceased, and even in the last or death illness.[3]

Constitution.

The pillars of marriage, as of other contracts, are *Eejáb o kubool*, or declaration and acceptance. The first speech, from whichever side it may proceed, is the declaration, and the other the acceptance.[4]

Conditions.

There are several conditions or requisites of a contract of marriage; among which are the following:—

Legal competency in the contracting parties.

1. Understanding, puberty, and freedom in the contracting parties;[5] with this difference between the conditions, that the first of them is essential, for marriage cannot be contracted by an insane person, or a boy[6] without understanding; but the other two are required only to give operation to the contract, for the marriage contracted by

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[1] The first part of the definition is from the *Kanz*; the second I have added from the *Kifayah* (vol. ii. p. 30), the author of which rightly argues that if enjoyment were the sole object or design of marriage, then a temporary marriage, which has nothing else in view, would be lawful; but it is not, as will be seen hereafter.

[2] *Kifayah*, vol. iii. p. 577.

[3] *Ibid.*

[4] *Inayah*, vol. ii. p. 2.

[5] Whether the persons to be united, or guardians or agents acting on their behalf.

[6] *Subee*. A youth under puberty, which is majority according to Moohummudan law.

a boy of understanding is valid though dependent for its operation on the consent of his guardian; and that by a slave is so also, but dependent on the consent of his master.[1]

A fitting subject.

2. A fitting subject; that is, a woman who may be lawfully contracted to the man.[2]

Parties to contract must hear each other.

3. The hearing by each of the parties of the words spoken by the other.[3] And if they should contract by means of an expression which they do not understand to signify marriage, still, according to the approved opinion, the contract would be effected.[4]

Presence of witnesses.

4. *Shuhadut*, or the presence of witnesses; which all the learned are agreed is requisite to the legality of marriage.[5] This condition is peculiar to marriage, which is not contracted without the presence of witnesses, contrary to the case of other contracts, where their presence is required, not for contracting, but only with a view to manifestation before the judge.[6]

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[1] *Fut. Al.*, vol. i. p. 467. In the contract of sale there are four kinds of conditions, viz., of constitution, of operation, of validity, and of obligation (*M. L. S.*, p. 1). In marriage the conditions appear to be all of the three first kinds; the fourth in sale depending on options, which have no place in marriage. See *post*, p. 21.

[2] With regard to this condition, including the description of a "fitting subject," there was some difference of opinion between Aboo Huneefa and his disciples. See *post*, Chapter of Invalid Marriages.

[3] This is a condition of constitution in sale, and apparently so in marriage.

[4] As if by the mere force of the expression. It is so in sale. The expressions must, of course, be those appropriate to the occasion.

[5] The text seems to point to a distinction between legality and constitution; for Malik, the leader of the second of the orthodox sects, required publication only, and not *shuhadut* as a condition. *Hedaya*, vol. i. p. 74.

[6] *Inayah*, vol. ii. p. 1. The author of the *Hidayah* says that *shuhadut* is a condition in marriage, by reason of the saying of the Prophet, "There is no marriage without witnesses," but the words "an essential condition," which are found in the English translation, do not appear in the printed original; and notwithstanding the absolute terms of the Prophet's saying, the condition seems to have become one of validity only, and not of constitution. See *post*, Chapter of Invalid Marriages.

Qualification of witnesses.

5. There are four requisites to the competency of the witnesses, viz., freedom, sanity, puberty, and *Islam*, or profession of the Mussulman faith.[1] Hence marriage is not contracted in the presence of slaves;[2] and there is no difference in this respect between absolute slaves and *Moodubburs*[3] or *Mookatibs*;[4] nor in the presence of insane persons, nor of minors, nor of infidels, when the marriage is between Mooslims. If the husband be a Mooslim and the wife a *Zimmeeah*,[5] their marriage may be contracted with two *Zimmees*[6] for witnesses, whether they be of the same or a different faith from the wife. And the *Islam* of the witnesses is not a condition to the marriage of two infidels; for marriage between them may be contracted with two infidels for witnesses, whether they agree with, or differ from, the parties in religion. Marriage is valid when contracted in the presence of two profligates, or two blind persons.[7] So also of two persons who have undergone the *hudd* or specific punishment for slander, or for *zina*.[8] It may also be contracted with persons for witnesses whose testimony in other cases could not be received in favour of the parties; as for instance, the sons of one of them. There must, however, in all cases, be more than one witness; but it is not necessary that all the witnesses should be males, for marriage may be contracted with one

[1] These qualities are essential to a literal compliance with the condition, for without the three first no person can be a witness in any case, and the last is equally necessary when testimony is to be given against a Mussulman.

[2] That is with only such persons as witnesses.

[3] Slaves who are to be free at their master's death.

[4] Slaves who have entered into an agreement with their master for freedom on payment of a ransom.

[5] Feminine of *Zimmee*.

[6] Male infidel subjects of a Mussulman State.

[7] These are disqualified in other cases. Shafei, the leader of the third of the orthodox sects, differed with regard to profligates (*fasik*), thinking that the witnesses should in this, as in other cases, be just persons.

[8] Disqualified in other cases.

man and two women for witnesses;[1] but not with women only without a man.

They must hear what is said by the contracting parties.

It is further a condition of marriage that the witnesses shall hear the words of both the contracting parties together. Hence it cannot be contracted[2] in the presence of two sleepers who have not heard the words of both the contracting parties, nor of two persons so deaf that they cannot hear: but the objection does not extend to a person who is dumb or tongue-tied, if he can hear.[3] If the witnesses should hear the speech of one of the parties, and not that of the other, or if one of the witnesses should hear the speech of one of the parties, and the other that of the other, the marriage is not lawful. So also, if both the witnesses should hear both the parties, but hear them separately, as for instance, if the marriage should first take place in the presence of one of the witnesses, and should then be repeated in the presence of the other, who was absent on the first occasion, it would not be valid.[4] And if it should take place in the presence of two men, one of whom is partially deaf, and if the hearing witness should hear, but not the one who is partially deaf, and the former, or a third party, should then call aloud the words in the ear of the latter, the marriage would not be lawful until they both hear the contracting parties at once.

And should understand what is said by them.

If two persons hear the words of the contracting parties, but do not understand their meaning, it has been said that the contract is valid; but apparently it should be the contrary, and there is a report of Moohummud, that when a man married in the presence of two Turks or two Hindoos, he said, that if the witnesses can explain what they heard the contract is lawful, but otherwise not so.[5] Is it then a condition that the witnesses shall understand the contract? It is said in some *fútawa*, or decisions, that regard is to

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[1] Shafei differed on this point also, deeming the testimony of females inadmissible except in cases relating to property.

[2] That is, lawfully, so as to make a valid marriage. See note 6, p. 5.

[3] Disqualified in other cases.

[4] *Shurhi Vikayah*, p. 106.

[5] The contract is supposed to be in Arabia.

be had to hearing without comprehending; so that if one should marry with *Ajumees*, or Persians, for witnesses, the contract would be lawful; but Zaheer has said (and apparently he is right) that their comprehension of the contract is also a condition, and this is correct.[1] But though the witnesses were drunk, and had no recollection of the transaction when they became sober, yet if they apprehended the matter at the time, marriage is contracted. In the *Futawa* of Aboo Leeth, it is stated that if a man should address several persons, saying, "Bear witness that I have married the woman who is in this house," and the woman should answer, "I have accepted," and the witnesses should hear her speech without seeing her person, and she were alone in the house, the marriage would be lawful; but not so if there was another woman in the house with her at the same time. A person marries his daughter to a man in a house, and there are several persons in another house who hear the transaction, but are not called upon to bear witness to it, yet if there be an opening between the houses through which the persons can see the father, their testimony will be accepted, but otherwise not.

But need not see the woman.

A woman appoints a man her agent to marry her to himself, and the agent says in the presence of witnesses, "I have married such an one,"[2] the witnesses being ignorant who the such an one is; the marriage is not lawful unless her name, and the names of her father and grandfather, be mentioned. But if the woman be actually present, though veiled and unknown to the witnesses, the marriage is lawful. It would, however, be a proper pre-

When absent, she must be properly identified to the witnesses.

[1] Two authorities are cited; and it may be observed, with reference to what has been said as to the parties themselves not comprehending the words of contract, that the difference with regard to the witnesses may arise from the manner in which their testimony is given, which is not to the words spoken, but to their effect, as, for instance, that the parties *did marry*, or *are man and wife*, involving a judgment of the mind.

[2] In contracting marriage it is lawful for one person to represent both sides. Here the party acts as agent on one side and principal on the other.

caution to uncover her face, that the witnesses may see her, or to mention her name and the names of her father and grandfather. If the woman be known to the witnesses, though absent, and the husband mentions her name only, the witnesses understanding him to intend the woman with whom they are acquainted, the marriage is lawful.

Miscellaneous cases relating to witnesses.

A person directs a man to contract his infant daughter in marriage, and he contracts her before another man and the father himself, who is also present, the marriage is valid; but it would not be so if he were absent. It has been said that when a man contracts his virgin adult daughter in marriage by her own desire, and in her own presence, and where, besides the father himself, there is another witness, the marriage is valid; but that it would not be valid if the lady were absent.[1] And if a person should appoint an agent to contract his male slave in marriage, and the agent should do so in the presence of one man or two women, the slave himself being present, the marriage would not be lawful.[2] When a person has permitted his male slave to marry, and the slave marries in the presence of his master, with one man for a witness besides his master, the contract ought to be lawful, according to "our" doctors.[3] And if a man should contract his adult male slave in marriage to a woman in the presence of one man and of the slave himself, the contract would be valid; but if the slave were absent the marriage would not be lawful. And the rule is the same with regard to a female slave;[4] but Moorghenanee has said that it is not lawful. Of this class of cases is that mentioned in the Mujmooa Nuwazil, of a woman who

[1] The lady being adult, and *sui juris*, may herself be supposed to be the contracting party.

[2] The slave is not *sui juris*, and therefore is incapable of being the contracting party.

[3] The slave is here the contracting party, being *sui juris* for the occasion, by reason of his master's permission.

[4] In these cases also the slave must be considered the contracting party, for freedom is essential to the competency of a witness. See *ante*, p. 6.

appointed a man her agent to contract her in marriage to a particular person, and he did so in the presence of two women, the principal herself being also present, and the *Imam* Nujum-ood-deen was of opinion that the marriage was lawful.

Time at which their presence is required.

The time when the presence of the witnesses is required is the time of the declaration and acceptance, not the time of the allowance of the contract; so that if a contract be dependent on the permission of a party, and the witnesses were not present at the time when the contract was entered into, it would not be lawful.

They must be human beings.

A man marries a woman calling on God and his Prophet to bear witness; the marriage is not lawful.

Woman's consent necessary.

6. The consent of the woman is also a condition, when she has arrived at puberty, whether she be a virgin or a *thuyyibuh*, that is, one who has had commerce with a man; so that, according to us, a woman cannot be compelled by her guardian to marry.

The declaration and acceptance must be expressed at the same meeting.

7. The declaration and acceptance must both be expressed at one meeting;[1] and if there be any change of the meeting, as, for instance, if both the parties being present, one of them should make a declaration, and the other should then rise from the meeting before the acceptance, or should take to some other occupation which would occasion a change of the meeting, there is no contract. In like manner, when one of the parties is absent, there is no contract; so that if a woman should say in the presence of two witnesses, "I have married myself to such an one who is absent," and the person referred to should, on the information reaching him, say, "I have accepted;" or if a man should say, in the presence of two witnesses, "I have married such an one who is absent," and the woman referred to should, on the information reaching her, say, "I have married myself to him;" it would not be lawful in either case, even though

[1] Literally *place of sitting*. See as to unity of the place of meeting, *M. L. S.*, pp. 4, 12. According to the analogy of sale, this seems to be a condition of constitution.

the acceptance were expressed in the presence of the same witnesses. This was the opinion of Aboo Huneefa and Moohummud. But if he should send her a message or write her a letter, to the same effect, and she should declare her acceptance in the presence of two witnesses who have heard the words of the messenger or the reading of the letter, the contract would be lawful by reason of the unity of the meeting in spirit; while if the witnesses should not have heard the words of the messenger or the reading of the letter, the contract would not be lawful, according to Aboo Huneefa and Moohummud, though Aboo Yoosif differed from them in this respect. And though, on receiving and reading the letter, she should not immediately contract herself to him at the same meeting, but should afterwards do so at another meeting, in the presence of two witnesses who have heard her words and the contents of the letter, the marriage would be lawful. And if she should say, "Such an one has written to me asking me in marriage, bear ye witness that I have married myself to him," the marriage would be valid, because the witnesses hear her words in her declaration of the contract, and they also hear the words addressed to her in her repetition of them. It makes no difference whether the messenger be free or a slave, a minor or adult, just or unjust, for he merely conveys the expressions of the sender.

When the declaration is conveyed by message or letter.

How the unity of the meeting is preserved.

If the parties contract while walking together, or riding together, the contract is not lawful;[1] but if they are both in a boat which is in progress the contract is lawful.

Case of parties in motion.

8. It is not a condition with us that the acceptance should immediately follow the declaration; but it is a condition that the acceptance should not vary from the declaration; so that if one person should say to another, "I have married to you my daughter for a thousand *dirhems*," and the other should answer, "I have accepted as to the marriage, but do not accept as to the *muhr* (or

Acceptance must conform to the declaration.

[1] The words "on a beast" (*dabbuh*) are added in the original, but it is implied, I think, that the parties are not riding on the same animal. See *M. L. S.*, p. 13.

dower),"[1] the contract would be null; but if he should say, "I have accepted the marriage," and should remain silent as to the dower, marriage would be contracted between them.

Reference to the whole person necessary.

9. It is also a condition that the marriage be referred to the whole of the woman's person, or to what implies the whole, as the head or neck, contrary to the hand or foot; and if it be referred to her back or belly, our doctors, according to the report of Hulwaee, have said that it is more in accordance with the tenets of our masters to hold that marriage is contracted.

Husband and wife must be identified.

10. It is farther a condition that the husband and wife shall both be known or identified; and, if a man, having two daughters, should give one of them in marriage, saying only "his daughter," the contract would not be valid unless one of them were already married, when it would be deemed to have reference to the unmarried one. It has been said that a female slave known in her childhood by one name, and by another when she had grown up, should be married in the last name, if known thereby; it would, however, be more proper to join both the names. A person having only one daughter called Fatimah, says to another, "I have married to you my daughter Ayesha," without pointing to her; there is no marriage according to the Futawa al Fuzlee; but if he had said merely "my daughter," without any addition, the marriage would be lawful. A man having two daughters, the eldest of whom is named Ayesha, and the younger Fatimah, and intending to marry the elder, contracts her in the name of Futimah, the marriage takes effect as to the younger; while if he had said, "I have married my elder daughter Fatimah" there would be no contract as to either. When the father of a young girl has said, "I have married my

[1] "The gift of a husband for a wife. 'Ask me never so much *dowry* and gift.' Gen. xxxiv." (Webster). "Dowry, a different spelling of dower but less used." (*Ibid*). The original word is the same in the Hebrew as in the Arabic language, but it seems that among the Jews the *muhr* was given to the father or kindred of the wife, while among Mussulmans it is the right of the wife herself.

daughter such an one to the son of such an one," and the person referred to has answered, "I have accepted for my son," without naming him, the contract is not lawful if he has two sons, and valid if he has only one. And if the girl's father should have named the son by saying, "I have married my daughter to thy son such an one," and his father should have said, "I have accepted," it would be valid.

If the father of the girl should say to the father of the boy, "I have married my daughter," without further addition, and the father of the boy should say, "I have accepted," the marriage would take effect as to the father himself. This is approved; and is correct.

Legal effects of marriage.

The legal effects of marriage are as follows:—It legalizes the mutual enjoyment of the parties in a manner permitted by law or according to nature. It subjects the wife to the power of restraint; that is, it places her in such a condition that she may be prevented from going out and showing herself in public. It imposes on the husband the obligation of *muhr* or dower, and of maintaining and clothing his wife. It establishes on both sides the prohibitions of affinity and rights of inheritance. It obliges the husband to be just between his wives, and to have a due regard to their respective rights; while it imposes on them the duty of obedience when called to his bed, and confers on him the power of correction when they are disobedient or rebellious. It enjoins on him the propriety of associating familiarly with them with courtesy and kindness. And it forbids him to associate together, either as wives or concubines, two women who are sisters, or so connected with each other as to render their association unlawful.

CHAPTER II.

HOW MARRIAGE IS CONTRACTED.

Marriage is contracted by spoken words.

MARRIAGE is contracted by declaration and acceptance, when both are expressed in words of the past,[1] or when one of them is expressed in the past and the other in the imperative or the present. So that when a man has said to a woman, "I marry thee for this," and she has said, "I have accepted," the contract is complete, even though he should not reply, "I have accepted." And if he should say, "Marry thyself to me," and she should accept, the contract is effected, provided that he did not intend a future time by the expression.[2]

But expressions in the imperative form, such as "Marry me," or "Marry thyself to me," or "Be thou my wife," are not, properly, declarations, but appointments of agency; and when they are answered at the same meeting by other expressions, such as "I have married," or "have accepted," or "hearing and obeying," the latter serve for both sides, and include both the declaration and the acceptance.[3]

As marriage is contracted by speech, so also it may be contracted, in the case of a dumb person, by signs, when the signs are intelligible. But it is not contracted by

[1] There are only two tenses in the Arabic verb, the preterite and the aorist. The latter being employed to express present and future time, is ambiguous, and the preterite is commonly used in contracts, for, though its proper function is to relate the *past*, it is employed in law in a creative sense, to meet the necessity of the case.—*Hedaya*, vol. i., p. 72.

[2] The imperative is supposed by Oriental grammarians to be necessarily referable to future time.—*Lumsden.*

[3] *Door-ool-Mookhtar*, p. 190.

taatee, or mutual surrender;[1] nor by writing between parties who are present; so that if the man should write, "I have married thee," and the woman should write, "I have accepted thee," there is no contract.

But not in writing between present parties.

The words by which marriage is contracted are of two kinds; *sureeh*, or plain, and *kináyát*, or ambiguous. The *sureeh*, or plain, are *nikáh* and *tuzweej*. All the others are *kináyát*, or ambiguous, and they comprehend every word that is employed to effect an immediate ownership in a specific thing. Thus, marriage is contracted by *heba*, or gift, *tumleek*, or transfer, and *sudkut*, or alms. So also by the word *beyâ*, or sale; as if a woman should say, "I have sold myself to thee," or a father should say, "I have sold my daughter to thee for so much."[2] And in like manner it is contracted by the word *shira*, or purchase; as if a man should say to a woman, "I have bought thee for so much," and she should make answer by "yes."[3] And if a man should say to a woman, "Thou art mine," or "hast become mine," and she should answer "yes." So also if he should say, "Be my wife for a hundred," or "I have given you a hundred that you may be my wife," and she should accept, it is a marriage. If a woman irrevocably repudiated should say, "I have restored myself to thee," and the husband should answer, "I have accepted," in the presence of witnesses, that is a marriage. So also if a man, after he has repudiated his wife three times, or irrevocably, should say, "I have recalled thee on so much," and the woman is content, and the transaction takes place in the presence of witnesses, it is a valid marriage; and it would be so even though no mention were made of any property, provided that both parties are agreed that the husband intended marriage. But if the same words were addressed to a stranger, and the woman should consent, there would be no contract.

By what words it may be contracted.

Marriage is not contracted by the words *ijarut*, or hiring, *iarut*, or lending, *ibahut*, or permitting, *ihlal*, or legalizing, *tumuttooa*, or enjoying, *ijazut*, or allowing, *ruza*, or

Words by which it cannot be contracted.

[1] A mode of effecting sale.
Hidayah and Kifayah, vol. ii., p. 4.

[3] *Ibid.*

being content, and the like. Nor by the words *sooth*, compounding, and *buráut*, releasing; nor the words *shirkut* or partnership, and *ítak*, emancipating; nor by the word *wuseeut*, bequeathing; for though that is a cause of property, its effect is postponed till after death.

Difference of opinion as to certain other expressions.

There is some difference as to the words *kurz*, or lending,[1] and *ruhn*, or pledging; but the sound opinion is that which negatives the contract. It has been said, however, that the contract of marriage may be effected by means of the word *kurz*, according to the analogy of the doctrines of Aboo Huneefa and Moohummud; for with them the inherent meaning of *kurz* is an exchange of property for property,[2] which is the definition of sale; and this has been approved. With regard to the word *sulum*, or advance, which is also a kind of sale, it has been said by some that it is sufficient to effect the contract of marriage, but by others that it is not sufficient. And there is the like difference of opinion with regard to *surf*, which is likewise a sale.

Miscellaneous cases.

A woman says to a man, "I have married myself to thee," intending to add "for a hundred *deenars*," but before she can utter the words he answers, "I have accepted;" marriage is not contracted. A man sends a party of persons to another to solicit him for his daughter, and they say in Persian, "Hast thou given thy daughter to us," and he answers, "I have given," whereupon they reply, "We have accepted;" but this is no contract of marriage for want of reference to the suitor. A man and woman acknowledge a marriage in the presence of witnesses, saying in the Persian language, "We are wife and husband," but marriage is not thereby contracted between them, and this is approved. And if he should say, "This is my wife," in the presence of witnesses, and she should say, "This is my

[1] The distinction between this word and *árut* on the preceding page is the same as between the *mutuum* and *commodatum* of the Roman law; the obligation of the borrower being to return a *similar* of the thing lent in the former case, and the actual thing itself in the latter.

[2] See *M. L. S.*, *Introduction*, p. xli.

husband," there never having been any marriage between them, the correct view, notwithstanding some difference of opinion upon the subject, is that this would be no marriage[1] —unless judicially pronounced to be a marriage, or the witnesses should say to the parties, "Have you made this a marriage?" and they should answer, "Yes;" when, according to the approved doctrine, as stated in the Shurh-ool-Jussas, it would be a marriage. Alee-as-Soghdee having been asked concerning a man who saluted a woman, saying "*Salaam uleki* (peace be to thee) O my wife," whereupon she answered, "And to thee *salaam*, O my husband" (the words being heard by witnesses), said that there was no contract. When a person says to the father of a girl, "Hast thou married thy daughter to me?" and he answers "I have married," or "Yes," there is no marriage until the man say after this, "I have accepted;" for his first words, "Hast thou married to me?" are merely interrogative.

Of *Moozáf* and *Mooulluk*, or future and dependent marriages.

The reference of marriage to a future time, and its suspension on a condition, are not valid.[2] A *Moozáf* marriage, therefore, or one which is so referred, as if a person should say, "I have married thee to her to-morrow," is not valid; but a *Mooúlluk*, or dependent marriage, is valid where the dependence is on an event already passed, for its state may be ascertained. Hence, if a person whose daughter has been asked in marriage should falsely inform the applicant that he had already married her to such an one, and should say, "If I had not married her to him I would have married her to thy son," and the father of the son should thereupon accept in the presence of witnesses, and it should subsequently transpire that the daughter had not been married to any one, this would be a valid marriage. But if a person should say to a woman, in the presence of witnesses, "I have married thee for so much, if my father permit," or "be satisfied," and she should answer, "I have accepted," there would be no valid marriage.

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[1] The declaration would apparently be sufficient to constitute marriage according to the Law of Scotland.—*Bell's Principles*, § 1514.

[2] *Door-ool-Mookhtar*, p. 196.

Of *Mootút* or usufructuary marriage.

A *Nikáh-i-Mootút*,[1] or usufructuary marriage, is *batil* or void, and is not susceptible of repudiation, nor of *Ecela*,[2] nor *Zihar*,[3] neither does either of the parties to it inherit from the other. This is a *Mootút* when a man says to a woman free from any cause of prohibition, "I will take the enjoyment of you for such a time," as ten days for instance, or "for days," or "Give me the enjoyment of your person for days," or "ten days," or without any mention of days "for so much."[4]

Of *Moowukkut*, or temporary marriages.

A *Moowukkut*,[5] or temporary marriage, is void;[6] and it makes no difference whether the time be long or short, according to the most valid opinions, nor whether it be known or unknown. Hulwaee and many of the learned of "our" sect have said that if the time mentioned be certainly beyond the period of human life, as a thousand years, for instance, the contract takes effect, and the condition is void; in the same way as if a man should marry a woman till the end of time, or the going out of Antichrist, or the descent of Jesus Christ, and Husn has reported to that effect as from Aboo Huneefa. Surukhsee has recorded

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[1] Literally, "a marriage of enjoyment." The word *mootút* enters into the definition of marriage; and is the root of *tumuttooa* by which it has been already seen that marriage cannot be contracted.

[2] Swearing not to cohabit with a wife for four months, if a free woman, or two, if a slave; by which means, if the vow be kept, divorce is induced.

[3] A husband likening his wife to the back of a female relative within the prohibited degrees.

[4] Malik deemed this marriage to be lawful, as it was once permitted by the Prophet, and the permission was never abrogated in his opinion. Aboo Huneefa, however, held the assent of all the companions to be sufficient proof of abrogation, and farther, that the permission itself was only for a particular occasion, and limited to a few days. See *Hidayah and Kifayah*, vol. ii., p. 29.

[5] With what remains of this chapter I have mixed up some cases that, in the original, are placed in a sub-section at the close of the next chapter, but appear to me to be more immediately connected with the subject of this.

[6] The reason assigned for this is that it can be for no other purpose than mere enjoyment, and therefore falls within the prohibition of *mootaut* marriages, from which they differ only in the words of constitution.—*Kifayah*, vol. ii., p. 30.

that when a woman marries for a thousand till the harvest, or the treading out of the corn, there is a difference among the learned as to the point, but the approved doctrine in my opinion[1] is that the contract is effected, and the period to be construed as having reference to the *muhr* or dower.

Marriages with conditions.

When an illegal condition is annexed to a marriage, the contract is not cancelled by it, but the condition itself is inoperative, leaving the marriage unaffected; contrary to the case of a marriage dependent on a condition, which, as already observed, is not valid.[2] If a man should marry a woman absolutely, but with the intention of remaining with her only for a certain time, the marriage would be valid. Or if he should marry her on a condition that he will repudiate her after a month, still the marriage would be lawful. And there is no objection to marrying a woman as a *Nuhuriyyah*, that is, on the terms of sitting with her by day and not by night. A man marries a woman on condition that she is repudiated, or that her business as to repudiation is in her own hands; Moohummud has said, with regard to such a case, that the marriage is lawful, but the word "repudiated" (*talik*) is void, and that the business is not in her hands. The lawyer Aboo Leeth, however, has said that this is so when the husband has taken the initiative, and said, "I have married thee on condition that thou art repudiated;" but that when the initiative is on the part of the woman, who says, "I have married myself to thee on condition that I am repudiated," or "that the business is to be in my hand to repudiate myself when I please," and the husband says, "I have accepted," the marriage is lawful, and repudiation takes effect, or is in her power, as the case may be. And in like manner, when a master marries his female slave to his male slave, if the latter should commence and say, "Marry this your slave to me for a thousand on the condition that the matter is to be in your hands, to repudiate her whenever you please," and the master then marries

[1] The opinion is probably that of the authority cited.

[2] *Door-ool-Mookhtar*, p. 196.

her to him, the marriage is valid, but the business or power of repudiation is not in the master's hands; while if the master should commence and say, "I have married to thee my female slave on condition that her business is to be in my hands, to repudiate her whenever I like," and the male slave should say, "I have accepted," the marriage would be lawful, and the business in the master's hands. And if the male slave should say to his master, "When I have married her, her business is then in your hands for ever," and he should thereupon marry her, the business would be in the master's hands, and could never be taken out of his hands.

Pilgrims may intermarry.

It is lawful for a *Moohrim* and *Moohrimah*[1] to intermarry while in the state of *Ihram*.[2] So, also, a *Moohrim* guardian may lawfully contract or give his female ward in marriage.

Effect of a judicial decree in constituting marriage.

A man that is sued in marriage by a woman who produces evidence against him, and is made or declared to be his wife by a decree of the judge, may lawfully take her to live with him, though in point of fact he had never married her; and he may have connection with her if solicited to that effect, according to Aboo Huneefa, and the first opinion of Aboo Yoosuf; but, according to the second opinion of Aboo Yoosuf, which was also that of Moohummud, he is not at liberty to have connection with her. Aboo Huneefa thus gives a creative effect to a decree; but for that purpose it is necessary that the woman should be legally competent to enter into the contract; for, if the woman were actually the wife of another, or in her *iddut* (or term of probation[3]) for another, or had been thrice repudiated by the man himself, the judge's decree would not be operative. And it is a necessary condition that witnesses should be present at the time of the decree, according to all our masters. In like manner, if a man should sue a woman in marriage, the effect would be the same. So also, if a decree were pronounced for a divorce on false testimony with the woman's knowledge, she might lawfully intermarry

[1] Male and female pilgrims to Mecca.

[2] That is, while on pilgrimage; after putting on the pilgrim's dress.

[3] After death or divorce, to ascertain if she be pregnant.

with another husband after the expiration of her *iddut*, and even the witness might lawfully marry her, and she would become unlawful to her first husband. According to Aboo Yoosuf, neither the first nor the second could lawfully have connection with her; but, according to Moohummud, her first husband might lawfully have such connection until consummation with the second, when further connection with the first would become unlawful from the necessity of observing an *iddut*, and with regard to the second, it would never be lawful for him to have connection with her. A man sues a woman in marriage, and she denies the claim, but he enters into a composition with her for a hundred *dirhems*, on condition of her acknowledging the suit, and she does so; the sum agreed upon is binding on him, and her acknowledgment is instead of a new contract. If, then, it take place in the presence of witnesses, the marriage is valid, and she may live together with him, as between her and her lord; but if not, marriage is not contracted, and she cannot lawfully live in the same place with her husband.

Marriage is not subject to option.

The options[1] of inspection, defect, or stipulation have no place in the contract of marriage, whether the option be given to the husband or the wife, or to both, and whether it be for three days, or less or more; so that if the stipulation were made the marriage would be lawful and the condition void. There is an exception, however, in the case of defect, when the husband is an eunuch of either kind, or impotent; and the woman has an option according to Aboo Huneefa and Aboo Yoosuf. When one of the parties stipulates with the other for freedom from blindness, paralysis, or the exhaustion of old age, or for the quality of beauty, or the husband stipulates for virginity in the wife, and the fact proves to be the contrary of what was stipu-

[1] Option is a power of cancellation, which may be reserved to either party in a contract of sale by express stipulation, and is allowed without stipulation to a purchaser who buys a thing which he has not seen, or which proves to be defective. See *M. L. S.*, chapters vi., vii., and viii.

lated for, still the party has no option. A man marries a woman under a condition that he is a citizen, and he proves to be a villager, the marriage is lawful if he be her equal, and she has no option. And in the Futawa of Aboo Leeth, there is a case of a man who married a woman under a condition that her father should have an option, and the marriage was held to be valid without the option.

CHAPTER III.

OF WOMEN WHO ARE UNLAWFUL OR PROHIBITED—OF THESE THERE ARE NINE CLASSES.

Class First,

Or such as are Prohibited by reason of Nusb or Consanguinity.

Prohibition for consanguinity.

These are mothers, daughters, sisters, aunts paternal and maternal, brothers' daughters and sisters' daughters;[1] and marriage or sexual intercourse with them, or even soliciting them to such intercourse, is prohibited for ever,[2] that is, at all times and under any circumstances.

Mothers are a man's own mother, and his grandmothers by the father's or mother's side, and how high soever. Daughters are the daughters of his loins, and the daughters of his sons or daughters how low soever. Sisters are the full sisters, and the half-sister by the father or the mother. And so as to the daughters of the brother and sister, and how low soever. Paternal aunts are of three kinds: the full paternal aunt, the half paternal aunt by the father (that is, the father's half-sister by his father), and the half paternal aunt by the mother (or the father's half sister by his mother). And so also the paternal aunts of his father, the paternal aunts of his grandfather, and the

[1] The prohibition is contained in the following passage from the Kooran:—"Ye are forbidden to marry your mothers, and your daughters, and your sisters, and your aunts—both on the father's and the mother's side; and your brothers' daughters and your sisters' daughters."—*Sale's Translation*, vol. i., p. 92.

[2] The distinction between a perpetual and a temporary prohibition is of importance. See *post*, Chapter of Invalid Marriages.

paternal aunts of his mother and grandmothers. Maternal aunts are the full maternal aunt, the half maternal aunt by the father (that is, the mother's half-sister by her father), and the half maternal aunt by the mother (or the mother's half sister by her mother), and the maternal aunts of fathers or mothers.

Class Second,

Or such as are Prohibited by reason of Affinity; and of these there are Four Degrees.

Prohibition for affinity.

The first are the mothers of wives, and their grandmothers by the father's or mother's side. The second are the daughters of a wife or of her children how low soever; subject to this condition, that consummation has taken place with their mother, that is, the wife, and whether the daughter be under the husband's protection or not. "Our" masters do not account retirement with a wife equivalent to actual consummation in rendering her daughters prohibited. The third degree of affinity comprises the wife of a son, or of a son's son, or of a daughter's son, how low soever, whether the son have consummated with her or not; but the wife of an adopted son is not prohibited to the adopted father.[1] The fourth degree are the wives of fathers and of grandfathers, whether on the father's or mother's side, and how high soever. And with all these marriage or sexual intercourse is prohibited for ever.[2]

It is incurred by marriage; or illicit intercourse;

The prohibition of affinity is established by a valid marriage, but not by one that is invalid. So that if a man should marry a woman by an invalid contract, her mother does not become prohibited to him by the mere contract,

[1] Adoption is not recognized by the Moohummudan law.

[2] These are all included in the prohibition of the Kooran, viz.:—"And your wives' mothers, and your daughters-in-law, which are under your tuition, born of your wives, unto whom you have gone in, but if you have not gone unto them it shall be no sin to you to marry them, and the wives of your sons, who proceeded out of your loins."—*Sale*, as above.

but by sexual intercourse. And the prohibition of affinity is established by sexual intercourse, whether it be lawful or apparently so, or actually illicit.[1] When a man has committed fornication with a woman, her mother, how high soever, and her daughters, how low soever, are prohibited to him, and the woman herself is prohibited to his father and grandfathers, how high soever, and to his sons, how low soever.

Or touching or kissing, &c. with desire.

As this kind of prohibition is induced by sexual intercourse, so it is also occasioned by touching a woman with the hand,[2] or kissing her or looking on her nakedness with desire, whether it be done by right of marriage or of property, or unlawfully, and whether she be a step-daughter or not, for there is no difference in this respect.[3] And if a woman should look on the nakedness of a man, with desire, or touch him with desire, prohibition by affinity, would in like manner be incurred, and her mother and daughter would be rendered unlawful to him.[4] Lying together with desire is equivalent to kissing, and so also is mutual embracing. Desire is necessary in all cases, and prohibition is not incurred by looking on, or touching all parts of the body, except when done with desire, and on this point there is no difference of opinion.

Further details as to touch.

With regard to touching, the prohibition is equally established, whether it be intentional, or inadvertent, or compulsory, or even in sleep, and apparently whatever part of the person be touched. If a man should touch with his hand the hair of a woman's head at its junction with the head, prohibition would be established without doubt, and according to Natikee, without this distinction, and absolutely. If he should touch her nail with desire, prohibi-

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[1] According to Shafei, the prohibition of affinity is not induced by *zina*: (*Hedaya*, vol. i., p. 81.) This, and similar differences of opinion, are of some importance. See *post*, Chapter of Invalid Marriages.

[2] *Lumusu.*—Tetigit manu et palpavit—Freytag.

[3] The text of the Kooran on which the prohibitions of affinity are founded refers particularly to the "daughters of your wives." —*Hedaya*, vol. i., p. 78.

[4] *Ibid*, p. 82.

tion is established. It is assumed that there are no clothes between the parties, and if there be a cloth between them, so thick that the person touching cannot feel the warmth of the other's body, prohibition by affinity is not established, however much desire may be excited, but if the cloth be so fine that the warmth of her body can be felt by his hand it is established. So also if his hand were applied to the sole of her boot, unless it be so hard as to prevent his feeling the softness of her foot. And when a man kisses a woman with a cloth between them, but is sensible of the cold of her front teeth or of her lip, that is a kiss; and the case is the same with regard to touch. A prolongation of the touch is not necessary; hence it has been said that if a man should reach his hand to a woman, with desire, and it should happen to touch the nose of her daughter, and his desire were increased, the mother would become unlawful to him, though he had withdrawn his hand on the instant. But it is a condition that the female touched be old enough to have desire. And the *futwa* is in favour of nine years as the age of desire, and nothing under it. Even actual connection with a female child so young as to have no desire does not occasion the prohibition of affinity. But though a woman have passed the age of desire, she may still give occasion for this prohibition for having once come within the line, she does not get beyond it by becoming old. Desire in the male is also a necessary condition, so that actual connection by a boy of four years old would not induce the prohibition of affinity, while if a boy be of an age that usually admits of sexual intercourse, such intercourse by him is the same as by an adult person, and such a boy is described as one who desires and is desired of women. Desire must in all cases be simultaneous with the touch or sight, for if these occur first without desire, and desire is afterwards excited, prohibition is not incurred. The definition of desire in a man is turgidity of the virile member, or the increase of such turgidity if it have previously existed. And this definition is correct, and decisions are given in accordance with it. But it supposes the person to be a young man, capable of coition, for if he be old or impotent the defini-

tion of desire in such an one is a motion or beating of the heart, accompanied by desire, if it were not previously beating, and an increase of desire where the movement already exists. The definition of desire in a woman and a *mujboob*,[1] is desire in the heart, or taking delight in it when there is none, and an increase of it when it already exists. The existence of desire in one of the parties is sufficient, but it is a condition that it shall not diminish at the time of touching or seeing, for if it do so the prohibition by affinity is not incurred. And according to Sudur-oos-Shuheed, the *futwa* is in accordance with this distinction.

Cases of acknowledgment connected with the preceding.

If a man should acknowledge that he has incurred the prohibition by affinity he is to be taken at his word, and the parties are to be separated. And the rule is the same though he should ascribe its occurrence to a time previous to his marriage, as, for instance, if he should say to his wife, "I had connection with your mother before your marriage," he is to be taken at his word, and they are to be separated; but he is not to be credited so far as regards the dower, and is accordingly liable for the whole amount specified or agreed upon, but without the *ookr*, (or prescribed ransom for vitiated virginity.) It is not necessary that he should persist in the declaration, for though he retract, and say "I lied," the judge is not to believe him; but, as between himself and his God, if the declaration were really false, his wife would not be prohibited to him. And Moohummud has related in his book of marriage, that if a man should say to a woman, "This is my mother by fosterage," and afterwards wishing to marry her should say, "I made a mistake in this matter," he is allowed to marry her on a liberal construction of the law. The reason of the difference between the two cases is, that in the former the declaration which he makes has reference to his own act, and as a mistake with regard to one's own act is rare, he is not to be believed; but in the case of fosterage what he declares to be his own act has

[1] From *jubb*, which means the removal of the penis only. *Door-ool-Mookhtar*, p. 267.

reference to another fact, of which his knowledge must have been derived by hearing from other persons, and in such matters it is by no means uncommon to make a mistake. When a man kisses or touches a woman, or sees her nakedness, and then says it was not with desire, Sudur-oos-Shuheed has said that in the case of the kiss a decree should be given for establishing the prohibition, unless it be proved that the kiss was without desire; but that in the case of the touch, or sight of the nakedness, a decree is not to be given for the prohibition, until it be proved that the act was done with desire; for desire is implied in kissing, but not in touching nor in seeing the nakedness. This, however, is only when the touch is on some other part of the person than the actual nakedness, for otherwise the assertion is not to be credited. The Sheikh Zuheer-ood-deen Al Moorghenanee used to decree for the prohibition in the case of a kiss on the mouth, the cheek, or the head, though it were on the *mikna* or coif, and to say that the man is not to be believed in saying that the kiss was without desire, but is entitled to credit if he deny desire in the case of a touch, in the absence of some unequivocal sign, as embracing her round the neck. And if he put his hand upon her bosom and say it was not with desire, he is not to be believed, because the presumption is against him; so also if he should ride together with her on a beast; but the contrary, if he ride on her own back to cross a water.

Testimony, how far receivable.

Testimony is to be received to a person's acknowledgment of having touched or kissed with desire. But is it to be received to be the mere fact of touching or kissing with desire? The approved doctrine is that it should be received; and Aly-al-Buzduvee was of that opinion. Moohummud has reported to the same effect in the Jama on the subject of marriage; for desire is an emotion that continues for some time, and is indicated by a quivering of the members and other signs. And it is customary to receive the evidence.

Miscellaneous cases.

A man is asked, "What did you do with the mother of your wife?" and he answers, "I had connection with

her,"—prohibition by affinity is established; and it is said that even though the questioner and the answerer were both in jest, there would be no difference, and that the man is not to be believed if he allege that he lied. A man having a female slave says, "I had connection with her,"—she is no longer lawful to his son. But if the slave were not his property, and he should say "I had connection with her," the son might disbelieve the assertion, and have connection with her, for the presumption is in his favour. And if the slave come to him by inheritance from his father, he may have connection with her, unless he know that his father had such connection.

If a woman complain that a touch of her by her husband's son was with desire she is not to be believed, and the word of the son is to be preferred. A man kisses his father's wife with desire, or a father kisses his son's wife with desire, against her will in either case, and the husband denies that the kiss was with desire, the word of the husband is to be preferred; but if he admit that it was with desire, a separation must be made between the married parties, and the husband is liable for the dower. He is, however, entitled to have recourse against the aggressor if the mischief was intended, but if it was done unintentionally he has no redress. In a case of actual connection he would have no right of redress against the party who did the mischief, though he actually intended by the act to do the injury, because in that case liability to the *hudd*, or specific punishment for the particular offence, would be incurred, and a pecuniary mulct cannot be joined with the *hudd*. A man marries the slave of another, and she kisses the son of her husband before he has consummated with her, and the husband complains that the kiss was with desire, but the master denies that it was so; in these circumstances the slave becomes absolutely separated or divorced from her husband by reason of his declaration that she kissed with desire, and he is liable for half the dower by reason of the master's denial that the kiss was with desire. But the word of the slave herself

would not be entitled to credit if she should say, "I kissed him with desire."

Marriage is not dissolved, but only vitiated by incurring the prohibition of affinity.

Moohummud has stated in his book of Marriage, that the general principle is that marriage is not taken away or dissolved by the prohibition of affinity, or fosterage, but that it is rendered invalid or vitiated, so that if the husband should have connection with his wife before actual separation, he is not liable to the *hudd*, whether he had any doubt on the subject or not. When a man has done wickedly with a woman, and repented of his misconduct, he is still prohibited to her daughter, for the prohibition of marriage with her daughter which he has incurred is perpetual; and this is evidence that prohibition is established by illicit intercourse, and by whatever induces prohibition by affinity.

There is no objection to a man marrying a woman, and his son marrying her daughter or mother.

Class Third,

Or Women who are Prohibited by reason of Fosterage.

Prohibition for fosterage.

Every woman prohibited by reason of consanguinity and affinity is prohibited also by fosterage, as will be explained in the Book of Fosterage.

Class Fourth,

Or Women who cannot be Lawfully Joined Together.

Women who cannot be lawfully joined together.

This prohibition is of two kinds: one applicable to women who are strangers to each other, and the other applicable to women who are related to each other.

Number of wives.

First, with regard to strangers. It is not lawful for any man to have more than four wives at the same time. And it is not lawful for a slave to marry more than two. A *Mookatib*, *Moodubbur*, and the son of an *Oom-i-wulud*,[1] are like absolute slaves in this respect. It is lawful for a free

[1] Literally, mother of a child. A slave who has borne her master a child, acknowledged by him, and who is entitled to her freedom at his death. The son referred to in the text is by another man.

man to keep and cohabit with as many female slaves as he pleases, but it is not permitted to a slave to keep and cohabit with any, even with the permission of his master. A free man may marry four women whether they be slave or free. And a slave may marry two women, whether they be slave or free. When a free man has married five wives in succession the marriage of the four first is lawful, but the marriage of the fifth is unlawful, and if he marry five in one contract, the marriage of the whole is vitiated.[1] The case is the same with regard to a slave who marries three. If an alien marry five wives, and they all embrace the faith, and if he had married them in succession, the marriage of the four first is lawful, and a separation should be made between him and the fifth, according to all opinions, while, if he had married the whole together, he must be separated from the whole, according to Aboo Huneefa and Aboo Yoosuf, and if he had married first one and then four, the first marriage would be lawful and none of the others.

Women within the prohibited degrees cannot be joined together.

Second, with regard to the joining together of women who are relatives. It is not lawful to cohabit with two sisters, either in marriage or by right of property, whether they be sisters by consanguinity or fosterage. The general principle with regard to the joining together of women, is, that it is not lawful to join together any two women, who, if we suppose either of them to be a male, could not lawfully intermarry, by reason of consanguinity or fosterage. Hence it is not lawful to join a woman with her paternal or maternal aunt, by consanguinity or fosterage, but it is lawful to join a woman with her husband's daughter. And in like manner a woman and her female slave may be joined together, for the unlawfulness of marriage in such a case is neither by reason of consanguinity nor fosterage. If a man marry two sisters by one contract he must be separated from them both, and if the separation take place before consummation, they are not entitled to anything, but if it

[1] It may be of importance to observe, that in neither case is the marriage said to be *batil*, or void. See *post*, Chapter of Invalid Marriages.

take place after consummation, each of them is entitled to whichever is the less of her *muhr-mithl*, or proper dower, and the dower mentioned in the contract. Should the sisters be married by separate contracts, the marriage of the last married is invalid, and it is incumbent on the husband to separate from her. If the judge be aware of the fact, he is bound to make the separation, and if he do so before consummation none of the legal effects of marriage are inferred, but if not till after consummation the woman is entitled to dower, and the husband liable for whichever may be the less of her proper dower and the dower specified. She must also observe her *iddut* (or term of probation,) and the paternity of her offspring is established, the husband being bound to refrain from matrimonial intercourse with his wife, until the expiration of the sister's *iddut*. If he had married the two sisters by separate contracts, and it is not known which of the contracts was first, the husband is to be required to explain, and if he do so the priority is determined according to his explanation; but if he fail to explain, he has no choice, and must separate from both. And if the separation take place before consummation they are both entitled to half the dower, supposing the dowers to have been equal, and specified in the contracts, but if the dowers were of different amounts, then each woman is entitled to a fourth part of each dower. If no dower be specified in the contract, a single *mootaût* (or present) is due to both, in exchange for the half dower. Should the separation take place after consummation, each woman would be entitled to her full dower.

A woman who cannot be lawfully joined with another is not prohibited after separation from the other.

The rules above mentioned with regard to two sisters apply equally to all other near relatives, who cannot be lawfully joined together in connection with a man. And if a man desire to marry one of the two after separating from the other, he is at liberty to do so, provided that the separation take place before consummation; but if it do not take place till after the consummation, he must wait till the expiration of both their *idduts*. When the *iddut* of one has expired, but not that of the other, he may marry the woman who is still in her *iddut*, but not the other, until the

unexpired *iddut* be also completed. If consummation with one only has taken place, he may marry that one, but not the other, until the expiration of her sister's *iddut*, and when that has expired he may marry whichever of them he pleases.

The prohibition extends to concubines as well as wives.

As it is not lawful for a man to be married to two sisters at the same time, so also it is unlawful for him to keep them both for pleasure; and when a man is the owner of two sisters, he may enjoy whichever of them he pleases, but when he has enjoyed one of them he is not at liberty to enjoy the other; and in like manner, if he should buy a female slave and have connection with her, and then purchase her sister, he may repeat his intercourse with the first, but cannot have connection with the other, until he has made the first unlawful to him, which is done either by marrying her to another man, or parting with his right of property in her, by manumission, gift, sale, bestowing her in charity, or *kitabut*.[1] Manumission of part is equivalent to manumission of the whole, and transferring his right of property in part is equivalent to a transfer of the whole. But if he merely say, "she is prohibited to me," the other does not become lawful; as the occurrence of the courses, *nifas* (or the time of purification after child-birth), putting on the *ihram*, or pilgrim's garment, on coming within the territory of Mecca, and fasting, are all causes of prohibition. When he has had connection with both, he is not at liberty to repeat it with either till the other is rendered unlawful to him, as already explained. And if he sell one of the two, or give her in marriage, or as a gift, and the sold one is returned to him on account of a defect, or he revokes the gift, or the husband of the married one divorces her, and her *iddut* has expired, he cannot have connection with either till he has rendered the other unlawful to him. Suppose a man to marry a female slave and to refrain from intercourse with her till he has pur-

[1] A contract of emancipation for a ransom entered into between a master and his slave, who becomes, in consequence, a *Mookatib*, and cannot be sold unless he fail to pay the ransom.

chased her sister, he would not be at liberty to enjoy the purchased slave, because the bed is established by mere marriage, and if he were to have connection with her, it would be a joining of both in one bed. And if he should marry the sister of a slave whom he has already enjoyed, the marriage would be valid; and being so, he is not to have connection with the slave, even though he should refrain from matrimonial intercourse with his wife: nor can he have connection with his wife until he has rendered her enjoyed sister unlawful to him in some of the ways already specified; after which he may have connection with his wife, and he may immediately have such connection if he had never enjoyed the slave. Should the marriage with the slave's sister be invalid, the slave is not prohibited to him until he consummate with his wife; whereupon any further intercourse with the slave would also become unlawful. A man marries two sisters, one of whom is in her *iddut* for another man, or is actually married to another, the marriage with the woman who is free from any tie is lawful.

And continues during *iddut*.

It is not lawful for a man to marry the sister of his *moontuddah* (or repudiated wife who is still in her *iddut*), whether the *iddut* be for a revokable, or absolute, or triple repudiation,[1] or for an invalid or a dubious marriage. And as it is unlawful to marry the sister of a woman who is in her *iddut*, so it is unlawful to marry any other of her near relatives who could not be lawfully joined with her; or to marry four others besides her. And if a man emancipate his *oom-i-wulud*, it is not lawful for him to marry her sister until the expiration of her *iddut*: but he may lawfully have four wives besides her, according to Aboo Huneefa; while according to the two disciples, the sister is lawful to him also. If the husband say, "she informed me that her *iddut* was past," and this be within a time not ordinarily sufficient for that purpose, his word is not to be received: nor is hers when giving such information, unless she accompanies it by some probable explanation, as

[1] Shafei held it to be lawful.—*Hedaya*, vol. i., p. 83.

the miscarriage of a formed child,[1] or the like; but if the assertion of the husband be made at a time within which it may be reasonably supposed that the *iddut* has expired, and she assent to his statement or remains silent, or is absent, he may marry another or her sister if he please; and so also though she should negative his statement, according to our sages. It is lawful for the husband of an apostate who has fled to a foreign country to marry her sister before the expiration of her *iddut*, in the same way as if she had died. And if she should return as a *mooslimah*[2] after the marriage with her sister, the marriage would not be vitiated, since the *iddut* does not revive; but if she should return before the marriage, though the result would still be the same, according to Aboo Huneefa—for, in his opinion, the *iddut* having once ceased does not revive without a new cause—yet, according to the disciples, it would not be lawful to marry the sister, because by the return of the woman in the faith, her flight becomes in law an ordinary absence, and as her property reverts to her in such circumstances, so also does she return to the state of a *moontuddah*.

Marriage of a man to two women, one of whom is lawful, and the other prohibited.

A man marries two women, one of whom he cannot lawfully marry by reason of her being within the prohibited degrees, or the wife of another husband, or an idolatress, but the other of whom it is lawful for him to marry, the marriage with her who is lawful to him is valid, but the marriage with the other is void;[3] and the whole of the specified dower belongs to her whose marriage is lawful, according to Aboo Huneefa.[4] But suppose him to consummate with her who is not lawful to him, then, as reported in the Asul, she would be entitled to a proper dower, whatever it might amount to, and the other woman

[1] Literally, a child whose creation is manifest. The *iddut* of a pregnant woman is completed by her delivery.

[2] Feminine of Mooslim.

[3] By one contract is implied.—*Hedaya*, vol. i. p. 92.

[4] According to the disciples, the dower should be divided ratably according to the proper dower of each woman.—*Ibid.*

would be entitled to the whole of the dower specified in the contract. And it is said in the Mubsoot that this is correct according to Aboo Huneefa.

Class Fifth,

Or Female Slaves married upon Free Women (that is while Marriage with a Free Woman is still subsisting) or together with them.

A man already married to a free woman cannot marry a slave.

The marriage of a female slave upon a free woman, or together with her, is not lawful.[1] And in like manner as to a *moodubburuh*[2] and *oom-i-wulud*. If a female slave and a free woman be put together in one contract, the marriage with the free woman is valid, but that with the slave is void, that is, when the marriage with the free woman if it stood alone would be valid; for otherwise the addition of the free woman to the slave would not invalidate the marriage with the slave; and supposing him to marry the slave first and then the free woman, the marriage of both would be lawful. If a man should marry a female slave upon a free woman who is still in her *iddut* after an absolute or a triple repudiation, it is not lawful according to Aboo Huneefa, though lawful according to his disciples; and if she be in her *iddut* for a revokable repudiation, the marriage is unlawful without any difference of opinion, while if the *iddut* of the free woman be for an invalid marriage or sexual intercourse of doubtful legality—though Husn has related that there was a difference of opinion between the master and his two disciples on such a case—according to another report, they all agreed in thinking that the marriage with the slave would be lawful; and this is more probable and likely. When a man marries a free woman during the *iddut* of a slave for a revokable repudiation, and then recalls the slave, this is lawful.

Cases.

A slave marries a free woman and consummates with

[1] Shafei held it to be lawful for a slave to make such a marriage, and Malik, for any one with the free woman's consent.—*Hedaya*, i., p. 87.

[2] Feminine of *Moodubbur*.

her without the permission of his master; he then marries a slave, but still without his master's permission, and subsequently the master sanctions both marriages; the marriage with the free woman is lawful, but not that with the slave. A man having a grown-up daughter and a grown-up female slave, says, "I have married them both to you, each for so much," and the husband accepts the marriage with the slave, it is void nevertheless; and if he should afterwards accept the marriage with the free woman it would be lawful.

It is lawful for a man to marry a slave who is either a Mooslim or *Kitabeeah*, even though he should have the means of marrying a free woman.

Class Sixth,

Or Women who are prohibited by being involved in the rights of others.

A man may not marry the wife or *moootuddah* of another;

It is not lawful for a man to marry the wife, or the *moootuddah* of another, whether the *iddut* be on account of repudiation, death, or the consummation of an invalid or a semblable marriage. And if a man should marry the wife of another, not knowing her to be the wife of another, and should have connection with her, an *iddut* would be necessary; but if he knew her to be the wife of another, it would not be required, so that her husband would be under no prohibition from having matrimonial intercourse with her.[1] It is lawful for the master of the *iddut*, that is, the person by connection with whom it is induced, to marry the *moootuddah* when there is no other impediment besides the *iddut*.

nor a pregnant woman, unless the pregnancy is unlawful;

Aboo Huneefa and Moohummud have said that it is lawful for a man to marry a woman pregnant by whoredom, though he must refrain from matrimonial intercourse with her till her delivery. Aboo Yoosuf, however, was of

[1] In the first case there would be a semblable marriage, which requires *iddut*, while in the second there would be mere adultery, which does not require it.

opinion that the marriage is not valid, but the *futwa* is in accordance with the opinion of the two others. As it is not permitted to have connection with her, so also it is not permitted to solicit her. In the Mujmooa Nuwazil it is stated that when a man marries a woman with whom he has already had illicit intercourse, and it appears that she is pregnant, the marriage is lawful, and he may have connection with her, and she is entitled to maintenance according to all their opinions. A man marries a woman and she miscarries of a child which appears to be created or fully formed; if the miscarriage take place at four months, the marriage is lawful, but if it take place within this period it is not lawful, for creation is not established in less than 120 days.[1] The marriage of a woman pregnant of a child whose descent or paternity is established,[2] is not lawful according to all opinions; but according to Aboo Huneefa, if the descent be established from an enemy, as for instance, if the woman be a fugitive or a captive, the marriage would be lawful, but the husband should not have connection with her till after her delivery. Aboo Yoosuf has reported to this effect as from Aboo Huneefa, and Tahavee has confidence in the report, but it was contradicted by one by Moohummud on which Kurkhee relies, and the report relied on by him is most correct.[3] A man gives his *oom-i-wulud* in marriage when she is pregnant by himself, the marriage is void;[4] but if she were not pregnant the marriage would be valid. When a man has had connection with his bondmaid, and then gives her in marriage, the contract is lawful,[5] but he ought first to purify

or was induced by himself;

nor can he give his *oom-i-wulud* in marriage if she is pregnant.

[1] And she must, therefore have been pregnant at the time of the marriage, and, in consequence, in her *iddut*. It is implied, that the pregnancy was not the fruit of unlawful intercourse.

[2] This condition excludes a pregnancy, the fruit of illicit intercourse.

[3] This report is adopted by the author of the *Hidayah*.—Vol. ii., p. 37.

[4] The descent of the child being in this case established without positive claim.

[5] Here the descent of the child is not established without being claimed.

her (by suffering a term of her courses to elapse) as a measure of precaution, on account of his seed. This purification is required of the master rather as a matter of propriety than as being absolutely necessary. And since the marriage is lawful, the husband may have connection with his wife before the purification, according to Aboo Huneefa and Aboo Yoosuf; but Moohummud was of opinion that such connection was improper until the purification, and the lawyer Aboo Leeth has said that "the opinion of Moohummud is recommended for its caution, and we adopt it." This difference of opinion relates to a case where the master has given the woman in marriage before making her undergo a purification, but if that precede the marriage, the husband may lawfully have connection without any further purification, according to all their opinions. When a man has seen a woman commit fornication, and then marries her, he may lawfully have connection with her without waiting for her purification, according to the opinion of the two, but Moohummud has said that such connection is improper until her purification.

A father may lawfully marry the bondmaid of his son according to us.[1] A female captive may lawfully marry any one but her captor,[2] when she has been captured alone, without her husband, and brought within the Mooslim territory, according to all opinions, and she is not bound to observe an *iddut*; and in like manner a *Moohajirah*, or fugitive from her own country to ours, may lawfully marry, and is not bound to observe an *iddut*, according to Aboo Huneefa. But Aboo Yoosuf and Moohummud have said that an *iddut* is incumbent upon her, and that her marriage is not lawful. There is no difference of opinion among them as to the unlawfulness of connection with her before purification by the occurrence of her courses.

A father may marry the slave of his son; and a female captive any one but her captor.

[1] Though he has such a right in the slave of his son, as to justify his having intercourse with her.

[2] The reason of the exception seems to be, that, by being made a prisoner, she becomes the slave of her captor.

Class Seventh,

Or Women prohibited by reason of Polytheism.[1]

A Mooslim cannot marry a polytheist.

It is not lawful to marry *Mujooseeahs* (or fire worshippers) nor idolatresses; and in this respect there is no difference between free women and slaves. Among the worshippers of idols are included the worshippers of the sun and stars, and images which they hold in reverence, and the *Mooûtillah*,[2] *Zunadook*,[3] *Bataniah*,[4] *Abahiah*,[5] *Moobuyyizzoh*,[6] and persons of every creed by belief in which one is deemed a *Kafir*, or infidel. A Mooslim is not to have carnal intercourse with an idolatress or a *Mujooseeah* by right of property, but he may lawfully marry a *Kitabeeah*,[7] whether she be an enemy or a subject, free or a slave, though it is better to refrain. When a Mooslim has married a *Kitabeeah* he may restrain her from going to church or synagogue, and from taking wine into his house. But he cannot compel her to wash after her courses, childbirth, or other ceremonial pollution. When a Mooslim marries a foreign *Kitabeeah* in the *Dar ool Hurb*, or a foreign country, the act is lawful but abominable; and if he should take her out into the *Dar ool Islam*, or Mooslim territory, they remain in the state of marriage. But if he should come

But he may marry a *Kitabeeah*.

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[1] Literally "associating," that is, with God. The term *mooshrik*, or associator, is sometimes applied to Christians on account of their belief in the Divinity of Christ, and to Jews who are supposed to believe Azeer or Esdras to be the Son of God; but it does not include them in this place, for the marriage of Mooslims with either is expressly permitted in the Koorun.—*Hidayah* and *Kifayah*, vol. ii., p. 21.

[2] One who adopts the dogma called *Tateel*, which consists in divesting the essence of the Deity of every attribute, and reducing it, in some sense, to nothing.—De Sacy, *Chrestomathie Arab.*, tom. i., p. 325.

[3] Sadducee, considered an atheist.

[4] The same as the Assassins of whom mention is made in the Crusades.

[5] Name of an Antinomian sect.

[6] A Musulman sect, so called because they wear white garments.

[7] Feminine of *Kitabee*.

out, leaving her in a foreign country, a separation takes place by reason of the difference of countries.

Kitabees, who?

All who believe in a heavenly or revealed religion, and have a *kitab*, or book that has come down to them, such as the book of Abraham and Seth, and the psalms of David, are *Kitabees*, and intermarriage with them, or eating of meat slaughtered by them, is lawful. With regard to Sabean women, they are lawful to Mooslims, though according to Aboo Huneefa, the connection is abominable; but according to the other two, it is not lawful. The reason of this difference of opinion is, that Aboo Huneefa looked upon them as a kind of Nazarenes who read the psalms of David, and venerate certain stars only as Mooslims do the *Kiblah* of Mecca; while the other two consider their veneration of these stars tantamount to worship, and class them with idolaters.

Case of a Kitabeeah changing her religion.

A person one of whose parents is a *Kitabee* and the other a *Mujoosee* is subject to the same rules as *Kitabees*.[1] And if a Mooslim marry a *Kitabeeah* and she become a *Mujooseah*, she is unlawful to him, and the marriage with her is dissolved; but if he marry a Jewess and she becomes a Christian, or a Christian and she becomes a Jew, the marriage is not vitiated; nor would it be vitiated, according to Aboo Huneefa, though she became a Sabean, but in that case it would be vitiated in the opinion of the other two. Khajindee says that the principle in those cases is, that when one of the parties turns to a state that would render the contract illegal if it were still to be entered into, what was legal before, is made void. When, then, a marriage is vitiated by perversion to *Majooseeism*, and the perversion is on the part of the woman, a separation takes place, and she is not entitled to any part of the dower, nor to a *mootât* or present, when the occurrence takes place before consummation; but if the perversion be on the part of the man, and it occurs before consummation, the woman is entitled to half the dower if a dower were specified, or

[1] This is a result of the general rule, that the child follows the better religion when the parents differ.

to a *mootaût* if none were mentioned; while if the occurrence take place after consummation, she is entitled to the full dower.

An apostate cannot marry.

It is not lawful for an apostate to marry a woman who has apostatized, nor a Mooslimah (or female Mooslim), nor an infidel by origin; and in like manner it is not lawful for a female apostate to marry with any one.

A *Mooslimah* cannot marry a *Kitabee*.

The marriage of a Mooslimah with an apostate or with a *Kitabee* is unlawful. Idolatresses and *Mujooseeahs* are lawful to all infidels except apostates. And *Zimmees*, or infidel subjects, may lawfully marry with *Zimmeeahs*, though of a different persuasion. It is lawful to marry a *Kitabeeah* upon a Mooslimah and a Mooslimah upon a *Kitabeeah*, both being in this respect equal in class from their equality in regard to the lawfulness of marriage.

Class Eighth,

Or Women prohibited by reason of Property.

A woman cannot marry her slave;

It is not lawful for a woman to marry her slave, nor a slave of whom she is part owner; and since bondage is an objection to marriage, so a marriage is rendered void by one of the married parties becoming the owner or part owner of the other.[1]

nor a man his bondwoman;

When a man marries his bondwoman or *Mookatibah*, or *Moodubburah*, or *oom-i-wulud* or a slave of whom he is part owner, it is not a marriage. In like manner it is not lawful for a man to marry a bondmaid in whom he has any right of property, as for instance, one acquired by his *Mookatib*, or by a slave licensed by him, and who is in debt. They say that in these times it is better that a man should marry his own slave, so that if she should happen to be free, his connection with her may be lawful by virtue of the marriage.

but a licensed slave, or a *Moodubbur* may marry his own slave.

When a licensed slave, or a *Moodubbur*, purchases his own wife, marriage is not annulled, and, in like manner, when a *Mookatib* purchases his own wife, he does not vitiate the marriage; but if a *Mookatib* purchase a slave

[1] See *post*, p. 157, where the marriage is said to be *invalid*.

and marry her, the marriage is not valid. One who is partially emancipated is, according to Aboo Huneefa, subject to the same rule as a *Mookatib*, and when he purchases his own wife his marriage with her is not vitiated; but, according to the other two, he is free, though in debt, and the marriage is vitiated. When a freeman purchases his wife with a stipulation for an option, the marriage is not annulled, according to Aboo Huneefa;[1] but when a *Mookatib* marries his mistress, the contract is not valid, and if he have connection with her he is liable for the *ookr;* and in like manner, when a man marries his *Mookatibah* the marriage is not valid, and he is also liable to the *ookr* if he have connection with her. And though the *Mookatib* be emancipated after he has married his mistress, the marriage does not become lawful. If a *Mookatib*, or an absolute slave, marry his master's daughter with his permission, the marriage is lawful; but if the master die the marriage of the slave is vitiated, but not that of the *Mookatib*, according to us.[2] If the *Mookatib* should afterwards become emancipated the marriage would be confirmed, but if he should be unable to fulfil the terms of his ransom and be obliged to return to slavery, the marriage of the daughter would be annulled, and if this should happen before consummation, the whole dower would fall to the ground, but if not till after the consummation, then only so much of the dower as corresponds to the daughter's share in the person or value of her husband would abate, and what corresponds to the shares of the other heirs would remain. If a *Mookatib* should marry the daughter of his master, after his master's death there would be no contract.

Class Ninth,

Or Women prohibited by reason of Repudiation.

A wife repudiated three times if free, or twice if a slave.

It is not lawful for a man to marry a free woman whom he has repudiated three times, nor a slave whom he has

[1] For the reason of this see *M. L. S.*, p. 68.

[2] On the master's death the daughter would become part owner of her husband, to the extent of her share in the inheritance.

cannot be remarried by her husband.

repudiated twice, till another husband has consummated with her. And as it is not lawful to marry her, so neither is it lawful for him to have connection with her by virtue of a right of property. And if a man should marry a slave, repudiate her twice, and then purchase and emancipate her, still it would not be lawful for him to marry her again till another had married and consummated with her, and then repudiated her, and her *iddut* had expired.

CHAPTER IV.

OF GUARDIANS.

GUARDIANSHIP is established by four different causes—Propinquity, *Wula*,[1] *Imamut*,[2] and Property. Guardianship: how established.

Guardianship in marriage, according to a saying of the Prophet, belongs, in the first place, to the *Usubah*[3] (or agnates), in the order of inheritance, the more remote being excluded by the nearer.[4] The nearest guardian to a woman is her son; then her son's son, how low soever; next her father; then her grandfather, that is, her father's father, how high soever.[5] When an insane woman has a father and a son, or a grandfather and a son, the guardianship belongs to the son, according to Aboo Huneefa and Aboo Yoosuf, but to the father, according to Moohummud. It is better, however, that the father should direct the son to give her in marriage, so that it may be lawful without any difference of opinion. After the above persons comes the full brother; then the half-brother by the father's side; then the son of the full brother: then the son of the half-brother by the father's side, how low soever; then the full uncle; then the half-uncle by the father's side; then Guardians by propinquity.

[1] The relation between a freed man and his emancipator, or a proselyte and the person by whose influence he has been converted.

[2] Leadership of the Moohummudans.

[3] The term includes all males connected with a party through males; and those that follow are all *Usubah*, in the order of inheritance.

[4] *Hidayah*, vol. i., p. 42.

[5] Malik restricts it to the father; Shafei to the father and grandfather.

the son of the full uncle; then the son of the half-uncle by the father, and their descendants; then the father's full paternal uncle; then his paternal half-uncle by the father's side; then the sons of both in the same order; then the grandfather's full paternal uncle; then his paternal half-uncle by the father's side; and then the sons of both, in the same order; then a man more remote of the woman's *ûsubah*, and he is the son of a distant paternal uncle.

Have the power of compelling minors.

All these guardians have the power of compulsion over a female or a male during minority, and over insane persons though adult.

The emancipator or emancipatress.

After all the preceding comes the emancipator or emancipatress, for in this case male and female are alike: and then the *ûsubah* of the emancipator or emancipatress.

Uterine relatives.

Failing *ûsubah*, every near uterine relative[1] who may inherit from a minor, whether a boy or a girl, has the power of giving him or her in marriage, according to the Zahir Rewayut, as from Aboo Huneefa; but, according to Moohummud, guardianship does not belong to uterine relatives; and there is some confusion as to the opinion of Aboo Yoosuf. The nearest, according to Aboo Huneefa, is the mother, then the daughter, then the son's daughter, then the daughter's daughter, then the daughter of the son's son, then the daughter of the daughter's daughter, then the full sister, then the half-sister by the father's side, then the half-brother and sister by the mother, then their children. After the children of sisters come paternal aunts, then maternal uncles, then maternal aunts, then the daughters of maternal uncles, then the daughters of maternal aunts; and the false or maternal grandfather is preferred to the sister, according to Aboo Huneefa.

The *Mowla-ool-Mowalat*.

The *Mowla-ool-Mowalat*[2] is next; then the Sultan or

[1] Arab. *Zuwee' l urham*, termed distant kindred in respect of inheritance.

[2] A person with whom a proselyte enters into a compact in the following terms:—"You are my mowla—you will be my heir when I die, and pay the mulct when I commit an offence;" and who accepts the terms.

ruler,[1] and then the judge, and a person appointed by him.

The judge has the power of contracting a person in marriage who requires a guardian, when it is within his commission and authority; but when it is not within his commission, he is not the guardian. If a judge should contract a woman in marriage when he has no authority from the Sultan for that purpose, and should afterwards, upon receiving such authority, give his sanction to the marriage, it would be lawful, on a liberal construction of the law: and this is correct. The judge.

When the judge marries a young girl to himself, it is a marriage without a guardian; for in his personal concerns he is a mere subject, and the guardianship devolves on the person above him, that is, the ruler, who also is but a subject in his own matters. Nay, the Khulecfah[2] himself is no more than a subject in things that regard himself. The judge cannot contract a female minor to himself.

It is lawful for the son of a paternal uncle to marry his uncle's daughter to himself. When the judge marries a young girl to his own son, the transaction is not lawful, contrary to the case of all other guardians. An uncle's son has that power.

An executor has no authority to contract a boy or a girl in marriage, whether he be appointed by the father or not, except when the executor happens to be the natural guardian, and then he has the power by virtue of his guardianship, not of his executorship. And if a boy and girl be both under the care or custody of a person who has brought them up, as, for instance, one who picks up a foundling or the like, the person has no authority to marry them to each other. An executor has no power to contract a minor in marriage.

A slave cannot be the guardian of any one; nor can a *mookatib* be guardian to his own child. A minor or an insane person has no power of guardianship; and an infidel Persons who may or may not be guardians.

[1] As representing the Imam.

[2] The successor of Moohummud, and so the true Imam. None has been generally acknowledged since the taking of Baghdad by the Tartars, in 1258 A.D.

cannot be guardian to a mooslim, whether male or female; nor a mooslim to an infidel, whether male or female. It is said, however, that it ought to have been added, unless the mooslim be the master of an infidel bondwoman, or be the Sultan. An infidel may be guardian to one like himself. But an apostate cannot be guardian to any one, whether a mooslim or an infidel; nor even to an apostate like himself. Profligacy is no impediment to guardianship.[1]

Guardianship ceases on the insanity of the guardian.

When a guardian becomes permanently insane, his guardianship ceases; but if he be mad with lucid intervals, his guardianship does not cease, and his acts during a lucid interval have legal operation. According to one report, the *Imam*[2] fixed continuance for a month as the criterion for determining the character of the madness, and decrees are given accordingly.

Guardianship of a father continues when his son attains to majority, insane.

When a son has arrived at puberty, lunatic with lucid intervals, or a confirmed madman, the father's guardianship over his person and property continues. In the *Futawa* of Aboo Leeth, it is stated that when a man contracts his grown-up son in marriage, and the son withholds his consent till he becomes permanently mad, and the father then allows it on the son's behalf, the marriage is lawful; but the lawyer Aboo Bukr has reported to the contrary in another case, and has said, that when a son attains to puberty in a state of sanity, and subsequently becomes a confirmed lunatic, or mad with lucid intervals, then, according to Aboo Yoosuf (reasoning from analogy), the guardianship would not revert to the father, but pass on to the judge; so that if the father should intermeddle with his son's property, or contract him in marriage, the act would not be legal; while, according to Moohummud, the guardianship would revert to the father, on a liberal construction of the law. The lawyer Aboo Bukr-al-Meeduncc insists, however, that the guardianship would revert to the father, according to our three masters.

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[1] The Futawa Kazee Khan is cited, but see further on, p. 50.

[2] Aboo Huneefa seems intended.

When a father becomes a confirmed lunatic, or mad with lucid intervals, the guardianship is not established in his son, so far as relates to his property; but it is established in him for the purpose of contracting the father in marriage, according to Aboo Huneefa and Aboo Yoosuf. And this is correct.

A son is the guardian in marriage to his insane father.

When a minor, whether male or female, has two guardians equal in degree, as two brothers or two paternal uncles, for instance, and either of them contracts the minor in marriage, the transaction is lawful, according to "us." And it makes no difference whether the other of them allows or cancels the marriage.

Case of two guardians equal in degree.

If a minor, whether male or female, be contracted in marriage by a more distant guardian, while a nearer is present and competent to the guardianship, the contract is dependent on the sanction of the nearer; but if the nearer be incompetent, by reason of minority, or insanity though of full age, the contract is lawful; and, in like manner, if the nearer guardian be absent at such a distance as precludes him from acting, the marriage contracted by the more remote is also lawful. The distance is a short interval, as approved by many of the moderns, and the *futwa* agrees with this. Surukhsee and Moohummud Ben al Fuzl say that it is to be estimated by the chance of losing a present suitable match while inquiry is made for the opinion of the absent guardian. And this is best. And the *futwa* is to that effect. So that if the nearer be concealed in the city, he is not to be waited for, and the absence is to be accounted a precluding one. If a more remote guardian should contract a minor in marriage while a nearer is present, so that the marriage would be suspended on his sanction, and the nearer should then absent himself, by which means the guardianship would devolve upon the more remote, the marriage contracted by the more remote would not thereupon become legal, nor until sanctioned by him after such devolution of the guardianship.

Where the guardians are of different degrees.

There is a difference of opinion among the learned with regard to the guardianship of the nearer, whether it actually ceases during his absence or still subsists. Some

Difference of opinion as to *status* of nearer during his absence.

say that it still subsists, except that in the absence of the nearer the more remote may exercise the power, and that the case is the same as if the woman had two guardians equal in degree, like two brothers or two paternal uncles; but others say that the guardianship of the nearer ceases during his absence and is transferred to the more remote, and this is most correct. The authority of the more remote is annulled by the coming or return of the nearer; but not so the contract which he may have actually made, for that was entered into while his authority was complete. All are agreed that when the nearer guardian prevents a woman from marrying, the power devolves on the more remote. When the guardian is absent, or prevents a woman from marrying, or when a father or grandfather is profligate, it belongs to the judge to contract the woman to an equal.[1]

Minors and lunatics may be contracted in marriage against their will.

The guardian of a boy and girl may marry them to each other against their will, whether the girl be a virgin or a *thuyyibah*, that is, enjoyed. Lunatics, whether male or female, and whether the madness be continued or with lucid intervals, are like the boy and girl, and their guardian may accordingly contract them in marriage when the madness is continued.

Option of puberty.

Where minors are contracted in marriage by a father or grandfather, they have no option on arriving at puberty; but when contracted by any other than a father or grandfather, they have an option on arriving at puberty, and may either abide by the marriage or cancel it. This is the doctrine of Aboo Huneefa and Moohummud on the subject; but it is a condition that there shall be the decree of a judge in the matter, contrary to the case of an option after emancipation. And if a boy or girl should choose to be separated, after arriving at puberty, but the judge has not yet made the separation when one of them dies, they have reciprocal rights of inheritance, and up to the actual separation between them by the judge the husband may lawfully have intercourse with his wife. When the judge

[1] See *ante*, p. 48.

or the *Imam* contracts one in marriage, the option is established. This is sound, and the *futwa* accords with it. Kazee Budee-ood-deen being asked with regard to a young girl who had married herself to a person who was her equal, she having no guardian, and there being no judge in the village, answered, "The marriage is contracted, but dependent on her approval after arriving at puberty." When a young girl contracts herself in marriage, and her brother being her guardian allows the marriage, it is lawful, but she is at liberty to rescind it on arriving at puberty.

How the option of a girl is extinguished.

Mere silence, when the woman is a virgin, is sufficient to extinguish this option upon her part, and it is not extended to the termination of the meeting;[1] so that if a woman, being a virgin, should arrive at puberty, and remain silent, her option would be at an end. But if she were a *thuyyibah* at the time of marriage, or if then a virgin, and her husband had directed her to be conducted to his house, and she had arrived at maturity while living with him, her option would not be cancelled by silence, nor even by her rising from the meeting; but it would be cancelled by her assenting explicitly to the marriage, or doing anything from which her assent might be clearly inferred; as for instance, permitting connection with her, or asking maintenance, or the like. She would, however, still retain her option, if she merely continued to eat his food or serve him as before. When a woman is aware of the contract at the time of arriving at puberty, but is ignorant that she has an option, and remains silent, her option is annulled; but when she is not aware of the contract at the time of arriving at puberty, she has an option on receiving intelligence of it. When a woman attains to puberty, and inquires the name of her husband, or the amount of the specified dower, or salutes the witnesses, the option of puberty is extinguished.

[1] The place or company in which she may happen to be at the time of her attaining maturity. *Hedaya*, i., p. 105, *note*.

Occurrence of two rights of option.

When two rights unite in the same woman, such as that of pre-emption and the option of puberty, she should say, "I claim both the rights," and then proceed by explaining first the option as to her own person.

Option of a boy, how extinguished.

The option of a boy is not cancelled until he say, "I have consented," or something proceeds from him from which his consent may be inferred; and rising from the meeting does not terminate the option of a boy, but it is cancelled by acquiescence.

Course to be followed by a female in exercising her option.

When a woman perceives that her courses have come on, it would be well to exercise her option immediately on seeing the blood; and when she observes it at night, she is to say, "I have cancelled the marriage," and take witnesses when she rises in the morning, saying, "Surely, I have now seen the blood, and have cancelled," for she is not to be believed if she say, "I saw it at night." This is reported in the Mujmooa Nuwazil, the author saying, "Even though it be a lie," for a lie is allowable in some cases. Husham has said, "I inquired of Moohummud regarding a young girl whose paternal uncle had contracted her in marriage, and who, on the appearance of her courses, exclaimed, 'Praise be to God, I have made my choice,' and (he answered) she has her option. But if she had sent a servant, on the appearance of her courses, to seek for witnesses to attest her declaration, and the servant were unable to procure any, and she had, by reason of her residing in a retired place, delayed for some days, for want of witnesses, he would have made the marriage binding on her, as that would not be a sufficient excuse." Ibn Sumaut reports, as from Moohummud, that when a woman makes her election to be free, and calls on witnesses to attest the fact, but delays for two months to bring the matter before the judge, she may still avail herself of her option, unless she has intermediately surrendered her person.

Dispute between husband and wife as

When there is a difference between parties with regard to the option of puberty, the woman saying, "I elected to be free, and rejected the marriage when I arrived at

puberty," while the husband says, "Nay, but you were silent, and your option has fallen to the ground," the husband's word is to be preferred.[1] to exercise of wife's option.

A boy and girl are both slaves when married together by their master; he then emancipates them, and subsequently they attain to puberty; they have not the option of puberty, because the option of emancipation is sufficient without it. But if a person should first emancipate his young bondmaid, and then contract her in marriage, after which she should attain to puberty, she would have her option of puberty, as reported by Asbeejanee. Option of puberty is merged in the option of emancipation.

Separation under the option of puberty is not a repudiation, because it is a separation in the cause of which both husband and wife participate. So also separation under the option of emancipation is not a repudiation contrary to the case of a *Mookheyyerah*, or woman who has been allowed the option of repudiating herself. And it is a general rule that every separation that comes from the part of the wife, without any cause for it on the part of the husband, is a cancellation, such as separation under the option of emancipation or at puberty; and every separation originating on the part of the husband is a repudiation, such as *Eela*, *jub*,[2] and impotence. Separation under the option of puberty is not repudiation.

When a separation takes place under the option of puberty, and the marriage has not been consummated, the woman has no title to dower, whether the separation be under the option of the man or of the woman;[3] but if the marriage were consummated, she is entitled to a full dower, be the separation under her own option or that of her husband. Effect of such separation.

An insane woman contracted in marriage by any other than a father or grandfather, has an option on recovering her reason; but she has no such option when contracted by either a father or grandfather. And if contracted by her son, he is like her father, or even before him. Option of a lunatic on restoration to reason.

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[1] That is, the burden of proof is cast on the wife.

[2] As to *Eela*, see *ante*, p. 18, *note* 2; and *jub*, *ante*, p. 27, *note* 2.

[3] If it were a repudiation, she would be entitled to half the dower.

When marriage with a girl may be consummated.

There is a difference of opinion as to the time when a marriage with a young girl may be consummated; some saying that it should not be till she has actually arrived at puberty, and others that it may take place when she has attained the age of nine years. Most of the learned are of opinion that no regard should be paid to years in this matter, but that ability is rather to be considered; and that if a girl be stout and plump, able to bear the embraces of a man, and there is no apprehension of danger to her health, the husband may consummate with her, though she should not have attained to nine years; but that if she be weak or slender, and unable, and there is any reason to apprehend injury to her health, the husband is not at liberty to consummate with her, even though she exceed that age: and this is sound. When a husband has paid down the dower, and calls upon a judge to order his wife to be delivered up to him, and her father declares that she is too young and unfit for a man, and unable to bear his embraces, while the husband maintains that she is quite fit and able, then, if she be a person who usually goes abroad, the judge is to compel her appearance before him, and to determine for himself as to her competency; but if not, he should direct women in whom he can confide to inspect her, and should order her to be delivered or not to be delivered to her husband, according as they may report her to be competent or incompetent.

Marriage by an adult and sane woman does not require the intervention of a guardian.

The marriage entered into by a free woman who is sane and adult, without a guardian, is quite operative, according to Aboo Huneefa and Aboo Yoosuf, as stated in the Zahir Rewayut. The Sheikh Ata-Ben-Humza being asked, with regard to a woman of the sect of Shafei,[1] a virgin and adult, who had married herself to a man of the Hanifite sect, without the permission of her father, who was dissatisfied and had repudiated the marriage, whether such

[1] Shafei and Malik both insist on the utter incompetency of a woman to enter into the contract either for herself or another. *Hedaya*, vol. i., p. 95. And if the man is not her equal, the guardian may object, even according to Aboo Huneefa. See *post*, p. 67.

a marriage is valid, replied in the affirmative, and that it would have been equally valid if she had married herself to one of her own sect.

And she cannot be contracted without her own consent.

No one, not even a father or the Sultan, can lawfully contract a woman in marriage who is adult and of sound mind, without her own permission, whether she be a virgin or *thuyyibah*. And if any one should take upon himself to do so, the marriage is suspended on her sanction; if assented to by her it is lawful, if rejected it is null.

Tokens of consent in a virgin. Laughing.

When a virgin laughs on being consulted, or after receiving information that she has been contracted, that is assent, on the authority of Koodoree and the Sheikh ool Islam, unless the laugh be in jest or sneeringly, when it would not be consent; and the *futwa* accords with this distinction. If she smile, that is consent, according to Hulwaee. There is a difference of opinion with regard to weeping; but the correct distinction is that, if the weeping be with effusion of tears and unaccompanied by any audible sound, it indicates consent, while, if accompanied by cries and sobs, it is not consent. This is most proper, and the *futwa* accords with it. When a guardian asks permission of an adult virgin to contract her in marriage, and she is silent, silence is permission; so also, if after being contracted by her guardian she gives herself up to her husband, or after being informed of her marriage she asks for her dower, in either case this is acquiescence. If, when told by her guardian that he means to marry her to such an one for a thousand, she remains silent, and the guardian then contracts her, whereupon she says, "I am not content;" or if he should make the contract without consulting her, and then inform her of the fact, whereupon she is silent; in both cases silence is consent, unless there be a nearer guardian than the one who has made the contract, in which case silence would not be assent, and she would still have an option either to sanction or reject it. When the information is brought by one person, but that person a messenger from the guardian, and she remains silent, her silence is assent, whether the

Smiling.

Weeping.

Silence.

Its effect varies according to circumstances.

messenger be a just person or not.[1] But when the information is conveyed to her through any other channel than the guardian himself, or a messenger from him, it is necessary, according to Aboo Huneefa, that there should be more than one informant, and that the informants should be just persons, in order to establish the marriage by her silence. Still, though there should be but one informant, and he not a just person, some of our learned men are of opinion that the marriage would be established, even according to the views of Aboo Huneefa, if the woman gave credit to the information, but not so if she disbelieved it, however truthful the informant may appear to be. The disciples, on the other hand, would have deemed her silence sufficient to establish the marriage, if the informant be apparently righteous.

To give it effect, the husband's name should be mentioned, when a woman is asked for her consent.

When a woman is consulted as to marriage, the name of the intended husband should be mentioned, so that he may be known. Hence, if the guardian should say, "I intend to marry you to a man," and she should remain silent, that would be no assent; but if he should say, "I will marry you to such an one, or such an one," mentioning several, and she should remain silent, that would be an assent to the guardian's marrying her to whichever of them he may please. All this is when she has not entrusted the matter entirely to him; but if she should say, "I am content with whatever you do," after his mentioning to her that several persons have proposed for her, or if she should say, "Marry me to whomsoever you please," or the like, that would be a valid permission. It has been said, however, that mention should also be made of the dower; and this is the opinion of the moderns, and is stated in the Futtih Kudeer to be most proper. When a father consults his daughter before marriage, and says to her, "I am going to contract you in marriage," and does not mention the dower or the name of the husband, and she remains silent, silence is not consent in such a case, and she may afterwards repudiate the marriage; but if both husband and dower be mentioned,

So also the amount of the dower.

[1] That is, one qualified to be a witness.

and she is silent, silence is consent in that case. If the husband alone is named and without any mention of the dower, and she is silent, and her guardian thereupon *gives* her in marriage, here it is said that the marriage is operative, because her silence is consent to a marriage without any specification of dower, which evidently means a marriage at a *muhr-i-mithl*, or proper dower, and that is implied whenever the contract is made by words of gift. It would be otherwise were he to contract her at a specified dower, for she gave him no authority to fix the dower, and the contract would not be operative until subsequently approved by her. When the guardian contracts her without previously consulting her, and then informs her of the marriage after it has taken place, but without mention of either the husband's name or the amount of the dower, and she is silent, there is a difference of opinion as to the effect of the silence, but according to that which is most correct, it is not consent in such circumstances; while, if both husband and dower were mentioned it would be consent; and if the husband alone be mentioned without the dower, then the case is to be determined in the same way as has been already explained, in the consultation before marriage.[1] If the dower alone be mentioned without the name of the husband, and she remains silent, silence is not consent; whether she were consulted before the marriage or only informed of the contract after it took place.

Effect of silence when only the husband is mentioned.

Effect of silence when dower only is mentioned.

If a guardian should contract his ward in her own presence, and she should remain silent, our doctors differ as to effect of silence in such circumstances, but the more correct opinion is that which holds it to be consent.

When the woman is present at the contract.

When a guardian contracts his ward in marriage, and she says, "I am not content," but afterwards assents at the same meeting, the contract is not lawful.[2] And suppose that the guardian has contracted her in marriage, and she has repudiated the contract, but that he afterwards says to her at another meeting, "Several persons have

Effect of certain expressions by a virgin on being consulted as to a marriage, or informed of it.

[1] That is, he may contract her at a *muhr-i-mithl*, or proper dower, but not otherwise.

[2] Because the first dissent had put an end to it.

proposed for you;" whereupon she answers, "I am content with whatever you do," and he then contracts her anew to the same person, but she refuses to sanction the marriage, she is at liberty to do so. When a guardian consults a virgin as to marrying her to a particular person, and she says, "Another is better," this is not permission; but if he inform her of a contract after it has been made, and she gives the same answer, it amounts to a sanction. If the guardian should say to her, "I wish to marry you to such an one," and she says, "It is good;" but, when the guardian has gone out, she says, "I am not content," and he is not made acquainted with her last words until he has actually contracted her to the person in question, the contract is valid. When a guardian has contracted his ward, and she says, "What has been done is approved," or "Thou hast done well," or "God bless you" or "us;" or if she accepts congratulations; all this is consent. But if she say, "I have no occasion for marriage," or "I have already told you I don't wish it," or "I am not content," or "I will not bear it," or "I abhor it;" all these, according to Aboo Yoosuf, amount to rejection: while if she should say, "It does not surprise me," or "I do not wish to be married," that is no rejection; and if she should afterwards consent, the contract would be valid. An adult virgin is married by the son of her paternal uncle to himself, and on the intelligence reaching her, is silent, but afterwards says, "I am not content," she is at liberty to do so, for her uncle's son is a principal in his own part, but only a *fuzoolee* on hers, that is, one acting without any authority; and the contract being incomplete, according to Aboo Huneefa and Moohummud, her silence was no consent. But if he should first consult her about marrying her to himself, and she should remain silent, whereupon he contracts her to himself, the marriage is lawful according to all opinions.

Disputes regarding a virgin's silence.

If a guardian should contract his ward in marriage without consulting her, and a dispute should afterwards arise, the husband saying, "You received the intelligence of the marriage and were silent;" and she, on the other

hand, insisting "Nay, but I rejected," her word is entitled to preference.[1] Whereupon, if he can prove her silence at the time of receiving the intelligence, she is his wife; otherwise there is no marriage between them. According to Aboo Huneefa, she is not liable to be put upon oath; but according to the disciples she is liable; and the *futwa* is in accordance with their opinion.[2] And if she refuse the oath, judgment is to be given against her on the ground of her refusal. If the husband offer proof of her silence at the time of receiving the intelligence, and she offer proof of her rejection, her proof is to be preferred. But if the proof tendered by the husband be that she sanctioned the marriage on being informed of it, and she tenders proof of her rejection of it at that time, his proof is to be preferred. If she were a virgin, and her husband having consummated with her, she should say, "I was not content," she is not to be believed, for permission to consummate is in itself consent. The case would be otherwise if the consummation were against her will, for then it would be no proof of her consent. But if, after permitting consummation, she should tender proof of her rejection, though it is stated in one authority that her proof should be received, yet it is more correct to say that it should be rejected; for her permission is as good as an acknowledgment of consent, and if after acknowledgment she were to bring a suit on the ground of rejection, the suit itself would be invalid and her proof rejected, so also should it be in this case. The word of a guardian is not to be received against his ward as proof of her consent; for that would be to establish a husband's power over her by a guardian's declaration, and his declaration cannot establish a marriage against her after she has attained to puberty.[3]

[1] That is, the burden of proof is on the husband.

[2] When a plaintiff has no proof, he is commonly entitled to the oath of the defendant.

[3] That is, he has no power as guardian to contract her against her will, and so put her under subjection to a husband; but if his declaration could produce the same effect, it would, in fact, be a covert way of giving him the power.

A man contracts his adult daughter in marriage, and it is never determined till the death of her husband whether she assented to or rejected the marriage; his heirs then allege that she was married without her authority, knew nothing of the transaction, and never consented to it, and has, therefore, no right to any share in the inheritance; the woman insists, on the other hand, that the contract was entered into by her father with her authority; in these circumstances her word is to be preferred, and she is entitled to a share in the inheritance, being also obliged to observe an *iddut*. But if she were to say, "My father, indeed, contracted me in marriage without my authority, but on receiving the intelligence I declared my consent," she would not be entitled to her dower nor to any share in the inheritance.

How a *thuyyibah's* consent is to be given

When a *thuyyibah* is asked for permission to contract her, or when informed that she has been contracted, her consent must be verbally expressed. And as her consent is established by speech, for instance, when she says, "I have consented," or "accepted," or "approved," or the like; so, also, it is manifested by her asking for her dower or maintenance, or permitting matrimonial intercourse, or accepting congratulations, or laughing from satisfaction, not in jest. But if a *thuyyibah* be contracted in marriage, and accept a present after the contracting, or partake of her husband's food, or serve him as before, this is not consent. But if he were to retire with her, and she consenting, would that amount to recognition of the marriage? There is no report upon this point, but, in my opinion, it would be so.[1]

A woman may sometimes be treated as a virgin, though not so physically.

If the signs of virginity be lost by jumping, or during the courses, or by a wound, or by long abstinence from marriage, the woman is still to be accounted a virgin: and so, also, according to Aboo Huneefa, if they be lost by illicit intercourse; but both the disciples were of opinion that in such a case silence would not be sufficient evidence of consent. And if she were actually turned out of doors,

[1] The *Zuheereeah* is cited, and the opinion is probably that of the author.

and subjected to *hudd* or the specific punishment for such intercourse, it is quite correct to say that silence would not be sufficient; so, also, if she is habitually addicted to the vice.

Virgin wife.

A virgin whose husband has died after retirement with her, but before actual consummation, is still to be treated as a virgin when she enters into another marriage; and the rule is the same with regard to one who has been judicially separated from an impotent husband. But if a woman lose her virginity by an invalid marriage, or by being compressed by mistake, she marries subsequently as a *thuyyibah*.

CHAPTER V.

OF EQUALITY.

Husbands should be the equals of their wives.

He has said on whom be blessings and peace,[1] that "women are not to be married except to equals."[2] To make marriages binding, the husbands should be the equals of their wives; that is, not inferior to them. But it is not required that the wives should be the equals of their husbands. Hence, if a woman should marry a man better than herself, a guardian has no power to separate them; for he is not disgraced by a man having subject to him one who is not his equal.

1. In respect of lineage.

Equality is to be regarded in several particulars. Among these are, first, descent or lineage. Among Koreishites all are equal; so that one who is not of the family of Hashim[3] is the equal of a Hashimite; but an Arab who is not a Koreishite, is not the equal of a Koreishite; while, among the other Arabs, one is equal to another, the Ansar[4] and the Mohajirite[5] being in this alike. The Bunnoo Bahalu[6] are not on an equality with the

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[1] The Prophet.

[2] *Hidayah*, vol. ii., p. 49.

[3] He was the grandfather of the Prophet, and of the tribe of *Koreish*, which was considered the noblest in that part of the country.

[4] Literally, assistants. Those of Madeena, who aided the Prophet after his flight from Mecca, called the Hegira, and adopted as the commencement of the Moohummudan era.

[5] Refugees. Those who accompanied him in his flight.

[6] Tribe of Bahalu. She was a woman of Humadan, who lived under the protection of Maad, a descendant of Kees. Their children were said to take their lineage from her (*Inayah*, vol. ii., p. 44), and were notorious for their vices (*Kifayah*, vol. ii., p. 50).

general body of the Arabs; and it is correct to say that all Arabs are equals, as Aboo'l Yusur has stated in his Mubsoot. *Mowallees* (who are all persons other than the Arabs) are not the equals of Arabs, but among themselves one is the equal of another. It has been said that one distinguished by merit is the equal of one of high lineage, so that a lawyer is the equal of a woman descended from Aly. Kazee Khan and Atabee have reported this; and in the Yoonabia a learned man is said to be the equal of such a woman; but it would be more correct to say that he is not her equal.[1]

2. In respect of Islam of paternal ancestors.

The second particular in which equality is to be regarded is the *Islam* of paternal ancestors. One who himself has embraced the faith, and whose father was not a Mooslim, is not the equal of a person who has had one paternal ancestor a Mooslim; and a person who has had only one such ancestor a Mooslim is not the equal of a person who has had two or more such ancestors Mooslims. A man who has himself embraced the faith is not the equal of a woman who has had two or more paternal ancestors Mooslims, but is the equal of one like himself; that is, when they are living among people who had long previously become Mooslims; but if their adoption of the faith is only recent, so that the distinction is not a reproach, one party is the equal of the other. A man who has had two paternal ancestors in the faith is the equal of a woman who has had three or more, for descent or lineage is completed by father and grandfather. A man who has apostatized from the faith, but returned to it, is the equal of a person who has never fallen into apostacy.

3. In respect of freedom.

The third particular in which equality is to be regarded is freedom; and a slave, whoever he may be, is not the equal of a free woman, nor one whose father was emancipated the equal of a woman free by origin, that is, a woman whose father and grandfather were free.[2] A

[1] The *Ghayut-ool-Surwujee* is the authority cited, and apparently adopted by the compilers of the *Futawa Alumgaree*.

[2] *Inayah*, vol. ii., p. 45.

freed man is the equal of one like himself. But one whose father was emancipated is not the equal of a woman two of whose paternal ancestors were free. A man who is free by origin through father and grandfather—that is, one whose grandfather was born free and a Mooslim, is the equal of a woman whose paternal ancestors were free and Mooslims; but if his grandfather had been emancipated, or an infidel converted to the faith, he would not be her equal. And a freed man is not the equal of a woman whose mother was free by origin and father a freed man. On this point, however, it is said that there is no report. The freed woman of a noble tribe is not the equal of the freed man of an ignoble person, for *wula* is like lineage; so that if the freed woman of a Hashimite were to marry herself to the freed man of a mere Arab, her emancipator would have a right to object. The freed woman of a noble tribe is the equal of Moowallee.

Two last particulars applicable to *Ajimees*.

Equality in respect of freedom and *Islam* are to be regarded in the case of *Ajimees* (Persians), for they pride themselves in these distinctions and not in lineage. But in the case of Arabs, the *Islam* of a father is not a condition of equality. So that if an Arab whose father was an infidel should marry an Arab woman whose paternal ancestors were Mooslims, he is her equal; but freedom is indispensable to an Arab, for it is not lawful to reduce Arabs to slavery.

4. Equality in respect of property.

Fourthly, regard is to be had to equality in respect of property; by which is meant that a man should possess enough to pay the dower and provide for the maintenance of his wife. This is what is required in the Zahir Rewayut; so that if a man should not have enough for both of these purposes, or should not have enough for one of them, he is not the equal of his wife, whether she be rich or poor. No regard is had to anything beyond this; so that if he should have enough for these two objects, he is to be considered her equal in respect of property, though she were a person of great wealth. If he should be able to maintain her out of his gains, but have no means of paying her dower, our doctors differ as to the legal effect

of such partial ability, but the generality agree that he would not be her equal. By "dower" is to be understood that part of it which is prompt, which again is to be determined by custom,[1] and no regard is to be had to the remainder, even though it were presently payable under the actual agreement. With regard to maintenance, Aboo Nusr has said that it must be understood as food sufficient for one year, but Naseer used to say food for one month, and this is more correct. And it is reported as from Aboo Yoosuf, that when a man is able to pay the dower, and makes from day to day enough to support his wife, he is her equal, and this is correct. The ability to maintain a wife is required only when she is a grown woman, or, if a young girl, when she is fit for matrimonial intercourse; for if she be young and unfit for that purpose, she has no right to maintenance, and it is enough if the husband can pay the dower. A poor man marries, and his wife abandons or gives up her claim to the dower, but this does not make him her equal, for regard must be had to his condition at the time of the contract. A man contracts his young sister to a youth who is able to maintain her, though not to pay the dower, but his father, who is rich, approves of the marriage; this renders it lawful, for a person is accounted rich in respect of dower on the ground of his father's wealth; but not so in respect of maintenance, as it is a common practice among men for fathers to take upon themselves the dower of their young sons, but not their maintenance. Though a man be in debt to the amount of the dower, yet he may still be an equal, for it is optional with him to pay whichever debt he pleases.

5. In respect of piety and virtue.

Fifthly, equality is to be regarded in respect of piety and virtue, according to Aboo Huneefa and Aboo Yoosuf, and this is valid. A profligate, therefore, is not the equal of a good woman, whether his profligacy be notorious or not. A person marries his young daughter to a man, supposing him to be virtuous, and not a drinker of wine, but

[1] See *post*, p. 126. The *Tibyeen* is the authority cited.

afterwards finds him to be an habitual drunkard, and the girl on attaining to puberty declares that she is not content with the marriage; in these circumstances, if the father was not aware of his being a drinker of wine, and if the persons of his family generally were known to be virtuous, the marriage is void, or will be annulled; and all are agreed upon this point. There is a difference of opinion between Aboo Huneefa and his two companions with regard to the marriage by a father of his daughter to a man whom he knows to be not her equal. According to Aboo Huneefa the marriage is lawful, because a father being zealous and diligent for his daughter's interest, must be presumed to have given the fullest consideration to the matter, and to have taken the person who is not her equal as being on the whole better than an equal. Equality in this particular is required at the commencement of the marriage, without reference to its permanence. So that if a man were the equal of his wife in piety and virtue when he married her, but should afterwards become depraved, that would be no ground for cancelling the marriage.

6. In trade or business.

Sixthly, equality is to be regarded in trade and business. Aboo Huneefa, according to the report in the Zahir Rewayut, was of opinion that no regard should be paid to difference of business, and that a horse-doctor is the equal of a perfumer. But, according to Aboo Yoosuf and Moohummud, and another report of Aboo Huneefa's opinion, the professors of low trades, such as horse-dealers, cuppers, weavers, sweepers, and tanners, are not the equals of perfumers, drapers, and bankers;—and this is correct. In like manner, a shaver is not their equal. It is reported on the authority of Aboo Yoosuf, that when trades are nearly on a footing of equality, the difference between them should not be taken into consideration, and they are to be regarded as equal. Hence a weaver is the equal of a cupper; the tanner, of the sweeper; the brazier, of the blacksmith; and the perfumer, of the draper. And according to Hulwaee, the *futwa* is in accordance with this view.

Equality is not

Beauty is not taken into account as regards equality.

Opinions differ as to understanding; some say that it is not to be regarded in a question of equality. required in respect of beauty.

When a woman has contracted herself in marriage to a man who is not her equal, the marriage is valid according to Aboo Huneefa, as reported in the Zahir Rewayut, and also according to the latest opinions of Aboo Yoosuf and Moohummud. So that before an actual separation of the parties, the case admits of repudiation in the ordinary form, or by *Zihar* or *Eela;* and reciprocal rights of inheritance with the like consequence ensue. Her guardians, however, have a right to object to the marriage. It is reported by Aboo Husn, as from Aboo Huneefa, that the marriage is not contracted: and many of our doctors have adopted his report. In our time, the report of Husn is preferred for the *futwa;* and the Imam Surukhsee has said that it is more cautious to abide by it.[1] Buzzazeeah has also reported that the *futwa*, as to the legality of the marriage, be the woman a virgin or *thuyyibah*, is according to the saying of the great Imam; that is, when the woman has a guardian; but if she have none, the marriage is valid according to general agreement. Marriage by a woman to one not her equal is valid; but may be objected to by her guardians.

To make a separation for this cause—that is, inequality —it must be done before the judge; and, without cancellation by a judge, the marriage between the parties is not cancelled.[2] The separation, however, is not a repudiation; so that if the husband has not consummated with her, she is not entitled to any part of the dower.[3] But if he have consummated, or if a valid and complete retirement has taken place, he is liable for the whole of the Objection must be made before a judge, to effect a separation. The separation is not a repudiation,

[1] The reason for his opinion, given in the *Kifayah*, is that it is not every guardian who thinks it proper to bring such a matter before the judge; nor is every judge just; and it is therefore better to shut the door against such marrying (vol. ii., p. 35). The same reason is obscurely given in the *Hidayah* (original) for the different report of Aboo Huneefa's opinion.

[2] It must, therefore, have been valid in the first instance; and it is evident that the compilers, as well as the author of the *Hidayah*, give the preference to the report of the Zahir Rewayut.

[3] If it were a repudiation she would be entitled to half the dower.

though resembling it in some of its effects.

dower specified, and for maintenance during the *iddut*, the observance of an *iddut* being incumbent on the woman.[1] And when a woman has married a man who is not her equal, and the judge, after consummation, has decreed a separation between the parties at the suit of the guardian, awarding payment of the dower against the man, and the observance of an *iddut* upon the woman, and subsequently to all this the man marries her again during the *iddut*, without the consent of her guardian, and the judge again separates them before a second consummation, the woman is entitled to a second full dower, and must observe another *iddut*, according to Aboo Huneefa.[2]

All guardians are competent to object.

According to some of the learned it is only *Mooharim* (or relations within the prohibited degrees) that are entitled to raise the question before the judge; but, according to others, there is no difference between *Mooharim* and other guardians in this respect; so that the son of a paternal uncle and the like are equally entitled to raise the question; and this opinion is sound. But the power does not belong to mere maternal relatives, and is confined exclusively to the *úsubah*, or agnates.

Tokens of consent by guardian.

When a woman has married herself to a man not her equal without the consent of her guardian, and the guardian takes possession of the dower and provides her *jihaz*,[3] this amounts to consent and acquiescence upon his part; and if he were only to take possession of the dower without providing the *juhaz*, though there is a difference of opinion on the point, yet, according to the sounder view, that would still be consent on his part, and acquiescence in the contract.

Guardian may object till the birth of a child.

The delay of a guardian to sue for a separation does not annul his right of cancellation, even though it were prolonged till the woman gives birth to a child. But after

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[1] These effects would be the same if the separation were a repudiation.

[2] This is the case also after divorce. See *Hedaya*, vol. i., p. 367.

[3] Paraphernalia, or a portion given to a daughter; whatever a bride brings with her to her husband's house.

the woman has actually borne a child to her husband, the guardians have no longer the right to cancel the marriage; it is stated, however, in the Mubsoot of Sheikh ool Islam, that when a woman has married herself to a man not her equal, and her guardian, being aware of the fact, has remained silent till she has borne several children, and then begins to litigate the matter, he has still power to separate the parties.[1]

Consent by one guardian binds himself and others more remote.

When a woman has married herself to a man who is not her equal, and one of her guardians has given his consent, it is no longer in the power of that guardian, or of any other equal to or below him, to cancel the marriage; but one superior to him may still do so. The rule is the same when one of the guardians has contracted her with her consent. And when a guardian contracts a woman in marriage to a man not her equal, who consummates with her and then repudiates her absolutely, after which she contracts herself again in marriage to the same man, without the concurrence of her guardian, the same guardian is at liberty to cancel the marriage. The case would be different if the repudiation were revocable and the husband should recall her, for then the guardian would have no right to separate the parties. It is stated in the Moontuku of Ibn Sumawt, that a woman being under or subject to a man who is not her equal, the matter is contested by her brother in the absence of her father, who is at such a distance as precludes his attendance; or it is contested by another guardian, besides whom there is one nearer in degree but he is at a precluding distance; and the husband pleads that the nearer or superior guardian had contracted her to him in marriage; in these circumstances he is to be directed to produce his proof, and if he do so it is to be received and taken as against the superior guardian; otherwise the parties are to be separated. It is also related in the Moontuku, as upon the authority of Aboo Yoosuf, that

Consent of a nearer guardian may be pleaded in his absence to objection made by one more remote.

Consent of a guardian once given

[1] The Nihayah is cited, and the author's own opinion seems to be contained in the first part of the extract, and it is confirmed by that of the author of the *Kifayah*, who also notices the difference of reports. —Vol. ii., p. 35.

is not affected by a change in his relation to the party.

when a person has married his young slave girl to a man, and then claims her as his child, her descent is established, and she remains as before if the man were her equal; and though he were not her equal, the marriage would be binding by analogy, because the person who contracted her was her guardian. Even supposing that he should sell the slave, and the purchaser were to claim her as his daughter, the result would still be the same if the husband were her equal; and, indeed, ought to be so also by analogy though the man were not an equal, because a guardian-proprietor had contracted her in marriage.

A guardian has no option with regard to a contract made by himself, unless equality is stipulated for, or the husband represents himself to be the equal of the wife.

A slave marries a woman with the permission of his master, without stating at the time of the contract whether he is free or a slave, and neither the woman nor her guardian has any knowledge of the fact, but it afterwards transpires that he is a slave; in these circumstances, if it were the woman herself who made the contract, she has no option, but the guardian is at liberty to cancel it, and if it was the guardian who made the contract neither she nor he has any option in the matter. In like manner, if the slave had stated that he was free, all the other circumstances being the same, the guardian would have an option. From this case it is manifest that if a woman should contract herself in marriage to a man, not knowing whether he is her equal or not, and not stipulating for equality, and should afterwards be informed that he is not her equal, she has no option, but her guardians have an option;[1] and that if the guardians are the parties who enter into the contract on her behalf, and with her consent, being themselves ignorant whether the man was her equal or not, none of them has any option in the matter, unless equality is expressly stipulated for, or the guardians are told that the man is the equal of the woman, in which case, if it should subsequently transpire that he is not her equal, they would have an option. And the Sheikh ool Islam being asked with regard to a person of unknown descent whether he is the equal of a woman

[1] That is, if the contract was made by the woman.

whose descent is known, answered in the negative. But suppose that the husband has assumed a lineage different from his own, and that his true lineage turns out to be inferior to what he assumed, and unequal to the woman's, in that case all, that is, both the woman and her guardians, would have the right to cancel the marriage; while, if the true lineage should be equal to that of the woman, she only, and not her guardian, would have the right of cancellation, and if it prove to be superior to what he asserted it to be, neither she nor they have that right. If it be the woman who is the deceiver of the man, by setting up a lineage different from her own, the husband has no option, and she remains his wife, to hold by or repudiate as he may think proper. If a woman should marry on a condition that the man is such an one, the son of such an one, and he proves to be only the half-brother by the father, or the paternal half-uncle by the father of the person indicated, she has the right of cancellation. A man marries a woman of unknown descent, who is then claimed as his daughter by a man of the tribe of Koreish, and her descent is established before the judge, who decrees her to be his daughter, and the husband is a barber. Such a father may separate the man from his daughter. But suppose the case to be different, and that the woman acknowledges herself to be the slave of another person, her master would not have the power to cancel the marriage.

Case of assumed lineage by the husband proving false.

When a woman has married herself to a man who is not her equal, can she refuse her person till her guardians give their consent? The lawyer Aboo Leeth used to decide in favour of her right to do so; but this is contrary to the Zahir Rewayut, and many of our doctors decide, agreeably to the latter, that she cannot refuse herself.[1]

A woman unequally matched by herself, cannot refuse her person to her husband.

If a woman should marry for less than her proper dower, the guardian may object till the full amount of the dower is made up, or he may separate her from her husband; and when the separation takes place before consummation she is not entitled to any part of the dower; but if it should take place after consummation, she would be entitled to the full amount specified.

A marriage entered into by a woman at an inadequate dower may be objected to by her guardian.

So also if one of the parties should die before a separation.[1] This, however, was only the opinion of Aboo Huneefa, and according to his two companions, the guardian has no right to object. It is to be observed that this separation can be effected only before a judge, and that until the judge has pronounced a decree for a separation, the case admits of repudiation in the ordinary form, or by *Zihar* or *Eela*, and that the right of inheritance remains in full force.

Effect of duress when contract is made by a guardian and duress restricted to him,

when extended to the woman.

When the Sultan compels a man to give his ward in marriage to one who is her equal for less than her proper dower, the woman herself assenting, and the constraint is then withdrawn, the guardian may sue the husband either to make up the dower to the proper amount, or for a separation; but, according to Aboo Yoosuf and Moohummud, the guardian has no such right in the matter. And in like manner, when the woman is also compelled, (that is, not willingly assenting), and the coercion is subsequently withdrawn; the woman and the guardian have both the right of contesting the matter, according to Aboo Huneefa, but in the opinion of the other two this right belongs exclusively to the woman.

Where a woman is constrained to marry herself to an equal she has no option on the restraint being removed.

Otherwise when he is not her equal.

When a woman is obliged to marry herself to a man who is her equal, and at a suitable dower, she has no option on the compulsion being withdrawn. But if the man is not her equal, or the dower is less than the proper amount, and she is compelled to contract herself, she has an option on the removal of the constraint. When a woman is constrained to enter into a marriage, and does so, the contract is lawful, and no responsibility attaches to the compeller. If the husband be her equal, and the specified dower more than or equal to that of her equals, it remains lawful; but if the specified dower be less than that of her equals, and she demands that it be made up to the proper amount, the husband may be required to complete it or separate from her. If he completes the dower to the proper amount, good and well; if not, and he

[1] That is, full dower would be due in that case.

separates from her before consummation, he is not liable for anything. If consummation has taken place and it was against her will, that would be equivalent to an assent on his part to complete the dower, while, if the consummation was with her consent, that would be an acquiescence on her part in the specified dower. It would still, however, be open to the guardians, according to Aboo Huneefa, to object, though in the opinion of the other two, they would have no such right. All this is on the supposition that the husband is her equal. But when he is not her equal the guardians may separate between the parties; and if the husband have consummated with her against her will, he is liable for the full dower of her equals, the right of the guardians to object to the marriage remaining intact; while, if the consummation were with her consent, he would be liable for no more than the dower specified, that being tantamount to assent on her part to the marriage; for the surrender of her person is as much a sanction of the contract as her words "I am content," and both her options, viz., that to separate on account of inequality, and that to require the completion of her dower, would fall to the ground; while the options of her guardians to separate on account of inequality, or for deficiency of dower, would remain intact according to Aboo Huneefa, but according to the other two they would have no more than the option. To separate on account of inequality, and supposing the separation to take place before consummation, the husband would not be liable for anything.

Unsuitable marriage by a father on behalf of his young child.

If a man should marry his young child to one who is not an equal, as, for instance, to a slave, whether the child be a son or daughter; or should marry the child at an improper dower, as, for instance, if the child be a daughter at less than the dower suitable to one of her condition, or if the child be a son at a dower in excess of what is proper to the condition of his wife, the marriage is lawful according to Aboo Huneefa. But according to the other two, if the deficiency or excess be very glaring, it is not lawful. The doctrine of Aboo Huneefa, however, in the matter,

is the more sound. Upon this point they were all agreed, that it is only a father or grandfather who can lawfully enter into such a contract, and that a judge cannot. The difference between them has reference only to a case where it is not known that the father acted carelessly or wickedly in the matter; but where this is known, the marriage is void according to all their opinions; and in like manner, they are agreed that if he were dumb at the time of contracting his child in marriage, the contract would not be lawful. When the excess or deficiency in the dower is within reasonable bounds, the marriage is also lawful according to general agreement. And it would be so whoever the guardian might be who made the contract, whether a father, grandfather, or any other.

CHAPTER VI.

OF AGENCY IN MARRIAGE.

An agent in marriage must contract in the name of his principal,

[1] THERE are some contracts, such as sale, purchase, and hiring, which an agent is under no necessity of referring to his principal, but may contract in his own name; and in these, the rights and obligations of the contract are the agent's, in the same way as if he were the principal, and the principal a stranger.[2] There are other contracts in which the agent is no more than a negotiator, and the principal himself must be referred to as the contracting party, and he alone is entitled to the rights and liable to the obligations of the contract.[3] Marriage, which is frequently effected through an agent on both sides, and almost invariably so on the part of the woman, belongs to the latter class of contracts.[4] Hence, the marriage agent of a man cannot be called upon to make good the dower; nor is the marriage agent of a woman entitled to receive it, or bound to make delivery of her person.[5] The appointment of an agent for marriage may be general, so as to include the power to select a husband or wife; or it may be special, for the purpose of contracting a marriage that has been already agreed upon between the parties.

who is alone entitled to its rights, and liable for its obligations.

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[1] The first three paragraphs are an addition to the original digest.

[2] *Fut. Al.*, vol. iii., p. 667.

[3] Ibid., p. 668.

[4] *Hedaya*, vol. i., p. 117.

[5] *Fut. Al.*, vol. iii., p. 667.

Marriage may be contracted by a *fuzoolee*, or person acting without any authority.

In both the classes of contracts which have been referred to, a *fuzoolee*, or person wholly unauthorized, may take upon him to act for one of the parties; and the contract is effected, but in dependence on the approval of the party for whom he has acted. Until confirmed by him, it is not binding on the other party, who may therefore retract. In sale, the *fuzoolee* has also the power to retract;[1] but it does not follow that he should have the like power in marriage, which is a contract of a different class; nor even that a duly authorized agent, who has entered into a contract of marriage for his principal with a *fuzoolee*, should in all cases have the power of cancelling the contract without referring to his principal.

The following cases, which have been selected from a great number in the *Futawa Alumgeeree*, relate to the construction to be put on general and special powers of agency in marriage, and the ratification of contracts that have been entered into by *fuzoolees:* to which is added a short section on the cancellation of such contracts.

A marriage agent may be appointed without witnesses. He cannot contract his principal to himself,

The appointment of an agent for marriage is valid without witnesses, though their presence is a necessary condition of the contract.

When a woman says to a man, "Marry me to whomsoever you please," this does not authorize him to contract her to himself. A man appoints a woman his agent to contract him in marriage, and she does so to herself, this is not lawful. When a woman has appointed a man her agent for the general management of her affairs, and he marries her to himself, whereupon she says, "I intended only buying and selling," the marriage is not lawful; for even if she had appointed him her agent for marriage, he would not have been authorized to marry her to himself: and the case is stronger here.

unless specially authorized;

A woman appoints a man to marry her to himself, and he says, "I have married such an one to myself," the

[1] *M. L. S.*, p. 221.

marriage is lawful, even though he should not add, "I have accepted."[1]

nor to any one for whom the agent can act on his own authority.

A man directs another to contract him in marriage, and he does so to his own little daughter, or to the little daughter of his brother (he being her guardian), this is not lawful. So also with regard to any other for whom he has power to act without her authority. But if he should marry the man to his grown-up daughter with her own consent, though it is stated in the Asul that, according to Aboo Huneefa, the marriage would not be lawful, unless assented to by the husband; yet in the opinion of the other two it would be lawful: and if the woman were the agent's grown-up sister, and he had married his principal to her with her own consent, the marriage would be lawful, without any difference of opinion.

The agent of a woman cannot contract her to his own father or son, nor to any one who is not her equal; but mere personal defects are no objection either in the man or woman selected.

When an agent on the part of a woman marries her to his own father or son, the marriage is not lawful according to Aboo Huneefa. And if the son be a child, it is unlawful, without any difference of opinion.

When a marriage agent on the part of a woman contracts her to a person who is not her equal, the marriage is unlawful according to all opinion. But if the party be her equal, though blind, or lame, or a boy, or lunatic, the marriage is lawful. So also even though he should be an eunuch or impotent. And if a marriage agent on the part of a man should contract him to a woman who is blind, or has a withered hand, or is physically impenetrable, or a child, whether capable or incapable of coition, or free or a slave, equal or unequal, Mooslim or *Kitabee*, the marriage is lawful according to Aboo Huneefa.[2] But if the agent should marry him to a slave of his own, it would be unlawful according to all their opinions. A person appoints another his agent to marry him to a

[1] As to a person acting for both parties, see *post*, p. 84.

[2] This indicates a difference of opinion on the part of the disciples, but it appears from the *Hedaya*, vol. i., p. 121, that it was confined to the case of marriage to a slave; and the author in stating the reason for the opinion of Aboo Huneefa seems to identify himself with it, by using the expression "*we* say." Original, vol. ii., p. 57.

woman, and he does so to one whom the principal had himself repudiated before the appointment; the marriage is lawful, however, unless the principal had previously complained to him of something bad in her disposition; but if the repudiation should not take place till after the appointment, the marriage would not be lawful. And in like manner, if the agent should marry his principal to one from whom he had separated by *eela*, or who was in her *iddut* for him, the marriage would be lawful. But if the woman were actually the wife of another, or observing *iddut* on account of another, the parties must be separated; and if the principal had consummated with her, though in ignorance, he would be liable to her for whichever might be the less, of her proper dower, or the dower mentioned in the contract, without, however, any right of recourse against the agent, whether he had acted knowingly or in ignorance. And the result would be the same if the agent should marry him to the mother of his wife.

How instructions are to be construed when they are restricted to a particular description of woman.

A man directs an agent to marry him to a white woman, and he marries him to one that is black, or *vice versâ*, the contract is not valid; but it would be valid if the direction were for a blind woman, and the agent should marry him to one having sight. An agent is directed to marry his principal to a slave, and he marries him to a free woman; this is not lawful; but it would be so if the woman were a *Mookatibah*, *Moodubburah*, or *Oom-i-wulud*. When an agent for an invalid marriage makes one that is lawful, it is not lawful. A person is appointed to marry another to one of his tribe or family, but he marries him to one of a different family; the marriage is not lawful. So also if the authority were to marry him to a woman of a particular town or family, and the agent should marry him to one of a different town or family, the marriage would not be lawful.[1]

When they involve an authority to the woman to repudiate herself.

When a man says to another, "Marry me to a woman, and when thou hast done so her business is in her hand," and the agent then marries him to a woman, but without

[1] *Ful. Al.*, vol. iii., p. 714.

making any stipulation to that effect in her favour, the business is nevertheless in her hand. But if he had said, "Marry me to a woman, and stipulate in her favour that when thou hast married her her business is in her own hands," and the agent should then marry him to a woman, her business would not be in her hands unless the stipulation were actually made. And if a woman should appoint a man her agent for marriage, and he should stipulate on her behalf, as against the husband, that when he, the agent, shall have married her to him, her business will be in her own hand, and the agent should thereupon marry her to the man, the marriage would be lawful, and the business would be in her hand from the time of the marriage.[1]

When they are for one woman,

A man directs another to marry him to one woman, and he marries him to two women by one contract, the principal is not bound as to either. But if he should allow the marriage as to both or either, the marriage so allowed would become operative. And if there had been two distinct contracts the first would be binding, and the second suspended on his sanction. If an agent be appointed to marry a man to a particular woman, and he marries him to that woman and another with her, the marriage is valid as to the former; and if the agent were appointed to marry him to two women in a contract, and he should marry him to only one, the marriage would be lawful. And in like manner, if the appointment were to marry him to "*these* two women in a contract," and he should marry him to only one of them, for making a separation in the contract is not acting contrary to instructions, unless the principal had said, "Do not marry me except to two by one contract," when, if the agent should marry him to one, the marriage would not be binding. If he should say, "Marry me to *these* two sisters," it would be a permission as to one of them, unless he had said, "in a contract." And if the words were "these two in a contract," and they should happen to be sisters, it would be lawful to make a separation in the contract, unless he had actually forbidden it.

or for two.

[1] See *ante*, p. 19, as to the legality of such stipulations.

When they are restricted to a particular woman,

If a person should appoint an agent to marry him to such an one, and the woman proves to have a husband, but he dies, leaving her a widow, or repudiates her, and his *iddut* having passed, the agent then marries her to his principal, the marriage is lawful. A person appoints an agent to marry him to a particular woman, and the agent marries her himself, this marriage is lawful; and if the agent should live with her a month, consummate with her, and then repudiate her, and after the expiration of her *iddut* should marry her to his principal, the marriage would be lawful. But if instead of the agent's marrying her, the principal should himself marry, and then irrevocably repudiate her, and the agent should afterwards marry him to the woman, the contract would not be lawful.

but silent as to her dower,

When a man appoints an agent to marry him to a particular woman, and he does so for more than her proper dower, if the difference be not excessive the marriage is lawful, without any difference of opinion; while, if it be beyond the reasonable limits of error in such circumstances,[1] though the result would be the same according to Aboo Huneefa, the marriage would not be lawful according to the other two.

or restricted as to its amount.

If one should appoint an agent to marry him to a particular woman for a thousand *dirhems*, and the agent should do so for two thousand, the marriage would be lawful if allowed by the husband, but void if rejected by him. If the husband, in ignorance that the agent had exceeded his instructions, should proceed to consummate the marriage, he would still have his option of confirming or rejecting it; and if he should elect to confirm it, he would be liable for the whole sum mentioned; while, if he should reject the marriage, it would be void, and he would be liable for no more than the proper dower, if that were less than the sum mentioned; otherwise he would be liable for the whole sum. If the husband should be unwilling to pay the excess, and

[1] Arab., *Yutaghabun-oon-nass*, which is described in the *Tarifah* as something beyond what a valuator would determine to be proper in the circumstances.—*Freytag*.

the agent should say, "I will be debtor for it myself, and render the marriage obligatory on you both," it would not be in his power to do so.

When they are general as to the person, but restricted as to the dower.

A person appoints a man his agent to marry him to a woman on a dower of a hundred, with a condition that the prompt shall be twenty and the deferred eighty,[1] but the agent makes the prompt thirty; the contract is not valid, and is suspended for the sanction of the husband. If he should proceed to consummate in ignorance of what was done by his agent, the contract would not be effected; but if he should consummate with knowledge of the fact, that would be an allowance of the marriage. A woman directs a man to contract her in marriage for two thousand, but he does so for one thousand, and, the woman being in ignorance of the fact, the marriage is consummated; she may, however, still repudiate it, and is entitled to her full proper dower, whatever that may amount to. A man appoints an agent to marry him to a woman for a thousand *dirhems*, and the woman refuses until the agent adds a piece of cloth of his own; the marriage is suspended on the sanction of the husband, for the agent has acted contrary to his instructions, and the husband might be endamaged thereby, since if another party should afterwards establish a right to the cloth, the husband would be liable for its value, not the agent, who acted gratuitously in the matter, and, therefore, could not be made responsible. If the husband should not be informed of the addition made to the dower by the agent until he had consummated with the woman, he would still have an option; for consummation in such circumstances would not be an assent to the agent's departure from his instructions, and he might either hold to his wife or separate from her; but if he should separate from her, she would be entitled to whichever may be the less of what was mentioned to her by the agent, or her proper dower.

[1] It is a very general custom in Moohummudan countries to divide the dower into two parts, one termed *moujjul* (or prompt), and the other *moowujjul* (or deferred), which are the terms used in the text.

Case of an agent contracting for a dower out of his own property.

A person appoints an agent to marry him to a woman, and he does so for a slave, or a piece of land, of his own; the marriage is valid and operative, and the agent is bound to make delivery; and when he has done so, he has no right of recourse against the husband. Yet if the woman should not take possession of the slave, and he should die, the agent would not be answerable, and she must have recourse for the slave's value to her husband. And if the agent should contract his principal to the woman for a thousand *dirhems* of his own, by saying, "I have married thee to this woman for a thousand of my own property," or "I have married thee to this woman for these two thousand," the marriage would be lawful, and the husband liable for the dower indicated, which could not be demanded from the agent.

Miscellaneous cases.

A person appoints an agent to marry him to a woman to-morrow after sunrise, and he does so before sunrise, or on a subsequent day, the marriage is not lawful; but suppose that a woman should appoint an agent to contract her and take a writing for the dower, and that he does so without taking a written engagement for it, the marriage would, nevertheless, be lawful. A man says to another, "Marry this, my daughter, to a man given to learning and religion, with the advice of such an one," and the agent contracts her to a man answering the description, but without consulting with the person referred to, the contract is nevertheless lawful; for the object of taking his opinion was merely to ensure the prescribed qualities, and, as that object has been accomplished, there was no necessity for taking the person's advice. A man sends another to solicit a certain woman on his behalf, and the agent contracts him to her in marriage, the contract is lawful, even though it should be at a dower glaringly above the proper dower of the woman.[1] A man appoints another to solicit the daughter of such an one on his behalf, and

[1] The difference between this and the case on page 80 seems to be that there the negotiation was already completed by the principal, but here the woman has still to be *solicited*.

the agent comes to the father and says, "Give me your daughter," and the father answers, "I have given her," this is a contract to the agent himself, even though he should add, "I have accepted for such an one;" for as soon as the agent has said, "Give me," and the father, "I have given," the contract is complete. But if the agent should say, "Give your daughter to such an one," and the father should answer, "I have given her," there would be no contract until the agent add, "I have accepted;" and whether he merely says, "I have accepted," or should say, "I have accepted for such an one," the contract would be to the principal in both cases. And though preliminaries had already taken place between the father and the agent for a marriage to his principal, and the father should say, "I have married my daughter for such a dower," without saying to the speaker or to his principal, and the speaker should answer, "I have accepted," there would be a valid marriage to the agent.

Agent cannot delegate his authority.

A marriage agent cannot delegate his authority to another; but if he should do so, and the delegate should make a contract in the presence of the original agent, it would be lawful. When a woman has appointed a man her agent to marry her, and has said, "Whatever thing you may do is lawful," the agent may lawfully appoint another to contract her in marriage, and if death were imminent, and he should bequeath the agency to another, and the second agent should contract her in marriage after the death of the first, the contract would be lawful.

When two agents are appointed, one cannot act alone.

When two agents are appointed by a man or a woman to contract him or her in marriage, and one of the two enters into a contract, it is not lawful.

Dispute between principal and agent as to the subject of the contract.

If a person should appoint another his agent to contract him in marriage to a woman, and the agent should do so, but the principal and agent should differ with regard to the woman with whom the contract was made, the husband saying, "You married me to this woman," and the agent, "Nay, but to this other;" in these circumstances the statement of the husband is to be preferred if believed or assented to by the woman, because they are both agreed,

or believe each other, as to the marriage, and it is established by their mutual belief. And this case is a precedent that marriage is established by mutual belief.[1]

Discharge of agent.

When a woman, after appointing an agent to contract her in marriage, makes a contract for herself, this is a discharge of the agent from his office, whether he be made aware of the fact or not. But when formally discharged his functions do not cease till he becomes acquainted with the fact, and if he should exercise them in the meantime by contracting her in marriage, the contract would be lawful. If the agent were appointed by a man, the appointment having reference to a particular woman, and the man should himself marry the mother or daughter of the woman, the agent would be discharged from his office. If an agent be appointed by a man to marry him to a particular woman, and she should apostatize and take refuge in a foreign country, but be subsequently captured and return to the faith, after which the agent should contract her to his principal, the marriage would be lawful according to Aboo Huneefa. When a man who has already four wives appoints an agent to marry him to a woman, the appointment is to be regarded as having reference to a time when it can be lawfully exercised, as, for instance, after he may absolutely repudiate one of his wives.

One person may represent both parties in a contract,

"Our" authorities are agreed that one person can act in a marriage as agent for both parties, or as guardian for both parties, or as guardian on one side and principal on the other, or agent on one side and principal on the other, or guardian on one side and agent on the other. But can one person act on both sides as a *fuzoolee*, that is, without having any authority, or as guardian on one side and *fuzoolee* on the other, or principal on one side and *fuzoolee* on the other, or as agent on one side and *fuzoolee* on the other, so as to make a contract that would be dependent on subse-

but not without authority from one of them.

[1] *Tusadook*, trusting in each other. The marriage is said to be established, that is, proved, not constituted. See *ante*, p. 17.

quent sanction? According to Aboo Huneefa and Moohummud, this cannot be done.

Contracts may be effected by *fuzoolees*, or unauthorized persons, subject to approval.

Every contract issuing from, or initiated by a *fuzoolee*, for which there is a person competent to accept it, whether the acceptor be another *fuzoolee*, or an agent or the principal, is contracted, subject to approval. And the other side of the contract may stand over for acceptance during the meeting, but no longer. A man says: "Bear witness that I have married such an one," and the woman, on receiving the intelligence, allows the marriage, yet it is void; and, in like manner, if a woman should say, "Bear witness that I have married myself to such an one who is absent," and the man, on receiving the intelligence, should allow the marriage, it would be void; but in both cases, if a *fuzoolee* had accepted, there would be a valid contract according to "our" masters, though dependent on the approval of the party concerned.

Marriages so contracted may be sanctioned by word or deed.

The ratification of a marriage contracted by a *fuzoolee* may be established by word or by deed. A man having married another to a woman without his permission, informs him of it, whereupon he says, "What you have done is good," or, "May God bless us in it;" or, "Thou hast done or said well." All these expressions amount to an approval of the contract, unless it is evident that they were uttered ironically. And if he were congratulated by a number of persons on the occasion, and should accept their congratulations, that also would be an approval. A man contracts another to a woman without her permission, and she says, "What he has done has not surprised me," or, "This matter does not come agreeably to me." These expressions do not amount to an actual rejection of the contract, and if she should afterwards assent to it, the marriage would become operative. Acceptance of the dower is an approval, but acceptance of a gift is not. To send the dower is to approve by deed, but is it necessary that the dower should reach the woman? On this point there is a difference of opinion; and also with regard to retirement of the husband with the wife in private, which some have considered a ratification of the contract,

but others not. If a *fuzoolee* should contract a man to four women by one contract, and to three sisters by another, and the man should repudiate one of the women, that would be an approval of the marriage with the set to which she might belong.

Allowance of contracts effected by *fuzoolees*, or unauthorized persons.

A *fuzoolee*[1] marries a man to ten women by separate contracts, and on the intelligence reaching them they all approve, the marriages of the ninth and tenth are lawful. And in this manner if each of ten men marry his daughter to one man, and the daughters being of mature age should approve all together, the marriage of the ninth and tenth is lawful; and if there were eleven men the marriage of the three last daughters would be lawful; and if there were twelve, the marriage of the four last would be lawful, and if thirteen the marriage of the last only would be lawful.[2] A *fuzoolee* marries a man to five women by separate contracts, he may approve as to four, and separate the fifth; and if a man should marry four women without their consent, and then other four, and then two more, the last two would be in suspense.[3] A *fuzoolee* marries a slave to two women by one contract; he then marries him to two others by one contract, and this with the consent of the women; the slave is then emancipated, and may allow the marriage of two of the women, either the first two or the second two, or one of the first two and one of the second two.[4] But if he should allow the marriage with three it would be

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[1] Some of the cases that follow are illustrative of the rules contained in the following section, and should be read in connection with it.

[2] In all the cases the husband acts for himself. While the marriages are all unconfirmed, he has the power of cancelling them either by deed or word, and his marriage of one above the legitimate number is a cancellation of the four preceding; so the marriage of the ninth is a cancellation of the second series of four, and the marriage of the thirteenth a cancellation of all the preceding.

[3] The rest being cancelled.

[4] The *fuzoolee* has not the power of cancelling, as will be seen hereafter; so that the whole four are in suspense on the sanction of the emancipated slave.

void, while if he allowed the marriage of the fourth only it would be lawful; and if all the marriages had been comprehended in one contract the allowance would not attach or take effect as to any of them. When a slave marries three women by separate contracts, without the consent of his master, and the master then allows the whole, the third is valid. The principle is that allowance or confirmation comes into the place of the original contract with regard to that which is the subject of it, and if the subject were in such a state that if consisting of parts they could not have been joined together at the inception, so neither can they be joined at the confirmation, while if they could have been conjoined at the inception, so also may they be conjoined at the confirmation.[1] When a man is already married to a free woman, and a *fuzoolee* contracts him to a slave, and the free woman then dies, or when a man who is already married is contracted by a *fuzoolee* to the sister of his wife, and the wife dies, in neither case can the marriage be legalized; and, in like manner, if a man who has already four wives living should be contracted by a *fuzoolee* to a fifth, and one of the wives should die, he could not legalize the marriage; so, also, if a man should be married to five women at once, he could not legalize the marriage as to any of them.

Principle.

If a man should contract his adult daughter in marriage to another, who is absent, and a *fuzoolee* should accept for him, and the wife's father should die before the absent husband has signified his assent to the marriage, still it would not be rendered void by his death. And when a man has married the daughter of his brother to his own son (both being of tender age), and the father of the daughter, though alive at the time of the marriage, has died without confirming it, and the uncle then allows the marriage before the girl arrives at puberty, his allowance of it is valid, and the marriage operative. In like manner, when a man has united his adult son

Death of the other party, before the contract is allowed, does not invalidate it.

[1] The three women could not have been joined by the slave himself in one contract. See *ante*, p. 30.

in marriage with a woman without the son's consent, and the son becomes mad before the intelligence reaches him, and the father then confirms the marriage, it is lawful. So, also, when a slave who has married without the permission of his master passes into the hands of another master who sanctions the marriage, the sanction is valid, and the contract operative; and, in like manner, with regard to a female slave, when she has married herself without the permission of her master, and then passes from his hands to the hands of another by sale, gift, or inheritance. But here it is only when the second master cannot lawfully have connection with her (as, for instance, by reason of his being only one of several persons who have inherited her, or, after having inherited her from a father who had connection with her), that he has the power of confirming the marriage. For, if the female slave be lawful to the second proprietor (as, for instance, when she has been given or sold to a stranger, or has been inherited by a son whose father had no previous connection with her), then the allowance by the second proprietor would not be lawful, nor would the marriage be rendered valid by his allowance.

Of Cancellations in connection with the Preceding Cases.

A *fuzoolee* has no power to cancel a contract of marriage, either by word or deed.

The contracting parties viewed with reference to their powers of cancellation are of four kinds. The first is the contractor, who has no power of cancellation either by word or deed; and he is the *fuzoolee*. Whenever, then, a person has married a man to a woman without his authority, and then says, "I have cancelled the contract," it is not cancelled; and, in like manner, if he should marry the man to the sister of the same woman, the second marriage would be in suspense, and there would be no cancellation of the first.

An agent who can cancel by word only.

The second is the contractor who cancels by word but not by deed; and he is an agent. A person appoints a man his agent to marry him to a particular woman, and he marries him accordingly

to that woman, a *fuzoolee* answering on her behalf; this agent then has the power of cancellation by word; but if he should marry the same man to the sister of the woman, that would be no cancellation of the first marriage; though, if the agent should contract the woman herself in a second marriage, the first would be dissolved. The third contractor is one who possesses the power of cancellation by deed but not by word. The manner in which this happens, is as follows: A person marries a man to a woman without his authority; the man then appoints the same person his agent for marriage, without specifying any particular woman, and the person marries him to the sister of the first woman. The first marriage is in consequence cancelled; but if the person had attempted to cancel it by word, the cancellation would not be valid. The fourth contractor is he who possesses the power of cancellation both by word and deed; as, for instance, a man appoints an agent to marry him to a woman without specifying any one in particular, and he marries him to a woman for whom a *fuzoolee* answers in the contract; if then the agent should verbally cancel this contract, the cancellation would be valid, and if he should marry the man to the sister of the first woman, that also would cancel the first marriage. Thus, a *fuzoolee* in the matter of marriage, has no power to revoke before confirmation, but an agent has the power of revocation in cases of suspended marriage, both by word and by deed.[1] One of two agents for marriage generally has not the power to dissolve a marriage entered into by the other agent, and left by him designedly in suspense; but he has the power to dissolve it by contracting his principal in marriage with the woman's sister, or by renewing the first marriage at a different dower. If a person should marry a woman without her permission, and then appoint an agent to contract him in marriage, and the agent should

One who cancels by deed only.

One who can cancel by both.

[1] That is, a general agent for marriage. In the second case the agent is restricted to a particular woman; and in the third, the restriction of his power to cancel is because he acted as a *fuzoolee* in contracting the marriage.

(by speech) cancel what the husband had done, it would not be valid; but if he should marry him to the sister of the woman, that would dissolve the first marriage; and if the agent should marry him, by one contract, to two women, one of whom is the sister of the first woman, or to four women by one contract, that would also dissolve the first marriage.

CHAPTER VII.

OF DOWER.

Preliminary.

Definition and names of dower.

DOWER is defined to be "the property which is incumbent on a husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself, in exchange for the usufruct of his wife;" and it is known by several names, as *muhr*, *sudak*, *nuhlah*, and *ookr*.[1] The dower which is due by the contract itself is termed the *muhr-i-mithl*, which means literally, dower of the like, or the woman's equals,[2] and has been well rendered by Mr. Hamilton as "the proper dower." Dower is not the exchange or consideration given by the man to the woman for entering into the contract;[3] but an effect of the contract, imposed by the law on the husband as a token of respect for its subject, the woman.[4] The usufruct of the wife being another of its effects, one of these (the dower) is said to be exchanged for the other (the usufruct), and marriage becomes, in the language of the law, a contract of exchange, though in popular parlance it is only a contract of union.[5] In sale, the delivery of the thing sold requires immediate payment of the price, and until delivery the price is not demandable, because the right to it may be defeated altogether by the loss of the thing sold in the hands of the seller. So, also, in marriage the right to dower is in danger of dropping altogether, by the apostasy of the wife, or by her kissing her husband's son with desire, but this danger is removed by consummation, which is

[1] *Inayah*, vol. ii., p. 52.
[2] *Ibid.*
[3] *Kifayah*, vol. ii., p. 59.
[4] *Hidayah*, vol. ii., p. 58.
[5] *Kifayah*, *Ibid.*

an actual delivery of the exchange for the dower. Hence dower is said to be confirmed and made binding, by consummation, or by its substitute, a valid retirement, or by death, which by terminating the marriage, puts and end to all the contingencies to which it is exposed.[1]

Exigible and deferred dower.

It is usual to divide the dower into two parts—one termed *mooûjjul*, or prompt, which is immediately exigible: the other *moowujjul*, or deferred, which is not exigible till the dissolution of the marriage.[2] The payment even of the exigible part of the dower is not unfrequently postponed till that event. This is of little moment in Moohummudan countries. But in the British dominions in India, a right may be lost by neglecting to sue for it within the time that the law has fixed for the limitation of actions; and several cases have occurred in which widows have been deprived of their right to dower altogether by refraining to sue for it during the lives of their husbands.[3] These decisions have now been happily overruled by a judgment of her Majesty's Privy Council,[4] by which it has been determined that, though a woman's dower should be payable on demand, she is not obliged to sue for it immediately, nor in the lifetime of her husband. It may, therefore, be inferred that the time for the limitation of a suit for even the exigible part of a woman's dower does not begin to run until the dissolution of the marriage.

Section First.

Of the lowest amount of Dower.— What are, and what are not, fit subjects of Dower.—And of the proper Dower.

Minimum of dower.

The lowest amount of dower is ten *dirhems*, coined or uncoined; so that the weight of ten in pieces is lawful

[1] *Inayah*, vol. ii., p. 55.

[2] *Reports S. D. A., Calcutta*, vol. i., p. 278; and see Lane's *Modern Egyptians*, vol. i., p. 215.

[3] *Reports S. D. A., Calcutta*, vol. i., p. 103; vol. vii., p. 40.

[4] Moore's *Indian Appeals*, vol. vi., p. 229.

though their actual value should be less. When other property is substituted for *dirhems*, regard is to be had to its value at the time of the contract, according to the Zahir Rewayut. If its value were ten *dirhems* on the day of contract, but is less at the time of taking possession, the woman has no right to reject it; while, if its value were less at the former time, though equal to ten at the latter, she is entitled to the difference. If the value be reduced by the loss of part of the property before taking possession, she has an option, and may take what remains of it, or ten *dirhems* instead.

No *maximum* of dower.

There is no legal limit to dower;[1] and dowers to very large amounts have been sustained by courts of justice in India.[2]

Property and profits are fit subjects of dower.

Anything that is *mal*,[3] or property, and has value,[4] is fit to be the subject of dower. *Moonafea*,[5] or profits, are also good for that purpose, with the exception of the man's own service when he is a freeman, which is not good as an assignment of dower, according to Aboo Huneefa and Aboo Yoosuf. The objection does not apply to the service of his male or female slave, nor to his own service if he is a slave; and the assignment would be good without any difference of opinion. But if a man should marry a woman for teaching her the Kooran, or the *hujj* (or pilgrimage to Mecca), or similar observances, the specification would not be valid, and she would be entitled to her proper dower.

Rule as to assignments of dower.

The general rule with regard to specifications of dower is, that when they are valid, the thing specified is obligatory on the parties; and nothing besides if it be the value of ten *dirhems* or more; while, if it be less than ten *dirhems*, the dower must be made up to that amount.

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[1] *Reports S. D. A., Calcutta*, vol. i., p. 277.

[2] *Ibid.* vol. i., pp. 48 and 266, where the dowers were respectively 300,000 gold mohurs, and 114,000 rupees with 355 gold mohurs.

[3] Everything corporeal, except carrion and blood, is *mal*.

[4] Everything that is *mal*, except wine and the hog, has value.

[5] Profits are of two kinds, according as they are derived from the use of corporeal things, such as houses, land, and cattle; or the labour of artisans, such as tailors, &c. *Inayah*, vol. iv., p. 43.

Miscellaneous cases.

When a man marries a woman on a condition that he will not take her away from her own town, or will not marry another while she is his wife, the specification is not valid, because there is no *mal*, or property. And, in like manner, when a Mooslim marries a Mooslimah for wine or a hog, the assignment is not valid, because the things have no value in law. But if he should marry her for the profits of all his property, such as the occupation of his house, the use of his cattle for riding or carriage, or the like, for a definite period, the assignment would be valid. Where again a woman marries a man for repudiating another woman, or releasing herself from the quest of blood, or performing the *hujj* (or pilgrimage to Mecca) with her, or postponing a debt for a thousand *dirhems* which she owes to him, the assignment is bad, and the woman is entitled to her proper dower.

Of *Shughar*, or a reciprocal bargain as to dower between two parties.

When one man gives his daughter or sister in marriage to another, on condition that the other will give him his daughter or sister in return, the right to the person of each woman being the dower of the other, the contracts are effected, but the condition is void, and each woman is entitled to her own proper dower. This is what is termed a Shughar marriage.[1]

What is not a fit subject of dower.

When something is mentioned as dower which is not in existence at the time, as, for instance, the future produce of certain trees, or of certain land, or the gains of a slave, the assignment is bad, and the woman is entitled to her proper dower. So also when something is mentioned which is not at the time property in all respects, as, for instance, what may be in the wombs of his flocks, or of his female slave, at the time, the assignment is not valid, and the wife is entitled to her proper dower.

When the dower is

If a man should marry a woman for a dower to be fixed

[1] *Jowhurrah*; *Inayah*, ii., p. 63. From *Shughoor*, lifting up and denuding, applied primarily to the action of a dog in lifting up one of his legs to make water (*Kifayah*, ii., p. 69); and thence—probably in contempt—to this kind of marriage, which was common among the Pagan Arabs, but prohibited by the Prophet.

by herself, or by him, or a stranger, the assignment would be defective. But if, when the dower is left at his own discretion, he should fix it at the proper dower or something more, she would be entitled to the sum fixed; while, if he should fix it at anything below the proper dower, she would be entitled to the proper dower, unless satisfied to take the sum specified. Where, again, the dower is left at the discretion of the woman, and she fixes it at the proper dower, or something less, she is entitled to the dower she has fixed; while if it is more than the proper dower, the excess is not lawful, unless assented to by the husband. And the rule is the same when the dower is left on the discretion of a stranger. If he fixes it at the proper dower, it is obligatory on both the parties; while if he fixes it above or below the proper dower, it is dependent, in the former case on the assent of the husband, and in the latter on that of the wife.

left to be fixed by one of the parties, or a stranger.

The proper dower of a woman is to be determined with reference to the family of her father, when on a footing of equality with her in respect of age, beauty, city, understanding, religion, and virginity. It is also a condition that the parties shall be equal in knowledge and manners, and that neither of them should have borne a child. It is likewise said that the condition of the husband in respect of wealth and lineage should be like that of the husbands of the women with whom she is compared. By her father's family are to be understood her full sisters, her half-sisters by the father, her paternal aunts, and the daughters of her paternal uncles. And in estimating her proper dower, no regard is to be paid to the dower of her own mother, unless she happened to be of her father's family, as, for instance, by being the daughter of his paternal uncle. It is also made a condition in the Moontuka that the informants of the proper dower be two men, or one man and two women, and that their information be given in words of testimony; but if no just witnesses can be found to speak to the matter, the word of the husband on his oath is to be received; and this is correct.

How the proper dower is to be determined.

Section Second.

How the liability to Dower is confirmed or perfected.[1]

How the wife's right to dower is perfected.

Dower is confirmed by one of three things,—consummation, a valid retirement, and the death of either husband or wife; and that, whether the dower be named, or be the proper dower.

If repudiated before it is perfected, she is entitled to half the specified dower; or a *mootût*, or present, if none has been specified.

When a man has repudiated his wife before consummation or a valid retirement, she is entitled to the specified dower; and when none has been named in the contract, or he has married her with a condition that she shall have no dower, she is entitled to her proper dower if the marriage be consummated or one of the parties happens to die, and to a *mootût*, or present, if repudiation takes place before consummation or a valid retirement. When dower has been assigned by the judge, or by the husband after the contract, and the husband repudiates his wife before consummation, she is entitled only to a *mootût*, instead of half the specified dower, according to Aboo Huneefa and Moohummud. So, also, when no dower has been specified in the contract, but the parties afterwards arrange it by mutual agreement, though she has a right to the whole if the marriage be consummated, or her husband happens to die; yet, if she be repudiated before consummation, it is only a *mootût*, or present, that she is entitled to, and not half of the dower subsequently agreed upon.[2]

And separation from her husband for any other reason originating on his part has the same effect.

It is only when a husband is himself the cause of the separation that he is liable for a *mootût*, or present; as, for instance, when he repudiates his wife, or is separated from her by reason of *eela*, or *lián*, or *jubb*, or impotence, or for apostasy and rejection of *Islam*, or kissing his wife's mother or sister with desire. And he is

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[1] The word in the original means literally "corroborated," or "made binding." As to the full legal meaning, see *ante*, p. 92.

[2] *Hedaya*, vol. i., p. 125. The authority of the Kooran is cited for this.

not liable when the cause of separation is on the part of the wife; as for instance, when it is her apostasy and rejection of *Islam*, or when she kisses her husband's son with desire, or exercises an option of puberty, emancipation, or inequality. In every case in which there is no liability for *mootût*, there is none for half the dower, if dower were specified; and in every case in which a contract requires the proper dower, a *mootût* is due if the wife is repudiated before consummation.

Mootût described.

A *mootût*, or present, consists of three articles of dress —a *kumees*, or shift; a *moolhuffet*, or outer garment; and a *mikna*, or head-dress, of medium quality, neither very good nor very bad. This is according to their practice, but in ours regard is had to our own usage.[1] And if the husband should give her the value of the articles in *dirhems* or *deenars*, she may be compelled to accept it. But it is not to exceed half the *muhr-i-mithl*, or dower of her equals, nor fall short of five *dirhems*. Regard is also to be had to the woman's condition, for the present comes into the place of the proper dower. If, then, she be of low degree, she is to have a *mootût*, or present, of *kirbas*, or linen; if of middle rank, one of *kuzz*, or spun silk; and if of high station, one of *abreshom*, or silk. But regard should be had to the man's condition, according to the Hidayah and Kafee; while, according to other authorities, the conditions of both should be taken into consideration; and the *Futwa* is said to be in accordance with this view.

Cases in which there is no right to it.

There is no *mootût* for a woman whose husband has died leaving her surviving him, whether dower were assigned to her or not, and whether the marriage had or had not been consummated.[2] And in like manner, in any case of invalid marriage, when a judge separates the parties before consummation or a valid retirement, or even

[1] The allusion must, I suppose, be to the custom in Hindostan, or as intending to indicate that custom is the rule generally.

[2] Because, in the event of death, she is entitled to full dower, either that specified or the proper.

after a valid retirement, when the husband denies consummation, there is no *mootût*. And with respect to liability for *mootût*, a slave is in the same predicament as a freeman, when his marriage has been with consent of his master.

Different kinds of *mootût*.

There are three kinds of *mootût*:— 1st. Incumbent, which is due to every woman repudiated before consummation, for whom no dower has been assigned; 2nd. Laudable, which is conferred on any woman repudiated after consummation; and 3d. What is neither incumbent nor laudable, which is applicable to women repudiated before consummation to whom dower has been regularly assigned. So that it is laudable to confer a *mootût*, or present, on all repudiated women except the last; namely, those for whom dower has been assigned, and who are repudiated before consummation.[1]

Valid retirement.

Retirement is valid or complete when the parties meet together in a place where there is nothing in decency, law, or health, to prevent their matrimonial intercourse. And the retirement is invalid whenever there cannot be such intercourse; as, for instance, when one of the parties is affected by a chronic disease; and the sickness of the man and the woman are alike in this respect. It is implied that the sickness is one that prevents coition, or would render it injurious; and any sickness on the man's part, accompanied by debility or languor, would be considered preventive, whether it should render coition actually injurious or not; and this distinction is also true with respect to diseases of the woman. When a man and his wife retire together, and either of them is a *moohrim* on account of the ordained pilgrimage, or is observing the ordained fast, or is engaged in the exercise of the ordained prayers, the retirement is not valid; but when the fast is only to make up for previous omissions, or for the performance of a vow, or expiation, it does not prevent a retirement from being valid, according to the more correct opinion; and neither voluntary fasts, nor voluntary prayers, have that effect, according to the Zahir Rewayut. If the

What it requires as to the condition of the parties.

[1] *Hidayah*, vol. ii., p. 67.

retirement should take place during the monthly courses, or a *nifas* (or period of purification after child-birth), it would not be valid. The retirement of a boy unfit for coition is not valid, nor that of a girl in like circumstances. When an infidel retires with his wife after he has embraced the faith, the retirement is valid; but not so, if the wife be an idolatress. And if there be any one present with the parties who is asleep or blind, that prevents the validity of the retirement; but the presence of a little child who does not understand, or of a person who has fainted away, does not. If, however, the child has understanding enough to mark what is going on between them, or a deaf or dumb person be present, the retirement is not valid. An insane person or lunatic is like a little child; if he has sufficient understanding, the retirement is not valid, otherwise it is. Though there are some differences of opinion as to the presence of a handmaid of the wife, yet, according to the *futwa*, it renders the retirement invalid. But the presence of a handmaid of the husband has not that effect. The presence of another wife of the husband breaks the retirement; and the presence of a biting dog has also that effect; and though the dog should not be vicious or biting, yet if it belong to the wife, the effect is the same; but not so if it be the property of the husband.

As to the absence of others.

If a woman should enter a room where her husband is asleep and alone, the retirement is valid, whether he is aware of her entrance or not. This answer is probably based on the saying of Aboo Huneefa; according to whom, the same rule is applicable to a sleeping person as to one awake. If a woman should enter the room where her husband is alone, without his knowing her, and, after remaining some time there, should retire, or if a husband should enter the room where his wife lies, without knowing her, there is no retirement until he recognizes her. And the husband is to be believed when asserting his ignorance. If he know her, the retirement is valid, though she should not know him.

As to the place.

Among the causes which render a retirement invalid

Other causes that

may render a retirement invalid.

are any natural obstruction or rupture on the part of the woman. And if a man compare his wife to the back of his mother, and then retire with her before making expiation, the retirement is not valid, intercourse with her in such circumstances being prohibited. And if a husband should retire with his wife, and she should refuse to surrender herself to him, the moderns differ as to the effect, some being of opinion that the retirement is invalid, while others maintain its validity. The retirement of a *mujboob* eunuch is valid, according to Aboo Huneefa; and the retirement of an impotent person, or an ordinary eunuch, is also valid.

The place must be secure from observation.

To make a retirement valid, the place must be one where the parties are secure from observation without their own permission—as a mansion, house, or separate apartment. An open plain where no one is near does not constitute a valid retirement, as the parties are not secure from passers-by. So, also, if the parties should retire to the top of a house, on the sides of which there is no screen or parapet, or only one pervious to sight, or so low that a standing person can look over it, the retirement would not be valid if there be any fear of intrusion; but if secure from that, the retirement would be so. In a garden without a door that is locked, there is no retirement; but if the door be locked, the retirement is valid. A litter, with a covering which remains fixed by day and night, if large enough, may make a valid retirement; or an uncovered apartment, or vineyard, according to the Zahir Rewayut, provided that the vineyard be enclosed by walls. It is stated in the Mujmooa Nuwazil that a question was put to the Sheikh ool Islam,—regarding a man who married a wife, and her mother, having brought her to him, went out, pushing the door to, but not locking it, the apartment being in an inn, where many persons were residing, and the apartments having open casements, and people sitting in the open area of the inn, looking from a distance,—whether that was a valid retirement, and he answered that if the persons were looking into the casements, steadily observing them, and the parties were aware of the fact,

the retirement would not be valid; but seeing from a distance, and people sitting in the area, do not prevent the validity of the retirement, for the parties may retire into a corner of the apartment where they cannot be seen.

Retirement equivalent to consummation in some respects.

Retirement imposes on a repudiated woman the necessity of observing an *iddut*, whether the retirement be valid or invalid, on a liberal construction of the law, from an apprehension that she may have conceived. And Kadooree has observed that mere legal impediments to the validity of a retirement do not prevent it from having this effect; but if the impediments are real, such as sickness or infancy, an *iddut* is not required. "Our" masters have placed a valid retirement on the same footing as coition in some of its effects, but not in others. They have done so in the confirmation of dower, and the establishment of descent or paternity, the observance of *iddut*, and the wife's right to maintenance and a residence during its continuance, the unlawfulness of marriage with the wife's sister, or with other four women besides her, or with a female slave according to the analogy of Aboo Huneefa's opinion, and *mura'aut*, or the observance of the time for repudiation in respect of her. But they have not placed it on the same footing as coition in making a person *moohsun* or a daughter unlawful, or a divorced woman lawful to her first husband, or for the purpose of revoking repudiation, or for inheritance. And retirement does not come into the place of coition in impairing virginity; so that if a man should retire with a virgin, and then repudiate her, she would subsequently marry as a virgin.

Dower once perfected does not abate,

When dower has once been perfected, it does not drop, though a separation should afterwards take place for a cause proceeding from the wife, as, for instance, by her apostatizing or consenting to the son of her husband after he had consummated or retired with her; but before dower is perfected, the whole falls by reason of any separation proceeding from the wife. If either of the parties should die a natural death before consummation of a marriage in which dower has been assigned, the right to it is perfected, without any difference of opinion, whether

even by the death of either party before consummation.

the woman be free or a slave. So, also when one of the parties has been slain, whether by a stranger or by the other of them; and in the case of the husband, though by his own act. When the wife commits suicide, there is no abatement to the husband from the dower, if she were free; nay, he is liable for the whole. But if she were a slave, Husn reports as the opinion of Aboo Huneefa that the dower would drop. There is, however, another report, by which he is said to have agreed with his disciples, who were of opinion that it would not. If she be slain by her master before consummation, the dower drops, according to Aboo Huneefa, but not so according to the disciples. This difference of opinion is only when the master is adult and sane; for if he were a minor or insane, they were all agreed that the dower would not drop. When one of the parties to a marriage in which there was no mention of dower has died, the right to the full *muhr-i-mithl*, or proper dower, is perfected, whether the woman be free or a slave, without any difference of opinion.

Section Third.

When the specified Dower is Property, and something is added to it that is not Property.

When the dower consists partly of what is, and partly of what is not, property.

When the dower consists partly of property and partly of what is not property, as, for instance, when a man has married a woman for a thousand *dirhems* and the repudiation of a certain other woman, the repudiation takes effect simultaneously with the contract, and the wife has merely the sum specified. It is different when he has married her for a thousand and on condition of repudiating a certain other woman; for then the repudiation does not take effect till it is actually pronounced; and if after entering into such a stipulation he should fail to repudiate the person referred to, the wife would be entitled to her full proper dower; in the same way as if, after marrying her for a thousand and an engagement to make her a present, he should fail to perform the engagement. And the rule is the same with

regard to every other condition involving a farther benefit to the wife, when the condition is not fulfilled. When it is said that the wife is entitled to her proper dower, it is implied, of course, that this exceeds the amount specified in the contract; for if that should be equal to or in excess of the proper dower, she would be entitled to the specified dower in the event of the non-fulfilment of the condition. And if the advantage stipulated for be in favour of a third party, and the condition is not complied with, the wife has no choice, and is entitled to no more than the dower specified in the contract.

When it consists of things lawful and unlawful.

If a Mooslim should marry a Mooslimah, and specify for her in the contract some things that are lawful with some that are unlawful, as, for instance, in addition to a valid dower, he should mention some *rutls* of wine, the former only would be the dower, while the latter would be thrown entirely out of account, as having no legal value for Mooslims, and the woman would have no claim to a full proper dower.

Section Fourth.

Of Conditions in the Dower.

When it is involved in a condition of something to be given or done by the wife.

If a man should marry a woman on a dower of a thousand, and make it a condition with her that she is to give him a particular garment, the thousand must be divided in the ratio of the value of the garment to the proper dower, and the sum corresponding to the value of the garment is to be considered as its price, while the sum corresponding to the proper dower is the value of the woman's person. It is stated in the Moontuka, that when a man has said to a woman, "I will marry you on a dower of a thousand *dirhems*, on condition that you will marry such a woman to me on a dower to be paid her by you," and has married the woman accordingly on that condition, the dower is her share of the thousand when divided in proportion to her own proper dower and the proper dower of the woman referred to, and she is under no obligation to contract the woman to him. But if he should say, "I

will marry you on a dower of a thousand *dirhems*, on condition of your marrying such an one to me for a thousand," and she should accept the terms, and the marriage should take place accordingly, the woman would be married without any specified dower, and would accordingly be entitled to the proper dower of women of her family.

When the condition is on the part of the husband for an increased dower in certain contingencies.

If a man should marry a woman on a dower of a thousand, in the event of his not having a wife already, and two thousand if he have; or on a dower of one thousand if he shall not remove her from her own city, and two thousand if he shall; or a dower of one thousand if she be a *Mowallee*, and two thousand if she be an Arab, or the like; there is no doubt that the marriage is lawful, and with regard to the dower, that the first part of the condition is also lawful, without any difference of opinion; so that if the fact be, or the husband should act, as mentioned in that alternative, the woman would be entitled to the corresponding dower. But if the fact be, or the husband should act, as mentioned in the second part of the condition, then the woman would have the proper dower, provided that it do not fall short of the smaller nor exceed the greater of the sums mentioned. This is according to Aboo Huneefa, but in the opinion of Aboo Yoosuf and Moohummud both parts of the condition are lawful. And if a man should marry on a dower of two thousand in the event of the woman being beautiful, and one thousand if she be ugly, the marriage would be valid, and both parts of the conditions lawful, without any difference of opinion. So, also, if he should marry her, on a condition of giving her more than the proper dower if she be a virgin, and she should prove to be a *thuyyibah*, he would not be liable for anything over the proper dower. A man marries a woman on condition of her being a virgin, and consummates with her, but finds her to be otherwise, the full dower is due; and if he should marry her on a dower of a thousand *dirhems* to be paid now, or two thousand at a year, then, according to Aboo Huneefa, the woman would have her choice of the alternatives if the proper dower were two

thousand *dirhems* or more; and if it were less than one thousand the choice would be with the man to give her whichever of the two sums he might please; while if the proper dower were more than one thousand *dirhems* and less than two thousand, she would have the proper dower, according to Aboo Huneefa.

When the condition is also on his part, but for some benefit to a third party.

If a man should marry a woman on a condition that he is to give her father a thousand *dirhems*, this thousand would not be a dower, neither could he be compelled to make delivery, but the woman would be entitled to the proper dower; and if he should make delivery of the thousand, it would be a gift, which, being the donor, he might recall at pleasure.[1] But if he should say "on condition that I am to give him a thousand *dirhems* as from you," the thousand would be a dower, and if the woman were repudiated before consummation, but after delivery of the thousand, she would be entitled to have recourse against her husband for half the sum mentioned, while the other half would be a gift, which she being the donor of it would have the right to recall. Ibn Jamaut has reported, as from Moohummud, that when a man has married a woman on a dower of two thousand, one thousand for herself and a thousand for her father, or when she has said, "I have married myself to you for two thousand, one thousand to myself and one thousand to my father," this is lawful, and both thousands are the woman's.

When the dower is in the form of an executory condition.

If a man should say to a woman, "I will marry you on condition that I am to give you a thousand *dirhems*," or "that I am to give you my slave," and the marriage should take place accordingly, then, according to Aboo Yoosuf, if delivery be made of the sum mentioned, it becomes the dower, but if the husband refuse to make delivery he cannot be compelled, and the wife is entitled to the proper dower, not however exceeding the thousand, nor the value of the slave; and this, it appears, was also the opinion of Aboo Huneefa.

In the Nuwadir it is reported as from Moohummud that

[1] Gifts to a stranger may, in general, be revoked at any time.

When a condition is made by guardians in their own favour.

when the guardians of a woman have said to a man who wishes to marry her, "We have married her to you at a thousand *dirhems* on condition that a hundred out of them is to be your own," this is lawful, and the dower is the remaining nine hundred; but if the terms were, "We have married her to you at a thousand *dirhems*, on condition that we are to have fifty *deenars*," both *dirhems* and *deenars* would belong to the woman.

Section Fifth.

Of Dowers in which there is something unknown.

When the dower is unknown as to species and quality.

When unknown as to quality only.

There are three kinds of named or stipulated dowers. In one the species and quality are both unknown, as if a person should marry a woman for "cloth," or "a beast," or "a mansion;" and in cases of this description she is entitled to her proper dower. In another, the species is known but its quality unknown, as if the marriage were for cloth of Herat, or a slave, a horse, a cow, or a sheep; and in such a case, the husband is liable for one of medium value, which may be given either in kind or in value.[1] That is, when the cloth or slave is mentioned absolutely, without any reference of it to the party himself; but if he should mention them with a reference to himself, by saying, "I have married thee for *my* slave," or "*my* cloth," he would not be at liberty to give the value, the reference to himself being a means of definition, like actual pointing it out.[2] The value is to be taken at a medium between high and low prices, according to Aboo Huneefa and Moohummud; and the *futwa* is in accordance with their opinion. If the parties choose to compound for less than the medium value the composition would be lawful, but not so if it were for more. In the third

When both species and quality are known.

[1] A sale, in such circumstances, would be invalid for uncertainty. *M.L.S.*, p. 185.

[2] It would be insufficient in sale if the seller had more than one. *M. L. S.*, p. 185.

kind of specified dower both species and quality are known; as if one should marry a woman for something estimable by weight or measure of capacity, and described as to its quality,[1] but left on his responsibility, that is, undelivered; and in such a case the specification would be valid and delivery incumbent on the husband. If it were for a *koor* of wheat absolutely, that is, without any description as to quality, he would be at liberty to give a *koor* of *medium* quality or its value; the case then falling under the second description of named or specified dowers. All other commodities estimable by weight or capacity follow the same rule as wheat.

When the dower is alternative.

If a man should marry a woman for this slave *or* this thousand, or for this slave *or* that slave, and one is inferior in value to the other, the proper dower is to be taken as the standard, and if that be equal to or more than the value of the superior, the woman should have the superior for her dower, on the ground of her own assent to that as the *maximum;* while if the proper dower were only equal to or less than the inferior, she would have *that* for her dower, on the ground of her husband's assent to it as the *minimum;* and if the proper dower should fall between the two values, she would have it for her dower. This is according to the opinion of Aboo Huneefa; but in the opinion of the two disciples, the inferior would be the dower in all the cases. And there would be the like difference between the authorities if the marriage were for one thousand *or* two thousand. But if the woman were repudiated before consummation, she would be entitled to no more than half the inferior, according to all the opinions; unless it fell short of the *mootút* or present, in which case she might take the latter.

When it is of a house indefinitely;

If a man should marry a woman for a *beit*, or house, though, among the Arabs, if he were a *Budwee*, or inhabitant of the desert, it would be taken to signify one of hair (a tent), and if he were a townsman, or inhabitant of a town, one of medium value, yet, with "us,"

[1] That is, as good, bad, or medium.

a *beit*, taken indefinitely, is not a fit subject for dower, and the man would be liable for the proper dower in the same way as he is liable for the proper dower when the contract is for a *dar*, or mansion, without defining it. But if the house were distinctly specified as a particular house, the assignment of it, as dower, would be quite valid. When a man has married a woman for "his share in this *dar*," she has an option, according to Aboo Huneefa,[1] and may either take the share, or her proper dower up to the value of the whole *dar*, but no more, though it should be in excess of the value; and, according to his companions, she has only the share, if equal to ten *dirhems*. And the rule is substantially the same, with a like difference of opinion, when the marriage is for "whatever he may have of right in this *dar*," except that in such a case Aboo Huneefa would apparently have given her the proper dower without any option if it amount to ten *dirhems*.

when it is in money, and there is a doubt as to the coin or currency.

If one should marry a woman for "a thousand" absolutely, a thousand in gold or silver (that is, *dirhems* or *deenars*) would be inferred, according as the one or the other would be nearer to the proper dower. And when *dirhems* have been mentioned, and there are several descriptions current in the city, that which is most prevalent is to be inferred; and if there is none more prevalent than another, then that which is most in accordance with the proper dower; and when all *dirhems* have ceased to be current by reason of the substitution of another coin, their value at the last day of their currency is to be assumed. A mere change in value in consequence of there being more or less of them in circulation is not to be regarded, provided they were current at the time of the contract, and even though not then current they are still obligatory, if equal to ten *dirhems*.

Case of two women married for one dower.

When a man has married two women on one dower of a thousand, it is divided ratably among them in proportion

[1] The gift of an undivided share is invalid; and though the sale of it is lawful, it is necessary that the purchaser should know the share. *M. L. S.*, p. 188.

to their proper dowers. And if both are repudiated before consummation, half of one thousand is to be divided between them in the same ratio. If only one of the women should accept the contract, the marriage would be lawful as to her, and the thousand be divisible in the same manner, so much of it as corresponds to her proper dower being the specified dower for her, and the share of the other reverting to the husband. But if the marriage should prove invalid as to one of them, the whole of the thousand would belong to the other, and if consummation should take place with her whose marriage is invalid, she would be entitled to her proper dower, according to Aboo Huneefa; and this is correct.

If a man should marry a woman for one of his slaves, or shirts, or turbans, the assignment would be valid, and he would be liable for one of them of medium value.

Section Sixth.

Of a Dower that proves to be different from what was named in the Contract.

When it proves to be unlawful.

When a man has married a woman for *this* cask of vinegar, and it proves to be wine, she is entitled to her proper dower, according to Aboo Huneefa; and if the marriage be for *this* slave, and he proves to be free, the husband is, in like manner, liable for the proper dower. But if the cases were reversed, and the marriage were for *this* cask of wine, and it should prove to be vinegar, or *this* free man, and he turns out to be a slave, the woman would be entitled to the actual thing specified, according to the most authentic report of Aboo Huneefa's opinion, with which Aboo Yoosuf concurred.

When it is different in kind from what was described.

When a man has married a woman for a male slave, and the slave proves to be a female, or a particular piece of Meroo cloth, which proves to be cloth of Herat, he is liable for a male slave equal in value to the female, and a piece of

Meroo cloth of the value of that of Herat. So also if he should marry her for a particular slave, and he should prove to be a *moodubbur* or a *mookatib*, or, being a female, she should prove to be an *oom-i-wulud*, in all these cases he would be liable for the value, without any difference of opinion, whether the woman were aware of the condition of the slave or not. And if he should marry her for *these* two slaves, and one of them is free, or *these* two casks of vinegar, and one of them is wine, she is entitled to the remaining slave or cask only, according to Aboo Huneefa. It is stated in the Moontuka, as on the authority of Moohummud, that when a man has married a woman for land, which he has described by its boundaries, on condition that it contains ten *jureebs*, and the woman, on taking possession, finds that there are only six *jureebs*, and this happens before she has sown the land, she has an option, and may take the land as it is without anything besides, or she may reject the land and take its value, as if there had been ten *jureebs* in the same *mouzah* or village. But if she had already sold the land, or made a gift of it with delivery, and then became aware that it contained only six *jureebs*, she would be entitled to nothing but the land. And in like manner with regard to pearls when they fall short of weight, and cloths when short of measure. If, however, she had neither sown nor given away the land, but it had been overflowed by the Tigris or other river, and had been destroyed or become waste in consequence, and she had then ascertained that there were but six *jureebs*, she might have recourse to her husband for the full value of the land. And when a man marries a woman for land, under a condition that there are a thousand date-trees in it, and describes its boundaries, or for a mansion also defined by its boundaries, under a condition that it is built with bricks and mortar and timber, and behold as to the land there are no trees in it, and as to the mansion it has no buildings,—she has an option, and may take the land or mansion as they are, with nothing more, or she may take her proper dower. And if he should repudiate her before consummation, she is not

When the variance is in quantity,

and it is discovered before a change in the subject, or after such change.

When the variance is in the appurtenances.

entitled to anything but half the land or half the mansion, as she has found them, unless her *mootût* or present be more than this, in which case she has an option and may take half the land or half the mansion without anything else, or she may take the *mootût*.

Section Seventh.

Of Additions to and Abatements from the Dower: and of what is increased or diminished.

An addition to the dower is valid during the subsistence of the marriage, according to our three masters. And if a man should make an addition to his wife's dower after the contract, the addition is binding on him, that is, when the woman has accepted the addition; and it makes no difference whether the addition be of the same kind as the original dower or not; or whether it may be made by the husband or by his guardian. The addition is not a gift, as supposed by Zoofr, requiring possession to render it complete,[1] but an alteration of the terms of the contract in a non-essential matter within the power of the parties, and like an addition to the price in sale, becomes incorporated with the original dower.[2] It nevertheless falls to the ground when the woman is repudiated before consummation.[3] Thus, an addition to the dower is perfected in the same way as the original, that is, by one of three causes, viz., consummation, valid retirement, or the death of one of the married parties; but if a separation of the parties should take place without the occurrence of one or other of these three causes, the addition is void, and it is only

An addition may be made to the dower at any time during the subsistence of the marriage,

and it becomes incorporated with the original.

[1] If it were a gift it would not only require possession, but delivery of it could not be compelled; and this was *Zoofr's* opinion with regard to additions to dower. (*Inayah*, vol. ii., p. 38.)

[2] *Inayah*, vol. ii., p. 58, and *Hedaya*, vol. i., p. 127, and vol. ii., p. 485.

[3] *Hedaya*, vol. i., p. 127.

the original dower that is halved, according to Aboo Huncefa and Moohummud.

But an addition cannot be made to the dower after a complete separation of the parties.

In the Futawa of Aboo Leeth it is stated that an addition to a dower after a gift of it[1] is valid, but if made after a separation has taken place between the parties it is void, according to Khwahir Zadah; and Busher has reported to the same effect, as on the authority of Aboo Yoosuf, that when a person repudiates his wife three times (it matters not whether before or after consummation), and then makes an addition to her dower, the addition is not valid. In like manner, if, after the expiration of the *iddut* of a woman repudiated revocably, an addition were made to her dower, the addition would not be valid, because the separation or divorce would then be complete. But if before the expiration of her *iddut* the husband of a woman repudiated revocably should say to her, "I have recalled thee on a dower of a thousand *dirhems*," it would be lawful if she should accept, but not otherwise; for in such circumstances the thousand would be an addition to the dower, and such an addition is suspended on acceptance. But is it a condition that the acceptance should be declared at the same meeting? According to the most authentic opinion, it is so.[2]

Abatement from the dower is valid.

If a woman should allow an abatement from her dower the abatement is valid. Her consent is necessary to the validity of an abatement; for if made against her will it is not valid. It is also necessary that she should not be sick of her death illness at the time of giving her assent.

Effect of repudiation before consummation when an increase in a specific dower takes place, and before possession.

When a man has married a woman for a male or female slave, or something else that is specific, and an increase takes place in the subject of the dower, and the woman is then repudiated before consummation—in such circumstances, if the increase is before possession, and be united to and have issued from the original (as an increase of fatness, stature, goodness, or beauty); or if the increase be

[1] That is, after the woman has given it away.

[2] This is agreeable to the analogy of additions to the price in sale. See *M. L. S.*, p. 241.

separated from and have issued from the original (as a child when it is born, or wool or hair when they are cut off), then the original subject of the dower and the increase are both to be halved. And though the woman should have taken possession of the original, with the increase issuing from it, and is then repudiated before consummation, both the original and the increase are still to be halved. Where, again, the increase is united to the original, but has not issued from it (as when a piece of cloth is dyed, or buildings are erected within a mansion), and the woman has become seized of the whole, it is not to be halved, and she is liable for half the value as of the day when she took possession; while if it be separated from, and has not issued out of, the original (as when a gift is made to a slave, or something is acquired by him), then, according to Aboo Huneefa, the original only is to be halved, and the whole increase becomes the wife's; but, according to the disciples, the original and increase are both to be halved. If the increase should take place after possession, and be united to and have issued from the original, it prevents the halving, and the husband has a claim against her for half the value as of the day of delivery, according to Aboo Huneefa and Aboo Yoosuf, though, according to Moohummud, it does not prevent the halving; while, if the increase be united to without having issued from the original, it does prevent the halving, and she must deliver half the value of the original. When, again, it is separated from and has not issued from the original, it prevents the halving, according to them all; but if it be separated from without having issued from the original, the increase belongs to the woman, and the original is to be halved.

When the increase takes place after possession

All this when the increase has first taken place, and the repudiation before consummation then follows. But suppose that the repudiation is first in point of time, and that an increase then appears: this may occur either after decree has passed in favour of the husband for a half, or before it, and either before possession or after it; but if it occur before possession the original and increase belong to the

Effect of repudiation before consummation—when the increase takes place after it.

parties in halves, whether there has been a decree or not; and if it comes after possession, and after decree for a half to the husband, the answer is the same; while if it occur before the decree for half to the husband, the dower in her hands is like a thing possessed by virtue of an invalid contract.[1] And if a woman should apostatize, or kiss her husband's son before consummation, but after the occurrence of an increase, the whole of the increase would be hers, and she would be liable for the value of the original as of the day that she took possession.

When the subject of the dower is damaged in the husband's hands, and the damage accidental.

When the subject of the dower sustains damage in the hands of the husband, and he then repudiates his wife before consummation, the case presents several aspects. First—when the damage is accidental.[2] Here, if it be slight, she is entitled to no more than half the blemished slave, and has no claim on her husband for the damage; but if it be serious, she has an option, and may take half the blemished slave, without any claim on her husband for the damage, or may abandon the dower to her husband, and claim half its value as on the day of contract. Second—when the damage has been occasioned by the act of the husband. Here, if it be slight, she may take half the slave, and hold her husband responsible for half the damage, but she cannot abandon the slave to her husband, and make him responsible for half the original value. While if the damage be serious, she may do so, or, if she please, take half the value of the slave as he stands, making the husband liable for half the damage. Third—when the damage is occasioned by her own act; and here, she has only half the slave, without any option, whether the damage be slight or serious. Fourth—when the damage is occasioned by the act of the subject of the dower; and in this case the results are the same, according to the Zahir Rewayut, as if the damage were accidental. Fifth—when the damage is occasioned by the act of a stranger; here, if the damage be slight, she can only take half the slave, and proceed against the stranger for half the damage, and has nothing besides;

When it is by the act of the husband.

When by the act of the wife.

When by the act of the subject of the dower.

When by the act of a stranger.

[1] See *M. L. S.*, p. 213.

[2] Literally, by a heavenly calamity.

and if it be serious, the same course is open to her, or she may throw back the slave on her husband, and take from him half the value of the slave on the day of the contract; whereupon the husband may have recourse against the stranger (transgressor) for the whole damage. In all these cases the loss is supposed to take place in the hands of the husband. But now suppose that it occurs in the hands of the wife, and that he then repudiates her before consummation. Here, if the damage be accidental and slight, the husband can only take half the damaged dower, with nothing besides; and if it be serious, he may take the half, damaged as it is, without any claim against her for the damage; or he may abandon it entirely, and hold her answerable for half the value in the same state of soundness as on the day of taking possession. But if the damage in the hands of the woman occur after repudiation, all the learned are agreed that the husband may take the half with compensation for half the damage. So Koodooree has reported in his Commentary, and it is valid. And if the damage be by the act of the wife, then whether it be before or after the repudiation, the case is the same as if it were by accident; and so likewise when it is by the act of the subject of the dower. When the damage is the act of a stranger, and it occurs before repudiation, the husband's right is cut off from the dower itself, but the wife is responsible to him for half the value on the day that she took possession; for the stranger being liable for compensation, this becomes a separated increase, which, as already stated, precludes a division of the actual dower. And if the loss occurs after repudiation, the effect is the same as when it occurs before it, according to a report by the Hakim Shuheed; but, according to Koodooree's Commentary, the husband takes half the original, and has an option of recourse against the wife, or the stranger, for half the compensation. If the damage be before repudiation, and by act of the husband, the case is the same as when it is by the act of a stranger.

When the damage occurs in the hands of the wife before repudiation.

Effect when it occurs after repudiation.

If the *sudák*, or dower, should perish utterly in the hands of the husband, and he should then repudiate the woman

When there is an entire loss

of the dower in the hands of the husband; in the hands of the wife.

before consummation, she would be entitled as against him to half its value on the day of contract; while, if it perish in the hands of the wife, and he then repudiates her before consummation, he is entitled as against her to half its value on the day of contract.

No option of inspection in dower and none of defect unless it be glaring.

A woman has no option of inspection with regard to dower;[1] and cannot return the subject of it for a defect, except it be very glaring, unless when the dower happens to consist of articles that are estimated by weight or measure of capacity; but in that case the articles may be returned for a small defect. And if a man should marry a woman for a particular female slave, and the slave should die in the woman's possession, after which it is discovered that the slave was blind, the wife may have recourse to her husband on account of this defect, as in a case of sale. And if the slave were not particularized, the wife may claim from the husband her value, blind as she was, and the husband claim from the wife the value of a medium slave; whereupon, one value being set off against the other, the surplus is to be restored to the wife. But if the value of the blind slave should exceed that of the medium slave, neither party would have any claim against the other.

Section Eighth.

Of Sumût.[2]

Sumût described;

is of two kinds.

First, when a greater amount is expressed in the contract than has been fixed in private.

When a man marries a woman for a certain *sudák*, or dower, in private, and a larger amount is announced in public, this is *sumût*, and the case may present itself in two ways. First, when a dower is assigned or designated in private, and the parties then contract openly for more; here, when that which is contracted for in public is of the same kind as that which was assigned or designated in private, the difference being only in

[1] As to options, see *ante*, note p. 21.

[2] "Sound," "fame," an infinitive of the verb "he heard."

quantity, and the parties are agreed as to the private designation, or the man had called upon persons to attest as against the woman, or her guardian, that the real dower was to be that which was specified in private, and that the addition was *sumût* or for reputation; then that which was assigned or designated in private is to be taken as the true dower. If, however, while they agree that there was a mutual assignment in private, they differ as to the terms of it, the husband claiming that the sum specified was a thousand, and the wife denying that that was the amount, the word of the wife is to be credited, unless the husband can adduce proof of his claim, and the dower specified in the contract is to be taken as the true dower. Next, when the dower contracted for in public differs in kind from that which was assigned or designated in private; and here, supposing that the parties are not agreed as to the designation in private, the dower is that which was mentioned in the contract; while, if they are agreed as to the designation, then the marriage is held to have been contracted at the proper dower of the woman. And when a man and woman have designated in private a certain amount of *deenars* as the dower, and the marriage then takes place in public, on a condition that there shall be no dower, the *deenars* designated in private are to be taken as the true dower. But if the marriage were on condition that the *deenars* should not be her dower, or entire silence were observed at the marriage in public with regard to dower, then the marriage would be held to have been contracted in both cases at the proper dower.

Second, when a greater sum is declared to be the dower in public than has been fixed by the contract in private.

In the second case of *sumût*, the marriage is contracted in private for a certain dower, and the parties then declare in public a larger sum to be the dower. And, here, if they are both agreed as to what was designated in private, and persons had been called upon to attest that the addition in public was merely *sumût*, or for reputation, then the true dower is that which was mentioned in the contract in private; but if there was no call on any person to attest the fact that the addition was *sumût*, then, it is stated in the Comment on the Epitome of Tahavee, as on the autho-

rity of Aboo Huneefa and Moohummud, that the true dower is that announced in public, and that it is an addition to the first dower, whether it be of the same or a different kind; except that, when of a different kind, the whole of it is considered to be an addition to the first dower, but if of the same kind, it is only the excess over the first that is to be considered an addition to it. And the Sheikh-ool-Islam has stated that when parties have contracted in secret for a thousand, and then declared in public something different to this, and there is afterwards a dispute between them, and the husband says, "What I acknowledged in public was a joke," while the wife says, "Nay, but it was in earnest," her word is to be preferred, and the dower taken to be that which was stated in public, unless the husband can adduce proof of his allegation.[1]

[1] Two cases are reported among the decisions of the Sudder Dewanny Adawlut of Calcutta, which appear to me to come within the second kind of *sumût*, though the technical word does not occur in either report. In both cases the parties were of the *Sheea* persuasion, and the facts, as found by the court, were nearly the same. In both the marriage ceremony was read in the *Sheea* form, with a verbal declaration of the dower at 300 rupees, but there was a deed of settlement for a larger sum, which was said to have been entered into according to the *Soonnee* custom (the *Soonnee* sect being generally prevalent throughout the provinces under the Bengal Government), as a matter of formal observance. In the case first reported it is not very clear whether the deed of settlement preceded or followed the marriage contract, for, though drawn up before, it was not completed by the attestation of the subscribing witnesses till after the performance of the *Sheean* ceremony. It does not appear that any proof to the satisfaction of the Court was adduced of the deed of settlement having been entered into merely as a "matter of formal observance," which would have been substantially a plea of *sumût*; and the Court pronounced the deed of settlement specifying the dower at 110.115 rupees to be good and valid, in preference to the verbal declaration of the amount at 500 rupees.—*Reports S. D. A., Calcutta*, vol. i., p. 279. In the second case, the settlement, which was for 100,001 rupees, was not merely attested and completed, but executed, subsequently to the contract. The decision was to the same effect; the Court declaring the sum specified in the settlement to be true.—*Reports S. D. A. of Calcutta*, vol. ii., p. 199.

Section Ninth.

Of the Loss of the Dower, and the Establishment of a Right to it.

If the subject of dower is lost before delivery, the wife is entitled to a similar, or its value.

When a man has married a woman on a dower of something distinctly specified, and it happens to perish before delivery, or a third party establishes a right to it, she may have recourse to her husband for a similar of the thing, if it belonged to the class of similars, or otherwise for its value.[1] And, in like manner, though she should give the specific thing which is the subject of dower to her husband, and should herself establish a previous right to it, she may still have recourse to him for its value. And if a right is established to half of a mansion, which is the subject of dower, she may either take what remains and half the value, or the value of the whole mansion; but if her husband repudiates her before consummation, she has only the half that remains, without any option. When a man has married a woman on the dower of a slave who belongs to a third party, or to whom a third party establishes a right, the husband is liable for the value of the slave, unless the transaction is allowed by the third party; and if the slave should happen to come into his possession under any right, before a decree has been pronounced against him for the value, he may be compelled to make specific delivery.

Section Tenth.

Of a Gift of the Dower, and of Gifts or Sales in lieu of Dower.

A woman may give her dower to her husband.

A woman may make a gift to her husband of whatever *sudák*, or dower, she is entitled to, whether he have consummated with her or not; and none of her guardians, not even a father, has any right to object. But a father cannot give away the dower of his daughter, according to all our learned men. A master may, however, give the *sudák*, or

[1] This follows the analogy of sale, where the thing sold is at the risk of the seller till delivery.

dower, of his female slave to her husband; so also of his *Moodubburah* and *oom-i-wulud;* but with respect to a *mookatibah,* her dower is her own, and a gift of it by her master is not valid; nor would her husband be discharged by making it over to her master. When the wife of a deceased person has given her dower to the deceased, the gift is lawful; but if she should give it while in the pangs of labour and should then die, the gift would not be valid.[1] If she should give it to his heirs, the gift would be lawful; and if she give away her dower conditionally, and the condition is fulfilled, the gift is lawful; otherwise it reverts to its former state.

Effect of such gifts when she is subsequently repudiated before consummation.

A wife being entitled to no more than half her dower if repudiated before consummation, it is necessary to consider what would be the effect of such a repudiation in the event of the wife's having previously made a gift of her dower to her husband. The case branches out into several parts, according as the dower may consist of things that have been identified to the contract, or of things that have not been so identified, and also according as possession of them may or not have been taken by the wife previously to the gift.[2] When a man has married a woman on a dower of a thousand (*dirhems* or *deenars*), of which she has taken possession and made a gift to her husband, and he then repudiates her before consummation, he is entitled to have recourse against her for five hundred; because he has not got by the gift the actual thing to which he was entitled, as money does not admit of identification; and so, in like manner, when the dower consists of articles estimated by weight or capacity, or something else which, though capable in its own nature of being identified, yet was not identified at the time of the contract, but left generally on responsibility, that is, indeterminate.[3] But if

When the dower consists of things that have not been identified to the contract.

[1] Or only to the extent of one third of her estate.

[2] *Inayah*, vol. ii., p. 65.

[3] *Hidayah*, vol. ii., p. 71. Dirhems and deenars, the only coined money of the ancient Arabs, do not admit of identification. Other articles estimated by weight or measure admit of identification when actually produced or pointed out at the time of the contract.

she should not have taken possession of the dower before making a gift of it to her husband, and he should repudiate her before consummation, neither party would have any claim against the other; because what he is really entitled to in this case is a release from responsibility, and that he has in effect obtained by the gift of the dower. And if she should take possession of five hundred, and then make him a gift of the whole thousand, that is, as well of the portion taken possession of as of the remainder, and he should then repudiate her before consummation, neither would have any claim against the other, according to Aboo Huneefa; but if she had given him less than a half, and taken possession of the remainder, then, according to the same authority, he might have recourse to her for the whole half.[1]

When it consists of things that have been identified.

If a man should marry a woman on a dower of something that is identified by specification, such as chattels, and she should make a gift to him of the half of the whole of them, and he should then repudiate her before consummation, he could not have recourse to her for anything, whether she had or had not previously taken possession. And if he should marry her for an animal or a chattel left on his responsibility (or indeterminate), the answer would be the same, whether she had previously taken possession or not.

Gift of the dower to a stranger.

When a woman has given the *sudák*, or dower, to a stranger, and empowered him to take possession of it, and he has done so, and her husband then repudiates her before consummation, he may have recourse to her for half of it. Things indeterminate and determinate are alike in this respect.

Sale of the dower to the husband.

When a woman has sold her dower to her husband, or given it to him for a consideration, and he then repudiates her (before consummation), he has a claim against her for half its like, or half its value, according as the dower belonged to the class of similars or dissimilars. And if she sell it before possession she is liable for half its value as

[1] *Hidayah*, vol. ii., p. 71.

on the day of sale; but if she first took possession and then sold it, she is liable for half its value on the day of taking possession.

Difference between the parties as to terms of gift.

When the parties differ as to the terms of a gift of the dower, the woman saying, "I gave it on condition that you would not repudiate me," and he that it was without any condition, her word is to be preferred.

Dower,[1] in modern times, is usually a sum of money, and is not unfrequently left, in whole or in part, as a debt on the responsibility of the husband. The debt is termed *Deyn-muhr*, or dower-debt; and, like any other debt, it may be made the consideration for a transfer of property by the husband to the wife. Transfers of this kind are of common occurrence in India, where they are usually effected by writings known by the names of *Heba bil Iwuz* and *Beya Mokassa*. A short description of these may, therefore, not be improper in this place.

Heba bil Iwuz.

Heba bil Iwuz means, literally, gift for an exchange; and it is of two kinds, according as the *Iwuz*, or exchange, is, or is not, stipulated for at the time of the gift. In both kinds there are two distinct acts; first, the original gift, and second, the *Iwuz*, or exchange. But in the *Heba bil Iwuz* of India, there is only one act; the *Iwuz*, or exchange, being involved in the contract of gift as its direct consideration. "And all are agreed that if a person should say, 'I have given this to thee for so much,' it would be a sale;"[2] for the definition of sale is an exchange of property for property, and the exchange may be effected by the word "give," as well as by the word "sell."[3] The transaction which goes by the name of *Heba bil Iwuz* in India is, therefore, in reality not a proper *Heba bil Iwuz* of either kind, but a sale;[4] and has all the incidents of the latter contract. Accordingly, possession is not required to complete the

[1] From here to the end of the section is an addition to the original digest.

[2] *Bidaut ool Mooftieen. P. P. M. L. Appendix*, p. 51, and other authorities, cited at p. 217 and 221.

[3] *M. L. S.*, pp. 1 and 9.

[4] *Reports S. D. A., Calcutta*, vol. iv., p. 335, and *P. P. M. L.*, p. 217.

transfer of it, though absolutely necessary in gift, and, what is of great importance in India, an undivided share in property capable of division may be lawfully transferred by it, though that cannot be done by either of the forms of the true *Heba bil Iwuz*.[1]

Beya Mokassa means literally a "set off sale,"[2] if the expression may be allowed, the consideration or price being a debt due by the seller to the purchaser, which is set off against the thing sold; and the transaction is in strict accordance with Moohummudan law.[3] The consideration being generally an unpaid dower, or *Deyn Muhr*, or a portion of it, the *Beya Mokassa* is commonly employed in India in the same way and for the same purpose as the *Heba bil Iwuz*. Both being sales, they are governed generally by the same rules as that contract. Hence, when dower is made the price or consideration in either of them, it must "be so known and determined as to prevent any disputes between the parties"[4] regarding it; so that when a husband "gave everything that he possessed of whatever sort in lieu of *part of the dower*," it was held that "how much *part of the dower* might imply being unknown," the gift was of no avail.[5] The rule is the same with regard to the property which may be given or sold in lieu of the dower. But it does not seem to be necessary that, when it consists of land, it should be described by its boundaries;[6] nor that the gift or sale of a person's share in property, or of "the whole of his property real and personal, without specification in exchange for dower," would be invalid, if the share or property referred to were known

Beya Mokassa.

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[1] *Reports S. D. A., Calcutta*, vol. iv., p. 212, and *P. P. M. L.*, pp. 199 and 217.

[2] It is a derivative from the same root as *Kissas*, retaliation. See *P. P. M. L.*, p. 96, *note*; though the learned author has been misled by Mr. Hamilton's spelling of the word *mookaiza*, which he renders *mokasa*, to confound the *Beya Mokassa* with the *Beya Mookaiza*, or Barter. *Ibid*, p. 175, *note*.

[3] *M. L. S.*, p. 137.

[4] *M. L. S.*, p. 4.

[5] *Reports S. D. A., Calcutta*, vol. i., p. 51. Opinion of the law officer.

[6] *M. L. S.*, p. 185.

to the parties, or could be sufficiently ascertained, so as to prevent disputes between them.[1] Thus, in a case decided in the Sudder Dewanny Adawlut of Calcutta,[2] it was decreed that a "deed executed by a husband settling on the wife by gift, in lieu of dower due, all the property he possessed, was a valid instrument, and that in virtue of it the widow was entitled to take the property then possessed by her husband to the exclusion of heirs. But, as in sale it is necessary that the thing sold, as distinguished from the price, should be in existence at the time of the contract,[3] so, also, with regard to either of the transactions in question; and in the case last referred to, it was declared[4] that the gift of property then non-existent is not good in law. Further, as in sale, it is not necessary that the thing sold should be immediately delivered; so neither does a *Beya Mokassa*, nor consequently a *Heba bil Iwuz*, require possession to render it valid. But, as an express stipulation for delay in the delivery of the thing sold when specific would invalidate a sale, so also it may be supposed that a similar stipulation would have the like effect on a *Heba bil Iwuz* or *Beya Mokassa* in lieu of dower.

Section Eleventh.

Of a Woman's right to refuse herself to her Husband on account of her Dower; and of deferring the Dower, and Matters connected therewith.

A wife may refuse herself to her husband

A woman may refuse herself to her husband, as a means of obtaining payment of so much of her dower as is

[1] This appears to be opposed to the answers of the law officers, given at pp. 174 and 178 of the *P. P. M. L.*, and approved by the learned author, as being in conformity with his 13th principle. But the conformity may be questioned, and the officers were those of inferior courts. It is true that in the *Hadaya* (vol. iii., p. 65,) it is said that land must be described by its boundaries, but this is with reference to a claim or suit, not a sale.

[2] *Reports*, vol. i., p. 54.

[3] *M. L. S.*, p. 3.

[4] By the law officer, in answer to a question put by the Court. (p. 54). *P. P. M. L.*, p. 175.

Mooâjjul, or prompt; and, in like manner, her husband cannot, until such payment has been made, lawfully prevent her from going out of doors, or taking a journey, or going on a voluntary pilgrimage. All this, according to Aboo Huneefa, even after consummation, or a valid retirement. But on that point both his disciples differed from him, unless the consummation had taken place against her will, or when she was very young, or insane; in which cases they agreed with him that her subsequent resistance would be lawful, and that her father might refuse to surrender her until the prompt portion of her dower was paid to her. There was the same difference of opinion between them as to the wife's refusal to accompany her husband on a journey until payment of her dower. On this point Sheikh-As-Suffar was in the practice of deciding according to Aboo Huneefa's opinion, but in the matter of refusing herself, he used to decide with the disciples, and several sheikhs have approved of this distinction.

band, and to accompany him on a journey, until she receives payment of so much of her dower as is prompt.

When a husband has paid his wife's dower he may remove her wherever he pleases. Many of "our" doctors however are of opinion that he cannot take her on a journey in our times, even if he have paid her dower, though he may remove her to the villages when he pleases; and the *futwa* is in accordance with this opinion. He may also remove her from village to town and from village to village.

After payment, he may remove her from place to place.

A man having contracted his virgin, but adult, daughter in marriage, is desirous of removing with her and his family to another town: he may do so, even though objected to by the husband, when the dower has not been paid; but if the dower has been paid, she cannot be removed without her husband's consent.

Until payment he cannot prevent her father from removing her.

Though a husband should give his wife the whole of her dower except one *dirhem*, she may refuse herself to him, and he cannot demand back from her what she may have already received.

If a single *dirhem* of the dower be unpaid, she may refuse herself to her husband.

A young girl, having been contracted in marriage, goes to her husband before possession has been taken of the *sudák*, or dower: in such circumstances the person who

A young girl, though given up

to her husband, may be reclaimed by her guardian when the dower is unpaid.

had the power of keeping her in the first instance before the marriage is entitled to take her back to his house, and refuse her to her husband until he pay the dower to whomsoever may be entitled to receive it. And when a paternal uncle has contracted his brother's young daughter in marriage at a specified dower, and has delivered her to her husband before possession has been taken of the whole dower, the surrender is invalid, and she is to be restored to her home.

A father is not obliged to produce his daughter before demanding her dower.

It is not a necessary condition to the demand by a father of his daughter's dower that he should actually produce her. But if the husband should demand that his wife be delivered to him, and she is at the time in her father's house, it is obligatory on the father to make delivery of her; and if she is not in his house, or he is otherwise unable to do so, he has no right to take possession of the dower. Should the husband suspect that his wife, though in her father's house, will not be delivered to him on payment of the dower, the judge should call on the father to give a surety for the dower before directing its payment to him. And if the dispute regarding the dower should take place at Koofah, while the daughter is at Bussorah, the father is not obliged to bring her to Koofah; but the husband may be called upon to make payment of the dower, and then to accompany the father to Bussorah, to receive possession of the woman there.

Prompt and deferred dowers.

When the parties have explained how much of the dower is to be *mooâjjul* or prompt, that part of it is to be promptly paid. When nothing has been said on the subject, both the woman and the dower mentioned in the contract are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman, and so much is to be *mooâjjul* or prompt, accordingly, without any reference to the proportion of a fourth or a fifth; but what is customary must also be taken into consideration. Where, however, it has been stipulated that the whole is to be *mooâjjul* or

prompt, the whole is to be so, to the rejection of custom altogether.[1]

When the dower is exchanged for a chattel the wife may refuse herself till it is delivered.

And if he should sell her a chattel for her dower, she may refuse herself till she has obtained delivery of the chattel. And Aboo Yoosuf has said, that when possession has been taken of the dower, and it is afterwards found that the *dirhems* are *zooyoof*, or alloyed, or that they are not current, she may refuse herself to him until he changes them; but if he had already consummated with her consent, and then the discovery were made of the dower

[1] The *Futawa Kazee Khan* is cited, but the rule has been questioned by the learned author of the *P. P. M. L.* (*note*, p. 279), who has laid it down as a principle, that the whole of the dower is due on demand in the case supposed (p. 59). The authority which he quotes (*Appendix*, p. 58, No. 22) does not appear to me to be in point, as it merely states what is admitted to be the general principle, without any allusion to custom. The doctrine of the text is confirmed by the following authorities, all of whom take notice of the custom; viz., the *Ashbaho Nuzair* with commentary (p. 254), the *Door-ool-Mookhtar* (p. 208), the *Munnih-ool-Ghuffar* (*P. P. M. L.*, p. 281), and the *Shurh-i-Vikayah* (p. 118). With regard to the last of these authorities, the learned author above referred to observes (note, p. 280):—"Had there been no mention whatever whether the dower should be prompt or deferred, the whole must be considered prompt. (See *Prin. Marriage, &c.*, p. 22.) This is unquestionably the law, and the author of the *Shurh-i-Vikayah* admits it to be so, although he states that occasionally in modern practice respect is had to the peculiar usages of the place in which the cause of action may have originated." In the printed edition of that work I find nothing corresponding to the word "occasionally." On the contrary, the author, after citing a passage from the work, on which his own is a comment, in very nearly the same terms as above given in the text, remarks that "the author has entered into some detail to show that there is a difference of opinion on the subject, and that this view" (that of apportioning the *mooŭjjul* according to custom and with reference to similar cases) "has been approved, and the moderns have adopted it as being founded on what is well known and customary." In a case decided in the Court of Sudder Dewanny Adawlut at Agra, it has been held that a wife cannot claim the whole of her dower as exigible, while her husband is alive, where no specific amount has been declared to be exigible. In such case one-third of the whole must be considered exigible (*mooŭjjul*), and two-thirds not exigible (*moowujjul*), such two-thirds being only claimable on the death of the husband.—*Reports N. W. P.*, vol. iii., p. 185.

being *zooyoof*, or the like; or if, in the case of the chattel, a right were established in it after he had consummated with her, she would no longer have the power of refusal.

When the dower is deferred for a term, the woman cannot deny herself at the arrival of the term, or before it.

When the dower is *moowujjul*, or deferred, to a known or definite term, and the term has arrived, she cannot deny herself for the purpose of obtaining payment of her dower, according to the principles of Aboo Huneefa and Moohummud. A man has married a woman for a thousand, payable at a year, and desires to consummate with her before the expiration of the period, and without giving her anything; if he made consummation before the term a condition of the contract, he may lawfully do so, and she cannot prevent him, without any difference of opinion. And though he made no such stipulation, he still may, according to Moohummud, after the analogy of sale, but cannot in the opinion of Aboo Yoosuf,[1] who controverts this doctrine, on the ground that marriage requires the delivery of the dower first, whether it be specific or indeterminate (while that is not required in sale when both the things exchanged are specific, or the transaction is, in other words, a barter[2]), and that the husband's acceptance of the delay, with a knowledge of this fact, is an assent on his part to the postponement of his right till after payment of the dower on the arrival of the term.

When it is partly prompt and partly deferred to a known time, the rule appears to be the same.

Where part of the dower is prompt and part of it deferred, and the woman has obtained the prompt: or when, after the contract, she has allowed it to be deferred to a known or definite term, she has no right to deny herself; but, on the principle of what has been said by Aboo Yoosuf,[3] she would be entitled to do so until she obtain payment of the consideration, that is, the dower, on the arrival of the term.

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[1] *Inayah*, vol. ii., p. 77.

[2] *M. L. S.*, p. 29.

[3] I do not understand that there is any express *dictum* of Aboo Yoosuf, or of his co-disciple Moohummud, on this case, where the dower is partly prompt and partly deferred, but this is a mere application of their principles. It is probable that the practice did not exist at that time of dividing the dower in that manner.

When the dower is half prompt and half deferred, but without defining the term, the deferred is payable at the dissolution of the marriage.

When the whole is so deferred.

If a husband should say, "Half of it prompt and half of it deferred," as is the custom in "our" country, and should mention a time for the payment of the deferred half, there is a difference among the learned upon the point; some saying that the postponement is unlawful, and that the whole of the dower is payable immediately, while others say that the postponement is lawful, and is to be construed as having reference to the time when a separation shall take place between the parties, either by death or repudiation; and there is a report as from Aboo Yoosuf which gives some confirmation of this view of the case. No one has disputed that the postponement of the dower for a fixed period, such as a month or a year, is valid; but when the period has been left unfixed, there is a difference of opinion among the learned. Some, however, say that the postponement is still valid; and this opinion is correct, for, in fact, the period is sufficiently known, *that* being death or repudiation. And is it not seen that the postponement of a part is valid, though the time of payment should not be expressly mentioned?[1] Even a revocable repudiation would hasten the payment of a deferred dower, that is, make it prompt; and though the wife should be actually recalled by her husband, it would not again become deferred.

Any guardian may take possession of an infant's dower,

but only a father, grandfather, or judge, that of an adult.

When a woman has contracted her infant daughter in marriage and taken possession of the dower, the daughter may, on coming to years of discretion, sue her for it, if she were the daughter's *wusee*, or guardian, but she has no claim against her husband in that case; while if the mother were not her guardian, she would have a right to sue her husband, who might have recourse against the mother. And the same rule applies to all others among guardians, except a father and grandfather. A father, grandfather, and a judge may take possession of the dower of a virgin, whether she be an infant or adult, except that when adult she may object, and her objection is valid; and no other besides them has this power. But a *wusee*

[1] Fut. Al. and see *Reports S. D. A., Calcutta*, vol. i., p. 278.

may take possession of an infant's dower, though in the case of an adult daughter it is only herself who is entitled to do so. And the father of a young girl yet unenjoyed by her husband may call upon the husband for payment of her dower.

Section Twelfth.

Of Disputes relating to the Dower.

Disputes—when they may occur, and to what they may relate.

Disputes regarding the dower may take place between the married parties themselves in their lifetime, or between their heirs when both are dead, or, after the death of one of them, between his or her heirs and the survivor. When the disputes arise in the lifetime of the parties, it must be either before or after repudiation. And in all cases the disputes may relate either to the amount of the specified dower, or to the fact of any dower having been specified in the contract.[1]

When the dispute arises during the marriage, and relates to the amount of the dower,

When a dispute arises between the married parties, at any time during the subsistence of the marriage, regarding the amount of the dower, the proper dower is to be assumed as the standard of probability; and if it bear witness in favour of one of the parties, his or her word and oath are to be preferred as against the claim of the other. In other words, the word and oath of the wife are to be preferred up to the full amount of her proper dower, but as to anything beyond that, the preference is to be given to the word and oath of the husband.[2] Thus, if the husband should say that the dower is a thousand, and the wife should say that it is two thousand, the husband's word and oath would be preferred, when the proper dower is a thousand or less; and the oath to be taken by him would be in these terms—"By God! I did not marry her at two thousand *dirhems*;" if then he should refuse the oath, the excess would be established against him by his refusal, while if he take the oath, the excess is not established. But if

and it is money,

[1] *Kifayah*, vol. ii., p. 86.

[2] *Hidayah*, vol. ii., p. 85.

either party should adduce proof to the matter, it is to be decreed in his or her favour; and if both of them should adduce proof, preference is to be given to the proof of the wife, and decree passed accordingly. If, on the other hand, the proper dower were two thousand or more, preference would be given to the word and oath of the wife, and the oath would be propounded to her in these terms—"By God! I did not marry for a thousand;" if then she should refuse, the thousand would be established by her refusal, while if she should take the oath, she would be entitled to the two thousand. But here again, if either party adduces proof, judgment is to be given for that party; while if they should both adduce proof, preference must be given to that of the husband. If, again, the proper dower be one thousand five hundred, both parties are to be sworn, and if the husband refuse the oath, judgment is to be given for two thousand; while if the wife refuse, judgment is to be given for one thousand; and if both should take the oath, the decree is to be for one thousand five hundred.

or anything else that is indeterminate.

If the dower were anything else than money that is indeterminate, and were left on responsibility, that is, not produced and delivered, as, for instance, something measurable by capacity and described, or something weighable and described, or something measurable by length and described, and the parties should differ as to the quantity in measure, weight, or length, the case is to be determined in the same way as when there is a difference as to the amount of *dirhems* or *deenars*. So also, where the subject of the dower is specific, but the parties differ as to what it was, the husband saying, "I married you for this male slave," and the wife saying, "For this female slave," the case is to be determined in the same manner as that of the difference as to *dirhems* and *deenars*, except in one point, which is that when the proper dower is equal to or more than the value of the female slave, it is the value and not the slave herself that the wife is entitled to. Where, however, they are agreed as to what the dower was, but it has happened to perish in the husband's hands before delivery, and they then differ as to its value, the word of the

Where the subject of dower is specific.

husband is to be preferred. But if there should be a difference as to what the subject of the dower was, the husband saying, for instance, "I married you for my black slave, whose value was a thousand, and he has died in my hands," and she saying, "Nay; but you married me for your white slave, whose value was two thousand, and he has died in your hands," decree must be given for the proper dower, and both parties be sworn, if the amount of the proper dower be between their claims, that is, bear witness for neither.

When the difference takes place after repudiation.

If the parties should differ after repudiation, and the repudiation had not taken place till after consummation or a valid retirement, the case is to be resolved in the same way as if the difference had taken place during the subsistence of the marriage; but if the repudiation had taken place before consummation or a valid retirement, and the subject of the dower being intermediate, the difference between the parties were as to one and two thousand, the word of the husband would be preferred, and the sum mentioned by him would be halved. If, however, the amount admitted by the husband were so low that the half of it would not be equal to the *mootût*, or present, of women of like condition, the wife would be entitled to a *mootût*.

When the dispute is as to the fact of a dower having been specified in the contract, and it occurs before repudiation. When after it.

And if the difference be as to the fact of any dower having been mentioned in the contract, one of the parties asserting and the other denying that it was, the proper dower is incumbent; and on this point all are agreed. But it is not to exceed what is claimed by the woman, if she be the party who insists that it was mentioned; nor to fall short of what is alleged by the husband, if he be the party insisting that it was mentioned.

If the difference should occur after repudiation, in a case where there has been no consummation, a *mootût*, or present, is due by general agreement.

When the dispute arises after the death of one of the parties.

If the difference does not occur till after the death of one of the parties, the answer is the same as if it had occurred in the lifetime of both, and during the subsistence of the marriage, both as regards the amount and the fact of a dower having been specified in the contract.

If both the parties have died, and a dispute arises between their heirs as to the amount of dower specified, the word rests with the heirs of the husband, and there is no exception in the case of a *moostunkir*, according to Aboo Huneefa. Two explanations have been given of this term. One of these is that it means a person who claims to have married the woman for less than ten *dirhems*, and some of the learned have adopted this explanation; and the other is that it is a person who claims to have married the woman for something for which it is not usual for such women to be married; and this interpretation has been adopted by many of the learned, and it is the correct one. And if a dispute should take place between the heirs of both the parties as to the fact of a dower having been mentioned, the word is with the person who denies the fact, and nothing is decreed to the wife, according to Aboo Huneefa; but according to the disciples, decree is to be given for the proper dower, and the *futwa* is said to be in accordance with their opinion. When both husband and wife are dead, and the fact that a dower was fixed for her is established either by proof or by the admission of the heirs, her heirs may take this from the estate of the husband,—that is, when it is known that the husband died first, or that they both died together, or the precedence is unknown; but if it be known that she died first, the share of the husband, as an heir, is to be deducted from it. And if the heirs agree as to the non-mention of a dower at the time of the contract, decree is to be given for her proper dower, according to a saying of the two companions, and the *futwa* is in accordance therewith.

When it arises after death of both, and relates to the amount,

or to the fact of a dower having been specified.

When a husband refuses to give a writing for the dower, he cannot be compelled to do so; and if *deenars* should be mentioned in a written settlement of dower, when the contract itself was really in *dirhems*, *dirhems* are due, and not *deenars*, as by the writing. Aboo Huneefa says that this is as between him and his conscience, but that the judge should compel him to render *deenars*, unless he actually knows that the contract was in *dirhems*.

Husband cannot be compelled to give a writing for the dower.

Dispute as to things sent by the husband to the wife being in part of the dower.

When a husband has sent anything to his wife, and she alleges that it was as a present, while he insists that it was on account of the dower, his word is to be preferred, except as to things actually prepared for eating, such as dressed meats and fruits that will not keep: with regard to those her word is to be preferred, on a favourable construction; contrary to the case of articles not actually ready or prepared for eating, such as honey, butter, nuts and almonds in the shell. And the lawyer Aboo Leeth has reported, as the approved doctrine with regard to *mutá*, or household stuffs, which it is not incumbent on a husband to provide his wife with, such as *khooff* (shoes, boots, or socks), *moolá't* (a mantle or scarf), and the like, his word is to be preferred; but as to such as it is incumbent on a husband to provide for his wife, such as a *khumar* (veil), *dira* (shift), and things required for the night, he cannot reckon them as in part of the dower. With regard to *mal*, or property generally, when a man gives it to his wife, and says it was a part of the dower, while she alleges it was for maintenance, his word is to be preferred, unless she adduce proof.

Section Thirteenth.

Of Repetitions of the Dower.[1]

Cases of re-marriage after repudiation.

A man having said to a woman, "As often as I marry you, you are repudiated," married her three times in one day, consummating with her on each occasion; in these circumstances two repudiations take effect on her, and he is liable for two dowers and half a dower, according to the analogy of the opinions of Aboo Huneefa and Aboo Yoosuf; because, as soon as he has married her the first time one repudiation takes place on her, and he becomes liable for

[1] This section is in the nature of an exercise on dower in connection with repudiation, and cannot be well understood, even with the aid of the parenthetical explanations and the notes, till the reader has perused the third book.

half the dower by reason of its being before consummation; then, when he has consummated with her (though it is to be remarked of this consummation that there is a doubt regarding it, for, according to Shafei, a repudiation which is made dependant on marriage does not take effect), she becomes liable to observe an *iddut*, and when he has married her the second time—she being in her *iddut*—another repudiation takes effect upon her, and this is one that admits of being revoked,[1] according to Aboo Huneefa and Aboo Yoosuf (for, in their opinion, when one marries a woman in her *iddut*, and then repudiates her before consummation, the effect is the same as of a repudiation after consummation, even though the *iddut* have been induced by a dubious consummation, and such a repudiation is susceptible of being revoked, and induces a full dower); hence the husband is rendered liable by it for the amount mentioned in the second marriage, so that two dowers and a half unite against him; but the third marriage is not valid, because it took place during an *iddut* after a reversible divorce, so that it is not accounted a third marriage, and cannot induce a third dower; and he is not liable for a third dower by consummation after the third marriage, for it was in reality connection with his own wife.[2] But if he should say, "As often as I marry you, you are repudiated *absolutely*;" and should then marry her three times, and have connection with her each time, she would be repudiated thrice absolutely, and he be liable for five dowers and a half, according to the analogy of the opinions of Aboo Huneefa and Aboo Yoosuf, viz.: a half dower

[1] The first repudiation did not, because it took place before consummation.

[2] The two dowers and a half are thus made up: the half dower for the first repudiation before consummation, one whole dower for the consummation; and another whole dower for the second marriage. Though repudiation takes place on the instant of the second contract, as of the first, it is a repudiation that can be revoked, and is revoked by the consummation which follows (a renewal of matrimonial intercourse being a revocation by deed); and consequently the third marriage not taking effect there is no more dower.

under the first marriage, a proper dower by reason of the first consummation, a full dower by the second marriage, a proper dower by the second consummation (though dubious, as already mentioned), a full dower by the third marriage, and a proper dower for the dubious connection, making, in all together, five dowers and a half.[1] And when a man has married a woman and had connection with her, after which he repudiates her absolutely, and then marries her again during her *iddut*, and repudiates her again before connection under the second marriage, she has one dower for the first marriage, and a full dower for the second marriage, according to Aboo Huneefa and Aboo Yoosuf, and she has to undergo another *iddut* according to them. And though, instead of being repudiated under the second marriage, she should become absolutely separated from him by reason of an act proceeding from herself, such as apostasy, or submitting to the son of her husband, he would still be liable, according to them, for the whole dower; or if, being a slave, she were emancipated after the second marriage, and should avail herself of her option before connection, still, according to them, the husband would be liable for a full dower under the second marriage.[2] And when a woman has married a man who is not her equal, and consummation follows, and the matter is then brought by her guardian before the judge, and he separates the parties, and imposes both dower and *iddut* in consequence, and the man then marries the woman again, without the consent of her guardian, and the judge again separates them before connection under the second marriage, she is entitled to another full dower, and is bound to the observance of another *iddut*, according to Aboo Huneefa and Aboo Yoosuf. A man has married a young girl who was contracted to him by her guardian, and has connection with her; she then arrives at puberty, and

Cases of re-marriage after separation for causes proceeding from the wife.

[1] The difference between this and the preceding case is in the repudiation being absolute, and not admitting of revocation.

[2] Because, I suppose, the right to dower was perfected by the *iddut*, which here comes into the place of consummation, and being once perfected it does not abate.

avails herself of her option, and is separated from him; after which he marries her again during her *iddut*, and then repudiates her before connection: he is liable for the full dower, according to them, and she is bound to the observance of a future *iddut*.

And, in like manner, if a man should marry a woman by an invalid contract, and having connection with her, a separation should then be made between them, and he should marry her a second time during her *iddut* by a lawful contract, and then repudiate her before connection, the full dower is incumbent upon him, and another *iddut* incumbent upon her, according to Aboo Huncefa and Aboo Yoosuf.

Cases of erroneous intercourse where the act is repeated.

If one should have connection with the maid of his son, or the maid of his *mookatibah*, or a woman under an invalid marriage, repeatedly, he is liable for only one dower. The principle is this: that when a man has had intercourse with a woman repeatedly in a case of *shoobh*, or semblance of property, each act of intercourse does not induce a separate dower, because the second connection meets his own property, and that when connection takes place repeatedly in a case of *shoobh ishtibah* (where the semblance exists only in an erroneous impression in the mind of the party), it induces a separate dower for each instance of connection, because every such connection meets the property of another. Hence if a son should have connection with the female slave of his father repeatedly, and then claim the benefit of a *shoobh*, or semblance of property, he is liable in a dower for each instance of connection; while, if one should have connection with the female slave of his wife, or with his own *mookatibah* repeatedly, he is liable for only one dower; but if one of two partners should have connection with a partnership slave repeatedly, he would be liable in half the dower for each instance of intercourse; and if the woman were his *mookatibah*, held in joint property with another, he would be liable in respect of his own half for half of one dower, and in respect of the half of his partner for another half a dower for each instance of connection; the whole becoming the right of the *mookatibah*.

If a man should have connection with a woman in her *iddut* after three repudiations, and plead *shoobh* or semblance of right, it has been said, that if the three repudiations were together, or given at the same time, and he supposed that they did not take effect on her, that is, make a complete divorce, there would be some ground for the plea, and only one dower would be due, though the act were repeated. But if he supposed that the repudiations had actually taken effect, but that still it was lawful for him to have intercourse with her, that would be a supposition without any reasonable ground for it, and he would be liable for a dower for each act of intercourse. When a man has purchased a maid, and had intercourse with her repeatedly, and a right to her is established by a third party, he is liable for only one dower; and if the right be only to half the maid, he is liable for half a dower to the party entitled.

Case of illicit intercourse followed by marriage.

A man commits fornication with a woman and then marries her, while still on her person; he is liable for two dowers, one the proper dower, on account of the fornication, and the other, the dower which is named or appropriate to the marriage.

Case of illicit intercourse by a boy.

When a boy has illicit intercourse with a girl, he is liable for her dower, but not on his mere acknowledgment of the act; and when a boy has such intercourse with a free adult woman, and her virginity is lost, if she were unwilling, the boy is liable for her dower; but if she were willing, and had solicited him to her embraces, he would not be liable for any dower. When a girl solicits a boy to her embraces, and her virginity is lost in consequence, he is liable for her dower, for even her order is not valid to the effect of cancelling her right; contrary to the case of the adult woman. And when a female slave solicits a boy, and he has illicit intercourse with her, he is liable for her dower; for her command would have no force with regard to the right of her master.

Equivalent to the proper dower.

What is intended by dower in these places is the *ookr*, and with regard to its amount, it is reported in the Hoojjut, as from Aboo Huneefa, that he said in explanation of

the *ookr*, that it is that for which the woman's like or equal might be married, and the *futwa* is to that effect.[1]

Miscellaneous cases of erroneous intercourse.

A man marries a woman, and his son marries her daughter, and each woman is brought (by mistake) to the husband of the other, and connections take place, one after the other; in these circumstances the man who has first had connection is liable for the whole dower of the woman with whom the connection has taken place, and for half the dower of his own wife, and the other man, whose connection was second in respect of time, is not liable for the dower of his own wife; and if the connections took place simultaneously, nothing would be due by either to his own wife. A man and his son marry two women who are strangers, or not related to each other, and each of the women is brought (by mistake) to the husband of the other, and connections take place; in these circumstances each of the men is liable for the *ookr* of the woman with whom he has had connection, but neither is liable for the dower of his own wife. Two brothers marry women, one of whom is the mother of the other, and each of the women is brought to the husband of the other, and connection takes place in both instances; Aboo Yoosuf says that each woman becomes absolutely divorced from her husband, and each husband is liable to his own wife for half her dower, and to the woman with whom he has had connection for her *ookr*, and that it is not lawful for either of them after this to remarry his own wife; but that the husband of the mother may marry the daughter with whom he has had connection, while the husband of the daughter cannot marry the mother. And, in like manner, if there were no relationship between the husbands, there would be no difference in the results.

A woman is brought to another than her husband, and

[1] In the Jowhurrah it is stated that the *ookr* in the case of free women is their proper dower, and in the case of slaves is a tenth of the value if the woman were a virgin, and half of that, or a twentieth of the value, if she were a *thuyyibah*. *Door-ool-Mookhtar*, p. 203.

he has connection with her,—he is liable for her proper dower, and has no claim against the person who brought her; and if the woman be the mother of his wife, his wife becomes unlawful to him, and is entitled to half her dower, on account of the necessary separation before consummation. The wife of a father is brought before consummation to his son who has connection with her; the father has no recourse against the son for half the dower, for the son himself is liable for the whole proper dower.

Section Fourteenth.

Of Suretyship in Dower.

A father may be surety for dower to his daughter.

When a person has married his daughter to a man, whether she be a child, an adult virgin, or insane, and has become surety on behalf of the man for the dower, the suretyship is valid, and the woman has her option of suing the husband or the guardian[1] when she is legally competent to sue; whereupon the guardian, after he has paid, may have recourse against the husband if he became surety by his direction. A person marries his daughter to a man at a dower of two thousand *dirhems*, and calls upon others to attest against himself that he has married such an one to such an one for two thousand, "one thousand out of my own property and one thousand by such an one," and the husband accepts. In these circumstances, the whole dower is payable by the husband, and the father is his surety for one thousand; which, if taken by the wife from him or his estate, he or his heirs may reclaim from the husband. When a man has married his infant son to a woman, and become his surety for the dower, and the transaction has taken place while the father was in good health, the suretyship is valid if accepted by the woman; and if the father should pay the dower while in health, he has no right to reimbursement from the son, on a favour-

And for his son.

[1] That is, the father; but any other guardian may, in like manner, be surety for the dower. *Hidáyah*, vol. ii. p. 83.

able construction of law, unless there was a condition in the original security, that he should be entitled to such reimbursement. The woman, however, may claim the dower from the guardian (that is the father), but she is not entitled to claim it from her husband (the son) till he attains to puberty; and when he arrives at that state she may demand it from either of them at her pleasure. When a son is adult and his father while in health becomes surety for him, without his authority, and then dies, and the woman takes the dower from his estate, his heirs have no right of recourse against the son, according to general agreement. Insane persons are like minors in this respect. All this when the suretyship is effected in a state of health, but when it is given in a death illness it is void; for the intention of such a transaction is to give some special advantage to an heir which a sick person is prevented from doing, and it is therefore not valid.

Case of a person addressing a woman on behalf of another and becoming surety for the dower.

When a person addresses a woman on behalf of another and becomes surety to her for the dower, saying "I am directed to do so," and the woman enters into the contract accordingly, and after this the husband appears and admits both that he sent the messenger to make proposals on his behalf and that he gave him the instruction as to security, in these circumstances the marriage is valid, and the security is valid also if the messenger is a person capable of being a surety; and if the messenger should pay under his suretyship, he may have recourse to the husband for the amount so paid. If, again, the husband should disavow the instructions as to the security, but admit the authority to make proposals, the marriage is valid, and the security is so likewise as between the woman and the messenger, though not so as against the husband; so that the woman may revert to the messenger for the *sudák*, or dower, but the messenger has no such right of recourse against the husband for anything he may have paid. While if the husband should deny both the instructions for security and the sending to make proposals, and the messenger has no proof that he was sent, the marriage is void, and no dower is due by the husband, though the woman may still

claim against the messenger for a part of the dower, according to some reports, and for the whole according to others. But if the person in making proposals to the woman should say, "the party does not give me any instructions, but I will marry you to him and will be surety for the dower, and perhaps he may confirm it," and she enters into the contract accordingly, but the husband denies the message, the whole is void. An agent for marriage, when he becomes surety to the woman for the dower, and makes payment, may have recourse to the husband if this were done by his directions, but not otherwise.

Section Fifteenth.

Of the Dower of Zimmees *and* Hurbees, *or unbelieving subjects and enemies of the Mussulman community.*

Whatever is fit for dower in a Mooslim marriage is fit for it in that of Zimmees.

Where the dower is something that is not property, or there is no dower, the wife has no claim.

Whatever is fit for dower in the marriage of Mooslims is fit for it in the marriage of *Zimmees;* and what is not fit for dower in the marriage of Mooslims is not fit for it in the marriage of *Zimmees,* with the exception of wine and the hog. And if a *Zimmee* should marry a *Zimmeeah* for carrion or blood, or should marry her without any dower, the parties either expressly declaring that there shall be none, or remaining silent with regard to it, and, such a contract being lawful with them, connection should follow, or the woman be repudiated before it, or the *Zimmee* should die leaving her his widow, she would have no dower in either case, according to Aboo Huneefa. And it would be the same, though both the parties should subsequently embrace the faith, or one or both of them should bring the matter before "our" tribunals. In like manner, if two *Hurbees,* or enemies, should contract in the *dar ool hurb* (or foreign country) for carrion or blood, or on a condition that there shall be no dower, the woman would have no dower, with the concurrence of our three masters; whether the parties should subsequently embrace the Mooslim faith, or concur in bringing the matter before our tribunals.

If a *Zimmee* should marry a *Zimmeeah* for wine or a hog, and both or one of the parties should subsequently embrace the faith, then if the wine or hog were specific, and possession had not taken place, she would have no right except to the specific thing; but if the wine or hog were indeterminate, she would in the case of the former have its value, and of the latter the proper dower. This was the opinion of Aboo Huneefa, while Aboo Yoosuf held that she would have the proper dower whether the thing were specific or indeterminate, and Moohummud that she should have the value in either case. All this, however, is on the supposition that possession has not been taken before conversion to the faith, for if it has been taken before that event the wife has nothing further. And if he should repudiate her before consummation she would have, according to Aboo Huneefa, half of the thing specified where the dower is specific, and where it is not, half of the value in the case of the wine, and a *mootût* or present in the case of the hog.

Where it is something that has no legal value for Mooslims, and both or either of the parties embraces the faith.

Section Sixteenth.

Of a Daughter's Juhaz.

If a man should give a *juhaz*, or marriage outfit, to his daughter, and should deliver it to her, he cannot afterwards (on a favourable construction) reclaim it from her; and the *futwa* is in accordance with this.[1] But if people belonging to the woman should take anything from the husband at the time of its delivery, the husband may reclaim whatever he may have so given, for it is a bribe.

A *juhaz* by a father to his daughter cannot be revoked after delivery.

If a man should give his adult daughter in marriage, and make her a *juhaz* of specific things, but without delivery, and should then break off the contract, and marry her to another, she has no right to demand that *juhaz* from

But before delivery it is not binding on the father.

[1] The reason of its being only a favourable construction does not appear, for the near relationship is a sufficient bar to the revocation of the *juhaz* considered only as a gift.

Nor would delivery to another for her be sufficient.

the father. And if a man should give something to his *oom-i-wulud*, in order that she may make a *juhaz* for her daughter, and she does so, and delivers it to her, the delivery is not valid unless it be made to the daughter by the father himself.

Mixed cases where the *juhaz* is partly made by the woman herself or her mother.

A young girl has woven or collected a *juhaz* with property partly belonging to her mother and father, and partly acquired by her own labour while she was under and after she had attained to puberty, after which her mother dies, and her father delivers the whole *juhaz* to her; in such circumstances, her sisters have no right to claim their share in it on account of what belonged to the mother. A woman weaves many things in the house of her father out of silk belonging to him, and the father dies; all these are hers from a regard to custom. And if a mother should prepare a *juhaz* for her daughter out of goods belonging to the father, doing so in his presence or with his knowledge, and he should remain silent, and the woman is led away to her husband, the father has no power to reclaim this from his daughter. And in like manner if the mother should spend in the *juhaz* what is customary, without any objection on the part of the father, she is in no way responsible.

Dust Pyman.

A man having married a woman gives her 3,000 deenars as a *dust pyman*,[2] and she is the daughter of a rich man, who gives her nothing as a *juhaz*, the Imam Jumal-ood-deen and the author of the Mooheet have decided that in such a case the husband can demand a *juhaz* from the father to such an amount as is usual and customary, and if he should not make such a *juhaz* the husband may demand back the *dust pyman*; and this is approved by the learned. A man excites the expectations of another by saying, "I will marry my daughter to you at a great *juhaz*, and I wish from you a *dust pyman* of so many *deenars*," the man thereupon takes a *dust pyman*, and gives it to him without receiving the *juhaz*, there is no report as to such a case further than that the Sheikhs of

[2] The phrase means literally something measured by the hand.

Bokhara have answered, that if the father do not give his daughter a *juhaz* the husband may recall so much of the *dust pyman* as is above what is suitable to a woman of like condition. The proper ratio of a *juhaz* to the *dust pyman*, according to other authorities, is that for every *deenar* of the *dust pyman* there should be three or four *deenars* of the *juhaz;* and if the father does not give in this ratio the husband may reclaim his *dust pyman*; but the Imam Al Moorgheenanee has said that the correct doctrine is that he cannot have recourse to the father of the woman for anything, since property is not the object designed or intended in marriage.

Miscellaneous cases.

A man made a *juhaz* to his daughter, but died before delivery, and the rest of the heirs demanded their share out of the *juhaz;* in these circumstances, if the daughter was adult when the *juhaz* was made, the remaining heirs are entitled to their share out of it; but if she were an infant at that time the heirs would not be entitled to any share; for in the former case there would have been no possession, but in the latter the father is considered to have taken possession on her account. A woman having given up her chattels to her husband, saying, "Sell these, and expend it on the marriage," and he does so,—he is liable to her for the value. A woman being possessed of slaves, says to her husband, "Expend on account of them out of my dower," and he does so, whereupon she says, "I will not allow it, as out of my dower, because you had the service of the slaves,"—according to Abool Karun, what may have been expended on them according to custom is to be ascribed as having been paid out of the dower.

Section Seventeenth.

Of Disputes between the Married Parties respecting the Household Effects.

How disputes are to be adjusted.

Aboo Huneefa and Moohummud have said that when married parties differ as to effects placed in the house in which they both reside, whether the difference arise during

when they arise between the parties themselves.

the existence of the marriage or after a separation has taken place, in consequence of an act either of the husband or of the wife, then things that by custom appertain to women, as the different articles of female attire are the wife's, unless the husband adduce proof to the contrary, and what appertains to men, such as armour or articles of male attire, are the husband's, unless the wife can adduce proof to the contrary; and what may belong to men and women, as a slave, a servant, a bed, a sheep, a bull, &c., belong to the man also, unless the woman can adduce proof to the contrary. And when one of the parties dies, and a dispute arises between the survivor and the heirs of the deceased, then, according to Aboo Huneefa and Moohummud, what is fit or appropriate to men belongs to the man if he be the survivor, or to his heirs if he have died, and what is appropriate to women belongs in like manner to the woman or her heirs; and what is appropriate to both belongs, according to Moohummud, to the man if he be living, or to his heirs if he be dead; but Aboo Huneefa was of opinion that what is doubtful belongs to the survivor, and things that relate to trade or merchandise, if the man was known to be engaged in matters of the kind, belong to the man.

Or between one of them and the heirs of the other.

When one is a slave and the other free, &c.

If one of the parties be free and the other a slave, whether inhibited or licensed, or a *mookatib*, the whole effects belong to the free person, whichever of the two may happen to be free; but, according to the disciples, such is the case only if the slave be inhibited, and if he be licensed or a *mookatib* the rule is the same as in the case of two free persons; and if one of the parties be Mooslim and the other *Kafir*, or unbeliever, the rule is the same as if they were both Mooslims; and if one of them be under puberty and the other above it, or both be under it, it is stated in some reports that they are to be considered equal. And if both be slaves or *mookatibs*, the word with regard to the effects is as has been described. Nor is there any difference in these cases, whether the house in which they are residing be the property of the husband or of the wife. And if there be any other person in the family

besides the wife, as, for instance, the son in the family of the father, or the father in the family of the child, and the like, the effects belong, in a case of doubt, to the party who supports or maintains the family.

Disputes when a man has several wives living in one house.

If a man have several women, and a dispute arises between him and them with regard to the effects, then if they all be in one house the effects that appertain to women are to be divided between the women equally; and if each of them be in a separate house by herself, then what is in the home of each woman is between her and the man, in the manner already described, without any participation on the part of the other woman.

Miscellaneous cases.

If a woman should declare with regard to any particular article that she purchased it from her husband, the thing is his (in the first instance), and the burden of proof lies upon her. And if they differ with regard to the house in which they are residing, both laying claim to it, the word rests with the husband; but if she should adduce proof, or they should both adduce proof, judgment is to be given on the proof of the wife. And if a mansion be in the possession of a man and woman, and she adduces proof that the mansion is hers and the man her slave, and he adduces proof that the mansion is his and the woman his wife, whom he married for a thousand *dirhems*, which he delivered to her, but does not adduce proof that he is free, judgment should be given for both mansion and man as the property of the woman, and that there is no marriage between them; but if the man adduces proof that he was free by origin, and all the other circumstances of the case are the same, judgment should be given for the freedom of the man, and the marriage of the woman, and that the house is her property. And if they differ with regard to things that appertain to women, and both adduce proof, judgment is to be given according to the proof of the husband.

Continued.

When a woman has spun cotton the property of her husband, and they afterwards dispute regarding the thread, whether before separation or after it, then, if he had given her permission to spin, by saying, "Spin it for me," the thread is the husband's and she has no claim against him

to anything for her labour; but if he had specified a fixed hire for her, she would be entitled to that; while if the hire be uncertain, or he had stipulated that the thread and the cloth should belong to both, the thread would be the husband's and she would be entitled to the hire due for similar work. And if they should differ as to there being any hire, she saying, "I spun it for hire," and he saying "without hire," the word is the husband's with his oath.[1] But if he had said, "Spin it for yourself," the thread is hers and nothing is due by her. And if they differ with regard to the permission, he saying, "I permitted you to spin for me," and she saying, "Nay, but you said, 'Spin it for yourself,'" the word is the husband's with his oath. And if he said, "Spin it that the thread may be ours," the thread is his and she has the hire due to similar work; but if he say, "Spin it," without adding anything more, the thread is his. And if he forbid her to spin, but she does spin notwithstanding, the thread is hers, but she is liable to her husband for a similar quantity of the cotton. And if they differ upon this point, the owner of the cotton saying, "You spun it with my permission," and she saying, "I spun it without your permission," the word is his. And if he carry cotton to his house, and say nothing, and she then spins it, if the husband be a seller of cotton, the thread is hers, and she is liable for a similar of this cotton; but if he be not a seller of cotton, and insist that he gave her permission, the word is his; in like manner as if she were to cook food of meat brought by him, the food is the husband's. And so also if they dispute about the linen, he saying to the woman, "You gave it to the weaver to weave it with my permission," and she saying, "I gave it without your permission," the word is the husband's. In the Book of Marriage of Aboo Leeth it is stated, that a woman spun cotton belonging to her husband with his permission, and they were in the practice of selling the cloth made from it, and purchasing with the price things for

[1] That is, his word is to be preferred, and to be credited if confirmed by his oath.

their joint necessities, and also of making of some of the stuff clothes for the household; in such circumstances all this stuff and what was purchased out of its proceeds belong to the husband, except only things which he may have actually purchased for her, or which it is known from custom must have been purchased for her, and these belong to her.[1]

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[1] These cases may not be of much use in themselves, but they serve to illustrate the relation of the married parties to each other in respect of property.

CHAPTER VIII.

OF INVALID[1] MARRIAGES AND THEIR EFFECTS.

SECTION FIRST.

Of the Distinction made by Aboo Yoosuf and Moohummud between Invalid and Void Marriages.

Definition of invalid marriages.

AN invalid marriage is one that is wanting in some of the conditions of validity, as, for instance, the presence of witnesses.[2] In this sense, every marriage that is unlawful, and, consequently every marriage contracted between a man and any of the nine classes of women who are unlawful or prohibited to him, is invalid. But when a Mooslim has intermarried with one of his *mooharim*,[3] and she is delivered of a child, its descent is not established from him, according to Aboo Yoosuf and Moohummud, because the marriage is void[4] in their opinion; while, according to Aboo Huneefa, the descent of the child is established from the husband, because in his opinion the marriage is only invalid.[5]

Difference of opinion as to marriages with *Mooharim*;

who they are.

Mooharim, according to us (that is, all of the Hanifite sect), are women whom a man is perpetually interdicted from marrying, by reason of consanguinity, affinity, or fosterage—and even though the affinity be by illicit intercourse—including, therefore, the

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[1] *Fasid*, literally "vicious," or "vitiated," and opposed to *suhech*, "sound," or "healthy," and used synonymously with *ghuer jaiz*, or "unlawful."

[2] *Door-ool-Mookhtar*, p. 207.

[3] An irregular plural of *muhrumut*, literally, "a place of prohibition," but applied to a woman who is prohibited or unlawful.

[4] The original word *batil* means "vain," "futile," and "ineffectual."

[5] *Fut. Al.*, vol. i. p. 727.

mother and daughter of the woman, and the father and son of the man, with whom the illicit intercourse has taken place, but excluding the sisters and aunts, paternal and maternal, of a wife.[1] A *Mujoosee* woman is rendered lawful by *Islam*, or by conversion to the Christian or Jewish religion; a thrice repudiated woman, by consummation with a second husband, and expiration of her *iddut;* and the *mooûtuddah* of another, by the expiration of the *iddut* alone. Accordingly, none of these women can be said to be perpetually prohibited to a man—consequently they are not *mooharim*.[2] By parity of reason, it can be shown, that of all the other women who are unlawful or prohibited to a man, it is only those that are prohibited by reason of consanguinity, affinity, or fosterage, that are his *mooharim*. Of these only, therefore, can it be predicated that marriage contracted with them would be void, in the opinion of Aboo Yoosuf and Moohummud.

A passage in the *Hidayah* which seems to extend the difference of opinion to all unlawful women,

But it is said in the Hidayah, that when a Mooslim has married a woman whom it is not lawful for him to marry, and has had connection with her, the *hudd* is not to be inflicted, according to Aboo Huneefa, though a discretionary punishment is to be imposed, if he were aware of the illegality; but according to Aboo Yoosuf, Moohummud, and Shafei, the *hudd* is to be inflicted if he were aware of the illegality,—because the contract does not meet with a fitting subject; as a fitting subject is that which can be lawfully used, and there is none such here, for the woman is of the *muhrumát*, or prohibited. Aboo Huneefa, on the other hand, was of opinion that the contract does meet with a fitting subject, because all the daughters of Adam being qualified for procreation, which is the primary object of marriage, are fit subjects for that contract.[3] If connection under the contract exposes the parties to the *hudd*, the connection itself must be *zina*,[4] and the fruit of it illegitimate,[5] and, consequently, it would seem that the marriage itself must be void; which is probably what is meant by the con-

[1] *Al Ashbahowa al Nuzair*, p. 588.
[2] *Ibid*, p. 589.
[3] *Hidayah*, vol. ii. p. 592.
[4] *Fut. Al.*, vol. ii. p. 208.
[5] *Ante*, p. 3.

tract not meeting with a fitting subject. At first sight, then, it would seem that whenever a Mooslim intermarries with any woman that it is unlawful for him to marry, the marriage is void, according to Aboo Yoosuf and Moohummud. But the reason which is assigned for their opinion that the woman is not a fitting subject for the contract, is that she is of the *muhrumát*. Now this term is synonymous with *mooharim*, both words being plural forms of the same singular;[1] and it might, therefore, I think, be fairly inferred that it was only of *mooharim*, or women perpetually prohibited to a man—in other words, those who are prohibited to him by reason of consanguinity, affinity, or fosterage—that the author of the *Hidayah* meant to assert, that connection with them, though under the sanction of marriage, would expose the parties to *hudd*, in the opinion of Aboo Yoosuf, Moohummud, and Shafei. But it must be admitted that the word *muhrumát* is also sometimes applied to all women who are unlawful or prohibited to a man; and it is, therefore, desirable to show, if possible, in some other way, that it is in the restricted, and not in the general sense, that the term is used in this passage.

shown to mean only the same classes.

When a Mooslim marries a woman whom it is not lawful for him to marry, he is liable to the *hudd*, according to the author of the *Hidayah*. The connection, therefore, must be *zina*, and if it can be shown that it is only to intercourse with *mooharim*, or women who are perpetually prohibited to a man, that the term *zina* is applicable, even according to Aboo Yoosuf and Moohummud, when the intercourse has taken place under the sanction of marriage or slavery, then it will equally follow that it was only of such women the author of the *Hidayah* was speaking when he said that the intercourse would expose the parties to *hudd*.

Similar result,

There are two kinds of unlawful intercourse between the sexes—one that is unlawful in itself, the other that is unlawful for something else.[2] The former is *zina*; the latter is not *zina*.[3] When the man has no right in the woman,

shown in another way.

[1] *Muhrumát* is the regular, *mooharim*, the irregular plural of *muhrumut*.

[2] *Inayah*, vol. ii. p. 496.

[3] *Hidayah*, vol. ii. p. 689.

or, having such right, she is perpetually prohibited to him, the intercourse is unlawful in itself; when the prohibition is temporary, the intercourse is unlawful for something else.[1] And Aboo Huneefa made it a condition of a perpetual illegality—that it should either be generally allowed, or founded on some well authenticated tradition, to remove all doubt on the subject;[2] that is, of course, in the absence of any positive precept of the Kooran. With regard to women who cannot be lawfully joined together, connection with them is not unlawful in itself, but only for a temporary or incidental cause, that is, the man's having a right over both of them at the same time, which may be removed by his repudiating or disposing of one of them, and therefore the connection is not *zina*.[3] Much less should it be so in the case of a marriage with one sister during the *iddut* of another, or of a fifth wife during the *iddut* of a fourth. Moreover, there is some difference of opinion with regard to such marriages, for Shafei, the head of the third of the orthodox sects, held them to be lawful.[4] Again, with regard to persons who are prohibited from intermarrying by reason of a difference of religion: though it is unlawful for a Mussulman to have connection with a *mujoosee* woman, the connection is not unlawful in itself, for the objection to it may be removed, as already observed, by the change of religion; and the connection is therefore not *zina*.[5] The same reason is applicable to his connection with any other idolatress, and to the marriage of a Mooslimah with a man of a different religion from her own; for the objection in both cases is equally removable by a change of religion.

The real difference of opinion confined to the three first classes of unlawful women.

It will be now seen, on referring to the third chapter, that of the nine classes of women who are unlawful or prohibited to a man, the sixth, the seventh, and ninth classes have been disposed of by showing, either from direct authority or by parity of reason, that they are not per-

[1] *Hidayah* vol. ii. p. 640.
[2] *Ibid.*
[3] *Inayah*, vol. ii. p. 496.
[4] *Hedaya*, vol. i. pp. 83-89.
[5] *Inayah*, vol. ii. p. 496.

petually prohibited; and that the fourth and sixth classes have been in like manner disposed of, by showing from express authority, or by parity of reason, that intercourse with them, when sanctioned by right on the part of the man, would not be *zina*, which amounts to the same thing. There remain the fifth and eighth classes, or slaves married upon free women, and persons who are forbidden to each other by reason of property. The illegality of the first is merely in the order in which the marriage takes place; for there is no objection to a man being the husband of a slave and a free woman at the same time, provided that he has married the slave first; and the illegality, such as it is, may be removed either by the repudiation of the wife, or the emancipation of the slave. There can be no ground, therefore, for calling it perpetual. With regard to the other of the two classes, it has been expressly stated that marriage with one's own slave is no marriage at all, and that if one of a married pair becomes the property of another, the marriage is *batil*, or void;[1] as if the two relations of master and slave, and husband and wife, are so incompatible that they cannot exist together in the same person. It is, however, said in another place that the marriage is only invalid.[2] Leaving this class as doubtful, it is only of the three first classes of women, or those who are prohibited by reason of consanguinity, affinity, or fosterage, that it can be said that they are *mooharim*, or perpetually prohibited, or that intercourse with them, when under the sanction of marriage, would expose the parties to *hudd*. Of them only, therefore, can it be averred that marriage contracted with them would be void, according to Aboo Yoosuf and Moohummud.[3] According to Aboo Huneefa, the marriage even in these cases would be only invalid.[4] It is difficult to say which of the opinions has been adopted

[1] *Ante*, p. 42.

[2] *Post*, p. 157.

[3] See *ante*, p. 30, where Moohummud is said to have stated in his book of marriage, that marriage is not taken away or dissolved, but only rendered invalid or vitiated, by the prohibition of affinity or fosterage.

[4] See *ante*, p. 3.

by the learned, Asbeejany maintaining that the opinion of Aboo Huneefa is valid,[1] while the lawyer Aboo Leeth seems to have given his adherence to that of the disciples, and said that the *futwa* is in accordance with it.[2] According to an authority cited in another place in the Futawa Alumgeeree,[3] the opinion of Aboo Huneefa is entitled to preference absolutely over that of the two disciples even when they are agreed, and unquestionably so when they differ. It would seem that the compilers of that work have adopted it in the present instance; for, though they have given this chapter the heading, "Of *Fasid* marriages and their effects," they have omitted to give any description of the marriages to which that title is applicable; as if, with Aboo Huneefa, they had rejected the distinction of *batil*, or void marriages, altogether. Their evident inclination to the opinion of Aboo Huneefa gives great additional weight to it, and ought, perhaps, to be decisive of the question in India.

Marriage contracted without witnesses is only invalid.

There is still the marriage without witnesses, of which some notice is necessary, because of the saying of the Prophet, "There is no marriage without witnesses," and the tradition is what is termed *mushhoor*, or notorious. Yet Malik, the leader of the second of the Orthodox sects, held such marriages to be lawful,[4] perhaps because he rejected the tradition as not sufficiently authentic. However that may be, there seems to be no doubt that the marriage in question is only *fasid* by general agreement. This is expressly stated by the author of the *Inayah* in one part of his work,[5] and in another,[6] as well as in the definition at the head of this section, a marriage without witnesses is adduced as an example of *fasid* marriages, or such as are only invalid.

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[1] *Fut. Al.*, vol. ii. p. 210.

[2] *Fut. Al.*, vol. ii. p. 210. The Moozmirat is cited, but it is not very clear which of the opinions he adopted.

[3] *M. L. S.*, Introduction, p. 59.

[4] *Hedaya*, vol. i. p. 74.

[5] *Inayah*, vol. ii. p. 269.

[6] *Ibid.* p. 74.

Section Second.

Of the Effects of Invalid Marriages.

The parties must be separated,

When an invalid marriage has taken place, it is the duty of the judge to separate the parties; and if the wife be unenjoyed she has no claim to dower, but otherwise she is entitled to whichever may be the less—of her proper dower, and the dower specified, when any has been named; and when none has been named she is entitled to the full proper dower, whatever it may be; and it is incumbent on her to observe an *iddut*, which is to be reckoned from the date of the separation, according to our three masters, whether the separation be by a judicial decree, or by a resolution of the husband to refrain from matrimonial intercourse.

and wife must observe an *iddut*.

Repudiation of an invalid marriage is a relinquishment.

Repudiation under an invalid marriage is, according to the Mujmooa Nuwazil, a relinquishment, and does not fail by falling short of the full number.[1] A relinquishment is not effected after consummation without the employment of speech, as, for instance, the husband's saying, "I have set your way free," or, "I have relinquished you." A mere denial of the marriage is not sufficient; but if with the denial the man should say at the same time, "Go and marry," that would amount to a relinquishment; and the refraining of one of the parties to come to the other does not effect a relinquishment after consummation.

Either party may cancel an invalid marriage.

According to the author of the Moheet, a relinquishment cannot be effected without the employment of speech even before consummation. But before consummation one of the parties may cancel the marriage without the other being present, though this cannot be done after consummation, except in the presence of the other. When one of the parties has relinquished, authorities differ as to the necessity of the other being made acquainted with the fact; one saying that this is a necessary condition of the validity of the relinquishment, while another says that it is no more necessary than in a case of repudiation.

[1] To make a complete divorce, there must in general be three repudiations.

Iddut not incumbent for the death of the husband.

An *iddut* on account of death is not incumbent in the case of an invalid marriage,[1] nor is maintenance, and if there should be a composition or agreement for maintenance in an invalid marriage it would not be lawful.

Nusub, or paternal descent of child, is established from the husband.

The *nusub*, or paternal descent of a child born of an invalid marriage, is established in the husband, without any claim on his part;[2] and the period of gestation is to be reckoned from the time of consummation, according to Moohummud, and the *futwa* is in accordance with his opinion, as stated by Aboo Leeth.

Invalid marriage has no legal effect before consummation;

but after, it has generally the same effects as a valid marriage.

An invalid marriage has no legal effect before consummation; so that if a man should marry a woman by a contract which is invalid by reason of his having previously touched her mother with desire, and should then relinquish the wife, he might lawfully marry the mother. But after consummation it is joined to valid marriages as to its effects,[3] one of which is the establishment of *nusub*, or the child's paternity,[4] as already mentioned. But still the parties do not become Moohsuns by means of the consummation, and if he should have intercourse with her after the separation he would be liable to the *hudd*, or specific punishment for *zina*. When a free man has purchased his wife, his marriage is rendered *fasid*, or invalid,[5] contrary to the case of a *mazoon*, or licensed slave, purchasing his wife, which has no such effect. And when a man has married a woman by an invalid contract and retired with her, after which she has been delivered of a child, and he denies the consummation, there are two reports of Aboo Yoosuf's opinion on the point, according to one of which the paternity is established, and both dower and *iddut* incumbent, while the other is quite the reverse; but if he had not retired with her, he could not be rendered liable for the paternity. When a repudiated woman has married and said subsequently that she was in

[1] That is, no special *iddut* of death; the *iddut* for consummation being all that is required under an invalid marriage, though it should be dissolved by the husband's death.

[2] *Door-ool-Mookh'ar*, p. 207.

[3] *Hidayah*, vol. ii. p. 465.

[4] *Inayah*, vol. ii. p. 379.

[5] See *ante*, p. 154.

her *iddut*, it is to be considered whether there was between the repudiation and the marriage less than two months, and if so she is to be credited, and the marriage is vitiated or rendered invalid; but if there were two months or more, she is not to be credited, and the marriage is valid.

Case of a woman with two husbands, to whom does the issue belong?

A man is absent from his virgin wife for years, and she marries and has children; or a woman is taken captive and married to an enemy and has children; or a woman claims to be repudiated, keeps *iddut*, marries another husband and has children; or her husband's death is announced to her, and she keeps *iddut*, marries with another and has children;—the offspring, according to Aboo Huneefa, belongs to the first, whether he deny or claim it, or whether the second deny or claim it, or the child is born within six months, or at the distance of more than two years; and the second husband may spend his *zukát* (or poor's rate) on such children, and their testimony may be received on his behalf. But Jurjanee has reported from Aboo Huneefa, that the children belong to the second husband, and that he came back to this opinion, and that the *futwa* is in accordance with it. Kazee Khan and the Sirajiyiyah are also to the same effect, and Sudur ool Shuheed used so to decide. Zuheer ood Deen, however, alleges that the *futwa* is for the children being to the first, since the child follows the bed according to *nuss*, or express authority. And if the first husband were present, and all the circumstances were the same, the child would belong to the first.[1]

[1] Though it is left doubtful to which of the husbands the child belongs, yet the case is of some value as an illustration of Aboo Huneefa's opinion, that no marriage is void.

CHAPTER IX.

OF THE MARRIAGE OF SLAVES.

The marriage of a slave without his master's consent is dependent on his sanction.

THE marriage of a male slave, whether *kinn* (or absolute), *mookatib*, or *moodubbur*, and the marriage of a female slave, whether *kinn* or *oom-i-wulud*, when entered into without the permission of his or her master, is in suspense. If allowed by him, it is operative; if disallowed, it is void. And when a male slave marries with his master's consent, he becomes personally liable for the dower; and if a *kinn*, he may be sold on account of it, but not so if he be of any of the other classes, when he would only have to work out the dower by his labour. When a slave has once been sold on account of dower, he cannot be sold again if the price be deficient (though the balance may be demanded of him if he should ever acquire his liberty), because when he is sold, it is for the whole dower, which is but one debt. This is contrary to the case of a wife's maintenance, for which a slave husband may be sold repeatedly. If the slave should die, both dower and maintenance would be at an end. When a man contracts his male slave in marriage, and then sells him, the dower adheres to him as a debt wherever he goes—in the same way as a debt which he may have incurred by destroying property. And when a man, after marrying his slave to a free woman, emancipates him, the woman has an option, and may proceed either against the master or her husband for the loss of the slave's value and the specified dower. A man contracts his *moodubbur* in marriage to a woman, and then dies, the dower is a debt on the slave's person, for which he may be seized after he has become free.

A master may compel his slaves to marry.

A master may compel all his slaves to marry, with the exception of the *mookatib* and *mookatibah*, over whom he has no such power, even when they are under puberty. If he should contract them in marriage while under age, without their consent, the marriage would be dependent on their allowance of it. Yet, what is very curious, if the ransom were paid, and the minor should in consequence become fully emancipated, no regard need be paid to their wishes, as the patron or the ruler would then become entitled to act for them on his own sole discretion.

Dower of a female slave belongs to her master.

Whatever is due on account of dower to a female slave, whether she be *kinn*, or *moodubburah*, or *oom-i-wulud*, and whether it be due by the contract, or in consequence of consummation, belongs to her master; but the dower of a *mookatibah*, and of a slave partially emancipated, is her own property. A man contracts his female slave in marriage, or she contracts herself with his consent, and she is afterwards emancipated, though she has the option of emancipation the dower still belongs to her master.

How the master's sanction of a marriage entered into without his permission may be established.

When a slave has entered into a marriage without the permission of his or her master, the master's sanction may be established in various ways. It may be given expressly, as by his saying, "I have allowed it," or "Am satisfied with it," or "I have permitted it." Or it may be inferred from what he says or does in regard to it; as, for instance, if he were to say in the slave's hearing, "This is good," or "right," or "well what you have done," or "God's blessing on it," or "No harm from it," or if he were to send the woman a dower, or anything else, provided it were not as a present. In the case of a male slave who has married without his master's permission, if the master should say to him, "Repudiate her revocably," that would be a sanction of the marriage; but not so, if the words were, "Repudiate her," or "Be separated from her." The reason of the difference is that the word "repudiation" (*tulák*) and the word "separation" are as applicable to the rejection or relinquishment of an invalid contract as to repudiation of one that is valid: and the first construction is preferred as being more

probable when the expressions are used towards a refractory or disobedient slave; while when the word "repudiation" is qualified by the word "revocably," it implies that the contract previously entered into was valid, for none other admits of revocable repudiation.[1] It may be observed that permission to marry is not the sanction of a marriage that has already taken place; and that if a woman should marry without witnesses, and her master gives his sanction to the marriage in the presence of witnesses, it would not be valid.[2]

Repudiation under a marriage contracted without the master's consent is a relinquishment.

When a *kinn*, or a *mookatib*, or *moodubbur*, or the son of an *oom-i-wulud*, marries without the permission of his master, and, before the marriage has received his sanction, repudiates his wife three times, the repudiation is a relinquishment, not a true repudiation; so that, though pronounced only once, it would not fail by reason of its falling short of the full number; and if the slave should have intercourse with the woman after the repudiation, he would be liable to the *hudd*, while the master's subsequent allowance of the marriage would not re-establish or render it effectual. Even if he were to grant the slave permission to marry, and the slave should then contract himself to the same woman, it would be abominable for him to marry her, though if he should do so the parties are not to be separated.

By whom a slave may be contracted in marriage.

A female slave may be contracted in marriage, not only by her master himself, but by his father or grandfather when he is a minor, and by an executor, judge, *mookatib*, and a *moofawiz* or universal partner; but neither a *mazoon* or licensed slave, nor a licensed youth, nor a *moozarib*,[3] nor an *inan* or commercial partner, has any such power. And none of these persons, except the master himself, can contract a male slave in marriage. Nor is it lawful even for a father or executor to contract the

[1] *Inayah*, ii. p. 86.

[2] See *ante*, p. 10.

[3] The managing partner in a *moozarubut*, or contract in which the capital is contributed by one party, and the labour and skill by the other, with an agreement for mutual participation in the profit.

female slave of a minor to a male slave of his own. When a man marries his female slave to his male slave she is not entitled to any dower as against her master. And such being the case, if a man should marry the female slave of his son to his son's male slave, the marriage would be lawful, according to Aboo Huneefa and Moohummud; for, as the dower in that case is not a debt on the person of the slave, no injury is done to the son, and the act is therefore within the father's power. If one of two masters should give their female slave in marriage, and consummation should follow, the other may dissolve the marriage; and if he does so he is entitled to half the proper dower; while the person who gave her in marriage is also entitled to whichever may be the less of half the proper dower, or half the dower specified in the contract.

Case of a male slave permitted to marry for himself as dower.

When a man has permitted his male slave to marry on his own neck—that is, giving himself as the dower—and he does so, contracting himself to a slave, or *moodubburah*, or *oom-i-wulud*, with the consent of their masters respectively, the marriage is lawful, and the male slave becomes the property of the master. But if the slave were to marry a free woman on his own neck, the marriage would not be lawful; and, in like manner, if he were to marry a *mookatibah*, it would be void. Here it is implied that the permission to marry a woman is couched in these express terms, "on his own neck;" for, if the permission were to marry a woman, without the addition of the words "on his neck," and the slave should marry a free woman, or a *mookatibah*, or an *oom-i-wulud*, "on his neck," the marriage would be lawful on a favourable construction at the value of the slave, provided that his value be only equal to, or not greatly in excess of, the woman's proper dower; but if the excess be beyond reasonable bounds the marriage is not lawful, insomuch that, if he were to consummate with her, he could not be followed for the dower until he obtain his freedom. When a slave marries "on his own neck," without the permission of his master, but the master afterwards sanctions the marriage, then, if the marriage were to a slave, a *moodubburah*, or *oom-i-wulud*, the sanc-

tion would take effect, and the marriage be valid; but not so if it were with a free woman, or a *mookatibah*, for in that event the sanction would not be effectual. In the case of the free woman, however, if the slave had enjoyed her, he would be liable for the less of his own value and her proper dower; and if the intercourse should take place after the master's sanction the liability would attach to the slave's person, and he might be lawfully sold for it, unless his master should ransom him; but if it had taken place before the sanction, he could be seized for what he is liable for only after emancipation. In the case of the *kinn*, or *moodubburah*, or *oom-i-wulud*, if the slave had enjoyed her, and this took place after the master's sanction, the liability would be for the slave's neck to the master of the female; and the result would be the same, though the intercourse had taken place before the sanction; but, according to some opinions, it would be so only on a favourable construction of law.

Case of a *mazoon*, or licensed slave, who is in debt, being contracted in marriage.

When a man contracts his *mazoon*, or licensed slave, who is in debt, to a woman, the marriage is lawful, and the woman takes equally with the other creditors, if the dower do not exceed her proper dower; but if it exceed that, she can only come in for the excess after the other creditors have been satisfied in full, as in the case of debts contracted in a death-illness, when opposed to debts contracted in health.

Effect on dower of a cancellation of a female slave's marriage by an act of her master.

If the master of a female slave should sell her to her husband before consummation, the dower falls to the ground; for a woman separated by her master before consummation (and the dissolution consequent on the husband becoming the owner of his wife is here ascribed to her master) is like a free woman who apostatizes, or kisses her husband's son, with desire, before consummation. The same result would follow if the woman were emancipated before consummation, and she should avail herself of her option to separate from her husband. And if her master should sell her to a third party, who takes her away from the city, or conceals her in a village where her husband has no access to her, the right to demand payment of the

dower is suspended until he bring her back, when he would be entitled to it. When there is an intermediate sale to a third party, from whom the husband buys her, he becomes liable for half the dower to her original master. If a female slave should marry without the permission of her master, and he should have connection with her, the marriage would be dissolved; and so, also, if he kiss her with desire, whether he know the fact of her marriage or not. When a person has only an incomplete right of property in a female slave—as, for instance, when he has purchased her without taking possession, and gives her in marriage—though the contract is lawful if the sale be completed; yet it is void, according to Aboo Yoosuf, if the sale be dissolved. Moohummud held a different opinion upon the point, but the *futwa* is in accordance with that of Aboo Yoosuf.

A mere *right* of property is sufficient to prevent the inception of a marriage, but not its continuance.

It is a general rule of marriage, as already mentioned, that no one can marry his or her slave, and a mere *right* of property is sufficient to prevent the inception of marriage, but not its continuance. As, for instance, in the case of an invalid sale, when the parties have a right of reversal, this right prevents the seller from intermarrying with a female slave who may be the subject of sale; but if he should marry her to his son, and then die, so that the right of reversal would rest in the son, that would not invalidate the son's marriage until the right were actually exercised and the sale reversed. Yet, if the son should not marry her till after the death of his father, the marriage would not be valid. In like manner, when a male slave is exchanged for a female slave, and the seller of the male obtains possession of the female, and marries her to her seller, after which the male, being still undelivered, perishes, the right of reversing the sale, which thence arises to the seller of the female, does not invalidate the marriage already contracted, though if the death of the slave had occurred before the contract the marriage would not be lawful. So, also, when a *mookatib* purchases his own wife, or the wife of his master, the marriage is not invalidated in either case; but if he should repudiate his

wife absolutely, and then desire to re-marry her, it would not be lawful for him to do so. And so, likewise, if a father should die, leaving his daughter the wife of his *mookatib*, or of his slave to whom he has bequeathed his freedom, and if the deceased were drowned in debt, the marriage of his daughter would not be invalidated; as, in such a case, until the debts were satisfied, she would have a mere right of property in her husband.

A master is not obliged to let his female slave live with her husband.

When a man has given his female slave in marriage he is not obliged to let her live with her husband in his house, as the master is still entitled to her service, and her husband must have intercourse with her as opportunity offers. Even if it were made a condition that the master should house her, or let her live with her husband, still it would not be binding on him, as such a condition is not required by the contract. When a master does allow his female slave to reside with her husband she is entitled to maintenance, including a fit habitation, as against the latter, in exchange for the matrimonial restraint; but even after such permission, the master may recall her to his service, for his right to that continues as a consequence of his right of property in her, and is no more cancelled by his permitting her to live apart than it is by his giving her in marriage.[1] The same is true with respect to a *moodubburah* and *oom-i-wulud*. And it has been said with regard to a *kinn*, or absolute slave, that when her master has permitted her to reside with her husband, and she still continues occasionally to serve her master without any requisition on his part, that her right to maintenance from her husband does not cease; and the same also with regard to the *moodubburah* and *oom-i-wulud*.

But if she is allowed to do so the husband must maintain her.

The practice of *izl* allowable.

A person gives his female slave in marriage—the permission as to *izl*[2] rests with the master. The practice of *izl* is not accounted abominable, with the consent of a wife if she be free, or of her master if she be a slave; and with one's own slave it is lawful without her consent. And it is said that a wife may take remedies to procure abortion

Query as to abortion.

[1] *Hidayah*, ii. p. 99.

[2] *Extrahere ante emissionem.*

till there is the appearance of life in the *fœtus*; that is, till the completion of one hundred and twenty days.

Option of emancipation.

When a female slave has married with the permission of her master, or the master has given her in marriage, and she is subsequently emancipated, she has an option, and may either abide by the marriage or separate herself from her husband, whether he be free or a slave. And it makes no difference whether the marriage were with or without her consent. This is called the option of emancipation, and there are several points in connection with it which are worthy of remark. 1st. It is available only to females and not to males. 2nd. It is not invalidated by mere silence; but is so by any word or act indicative of approval of the marriage on the part of the woman. 3rd. It is also invalidated by rising from the meeting. 4th. Ignorance of the option is, however, a sufficient excuse; so that, though the woman were informed of her emancipation, yet if she were unacquainted with the fact of her having an option, the option would not be invalidated by her rising from the meeting, according to the great body of the learned, although contrary to the opinion of Aboo Tahir al Dubbas. 5th. Separation by virtue of the option of emancipation does not require the decree of a judge.

Does not extend to male slaves.

When a male slave marries without the permission of his master, and is afterwards emancipated, the marriage is valid, and he has no option. And in like manner, if he should be sold, or his master should die, and the marriage be allowed by the purchaser or the heir, as the case may be, it would be valid, and the slave have no option.

Nor to a female slave who has married without her master's permission.

When a female slave marries without the permission of her master, and he allows the marriage, her dower belongs to him, whether he afterwards emancipates her or not, and whether consummation takes place after the emancipation or before it. And if, without altering the marriage, he should emancipate her, the contract would be lawful, and she would have no option; but, with regard to the dower, if consummation had not taken place, she would herself be entitled to it; while if the marriage were consummated

before the emancipation, the dower would belong to her master. This supposes her to be adult at the time of the emancipation; but if she were under puberty, the marriage would continue dependant on the allowance of the emancipator, unless she had another agnate besides him; and if she have such agnate, and he should allow the marriage, it would be lawful; subject, however, to her option of puberty when she arrives at that state, unless the sanctioner of the marriage were her father or paternal grandfather, when she would have no such option. If the slave who marries without her master's permission be a *moodubburah*, and he should happen to die, leaving property enough for her emancipation to be made good out of the third, the marriage would be lawful; but if the third were inadequate for that purpose, the marriage would not become lawful, according to Aboo Huneefa, until she had worked out her freedom by emancipatory labour, though, in the opinion of both his disciples, it would be lawful without such condition. When an *oom-i-wulud* marries without the permission of her master, and he then emancipates her, or dies leaving her surviving, the marriage is lawful if it had been consummated before the emancipation, but not otherwise.

Disposal of dower when the option is exercised.

When an emancipated slave in exercise of her option elects to separate from her husband, and this is done before consummation, she has no right to dower; and if done after consummation, the specified dower is her master's; while if she elect to adhere to her husband, the specified dower belongs to her master, whether the marriage were consummated or not.

A slave married to the father or son of her master does not become an *oom-i-wulud*.

When a man marries the slave of his son, and she bears him a child, she does not become his *oom-i-wulud*, and he is liable for her dower; but the child is emancipated against his brother by reason of propinquity. In like manner when a man has married the slave of his father, and she bears him a child, the mother does not become his *oom-i-wulud*, though the child is emancipated against the father. And when a father has married the slave of his son by an invalid contract, or under a *shoobh*,

they may therefore be said to compose but one *dar*. And, in like manner, all who are not Moohummudans, being accounted as of one faith, when opposed to them,[1] however much they may differ from each other in religious belief, they also may be said to be of one *dar*. The whole world, therefore, or so much of it as is inhabited and subject to regular government, may thus be divided into the *Dar-ool-Islam*, which comprehends Arabia and all other countries subject to the government of Mussulmans, and the *Dar-ool-hurb*, which comprehends all countries that are not subject to Mussulman government.

and *Dar-ool-hurb*.

How a country belonging to one *dar* may be transferred to another.

A country that was once comprised in the *Dar-ool-hurb* may change its character and become a part of the *Dar-ool-Islam*, on a single condition, which is the public exercise within it of Mooslim authority. But it requires three conditions, according to Aboo Huneefa, to convert a country that once formed a part of the *Dar-ool-Islam* into *Dar-ool-hurb;* and these are—1st, the public exercise of infidel authority, and the non-exercise of Mooslim authority within it; 2nd, annexation to the *Dar-ool-hurb* without the interposition of any Mooslim city or community; and 3rd, the non-continuance in it of a true believer, or a *zimmee*, in the original state of security which he enjoyed either by virtue of his religion, or his submission, previous to the conquest of the country by infidels. This state of things may be induced in three different ways—1st, by a people of the enemy conquering a *dar* or country belonging to "us;" 2nd, by the people of a Mussulman city apostatizing and gaining the mastery over "us," and issuing infidel orders; or, 3rd, by a people under subjection to "us" breaking their compact of submission, and gaining the ascendancy over "us." But in none of these three cases does the country become *Dar-ool-hurb*, except on the three conditions before mentioned, according to Aboo Huneefa. Aboo Yoosuf and Moohummud were, however, of opinion that *Dar-ool-Islam* may become *Dar-ool-hurb*, on the single condition of the public exercise

[1] *Sh[illegible]fea*, p. 12.

within it of infidel authority; and this is agreeable to analogy.[1]

The people of the *Dar-ool-Islam* are Mussulmans or *zimmees*.

The *ahl*, or people of a country in the *Dar-ool-Islam*, may be Mussulmans or *zimmees*—that is, persons who though unbelievers in the Mussulman religion have, by submission[2] to the *jizyut*, or poll-tax, become entitled to the free exercise of their own religion, and generally to the same privileges as their Mussulman fellow-subjects.[3] The *ahl*, or people of a country in the *Dar-ool-hurb*, are, *primâ facie*, all *hurbees*,[4] or enemies, since the law does not recognize the state of *zimmut*, or subjection to foreigners, as applicable to Moohummudans.

Those of the *Dar-ool-hurb* are *hurbees*.

Persons in one *dar* living with permission in another are termed *Moostamin*,

Persons belonging to one *dar* may obtain permission to reside in a country comprised in the other *dar*, for trade or other purposes, and in that condition are termed *Moostamin*, as having obtained protection;[5] but being under no obligation to continue their residence longer than they please they are presumed to have the *animus revertendi*,[6] or intention of returning to their own *dar*, and therefore do not lose the *dar* to which they originally belonged, nor acquire that of the country in which they are temporarily located, being still constructively inhabitants of their own *dar*,[7] until their connection with it is cut off in the manner hereinafter mentioned.

and retain their own *dar* until their connection with it is cut off.

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[1] *Fut. Al.*, vol. ii. p. 330. Even the conditions of Aboo Huneefa seem to meet in the case of British India; but while there was a Mussulman king, in name at least, at Delhi, and the revenues were collected, under the authority of a firman by one of his predecessors, and the current coin bore his name, there was some ground for the doubt which I have frequently heard expressed by learned Moohummudans, whether the territories were so completely severed from the *Dar-ool-Islam* as to have legally become *Dar-ool-hurb*. The deposition of the king, and the assumption of the government by her Majesty in her own name will now, I hope, remove every trace of this doubt from the Moohummudan mind.

[2] *Zimmut*—hence the word *zimmee*.

[3] *Fut. Al.*, vol. ii. p. 273.

[4] *Ibid*, p. 336.

[5] *Iman*, of which *Moostamin* is a derivative.

[6] *Niyyut oor Roojoo*ŏ, literally as above rendered.

[7] *Kifayah*, vol. ii. p. 118.

or semblance,[1] she does not become his *oom-i-wulud*, according to "us" (that is, of the Hanifite sect).

Effect of a slave being emancipated at request of a wife or husband.

A free woman, subject to a slave (that is, being his wife), says to his master, "Emancipate him on my account for a thousand," and he does so, the slave is emancipated, the marriage is invalidated, the dower fails, and she is liable to the master for the thousand. In like manner, if a man having a female slave under him should say to her master, "Emancipate her on my account," and the master should do so, the slave would be emancipated and the marriage invalidated, the *wula* belonging to the emancipator, according to Aboo Huneefa and Moohummud.

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[1] That is, of marriage; for a father has such a semblance of property in the slave of his son as would make her his *oom-i-wulud* by bearing a child to him.—*Hidayah*. vol. i. p. 170.

CHAPTER X.

OF THE MARRIAGE OF INFIDELS.[1]

Who are infidels.

EVERY unbeliever in the Mussulman religion is termed *kafir*, or infidel, and infidels who are not in subjection to some Mussulman State are generally treated by Moohummudan lawyers as *hurbees*, or enemies. Marriage with them is not entirely interdicted even in such circumstances, though it is subject to some restriction. A few words, therefore, on the general principles that seem to regulate the intercourse of Mussulmans with persons of other religions, whether they are natives of the same or of different countries, may not be improper in this place, as an introduction to the proper subject of the chapter.

Of Nationality.

The inhabited world is divided into *Dar-ool-Islam*

A country that is subject to the government of Mussulmans is termed *Dar*[2]*-ool-Islam*, or a country of safety or salvation, and a country which is not subject to such government is termed *Dar-ool-hurb*, or a country of enmity. Hence the term *hurbee*, or enemy. Though Moohummudans are no longer under the sway of one prince, they are so bound together by the common tie of *Islam* that as between themselves there is no difference of country,[3] and

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[1] *Kooffar*, pl. of *kafir*. A great deal of opprobrium attaches to this word, as to the parallel term *infidel* with us.

[2] Infinitive of the word *daru*, "he went round," and commonly applied to a mansion or house, with its appurtenances, as well as to a country.

[3] *Shureefea*, p. 19.

A foreigner entering the *Dar-ool-Islam* without permission may be slain or enslaved. Permission should not exceed one year.

If a foreigner should enter the *Dar-ool-Islam* without protection, he may be slain, or reduced to slavery, or protection may be granted to him. His acts in the meantime are in suspense; if he is slain or made a slave they are void; but if protection be granted to him, they become operative.[1] Foreigners, even when allowed to come into the Mussulman territory as *Moostamins*, or under protection, ought not to be allowed to prolong their residence beyond one year;[2] and it is the duty of the rulers to give them warning to that effect, while the period may be shortened, if that is thought proper, to one or two months.[3] If they neglect the warning, and continue their residence beyond the period prescribed by the notice, they become *zimmees* on its mere expiration, and liable to the *jizyut*, or poll-tax; after which they can no more leave the territory and return to their own country.[4] The same liabilities are incurred by the purchase of land subject to the *kharaj*, or land-tax, which, so soon as it is imposed on a *Moostamin*, has the effect of converting him into a *zimmee*.[5] But the mere purchase of the land has not that effect, provided he disposes of it before the *kharaj* is due. Nor does he become a *zimmee* by taking the land on lease;[6] nor by marrying a *zimmeeah* woman, for he may repudiate her and return to his own country, and is therefore not bound to the place.[7] But if a woman of the enemy's should enter the Mussulman territory under protection and marry a *zimmee*, she would become a *zimmeeah*, because she is bound to the place as following her husband.[8] When a foreigner becomes a *zimmee* or a Mussulman, his connection with his own *dar* is cut off in the eye of the Moohummudan law, and he becomes a member of the *Dar-ool-Islam*.

How from *Moostamin* they become *zimmees*,

and connection with their own *dar* is cut off, and junction to the *Dar-ool-Islam* effected.

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[1] *Hidayah*, vol. ii. p. 806.
[2] *Hidayah*, vol. ii. p. 766.
[3] *Inayah*, vol. ii. p. 582, and *Fut. Al.*, vol. ii. p. 334.
[4] *Ibid.*
[5] *Hidayah*, vol. ii. p. 767. His marriage with a *Mooslimah* would be unlawful.
[6] *Ibid.*
[7] *Fut. Al.*, vol. ii. p. 334.
[8] *Ibid* and *Inayah*, vol. ii. p. 582.

When an apostate from the Mussulman religion has fled to a foreign country, and is judicially declared to have joined the *Dar-ool-hurb*, he becomes civilly dead, his *moodubburs* and *oom-i-wuluds* are immediately emancipated, the debts for which he was liable become instantly payable, and whatever he may have acquired during his profession of the Faith passes at once to his heirs.[1] But it is necessary that he should be judicially pronounced to have joined himself to the *Dar-ool-hurb*, because there is a possibility of his repentance and return;[2] and if, before the judge's decree to that effect, he should return as a *Mooslim*, his condition is the same as if he had uniformly continued to be so.[3] Even though his return should not be till after the judge's decree pronouncing him to have joined the *Dar-ool-hurb*, he is still entitled to take back any part of his specific property that he may find in the hands of his heirs, though he cannot reclaim his *moodubburs* and *oom-i-wuluds*, because the decree having been pronounced on valid evidence cannot be cancelled.[4] By parity of reason, it would seem that a Mussulman who entered a foreign country as a *Moostamin*, and apostatizes there, is not cut off from his own *dar* till judicially pronounced to have joined himself to the *Dar-ool-hurb*.

A Mooslim's connection with his own *dar* is not cut off until he is judicially pronounced to have joined the *Dar-ool-hurb*.

The contract of *zimmut*, or submission, by means of which the *zimmee* is entitled to protection, is not dissolved by his refusing to pay the *jizyut*, or poll-tax, or by his slaying a Mooslim, or having illicit intercourse with a Mooslimah, or blaspheming the Prophet, or otherwise than by his joining himself to the *Dar-ool-hurb*, or engaging in actual warfare with the Faithful; but when the contract is dissolved, his condition is the same as that of the apostate.[5] By which is meant, that he becomes civilly dead by the junction; and that if he repent, his repentance is to be accepted, and his condition of *zimmut* revives;

Nor a *zimmee* until he has broken his compact of subjection.

[1] *Hidayah*, vol. ii. p. 801.
[2] *Ibid.*
[3] *Ibid*, p. 807.
[4] *Ibid*, p. 806.
[5] *Ibid*, p. 792.

while the protection of his family is not cancelled by the dissolution of his compact, but his *zimmeeah* wife, whom he may have left behind in the *Dar-ool-Islam*, becomes absolutely separated from him by general agreement, and his property is divided among his heirs.[1]

How far *zimmees* are subject to Moohummudan law.

Zimmees, or infidel subjects of a Mussulman Power, do not subject themselves to the laws of *Islam*, either with respect to things which are merely of a religious nature, such as fasting and prayer, or with respect to such temporal acts as—though contrary to the Moohummudan religion—may be legal by their own, such as the sale of wine or swine's flesh, because "we" have been commanded to leave them at liberty in all things which may be deemed by them to be proper, according to the precepts of their own faith. Wherefore, with respect to all such acts, *zimmees* are on the same footing as aliens; but from these is to be excepted *zina*, or illicit intercourse between the sexes, that being held universally and by all sects to be criminal, and usury, which has been specially excepted by the Prophet himself.[2] When disputes arise between *zimmees*, which they are unable to settle among themselves, and are consequently brought for decision before the Moohummudan tribunals, it is necessary that the judge should have some certain rules for his guidance; and it is accordingly usual in legal treatises to appropriate one or two chapters or sections under the general heads of law, for exhibiting the differences between the law as applicable to Moohummudans and the *zimmees*. Hence this chapter on the marriage of infidels, and the section under the head of dower, on the dower of *zimmees* and *hurbees*.

How far foreigners residing under protection in a Mussulman country are subject to it.

Foreigners residing as *Moostamins* in the *Dar-ool-Islam*, or any Mussulman country, are presumed from accepting protection to submit themselves to the jurisdiction of the Moohummudan judge in all matters accruing subsequently to their becoming *Moostamins*, though not for anything previous thereto.[3] When a *Moostamin* returns to his own

[1] *Fut. Al.*, vol. ii. p. 357. [2] *Hedaya*, vol. i. p. 174.
[3] *Ibid.*, vol. ii. p. 193.

country, leaving deposits with Mooslims, or *zimmees*, or debts due by either, and is subsequently taken captive, or his country is conquered by Mussulmans and himself slain, the debts fall to the ground, and his deposits escheat to the State; but if he is slain without any such conquest, or dies a natural death, both debts and deposits become the right of his heirs.[1] So, also, when a *Moostamin* dies within the Mussulman territory, leaving property in it, and heirs in his own country, the property is reserved for them until they establish their right to it; but a bequest by him in favour of a Mooslim or *zimmee* to the full amount of his estate would be valid, unless his heir had accompanied him on his entrance into the *Dar-ool-Islam*; when if the bequests should exceed a third of his property, the excess above a third would require the assent of his heir; though if his heir had not come originally with him, the bequests would be valid to the full amount of his property; and so, also, if he has no heir, or none except in the *Dar-ool-hurb*.[2] A bequest to a *Moostamin* by a *Mooslim*, or a *zimmee*, is valid; but a

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[1] *Hedaya*, vol. ii. p. 198.

[2] *Fut. Al.*, vol. ii. p. 335. and *Hidayah*, vol. iv. pp. 1485. By articles of peace between Great Britain and the Ottoman Empire, finally confirmed by the Treaty of Peace concluded at the Dardanelles, it is (26th section) agreed, "That in case any Englishman, or other person subject to that nation or navigating under its flag, shall happen to die in our sacred dominions, our fiscal and other persons shall not, on pretence of its not being known to whom the property belongs, interpose any opposition or violence, by taking or seizing the effects that may be found at his death, but they shall be delivered up to such Englishman, whoever he may be, to whom the deceased may have left them by his will. And should he have died intestate, the property shall be delivered up to the English consul, or his representative who may be there present; and in case there be no consul or consular representative, they shall be sequestered by the judge, in order to his delivering up the whole thereof whenever any ship shall be sent by the ambassador to receive them." See case of Maltass *v.* Maltass, *Curteis' Reports*, vol. iii. p. 231. The treaty removes any doubt as to the validity of a bequest by a British subject to an Englishman, and in other respects seems to follow the general Moohummudan law.

bequest by either of them to a foreigner not a *Moostamin* is not valid.[1]

A Mussulman is always subject to Moohummudan law.

A Mussulman is subject to the laws of *Islam* absolutely,[2] that is, without any distinction of place or otherwise. Yet if he should enter the *Dar-ool-hurb* under protection, and have dealings with an enemy whereby one of them becomes indebted to the other, and he should then return to "us," the enemy also coming as a *Moostamin*, the judge is not to decree to either of them against the other.[3] But this is not for want of jurisdiction over the Mooslim, either at the time when the debt was contracted or at the time of adjudication, but because the foreigner has not made himself liable by accepting protection to the judge's jurisdiction for past transactions, and justice requires that both parties should be on an equal footing.[4] So, also, with regard to a transaction in the foreign country between two foreigners, who afterwards came out to us as *Moostamins*, or under protection. But the case would be different if they came out as Mooslims, or having embraced the faith; for then, both being liable to the judge's jurisdiction, he might lawfully decree in favour of one against the other.[5] The rule furnished by this case seems equally applicable to marriage, as well as to any other transactions, by a Mooslim in a foreign country. Whether the wife were a *Mooslimah* or *Kitabeeah*, she would, on entering the Mussulman territory under his authority, be bound to the country as following him, and the Moohummudan judge would consequently, it would seem, have jurisdiction over all transactions between them, whether previous or subsequent to their coming within his authority.[6]

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[1] *Fut. Al.*, vol. vi. pp. 141 and 205.

[2] *Kifayah*, vol. ii. p. 763.

[3] *Hidayah*, vol. ii. p. 762.

[4] *Kifayah, ibid.*

[5] *Hidayah, ibid.*

[6] Marriages occasionally take place in this country between a Mussulman and a Christian woman. Such marriages are valid according to Moohummudan law, as it is received by the Hanifite sect which prevails generally throughout India and Turkey, and most of the Moohummudan world, except Persia; but if the husband should return to the *Dar-ool-Islam*, that is, to any Mussulman country,

Persons found within a *dar* are *primâ facie* held to belong to it.

The *dar* itself is *primâ facie* evidence that those who are found within it belong to it; but personal signs or tokens are better evidence, and proof or positive testimony still better. So that if a band of Mussulmans should capture a number of persons and bring them within the territory, and the captives should claim to be of the people of *Islam*, or *zimmees*, but admit that they were taken in the *Dar-ool-hurb*, alleging, however, that they entered it as *Moostamins* for the purposes of trade or a visit, or were captives in their hands, their plea is not to be allowed; and they are to be reduced to slavery, unless they be found with the signs or tokens of *Islam* upon them, such as circumcision or the reading of the Kooran and the law, and they have pleaded *Islam*, when their plea would be accepted and their reduction to slavery averted.[1]

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leaving his wife behind him in her own, a separation (equivalent to a divorce) would take place by reason of the difference of *dar*. This, and the fact that Moohummudans are frequently married in childhood, and are allowed a plurality of wives, and may probably have left wives living in their own country, ought to render Englishwomen cautious how they enter into such connections. Among the *Sheeahs* there is some difference of opinion on the subject of these marriages, or, rather, two reports, and according to the more authentic, a perpetual marriage between a Mussulman and a Christian woman is unlawful, though there is no objection to a temporary contract, which the *Sheeah* law allows.—*Shuraya ool Islam*, p. 274.

[1] Though the Moohummudan law does not appear to recognize any distinction between domicile and country, yet as it assumes that persons residing in a *dar* different from their own have always the *animus revertendi*, it would seem that, according to it, a foreigner cannot acquire a domicile in a Mussulman country, nor a Mussulman acquire a domicile in a foreign country, until they have ceased to be subjects of their own respectively. The subject of domicile was raised in the case referred to in page 173, but not decided, as the treaty afforded a sufficient ground for determining it. According to the decision in that case, the will of a British subject made in Turkey, to be valid, must be made in conformity with English law. See Williams on *Executors and Administrators*, vol. i. pp. 326, 327.

Marriage of Infidels.

Marriages between *zimmees* lawful without witnesses.

Every marriage that is lawful between two Mooslims is lawful between two *zimmees*.[1] Marriages that are not lawful between two Mooslims are of several kinds. Of these there is the marriage without witnesses. When a *zimmee* marries a *zimmeah* without witnesses, and such marriages are sanctioned by their religion, the marriage is lawful. So that if they should afterwards embrace the Mussulman faith, the marriage would still be established, according to "our" three masters. And, in like manner, if they should not embrace that faith, but should both claim from the judge the application of the rules of *Islam*, or one of them should make such a claim, the judge is not to separate them.

Marriage with a woman in her *iddut* for a Mooslim is invalid.

There is also the marriage of a woman during her *iddut* on account of another man. When a *zimmee* marries a woman in her *iddut* for another man, that man being a Mooslim, the marriage is invalid, and may be objected to before their adoption of the Mussulman religion, even though their own religion should recognize the legality of marriage in the state of *iddut;* but if the *iddut* were rendered incumbent on the woman on account of an infidel, and marriages in a state of *iddut* are accounted lawful in the religion of the parties, it cannot be objected to while they remain in a state of infidelity, according to general agreement.

Otherwise when the *iddut* was for an infidel.

When an infidel marries a woman in her *iddut* for an infidel, and the marriage is lawful according to their persuasion, and they afterwards adopt the Mussulman faith, the marriage remains fixed and established, according to Aboo Huneefa. Aboo Yoosuf and Moohummud, however, were of a different opinion—holding that it was not fixed and established; but the saying of Aboo Huneefa is valid. And the judge is not to separate between them, according to Aboo Huneefa, though both, or only one of them, should adopt the faith; or both, or only one of

[1] It may, I think, be inferred that the same allowances would be made in respect of marriage to *Moostamins*, or foreigners living under protection in a Mussulman country, as to *zimmees*.

them, should bring the matter before the judge. In the *Mubsoot* it is stated that this difference between the masters was only when the reference to the judge or the adoption of the faith takes place during the subsistence of the *iddut*; but where it does not take place till after the *iddut* has expired, the parties are not to be separated, according to all their opinions. There is next the marriage of *Mooharim*, or persons who are perpetually prohibited from intermarrying. If the wife of an infidel were unlawful to him, by being his mother or sister, for instance, is such a marriage to be accounted valid? According to Aboo Huneefa it is valid as between the parties; so that she is entitled to maintenance, and his *ihsan*,[1] or respectability, is not abated by his having intercourse with her after the contract. It is also said, however, that Aboo Huneefa accounted the marriage invalid, which was the opinion of the disciples; but the first opinion is correct. And there is the like difference of opinion with regard to a woman repudiated three times, and as to the conjoining of women who are too closely related to each other, or five women in marriage. But there are no mutual rights of inheritance between them arising out of such marriages. Hence, if a *mujoosee* should marry his mother, or any other relative within the forbidden degrees, he would not inherit from her by reason of the marriage. And if both or one of the parties should adopt the Mussulman faith, they must be separated, according to general agreement. And, in like manner, when they do not adopt the Mussulman faith, but concur in bringing the matter before the judge. But if one of them only should bring the matter before the judge, and claim the application of the rule of *Islam*, they are not to be separated when the other refuses compliance; yet, according to the disciples, they are to be separated in such a case. While they remain in infidelity, and do not bring the matter before "our" tribunals, all are agreed that no objection is to be made to them if the marriage is

Marriage between parties who cannot lawfully intermarry.

Effect of conversion to Islam in such case.

[1] The character of being a *Moohsun*. For the exact meaning of this term, see *ante*, p. 2.

sanctioned by their own religion. It is also agreed, in conformity with the saying of Aboo Huneefa, that if one should marry two sisters in a single contract, but separate from one of them before adopting the faith, and should then adopt the faith, the marriage of the remaining one would be valid and the man established in it.

A *zimmee* cannot lawfully continue to cohabit with a thrice repudiated wife,

but may re-marry her without previous intermarriage with another. Cannot be the husband of a Mooslim woman.

When a *zimmee* has repudiated his *zimmeeah* wife three times, and then behaves to her as he had done before the repudiation, without marrying her again or saying the words of the contract over her; or when his wife has obtained a *khoolá* or release, and he then acts to her as before without renewing the contract—they are to be separated, even though they should not bring the matter to the judge. But if he repudiates her three times, and then renews the contract of marriage with her without her being married to another, they are not to be separated.

When a *zimmee* marries a Mooslimah, they are to be separated; and if he should embrace the faith, and she should say, "You married me, I being a Mooslimah at the time," and he should say, "Nay, but a *mujooseeah*," the word is with her, and he is to be separated on her suing on the ground of the illegality.

Zimmees contracted under age have the option of puberty.

When a girl under puberty is contracted to a boy under puberty, both being *zimmees*, and they then arrive at puberty, if the contracting party was a father, they have no option; but if he were any other than a father or grandfather, they have an option, according to Aboo Huneefa and Moohummud.

Course to be followed when one of married parties is converted to the faith.

When one of two spouses embraces the Mussulman faith, *Islam*[1] is to be presented to the other, and if the other adopt it, good and well; if not, they are to be separated. If the party is silent and says nothing, the judge is to present *Islam* to him, time after time, till the completion of three, by way of caution. And there is no difference between a discerning youth and one who is adult; so that

[1] *Islam* being an act of piety, is not a ground for separation, but the obdurate rejection of it is.—*Hedaya*, vol. i. p. 178. There is an exception, when the husband is a convert and the wife a *Kitabee*, see *post*, p. 181.

a separation is to be made equally on the refusal of the former as of the latter, according to Aboo Huneefa and Moohummud. But if one of the parties be young and without sufficient discernment, it is necessary to wait till he has understanding; and when he has understanding *Islam* is then to be presented to him; and if he adopt it, well; if not, a separation is to be made without waiting for his arriving at puberty. And if he be mad, *Islam* is to be presented to his parents; and if they, or one of them, should embrace it, good and well; if not, a separation is to be made between the married parties. If the husband should embrace the faith and the wife refuse, the separation is not accounted repudiation; but if the wife should embrace the faith, and the husband decline, and a separation is made in consequence, the separation is accounted a repudiation, according to Aboo Huneefa and Moohummud. When a separation takes place between them by reason of refusal, and it is after consummation, she is entitled to the whole dower; and if it is before consummation, and through his refusal, she is entitled to half the dower; but if through her own refusal, she has no dower at all. If the husband of a *Kitabee* woman adopt the faith, their marriage remains unaffected.

Different effects of conversion according as the husband or wife is the convert.

When one of the married parties adopts the Mussulman faith in a foreign country, and the parties are not *Kitabees*, or even though they should be so, yet if the woman be the person who embraces the faith, the cutting off of their marriage is suspended for the completion of three menstrual periods, whether consummation have taken place or not.[1] And if the other party should also adopt the faith before their completion, the marriage remains subsisting. When the parties are *Moostamins*, an absolute separation is effected between them by presenting *Islam* to the other, or by the expiration of three courses. The courses in these instances do not constitute an *iddut*; and

When the parties are foreigners, and conversion takes place in any foreign country.

When it takes place in the Mussulman territory.

[1] That is, as *Islam* cannot be formally presented for acceptance in a foreign country, the separation is effected by abstinence for three occurrences of the courses.

for that reason there is no difference between an enjoyed and an unenjoyed wife; and whenever a separation takes place on this account before consummation, there is no *iddut;* nor if it take place after consummation, and the woman is a *hurbee,* and even though she were a *moostamin,* the result would still be the same, according to Aboo Huneefa. If the woman, from extreme youth or advanced age, is not subject to the courses, the separation cannot be effected except by the expiration of three months. And if the woman be the convert to *Islam,* and her husband should come out from the enemy's territory as a *moostamin,* there can be no separation, except by the completion of three courses. And in like manner, if he should become a *zimmee,* after having come out a *moostamin;* so that if his wife should afterwards follow him, *Islam* is to be presented to him; and if he adopt it, no separation is to be made between them. And so also if the husband be the convert, and the wife come out as a *zimmeeah,* there is no separation till she has had her courses three times; and if a separation take place by the completion of three courses, it is reported in the Siyur Kubeer that this is a separation by repudiation, according to Aboo Huneefa and Moohummud.

Effect of difference of religion by apostasy of one of a married pair.

Apostasy from *Islam* by one of a married pair, is a cancellation of their marriage, without requiring the decree of a judge;[1] and the separation, by general agreement, is not a repudiation, whether the occurrence is before or after consummation; yet if the husband be the apostate, the wife is entitled to the whole dower when consummation has taken place, and half when it has not.[2] If the wife be the apostate, she is equally entitled to the whole dower in the former case, but to no part of it in the latter. If they apostatize together, and then together re-embrace the faith, the marriage remains valid on a favourable construction; but if one only of them returns to the faith, a separation takes place between them. If words of infidelity should come to the wife's tongue in anger against her husband, or

[1] *Door-ool-Mookhtar,* p. 216.

[2] As would be the case if it were a repudiation.

in order to extricate herself from the net of his authority, or to entitle herself to a dower against him by a new marriage, she becomes unlawful to her husband, but should be compelled to return to the faith, and any judge may renew the marriage at the lowest amount of dower, though so low as one *deenar*,[1] whether she dislike it or not; and she cannot marry another husband. Hindoowanee and Aboo Leeth both have said that they approved of this doctrine.

Apostasy of the husband of a *Kitabee* wife.

If a husband having a *Kitabee* wife, should become Mooslim, and afterwards apostatize, she would be absolutely separated from him. A Mooslim having married a *Kitabee*, they both became *Mujoosees* together, and, according to Aboo Yoosuf, a separation should take place, though Moohummud was of a different opinion. But if a Christian woman, being subject to a Mooslim, they should both become Jews, a separation would take place between them by general agreement, because the cause of separation comes from the part of the husband specially.[2]

Effect of difference of *dar*.

A difference of *dar* is a cause of separation, though captivity is not so in itself. Hence, if one of the parties should come out from the *Dar-ool-hurb* as a Mooslim or *zimmee* to the *Dar-ool-Islam*, separation would take place.[3] A *hurbee*, or enemy, comes out to "us" under protection, and then accepts subjection, his wife becomes separated from him. And if one of a married pair should be taken prisoner, a separation would take place between them by reason of the separation of *dar*; but if they are taken prisoners together, no separation takes place.[4] And if a *hurbee* come out as a *moostamin*, or a Mooslim enters the alien country as a *moostamin*, no separation takes place between the husband and wife.[5] In like manner, the

[1] A *deenar* is ten *dirhems*.

[2] By becoming a Jewess she would be still lawful to him, so that it is his apostasy only that makes the separation.

[3] By reason of the change of *dar*.

[4] Captivity alone not being a ground of separation; though it was according to the doctrine of *Shafei*.

[5] The parties being *constructively* in their own *dar*.

removal from a fortress of rebels to one of the just or loyal, or the contrary, does not induce separation. A Mooslim marries an alien *Kitabeeah* in the foreign country, and then the husband comes from it alone, his wife becomes separated from him, according to "us"; but if the woman should come out before the husband, no separation would take place.

Case of prisoner.

If one is taken prisoner having under or subject to him (that is, as wives) two sisters, or four or five women who are taken with him, the marriage of the whole is void, according to Aboo Huneefa and Aboo Yoosuf, whether they were by separate contracts, or by one contract; but if there be in subjection to an infidel, two sisters or five women, and they embrace the faith together, and the marriages were by separate contracts, the marriage of the sister first married, or of the four first women, is valid, and the remaining one void. If he married them all by one contract, and they were *zimmeeahs*, the whole would be void, without any difference of opinion; except that when one dies, or is separated before entering *Islam*, the marriage of the four remaining is valid; and if they were *hurbees*, or enemies, the case would be the same, according to Aboo Huneefa and Aboo Yoosuf. If two be taken prisoners with him their marriage would not be vitiated, but that of those remaining in the foreign country would be vitiated.[1] If a *hurbee* having married a mother and daughter, should then adopt the faith, the marriage would be void if he had married them by one contract: but if by separate contracts, the marriage of the first would be lawful, and that of the other void, according to Aboo Huneefa and Aboo Yoosuf. That is, when he had not consummated with either of them; but if he had consummated with both the marriage of both would be void together; and while, if he had consummated with one of the two, and the consummation had been with the first, after which he had married the second, the marriage of the first would be lawful, and that of the second void, according to general

[1] By difference of *dar*.

agreement. If he had not consummated with the first, but consummated with the second, and the first were the daughter and the second the mother, the marriages of both would be void, by general agreement; but if he had married the mother first without consummation, and then married the daughter, and consummated with her, the marriage of both would be void, according to Aboo Huneefa and Aboo Yoosuf; except that it would be lawful to him to marry the daughter, but not the mother.[1]

Rule as to religion of children.

The child follows the religion of the better of its parents. Hence, if one of them be a Mooslim the child is of the Mooslim religion.[2] So, also, if one of them should embrace the Mooslim religion, having an infant child, the infant would become a Mooslim by virtue of the parent's conversion,[3] that is, when there is no difference of *dar*, by both of the parents being either within the *Dar-ool-Islam* or the *Dar-ool-hurb*, or by the child's being in the former at the time that its parent embraces the Mooslim faith in the foreign country, for he then becomes constructively one of the Mussulman people; but when the child is in the foreign country, and the parent within the Mussulman territory, and he adopts the faith there, the child does not follow him, and is not a Mooslim. A *Mujoosee* is worse than a *Kitabee*; and if one of the parents be a *Mujoosee* and the other *Kitabee*, the child is a *Kitabee*, and may be lawfully married by a Mooslim, to whom also things slaughtered by the child would be lawful.

Qualified in the case of a married female.

If a Mooslim marry a young girl both of whose parents are Mooslim, but both subsequently apostatize, the child is not separated from the husband; but if they join themselves to a foreign country, taking her with them, a separation takes place; and if one of the parents should die in "our" country, either a Mooslim or an apostate, and the

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[1] *Hidayah*, vol. ii. p. 804.

[2] The mother could not be so *ab initio*, for a *Mooslim* woman cannot lawfully be the wife of any other than a man of her own religion.

[3] *Hidayah*, ii. p. 113.

other should then apostatize, and take her to the foreign country, she is not separated from her husband. A Christian girl subject to a Mooslim, whose father becomes a *Mujoosee*, but whose mother has died a Christian, is not separated from her husband. A Mooslim marries a Christian girl who is contracted to him by her father, and both of whose parents are Christian; one of her parents then becomes *Mujoosee*, the other remaining Christian, the daughter does not become separated from her husband; but if both the parents should become *Mujoosees*, and the maid being still under puberty, should remain in her own religion, she would be separated from her husband, even though they should not have taken her to the foreign country, and she would have neither little nor much of the dower. And the answer would be the same if she should arrive at puberty, but in a state of fatuity, for in such circumstances she would remain subject to her parents and to the *dar* in religion; because a fatuous person cannot be of *Islam*, of himself in reality, and is therefore in this respect the same as an infant.[1] A Mooslim woman, having arrived at puberty, became insane (both her parents being Mooslim), and her father gave her in marriage, she being fatuous at the time, so that the marriage was lawful; the parents then apostatized, and took refuge in the foreign territory;—it was held that she did not become separated from her husband. And a young girl who had once understood *Islam*, and could describe it, becoming subsequently insane, is in the same way as this person. A Mooslim marries a young Christian girl, who does not understand, nor can describe, any religion, but is not insane,—she is to be separated from her husband; and, in like manner, a young Mooslimah, when she arrives at puberty, having her senses, but not understanding *Islam*, nor able to describe it, though not insane, is to be separated from her husband. And she is not entitled to any dower before consummation, but after it she is entitled to the dower specified. And God should be mentioned to her, with all his

[1] And consequently of the same *dar* with the child.

attributes, and it should then be said to her, "Is he so?"—whereupon, if she answer "Yes," she is to be judged as of *Islam*. And if she should say, "I know him and can describe him," but does not do so, she is to be separated; while if she say, "I cannot describe him," opinions vary on the point. If she understand *Islam*, but does not describe it, she is not to be separated; and if she describe *mujooseeism*, she is to be separated, according to Aboo Huneefa and Moohummud, though against the opinion of Aboo Yoosuf. And this is applicable to the case of the apostasy of a youth.

Cases relating to apostates.

A man apostatizes several times, and every time returns to the faith and renews his marriage; according to Aboo Huneefa his wife is lawful to him, without being intermediately married to another husband. And the husband of a woman who apostatizes may lawfully marry four women besides her, when she has betaken herself to a foreign country. A man having married a woman, before having connection with her, is absent from her: an informer then tells him that she has apostatized, the informer being free, or a slave, or even one who has undergone the *hudd* for slander, but trustworthy,—he may give credit to his assertion, and marry four wives besides her. And in like manner, though the person be not trustworthy, but there is a greater probability of his being true than false in the present case; but if the probability be greater that he is lying, the man should marry no more than three. And if a woman be informed that her husband has apostatized, she may intermarry with another after the expiration of her *iddut*, according to a report which Surukhsee says is valid. If a man apostatize when so drunk as to be bereft of understanding, his wife is not separated from him, on a favourable construction.

CHAPTER XI.

OF PARTITION.[1]

A man who has two wives must be just and impartial in his treatment of them, in matters within his power.

WHEN a man has only one wife he may be directed to be attentive to her, and to occupy the same apartment with her at times, though no exact time has been fixed by the Zahir Rewayut.[2] And when he has two wives who are free-women, he must be just and equal in dividing his attentions among them.[3] What is required of him in this respect is justice and equality in matters that are within his power, and living with them for society and acquaintanceship, not in matters that are beyond his control, such as love and matrimonial intercourse. And there is no difference between the husband who is a slave and one who is free. The healthy husband, also, and the sick, the *mujboob* and the eunuch, the impotent, the adult, and the boy verging on puberty, the Mooslim and the *zimmee*, in respect of partition are all alike. And with regard to wives, equality must be observed between the old and the new, the virgin and the *thuyyibah*, the healthy and the sick,—even the paralytic and the insane if not dangerous,—the woman in her courses, and one who is purified from them, the pregnant woman, and one in an interval of pregnancy, the young girl unfit for matrimonial converse, the pilgrim and the wife under *eela*, or *zihar*.[4] But if one

All husbands are alike in this respect,

and all wives,

except slaves.

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[1] Arab, *Kusm*.

[2] *Kifayah*, vol. ii. p. 123.

[3] *Hidayah*, vol. ii., p. 122.

[4] A man's comparing his wife to the back of a female relative within the prohibited degrees, by which illegality of matrimonial intercourse is incurred until duly expiated.

of the wives be free, whether she be a Mooslim or *zimmee*, and the other a slave, whether *kinn* (or absolute), *mookatibah*, *moodubburah*, or *oom-i-wulud*, two days and two nights are to be given to the free-woman, for one day and one night to the slave. And slaves, or women enjoyed merely by virtue of proprietary right, have no claim to partition.

Partition has reference to the night; but a man may not have intercourse with a woman during the day unless the day be her own: and at night he ought not to enter the apartment of a wife whose night it is not by partition, though there is no objection to his going into it by day for necessary purposes, and returning to it even at night, if the woman be sick; while, if her illness is severe, he may remain with her continuously till she recover or die.

Partition of time has more particular reference to the night.

The measure of partition, that is, how long he is to abide with each wife, is left to the husband's discretion; for though each is entitled to an equal share, it is not in any precise manner.

Period of remaining with each wife is left to the husband's discretion.

When the judge has enjoined partition and equality on a man, and he has evaded the order, and the matter is again brought before the judge by the wife, he should impose some punishment on the husband for doing what was fordidden, and again enjoin him to do justly. But if the man should remain with one of his wives for a whole month, whether before or after the matter is made the subject of litigation, and another wife should complain of it to the judge, he can only order equality to be observed between them for the future, and the past goes for nought, the complainant having no right to demand that her husband should remain for a like period with her. And if a man should remain with one wife for more than her proper time, with the permission of another, the other may recall the permission at any time, being in nowise bound by it. So, also, if one of the wives should give up her share to her companion, it is lawful,[1] but she may retract at any time whenever she pleases. Or if one is content to abandon

A husband may be punished by the judge for not observing equality to his wives.

But one wife may give up her time to another.

[1] The reader will remember the case of Leah and her son's mandrakes.—Gen. ch. xxx., v. 15.

her share to her companion, the act is lawful, but still she may retract. And if a man should marry two women on a condition of remaining longer with one than with the other; or if a woman should give her husband property, or take upon her something, that he may increase her share, or make some abatement from her dower with the same view, the condition and the gift would be void, and she might retract and reclaim her property. So, in like manner, if a husband should be profuse of his property to one wife, on condition of her being equally liberal of her time in favour of her companion, or one of the wives should expend her property on her companion, that she may in return abandon her time to her, the arrangement would be unlawful in either case, and the property might be reclaimed.

Conditions for inequality void, and contracts for it may be revoked.

A man going on a journey may lawfully take some of his wives with him without the others, though it would be better to cast lots between them, to prevent jealousies; and when he returns, the others have no right to require that he shall remain for a similar period with them. When a man has already one wife, he should not take another, if he have any apprehension of not being able to act justly between them both; and even though he should be under no such apprehension, it is better to abstain, and so avoid giving his wife cause for grief and vexation. It is also right and becoming to distribute all his attentions equally between his wives, even to matrimonial intercourse and kissing, and also among his slaves and *oomahat-i-wulud* (or mothers of children), though he is under *no positive* obligation to do so.

A man going on a journey may take any of his wives, without the others.

Of some Matters connected with the preceding.

It is not lawful for a husband to place two co-wives together in one habitation without their consent, from its necessarily giving occasion for disputes. And if he should do so with their consent, it is abominable to have matrimonial intercourse with one of them in the presence of the other. So that if he should call one of them to him

for that purpose, she would not be bound to obey, nor become *nashizah* or rebellious, by refusal. On these points there is no difference of opinion. But a husband may compel his wife to wash after ceremonial defilements, and her courses and childbirth, unless she be a *zimmeeah*, and to observe other customary proprieties. Further, he may prevent her from eating things of bad odour or productive of leanness, and from the use of things of bad odour, such as green henna, in the adorning of her person; and he may beat her for neglecting to adorn herself when he desires her company, or refusing him when she is pure, or abandoning the practice of prayer and its proper conditions. When a man has a wife who does not pray, he may repudiate her, though unable to pay her dower. And if a wife have any defluxion on her, she is not to go out, whether her husband know it or not; but when there is nothing of the kind she may go out. If she have an infirm father, who has no one to remain with him, and her husband forbids her to go to him, she may disobey her husband, and obey her father, whether he be Mooslim or infidel. A man who has a mother still in her youth, who is in the practice of going out on occasions of festivity or sorrow, but has no husband, has no right to prevent her from going out, unless it is established to his satisfaction that she goes out for improper purposes; whereupon he may bring the matter before the judge, who may authorize him to prevent her, and then he may do so as representing the judge.

BOOK II.

OF FOSTERAGE.[1]

Mothers and sisters by fosterage are perpetually prohibited.

It is not lawful for a man to marry his mother by fosterage, nor his sister by fosterage, by reason of the sacred text—"And your mothers who suckled you, and your sisters by sucking," and the saying of the Prophet—"What is unlawful to you by consanguinity is unlawful to you by fosterage;"[2] and the illegality is perpetual.[3]

How the prohibition is induced.

Illegality is induced by sucking, whether it be little or much, provided that it takes place within the proper period. The little, however, must be understood as what is known to reach the stomach; and the period of sucking, according to a saying of Aboo Huneefa, is thirty months; though the disciples have said that it does not extend beyond two years. Though a child has been weaned within the period, yet if again put to the breast before its expiration, that would be sufficient to occasion the prohibition by fosterage, as the infant has been actually suckled within the period. This seems to be clear, according to "our doctrines" and the *futwa* is stated in the Yoonabia to be in accordance with it. When the full period has expired, the illegality by fosterage is not established by sucking after it. All are agreed that the period of suckling, so as to establish a right to hire on the part of the nurse, is two years; so that when a woman who has

[1] Arab, *Rizáa*. The word means, literally, *sucking*.
[2] *Hidayah*, vol. ii. p. 125.
[3] *Ibid*, p. 640.

been divorced makes a demand for the time of nursing after the expiration of two years, and the father of the child refuses to give it, he cannot be compelled to do so, but he may be compelled to pay the hire for two years.

It is established as well on the side of the man, who is the author of the milk, as of the nurse.

As the illegality by fosterage is established on the part of the mother, so also it is established on the part of the father, that is, the person by connection with whom the milk has been induced.

The foster parents and their ascendants and descendants by consanguinity or fosterage are prohibited to the child.

To the suckling, both his foster parents and their ascendants and descendants, either by natural descent or fosterage, are all prohibited; so that if his nurse should have already borne, or should thereafter bear, a child to the same or to another man, whether before the nursing or after it, or should have nursed another infant; or if the man have a child by another woman, whether before this nursing or after it, or such woman should nurse another infant on *his* milk, the whole would be brothers and sisters to the first suckling, and their children would be his nephews and nieces, and the brother and sister of the man would be his paternal uncle and aunt, and the brother and sister of the nurse would be his maternal uncle and aunt; and in like manner as to his grandfather and grandmother. The illegality of affinity is also established by fosterage, so that the man's wife would be unlawful to the suckling, and the wife of the latter be unlawful to the man, and by the same analogy, in all other cases except two. One of these is, that it is not lawful for a man to marry the sister of his son by consanguinity, while it is lawful in the case of fosterage; for the former must be either his own daughter or his step-daughter, while the latter is neither; and if a case should occur in consanguinity where the sister of a man's son is neither his own daughter nor daughter-in-law, as for instance, when a maid, the property of two persons, brings forth a child which is claimed by both, and its descent is in consequence established from each, and each master has a daughter by another woman, it would be lawful for each of them to marry the daughter of his co-owner, though the result should be that he is marrying the sister by consanguinity

Affinity is also established by fosterage.

Two exceptions.

of his own son. The second case is, that it is not lawful for a man to marry the mother of his sister by consanguinity, while it is lawful in fosterage; for, in the former case, she must either be his own mother or his father's wife; and, in the latter case, this objection does not exist. The sister of one's brother by fosterage is lawful in the same way as his sister by descent would be; as, for instance, when a man's half-brother, by the father, has a sister by the mother's side, it is lawful for the man to marry her. In fosterage, the mother of one's brother, or of his paternal or maternal uncle or aunt, is lawful to him. And, in like manner, it is lawful for one to marry the mother of his nephew and the grandmother of his child by fosterage; but this is not lawful in consanguinity. So, also, it is lawful to marry the aunt of one's child by fosterage, and so the mother of his son's sister, and the daughter of his child's brother, and the daughter of his child's paternal aunt. And in like manner it is lawful for a woman to marry her sister's father, son's brother, niece's father, child's grandfather, or child's maternal uncle by fosterage; though all these are unlawful when the relationship is established by descent.

To whom the milk is to be ascribed when a repudiated woman has married again.

When a man repudiates his wife, being in milk at the time, and she marries after the expiration of her *iddut* another husband, who has connection with her, all agree that if she should bear a child to the second husband, the milk is to be accounted as proceeding from him, and as being cut off from the first; and all are also agreed that when she does not become pregnant to the second husband, her milk is to be ascribed to the first; while if she be pregnant to the first, but have not yet borne a child to him, the milk, according to Aboo Huneefa, is to be accounted as proceeding from the first until she actually give birth to a child to the second.

Case of fosterage limited to the woman.

A man marries a woman who never bears him a child, but is found to be in milk and suckles an infant, fosterage is confined to the woman; so that the children of the man by another woman are not unlawful to this infant.

Where it extends to

A man commits fornication with a woman, and she bears

the man, but not to his relatives.

him a child, and with this milk suckles a female infant, neither the man, nor any of his ancestors or descendants, can lawfully intermarry with the child. But his paternal or maternal uncle may marry the child as (they may) the child the actual fruit of the unlawful intercourse.[1]

Goes beyond him to his relatives only when the child's paternity is established.

If a man have connection with a woman under a *shoobh*, or semblance of right, and she becomes pregnant by him and suckles an infant, this infant is his son by fosterage; and in the same manner, whenever the descent of a child is established from the man who has had connection with its mother, fosterage is established; and whenever the descent of a child is not established from the man who has had connection with its mother, fosterage is established only through the mother. A man marries a woman who bears him a child which she suckles, and her milk then dries up, but afterwards returns, whereupon she suckles a boy; this boy may lawfully intermarry with the man's children by any other than the woman who nursed him. If milk should appear in the breast of an unmarried virgin, and she should suckle an infant, she would be its mother by fosterage, and the rules of fosterage generally would be established between them, &c.

Fosterage established by the milk of a corpse, but not of a beast,

The milk of a living and a dead person are alike in establishing illegality by fosterage. When two infants are suckled by the milk of a beast, fosterage is not established. Sucking in the Mooslim territory and in a foreign country are alike; so that when it has taken place in the latter, and the parties embrace the faith or come into the Mooslim territory, the rules of fosterage are established between them. And as fosterage takes place by imbibing from the teat, so also it is induced when the milk is poured out or administered medicinally. But not when poured into the ear or other cavities of the body, or even administered as a clyster, though in some cases it should reach the brain or the stomach; but, according to Moohummud, it is established when administered by a clyster. The former, however, is in accordance with the Zahir Rewayut.

nce by milk administered in a clyster.

[1] Because the paternity of the child is not established.

When milk is mixed with food and touched by the fire, that is, subjected to its action, and the food is cooked, its character is changed, and no illegality is incurred, whether the milk or the food preponderates, and though the milk has not been touched by the fire, yet, unless the milk preponderates, illegality is not established; and even though it should preponderate, the result would still be the same, according to Aboo Huneefa, because when a liquid is mixed with a solid the liquid follows the solid, and passes from its own character of being a drinkable. If human milk be mixed with the milk of a goat, and the former preponderates, illegality is established; so also, though bread be crumbled in a woman's milk, and the bread soaks up the milk, or though meal be mixed with the milk, yet if the flavour of the milk be found in it illegality is established; that is, whether the food be taken mouthful by mouthful, or swallowed at once, illegality is established. And if the milk of a woman be mixed with water, or medicine, or the milk of a beast, regard is to be had to that which preponderates. And the case is the same with every other liquid or solid. The test of preponderance is the perception of flavour, colour, and smell, or of one of these things. And if the substances be equal, illegality is established for want of preponderance over the milk

Case of a woman's milk mixed with other substances.

When the milks of two women are mixed together, illegality is established, according to Aboo Yoosuf, on the side of that woman whose milk preponderates; but, according to Moohummud, with regard to both the women, however the mixture may be made; and there is one report, as from Aboo Huneefa, to that effect, the Zahir Rewayut being also in its favour. It is further recommended as being more cautious; and in one authority, the opinion of Moohummud is said to be correct. When the milk is churned, or thickened, or made into a confection, or cheese, or *ariel* (that is, dried and powdered), or into whey, and the child is fed with it, illegality is not established, for the term sucking is inapplicable in such a case.

Or with the milk of another woman.

It is not proper for women to suckle any child indis-

Indiscriminate

nursing objectionable.

criminately, and when they do suckle they should take care to remember or write down the particular child.

An infant wife is rendered unlawful to her husband by being suckled by his near relative.

If a man should marry a young child, and the husband's natural or foster mother, or his sister, or daughter, should come and give suck to the child, she would become unlawful to him, and he would be liable to her for half the dower; for which, however, he might have recourse against the nurse if she had done the mischief intentionally, but if it were not intentional he would have no claim against her.

So also two or more infant wives when suckled by a stranger.

And if a man should marry two children at the breast, and a strange woman should suckle them both together, or one after the other, both would become unlawful to him; but he might remarry either of them at his pleasure; and if there were three, and the woman should suckle them together, they would all become unlawful to him, but he might remarry whichever of them he pleased; but if she had suckled them in succession, one after the other, the two first only would be unlawful to him, while the third would remain his wife; and in like manner if she should suckle two of them together, and then the third, the two first would become unlawful, and the third remain his wife; but if one were suckled first, and then the other two together, the whole would become unlawful. The husband in all the cases would be liable to each of the children for half her dower; for which, however, he might have recourse against the nurse if she did the mischief intentionally. If there were four girls, and the woman should nurse them together, or one after another, the marriage of all would be vitiated. And, in like manner, if she should nurse one and then the three together, they would all become unlawful. But if three were nursed together, and then the fourth, the fourth would not be rendered unlawful.

Case of an infant wife being suckled by a co-wife who is adult.

When a man has married a child and an adult woman, and the latter gives suck to the former, both of them become unlawful to their husband; and the adult woman, if he never had connection with her, has no right to dower; but the child is entitled to it, and the husband has a right of recourse against the adult for whatever he has to pay to the child, if the mischief was intended;

while, if it was not intended, she is not liable for anything, even though she knew that the child was his wife. If, in addition to the knowledge of the marriage, she were also aware that it would be vitiated by her suckling the child, her intention to do the injury would be inferred, unless her object were the allaying of hunger or saving the child's life. If, when apprehensive on account of it, she did not know the marriage; or, knowing it, was not aware that her act would vitiate it; or, knowing this fact, she was apprehensive for the child's life, or meant only to allay its hunger, the husband could have no claim against her; and her word is to be received with her oath. Neither would he have any remedy against the grown woman if she were insane, or acted under compulsion. Or if the child should come to her, being hungry, and should seize the teat and suck her, she forbidding; and, in this case, each would be entitled to half her dower, the husband having no right of recourse against either of them. Then, as to the grown woman, she is rendered unlawful for ever to her husband; and so also the child, if connection had taken place with the mother, or the milk had proceeded from the man; and it is not even lawful for him to marry her a second time.

Or by the mother of the co-wife.

A man has two wives, one a child and the other a grown woman, and the mother of the latter suckles the former; both the wives become absolutely separated from him; and the result would be the same if the child were suckled by the sister of the grown woman. But if the paternal or maternal aunt of the grown woman should suckle the child, neither of them would become absolutely separated. A man has connection with a woman under an invalid marriage, and then marries a girl who is suckled by the mother of the former woman, the girl becomes absolutely separated.

Case of two infant wives being suckled by a co-wife.

If a man should marry a grown woman and two girls, and the grown woman should suckle them both together, they would all become prohibited to him, and he could never lawfully marry the grown woman, nor ever lawfully conjoin the two girls in marriage, but he might lawfully

marry one of them, unless he had connection with the grown woman; while if he had such connection he could never lawfully do so, just as in a case of descent.

Case of an infant wife suckled after repudiation.

If a man, having married a child, should repudiate her, and then intermarry with a grown woman, and the woman should suckle the child—it matters not whether the milk be of the same man or another—the woman would be rendered unlawful to him, having now become the mother of his wife. And if a man should repudiate his wife three times, and she should then, before the expiration of her *iddut*, suckle another wife of his who is an infant, the infant would be separated from him because she has become the foster daughter of the other, and a conjunction has taken place during the subsistence of the *iddut;* a conjunction in such circumstances having the same effect as a conjunction during the subsistence of marriage. The result would be the same if her sister should nurse the infant wife of the man, and the infant would be separated.

Or of an *oom-i-wulud* suckling her infant husband.

When a man has given his *oom-i-wulud* in marriage to his slave, being a child, and she has suckled the child with her master's milk, she becomes unlawful to her master and to her husband also. A man, having an *oom-i-wulud*, marries her to a boy, and then emancipates her, whereupon she separates herself from her husband under the option of emancipation, and marries another, to whom she bears a child, after all which she comes to the boy and suckles him; she is, in consequence, separated from her husband, because she was the wife of one who has now become her son by fosterage.

Fosterage is established by declaration or by proof. What proof required.

Fosterage is made manifest or established in two ways, viz. either by acknowledgment or by proof; and no proof is received except the testimony of two men, or one man and two women, all of whom must be just persons. Further, no separation can be made on account of fosterage, except by order of the judge. But when attestation is made to a woman after her marriage, by two men or by one man and two women, being just persons, she ought not to remain with her husband, as their attestation would be sufficient to establish the fosterage before the judge.

When a man has married a woman, and then said after the marriage, "She is my sister by fosterage" or the like, but afterwards retracted by saying, "I made a mistake; the fact is not as I stated," the parties are not to be separated, on a favourable construction; while if the first words were established against him, and he should say, "What I said is true," they ought to be separated, and any subsequent denial would be of no avail to him. If the woman assents to his first statement, she has no right to dower; but if she denies it, she is entitled to half the dower; and if consummation have taken place, she is entitled in the former case to whichever is the less of the named or the proper dower, and in the latter to the full dower, besides maintenance and lodging. If the declaration were made before marriage, all the circumstances being the same, and the man were to retract, he might lawfully marry the woman; but not so if he had confirmed the statement, for in that case the marriage would be unlawful, and the parties must be separated, without regard to any subsequent denial by the husband.

Declaration of fosterage by a man when and how it may be retracted.

When a woman has declared with reference to a particular man, "This is my son, or brother, or nephew, by fosterage," but the man has denied it, and the woman has then given herself the lie by saying, "I was mistaken," after which a marriage takes place between them, it is quite lawful. So also if the marriage should intervene before she has given herself the lie, and even though she should have said after the marriage, "I declared before marriage that you were my brother by fosterage, and what I declared was true at the time of the declaration, and the marriage is invalid," still the parties are not to be separated; while if this were said by the husband, they must be separated. And if they had both made such a declaration, and then concurred in giving themselves the lie, saying, "We were mistaken," and should then marry, the marriage would be lawful.

Similar declaration by a woman.

If a man should make a declaration of descent or consanguinity, by saying, "This is my sister," or "my mother," or "my daughter," by descent, and the party

Declaration of descent may be similarly retracted.

referred to has no known descent, their respective ages also admitting of the relation of parent and child, and the question is then put to him a second time, whereupon he says, "I was mistaken," or "in error," they would still continue married to each other, on a favourable construction of the law. But if he should repeat, "The fact is as I stated," a separation must be made between them. When, however, the respective ages do not admit of the parties being in the relation to each other of parent and child, the descent is not established, and the parties are not to be separated. And if a man should say to his wife, "This is my daughter," she being of known descent, or, "This is my mother," he having a known mother, there would be no separation.

BOOK III.

OF DIVORCE.

Thirteen kinds of separation or divorce between married parties.

THERE are thirteen different kinds of *firkut*, or separation of married parties, of which seven require a judicial decree, and six do not. The former are separations for *jub* and impotence, and separations under the option of puberty, or for inequality, or insufficient dower, or a husband's refusal of *Islam*, or by reason of *Lián*, or imprecation. The latter are separations under the option of emancipation, or for *eela*, apostasy, or difference of *dar*, or by reason of property (that is, one of the parties being the owner of the other), or a marriage being invalid.[1] As a consequence of the first seven causes of separation requiring a judicial decree, it follows that effect cannot be given to them in the husband's absence, since a decree cannot be passed against an absent person.[2]

Separation for causes originating in the husband are termed *tulák*.

Every separation of a wife from her husband for a cause not originating in him, such as the option of puberty or emancipation, is a cancellation of the marriage contract; and every separation for a cause originating in the husband, such as *eela*, *jub*, and impotence, is a TULÁK.[3] Separation for a husband's apostasy appears to be an exception to this rule, for it is a cancellation; but the apostasy does not make the cancellation; it merely nullifies the husband's right, and with it the legality of conjugal intercourse.[4]

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[1] *Ashbaho wa al Nuzair*, p. 250.
[2] *Ibid.*
[3] *Ibid*, Commentary.
[4] *Ibid*, and see *ante*, p. 182.

The term is also used in a more restricted sense.

Tulák, as explained in the dictionaries, is the taking off of any tie or restraint; in the language of law it is the taking off of the marriage tie by appropriate words.[1]

There are thus two senses in which the term is used by Moohummudan lawyers, one of which comprehends the other. In the more comprehensive sense, it is the title of a *Kitab*, or book, which comprises all the separations of a wife from her husband for causes originating in him. In the less comprehensive sense, it is restricted to that kind of separation, or release from the marriage tie, which is effected by the use of certain appropriate words by the husband. To distinguish the two senses in which the term is employed, I render the more comprehensive sense by the word "Divorce," and the more restricted sense by the word "Repudiation;"—though I am sometimes obliged to use the former word in its common acceptation, of any dissolution of the marriage tie.

[1] *Inayah*, vol. ii. p. 211.

CHAPTER I.

DEFINITION, CONSTITUTION, CONDITIONS, LEGAL EFFECT, AND DIFFERENT KINDS OF REPUDIATION; AND WHOSE REPUDIATION IS EFFECTUAL, AND WHOSE IS NOT.

Repudiation, or *Tulák* as the term is defined in law, is a release from the marriage tie, either immediately or eventually, by the use of special words. It was originally forbidden and is still disapproved, but has been permitted for the avoidance of greater evils. Its pillar is the expression, "Thou art repudiated," or the like; and it is subject to two special conditions. First, there must be an actual tie on the woman, either of marriage or of *iddut*. Second, she must still be legally capable of being the subject of the marriage. Hence, if a woman should become unlawful to her husband by means of supervenient affinity, after consummation, and it should in consequence become incumbent on her to separate from him, and to observe an *iddut*, and he should then repudiate her while the *iddut* is still subsisting, the repudiation would not take effect.

Definition.

Constitution.

Special conditions.

Repudiation is either revocable (*Rujâee*) or irrevocable (*Bain*); and its effect is a total separation or divorce between the parties, on the completion of the *iddut* when it is revocable, and without such completion when it is irrevocable. Further, when repudiations amount to three, they present an obstacle to the re-marriage of the parties with each other.

Effect.

There are two forms of repudiation; one termed *Soon-*

Two forms:

nee, or that which is agreeable to the Sonnah or traditions, and the other termed *Budâee*, or that which is new or irregular; each being distinguished from the other by number and time. The *Soonnee* form of repudiation, or that which is conformable to the traditions in number and time, is of two kinds; the *Ahsun* or best, and the *Husun* or good. The *Ahsun*, or best, is when a man gives his wife one revocable repudiation in a *toohr*, or period of purity (that is, between two occurrences of the courses), during which he has had no sexual intercourse with her, and then leaves her for the completion of her *iddut*, or the birth of her child if she happens to be pregnant; whereupon the repudiation, unless revoked in the meantime, becomes complete, or in other words a divorce. The *Husun*, or good, is when he gives her one repudiation in a *toohr*, or period of purity, in which he has had no sexual intercourse with her, and then gives her another repudiation in the next *toohr*, and a third in the *toohr* after that. The third being irrevocable[1] completes the divorce, without waiting for the expiration of the *iddut*, or delivery if she happens to be pregnant. When the woman is a slave the divorce is completed by two repudiations, whether the husband be a slave or free.[2]

Soonnee form,

of two kinds: *Ahsun* or best,

and *Husun*, or good.

To render the *toohr*, or period of purity in which there has been no sexual intercourse, a fit time for repudiation in the *soonnee* form, there must have been no such intercourse, nor any repudiation, during the courses immediately preceding it; either of which would render the following *toohr* altogether unfit for that purpose.

The time when repudiation in the *soonnee* form should be given.

Adherence to number is required by the *soonnee* form of repudiation, both with respect to the enjoyed and unenjoyed wife, who are here on the same footing; but adherence to time is required only in the case of the enjoyed wife; and one who is unenjoyed may be repudiated according to that

Distinction between the enjoyed and unenjoyed wife in this respect.

[1] It is only after one or two repudiations that a wife can be retained (see *post*, p. 285); and three must, therefore, be irrevocable. *See* also p. 220.

[2] *Hidayah*, vol. ii. p. 153.

form at any time, either in a *toohr*, or during the actual occurrence of the courses. A wife with whom a valid retirement has taken place is in this respect on the same footing as one whose marriage has been consummated.[1] A Mooslim and a *Kitabee* woman, and a slave, are all alike as to the proper time of a *soonnee* repudiation.

Budâee form.

The BUDÂEE, or new and irregular form of repudiation, is of two kinds: one, where the innovation is in respect of number, and the other, where it is in respect of time. The former is, when a man repudiates his wife three times in one *toohr*, either in a single sentence or in different sentences, or joins two repudiations in one *toohr* in a single sentence, or in different sentences. When he does this, the repudiation takes place, but he is sinful for so doing. The other kind of BUDAEE, or new repudiation, and which is so in respect of time, is when a man repudiates an enjoyed wife who is subject to the monthly courses, either at a time when they are actually on her, or during a *toohr*, in which there has been sexual intercourse between them. Such a repudiation is also effective, but it ought to be revoked, or, more correctly speaking, revocation is incumbent on the husband. This kind of BUDÂEE repudiation is necessarily restricted to an enjoyed wife, because one who has not been enjoyed may be repudiated by the *soonnee* form without any reference to time. In the first of the *Budâee* forms the repudiations become a complete divorce as soon as they amount to three; in the second, the repudiation does not become divorce until the completion of the *iddut*. According to the Zahir Rewayut no repudiation that is *bâin*, or irrevocable in the first instance, can be agreeable to the Sonnah.

How the soonnee form is applied to a woman not subject to the courses.

When a woman, by reason of extreme youth or age, or some morbid obstruction, is not subject to the courses, and her husband is desirous of repudiating her according to the Sonnah, he should give her one repudiation, and then another after the lapse of a month, and a third after the lapse of another month. If the first is given at the

[1] See *ante*, p. 101.

beginning of the month; that is, the night of the first appearance of the new moon, the months are to be determined by the subsequent appearances of the new moon, both for repeating the repudiation, and also for reckoning the *iddut*, according to general agreement. But if the first repudiation is given in the middle of the month, the time for its repetition is to be reckoned by days, and the second repudiation to be given on the thirty-first day (not on the thirtieth) after the first; and so with regard to the next; and the *iddut* is in like manner to be reckoned by days, according to Aboo Huneefa and one report of Aboo Yoosuf. So that it is not completed till after the expiration of ninety days. It is also to be observed that a husband may lawfully repudiate a wife, who, either from extreme youth or age, is not subject to the courses, immediately after carnal intercourse; that is, without any time intervening between it and the repudiation. A pregnant woman may also be repudiated immediately after such intercourse, and three times according to the Sonnah, by observing the interval of a month between the repetitions.

Whose Repudiation is Effectual and whose is not.

Any husband who is sane and adult may repudiate his wife.

Repudiation by any husband who is sane and adult is effective,[1] whether he be free or a slave, willing, or acting under compulsion; and even though it were uttered in sport or jest, or by a mere slip of the tongue, instead of another word. And if a person, meaning to say "Zeinub," "thou art repudiated," should, by a slip of the tongue, say, "Amrut" instead, the person actually named would be repudiated as before the judge, though, in a question between the man and his God, the repudiation would apply to neither. When a man says to his wife—"Thou art repudiated," without knowing the meaning of the words, or so much as what is implied by repudiation, still the words are effective, and the woman is repudiated judicially, though, in a religious point of view, there is no repudiation.

[1] This is founded on a saying of the Prophet that "Every *talák* is lawful, except that of a boy or a lunatic." *Hidayah*, vol. ii. p. 149.

But a youth under puberty cannot repudiate.

Repudiation by a youth under puberty, though possessed of understanding, is not effective; and that by a person who is insane, or asleep, or affected by pleurisy, or in a faint, or overcome by astonishment, is in the same predicament. So also repudiation by a lunatic with lucid intervals, if pronounced while a fit is upon him, is ineffectual; but when given in a lucid interval, it is valid. And if a person should repudiate his wife in his sleep, and on waking should say to her, "I repudiated thee in my sleep," or, "I have allowed that repudiation," still it would not take effect.

And mere approval, after he has arrived at majority, of a repudiation given before it, is not sufficient.

If a youth under puberty should repudiate his wife, or another person should do so on his behalf, and the youth, after arriving at maturity, should allow what was done while he was a minor, the allowance, to have any effect, must be couched in terms expressive of a new repudiation, rather than a confirmation of the old one. Thus, if he should say—"I have allowed it," no repudiation would take place; But if he should say—"I have made it to happen," that would be sufficient to effect it *de novo*.

In what cases repudiation by a drunken man is or is not effective.

Repudiation by a drunken man, when the intoxication has been produced by grape or date wine, is effective according to "our doctrine," unless the drinking be against his will, or for a necessary purpose; when, if he should become intoxicated and repudiate his wife, though there is some difference of opinion, yet, according to the more correct view, as he would not be liable to the *hudd*, or specific punishment for drunkenness, in such a case, so neither should repudiation, or any other *tusurroof* (or disposing act) done by him in that state, be effective. Repudiation by one drunk of henbane is effective, and the person himself is held to be liable to the *hudd*, on account of the prevalence of the vice in "our" times and the *futwa* is in accordance with this view. With regard to the various kinds of liquor extracted from grain and honey, though, according to Aboo Huneefa and Aboo Yoosuf, repudiation by a man intoxicated on them would not be effective, yet Moohummud held differently, and the *futwa* is in accordance with his opinion.

Distinction between a compulsory repudiation, and a compulsory acknowledgment of one.

A compulsory acknowledgment of repudiation is not valid; though repudiation itself under compulsion is so. The Sultan compels a man to appoint an attorney to repudiate his wife, and for fear of beating and imprisonment, he says, "You are my attorney," without further addition; whereupon the attorney gives the repudiation, but the principal afterwards alleges, "I did not appoint him to repudiate my wife." His plea cannot be listened to, and the repudiation is effective.

Repudiation by a dumb man is effective;

Repudiation by a dumb man by signs is effective, when the dumbness has been long continued, and his signs have become well understood; and it makes no difference whether he can write or not. Where the dumbness is supervenient to birth, and has not been of long continuance, no regard is paid to his signs; when short of three, the repudiation is *Rujâee* or revocable. Repudiation by a dumb man in writing is also lawful.

but not by an apostate,

Repudiation by a husband who has apostatized from the Moohummudan religion, and joined himself to the *Dar ool Hurb* or a foreign country, is without effect, but would become effective if he should return (as a Mooslim) to the territory while his wife is still in her *iddut*; and in the case of a wife who apostatizes and joins herself to a foreign country, repudiation by her husband would not take effect upon her; not even though she should return before her courses, according to Aboo Huneefa; but Aboo Yoosuf held in that case that it would.

nor by one who has become the owner or slave of his wife,

unless emancipation first takes place

If a person should buy his wife and then repudiate her, the repudiation would have no effect. So also, if a woman should become the owner of her husband, and he should then repudiate her, the repudiation would be without effect. But if a woman should purchase her husband and emancipate him, and he should then repudiate her, the repudiation would be effective; and in like manner, if a husband, after purchasing his wife, should emancipate and then repudiate her while she is still in her *iddut*, the repudiation would take effect, by reason of the removal of the impediment.

The wife of a slave

When a slave has married a woman and repudiates

her, his repudiation is effective; but his master's would not be so. cannot be repudiated by his master.

Repudiation has regard to the condition of the woman; so that if she be a slave, the full number of repudiations is two, whether her husband be a slave or free; and if she be free the full number is three, whether her husband be free or a slave. Condition of wife regulates the number of repudiations.

CHAPTER II.

HOW REPUDIATION IS EFFECTED.

Two kinds of words, *sureeh* and *kinayát*.

THE words by which repudiation may be effected are of two kinds; *sureeh* or plain, and *kinayát* or ambiguous. The former are sufficient of themselves, the latter require intention.

Repudiation may be either of the present time, or be referred to the future; and it may be with or without comparison, or description, and may be pronounced either before or after consummation. It may also be in writing, and in a different language from the Arabic. This chapter, therefore, is divided into the following sections:—1st. Of *sureeh* or express repudiation. 2nd. Of *izafut* or the reference of repudiation to a future time, and matters connected therewith. 3rd. Of comparing repudiation to something, or describing it. 4th. Of repudiating before consummation. 5th. Of *kinayát* or ambiguous expressions. 6th. Of repudiation by writing; and 7th. Of repudiation in the Persian language.

SECTION FIRST.

Of Sureeh or Express Repudiation.

Sureeh, or express words and their effect when addressed directly to the wife.

Express repudiation is effected by the words, "Thou art repudiated," or, "I have repudiated;" by which only one revocable repudiation is induced, though the husband should intend more, or intend that it should be irrevocable, or have no particular intention in making use of the expressions. And if he should allege that by the words

"Thou art repudiated," he meant nothing more than a release from bondage, the plea is not to be admitted judicially, though it is different as between him and his God; but as to the wife, it is material to observe that she is in the same position as the judge, and cannot lawfully admit the embraces of her husband when she has either heard the words herself, or they have been communicated to her by a trustworthy witness.

When addressed to her indirectly.

If a man, in addressing his wife, should say, "O repudiated," and she were never married before, or, if married before, had not been repudiated by her husband, the words would be one repudiation; and even though she had been previously married and repudiated, the repudiation would still be effective, unless he could allege that he merely meant to announce the fact; in which case the plea would be good in conscience, and might, perhaps, be received in law; but if he should say that he used the word in contumely, though the plea might still be good in conscience, it would certainly not be so in law.

Their effect when repeated.

If a man should say to his wife, "Thou art repudiated, repudiated," or "Thou art repudiated, thou art repudiated," or "I have repudiated thee, I have repudiated thee," or should say, "Thou art repudiated, and I have repudiated thee," two repudiations would take place if she were an enjoyed wife; and though he should say, "I intended by the second expression only information of the fact," no credit could be given to his allegation in law, though it might be good as a matter between him and his conscience. When a man has said to his wife, "Thou art repudiated, and repudiated, and repudiated," without superadding any condition, she is repudiated three times if an enjoyed wife, and once if unenjoyed; so also if the connective, instead of being *wa* (and), as in the last case, were *fa* or *thoom* (then). But there is some difference between these words when it is alleged that the second and third were intended only as explanatory of the first. Thus, when the word "repudiated" is repeated, whether with or without the connective *wa* (and), the woman is repudiated a second time; and if the husband should allege that he meant by the second no

by the whole body, repudiation would take effect. So also if he should say, "Thy navel," "thy tongue," or "nose," or "ear," or "leg," or "thigh."

or to a distributive share.

If the repudiation be applied to a distributive part; as, if one should say, "Thy half," or "third," or "fourth," or "one of thy thousand parts, is repudiated," it takes effect.

When half a repudiation or one or more halves of it are given.

If one should say, "Thou art repudiated half a repudiating," one full repudiation would take effect; and though he should say, "Two halves of one repudiating," still there would be only one. But "three halves of a repudiating" would amount to two repudiations; and so also "four halves of one." And if he were to say, "Thou art repudiated half of two repudiatings," one repudiation would take effect; while "two halves of two repudiatings would amount to two, and "three halves of two repudiatings" would amount to three. And if he should say, "Thou art repudiated half of one repudiating, and a third of one repudiating, and a sixth of one repudiating," three repudiations would take effect; for the repudiating referred to is indeterminate, and whenever an indeterminate noun is repeated, it is held to apply to a new individual, not to that which has been already mentioned. But if he were to say "half of a repudiating, and a third of it, and a sixth of it," only one repudiation would take effect, unless the sum total of the parts should exceed one whole; as, for instance, if it were said, "Thou art repudiated half a repudiating, and a third of it, and a fourth of it," when, though it has been said that there would still be but one repudiation, the more approved and the correct view is that there would be two.

Of associating one woman in the repudiation of another.

If a man should repudiate his wife once, and then say to another, "I have associated thee in her repudiation," the other would be repudiated once; but if he should then say to a third, "I have associated thee in their repudiations," she would be repudiated twice, and if he should repeat the expression to a fourth, she would be repudiated three times. If, however, the repudiation of the first were for a consideration in property, the second would not become liable for any similar consideration, unless he were to say,

"I have associated you with her for such property;" when, if she chose to accept the repudiation, she would be liable, but not otherwise. If one should say, "Such an one is repudiated thrice, and such an one with her," or "I have associated such an one with her in repudiation," they would both be thrice repudiated. And if a man should say to three of his wives, "You are repudiated three times," or "thrice," there would be no division of the repudiations between them, but each wife would be thrice repudiated, contrary to the case of his saying, "I have made three between you," when there would be a division, and only one repudiation would take effect upon each.

An option cannot be reserved in repudiation.

Repudiation cannot be qualified by an option. Thus, a person says to his wife, "Thou art repudiated, and I have an option for three days," repudiation takes place, and the option is void.

Effect of limiting repudiation to a particular time,

If a person should say, "Thou art repudiated till night, or "till a month," or "till a year," the expression may be considered in three different ways. He may have intended repudiation to take place immediately, and have specified the time for the purpose of prolongation, and in that case the repudiation would take effect on the instant. Or he may have intended the repudiation to take effect after the expiration of the time referred to, and in that case the repudiation would so take effect. Or he may have had no particular intention, in which case the repudiation would not take effect till after the expiration of the time.

or place.

If one should say, "Thou art repudiated from here to Syria," that would be one repudiation, and he would have the power to revoke it. And if he should say, "Thou art repudiated at Mecca," or "in Mecca," she would be repudiated on the instant in every country. So also if he should say, "Thou art repudiated in the mansion." And if he should allege that he meant on her coming to Mecca, though the allegation might be good as a matter between him and his conscience, it could not be admitted judicially. But if he should say, "Thou art repudiated when thou hast entered Mecca," she would not be repudiated till her

more than the first, he is not to be credited judicially; as, for instance, when he says "O repudiated, thou art repudiated," or "I have repudiated thee, thou art repudiated;" but if he should make use of the explanatory particle, that is, of *fa* (then), the second repudiation would not take place without intention; as, for instance, when he says, "I have repudiated thee, *fa*, thou art repudiated."[1]

When given in answer to a repeated request of the wife.

A woman says to her husband, "Repudiate me, and repudiate me, and repudiate me," and the husband says, "I have repudiated thee," this amounts to three repudiations, whether he mean three or not; but if she had used the same expressions, without the connective *wa* (and) as, "Repudiate me, repudiate me, repudiate me," and the husband had answered, "I have repudiated thee," there would be three repudiations if he intended three, and only one if he intended one or had no particular intention. If she should say, "Repudiate me thrice," and he should answer, "Thou art repudiated," or "Then thou art repudiated," there would be only one repudiation; but if the answer were, "I have repudiated thee," it would amount to three. A woman says to her husband, "Repudiate me," and he answers, "Thou art not my wife," it has been said that this effects a repudiation without the necessity of intention. A woman says to her husband, "Repudiate me," and he answers, "Thou art single," she is repudiated once.

When in answer to a question by a third party.

A person says to a man—"Have you not repudiated your wife?" and he answers, "True" (*bula*),—she is repudiated, just as if he had said, "I have repudiated;" for that is an answer to the question in the affirmative; but if he had said, "Yes" (*naám*), there would be no repudiation, for that is an answer to the question in the negative.

When referred to a class of women including his wife.

If a man should say, "The wives of the people of the world, or of Rei, are repudiated," he himself being an inhabitant of Rei, his wife would not be repudiated; and it would make no difference whether he say "all" or not.

[1] See *post*, p. 244.

But with regard to the words "wives of the people of the street" or the "mansion," he being one of them, or "the women of this house," his wife being in it,—she would be repudiated.

When applied to a wife by name, who is absent.

When a man has said that his wife Zeinub is repudiated, and she sues him before the judge for a divorce, it is open to him to allege that he has another wife of the same name in the city, to whom he intended the repudiation to apply; and though he should fail at the time to prove that he had another wife of the name, and the judge should decree for a divorce, yet if he should subsequently produce the other wife, and the judge should then be satisfied of her being of the same name, he would have to make the repudiation applicable to her, and to reverse the former decree (even though he had decreed it to be irrevocable), and to restore the former wife to her husband. So also, if a man had said "his wife is repudiated," he having a known wife at the time, it would be open to him to prove that he had another wife, and if so, to restrict the repudiation to whichever of them he might please. But if a man, having named two wives of the same name, one by a valid and the other by an invalid contract, should say, "Such an one is repudiated," and afterwards allege that he meant the repudiation to apply to the wife who was married by the invalid contract, his allegation could not be admitted judicially. And in like manner, if he had said, "One of my two wives is repudiated," and then added—"I intended her whose marriage is invalid," the allegation could not be admitted judicially.

or to a wife generally when the husband has more wives than one.

When applied to a particular part of the person.

When the repudiation is applied to the whole of the woman, or to what is usually considered as implying the whole, it takes effect; as when a husband has said, "Thou art repudiated," or "thy neck," or "soul," or "body," or "head," or "face," is repudiated. So also, "thy mind." But when applied to a part which is not usually considered to imply the whole person, repudiation does not take effect. As if one were to say, "Thy hand, or foot, or finger, is repudiated," unless the whole body were intended; and if one should say, "Thy hand is repudiated," meaning there-

entrance into it; and if the words were "on thy entrance into the house," the repudiation would be dependent upon that event.

Section Second.

Of Izafut,[1] *or the reference of Repudiation to a future time; and of matters connected therewith.*

Repudiation is said to be referred to a time when its effect is postponed from the time of speaking to some future time specified, without any condition.[2] And repudiation is said to be suspended on or attached to a condition, when it is combined with a condition and made contingent on its occurrence.[3] In the former case repudiation takes effect immediately on the arrival of the time to which it has been referred; in the latter it takes effect on the occurrence of the event on which it has been made to depend. And revocable as well as irrevocable repudiations are susceptible of being referred to a time, or made subject to a condition. The two kinds of *Izafut*, or reference to a future time with or without a condition, might therefore, I think, be treated together; but as they have been treated separately by the compilers of the *Futawa Alumgeeree* and other writers on the Moohummudan law, I follow the same arrangement.

When repudiation is referred to a time it takes effect at the commencement of the time.

When a man has said, "Thou art repudiated in the morrow," or "to-morrow," without any particular intention, repudiation takes place at the dawn of the morrow; and if he should say, "I did not intend it to take effect till the end of the morrow," the allegation would be good in conscience in both cases; but would it be so judicially? All are agreed that it would not be good judicially with respect to the expression "to-morrow;" but there is a difference of opinion as to the expression "in the morrow;" Aboo

[1] The word means, literally, "inclining towards;" when applied to time, it is "towards the future."

[2] *Inayah*, vol. ii. p. 140. [3] *Ibid*, p. 180.

Huneefa being in favour of the admission of the plea even judicially, while both his disciples were opposed to its admission. So also, when a man has said, "Thou art repudiated Ramzan," or "in Ramzan," or "Thou art repudiated a month," or "in a month;" but here if the expression were, "Thou art repudiated in Ramzan," it would have reference to the first of the proximate Ramzan; and in like manner if one were to say, "Thou art repudiated in the fifth day," it would be taken to mean the proximate fifth day; and an allegation that he meant not the proximate Ramzan or fifth day, but the one after that, could not be admitted in law, though it would be good in conscience. If, on the other hand, it were the fifth day on which he made use of the expression, "Thou art repudiated on the fifth day," it would be held to refer to the day actually current. So also, when he has said, "Thou art repudiated Friday," or "in Friday," and he happens to be speaking on a Friday, the repudiation takes effect at once, and is not postponed to the coming Friday, unless positively intended.

Effect of reference to two times without a conjunction;

If a man should say, "Thou art repudiated to-day, to-morrow," or "to-morrow, to-day," the first of the two times referred to is to be taken in both cases; so that in the first case the repudiation would take effect as of to-day, and in the second as of the morrow. And if he should say, "Thou art repudiated to-day and to-morrow," one repudiation would take effect immediately, and nothing besides; but if he should say "to-morrow and to-day," one would take effect to-day and another to-morrow. So also, when he has said to her in the night, "Thou art repudiated in thy night and thy day," a repudiation takes place on her the instant he is speaking the words; but after that nothing takes effect in the day, unless he should intend a repudiation to take effect at each time, when it would be agreeably to his intention. But when he has said to her in the night, "Thou art repudiated thy day and thy night," one repudiation takes effect on the instant of his speaking the words, and another at the dawn of the morning. While if he should say at night, "Thou art repudiated in thy

with a conjunction, when the precise time is the first mentioned;

when it is the last.

night and in thy day," or should say to her by day, "Thou art repudiated in thy day and in thy night," one repudiation would take effect each time. If one should say to his wife in the middle of the day, "Thou art repudiated the beginning of this day and the end of it," this would be one repudiation; but if he should say, "the end of this day and the beginning of it," she would be repudiated twice; for a repudiation taking place in the beginning of the day must continue or be in existence in the end of it, so that there can be but one; but when it begins at the close of the day, the repudiation of the close of the day could not have taken effect till the beginning, so that there must be two repudiations. And it is stated in the Moontuka that the words "Thou art repudiated to-morrow and after to-morrow" make only one repudiation on the morrow; so also the words "yesterday and to-day" make but one; but if he said, "to-day and yesterday," there would be two repudiations; and if he should say, "Thou art repudiated to-day and after to-morrow," she would be repudiated twice, according Aboo Huneefa.

When the reference is to two times in the alternative.

If a man should say to his wife, "Thou art repudiated to-morrow," or "after to-morrow," repudiation would take effect after to-morrow; for it is a principle that when repudiation is referred to one of two times it takes effect as of the last of them.

When the reference is to a recurring time.

If one should say, "Thou art repudiated the beginning of every month," she would be repudiated three times, once at the beginning of each month; but if the words were, "Thou art repudiated every month," only one repudiation would take place. If he should say, "Thou art repudiated every Friday," intending thereby a repudiation on each such day, she would be repudiated every Friday until the repudiations became absolute by amounting to three; but if he intended only a continuance of the repudiation in perpetuity, or had no particular design, there would be only one. It is related by Busher, as from Aboo Yoosuf, that when a man has said to his wife, "Thou art repudiated after days," the repudiation takes place after seven days.

If a man should say to his wife, "When it is *Zoo'l Kaada* thou art repudiated," and part of it has already passed, the repudiation takes effect while he is speaking; and if he should say, "Thou art repudiated on the coming of the day," and this is said at night, she is repudiated at the dawn of the morning. But if it were said, "when the day is well advanced," the repudiation would not take effect till the same time on next day; while, if he had said, "Thou art repudiated in the passing of the day," and the words were said at night, it would not take effect till sunset of the morrow; and if they were uttered when the day was well up, it would take effect at the same hour on the morrow. When the reference is to a time inclusive of that in which the repudiation is given.

If a man should say to his wife, "Thou art repudiated yesterday," when he had married her only to-day, nothing takes place, because the reference is to a time when he had no power to repudiate her; but if he had married her before yesterday, repudiation would take effect on the instant.[1] When to a time before the wife was in the husband's power.

When a man has said to his wife, "Thou art repudiated before thy entry into the house in a month," or "before the arrival of such an one in a month," and she should enter, or the person should arrive before the completion of a month from the time of speaking, she would not be repudiated; but if the entrance or the arrival should take place at the termination of a month from the time of speaking, she would be repudiated. When the reference is to an event in a given period.

It is a general rule, when repudiation is made to depend on two facts, that it takes effect on occurrence of the last of them, for if it were to take effect at the first, it would in fact be dependent on only one of them. When it is made to depend on one of two facts, it takes effect on the occurrence of the first of them; when dependent on a fact and a time, it takes effect once on the occurence of each of them, and that, when dependent on a fact or a time, if the fact occurs first, the repudiation takes effect without waiting for the arrival of the time; but if the time arrives General rule when the reference is to two events.

[1] *Hidayah*, vol. ii. 167.

first, repudiation does not take effect till the occurrence of the fact, the case being the same as if there were two times, and the repudiation had been referred to one of them. And if he should say, "When such an one comes, and when such an one comes, then thou art repudiated," repudiation does not take effect till after the coming of both together; but if the consequence were placed first, as, for instance, "Thou art repudiated when such an one comes, and when such an one comes," she would be repudiated whichever of them should come first. So, also, if the consequence were placed between, and nothing would take place on the coming of the second, unless positively intended. And suppose a man to say to his wife, she being reclined at the time, "Thou art repudiated in thy standing and thy sitting," she would not be repudiated until she did both. And if she were sitting at the time, and should continue so for a while, and then stand up, or if she were standing at the time, and continuing so for a while, should then sit down, she would be repudiated in either case; but if the expression used were, "Thou art repudiated in thy standing and in thy sitting," she would be repudiated whichever she might do, but only once, though she were to do both. And if he were to say, "Thou art repudiated when such an one comes, or when such an one comes," one repudiation takes place whichever should come. And, in like manner, if he should say, "Thou art repudiated when the beginning of the month has come, or when such an one has arrived," repudiation would take effect on the arrival of either. But suppose him to say, "Thou art repudiated the beginning of the month, or when such an one arrives," then, if the arrival take place first, repudiation takes effect; but if the beginning of the month came before the arrival of such an one, repudiation does not take effect till his arrival.

Section Third.

Of comparing[1] *Repudiation to something, or describing it.*

Effect of comparison on the number of repudiations when it is to the number of something that has none,

or has no known existence.

When a person says, "Thou art repudiated like the number of such a thing," mentioning a thing which, like the sun and moon, has no number, one repudiation takes effect, and it is irrevocable, according to Aboo Huneefa. So, also, if he should say, "the number of *dirhems* in my hand," when there is nothing in it; or, "the number of fish in my tank," there being none there at the time, one repudiation would take effect. And whenever repudiation is annexed to the number of anything of which it is known there are none, such as, "the hairs on the palm of my hand," or anything of which it is not known whether there be any or not, such as the "hairs of the devil," or the like, one repudiation takes effect.

Difference when the non-existence is supervenient.

But if it were annexed to the number of something which, in its own nature, has number, though none for some supervenient reason be in existence at the time of the vow, such as "the hairs of my or your leg," after they have been anointed with an ointment which has the effect of removing them by the roots, there would be no repudiation, because of the non-existence of the condition. So neither would there be any if he had said, "Thou art repudiated the number of hairs on my head," after it had been shaven.

Effect when the comparing is to an abstract number.

If a man should say, "Thou art repudiated as a thousand," or, "like a thousand," there would, according to general agreement, be three repudiations, if he intended three, or one, if he intended one, or had no particular intention in using the expressions; and the single repudiation would be irrevocable, according to Aboo Huneefa and Aboo Yoosuf; while if he had said, "Thou art repudiated one like a thousand," it would be so, according to them all; and if the expressions were, "Thou art repudiated as number a thousand," or "number three," or "like number

[1] Arab. *Tushbeeh*, assimilating.

three," there would be three repudiations in law and conscience, and he could not be listened to if he alleged that he meant anything else. But if he had only said, "like three," it would be three, if he intended three, and one, if he intended one, or had no particular intention in the matter. The single one, however, being irrevocable, according to Aboo Huneefa and Aboo Yoosuf. A man says to his wife, "Thou art repudiated the number of the stars," or "the number of the lands," or "the number of the seas," and she is repudiated three times; but if he were to say, "like the devils," or "like the mountains," or "like the seas," only one irrevocable repudiation would take effect, according to Aboo Huneefa and Zoofr. "Thou art repudiated the number of the sand" would also induce a triple repudiation, according to general agreement.

When to the full of anything.

If a man should say, "Thou art repudiated the full of the room," it would be only one irrevocable repudiation, unless he meant three. So, also, if he said, "The full of the mansion," or "the full of the well," there would be three, if he intended three, or one irrevocable, if he intended one or two, or had no particular intention.

All repudiations by comparison are irrevocable.

It is a general principle with Aboo Huneefa that whenever repudiation is likened to anything it is irrevocable, be the thing small or great, and whether mention be made of "the magnitude" of the thing or not; while, according to Aboo Yoosuf, the repudiation is irrevocable if magnitude be mentioned, and is revocable if it be not mentioned, whether the thing to which the repudiation is likened be small or great. There are different reports as to Moohummud's opinion on the subject, some saying that he agreed with Aboo Huneefa, and others with Aboo Yoosuf. As an example of this difference of opinion between the two last, if a man were to say, "Thou art repudiated like the magnitude of the point of a needle," the repudiation would be irrevocable according to both Aboo Huneefa and Aboo Yoosuf, whereas if he were to say "like the point of a needle" or "a grain of mustard seed," it would be irrevocable only according to Aboo Huneefa, but revocable according to Aboo Yoosuf. In like manner, if the

expressions were " like a mountain," and " like the magnitude of a mountain," the repudiation in the former case would be irrevocable according to Aboo Huneefa, but revocable according to Aboo Yoosuf; while in the latter it would be irrevocable according to both. But in all the cases there would be three repudiations, if three were meant. And if the repudiation were likened to snow, while it would be irrevocable according to Aboo Huneefa, it would be so in the opinion of his disciples only when the cold of the snow is intended, and revocable if its whiteness were meant.

Repudiation by exhibiting fingers.

If a man should say, " Thou art repudiated thus," and exhibit one finger, she would be repudiated once; and if he exhibit two fingers, she would be repudiated twice, and thrice if he exhibit three; but it is implied that the fingers are exhibited separately, and not together; and if he should say that he intended the closed hand, or the fingers together, the assertion could not be received judicially.

Repudiation with description is irrevocable or revocable, according to the nature of the description.

If a man should say, " Thou art repudiated irrevocably," or " certainly," or " the most infamous of repudiations," or " the devils," or " *Bûdâee* repudiation," or " the hardest repudiation," or " repudiation like a mountain," or " a strong," or " broad," or " long repudiation," there would be one irrevocable repudiation in all the cases, unless three were intended; and if he intended one repudiation by the expression " Thou art repudiated," and another by the expression " irrevocably," or the like, two repudiations would take effect, and they would both be irrevocable. The general rule with regard to the description of repudiation is, that if the description be such as is not applicable to repudiation, the description is to be treated as a mistake or redundant, and revocable repudiation takes place; as, for instance, if one were to say, " Thou art repudiated a repudiation that does not affect thee," or " on condition that I am to have an option;" and that when the description is applicable, and is no aggravation of the repudiation, as in the expressions " the best," or " most excellent," or " most beautiful," or " most just of repudiations," the repudiation is revocable; but that when the

description is aggravating, as in the expressions "the strongest of repudiations," and the like, the repudiation is irrevocable, and single, unless three repudiations are intended, when three will take effect. Suppose one to say, "Thou art repudiated a good," or "beautiful repudiating," or "such a repudiation as is not lawful to thee," or "such as does not take effect," or "on condition that I am to have an option for three days," one repudiation would take effect, and the option would be void. And if the condition were that "I am to have no power of revocation against thee," still he would have the power of revoking it.

Section Fourth.

Of Repudiating before Consummation.[1]

How three repudiations are to be given to an unenjoyed wife.

When a man repudiates his wife thrice before consummation, three repudiations take effect upon her, unless there is a separation between the repudiations, and in that case she becomes irrevocably repudiated by the first, and the second and third do not take effect; as, for example, when he has said, "Thou art repudiated, repudiated, repudiated," or, "Thou are repudiated one, and one, and one," only a single repudiation takes effect. The rule in these cases is that when that which is first uttered takes effect first, there is but one repudiation, and when that which is first uttered is the second of taking effect there are two repudiations. Thus, if a person should say, "Thou are repudiated one before one," or "one after it one," only a single repudiation takes place; but if he were to say "one before it one," or "one after one," two repudiations would take effect;[2] so, also, if he should say "one with

[1] The repudiation of an unenjoyed wife being irrevocable, there is a difficulty in giving her more than one, because, as will be seen hereafter (p. 232), one irrevocable repudiation cannot be added to another.

[2] The one first uttered takes effect first in the one case, and the second in the other, because the qualities indicated by the prepositions "before" and "after" (that is, priority and its opposite), when they are not accompanied by a pronoun, apply to that which precedes the preposition, and when accompanied by a pronoun, apply to that which follows the preposition. *Inayah*, vol. ii. p. 164.

one," or " one with it one," while if she were an enjoyed wife, two repudiations would take effect in all the cases. And if he should say, " one preceded by two," or " one with two," or " one with it two," or " one before it two," or " one after two," there would be three repudiations. And if he should say to her being unenjoyed, " Thou art repudiated twenty-one," three repudiations would take effect, according to " our " three masters; so, also, if he had said *eleven;* but if he should say one and ten, only one would take effect; so, also, one and a hundred, or one and a thousand, as reported by Husn from Aboo Huneefa, but according to Aboo Yoosuf there would be three.

How they may be given, subject to a condition.

If repudiation were suspended on, or attached to a condition, and the condition were made the antecedent, as, for instance, by the husband saying to his unenjoyed wife, " If thou enterest the house then thou art repudiated, and repudiated, and repudiated," there would be one irrevocable repudation, according to Aboo Huneefa, on the occurrence of the condition, and the others would be treated as a mistake or redundant; but, according to the two disciples, three would take effect; and if she were an enjoyed wife that would be the result according to all their opinions; with this difference, that, according to Aboo Huneefa, the repudiations would take effect one after the other, while, according to the disciples, they would take effect simultaneously. If, on the other hand, the condition were placed last, as by the husband saying, " Thou art repudiated, and repudiated, and repudiated if thou enterest the house " (whether the connective were *wa* or *fa*), and she should enter, she would become irrevocably repudiated three times according to all their opinions, whether enjoyed or unenjoyed. What has been said is on the supposition of there being a connective between the repetitions of " repudiated; " but if this were not the case, and the condition were placed first, as in the example " if thou enterest the house then thou art repudiated, repudiated, repudiated," the woman being unenjoyed, the first repudiation would be suspended on the condition, the second would take effect on the instant, and the third be redund-

ant: then, if under these circumstances, he should marry her again, and she should thereafter enter the house, the suspended repudiation would descend and take effect, but not so if the entrance were to take place in the interval between the irrevocable repudiation and the marriage; and if the woman were an enjoyed wife, while the first repudiation would be suspended on the condition, the second and third would both take effect on the instant. Now, if we suppose the condition to be placed last, the first repudiation would take effect on the instant, and the others be redundant, if she were an unenjoyed wife; whereas, if she were enjoyed, the first and second would take effect on the instant, the third remaining dependent on the condition.

Section Fifth.

Of "Kinayát" or Ambiguous Expressions.

Kinayát defined.

Kinayát are expressions in which the purpose is concealed, and, being susceptible of another meaning besides repudiation, and consequently ambiguous, they require to be fixed to the latter by intention, or some substitute for it in the state or condition of the party making use of them.[1] Hence repudiation is not effected by them except with intention or evidence of the situation. They are of three different kinds. The first are those which are good for consent and nothing else, and they are three in number, viz. "your business is in your hand," "choose," and "count." The second are expressions which are good either for consent or refusal, but nothing else, and they are the following seven, viz., "go out," "go," "withdraw," "rise," "veil yourself," "conceal yourself," and "cover yourself." The third are expressions which are good for consent and reproach, and they are, "thou art loosed," or "freed," "cut off," "separated," "unlawful."

Three kinds,

and three states or frames of

There are also three states or conditions in which the expressions may be uttered. First, *Reza* or satisfaction,

[1] *Inayah*, vol. ii. p. 156.

when the husband is supposed to be in an agreeable frame of mind; second, *Moozakurah* or conversation, when the wife or some one on her behalf has asked for the repudiation; and third, *Ghuzub* or anger, when the husband is disturbed by passion. mind in which they may be uttered.

In the state of *Reza*, or satisfaction, repudiation is not effected by any of the *Kinayát*, or ambiguous expressions, without intention; and if intention be denied by the husband, his word and oath are entitled to credit. In the state of *Moozakurah*, or conversation, repudiation is effected by all the expressions, except those comprised in the second class, which bear the construction both of consent and refusal. And with regard to *Ghuzub*, or anger, whenever any of the ambiguous expressions have been used in that state, and the husband denies any intention to repudiate, he is to be credited, except only with respect to those comprised in the first class, which bear the construction of assent only, and not of refusal or reproach. The effect of the expressions varies according to the difference of state.

To the third kind of expressions, or such as express consent and reproach, Aboo Yoosuf, according to several reports, added four, viz., "I have no way or means against you;" "I have no power over you;" "Your way is free;" and "I have separated from you;" and, according to another report, he added six; that is, these four and two more: or, "I have put you off,"[1] and "Join yourself to your own people." Nor does this exhaust the *Kinayát*, or ambiguous expressions, by which repudiation may be effected when used with that design. Thus, if a man were to say to his wife, "The reins are on thy neck," she would be repudiated if such were his intention, but not otherwise. So, also, other Arabic words, which have the meaning of "go," or "remove," have been classed with "Join yourself to your people," as affecting repudiation, when employed with that design. And the phrase, "Purify your womb," is classed with "count," as admitting of the same construction; and both are classed with "Thou art single," as all are held to imply a previous act of repudiation. Additional expressions.

[1] Arab *Khálâtoki*, from *Khoolâ*, of which see *post*, chapter viii.

By three of the *Kinayát* only one revocable repudiation is effected.

The *Kinayát*, or ambiguous expressions, considered with regard to the kind and number of repudiation effected by them, may be divided into two classes. The first comprises the following: "count," "purify your womb," and "thou art single;" and one revocable repudiation is effected by them, and no more than one, even though three or two should be intended. The reason of this is, that these expressions imply a repudiation already effected, and something to be done in consequence of it; as if the man meant, when addressing them to his wife, "Thou art repudiated, then count the courses necessary for thy purification," or, "then purify thyself;" and as there would be only one revocable repudiation if he had used the express words, "Thou art repudiated," so neither can it be otherwise when he only means them.[1]

By all the rest irrevocable repudiation is effected, which may be single or triple according to intention.

All the remaining ambiguous expressions are comprised in the second class, and by them one irrevocable repudiation is effected, and one only, even though two repudiations should be intended. But if three be intended, the intention, though not valid as to two, would be valid as to three.[2] And in the case of a female slave, intention would be valid as to two repudiations. If a man should give one repudiation to his wife, being a free woman, and should then say to her, "Thou art absolutely *bain*," or "absolutely separated," meaning thereby two repudiations, only one would take effect; but if he intended three, there would be three.

Miscellaneous expressions.

All are agreed that though a man should say to his wife, "By God, thou art not to me as a wife," or "Thou art not, by God, to me as a wife," nothing would take effect, even if he intended repudiation; and if he should say, "I have no need of thee," intending repudiation, none would take

[1] *Hidayah*, vol. ii. p. 188.

[2] The word "choose" ought, perhaps, to be excepted, see *post*, p. 238. The reason why intention is not good as to two, but good as to three, seems to be that in the former case there would be an addition of one repudiation to another, and the expressions being in the singular are inapplicable to more than one repudiation, while in the other case there would be only an aggravation of the irrevocable repudiation. *Hidayah*, vol. ii. p. 192.

effect; but if he were to say, "Be prosperous" or "free,"[1] intending repudiation, it would be so. When a man has said, "Thou art not to me as a wife, and I am not to thee as a husband," meaning repudiation, it takes effect according to Aboo Huneefa, though not so according to the other two; and if he should say, "I am separated from thee," or "I am unlawful to thee," meaning repudiation, it would take effect; but not if he were to say, "I am separated," or "I am unlawful," omitting "from thee," or "to thee," even though he intended repudiation. If a man should say, in a state of *moozakurah* (repudiation being the subject of discussion), "I have separated thee," or "separated from thee," or "I have no power over thee," or "I have given thee to thyself," or "Thy way is open," or "Thou art free;" and she should say, "I have chosen myself," repudiation would take effect. And if he should say, "I did not intend it," he would not be believed in a court of justice. And if the wife should say to her husband, "Thou art not a husband to me," and he should say, "I believe you," intending repudiation, it would take effect. It is related as from Aboo Huneefa, that when a man has said, "I have given thee to thy people," or "thy father," or "thy mother," or "to husbands," she is repudiated, if that be his intention; but if he should say, "I have given thee to thy brother," or "maternal," or "paternal uncle," or to "such an one," a stranger, there would be no repudiation. If a man should say to his wife, "I have emancipated thee," she is repudiated with intention. And the expressions "be free," or "emancipated," are equivalent to "thou art free." And if he were to say, "Go to hell," intending repudiation, she would be repudiated.

A man says to his wife, "Count, count, count," and declares that he means by the whole only one repudiation; though the assertion may be good as between him and his conscience, it cannot be admitted judicially, and three repudiations take effect. But if he should say, "Count

Three or two repudiations may be effected by the repetition of the word "count."

[1] Arab *Iftahee*; some of the inflections from the original root being used for the purposes of divorce.—*Freytag*.

three," and allege that by "count" he meant a repudiation, and by "three" three counts, the allegation would be received judicially. And if the words were, "count three count," or "count and count," or "count, count," and repudiation were intended, two would take effect judicially.

A revocable or irrevocable repudiation may be added to one that is revocable,

An express repudiation may be added to another express one; as if a person should say, "Thou art repudiated," whereupon one repudiation would take place, and should then say, "Thou art repudiated," when another would take effect. So, also, an express repudiation may be added to one that is irrevocable; as if one should say, "Thou art separated," or should release her for property,[1] and then should say, "Thou art repudiated," whereupon another repudiation would in like manner take effect, according to "us." And an irrevocable repudiation may also be added to one that is express; as if one should say, "Thou art repudiated," and then should say, "Thou art separated," whereupon another repudiation would take effect. But one irrevocable repudiation cannot be added to another that is irrevocable; as if a man should say, "Thou art *báin*" (or absolutely separated), and then again, "Thou art *báin*," when only one irrevocable repudiation would take effect; because the last may be taken as merely declaratory of the first, and if the person should allege that it was so, he is entitled to belief; there being no necessity for taking it in a creative sense. But if he were to say, "I intended to make a *ghuleez* (or aggravated) irrevocable repudiation," regard must be paid to his allegation, and an aggravated illegality would in consequence be incurred.[2]

and an irrevocable to a revocable;

but not to another irrevocable.

Section Sixth.

Of Repudiation by Writing.

Two kinds of writings, customary and unusual.

Writings are of two kinds: *mursoom*, or customary; and *ghuer mursoom*, or unusual. The former are those

[1] When the repudiation would be irrevocable. See *post*, chap. viii.

[2] There are two kinds of irrevocable repudiation; the *khufee*, or light, and the *ghuleez*, or aggravated, which is triple and prevents marriage. See *note*, p. 230.

which are properly superscribed and addressed, being such as are written to absent persons, and bear on their face, from such an one to such an one. The latter are those which are not so superscribed and addressed, and they are also of two kinds: *moostubeen*, or manifest, and *ghuer moostubeen*, or not manifest; the manifest being such as are written on paper, or a wall, or on the ground, in such a manner that they can be comprehended and read; and those which are not manifest are such as are written on the air, or water, or something that cannot be comprehended and read. By writings that are not manifest repudiation cannot be effected, even though intended; whereas, by writings that are manifest, though not customary, repudiation is effected, when such is the intention, but not otherwise; while by writings of the customary, or regular description, it is effected, whether intended or not. Writings of this kind may either be so expressed that the repudiation takes effect on the mere writing, as when a person having prefaced his letter with the usual compliments, says, "But after these you are repudiated," whereupon repudiation takes effect, and an *iddut* becomes obligatory on the woman from the time of writing. Or the writing may be so expressed as to make the repudiation dependent on the receipt of the writing; as if one were to write, "When this my letter reaches thee then thou art repudiated;" in which case repudiation does not take effect till the actual receipt of the letter. And if a person should write to the effect that "When this my letter reaches thee then thou art repudiated," and after that should proceed to write of his affairs, and the letter should reach its destination, repudiation would take effect, whether the letter be read or not. If a man should write to his wife, "When this my letter has reached thee, then thou art repudiated," and the letter should go to her father, who takes and tears it up, without delivering it to his daughter; in such circumstances, if her father have the disposal of her affairs generally, and the letter reaches him in her town, repudiation takes effect, but not otherwise, unless it reaches herself; and if the father should inform her of the receipt

The latter of two kinds, manifest and not manifest.

Repudiation not effected by last.

Effected by the manifest with intention.

By the customary without.

of the letter, and deliver it to her torn as it is, then if it can be read and understood the repudiation will take effect, but not otherwise. A man is compelled by beating and imprisonment to write the repudiation of his wife, "such an one, the daughter of such an one, the son of such an one," and he writes that his wife, "such an one, the daughter of such an one, the son of such an one," is repudiated, but his wife, nevertheless, is not repudiated. And if a man should say to another, "Write to my wife a letter to the effect that if thou goest out of thy house then thou art repudiated," and the other should write the letter, and the woman should have gone out of the house after the letter was written, but before it is read by the husband, and the letter is then read to him and sent to the wife, she would not be repudiated by means of the first going out.

Section Seventh.

Of Repudiation by Words of the Persian Language.

General rule.

The general rule with which the *futwa* accords in "our" time with regard to repudiation in the Persian language is, that if among the expressions in use there is one which is not employed for any other purpose than repudiation, such a word is *sureeh*, or express, and repudiation is effected by it without intention when applied to a wife; and that expressions which are employed for repudiation, but not exclusively, being also used for other purposes, are to be reckoned as Persian *kinayát*, and repudiation is effected by them in the same way as by the *kinayát*, or ambiguous expressions of the Arabic language. When a person has said to his wife, "I have dismissed you from being my wife" (*behishtum tora uz zunee*)—it is known that the people of Khorassan and Irak were in the practice of employing this expression, and Aboo Yoosuf held it to be *sureeh*, or express, so that it is employed for repudiation,

[1] The same rule seems equally applicable to the Hindoostanee or any other language.

and the repudiation effected by it is *Rajâee*, or revocable, without intention. The *futwa* is in accordance with this; and if he should say, "I have dismissed thee," without adding the words "from being my wife," and the words were used either in a state of *Ghuzub* (anger) or *Moozakurah* (conversation, the subject being repudiation), there would be one revocable repudiation; and if he intended that it should be irrevocable, or triple, it would be according to his intention, Mohummud concurring with Aboo Yoosuf. Al Moorghenanee was in the practice of decreeing for a revocable repudiation without intention, when the word *behishtum* was used, and in all other cases of making intention a condition, and the repudiation irrevocable.[1] If a woman should say to her husband in Persian, "Hold back your hand from me," and the husband should answer, "Held back, take," that would be repudiation if intended, and irrevocable. And if she should say, "Hold me not," and he should reply, "Not held, take," that also would be repudiation if intended, and irrevocable. A man says to his wife, "Thou art of no use to me" (*mura bukar neestee*), intending repudiation, but none takes effect; and another, "A thousand repudiations to thee" (*huzar tulák tora*), three repudiations take effect.

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[1] It would appear from this, that the verb *hishtun*, to "quit" or "dismiss," is the only Persian word by which express repudiation can be given, and that all other forms of expression in that language are *kinayát*, or ambiguous. In Hindoostan the Arabic word *tulák*, with some appropriate verb, is, I believe, commonly employed.

CHAPTER III.

OF TUFWEEZ, OR COMMITTING REPUDIATION TO ANOTHER.

As a man may in person repudiate his wife, so he may commit the power of repudiating her to herself or to a third party. This is termed TUFWEEZ, and it is of three kinds: IKHTIYAR, or choice; AMR BU YUD, or business in hand; and MUSHEEUT, or pleasure. The two first have been already met with as belonging to the second class of the *Kinayát*, or ambiguous expressions from which repudiation may be inferred. The last requires the imperative mood of the word by which the *sureeh*, or express repudiation is given,—as "repudiate, if you please." The discretion conferred by each kind of *Tufweez* will be found to correspond with the nature of the expression by which it is constituted.

SECTION FIRST.

Of IKHTIYAR, *or Choice.*

By the word "choose," a wife is empowered to repudi-

When a man has said to his wife, "Choose," intending repudiation thereby, or "Repudiate thyself,"[1] she may repudiate herself at any time while she remains at the meeting,[2] though she should prolong it for a day or more,

[1] This is properly an example of *musheeut*. See *post*, section iii.

[2] This restriction to the meeting is founded on the general consent of the Companions. See *Hedaya*, vol. i. p. 244.

by not rising from it or betaking herself to some other matter; and though he should rise from the meeting, the matter is still in her hands so long as she continues at it herself; and it is not in his power to revoke the option he has given her, nor to prevent her from exercising it, nor to cancel what she may do under it. But if she should rise from the meeting, or betake herself to some other employment, that would induce a cutting off of what preceded it; as for instance, if she should ask for something to eat, or should fall asleep, or remove from the place, or wash, or stain her hands or nails, or have to do matrimonially with her husband, or address another man with regard to sale or purchase; that would in all the cases cancel her option. To drink water, or eat a small morsel without calling for food, would not have that effect. If she should sit up, or put on her clothes without standing, or do some small matter, such as would not indicate a turning away from what was in hand, her option would not be cancelled; and if she were to say, "Call witnesses to attest my option," or "call my father that I may ask his counsel,"—or if she were standing, and should lean or sit down, she would still have her option; and so also, if she were sitting and should lean, according to the more authentic opinion. But if she were standing and should ride, or if she were riding on one animal and should transfer herself to another, or if when riding she should dismount, the option would be at an end. If she were riding on an animal, or were borne along in a litter, and should stop, the option would remain; but if having stopped, she should proceed again, it would be cancelled.

ate herself at any time during the meeting.

What is a termination of the meeting.

What is not.

A man gives his wife an option, and before she can exercise it takes her by the hand and raises her up standing, or has matrimonial intercourse with her, with or against her will, the option is at an end.

The meeting may be terminated by the husband against her will.

If a man should give his wife an option, and she were not to hear him, or were absent, the option would remain to her during the meeting at which she is made acquainted with it; and if her husband should allege that she was aware of it at the meeting where it was given, and she

What is accounted the meeting when the woman does not hear or is absent.

should deny her knowledge of it, her assertion would be preferred.

Intention is necessary to give effect to the word "choose;" and if the wife should choose herself on his saying "choose" a single irrevocable repudiation would take place;[1] and it would not be triple even though the husband should have intended it. If after she has exercised the choice in her own favour he should deny any design to repudiate her, his word and oath would be preferred, unless he had given her the choice after *Moozakurah*, or mention of repudiation. In that case if she should choose herself, and he should say he had no intention to repudiate, his word would not be accepted judicially; nor would it be so if the expression were uttered in *Ghuzub*, or anger. And as his word would not be received judicially, so neither can his wife lawfully remain with him without a renewal of the marriage contract.

Intention is necessary to give effect to the word "choose," but only one repudiation is effected.

It is further necessary, to give effect to the repudiation, that the word "self," or the word "repudiation," should be combined with the word "choose," on one side or the other; either by the husband's saying, "Choose thyself," or "choose repudiation," or "choose a choice;" or by the wife saying, "I have chosen myself," or "I have chosen repudiation," or "chosen a choice," whereupon repudiation would take place. And if he were merely to say, "Choose," and she were to say, "I have chosen," nothing would take effect. So also if he were to say, "Choose," and she, "I have done it;" but if his words were, "Choose thyself," and hers, "I have done it," she would be repudiated. It is also a condition that the word "self" be mentioned in conjunction with "choose;" or if separated from it the word must be uttered at the meeting, and in that case the repudiation would be valid, but not otherwise. Repetition of the word "choose" is a substitute for the mention of "self;" and so also the wife's saying, "I have chosen my

The word "self" or "repudiation" must be added to "choose" either in giving or exercising the choice.

Substitutes for the word "self."

[1] The word "choose," it will be recollected, is among the second class of the *kinayat*, or ambiguous expressions, by all of which an irrevocable repudiation is effected.

father or mother," or "my people," or "husband," it would suffice for mentioning herself; contrary to the case of her saying, "I have chosen my tribe," or "my relations within the prohibited degrees," when repudiation would not take effect, that is, if she had father or mother, but if she had neither, and had a brother, repudiation would take effect. And suppose him to say, "Choose," and her to say, "I have chosen," and then to add, "I intended myself," if this were at the meeting she would be repudiated, her assertion being worthy of credit; but if it were not till after rising from the meeting, there would be no repudiation, and her assertion would not be credited.

If a man should say to his wife, "Choose," and she should say, "I choose myself," she would be repudiated on a favourable construction.[1] If she were to say, "I have separated myself," or, "made myself unlawful," or "repudiated myself," the answer would be sufficient, and repudiation take effect.

Effect of adding the word "repudiation."

If the choice be given in connection with the word *talák* (repudiation), as if he were to say, "Choose *talák*," and she should say, "I have chosen *talák*," there would be one revocable repudiation.[2] And if he should mention three in the choice, as by saying, "Choose three," and she were to say, "I have chosen," it would take effect three times. If he say, "Choose, choose, choose," and she answer, "I have chosen the first," or "the middle," or "the last," it would amount to three repudiations according to Aboo Huneefa, but only one according to the other two, while if her words were, "I have chosen a choice," or "the choice," or "once," or "for once," or "one," there would be three according to them all. So, also, if her words were, "I have repudiated myself," or "I am repudiated," it would be deemed an answer as to the whole, and she would be repudiated three times.

What is a rejection

If a woman should say, "I do not choose repudiation,"

[1] Only on a favourable construction, because the word being in the aorist tense, may have either a present or future signification.

[2] Because the word *talák* restricts the choice to its own meaning. See *ante*, p. 212.

by the wife of the option.

that would be a rejection of the option; but if she merely say, "I desire or love my husband," her option would remain; while if she should say, "I abominate separation from my husband," that would be to choose him, or, in other words, to reject the option.

How the option given is construed when given through a third party.

If a man should say to another, "Give my wife a choice," she has none until he do so; but if the words were, "Inform her of her choice," and she should hear of it through another channel before he gave the information, and should "choose herself," repudiation would take effect.

The period of option may be enlarged to a month or year, &c.

When a man has said to his wife, "Choose thyself to-day," or "this month," or "a month," or "a year," she may exercise the option at any time within the given period, though she should move from the meeting or engage in some other business. If his words were, "Choose this day," or "this month," the option is only for what may remain of the day or the month, and no more; whereas, if it were for a day, the option would extend from the time of speaking to the same hour on the morrow, and so, if it were for a month, the period would be reckoned from the time of speaking until the completion of thirty days. When the choice is thus restricted to a particular time, it is cancelled by the lapse of the time, whether the wife were aware of it (that is, of having the option) or not; which is contrary to the case of an unrestricted option.[1] If he should say, "Choose, and choose to-morrow," and she were to reject the offer to-day, it would not be cancelled for the morrow; but if the words were, "Choose in to-day and to-morrow," and she were to reject to-day, the whole option would be at an end.

Section Second.

Of Amr bu yud, *or Business in Hand.*

Subject to the same condition as *Ikhtiyar*,

Amr bu yud is like *Ikhtiyar*, in requiring the use of the word "self," or some substitute for it, and as to the husband's having no power to recall the authority given to the

[1] See *ante*, p. 237.

wife, and in all other respects except that intention to give three repudiations is valid in this case, though not in the other. When a man has said to his wife, "Thy business is in thy hand," intending repudiation, and she has heard him speak, she may exercise the power given to her at any time while she continues at the meeting: or if she has not heard him speak, her option continues during the meeting at which she becomes cognizant of the power having been conferred on her. If she were absent, and the option was given generally, she may exercise it any time during the meeting at which the intelligence reaches her; but if it were restricted to a particular time, and the intelligence reaches her before the expiration of the period, she has only the remainder of the time to exercise her option; while, if the whole period should have elapsed before the intelligence reaches her, the option is at an end.

with one exception.

If the man should say, "Thy business is in thy hand," intending three repudiations, and she should say, "I have chosen myself with one," still there would be three repudiations: and if she should repudiate herself thrice, there would be three; though if he intended two, there would be but one.[1] In like manner, if she should say, "I have repudiated myself," and "have chosen myself," without saying "thrice," still there would be three repudiations; so also, if she had said, "I have separated myself," or "rendered myself unlawful," or used other expressions suitable to express assent. When a woman has said, "I have repudiated myself once," or "have chosen myself by one repudiation," it is one irrevocably.[2] When a man has put his wife's business in her hand, and she has chosen herself at the meeting where she is made acquainted with the fact, she is repudiated once; and if her husband had intended three repudiations, there are three; but if he intended two, or one, or had no particular intention, there is only one repudiation. When he has said, "Thy business is in

Effect and number of repudiations regulated generally by intention.

But the repudiation is irrevocable.

[1] See *ante*, p. 230.

[2] Being the answer to *Amr bu yud*; by which, as one of the second class of *kinayát*, an irrevocable repudiation is effected.

thy hand in one repudiation," it is a revocable repudiation.[1]

Acceptance is an exercise of the option.

When a woman's business has been given into her hands, and she has said, " I have accepted myself," she is repudiated; so also if she have said, " I have accepted it."

Words that are equivalent to "hand" in the phrase, "Thy business," &c.

If he should say, " Thy business is in thy hand," or " thy palm," or " thy right hand," or " thy left hand," or " I have given the affair into thy hand," or " entrusted the whole affair in thy hand," intending repudiation, it would be valid; and the words " in thy mouth," or " in thy tongue," are equivalent to " in thy hand." And if he should say, " My business is in thy hand," that, according to the most approved opinion, would be equivalent to " Thy business is in thy hand."

Disputes regarding intention

When a husband has not intended to repudiate by the words, " Thy business is in thy hand," they are of no avail except when uttered in anger or in a conversation regarding divorce. In either of these cases, if he should deny the intention, his assertion is not to be received with implicit credit; and if the wife should sue for a divorce on the ground that he intended to repudiate her, or that the expressions were uttered in *Ghuzub* or *Moozakurah*, though his word and oath would be preferred, yet her proof would be received with respect to the fact of *Ghuzub* or *Moozakurah*. With regard, however, to his intention to repudiate, her proof could not be received unless it were adduced to the fact of an acknowledgment by him. And when he has put her business in her hand, and she has repudiated herself, and he then alleges that she did so after taking to some other matter in word or deed, while she denies the allegation, asserting, on the other hand, that the option was exercised at the meeting before any such taking to any other matter in word or deed, her word is preferred, and repudiation takes effect. The suit of a woman against her husband that he gave her business into her own hands cannot be heard; but if she should repudiate herself in

and the exercise of the option.

[1] The word *tulák* (repudiation) restricting the *amr* to its own signification. See *ante* p. 207.

pursuance of the authority given to her, and should then sue for effect to be given to the repudiation, and for her husband's being made liable for the dower, her suit must be heard, though she is not entitled to bring the matter before the judge, in order that he may compel her husband to place the business in her hands. A man having put his wife's business into her hands if she stood up, and she having stood up repudiated herself; but he denies that she did so at the meeting at which she became acquainted with what he had said, while she maintains the contrary, her word is to be preferred.

Various expressions by which repudiation is effected under the option.

A man places the business of his wife in her hands, and she says to her husband, "Thou art unlawful to me," or "are separated from me," or "I am unlawful to thee," or "separated from thee," repudiation takes effect. But if "to thee" and "from thee" were omitted in the two first expressions, they would be void; while their omission in the two last would not have the same effect, and repudiation would follow.

The option may be extended to a month or a year, &c.

If a man should say to his wife, "Thy business is in thy hand a day," or "a month," or "a year," or "the day," "the month," or "the year," or "this day," "this month," or "this year," her option would not be restricted to the meeting, but might be exercised whenever she pleased during the period indicated. And if she were to rise from the meeting, or take to some other employment without answering, her option would not be cancelled, so long as there remained any part of the time; without any difference of opinion. If the period were stated indefinitely, it would in all the cases be reckoned from the time of speaking to the same time on the morrow, or that day month, or year, as the case might be; while, if the period were stated definitely, the option would be only for the remainder of the day, month, or year, as the case might be. If the option is once exercised in favour of herself, it cannot be so exercised again during the period; and if she were to say, "I have chosen my husband," or "do not choose repudiation," the matter would be out of her hands for the whole period, according to Aboo Huneefa and

Moohummud, so that she could not afterwards choose herself. If a husband should say, "The business of my wife is in the hand of such an one a month," it would have reference to the current month, and the authority would expire with it, though the person were not aware of it. And if one should say to his wife, "Thy business is in thy hand for ever," and she should reject it once, it would become void.

Power to repudiate by this form may be given to a third party.

If a man should say to another, "My wife's business is in your hand for a year," it would be so for a year; and the authority could not be recalled by the husband, but would expire of itself on the completion of the year. When a man says to a stranger, "My wife's business is in your hand," it is limited to the meeting, and he has not the power of recalling it while the meeting lasts. If the person who is entrusted with the power should hear what has been said, the power lasts only during the meeting, but if he should not hear what has been said, or was absent at the time, the power continues with him during the whole meeting at which he receives information of its having been conferred on him; and acceptance of the commission at the meeting is not a condition, though, if rejected, it would be at an end by the rejection. A man says to another, "Say to my wife, 'Thy business is in thine hand,'" but the power is not actually in her hands until the person rehearses to her what he was directed to do; yet if the words were, "Say to my wife her business is in her hands," the power would be in her hands before the intelligence is communicated to her.

Effect of the word "repudiate" when accompa-

If a man should say to another, "Repudiate my wife, *fa*[1] I have already committed this to thee,"—it would be a discretion restricted to the meeting which the husband

[1] *Fa*, though a particle of conjunction, does not ordinarily indicate a simple connection between the two propositions which it unites, but rather that the second depends on the first as a consequence. (De Sacy *Gram. Arab.*) The particle being ambiguous, I think it better to leave it untranslated in the text. The reader can supply "as," "for," or "so."

might recall; and if the person should repudiate her at the meeting, the repudiation would be single and revocable.[1] So, also, if he should say to the person, "I have given to thee her repudiation, *fa* repudiate her," the power would be restricted, and the repudiation revocable. But if a man were to say to another, "Repudiate her, *wa* I have already given her business into thy hand," or should say, "I have given her business into thy hand, *wa* repudiate her," the second would be different from the first; for while *fa* in these places is explanatory of the cause, and the person entrusted when that is employed has power only as to one repudiation, *wa* is a connective. If then, when *wa* is employed, the agent should repudiate at the meeting, the woman would be repudiated by two repudiations; and they would be irrevocable, because what is done in consequence of the *amr* is irrevocable, and one of the repudiations being irrevocable the other is so also of necessity, and the husband has no right to recall it. If, however, the agent should not repudiate till after rising from the meeting only one revocable repudiation would take effect; and so also if the husband had said, "Her business is in thy hand, so repudiate her." But it is reported in the Jamâ that when a person says to another, "The business of my wife is in thy hand, *fa* repudiate her," and the agent repudiates her before rising from the meeting, there is one irrevocable repudiation, unless the husband intend three, when it is triple; and that if the person should rise from the meeting without repudiating her, the commission would be void; as if he had said, "Repudiate her, *fa* her business is in thy hand."

nied by an *amr bu yud.*

If a man should put his wife's business in her own hand, or in that of a stranger, and should then become insane, that would not invalidate the authority though the insanity were continued. And if the authority were given to a youth under puberty, or to an insane person, or a slave, or

The authority is not invalidated by subsequent insanity of the husband;

[1] This is the effect of the word "repudiate" when addressed to another than the wife, as will be seen hereafter (p. 252), and it is not affected by the "amr bu yud" connected with it.

and may be given to one under puberty.

an infidel, it would remain in his hands till his rising from the meeting, in the same way as if the authority had been given to the wife herself; and if he were to say to his wife, she being under puberty, "Thy business is in thy hand," intending repudiation, and she should repudiate herself, it would be valid, and the repudiation take effect. A man put his wife's business in the hand of her father, and he said, "I have accepted her," repudiation took effect.

A choice by the wife of herself without authority is not rendered valid by a subsequent sanction of the husband.

A *fuzoolee* says to the wife of another person, "I have put your business into your hand," whereupon she says, "I have chosen myself;" and on the intelligence reaching her husband, he allows the whole matter, yet she is not repudiated, but her business is placed in her hands by the allowance of her husband, for the meeting at which she may receive the intelligence of his allowance. And in like manner, if the wife should say to herself, "I have put my business into my hands, and have chosen myself," and the husband should allow the whole matter, repudiation would not take effect, but the business would be in her hands by his allowance; while, if she should say, "I have put my business in my hand, and have repudiated myself," and her husband should allow this, one revocable repudiation would take effect on the instant, and her business would be in her hands, so that if she should then say, "I have chosen myself," another irrevocable repudiation would take effect. If a wife should say, "I have chosen myself," and her husband should say, "I have allowed it," there would be no repudiation, even though he intended it. But if she should say, "I have separated myself," and he say, "I have approved," it would take effect, when intended; while, if she should say, "I have made myself unlawful to thee," and he reply, "I have approved," he would become a *Moolee*,[1] for to make unlawful that which was lawful is in truth *eela*, but in "our" usage it amounts to repudiation, and she would be repudiated.

But a repudiation in these circumstances is rendered valid by his sanction.

So also a repudiation by a third party.

If a person should say "The wife of Zeyd is repudiated," and Zeyd should say, "I have allowed," or "am content,"

[1] The person who makes an *eela*. See *post*, chapter vii.

or "have made it obligatory on myself," repudiation would become obligatory. And if a husband should say, "I have sold to thee thy business in thy hand for a thousand *dirhems*," and she should make choice of herself at the meeting, it would be a repudiation, and she would be liable for the money.

Effect of combining different forms of *tufweez* as proof of intention.

When a husband has joined together different words of *tufweez*, that is, "Thy business is in thy hand," "choose," "repudiate," and mentions them without a connecting particle, each one is made a separate sentence. If the particle *fa* be interposed between the words of *tufweez*, the word by which it is followed, if susceptible of being used in explanation, is explanatory of that which precedes it, and if not susceptible of being used in explanation, it is the cause of that which precedes it. And it is to be observed that the word "choose" is capable of being made explanatory to "your business is in your hand," but not *vice versâ;* and that "choose" is not good as an explanation of "choose," nor *amr* of *amr*, as a thing cannot be explanatory of itself. If the particle *wa* be interposed between the words of *tufweez*, it can only be employed for the purpose of connection, and the word by which it is followed is in no case to be considered as merely explanatory of that which precedes it. When, therefore, a man has said to his wife, "Thy business is in thine hand, repudiate thyself," or "choose, repudiate thyself," and she says, "I have chosen myself," whereupon the husband replies, "I did not intend repudiation," he is to be believed, and nothing takes effect on her.[1] But when he has said, "Thy business is in thy hand, *fa* choose, *fa* repudiate thyself," and she says, "I have chosen myself," whereupon he subjoins, "I intended by none of these repudiation," he is not to be believed, and one irrevocable repudiation takes effect by his saying, "Thy business is in thy hand," subject to his oath, "by God, I did not intend three thereby." And if he should say, "Choose, *fa* my business is in thy hand,

[1] It is assumed that they were uttered in a state of *reza*, or satisfaction. See *ante*, p. 229.

fa repudiate thyself," and she should answer, "I have chosen myself," or "I have repudiated myself," she would be repudiated and irrevocably by his having said, "Thy business is in thy hand." And when he has said, "Thy business is in thy hand, *fa* repudiate thyself," or "choose, *fa* repudiate thyself," and she should say, "I have repudiated myself," or "I have chosen myself," there would be one irrevocable repudiation. But if he should say, "Thy business is in thy hand, *wa* repudiate thyself," or "choose, *wa* repudiate thyself," and she should say, "I have chosen myself," there would be nothing, unless the husband intended repudiation. And if she should say, "I have repudiated myself," a revocable repudiation would take effect by means of the direct expression "repudiate," unless he had intended three by the words, "and repudiate thyself." And if he had said, "Thy business is in thy hand, *wa* choose, *wa* repudiate thyself," and she should choose herself, nothing would take effect. So also if he should say, "Thy business is in thy hand, *wa* choose, *fa* choose;"[1] or if he should say, "choose, *wa* thy business is in thy hand, *fa* thy business is in thy hand;" but if he should say, "Thy business is in thy hand, *wa* choose, *fa* repudiate thyself," and she should choose herself, she would be repudiated twice,—subject to his oath that he did not intend three by the words "thy business," &c.[2] And if he should say, "I have made thy business in thy hand, *fa* thy business is in thy hand, *fa* repudiate thyself," the *amr* is only one, and the third, or "*fa* repudiate thyself," is explanatory of it.

The discretion may be attached to a condition definitely or indefinitely as to time.

When a discretion to repudiate is attached to a condition, it may be absolute with regard to time, or may be limited to a particular period. In the former case, as if a husband should say, "When such an one has arrived your business is in your hand," and the person should arrive, her business

[1] The particle *wa* not being explanatory, and "choose" not explanatory of itself.

[2] For similar reasons, "Thy business," &c., not being capable of explaining "choose" or itself.

would be in her hand for the meeting at which she became aware of his arrival; while in the latter case, as if the husband should say, "When such an one has arrived your business is in your hand for a day," or "for the day in which he may arrive," and the person should arrive, she being cognizant of the fact, the business would be in her hand during the whole of the time limited (except that when a day is mentioned indefinitely, she has a whole day, and if definitely only the remainder of the day), and the power is not cancelled by her rising from the meeting. But she can exercise the choice only once during the whole time. If she is not cognizant of his arrival till after the expiration of the time, she has an option during the meeting at which she is first made acquainted with it.

When the condition is the non-payment of a debt to a third party.

When a creditor has said to his debtor, "If you do not pay me my right in a month the business of your wife will be in my hands," and he has replied, "Let it be so," and the condition happens, the creditor may repudiate her.

When it is a second marriage;

A man having placed the business of his wife in her hand, if he should marry another woman upon her (that is, while she is still his wife), she sues her husband on the ground that he has married such an one, the person mentioned being present admitting the fact, and witnesses also attesting the marriage,—the business is thereupon in her hand. But suppose that the second wife is absent, and that the first adduces proof against the husband, saying, "Thou hast married upon me such an one, the daughter of such an one, and my business is in consequence in my hand," would her suit be heard? There are two reports, and according to the more authentic it would not, because she cannot be a plaintiff in establishing the marriage against the other in her absence. When a man has said to his wife, "If I am absent from the town of Bookhara thy business is in thy hand," and then goes to a village out of the city, the business is in her hands. A man puts the business of his wife into her hands to repudiate herself, if he should go out of the city of Bookhara without her permission, and then goes out to Kooh Serrae and abides there two days, she is not repudiated. A man places his

or absence for a specified time.

wife's business in her hand, if he does not give her such a thing within a specified time, and the time having expired she repudiates herself, whereupon a dispute arises between the parties, the husband saying, "I gave the thing within the time," and she denying it, his word is to be preferred as to the question of repudiation. A man, intending to be absent from his wife from Samarkand, is asked by her for maintenance, whereupon he says, "If I do not send you maintenance from Kûsh till ten days your business is in your hand to repudiate yourself whenever you like," and he sends her maintenance before the expiration of ten days, but from another place; is her business in her hand? It may be inferred from what is stated in the *Futawa* of Zubeer ood Deen that the business would be in her hand; for he has reported that if a man should say, "If I do not send you maintenance from Kurmena in ten days, then you are repudiated," and he should send within the time, but from another place, it would be a breach of the vow. If the words were "if maintenance does not reach you in ten days your business is in your hands," and she is rebellious by going to her father's without his permission within the time, repudiation does not take effect, though he should fail to send her the maintenance.[1]

On beating her without a fault.

When a man has put his wife's business into her hand to repudiate herself if he should strike her without a fault, and he beats her, whereupon a dispute arises as to the fact of her having committed any fault; upon this point his word is preferred. But suppose she has gone out without his permission and he beats her, does that put the business into her hand? It has been said that it does not if he has not paid up so much of her dower as is prompt, because until then she may go to her father's house without his permission and refuse herself to his embraces, and her going out is therefore no fault; but Sheikh Moorghenanee was of opinion that there was no ground for this distinction, her going out without his permission being a fault abso-

[1] Because while *nashizah*, or rebellious, she has no right to maintenance.

lutely. The first opinion, however, is more correct. A man says to his wife, "If I don't give thee two *deenars* in a month thy business is in thy hand," whereupon she contracts debt and refers her creditor to him; in these circumstances, if before the expiration of the time he pay the creditor, she has no power to repudiate herself; but if not, she has. "If I am absent from thee six months, and do not join thee in person and send thee maintenance within the time, thy business is in thy hand;" whereupon he is absent and does not join her in person, but sends maintenance, the business is in her hands; because here the repudiation is made dependent on the not doing of two things in the time, and the consequence is incurred by the not doing of one of them. But if it were dependent on the doing of two things, it would not be incurred till both were done.

Continued.

When a man has said to his wife, "If I beat thee without a fault thy business is in this hand," and she says to her husband, "O ass!" or "O fool!" or "God bring you to death;" these are faults. Exposing her face to one not within the forbidden degrees is considered by some a fault, by others not; and Koodooree seems to agree with the latter, for he says "that the face and palms are not naked," but the other seems to be the more valid opinion. So also if she make her voice be heard by a stranger, as by speaking to him, or designedly so loud that he hears her. If she commit something that is legally an offence, and he does not beat her, but some time after she does something that is not a legal fault and he beats her, whereupon she repudiates herself; and the husband alleges that he beat her for the first fault, while she insists that it was for the second, his word is to be preferred. If he take the *lián* or imprecation against her, and she retaliates by taking it against him, whereupon he beats her; some say this is no fault, but the majority of doctors are of opinion that it is, and the opinion is valid. So also if he should slander her mother and she slander his in return.

Section Third.

Of Musheeut, *or Pleasure.*

The words "Repudiate thyself," addressed to a wife, are sufficient authority for her to do so.

When a man has said to his wife, "Repudiate thyself" (whether he say "if you please," or not), she may repudiate herself at the meeting, and he cannot divest her of the power. In like manner, when a man says to a third party, "Repudiate my wife," and refers it to his pleasure, the result is the same; but if there is no reference to his pleasure, it is an appointment of agency, which is not restricted to the meeting, and may be revoked. So also, when a man says to his wife, "Repudiate thy co-wife," the authority is an agency and is not restricted to the meeting.

When he intends three she may give herself that or any less number.

A man says to his wife, "Repudiate thyself," intending three times, and she does so together or separately, or merely says, "I have repudiated myself," three repudiations take effect; and if she should give herself one, or two repudiations, one or two would take effect in like manner; but if she were to give herself only one, and after remaining silent, should then say "two," one only would take effect. If he intended two, there would be only one repudiation, unless the woman were a slave; while if he intended one, and she gave herself three, there would be none, according to Aboo Huneefa, but according to the two disciples one repudiation would take effect. And if she should repudiate herself once, her husband having no particular intention, or intending one, the repudiation would be revocable. So, also, if she should say, "I have separated myself," or "I am unlawful," or "separated," or "cut off," or "free." But if she should say, "I have chosen myself," she would not be repudiated, and the matter would pass out of her hands.

So also when he has said three repudiations.

If he should have said to her, "Repudiate thyself three times," and she should do so only once, there would be but one repudiation; but if he had said, "Repudiate thyself once," and she should give herself three repudiations,

there would be none according to Aboo Huneefa, though in the opinion of his disciples there would be one here also. And if she were to say, "I have repudiated myself one, one, one," one repudiation would take effect (apparently without any difference of opinion), the other two being surplusage. If he should say, "Repudiate thyself one revocable repudiation," and she should repudiate herself irrevocably, or *vice versâ*, the repudiation would be as appointed by the husband, however she might act under his direction.

When he has added "If you please."

When a man has said to his wife, "Repudiate yourself, if you please," and she repudiates herself thrice, nothing takes effect according to Aboo Huneefa, but in the opinion of his disciples there would be one repudiation. And when the words are, "Repudiate yourself when you please," she may repudiate herself at the meeting or after it, and has one option; but if the words were "whenever" or "as often as," the power would continue in force till exercised three times.

Or "Thrice if you please."

If a man should say to his wife, "Repudiate yourself thrice, if you please," and she says, "I am repudiated," nothing takes effect until she say, "I am repudiated three times." If in answer to "Repudiate yourself, if you will," she should say, "I have already willed to repudiate myself," nothing would take effect. So also, if she should merely say, "I have already willed."

When the authority is referred to a particular time, and is retracted before it.

If a man should say to his wife, "When the morrow comes repudiate thyself for a thousand *dirhems*," and then before the coming of the morrow retracts, his retractation is of no effect; but if a woman should say to her husband, "When the morrow comes, then repudiate me for a thousand *dirhems*," and retracts before the coming of the morrow, the retractation is good. And if he should say, "Thou art repudiated if thou wilt," and she says, "I have willed," it takes effect at the meeting.

When the reference is general.

When a man has said, "If I marry such an one, she is repudiated if she will," and he marries her, she has an option at the meeting where she becomes acquainted with what he said. If a man should say, "Thou art repudiated

when" or "whenever thou wilt," she may exercise the option at the meeting or after rising from it, but she can repudiate herself only once. So, also, if the words were at the time you wish, the option would not be restricted to the meeting.

Miscellaneous cases of commission and agency to repudiate.

The guardians of a woman having asked her husband to repudiate her, he said to her father, "What is this that thou desirest of me? I will do what thou desirest," and then went out, whereupon her father repudiated her; but the repudiation does not take effect unless the husband intended a commission to the father, and his word will be preferred if he should deny his intention. When a person has said to a man, "Repudiate my wife," he may do so either at the meeting or after it, and the husband may retract. And if a man should say to his wife, "Repudiate thyself and thy companion," she may repudiate herself at the meeting, for it is a *tufweez*, or commission, so far as she is concerned, and she may repudiate her companion either at the meeting or elsewhere, for it is an agency with regard to her. And if a man should say to two others, "Repudiate ye my wife, if you please," one of them cannot repudiate her separately without the other; but if he should not add the words, "if you please," it would be an agency, and one alone of them is competent to repudiate, without the concurrence of the other. When two men have been appointed agents to repudiate, each of them may repudiate the woman when it is not for property; but if the husband should say, "One of you is not to repudiate without the other," and one should nevertheless repudiate without the other, who subsequently approves, or one of them should repudiate with the permission of the other, still nothing would take effect. And if the authority to two were to repudiate three times, and one of them were to give one repudiation, and then the other two more, none would take effect. When one man has said to another, "You are my agent to repudiate my wife, if you please," and he has declared it his pleasure at the meeting, this is lawful; but if the agent should rise from the meeting without doing so, the agency is void. When a man has said to another, "Repudiate my wife three

Joint commissioners cannot act separately.

But joint agents can,

unless restricted.

An appointment of agency qualified by "if you please" is a commission.

times, if she please," he does not become the agent until she expresses her pleasure, and she has the option of doing so during the meeting at which she receives the information, and when she has declared her pleasure at the meeting, so that he becomes the agent, and the agent repudiates her at that meeting, the repudiation takes effect; but if he should rise from the meeting the agency would be cancelled. Sheikh Hulwaee has remarked that this is worthy of special remembrance, for most of the forms of repudiation which are given are to this effect; "I have written to thee this letter. Ask my wife, does she wish for repudiation; and if she does so, then repudiate her." And many agents postpone the repudiation till after the meeting at which the woman has expressed her wish, not knowing that the repudiation does not take effect. When one man has said to another, "Thou art my agent to repudiate my wife, on condition that I am to have an option," or "that she is to have," or "such an one to have an option," the agency is lawful, but the option void.

A general agency does not authorize the agent to repudiate, unless the appointment be in the most comprehensive terms.

When a man has said to another, "I appoint you my agent for all my affairs," and the agent has repudiated his wife, authorities differ with regard to such a repudiation, but the correct opinion is that it is not valid. But if the words of appointment were, "I have made you my agent in all my affairs in which agency is lawful," the power would be general for sales, marriages, and everything else.

The agent to repudiate must act according to his instructions.

When the appointment is to repudiate a wife once, and the agent gives her two repudiations, it is not lawful, according to Aboo Huneefa, but according to the other two one repudiation takes effect. A man says to another, "Repudiate my wife revocably," and he gives her an irrevocable repudiation, one takes effect, but it is revocable; and if the agent had said, "I have separated her," it would be nugatory. A man says, "Repudiate my wife before my brother such an one," and the agent repudiates her without the presence of his brother, the repudiation nevertheless takes effect; in the same way as if he had said, "Repudiate her before witnesses," and he should repudiate her without them. When an absent person has

been appointed an agent to repudiate, and he repudiates in ignorance of his appointment, the repudiation is void, for an agency to repudiate is not established before the agent is acquainted with it.

When the instructions are subject to a condition.

If a person should say, " Repudiate my wife so that she is not to take anything away with her from the house," and the agent says to her, " I have repudiated thee so that thou art not to take anything away from the house," and she accepts the terms, repudiation takes place whether she do so or not; but if the agent should say, " I have repudiated thee on condition that thou art not to take anything out of the house," and she should, notwithstanding, take something away, there would be no repudiation; and if there should be any dispute as to the fact, the word of the husband would be preferred, because he denies the repudiation.

An agent and messenger are alike.

A man says to another, " Repudiate this my wife," and the agent accepts, and the man goes away (is absent), the agent cannot be compelled to repudiate. An agent and a messenger for repudiation are alike. A message to repudiate is when a husband sends a repudiation to his absent wife by the hand of a person, and if the messenger should go to her and deliver the message to her face, repudiation would take effect.

CHAPTER IV.

OF REPUDIATION WITH A CONDITION, AND THE LIKE.

Preliminary.[1]

Suspension on a condition is a *yumeen*.

Definition and kinds of *yumeen*.

Yumeen by God.

To suspend anything, or make it dependent on a condition, is a kind of *yumeen*;[2] and repudiation, when so suspended, is indifferently said to be on condition, or by *yumeen*.

Yumeen, in its legal acceptation, is an engagement by which a *halif*, or swearer, is confirmed in his resolution to do or refrain from something, and it is of two kinds: the *yumeen* by God, and the *yumeen* without Him; which is also of two kinds: one, by the patriarchs, prophets, and angels, or the like; and the other by suspending a *juza*, or consequence, on a *shurt*, or condition. The *yumeen* by God is constituted by the mention of God or his attributes, and the *yumeen* without God is constituted by the mention of a good *shurt* and a good *juza*. A good *shurt* is something that is non-existent, and is contingent, that is, which may or may not happen; and a good *juza* is something the being of which is certain, or, at least, highly probable, on the occurrence of the *shurt*; and this is secured by annexing the *juza* to the right, or power of effecting it, or to the cause of such power, and by its being a matter that may properly be made the subject of an oath; for if it is not so, as, for instance, if it be agency or a licence to trade,

[1] The authorities for this preliminary section, where not otherwise indicated, will be found in the first chapter of the book *Yumeen*. *Fut. Al.* vol. ii. p. 71.

[2] *Kifayah*, vol. ii. p. 221.

as when one has said, "If thou dost so, I appoint thee my agent," or, "license thee to trade," there is no *yumeen.*

Yumeen without God, or suspension on a condition.

The *yumeen* without God, or by *shurt* and *juza,* is restricted to repudiation, emancipation, and *zihar;*[1] and the following are its conditions. First—every condition that is required in the *halif,* or swearer, for legalizing repudiation or emancipation by him, is required for his effecting them by *yumeen;* and what is not a condition in the one case is not a condition in the other. Second—the matter on which the oath is taken must be in the future; for to suspend on what is actually in being is not to make a *yumeen,* but to expedite or perfect the thing so suspended, or made dependent on it; so that if one were to say to his wife, "Thou art repudiated if there is a heaven above us," repudiation would take effect immediately. Third—when repudiation or emancipation is the subject of the *yumeen,* it is necessary that the person making it have the power to repudiate or emancipate, or that he should annex the act to his future possession of the power, or to the cause of it. Fourth—with regard to the body of the *yumeen,* what is required in the *yumeen* by God is required in the *yumeen* without Him; or, in other words, it must be free from *istisna,* that is, from expressions such as—"If God will," or "Unless God will," or "Unless I see or prefer something else," or the like. For anything of this sort said in connection with the *yumeen* would prevent it from being contracted; though, if separated from the *yumeen,* it would not have that effect. It is also a condition that nothing shall intervene between the condition and the consequence to interrupt or restrain its operation; for if there should be anything of that kind, there would be no *yumeen,* or suspension, but rather an expediting or perfecting of the consequence.

Different kinds of the *yumeen* by God: *Ghumoos,*

The *yumeen* by God is of several kinds. First—the *ghumoos,* which is a designedly false affirmation or denial of something in the past or present; and the person who takes such an oath commits sin, for which he ought to ask

[1] *Inayah,* vol. ii. p. 180.

pardon and repent.[1] Second—the *lugho*,[2] which is when a person swears to something in the past or the present, thinking that the fact is as he states it, but in truth it is the contrary. For instance, he has said, "By God, I did so;" when in truth he did not, and only thought that he did; or, seeing one at a distance, he has said, "By God! that is certainly Zeyd," when, in truth, the person referred to is Omar. For such an oath the swearer is not accountable, and, when uttered without design, it is not productive of any effect against him, either in this world or the next. Third—the *moonâkudah*,[3] which is when a person swears, with reference to something in the future, that he will or will not do it, and the effect is to induce expiation in the event of a breach.

Lugho.

Moonâkudah.

A *hulf*, or oath by repudiation, emancipation, and the like, when taken to a fact in the future, resembles the *mâkoodah*,[4] or contracted *yumeen;* but when taken to a fact in the past, it is neither *ghumoos* nor *lugho*, except in so far that when the *halif*, or swearer, is aware that the fact is contrary to what he has stated, or does not know it to be as he has stated, repudiation takes effect. And this is also the case with *nuzr;*[5] for its effect is to establish and confirm. Thus, supposing a person to say, "If this be not such an one, I am under an obligation to perform the *hujj*" (or pilgrimage to Mecca), not doubting that he is so, but he proves to be otherwise; the person is bound nevertheless to perform the pilgrimage.

An oath by repudiation compared with them.

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[1] To avert the terrible consequences in a future state, according to the saying of the Prophet, "Him who swears falsely God will cause to enter into the fire." *Hidayah*, vol. ii. p. 474.

[2] Literally, "rash or inconsiderate."

[3] Literally, "contracted," from *ákd*, a contract.

[4] Another inflection of *ákd*.

[5] The *nuzr* is properly a vow taken for God's sake, to do something that is good, or abstain from something that is evil. A man has said, "If I recover from this sickness I will sacrifice a sheep," and he does recover; yet nothing is incumbent on him, unless he had said, "If I recover, then for the sake of God I am under an obligation to sacrifice." *Fut. Al.*, vol. ii. p. 92.

When the *moonákudah* ought and ought not to be observed.

The *yumeen moonákudah*, considered with reference to the propriety of observing it, is of four different kinds. The first is one that ought to be observed; and it is where a person has bound himself to do, or refrain from something that he ought to do or refrain from; for here there is a moral obligation already, and it is increased by the *yumeen*. The second is one which it is not lawful to observe; and it is when a person binds himself to abandon a duty or commit a sin. The third is a *yumeen* which it is optional to keep or to break, but better to keep. And the fourth is a *yumeen* which it is also optional to keep or to break, but better to break. With all, however, it makes no difference whether the *yumeen* be taken designedly, or on compulsion, or in forgetfulness; and expiation is due on breach of the oath. If it be asked, How can this be consistently with the definition of a *yumeen*? the answer is, that it might be otherwise by analogy, but for this there is *nuss*, or an express authority, which is a saying of the Prophet.[1] And if a man should do the thing upon which he has sworn, designedly, or under compulsion, or in forgetfulness, it would be all the same; for the occurrence of the condition is a fact which cannot be extinguished by compulsion.

Expiation due in all cases of breach.

The oath "by God," should be used with moderation.

It is not abominable to take the *yumeen* by God, but it should be done in moderation;[2] and though to take the *yumeen* without God is accounted abominable by some, it is not so according to the generality of the learned—for no confidence is obtained by it, particularly in "our" times.[3]

Section First.

Of Conditional Words.

Conditional words in the Arabic.

The following are conditional words, viz.:—*in* (if), *iza* (when), *izáma* (at the time), *kooll* (every), *koolluma* (as often

[1] *Hidayah*, vol. ii. p. 477, and *Inayah*, vol. ii. p. 389.

[2] Literally, "little is better than much."

[3] The *Kafee* is cited, and it is evident that the author is speaking of the *yumeen moonákudah*.

as), *muta* (whenever), *mutuma* (whensoever). *In* is distinguished from the others as expressing nothing but condition, while in the others there is also a reference to time.[1] But with all of them except *koolluma*, when the condition occurs once, the oath is satisfied and at an end, and there is no repetition of the consequence on a recurrence of the condition. When again the oath is contracted with the word *koolluma* (as often as), and repudiation is the *juza* or consequence, it is repeated on every occurrence of the fact or event on which the oath is founded, until there is a complete discharge from the marriage tie to which it was applied. If after such a discharge, as by a marriage with another husband, the parties were to re-marry, and the fact on which the vow was founded should again be repeated, there would be no fresh incurrence of the consequence; unless the word *koolluma* had been applied to the act of marrying, as for instance by a man's saying, "As often as I marry a woman then she is repudiated," or "As often as I marry thee, then thou art repudiated;" whereupon the consequence or repudiation would be incurred on each occurrence of marriage, even after the woman had intermarried with another husband. With regard to the word *kooll* (every), if a man were to say, "Every woman that I marry is repudiated," and should marry several, they would all be repudiated; but if he were to marry the same woman several times, she would be repudiated only once. There are some other Arabic words which are used as words of condition, among which are the following:—*luw* (if), *mun* (he who), *ayy*, or in the feminine, *ayyut* (whosoever), *ayyán* (when), and *ayyun* (wheresoever). To which may be added, *fee* (in), when placed before a verb, as in the phrase, "Thou art repudiated *in* thy entering into the house," meaning "if thou enterest."

Conditional words in Persian.

The words of condition in the Persian language are the following:—*ugur* (if), *hume* and *humesha* (always), *hurgah* (whenever), *hur zuman* (each time), and *hurbar* (as often

[1] *Hidayah*, vol. ii. p. 223.

as). Of these words, the first corresponds to the Arabic *in*, and the consequence is incurred only once; the second and third correspond to the Arabic *muta*, the meaning of both being the same, and the consequence incurred only once; and with the fourth and fifth the consequence is incurred only once, for they correspond to the Arabic *kooll*. But the sixth corresponds to the Arabic *koolluma*, and the consequence is incurred with every repetition of the condition.

Section Second.

Of suspending Repudiation by the words Koolluma *and* Kooll.

Examples of *koolluma*.

When a man has said to his wife, "As often as you repeat a good sentence then you are repudiated," and she says, "Praise be to God," and "There is no God but God," and "God is most great," only one repudiation takes place; but if she were to repeat the same formulas without the connective "and," she would be repudiated three times. A man having said, "As often as I enter the house then thou art repudiated, if I speak to such an one," enters the house several times and then speaks to the person several times, there is a breach of the vow each time. And if he should say, "As often as I marry a woman she is repudiated if she enters the house," and then marries her repeatedly and she enters once, she is repudiated three times.

Examples of *kooll*.

When a man has said, "Every woman that I marry in (*fee*) such a village is repudiated," and then takes one out of it and marries her, she is not repudiated. The result would be the same if, without taking a woman from the village, he should marry one elsewhere. But suppose him to have said, "Every woman I marry from (*min*) such a village," and then to marry a woman of the village, he would be forsworn, wheresoever the marriage might take place. A man having said to his parents, "Every woman I marry," or "who may enter into marriage with me," or "who may become lawful to me while you both remain

alive is repudiated," one of his parents dies, the vow then is void. A man is aware that he has made a vow to repudiate every woman whom he may marry, but does not know whether he was adult at the time or not, and enters into a marriage, his wife is not repudiated, by reason of the doubt. If a man should say, "Every woman I marry till I marry Fatima is repudiated," and Fatima dies or is absent, after which he marries another woman, she is repudiated in the case of absence, but not in that of death. If a man should say to his wife, "Every woman that I marry I have already sold her repudiation to thee for a *dirhem*," and then marries a woman, whereupon the wife first addressed, as soon as she is made aware of the marriage, says, "I have accepted," or "have repudiated her," or "have bought her repudiation," the woman last married becomes immediately repudiated. But if the wife first addressed should say before the second marriage, "I have accepted," there would be no repudiation; for the acceptance would not be valid, as coming before the *eejab*, or declaration. A man having said, "Every woman I marry is repudiated," marries one by an invalid contract, and then repeats the ceremony in a valid manner, repudiation takes effect. But if a *fuzolee* or unauthorized person were to marry him to a woman, and he should allow the marriage by his act, as for instance by sending her the dower, she would not be repudiated.

Section Third.

Of Suspending Repudiation by means of the words In, Iza, *&c.*

When repudiation is annexed to marriage, it takes effect after the marriage; as if a man should say to a woman, "If I marry thee, then thou art repudiated," or "Every woman I marry, she is repudiated;" and in like manner as to the words "where" and "wherever." And it makes no difference whether he does or does not specify a particular city, or family, or time. And if he should annex

When repudiation is annexed to a condition, it takes effect immediately after its occurrence,

the repudiation to a condition, it would take effect after the condition, by general agreement, as if he should say to his wife, "If thou enterest the house, then thou art repudiated." The annexing of repudiation is not valid, unless the *halif*, or swearer, has a right to repudiate, or annexes it to his possession of the right; and annexing to the cause of the right, as the act of marriage, for instance, is the same as annexing it to the right itself.[1] Thus, if a person should say to a strange woman, "If thou enterest the mansion, then thou art repudiated," and should afterwards marry her, and the woman should then enter the mansion, there would be no repudiation; or if he should say, "Every woman that I congregate with in bed is repudiated," and should then marry a woman, she would not be repudiated. And if a man should marry a woman on condition that she is repudiated, there would be no repudiation. But if he should say to a strange woman, "If I marry thee, then thou art repudiated," and he should marry her, repudiation would immediately take place.[2]

if there is power to repudiate.

Suspension by an express condition, that is, by the employment of a conditional particle, takes effect on a woman that is particularized, as well as on one that is not particularized; while suspension by the meaning of a condition affects a woman that is not particularized; as when a man says, "The woman that I marry, she is repudiated," but does not affect one that is particularized, as if he should say, "This woman that I marry is repudiated," and should then marry her, when there would be one repudiation.

and the condition is express.

After a conditional repudiation has been given, it is not necessary that the right to repudiate should remain entire and perfect, until the occurrence of the condition; so that a decline in the right, as, for instance, by the swearer's giving one or two unconditional repudiations in the meantime, would not cancel it; and if the condition, when it occurs, still finds the woman under the power (though partially reduced) of her husband, the vow is paid. Thus,

A diminution of the power before the occurrence of the condition does not invalidate the repudiation.

[1] See *ante*, p. 258.

[2] *Hidayah*, vol. ii. p. 220.

if a man should say to his wife, "If thou enterest the mansion, then thou art repudiated," and should repudiate her before the occurrence of the condition, and she should then enter the mansion, being still his wife (that is, in her *iddut*), the conditional repudiation would take effect, and nothing remain of the vow. But if the occurrence of the condition should find her out of his power, and the vow should be paid,—as, for instance, if he had said to his wife, "If thou enterest the mansion, then thou art repudiated;" and should then repudiate her before the occurrence of the condition, and the *iddut* should expire, and she should then enter the mansion, whereupon the vow would be paid,—no repudiation would take effect. And if he should say to his wife, "If thou enterest the mansion, then thou art repudiated thrice," and should repudiate her once or twice before her entrance, and she should then intermarry with another husband, and the marriage be consummated, after which (being released from him by his death or otherwise), she should return to her first husband (by re-marriage) and then enter the mansion, the three original repudiations would, on this occurrence of the condition, take place, according to Aboo Huneefa and Aboo Yoosuf. But if, after the conditional repudiations, whether three or under, she were thrice repudiated, instead of once or twice, before her entrance into the mansion, and should then return to and be re-married to her first husband, after such marriage had been legalized by intermarrying and consummating with another husband, and should then fulfil the condition by entering into the mansion, nothing would ensue; because suspended repudiations, whether three or more, are neutralized and invalidated by three given subsequently, which extinguish the whole of the matrimonial right.

but an entire exhaustion of the power has that effect.

So also an exhaustion of the *yumeen* before the occurrence of the condition.

When the *shurt*, or condition, is placed after the *juza*, or consequence, the relation between them is validly established without prefixing the particle *fa* (then), as in the example—"Thou art repudiated if thou enterest the mansion," and repudiation immediately follows the entrance. But if their places be reversed, and the conditional proposi-

When the consequence is the antecedent, the particle *fa* (then) need not be introduced.

But it must if the condition is the antecedent.

tion be made the antecedent, it is necessary to prefix the particle *fa* to the affirmative whenever it begins with a noun (*ism*), as in the example, "If thou enterest the mansion, *then* thou art repudiated;" for if the *fa* were omitted, the dependence would not be established, and, there being nothing to qualify the repudiation, it would take effect on the instant, unless he should say that he meant it to be suspended; and even then his assertion would be good only in conscience, and could not be admitted in a court of law. If, however, the affirmative proposition should begin with a verb, whether in the past or future time, its dependence on the conditional would be sufficiently established without any necessity for prefixing *fa*.[1]

Repudiation takes effect immediately when suspended on an existing fact,

If a man were to say to his wife, "Thou art repudiated, if the heaven be above us," or "if this be the day," or "if this be the night," when it is the day, or the night respectively, repudiation takes place on the instant; for this is to confirm, not to suspend on a condition, which always implies that something is not to take place on the non-happening of something else, while here the something else is actually in existence.[2] And if a person should say, "If a camel enter the eye of a needle, then thou art repudiated," there is no repudiation; for this is to confirm a negative, the thing on which the condition is suspended being plainly impossible.[3] A man says to his wife, "If you do not restore to me the *deenar* which you took from my purse, then you are repudiated," and lo! the *deenar* is in his purse, no repudiation takes place. A drunken man knocks at the door, and the door not being opened, says, "If thou dost not open the door this night, then thou art repudiated," and there being no one in the house, the night passes without the door being opened, yet there is no repudiation. A man being absent from his house an hour, returns, and supposing his wife to be absent, says, "If she is not brought to my house this night, she is repudiated

and never when on an impossibility.

[1] This is a rule of Arabic grammar.—De Sacy, *tom* ii. p. 396.
[2] See *ante*, p. 258. [3] *Ante*, p. 258.

thrice," but on the morning appearing, the wife says, "I was in the house," there is no repudiation.

How its incidence is determined when the condition is an existing fact that may occur again.

When a man has said to his wife, "If you are in your courses," or "if you are sick, then you are repudiated," she being as indicated at the time, the repudiation has reference to a future occurrence, unless he intended that it should have reference to her actual condition at the time; in which case it would be as he intended. But suppose when he has said to her, "If you are in health, then you are repudiated," she being well at the time, then repudiation takes effect on the instant of his being silent, that is, of the present time. So also when he has said, "If you see, if you hear, then you are repudiated," she both seeing and hearing at the time, repudiation takes effect on the instant. "Standing," "sitting," "riding," and "dwelling," however, require to be prolonged for a little before the repudiation can take effect, and "entering" and "going out" must be understood as of the future. Pregnancy, in like manner, as when a man has said to his wife, "If you are pregnant, then you are repudiated," she being so at the time, must be understood as of a future pregnancy. So also, "beating" and "eating" must be referred to future occurrences of the act.[1] If he should say, "When you have your courses, then you are repudiated," repudiation would not take effect till they had continued for three days, for what ceases within that time is not accounted the courses; but when the three days are completed "we" give effect to the repudiation as from the time of their commencement.

Dispute between husband and wife as to the occurrence of the condition.

If the parties should differ as to the occurrence of the condition, the word of the husband is preferred; except as to a matter within the wife's knowledge, when her word is to be preferred, so far as concerns herself. Thus, if a man should say to his wife, "If your courses are on you, then you are repudiated and such an one;" or "If you love me, then both are repudiated," and she should say, "They are on me," or "I do love you," she would be repudiated alone;

[1] The distinction between the cases seems to be that in the one set the existing fact is incidental, in the other it is the normal condition.

except that, in the case of the courses, if she gave the information while they were actually on her, her word would be taken to the full extent; and it is only when her husband denies the fact that there is any reserve as to her word; for if he should admit it, her co-wife would be repudiated also. And if a man should say to two wives, "When you both have had your courses, then you both are repudiated," and they reply, "We have already had them," and he believes the assertion, they are both repudiated; while, if he disbelieves them, they are not; but if he believes one and disbelieves the other, the latter is repudiated and not the former; all that is required being found in her case; for each of them is a declarer or acknowledger against herself, and a witness against the other, and is therefore to be believed as against herself, though not entitled to credit with respect to the other. When, therefore the husband believes one of them, both the requisite conditions are satisfied with regard to the one whom he disbelieves, by her information against herself, and by his assent to the testimony of the other against her, while only one of the conditions is satisfied with regard to the one whom he believes.

Case of repudiation placed on two conditions.

When there are two parts to a condition, as when a man has said to his wife, "If you enter the mansion of Zeyd and the mansion of Omar," or "If you speak to Omar and Aboo Yoosuf, then you are repudiated," it is a condition of repudiation taking effect that the last of the facts should occur while she is still under his power; so that if he should subsequently repudiate her after thus suspending her repudiation on two conditions, and her *iddut* should expire, and one of the conditions should then take place, she being now irrevocably divorced, and he should after this remarry her, and the remaining condition should then take place, the suspended repudiation would take effect. Zoofr, however, disputed this, and the case presents four phases: first, both conditions may occur while the woman is under the husband's power, and here the repudiation would take effect; second, both may occur while she is not under his power, and repudiation would not take effect; third, the first condition may occur while she is under his power,

and the second when she is not under his power, and here also there would be no repudiation; and fourth, the first may occur while she is not under his power and the second while she is, and this phase is the case above stated on which there is the difference of opinion.

Miscellaneous cases.

A man says to his wife, "If this night you do not come near me, then you are repudiated," and she comes to his door but does not enter, repudiation takes effect; but if she should enter his apartment while he is asleep she would not be repudiated; and the condition of coming to him would be satisfied by her coming within reach of his arm. A woman being asleep on her own couch, her husband calls her to his, and on her refusing, he says, "If you do not come this night to my bed you are repudiated," after which he himself brings her forcibly to his bed in such a manner that her feet do not touch the ground, and she sleeps with him for the night, repudiation does not take effect. A man says to his wife, "If you complain of me to your brother you are repudiated," whereupon her brother comes, and with him a boy who does not understand, and the woman says, "O boy, my husband has done to me so and so," her brother hearing what is said, she is not repudiated, as she addressed the boy and not her brother.

A woman takes a *dirhem* from her husband's purse and buys meat with it, and the butcher mixes the *dirhem* with other *dirhems* of his own, but the husband having said to his wife, "If you don't return that *dirhem* to me to-day you are repudiated three times," and the whole day passes without the *dirhem* being returned, repudiation takes effect. The proper device in this case would have been for the woman to take the butcher's purse and deliver it to her husband, which would have satisfied his oath.

When the condition is doing something without permission.

When a man has said to his wife, "If you go out from this mansion without my permission, then you are repudiated," and he gives the permission in Arabic, which she does not understand, but goes out, repudiation takes effect. And this is a precedent for permission given to one who is asleep or absent; the principle being, that permission given to one who does not hear it, is not permission; so

that when the wife goes out after such a permission she is repudiated, according to Aboo Huneefa and Moohummud. And when a man has said to his wife, "You are repudiated if you go out without my order," there is no order unless it is communicated to her by himself or by a messenger from him; in so much that though he should call upon several persons to bear witness that he had given the order, and they should communicate it to her, but without being desired by him to do so, and she should go out, she would be repudiated; but if he had directed them to communicate the order to her, and they had done so, and she had then gone out, there would be no repudiation. If, however, instead of order, the words "good pleasure," "will," "satisfaction," had been used, there would be no necessity for her hearing them, and if she should go out after he had actually said, "I am satisfied," she would not be repudiated, though she did not hear them delivered. When a man has said to his wife, "You are repudiated if you go out *except* with my permission, 'satisfaction,' or 'knowledge,'" or "You are repudiated if you go *without* my permission, 'satisfaction,' or 'knowledge,'" the expressions amount to the same thing, there being no real difference between *except with* and *without*. But with either expression the oath is not at an end upon one permission being given; so that if he should give her permission to go out once, and she should avail herself of it, and then go out another time without his permission, she would be repudiated. And this is a precedent for the case of a man saying to his wife, "If you go out from this mansion without the *milhafah* you are repudiated," whereupon, if she go out without it, repudiation takes effect. The device for avoiding the consequence, is for him to say, "I give you permission to go out at all times," or "as often as you go out," or "as often as you please to go out I permit you," or "I permit you to go out for ever" or "always," and he might still give her a general prohibition afterwards, and the prohibition according to Moohummud would be good, the *futwa* also being in accordance with his opinion.

Subsistence of the power to refuse permission is necessary to a breach of the oath.

A man swears by the repudiation of his wife that she will not go out without his knowledge, and she goes out under his eye, it matters not whether he forbid her or not, there is no breach of the oath.[1] And if a man should make his wife swear by her repudiation that she will not go out of the mansion except with his leave; or if the Sultan should make a man swear by the repudiation of his wife that he will not go out of the city without his leave; or if a creditor should make his debtor swear that he will not go out of the city without his leave, the *yumeen* is restricted in the first case to the subsistence of the marriage, in the second to the continuance of the Sultan's authority, and in the third case to the subsistence of the debt; so that, if the wife should become irrevocably repudiated, or the Sultan be deposed, or the debt cease to be due, the *yumeen* would fall to the ground and never revive, though the husband or the Sultan should regain his power, or the creditor be reinstated in his former position.[2]

Case of oath by repudiation to a fact that is otherwise than as stated.

A man sues another for a thousand *dirhems*, and the defendant says, "My wife is repudiated if you have a claim against me for a thousand *dirhems*," whereupon the plaintiff replies, "If I have no claim against you for a thousand *dirhems*, then my wife is repudiated;" after which he adduces proof of his right, and the judge decrees in his favour, and makes a separation between the defendant and his wife. This is agreeable to a saying of Aboo Yoosuf, and according to the report of Moohummud's opinion; and the *futwa* accords with it. But if after this the defendant should adduce proof that he paid the plaintiff a thousand *dirhems* before the suit was brought, the judge must cancel the separation between the defendant and his wife, and the plaintiff's wife would become repudiated if he meant that he had no other claim against

[1] This properly is not a *hulf* by repudiation, which, like the *moonâkudah yumeen*, has reference to something to be done or not done by the swearer himself. See *ante*, p. 259.

[2] These being examples of *hulf*, the consequence of a breach could only be expiation, as in the case of the *moonâkudah yumeen*. See *ante*, p. 259.

the defendant except for the thousand *dirhems*.[1] If the plaintiff, instead of adducing proof to the actual debt of the defendant, should adduce it to an acknowledgment by the defendant of a thousand *dirhems* being due by him, some say that the judge ought not to separate between the defendant and his wife; but "our" master has said it is difficult to allow this, for what is established by proof is what is established by seeing and hearing; and if the judge had been present at the acknowledgment by the defendant of a thousand *dirhems* being due by him to the plaintiff, he must have made the separation between the defendant and his wife.[2]

Miscellaneous cases where the occurrence of the condition is in question.

A man having said, "If I lie my wife is repudiated," and being questioned as to a fact, nods his head to what is a lie, he is not forsworn, however, until he speaks falsely.

When a man has sworn by the repudiation of his wife that he will not drink of any intoxicating liquor, and some is poured down his throat, and enters his stomach, if the entrance is effected without any act of his own, he is not forsworn; but if he retain the liquor in his mouth, and then drink it, he is forsworn. And when a man has said to his wife, "If I drink, then thou art repudiated," and his wife adduces one man and two women who testify to his drinking wine, their testimony cannot be received either with reference to the *hudd*, or specific punishment for the offence, or to the repudiation; but it has been said that it ought to be received as to the latter, and this is approved for the *futwa*. A man said to his wife, "If such an one has repudiated his wife, then thou art repudiated thrice," and the person alluded to being absent, the wife of the swearer offers proof of his absence, and that he has repudiated his wife, but according to Aboo Nusr the proof is not to be received, and this is correct.

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[1] Though put into the form of a condition, this properly is not a case of *yumeen*, which requires a fact in the future, but of *hulf* by repudiation; and as the party must be presumed to know whether he is in debt or not, or, at least, is ignorant with regard to the fact, repudiation takes effect. See *ante*, p. 259.

[2] By proof, is to be understood the testimony of witnesses.

A man says to his wife, "Enter the mansion, and thou art repudiated," and she enters, repudiation takes effect, for the "and" is here equivalent to the particle *fa*. A man says, "Whatsoever (*ayyuto*) woman I marry she is repudiated," this is restricted to a single woman, unless he meant a number. But if he should say, "Whatever (*ayyuto*) woman marries herself to me she is repudiated," the expression would comprehend all the women he might marry. If a man should say, "The first woman I marry, she is repudiated," and should marry a woman, she would be repudiated, though he should never marry another. But if he were to say, "The last woman that I marry, she is repudiated," and should marry one woman and then another, repudiation would not take effect on the latter till his death, and then it would have a retrospective effect as from the time of the marriage, according to Aboo Huneefa; but according to the other two its effect would be restricted to the present time.

Some miscellaneous expressions and their effect.

Section Fourth.

Of Istisna *or Exception.*

Istisna means literally "to except," but with every exception there is a remainder, of which something is said after the exception, and it is to this speaking with reference to the remainder that the term *istisna* is more properly applied. In the Kooran, however, the formula "If God will" is also termed *istisna*, and this being in form a suspension, or conditional,[1] *istisna* is treated by writers on Moohummudan law in connection with repudiation on condition or by vow.

Meaning of *istisna*.

Applied to the words, "If God will."

When a man has said, "Thou art repudiated if God will," the latter words being in juxtaposition to the former, repudiation does not take effect,[2] even though the woman

Repudiation does not take effect when followed by these,

[1] *Inayah*, vol. ii. p. 189.

[2] One reason assigned for this is a saying of the Prophet, that when a man has vowed to repudiate or emancipate, and said, "If the most high God will" in connection therewith, he is not forsworn. *Hidayah*, vol. iii. p. 233.

should die before he has uttered the words "if God will." On the other hand, if the man were to die before uttering the words, but intending to have done so, repudiation would take effect, and his intention might be known by his having said previously, "I will repudiate my wife and except." If he should have said, "except if God will," or "when God will," the effect would be the same as of the words "if God will." And if he should say, "Thou art repudiated if God has not willed," there would be no repudiation, unless he were to give a limit of time, as "to-day," in which case, when the day had passed, she would be repudiated by virtue of the *yumeen*. And if his words were "if God desire," or "be satisfied," or "intend," there would be no repudiation. So, also, if the words were "with the will," or "decree," or "intention of God," there being in all these cases either a nullification, or a suspension on what is an unfit basis for a condition, in the same way as when the words are "if God will," for the particle *ba* (with) is of equal efficiency in connecting the *juza* with the *shurt*, as if the one were suspended on the other.

or words of the like import.

When repudiation is suspended, or made dependent on the will of one whose will is not a fit basis for it, as when one has said, "If Gabriel," or "the angels," or the "genii," or "the devils will," it is the same as suspension on the will of God; and if one should join the will of God and the will of mankind, as by saying, "If God will and Zeyd will," there would be no repudiation, though Zeyd should declare his will to that effect; because the suspension is on two conditions, one of which is unknown; and when this is the case the consequence does not follow on the occurrence of only one of the conditions.

Different reasons assigned for this.

To suspend anything on the will of God is to extinguish and nullify it according to Aboo Huneefa and Moohummud; while, according to Aboo Yoosuf, it is to suspend it on a condition, but one that is incapable of sustaining it; and, consequently, it does not take effect, in the same way as it would be without effect if suspended on the will of an absent person; and hence, also, the necessity for connection with the condition, as is required in

all conditions. The fruit of this difference of opinion appears in the following cases:—1st. When the condition is placed first and the consequence follows without the intervention of the particle *fa*, as by one's saying, "If God will, thou art repudiated;" for here, while there is no repudiation according to the two, it takes effect according to Aboo Yoosuf.[1] 2nd. When there is a combination of two vows, as by one's saying, "Thou art repudiated if thou enterest the mansion, and my slave is free if I speak to Zeyd, if God will," the *istisna* is confined to the second sentence, according to Aboo Yoosuf (because the first is complete with respect to suspension[2]), but extends to the whole in the opinion of the other two (because, though the first is complete with respect to suspension, it is defective in so far as it is connected with that which nullifies it[3]); while if it were applied to two consequences, as for instance if the husband should say, "Thou art repudiated and my slave is free, if God will," it would extend to the whole according to all their opinions. When again the particle *fa* is interposed, as for instance, when the man has said, "If God will, then (*fa*) thou art repudiated," she would not be repudiated, according to all their opinions. And if the repudiation were placed first by the saying, "Thou art repudiated and (*wa*) if God will," or using the same words with *fa* instead of *wa*, there would be no *istisna*. And suppose one to say, "Thou art repudiated, if God will, if thou enterest the house," repudiation would not be suspended on entering the house, the *istisna* being here a separation between the consequence and the condition. But if he should have said, "Thou art repudiated, if God will, thou art repudiated," the *istisna* would have reference to the first, and the second would take effect.

Fruit or effect of the difference.

When the case is not affected by the difference.

If a man should say to his wife, "Thou art repudiated three times except one," she would be repudiated twice; and if he should say "except two," she would be repu-

Other examples of *istisna* or exception.

[1] Because there is no suspension for want of the particle *fa* before the pronoun. See *ante*, p. 265.

[2] *Kifayah*, vol. ii. p. 283.

[3] *Ibid.*

diated once. An exception of the whole from the whole, if made in express terms, would not be valid, but if made only in meaning or by inference it would. Thus, if a man were to say, "All my women except all are repudiated," no effect would be given to the exception, and all would be repudiated; but if he were to say, "All my women are repudiated except Zeinub, and Amrut, and Bukrut, and Sulma," effect would be given to the exception, and not one of them would be repudiated. So also if his words were, "All are repudiated but three," and he had none other, the exception would be valid, and none of them repudiated.

Conditions of validity.

It is a condition to the validity of an exception, that it be joined to the preceding sentence in the absence of any necessity to the contrary; so that if they be unnecessarily separated by a pause or the like, the exception is not valid; but a pause to take breath does not invalidate it, unless there is positive silence. And if he should sneeze or belch, or by reason of a heaviness in his tongue should hesitate, before uttering the words "if God will," the exception would be valid. But not so if after saying, "Thou art repudiated," the words "if God will" should slip from his tongue without design, for then it would not take effect.

CHAPTER V.

OF REPUDIATION BY THE SICK.[1]

A revocable repudiation has no effect on the inheritable rights of husband or wife when death occurs during the *iddut*;

WHEN a man has given his wife a revocable repudiation, whether it were given in health or in sickness, or with or without her consent, and either of them happens to die before the expiration of her *iddut*, they are reciprocally entitled to inherit,[2] without any difference of opinion.[3] And though the woman were a *Kitabeeah* or a slave at the time of the repudiation,[4] yet if she should embrace the faith, or be emancipated, while still in her *iddut*, she would be entitled to share in his inheritance.

nor an irrevocable repudiation on the rights of the wife, when it is given during the husband's death illness;

When a man in his death illness has repudiated his wife irrevocably, or given her three repudiations, and has then died while she is still in her *iddut*, she inherits from him in like manner according to "us;" but if her *iddut* should expire and he were then to die, she would not inherit.[5] And if the repudiation were given in health or in an illness from which he recovers, she would not inherit.[6] Shafei maintained that in both cases, that is, whether the death take place before or after the expiration of the

[1] Death sickness is meant.

[2] A husband is entitled to half his wife's estate when there is no son or child of a son, and to a fourth when there is either; the wife's share in her husband's estate is half of his share in her estate under the like circumstances.

[3] Because the effect of the marriage continues in every way until the expiration of the *iddut*. *Inayah*, vol. ii. p. 191.

[4] Difference of religion and slavery are among the impediments to inheritance.

[5] *Moheet* and *Hidayah*, vol. ii. p. 237.

[6] *Inayah*, vol. ii. p. 191.

iddut, she is alike without any right of inheritance, because the conjugal relation, which is the basis of the right, is cancelled by the supervening repudiation, for which cause it is that, if she were the person to die, her husband does not inherit from her. According to "us," however, the cause of her right to inherit is in the death illness,[1] and as the husband designs to defeat it, his device ought to return to himself, by postponing the effect of his act till the expiration of the *iddut*, to prevent the injury which would otherwise fall upon her; and this can be done, because the marriage lasts for some purposes, such as maintenance, and the prevention of another marriage in some circumstances, &c., and may therefore be supposed to last for the purpose of inheritance also; but that would be impossible after the expiration of the *iddut*. And to meet the argument drawn from the husband's having no right to inherit from his wife in the event of her death during his sickness, "we" insist that the continuance of the conjugal relation can be no cause of right to him, because the rupture of it is with his own consent.[2] Repudiation by a man in his last illness is termed the repudiation of a *farr*, or evader;[3] and when it is said that a woman irrevocably repudiated in such circumstances retains her right of inheritance until the expiration of her *iddut*, it is assumed that the repudiation is without a request on her part; for if he had repudiated her at her own request she would have no right of inheritance, unless she were compelled to ask for it, when her right would not be invalidated. In this case, that is, of irrevocable repudiation during a death illness, competence on her part to inherit must exist at the time of repudiation and continue till the husband's death. So that if a woman were a *kitabeeah* or an absolute slave when irrevocably repudiated by her husband during his illness, and she should then embrace the faith or be emancipated, she would have no share in his inheritance; and if a sick man

unless it were given at her own request.

[1] That is, the heirs have then an inchoate right.

[2] *Hidayah* and *Kifayah*, vol. ii. p. 237-8.

[3] *Inayah*, vol. ii. p. 191.

were to repudiate his wife three times, and she should then apostatize, but subsequently return to the faith, and he should then die while she is still in her *iddut*, she would not inherit.

Similar effect of apostasy.

When a man has apostatized from the faith, and has been put to death, or has joined himself to the *dar ool hurb*, or has died in his apostasy within the Mussulman territory, his wife inherits from him. But if a woman should apostatize and then die, or join herself to the *dar ool hurb*,[1] and her apostasy had taken place while she was in health, her husband would have no share in her inheritance, while, if it took place in sickness, he would inherit, on a favourable construction of law. And if they should both apostatize together, and one of them should then return to the faith and then die, the apostate survivor would not inherit;[2] but if the apostate should die, being the husband, the Mooslim wife would inherit; while if the wife were the apostate, and she should die, it is only in the case of her apostasy having occurred in sickness that the Mooslim husband could inherit; for if it took place in health he would have no claim.

Effect of other acts that would illegalize the intercourse of the parties.

When the son of a sick man has had carnal intercourse with his father's wife against her will, she does not inherit;[3] unless it were at his father's instigation, when the act of the son would be tantamount to the act of the father, and the latter would be a *farr*, or evader of his wife's right. But if the sick man should first repudiate his wife three times, and his son should then have carnal intercourse with her, or should kiss her with desire, she would inherit. So, also, if after the triple repudiation by her sick husband she should kiss his son, and the husband then die, leaving her

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[1] She is not liable to capital punishment, but this is civil death, which opens her succession to her heirs generally.

[2] An apostate is incapable of inheriting to any one.

[3] Because it illegalizes her future intercourse with her husband, and is a cause for dissolving the marriage, which is the basis of her right of inheritance.

in her *iddut*, she would retain her right of inheritance.[1] And if a sick woman should submit to the embraces of her husband's son, and then die during her *iddut*, the husband would inherit on a favourable construction.[2]

What amounts to a request for repudiation on the part of the woman.

If a woman should say to her husband, "Repudiate me revocably," and he should repudiate her three times or once irrevocably, she would inherit. But if he should say to her in his sickness, "Thy business is in thy hand," or "choose," and she should choose herself; or if he were to say to her, "Repudiate thyself three times," and she were to do so; or if she should obtain her release by *kloolâ*, and her husband should then die while she is still in her *iddut*, she would not inherit. But if she were first to repudiate herself three times, and he were then to allow or render it lawful, she would inherit, because it is his allowance that nullifies the right of inheritance.

Death illness, and what is evasion by a man.

When a man has repudiated his wife in his illness, and has then recovered but afterwards died, she does not inherit. Evasion is established as soon as a woman begins to have a right in her husband's property; and this takes place on his falling sick of an illness that will probably terminate in death. It is correct to say that, when a man is unable to go out of his home for his necessary avocations, he is sick, whether he can stand up in the house or not; for it is not every sick man that is disabled from standing up in the house for the necessary calls of nature. When a woman is unable to rise for the purpose of sitting on a seat, she is deemed to be sick—otherwise not. Evasion may also be established by other causes which come within the meaning of disease, if death be imminent; but if the chances are in favour of escape, the person is to be accounted as one in health. So that one is not an evader though he were surrounded by the enemy, or in the line of battle, or in a place abounding with beasts of prey, or on board ship,

[1] Because the acts referred to are in themselves no impediments to inheritance, and they can have no bearing on the right, through its cause, marriage, because that no longer exists.

[2] She being here the *furr*, or evader.

or in prison under sentence of retaliation or stoning; because, in all these cases, a way of escape may be found by some means or other. But if the ship, on board of which he was, has actually gone to pieces, and he is left floating on a plank; or if he were actually in the mouth of the beast of prey, he would be an evader. A lame man, and one who is paralytic, are to be accounted as sick while the lameness or the paralysis is increasing, but when they have lasted long and are not increasing, he is as one in health. A man with a wound, or other pains that do not make him take to his bed, is also as one in health. A man who is compelled to repudiate his wife is not an evader, if the compulsion be by threats of death; but if only by imprisonment or duress he is.

Evasion by a woman.

A woman may be an evader as well as a man, by giving cause for separation; as, for instance, by exercise of the option of puberty or emancipation, or by submitting to the embraces of her husband's son, or by apostasy or the like, after she has fallen sick; and in such cases her husband would be entitled to inherit. When a separation is made between a sick woman and her husband, by reason of impotency, as, for instance, when the year which has been given to him has expired without their coming together, and she makes her choice to be free, and then dies within the *iddut*, the husband does not inherit from her. And when he has slandered her, and they mutually take the *lián* or imprecation, she being well at the time, and the judge decrees a separation, and she dies, being still in her *iddut*, the husband does not inherit. When a separation has taken place for impotence during the sickness of the husband, and he dies in her *iddut*, she does not inherit, by reason of her assent to the separation. But if a husband should slander his wife in his illness, and take the *lián* against her in his illness, she would inherit according to all their opinions; and though the slander were in health, and the *lián* only in sickness, she would still inherit, according to Aboo Huneefa and Aboo Yoosuf. And if he should take the *eela*, or vow of abstinence, against her in sickness, and the period of the *eela* should expire in his sickness, she would

inherit if his death should take place during the continuance of the *iddut;* but if the *eela* had been taken in health and its period should expire in illness, she would not inherit.

Effect of a sick man's declaration that he had repudiated his wife in health, and an acknowledgment of debt or a legacy in her favour.

If a man should say to his wife during sickness, "I repudiated thee three times in health, and thy *iddut* has expired," and she should assent, and he then acknowledges a debt to her, or bequeaths a legacy to her, she would be entitled, according to Aboo Huneefa, to whichever is the less of the debt or legacy, and her share in the inheritance; but according to the other two, the acknowledgment of debt or legacy would be lawful. If he should repudiate her three times in his illness by her own desire, and should then acknowledge a debt to her or bequeath her a legacy, she would be entitled to whichever might be the less of this, and her share of the inheritance, according to all their opinions. She would be entitled to the less of the two, according to "us," if her husband should die during the subsistence of the *iddut*, but if his death did not take place till after its expiration, she would have the amount acknowledged.

Wife's word to be preferred in a dispute with heirs.

If a woman should say, after her husband's death, "He repudiated me three times during his illness, and then died, I being still in my *iddut;* so that I am entitled to my share in his inheritance," and the heirs should say, "He repudiated thee in health, and thou hast no right," her word would be entitled to credit. If a man should say to his wife, in his illness, "I repudiated thee three times while I was yet in health," or "had connection with the mother or daughter of my wife," or "married her without witnesses," or "there was fosterage between us before the marriage," or "I married her in her *iddut*," and the woman should deny these allegations, she would be irrevocably repudiated, but retain her right of inheritance. Whereas if she admitted them she would have no right.[1]

General principles

When a man has said to his wife, he being in health at

[1] This would be equivalent to an assent on her part to the repudiation (as in the cases on the next page), which would bar her right to inherit. See *ante*, p. 278.

the time—"When the beginning of the month has come," or "when thou hast entered the house," or "such an one has entered it, thou art repudiated;" and the occurrences take place at a time that he is sick, she does not inherit; but if the words were uttered in sickness, she would inherit in all the cases, except where the condition was, "if thou enterest the house." When repudiation is suspended on a condition, and the condition is an act of the husband's own, regard is to be had to the time of its taking place, and if he should then be sick and she in her *iddut*, she would inherit, whether the suspension had been made in health or in sickness, or the occurrence were avoidable or not. But when the suspension is on the act of a stranger, the time when the suspension was made, and the time of the occurrence of the act, are both to be taken into consideration. And if the husband were sick at both the times the wife would inherit, otherwise not, whether the event were avoidable or not; as if he should have said, "When such an one has arrived," &c. And the result would be the same if the suspension were on anything in the course of Providence, as the coming of the first of the month, or the like. If the supension were on some avoidable act of the wife, she would not inherit, whether the suspension and the act should both take place during the husband's sickness, or the suspension in his health and the act in his sickness; and if the act be one of necessity to her, such as eating, drinking, sleeping, praying, fasting, and both the suspension and the act should occur in his sickness, she would inherit, according to all their opinions. And if the suspension were in his health and the act in his sickness, the rest would be the same, according to Aboo Huneefa and Aboo Yoosuf, in the same way as if the repudiation had been suspended on an act of his own.

to suspended or conditional repudiations.

When a sick Mooslim has said to his *kitabeeah* wife, "When thou becomest Mooslim thou art repudiated three times," and she embraces the faith, after which the husband dies, he is an evader.[1] If the woman were free, and a

Miscellaneous cases.

[1] Difference of religion is an impediment to inheritance, and he is trying to prevent its removal.

kitabeeah, and the husband should say to her, "Thou art repudiated three times to-morrow," and she then embraces the faith, whether before or after the morrow, she has no share in his inheritance; but if she should have embraced the faith, and were then repudiated three times, the husband being in ignorance of her having done so, she would inherit. And when the wife of an infidel has embraced the faith, after which he has repudiated her, he being ill at the time, and has then embraced the faith himself, and subsequently died while she is still in her *iddut*, she does not inherit. So, also, when a slave has repudiated his wife in his sickness, and then got his emancipation, and acquired property, she has no right to inherit.

Case of a commission to repudiate acted upon in illness.

When a man in health has committed the repudiation of his wife to a stranger, and the stranger repudiates her in sickness, and the commission were of such a nature that it could not be withdrawn, she would not inherit; as, for instance, when he has invested him with the right of repudiation.[1] But if the commission were of such a nature that it could be withdrawn, as if the person were appointed an agent to repudiate, and the repudiation were given in sickness, she would inherit.

[1] See *ante*, p. 244.

CHAPTER VI.

OF "RUJÂT,"[1] OR RETAINING A REPUDIATED WIFE, AND OF WHAT LEGALIZES A REPUDIATED WOMAN TO HER HUSBAND, AND MATTERS CONNECTED THEREWITH.

Definition.

RUJÂT is defined to be the maintaining of a marriage in its former condition while the wife is still in her *iddut*. When a man has repudiated his wife by one revocable repudiation, or by two repudiations, he may retain her while she is still in her *iddut*, whether she be willing or not, according to the sacred text, "Hold them with humanity;" in which there is no distinction between willingness and the absence of it, or, in other words, without making willingness a condition.[2]

Two kinds of *rujât*:

Soonnee

Rujât, or retention, is of two kinds: *Soonnee*, or according to the traditions; and *Budâee*, or irregular. The *Soonnee* form is when a man retains his wife by speech, calls on witnesses to attest the fact, and intimates it to her; if, then, he should retain her by speech, as, for instance, by saying, "I have retained thee," or "have retained my wife," without calling upon witnesses to attest what he has done, or though he should call upon them to do so, yet if he fail to give his wife intimation, the *rujât* is *Budâee*, or irregular, and contrary to the Sonnah, or traditions, but still valid. And if he were to retain her by deed, as by having intercourse with her, or kissing her with desire, or looking on her nakedness with desire, it would still be a

and *Budâee*.

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[1] The word is also written with a *kusra* (i) in the first syllable, but *futha* (u) is better. *Inayah*, vol. ii. p. 196.

[2] *Hidayah* and *Kifayah*, vol. ii. p. 248.

retention with "us," but abominable; and he ought afterwards to retain her, with a proper calling on witnesses to attest the fact.

It may be effected by words

The words of *rujât* are either *sureeh* or *kinayât*, that is, as before explained, express or ambiguous. The express are, "I have brought thee back," or "have retained thee,"[1] or "restored thee." The ambiguous are, "Thou art to me as thou wert," or "art my wife," and these are not sufficient without intention. If he should retain her by words of marriage, it would be lawful, according to Moohummud, and the *futwa* is to the same effect; and thus, when he has married her, he is accounted to have returned to her. And if he should say, "I have married thee," it would be a *rujât*. When he has said, "I have retained thee for a dower of a thousand *dirhems*," and she has accepted, it is valid, but otherwise not; for this is an addition to dower which requires acceptance, and it serves as if he had renewed the marriage.

or by deed.

As *rujât* is established by speech, it may be so in like wise by deed; as by matrimonial intercourse, or touching with desire; so also by kissing on the mouth with desire, by general agreement. There is a difference of opinion as to kissing on the cheek, the chin, the forehead, or the head; but the most probable and correct opinion is that any kind of kiss that would induce the prohibition of affinity would be sufficient for this purpose. Looking on the nakedness with desire is also a retention, but looking on any other part of the person is not so; and whatever would induce the prohibition of affinity would suffice also for *rujât*. Kissing or touching without desire would not suffice, by general agreement; but it makes no difference whether the kissing, looking, or touching be on her part or on his, provided that when on her part it is with his knowledge and without his prohibition. If it were purely on her part, and without his permission (he being asleep, for instance), or if she should act against his will, or when he is out of his right mind, still it is reported, as from Aboo Huneefa

[1] These two expressions are inflections of *rujât*.

and Moohummud, that it would be a retention, provided the husband give credit to her assertion that the act was with desire; but if he should deny that it was so, the retention would not be established; so, also, if the husband should die, and his heirs give credit to her assertion; but no proof could be received as to the fact of desire. Yet if witnesses should attest the fact of actual intercourse, that would be lawful. Retirement with a *Mooâtuddah* or woman in her *iddut* does not amount to retention, for that is not peculiar to a right of enjoyment, and anything that may be done by the husband that is not peculiar to such a right is not retention.

It is valid under compulsion or in jest.

Retention by an insane person must be by act and not by speech. Retention, like marriage, is valid, though made under compulsion, or in jest, or sport, or by mistake; and if a husband should allow a retention as pronounced by a *fuzolee*, or unauthorized person, it would also be valid;

but not on a condition.

but retention cannot be suspended on a condition; as if a husband should say, "When the morrow comes," or "when thou hast entered the house," or "done so and so, I have retained thee," this would be no *rujât*, according to them all. Nor if he were to stipulate for an option would retention be valid; and if he should say, after repudiation, "I have retained thee to-morrow," or "the beginning of the month," it would not be valid, by all opinions.

Disputes between the parties.

If a husband should claim to have enjoyed his wife, and retirement has actually taken place between them, he may retain her; but if no retirement has taken place, he has no such power.[1] When the parties are agreed as to the expiration of the *iddut*, but differ as to the fact of *rujât*, the word of the wife is preferred, and all are agreed as to this; but, according to Aboo Huneefa, an oath is not required of her. If, however, the *iddut* be still unexpired, preference is given to the word of the husband. If he should adduce proof after the *iddut* that he had said, during her *iddut*, "I have retained her," or "have had matrimonial converse

[1] There can be no revocable repudiation of an unenjoyed wife. See *ante*, p. 226, and consequently no *rujât*. See *post*, p. 289.

with her," or even though the *iddut* should have expired, yet if he then say, "I retained her during her *iddut*," and she should assent, it would be a *rujât*. When a man has said to his wife, "I have retained thee," and she has answered on the instant, in connection with his words, "My *iddut* is past," the retention is not valid, according to Aboo Huneefa, and though the disciples were of a different opinion, his is held to be correct. The difference, too, was restricted to cases where the time admits of the expiration of the *iddut*, for otherwise the retention would be valid, according to them all. And here they are all agreed that her oath may be required as to the expiration of the *iddut*. They were also all agreed that if she remain silent for a time, and then say, "My *iddut* is past," the retention would be valid. If the woman commence the discourse by saying, "My *iddut* is past," and the husband says in answer immediately, in connection with her words, "I have retained thee," the *rujât* is not valid.

The right to retain a wife expires on the full completion of her *iddut*.

The right to retain a repudiated wife is at an end as soon as she has come out of her third courses if she be free, or the second if she be a slave, that is, on the completion of the tenth day, though the discharge should not have ceased. Where it has ceased before the completion of ten days, the time for *rujât* is not cut off till she has performed the customary ablutions, or the time for prayers has past. If the woman be a *kitabeeah*, it has been said that the right to retain her is cut off on the mere ceasing of the discharge. And if a man should retain his wife after the ablutions which terminate the proper time for retention, and should return to former habits with her before the ten days have expired, the retention would be valid. So, also, when the *tuyummum*, or purification by sand, has been used instead of ablution. And if she has neither washed, nor the full time for prayer has passed over her, though she may have used the sand purification (being on a journey), then the time for *rujât* is not cut off merely by the purification. But it is cut off when she has used such purification and has also said her prayers, according to Aboo Huneefa and Aboo

Yoosuf; when she has washed and forgotten a part of her person to which the water has not reached, if it be a whole limb or more, the time of retention is not cut off, but if less than a limb it is.

Rujât of an unenjoyed wife.

A man has retired with his wife and has then repudiated her, saying, "I have had no intercourse with her," whether she confirm or deny the statement he has no power to retain her. Yet if he should retain her, and she should bear a child, at any time less than two years, and though only one day before she has given intimation of the expiration of her *iddut*, the retention would be valid. And if a man should repudiate his wife when she is pregnant, or after she has been delivered of a child, while she is still under his protection, and should declare that he had no intercourse with her, he may retain her; because the child, when it appears within a time that admits of its being his (as, for instance, by its being born at six months or upwards from the day of marriage), is ascribed to him, so that its descent is established as from him.

A repudiated wife may adorn herself.

A woman repudiated revocably may adorn and beautify herself; and her husband should not enter her apartments without previous notice, or letting the sound of his shoes be heard, unless he means to retain her; and he has no right to take her with him on a journey until he has called upon witnesses to attest that he has retained her. So, also, it is unlawful for him to send her out on what may be less than a journey. And as it is abominable to take her on a journey, so is it also to be in retirement with her.

A revocable repudiation does not forbid matrimonial intercourse.

A revocable repudiation does not render matrimonial intercourse unlawful; so that if it should take place the husband is not liable to the *ookr*. When a man has repudiated his slave wife revocably, and then married a free woman, he may still retain the slave.

Section.

What legalizes a repudiated Wife, and matters connected therewith.

A free woman repudiated thrice, or a slave twice, cannot be remarried until married and enjoyed by another husband.

When a man has repudiated his wife irrevocably, without giving her three repudiations, he may marry her again during her *iddut*, or after its expiration; but when he has repudiated her three times, being a free woman, or twice being a slave, it is not lawful for him to marry her again till she has been married by a valid and operative contract to another husband, who, after enjoying her, has repudiated, or died, leaving her his widow. And in this there is no difference whether the repudiated woman were an enjoyed wife or not so. Penetration after the second marriage is a positive condition, but not emission. When a man has had illicit intercourse with a woman, or converse with her under a semblance of right, that does not legalize her to her first husband, for want of a valid marriage. So, also, when a master, by virtue of his right of property, has had intercourse with his married slave, and she is in consequence rendered unlawful to her husband, and then after the expiration of her *iddut* has intercourse with her again, that does not legalize her to her husband. When intercourse has taken place with a girl so young as to be unfit for the embrace of a man, that does not legalize her; but if she be fit for such embrace it does. A *moorahik* youth, in the matter of legalizing, is like an adult,[1] that is, when the intercourse has taken place before puberty, but the repudiation not till after it; for repudiation by a youth under puberty is of no effect. By *moorahik* is to be understood a boy who, though under puberty, is capable of intercourse with a woman, and whose connection with her obliges her to wash; and Shums ool Islam has fixed the age at ten years.

It is sufficient though the husband be a youth under puberty if *moorahik*,

Though the second husband be insane, or a slave, if he have married with the permission of his master and has consummated, the woman is rendered lawful. But when

or insane, or a slave.

[1] *Door ool Mookhtar*, p. 251.

a woman has married a slave without the permission of his master, and the slave has consummated with her, after which the marriage is allowed by the master, and the slave then repudiates her without having intercourse subsequent to the allowance, she is not rendered lawful to her first husband; for which purpose enjoyment after the permission is necessary. Intercourse with a very old man who cannot penetrate without the assistance of the woman's hand is not sufficient to legalize her. When a Christian woman married to a Mooslim has been repudiated by him three times, and has then married a Christian who enjoys her, she is rendered lawful to her Mooslim husband who had repudiated her. When a man has repudiated his wife three times, and she intermarries with another husband who repudiates her three times without enjoying her, and she then marries a third who does enjoy her, she is rendered lawful to whichever of the two first may re-marry her. When a thrice repudiated woman has apostatized and joined herself to the *dar ool hurb* or a foreign country, and has been subsequently captured,—or when a man has repudiated his slave wife twice, and has then become her proprietor; in neither case is matrimonial intercourse lawful until the woman has been married to another husband.

When a man may re-marry a thrice repudiated wife on her own assertion that she has been married to another and enjoyed by him.

When a man has repudiated his wife three times and she has said, "My *iddut* having passed I married again, was enjoyed by my husband, and he has repudiated me, and my *iddut* has passed," her first husband may lawfully believe her if time admit of all this, and he thinks it highly probable that she is speaking the truth. When a woman says that her second husband has had intercourse with her and he denies it, she is lawful to the first; but if the case were reversed, the second husband declaring and she denying the intercourse, she would not be lawful to the first.

When the first contract was invalid the repudiated wife may

When a man has married a woman by an invalid contract, and has repudiated her three times, he may lawfully re-marry her though she should not have intermediately married with another. When two witnesses have attested

be re-married at once.

to a woman that her husband repudiated her three times, at a time that he was absent from her, she may marry another; but not if he were present.

How a thrice repudiated woman may protect herself from the advances of her former husband.

Aboo 'l Casim, being asked by a woman whose husband had repudiated her three times, but whom nevertheless she could not prevent from coming to her, if she might kill him, replied, "Yes, if you kill him at the time that he is approaching you, and you cannot otherwise prevent him;" and several other learned men have approved of this opinion; but Asbeejanee was opposed to it, and it is stated in the Mooltukut that the *futwa* is in accordance with this view. When two just persons have attested to a woman that her husband has repudiated her three times, but he denies it, and the witnesses die or go away before they can give their testimony before the judge, she cannot lawfully remain with her husband: and if she should complain to the judge that he approaches her, and the husband should swear to his denial, and the judge (the witnesses being dead) should decree for her return to her husband, still she ought not to remain with him, but rather to ransom herself with her own property, or to run away from him; and if she can do neither, she may kill him when she knows that he is coming to her; but she ought to do so with medicine, and has no right to kill herself. But when she runs away from him she cannot keep *iddut* and marry another husband. Sheikh Hulwaee, however, has said that, though that be the rule, she may, as between herself and God when she has run away, keep *iddut* and marry another.

Devices for securing repudiation by the husband who is the legalizing medium.

Of the devices applicable to cases of this description, this seems to be one of the best: that the repudiated woman should marry a young slave just capable of legalizing her, and then, after he has enjoyed her, get the ownership of him by some means, which would cancel the marriage. A man has said, "If I marry a woman she is repudiated three times." The device in such a case is for a *fuzoolee* or an authorized person to contract a marriage between them, which the man may confirm by deed without being forsworn, while if he were to do so by word he

would be forsworn, and this device may be relied on. When a woman is afraid that the legalizer will not repudiate her, she may say, "I marry myself to thee, on condition that my business is to be in my own hand, to repudiate myself whenever I please," and he accepts, such a marriage is lawful, and the business is in her hands.

CHAPTER VII.

OF EELA.

Definition. EELA is a husband's prohibition of himself from approaching his wife[1] for four months when he is a free man,[2] and two months when a slave, the prohibition being confirmed by a *yumeen*, or vow, either by God or without Him; as by repudiation, emancipation, fasting, pilgrimage, or the

Effect. like. So that if the husband should approach his wife during the time, he would be forsworn, and liable to expiation, when the oath is by God, whether by Himself or by any of his attributes by which it is customary to swear, or for the consequence of the condition in other cases; and the *eela* would cease after the approach. On the other hand, if he should not approach her during the time, she would become irrevocably repudiated by one repudiation, and the oath would be at an end, if it were for four months; but if it were for ever, as by the husband's saying, "By God! I will not approach thee for ever," or if he were to say, "By God! I will not approach thee," without adding "for ever," the oath would remain, except in so far that the repudiation would not be repeated without a second marriage. If, however, he were to marry her a second time, the *eela* would revive, and if she were not enjoyed, another repudiation would take effect after the expiration of four months from the marriage; and if he

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[1] Carnally is implied.

[2] Founded on the text of the *Koorán*. "They who vow to abstain from their wives are allowed to wait for four months." Sale, vol. i. p. 39.

were to marry her a third time, the *eela* would again return, and on the expiration of other four months another repudiation would take effect if there were no intermediate intercourse. If, subsequently to all this, he should marry her after another husband has had her, repudiation would not take effect on that *eela*, but the vow would remain; and if he should have intercourse with her he would be liable to expiation.

It cannot be for less than four months.

When a man has sworn to abstain for less than four months, he is not a *moolee*,[1] according to the saying of Aboo Abbas—"There is no *eela* in what is less than four months," which Aboo Huneefa adopted on receiving his *futwa*, though he was at first of a different opinion.[2] A *moolee* is defined to be one who cannot approach his wife without incurring some difficult or troublesome liability.[3]

Eela by a *zimmee*.

When a *zimmee* has made an *eela* by one of the names of God, or by any of His attributes, he is a *moolee*, according to Aboo Huneefa, but not so according to the other two; while if he should swear by repudiation or emancipation he would be so in all their opinions. But if the oath were by pilgrimage, or by fasting, or alms, he would not be a *moolee*, according to them all; nor if he were to say to his wife, "If I approach thee thou art to me like the back of my mother."[4] When the *eela* of a *zimmee* is established, it is subject to the same rules as the *eela* of a mooslim in all respects, except that when he has intercourse with his wife, and the vow to abstain was by God, he is not liable for expiation.

Words by which *eela* may be effected.

The words by which *eela* may be effected are either *sureeh* or *kinayát*. The *sureeh*, or express, are all such words as first present to the mind the idea of sexual intercourse, as, "I will not approach thee," "I will not unite with thee," "I will not have intercourse with thee," or "I will not lie with thee," or "wash away defilement on account of thee;"

[1] Active participle of *eela*.

[2] *Hidayah* and *Kifayah*, vol. ii. p. 271.

[3] *Door ool Mookhtar*, p. 253.

[4] This would be *zihar*, to which a *zimmee* is incompetent. See *post*, p. 324.

for by lying with a woman coition is usually meant, and washing for defilement on account of her is required for no other cause but that; so, also, "I will not deflower thee," when addressed to a virgin; for that cannot be done without coition. The *kinayát*, or ambiguous expressions, are words that do not first present to the mind the idea of coition, and are susceptible of another meaning, so long as *eela* is not intended by them; such as "I will not come to her," "I will not enter to her," "Her head shall not be joined to mine," "I will not abide with thee in my bed," "I will not approach her bed," &c. But if he should say, "If I sleep with thee, thou art repudiated three times," having no particular intention, that would be *eela;* the expressions being commonly used for coition, though if he mean merely lying side by side, he would not be a *moolee*, because that may be without coition. It is stated in the Yoonabeea that *eela* is contracted by all expressions by which a vow may be contracted. As if he were to say, "By God," or "By the majesty or greatness of God;" and that it cannot be contracted by any words which are not sufficient to effect a vow; as if he were to say, "By the knowledge of God, I will not approach thee," or "The wrath of God be upon me," and the like.

Who are competent to contract it.

The persons competent to pronounce an *eela* are those who are competent to repudiate, according to Aboo Huneefa; while, according to his two disciples, they are those who can make a vow. They were all of opinion that no person can be a *moolee* except by an oath against natural intercourse, and if he is forsworn by any other than an oath of that description he is not a *moolee*.

What may be the penalty when the *eela* is not by God.

If one should say, "When I approach thee prayer is incumbent on me," he would not be a *moolee*. Nor if he should say, "If I approach thee, or solicit thee to my bed, thou art repudiated."[1] But when he swears, by saying, "If I approach thee, pilgrimage is incumbent on me," or "alms," or "fasting," or "a vow," or "the expiation of a

[1] This would be no penalty, as a single repudiation may be revoked, contrary to the case of three repudiations.

vow," he is a *moolee;* while, if he were to say, "To follow a *junazah*" (or corpse to burial) "is incumbent on me," or "to read the Kooran," or "to say my prayers," he would not be a *moolee.* But it ought to be a valid *eela,* if he were to say, "I am bound for a hundred *rookâs,*" that is, to say them with a hundred *rookâs* (genuflexions), or anything similar, that would usually be attended with some trouble.

When two women are made the subject of one *eela.*

If a man should say, "I will not approach you two," he is *moolee* to both; and when four months have passed without his approaching them they are both irrevocably repudiated; and if he should approach only one of them the *eela* would be void with respect to her, but subsisting for the other, and he would not be liable for any expiation; but if he should approach them both, the *eela* would be broken as to both, and he would incur the expiation of his vow. If one of them should die before the expiration of the four months, the *eela* of both would be void, and no expiation incurred, though he should afterwards have intercourse with the other, according to general agreement. But if he should repudiate one of them, the *eela* of the other would not be invalidated.

When it is applied to one of them indefinitely.

When a man has said, "I will not approach one of you two," he becomes a *moolee* to one of them, so that if he have intercourse with either, expiation is due and the *eela* void; and if one of them should die, or be repudiated thrice, or became absolutely separated by apostasy, the *eela* would be rendered specific as to the other; while, if he refrain from approaching both till the expiration of the four months, one of them, without distinguishing which, is repudiated irrevocably, and he may apply the repudiation to either at his pleasure; but he cannot make the *eela* special to one of them before the expiration of the four months, insomuch that if he were to attempt to do so by indicating one of them in particular, and the four months were then to expire, the repudiation would not fall on the individual specified, but would still be general, and he would have to make his choice; and if it should not take effect on one of them (as by his failing to exercise his choice) till the expiration of another four months, one

repudiation would take effect on the other, and each would be irrevocably repudiated by one repudiation.

When applied to a wife and a slave, or a stranger.

If a man should swear not to approach his wife and his female slave, or a stranger, he would not become a *moolee* until he had approached the stranger or the slave, whereupon he would become a *moolee;* for after that he could not have intercourse with his wife without expiation. A man has said to his wife and his slave, "By God, I will not approach one of you two," he is not a *moolee* unless he intend the wife; but if he approach either he is forsworn; and even though he should emancipate the slave and then marry her, he would not become a *moolee.*

Eela followed by repudiation,

A man having pronounced an *eela* on his wife, repudiates her once irrevocably,—if four months expire from the time of the *eela,* and she is still in her *iddut,* another repudiation takes effect by virtue of the *eela;* but if her *iddut* is passed there is no repudiation by the *eela.*

or apostasy.

And if a man, after pronouncing an *eela,* should join himself as an apostate to the *dar ool hurb,* or a foreign country, and the four months should then expire, his wife would not become irrevocably separated by the *eela,* by reason of the decadence of his right over her, and her having become already separated by the apostasy. There are, however, two reports as to an *eela* and a *zihar* being rendered void by apostasy, but this is approved. A slave having pronounced an *eela* on his free wife, afterwards becomes her property, the *eela* does not remain; but if she were to sell or emancipate and then re-marry him, the *eela* would revive.

When the *eela* is for two months and two months.

When a man has said, "By God, I will not approach thee for two months and two months," or "I will not approach thee for two months and two months after these two months," he is a *moolee.* But if he should say, "By God, I will not approach thee for two months," and then should stop for a day and say, "By God, I will not approach thee for two months after the first two months," he would not be a *moolee.* So also if he should say, "By God, I will not approach thee for two months," then stop and say, "By God, I will not approach thee for two months," he would not be a *moolee.*

When a man has sworn not to approach his wife by the emancipation of a slave,[1] and has then sold him, the *eela* fails, but revives if he again become possessed of the slave before approaching his wife; not so, however, if this do not take place till after he has had intercourse with her. And suppose a man to say, "If I approach my wife these two slaves are free," and that one of them dies or is sold, that would not cancel the *eela;* whereas, if they were both to die or be sold, whether together or one after the other, the *eela* would be cancelled; while if he should again by any means becomes re-possessed of one of them, before approaching his wife, the *eela* would revive as to that one; and so also if he became possessed of the other the *eela* would also revive as to him, from the time of the re-acquisition of the first. A man says to his wife, "If I approach thee this my slave is free," and four months having passed the matter is litigated before the judge, who decrees a separation between the parties; the slave then adduces proof of his being free by origin; whereupon the judge must decree his freedom and cancel the *eela*, restoring the woman to her husband, because, in fact, proof has been adduced that the husband never was a *moolee*, and might therefore approach his wife without incurring any liability.

When it is by the emancipation of a slave who is subsequently sold,

or proves to have been free.

If three *eelas* be pronounced at one meeting, only one takes place, according to the two disciples, on a favourable construction; but if they were at different meetings it would be a repetition. When a man has said, "By God, I will not approach thee," and a day having passed he then says, "By God, I will not approach thee," and another day having passed again he says, "By God, I will not approach thee,"—there are three *eelas* and three vows; and if he should not approach her till the expiration of four months, she would become irrevocably repudiated once, and after the expiration of a day a second irrevocable repudiation would take place, and again after another day

When more than one *eela* is pronounced on the same woman.

[1] As by saying, "If I approach thee, then my slave is free." *Inayah*, vol. ii. p. 211.

a third, making three repudiations; after which she would not be lawful to him till another husband has married her, and even then, if he were to approach her after that, he would be liable for three expiations. A man has said, "I will not approach for a year bating a day," the day is to be reckoned at the end of the year, by general agreement. A man says to his wife, "By God, I will not approach thee for a year:" when four months have passed she is irrevocably repudiated, and he then marries her again and four months having passed, she is again irrevocably repudiated; but if he should marry her three times, a third repudiation would not take place, because less than four months would remain of the year after the third marriage. If he were to say, "I will not approach thee for a year except a day," he would not be a *moolee* on the instant, according to "our" three masters. But if after this he should have intercourse with her, and there should be four months of the year still to run, he would then become a *moolee*. So also, if instead of "except a day," he should say "except once;" but in the latter case the time would be reckoned from the actual intercourse, while in the former it would be from sunset on the day when it took place. A man who is at Busrah, with his wife, does not become a *moolee* by saying, "I will not enter Koofah." But when a man has said, "I will not approach thee while this river continues to flow," and it is one where waters are never cut off, he is a *moolee;* otherwise not.

If the *eela* were made in health it can be rescinded only by intercourse.

When the *moolee* was, at the time of contracting the *eela*, in good health and able for matrimonial intercourse, the *fuy*, or return to his wife, is by such intercourse, and not by speech; and though he were to kiss or touch her, or look on her nakedness with desire, there would be no return. Even though he should subsequently fall ill, still the return must be by intercourse, according to "us," in opposition to the opinion of Zoofr, who thought that allowance should be made for inability at the end of the period.[1]

But may by speech,

But if the *moolee* were sick and unable for matrimonial

[1] *Inayah*, vol. ii. p. 218.

intercourse, or if his wife were sick at the time of the *eela*, the return may be by speech, as by his saying, "I have returned to her;" and when he has said so it is like a *fuya*, or return by intercourse, in nullifying the effect of the oath so long as the sickness lasts. But if he should become competent for matrimonial intercourse before the expiration of the four months, this *fuy* or return by speech would be cancelled, and another must be made by intercourse.[1] When a *fuy*, or return, has been effected by speech, as by his saying, "I have returned to her," repudiation does not take effect on her by the passing of the time; but the vow, if it were in absolute terms, remains as it was, so that if he have intercourse with her he is liable to expiation. If, however, it were limited to four months, and he should have intercourse with her after their expiration, no expiation would be incurred.[2] If a man were prevented from matrimonial intercourse by physical obstruction in the woman, or by her extreme youth, or by *jub*, or impotency; or if he were a prisoner in the enemy's country, or she were withholding herself from him, or in a place unknown to him, the return may be by speech, as by his saying, "I have returned to her," or "retained her," or "cancelled the *eela*;" provided that the inability is continued till the completion of the period. But if the preventive were only legal, as by his being in the pilgrim's garment on *hujj* or pilgrimage for four months, the return can only be by actual intercourse.

if made in sickness,

or under any other physical disability.

When a dispute has arisen between the parties within the period the word is with the husband. Still, if the wife knows that he is speaking falsely, she ought not to remain with him, but rather to fly from him, or ransom herself with property. And if the dispute should not arise till after the expiration of the period, and the husband claims that he returned to her within the four months, he is not to be credited unless the assertion is assented to by her.

Of disputes between the parties.

[1] *Hidayah*, vol. ii. p. 276.

[2] Otherwise if before the expiration, because in that event the previous return by speech would have been void.

Eela made dependent on the will of the woman, or another.

When a husband has said to his wife, "If thou willest, by God, I will not approach thee," and she has declared that she wills at the meeting, he becomes a *moolee*. So also when the reference is to the will of such a person, and he declares his will at the meeting. When a man has said to his wife, "Thou art unlawful to me," and this has occurred at a time when there has been no talk between them of repudiation, he should be asked as to his intention;[1] and if he intended repudiation thereby she is irrevocably repudiated; if he intended three repudiations, three take effect; if two it is not valid, except in the case of a female slave; if he intended *zihar*, it is *zihar*, according to Aboo Huneefa and Aboo Yoosuf; and if he intended a vow, or had no particular intention, it is *eela*; and if he meant a lie, it is to be taken as such. If he were to say, "You two are to me unlawful," he would be a *moolee* as to each of them, and would be forsworn by having intercourse with either.

[1] *Hidayah*, vol. ii. p. 276.

CHAPTER VIII.

OF "KHOOLA" AND WHAT COMES UNDER ITS EFFECT.

SECTION FIRST.

Definition, conditions, and legal effect of "Khoolâ."

KHOOLA means to put off, as a man is said to *khoolâ* his garment when he puts it off.[1] It also means to demit or depress generally.[2] In law, it is the demission or laying down by a husband of his right and authority over his wife, for an exchange, to take effect on her acceptance,[3] by means of the word *khoolâ;* and it is sometimes validly effected by words of sale and purchase, and also sometimes by words in the Persian language. Its conditions are those of *tulák*, or repudiation, and its effect one irrevocable repudiation.[4] It is, however, valid as to three repudiations when so intended. And if a man should marry a woman three times, and give her a *khoolâ* in each contract, it would not be lawful for him, according to "us," to marry her after the third until she had intermarried with another husband. The presence of the Sultan is not required as a condition of the legality of *khoolâ*, according to general agreement, and this is correct.

Definition.

Conditions.

Effect.

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[1] *Kifayah*, vol. ii. p. 278.

[2] *Door ool Mookhtar*, p. 256.

[3] This clause of the definition is added from the *Door ool Mookhtar*, and is implied in what follows.

[4] Two reasons are assigned for this: a saying of the Prophet, and because *khoolâ* is one of the *kinayát*, or ambiguous expressions by which a wife may be repudiated. *Inayah*, vol. ii. p. 221, and see *ante* p. 229.

Moobarát, and other expressions equivalent to *khoolâ*, but acceptance by the wife required in all cases.

Whether the word *khoolâ*, or *moobarát* (which means a mutual release),[1] or sale, be employed, as, for instance, whether a person should say, "I have given thee a *khoolâ* for a thousand *dirhems*," or "repudiated thee for a thousand," or "released thee," or "sold thyself to thee" or "thy repudiation to thee for a thousand," repudiation does not take effect without her acceptance at the meeting, for the transaction is an exchange.[2]

When, and on what terms it is justifiable.

When married parties disagree, and are apprehensive that they cannot observe the bounds prescribed by Almighty God (or, in other words, perform the duties incumbent on them by the marriage relation),[3] there is no objection to the woman's ransoming herself from her husband, with property, in consideration of which, he is to give her a *khoolâ;* and when they have done this, one irrevocable repudiation takes place, and she is liable for the property. When the aversion is on the part of the husband, it is not lawful for him to take anything from her in exchange for the *khoolâ*. But this is only as a matter of conscience; and if he should take it, the legal effect is valid, notwithstanding, and she has no right to demand restitution of what she has given. And when the aversion is on her part, "we" abominate his taking from her more than he gave her as dower; but, notwithstanding, it is lawful for him judicially to take more.

Further effect of *khoolâ* in a mutual release of liabilities.

Khoolâ and *moobarát* cause every right to fall or cease which either party has against the other depending on marriage. With regard to a repudiation for property there are two reports; but, according to that which is correct and relied on, it does not operate as a release.[4] When a *khoolâ* is made by means of the word *khoolâ*, it does not occasion a release of any other debts than dower, according to Aboo Huneefa, as reported in the Zahir Rewayut, which is held to be correct. In like manner, with regard to

[1] *Door ool Mookhtar*, p. 258. [2] *Kifayah*, vol. ii. p. 278.
[3] *Inayah*, vol. ii. p. 221.
[4] The *Khoolasa* is cited as the authority, and it is confirmed by the *Door ool Mookhtar*, p. 258.

the word *moobarât*, though there is a difference of opinion, the correct view is that it does not occasion a release of other debts than dower.[1] So, also, with regard to the words, sale and purchase: though there is the like difference of opinion, the most correct is, that, like *khoolâ* and *moobarât*, they do not occasion a release of other debts than dower. Neither these words nor repudiation for property occasion a release of maintenance during *iddut*,[2] without a condition to that effect; according to all opinions. Nor do they effect a release from the maintenance of a child, or the hire of suckling it, without a special condition. If there is a condition to that effect, and a fixed time is specified, the release is lawful, but otherwise not; and when it is rendered lawful by specification of time and condition, and the child happens to die before completion of the time, the husband may reclaim a due proportion of the hire.

When a *khoolâ* has been entered into[3] for property named, known, and equal to the dower, then if the woman has been enjoyed and has taken possession of the dower, she must deliver the exchange for the *khoolâ* to her husband, and neither party can follow the other for anything after the repudiation; and though she may not have taken possession of the dower, she must still deliver the

Application of the rule when the exchange is property equal to the dower, and the word *khoolâ* is employed.

[1] It appears from the *Hidayah* (vol. ii. p. 290.) that the difference was between Aboo Huneefa and his disciples, and that Moohummud, in direct opposition to him, held that nothing falls on either side except what is specially mentioned by the parties; while Aboo Yoosuf agreed with him as to *khoolâ*, but with Aboo Huneefa as to *moobarât*. The author, as usual, gives the reasons on both sides, without deciding for either. The compilers of the *Futawa Alumgeeree* have adopted the opinion of Aboo Huneefa, without mentioning that of Moohummud, and noticing Aboo Yoosuf's only where it agrees with the master's. The authority cited is the *Kanz ood Dukaik*, and it is confirmed by the *Door ool Mookhtar*, p. 258.

[2] Maintenance during the *iddut* is to be distinguished from any past maintenance that may be due to her, which seems to fall as a right depending on the marriage. *Inayah*, vol. ii. p. 230.

[3] The word in the original is *mookhalaut*, which signifies mutual action.

exchange for the *khoolâ*, according to Aboo Huneefa, and has no claim for any portion of the dower. If, on the other hand, she has not been enjoyed, yet has obtained possession of the dower, the husband can take from her the exchange for the *khoolâ*; but, according to the same authority, he has no claim against her for half the dower, on the ground of the repudiation being before consummation; and if she has not obtained possession of the dower, the husband can still, according to his opinion, take from her the exchange for the *khoolâ*, while she has no claim against him for half the dower.

When the word *moobarât* is employed.

When a husband has released[1] his wife for known property equal to the dower, the answer (or result) is the same according to Aboo Huneefa and Aboo Yoosuf, as it is in the case of *khoolâ* according to Aboo Huneefa alone.

When the exchange is for the dower itself.

When a *khoolâ* has been entered into for the dower, then, if the woman has been enjoyed and has obtained possession of it, the husband may reclaim it from her; and if she has not obtained possession of it his liability for the whole dower falls to the ground, and neither party has any claim against the other for anything. If, again, she has not been enjoyed, yet has obtained possession of the dower, supposing it to be a thousand *dirhems*, the husband may revert to her for the whole thousand, on a favourable construction; and if she has not obtained possession of the dower, her right to the whole falls to the ground, on a favourable construction, and he has no further claim against her.

When the exchange is a part of the dower.

When a *khoolâ* has been entered into for a tenth of the dower (still supposing it to be a thousand *dirhems*), then, if the woman has been enjoyed and has got possession of the dower, the husband may sue her for a hundred *dirhems*, but must relinquish the remainder, according to all their opinions; and if she has not obtained possession of it, her right to the whole falls to the ground: while, if she has not been enjoyed, yet has obtained possession of the dower,

[1] The word in the original is an inflection of *moobarât*.

the husband may have recourse to her for a tenth of half the dower, that is, for fifty *dirhems*, but leave her in possession of the remainder; and if she has not obtained possession of the dower, he is released from the whole, according to Aboo Huneefa.

When it is for the dower or a part of it, and the word *moobarát* is employed.

What has been said applies to cases where a *khoolâ* has been entered into for the whole, or a part, of the dower; but when they have entered into a *moobarát* for the whole, or a part, of the dower, then the answer would be the same according to both Aboo Huneefa and Aboo Yoosuf, as according to the former alone in the case of *khoolâ*.

When it is for what may be due, and nothing is due.

When a man makes a *khoolâ* for what is due to his wife of her dower, and it appears that nothing is due to her by him, she must restore the dower to him. As if he had said, "I give thee a *khoolâ* for this slave of thine," or "this piece of furniture of thine that is in my hands," and it should appear that there was nothing of hers in his hands: whereupon the *khoolâ* would be for the dower, and it would fall if due by the husband, and must be restored if taken possession of by her. But if he should give or enter into a *khoolâ* with her, or give her one *tulák* for the dower that is due to her, well knowing that no dower is due to her by him, and she should accept, one gratuitous repudiation would take effect, which would be irrevocable in the case of the *khoolâ*, and revocable in that of the *tulák*.

When for the keep of a child.

When a *khoolâ* has been entered into, any addition made to the exchange is void. If a woman should enter into a *khoolâ* on the terms of keeping a child till puberty, the *khoolâ* is valid if the child be a female, but not so if the child be a son; for a son ought to be trained to the manners and behaviour of men, and is more likely, if left with his mother beyond the proper age, to be trained to those of women, which would be injurious to him. If the mother should marry, the father may take back the child from her, and though they should come to an agreement on the subject, he cannot leave the child with her, for this is a right of the child. And when it is said that a *khoolâ* would be

lawful on the terms of keeping a child, it is to be understood that the time for which the child is to be kept is specified, for otherwise it would not be valid. A man enters into a *khoolâ* with his wife, and there being an infant child of the marriage, it is agreed that the child shall remain with the father for two years—the *khoolâ* is valid, but the condition void, for the child being an infant has a right to be with its mother, and the right cannot be cancelled by its parents. A woman takes a *khoolâ* from her husband on the condition that she is to give her dower to her child, or to such an one who is a stranger: the *khoolâ*, according to Moohummud, is lawful, but the dower belongs to her husband, and there is nothing for the child or the stranger.

Miscellaneous cases where the word *khoolâ* is used.

If a man should say, "Give thyself a *khoolâ*," and she should say, "I have given myself a *khoolâ*[1] from thee," and the husband should allow it, it would be lawful without any property; but the second Imam has said that when the man says to her, "Give thyself a *khoolâ*," and she says, "I have given myself a *khoolâ*," it is not without property unless he intended it to be so;[2] and if he were to say to a third party, "Give my wife a *khoolâ*," he would not have the power to do so without property. If the husband should say to the wife, "Give thyself a *khoolâ*," and she were to say, "I have repudiated myself," she would be liable for some property unless he intended that it should be without property.

When it is used on one side and *tulâk* on the other.

A woman says to her husband, "Give me a *khoolâ* for a thousand *dirhems*," and he says, "Thou art repudiated:" opinions differ, some saying that the words of the husband are an answer to the request, and that the *khoolâ* is completed, while others maintain that repudiation takes effect, and that there is no *khoolâ*. The approved view, however, is to construe his words as an answer; yet if he should

[1] The expressions in the original are, as if it could be said in English, "*Khoolâ* thyself," and "I have *khoolâ'd* myself."

[2] The question seems to be, whether it is a *khoolâ*, or only a repudiation by virtue of the word as one of the *kinayât*, or ambiguous expressions, which require intention. See *ante*, p. 228.

afterwards say, "I did not intend them as an answer," his word would be preferred, and repudiation would take effect without anything, that is, gratuitously. And in like manner, if a woman should say to her husband, "I have taken a *khoolâ* from thee," and he should say to her, "I have repudiated thee," some say that this would be an answer, and the *khoolâ* completed between them; while others insist that one revocable repudiation would take effect; and others, again, say that the husband should be asked as to his intention, and his words if intended to be an answer should be taken as such; and that a similar course should be followed in the first case, and the husband questioned as to his intention. A woman says to her husband, "Give me a *khoolâ* for so much," and he says, "I have certainly repudiated thee:" this is a commencement without any difference of opinion.[1] But when she has said, "Give me a *khoolâ*," or "I have bought myself," and he in answer to her says, "Thou art repudiated," the words are to be taken as coming instead of "I have given thee a *khoolâ;*" and the *futwa* is in conformity with this.

When the words purchase and sale are employed.

When a man has said to his wife, "Thou hast bought from me three repudiations for thy dower and maintenance during *iddut*," and she has answered, "I have bought," there is no repudiation till he say, "I have sold," unless he intended to confirm the fact, and not to make an offer. But if he should say, "Buy of me three repudiations for thy dower and the maintenance of thy *iddut*," and she should say, "I have bought," there would be a complete *khoolâ* between them. And if *he* were to say, "I have sold thyself to thee," and *she*, "I have bought," there would be an irrevocable repudiation. A man has said to his wife, "I have sold to thee thy business for a thousand *dirhems*," and she has said at the meeting, "I have chosen myself;" repudiation takes effect at the thousand. By-standers[2] say to a woman, "Hast thou bought thyself with one repudiation for all the rights that women have

[1] That is, it is not to be taken as an answer to the previous request for *khoolâ*.

[2] Rather by-*sitters*.

against men, of dower and maintenance during *iddut?*" and she answers, "I have bought;" whereupon they say to the man, "Hast thou sold?" and he says, "Yes:" the *khoolâ* is valid, and the husband freed; though it has not been said to the woman, "Hast thou bought thyself *from him?*" for the purchase of herself could only be from her husband.

Section Second.

Of what may lawfully be the Exchange in Khoolâ.

What is lawful.

What is lawful to be dower is lawful to be the exchange in *khoolâ*.

When the exchange is not lawful, there is no liability on the wife.

When a *khoolâ* has been entered into for wine, pork, carrion, or blood, and the husband has accepted the terms, a separation is established between the parties, but none of the things specified is obligatory on the wife; nor has she to restore any part of the dower.[1] When the *khoolâ* is for a slave of the husband's, or a husband repudiates his wife for a slave of his own, nothing is due by her, but it is necessary that she should accept in order to give effect to the repudiation; and in every case where there is no liability for property, and the transaction is effected by the word *khoolâ*, or "sale," the repudiation is irrevocable; but where it is effected by the word *tulák*, or repudiation, it is revocable, if after consummation; in the same way as if a person should repudiate his wife for wine, or for a release from any other debt than dower which he may owe her, or for the postponement of such a debt, when the release would be valid, and the postponement so also, if for a definite time; but the repudiation would be revocable.[2]

Effect of there being no liability.

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[1] None of the things specified could be the subject of dower, and there is no *khoolâ*; but still a separation is established by virtue of the term as one of the *kinayát* or ambiguous expressions by which repudiation is effected. *Inayah*, vol. i. p. 223.

[2] In none of the cases mentioned is the exchange property, otherwise the repudiation would be irrevocable. See *post*, p. 311.

A man says to his wife, "I have given thee a *khoolâ*,"[1] and she answers, "I have accepted:" no part of the dower drops, but an irrevocable repudiation takes place if such be his intention; and there is no necessity for acceptance; so that if the husband really intended repudiation it would take effect irrevocably, whether she accept it or not. But if he should say that he did not intend it, there would be no repudiation. When he has said, "I have given thee a reciprocal *khoolâ*,"[2] without the mention of anything as an exchange, it is correct to say that each of the parties is released from his fellow, and if no part of the dower be due by the husband, the wife must restore what she may have previously received of it, for property is implied in the word *khoolâ*.

Difference between a *khoolâ* expressed simply and in a reciprocal form.

When a *khoolâ* is made for something to be fixed by him or her, or by a stranger, it is lawful, as in the case of dower, with this difference, that there the standard is the proper dower, while here it is the dower he may have given her. If, then, it were to be fixed by the husband, and he should specify that amount or less, it would be valid; but if he were to specify more it would not be so unless assented to by the wife; and, in like manner, if it were to be fixed by her, and she should specify that amount or more, it would be lawful; but if less, the abatement would not be established unless he were content. In like manner, when the amount is to be fixed by a stranger, and he specifies more or less than the amount given by the husband, thereupon abatement is not established, unless assented to by the wife or husband, as the case may be.

Khoolâ for exchange to be fixed by one of the parties, or a stranger.

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[1] Arab, *khuláto ki*. The verb being of the first conjugation, and signifying action only on one side, mere acceptance without an exchange is not sufficient to make a *khoolâ*.

[2] Arab, *khálâto ki*. The verb is here an increased conjugation, and of a form that signifies reciprocal action, implying that what is done by the one is done by the other. It is not necessary, however, that the wife should repeat the same *formula*; for if she should say, "I have accepted," that would be sufficient to complete the *khoolâ*.—*Door ool Mookhtar*, p. 259.

Section Third.

Of Repudiation for Property.[1]

A repudiation for property is irrevocable.

When a husband has repudiated his wife for property, and she has accepted, an irrevocable repudiation takes effect and she is liable for the property. When he has repudiated her before consummation for a thousand, and three thousand are due by him to her for dower, one thousand and five hundred drop by reason of the repudiation being before consummation; and the remainder being a debt against him, one thousand of it is set off against her liability, and she is entitled to revert to him for five hundred. When he has made the dower into three parts, and repudiated her once for a third of the dower, and then a second and a third time in like manner, three repudiations take effect, but only one-third of the dower drops, the husband being liable for the remainder.

The exchange is divisible when three repudiations are asked for, and only one given.

If a woman should say, "Repudiate me three times *for* a thousand," and he should give her one repudiation, she would be liable for a third of the thousand;[2] but if she were to say, "Repudiate me three times *on* a thousand," and he should repudiate her once, she would not be liable for anything, according to Aboo Huneefa,[3] but the husband would have power to revoke. If, on the other hand, the husband should say, "Repudiate thyself thrice for a thousand," or "on a thousand," and she should give herself one

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[1] Arab, *mal*, defined to be "that which can be taken possession of, and secured" (*Kifayah*, vol. iii. p. 103), and therefore something tangible or corporeal.

[2] Because in contracts of exchange not only the whole but the parts of the things exchanged are held to be opposed to each other; the case is therefore the same as if she asked each of the three repudiations for a third of the thousand (*Hidayah*, vol. ii. p. 284).

[3] While the disciples thought that the words *for* and *on* were substantially the same in contracts of exchange, Aboo Huneefa was of opinion that *on* (*ula*) is properly a conditional particle, and that the case is the same as if she had said, "If you repudiate me three times you shall have the thousand" (*Kifayah*, vol. ii. p. 285).

repudiation, nothing would take effect. A woman says to her husband, "Repudiate me three times for a thousand," and he having already in fact repudiated her twice gives her one repudiation, she is liable for the thousand. And if he should say to her, "Thou art repudiated *on* a thousand," and she should accept, she would be repudiated and liable for the thousand; this being like his saying, "Thou art repudiated for a thousand;" and acceptance is required in both cases. A man has said to a strange woman, "Thou art repudiated on a thousand if I marry thee," and she accepts, after which he marries her, but no regard is paid to the acceptance unless it take place after marriage.

Also when repudiation is asked for by two women in exchange for one sum.

When a man has two wives and they both ask him to repudiate them both *on* a thousand *dirhems*, or *for* a thousand *dirhems*, and he repudiates one of them, she becomes liable for her share of the thousand, and if he should repudiate the other she would also be liable for her share, if the repudiation took place at the meeting. But if they separate before he has repudiated one of them, the declaration of both is cancelled by the separation, and if he should repudiate them after that, the repudiation would be without any exchange. A man having two wives says, "One of you two is repudiated for a thousand *dirhems*, and the other for five hundred," and both accept, they are both repudiated, and each liable for five hundred, what is beyond that being in doubt between them; but if he should say, "and the other for a hundred *deenars*," neither would be liable for anything, because there would be doubts as to each.

When the exchange is not property, the repudiation is revocable.

When a man repudiates his wife on condition that she shall release him from his bail for the person of such an one, the repudiation is revocable; but if it were on condition of her releasing him from the thousand for which he is bail to her for such an one, the repudiation would be irrevocable.[1] "Repudiate me" (she says) "on condition of my postponing the payment of what you owe me," and

[1] In the first case the consideration would not be property.

he does repudiate her: if there be a fixed term for the postponement it is valid, but otherwise not, and the repudiation is revocable in both cases.

Delivery of the exchange in *khoolâ* may be postponed.

A postponement of the exchange for a *khoolâ* is valid, though the term should be unknown, if it be capable of being fixed, as for instance, the time of reaping, or treading out the grain; but if the uncertainty be very great, as the blowing of the wind, for instance, the postponement is not valid and the property is due immediately. A *khoolâ* may be lawfully made on the crop of the woman's land, or the riding of her cattle, or her own service in any way that would not require her being in retirement with him, or on the service of a stranger.[1]

How *khoolâ* is regarded on the part of the husband;

Khoolâ is regarded on the part of a husband as a suspension of repudiation on acceptance by the wife; so that his retractation of it is not valid, nor is it cancelled by his rising from the meeting; while it is valid though she were absent, insomuch that when she receives the intelligence of it she has an option at the meeting. The suspension of it on a condition and with reference to a future time is also valid; as when a person says, "When to-morrow comes," or "when such an one arrives, I have *khoolâ'd* you for a thousand," she has to accept after the coming of the morrow, or the arrival of the person. On the part of the wife it is to be regarded as a transfer for an exchange as in sale, so that she may retract before acceptance; and it is cancelled by her rising from the meeting, and neither its suspension on a condition nor a referring of it to a future time is lawful. There may, however, be a condition of option to her though not to him. A man has said to his wife, "Thou art repudiated on a thousand on condition that I am to have an option for three days," and she accepts: the option is void, and the repudiation takes effect; but if he were to say, "Thou art repudiated on a thousand on condition that thou art to have an option for three days," and she should say, "I

and on that of the wife.

[1] These being profits are sufficient as the subject of dower. See *ante*, p. 93.

have accepted," and were to refuse the repudiation within three days, it would be void; while if she were to adopt it within the time it would take effect, and she become liable for the thousand to her husband. If they should enter into a *khoolâ*, both being walking at the time, and the words of each are consecutive, the *khoolâ* is valid, but if they are not consecutive it is not; neither does repudiation take effect.

A repudiation for property like a *khoolâ* in its effects.

A repudiation on property comes into the stead of a *khoolâ* as to its effects; except that in the latter when the consideration is void there remains an irrevocable repudiation, while in the former when the consideration is void the repudiation is revocable, and when the consideration is incumbent on the wife the repudiation is irrevocable.[1]

Disputes between the married parties, and how the burden of proof is regulated.

A woman says to her husband, "I asked thee thrice for a thousand, and thou gavest me one," and the husband says, "Thou askedst of me one:" the word is with her (that is, hers is to be preferred), and the burden of proof upon him. And when a man says to his wife, "I repudiated thee yesterday for a thousand *dirhems*, but thou didst not accept," the word is his with his oath. If he should say, "I sold thee yesterday thy repudiation for a thousand, and thou didst not accept," and she should say, "I did accept," the word is with her (or hers is preferred), because an acknowledgment of sale is an acknowledgment of acceptance, that being a condition of sale. The difference between the two last cases is, that a repudiation for property is a *yumeen* or oath on the part of the husband, and acceptance only the condition on which it is made to depend. Acknowledgment of the former, therefore, is not an acknowledgment of the latter, and when married parties differ as to the occurrence of a condition, the word of the husband is preferred because he is the denier. But in the case of sale, as the contract cannot be effected without

[1] There is another important exception, that the repudiation for property is not what is termed *mooshkit lil hookook*, or a *feller* of rights depending on marriage. See *ante*, p. 304.

acceptance, acknowledgment of sale is necessarily an acknowledgment of acceptance, and when the husband, after acknowledging the former, denies the latter, his denial is a contradiction in terms, and not entitled to any credit.[1] In like manner if one should say to his slave, "I sold yourself to you for a thousand, but you did not accept," and the slave should say, "I did accept," the word of the slave would be preferred; while if the master should say, "I emancipated you yesterday for a thousand, but you did not accept," and the slave should say, "I did accept," the word of the emancipator would be preferred; emancipation and repudiation being in this respect alike.[2] If a woman should say, "I asked thee to repudiate me for a hundred *dirhems*," and the husband should answer, "Nay, but for a thousand," the word is with her; and if both should adduce proof, the proof of the husband would be preferred. And in like manner, if she should say, "Thou madest a *khoolâ* with me for nothing," and the husband should say, "Nay, but it was for a thousand," the word would be with her; and if both should adduce proof hers would be preferred. [3]And if he should claim a *khoolâ* on property (that is, sue for property on the ground of a *khoolâ*) and she deny it, repudiation would take effect by reason of his acknowledgment,[4] and the claim for property would remain as it was, the word being with her, as she is the denier. But not so in the opposite case; and if he should deny a *khoolâ*, or claim that there was a condition, or exception (*istisna*), or say that "What I took possession of was a debt due to me," or they should differ as to the *khoolâ* having been on compulsion or willingly, the word of the

[1] *Hidayah* and *Kifayah*, vol. ii. pp. 289 and 290.

[2] *Kifayah*, vol. ii. p. 290.

[3] From here to the end of the paragraph is from the *Door ool Mookhtar*, p. 258.

[4] Involved in the claim of *khoolâ*, which, as already observed, is on the part of the husband a suspension of repudiation on acceptance by the wife, and therefore implies, when a claim is founded upon it, that the transaction has been completed by acceptance, as in the case of sale.

husband would be preferred. A woman has sued for dower and maintenance during her *iddut*, and that her husband repudiated her, and he has pleaded a *khoolâ*, and there is no proof, the word is hers as to the dwoer, and his as to the maintenance.[1]

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[1] It is hers as to the dower, because, irrespective of the question of repudiation, or *khoolâ*, a wife is *primâ facie* entitled to payment of her dower by the mere contract of marriage; and it is his as to the maintenance, because she has no right to maintenance during her *iddut*, except in a case of repudiation. His claim of *khoolâ* here is, therefore, not an acknowledgment of repudiation, or else the word would be hers with respect to the maintenance as well as to the dower. In the case of Moonshee Buzl ool Ruheem, appellant, and Mt. Luteefut oon Nessa, respondent (Sevestre's *Reports of Indian Cases affirmed on Appeal by the Privy Council*, vol. vii. p. 251), the following question was put to the Cazee, or Moohummudan law officer of the court of S. D. A., Calcutta:—"Does the mere fact of the husband pleading a *khoolâ nama* have the effect of proving a divorce, such as to entitle the wife to claim the immediate payment of the dower, just as if the alleged divorce had been proved?" And the Cazee is reported to have answered—"Under the circumstances mentioned in the question put by the court, the fact of the husband pleading or asserting a *khoolâ* (which means a divorce in lieu of property) will have the effect of a divorce, and will entitle the wife to obtain immediate payment of her dower, just as if the divorce had been proved." The Cazee quotes, among other authorities, the passage now under consideration, but he stops at the word "dower," and omits the important words, "and his as to the maintenance," which appear to me to contain the true clue to its meaning. Moreover, it appears that in the other authorities which he has quoted (the originals of which are given in Mr. Sevestre's excellent report, and which are all cases of claims, and not of pleas), the Cazee has added to the word "claims," wherever it occurs, the explanation, "or pleads," and that in one of them he has added the following words, which appear in the report within parentheses, and on which the reporter remarks in a note (p. 257) that they are the Cazee's own explanation of the law: "it matters not whether the husband originally be a plaintiff or defendant." I have no doubt that the Cazee delivered his opinion conscientiously, but I think he was mistaken, though the judgment of the court was founded on it in preference to that of Moulvie Ahmud (Mufti or law officer of the superior court), whose *futwa* expressly restricted the effect of the husband's allegation of the *khoolâ* to a case where the husband is plaintiff in the suit. (Appendix to Pro-

When a wife has made a *khoolâ* with her husband on property, and has subsequently adduced proof against him that he had repudiated her three times, or irrevocably, before the *khoolâ*, the proof is to be received and the exchange restored; and here the inconsistency does not prevent the acceptance of her proof. When the parties differ as to the genus, or species, or quantity or quality of the subject of the *khoolâ*, the word is with the wife, and the proof on the husband. So, also, if she should say, "I made the *khoolâ* for nothing," the word is hers, and the proof her husband's.

Agency for *khoolâ*.

When a woman appoints a person her agent for *khoolâ*, and then revokes the appointment, revocation is without effect if unknown to the agent; but if she should send a messenger to her husband for the same purpose, and then recall him before the message is delivered, the revocation would be good, whether known to the messenger or not. A man says to two persons, "Make a *khoolâ* with my wife without anything," and one of them does so: repudiation, however, does not take effect; but if two men were desired to make a *khoolâ* for a thousand, and one of them should say, "I have made the *khoolâ*," and the other, "I have made the *khoolâ* for a thousand," it would be lawful. If a man should appoint another his agent to make a *khoolâ* for so much, and the agent should say, "I have made a *khoola* of such an one from her husband on so much," it would be lawful, though the woman were not present; and although it has been said that one person cannot act as an agent for both parties in a *khoolâ*, yet this is deemed a

One person may represent both parties.

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ceedings in Appeal, p. 51.) The learned Mufti seems also to have perceived, what was overlooked by the Cazee, that the defendant did not in reality plead a *khoolâ*, which would of necessity have implied something done by himself, but merely stated in his answer that "his wife gave him a *khoolâ*," and adduced in support of his allegation a writing which, though he called it a *khoolâ nama*, was not so in reality, as it professed to be only on her part, and was signed only by herself; whereas a proper *khoolâ nama* is not only bilateral, and the husband a necessary party, but he is the principal party to it.

precedent that he can; which is more agreeable to the Rewayut Asul, and is correct.

A mad or insane person may be agent in *khoolâ*.

A youth, a madman, or a slave may lawfully be appointed by either of the parties to give or receive the *khoolâ* in his or her stead.

A *khoolâ* made by a father for his adult daughter;

When a man has made a *khoolâ* for his grown-up daughter on her dower and with her permission, it is lawful. When it is done without her consent, or subsequent sanction, and the father has not given security for the dower, the transaction is not lawful, and the *khoolâ* is without effect; but if he has given security repudiation takes effect; except, however, insomuch that it is not operative till the news reach her and she approves; and if she does not approve of it she may have recourse to the husband for her dower, and he can sue the father on his security.

for his infant daughter;

When a man has made a *khoolâ* for his infant daughter on her own property, it is not lawful as against her, and her dower does not drop, nor does the husband get any right to what belongs to her; but does the repudiation take effect? There are two reports, and, according to the most authentic, it does. If a husband should give a *khoolâ* to his infant wife on a thousand, and on condition that her father is to be security for the thousand, the *khoolâ* takes effect, and the father is liable. When the *khoolâ* is made, without any security, for the infant's dower, the matter must stand over for her sanction, and if sanctioned she is repudiated, but her dower does not drop. When the *khoolâ* is between a husband and the mother of an infant, and the mother refers the exchange to her own property, or becomes security for it, the *khoolâ* is complete, in the same way as if it were with a stranger; and though she did neither it would be so, according to the best report.

for his infant son.

When a father has made a *khoolâ* for his infant son it is not valid, without any waiting for the son's sanction.

Khoolâ is lawful under compulsion.

Khoolâ is lawful when given by a drunken person, or one who is under compulsion, but the *khoolâ* of a youth under puberty, or an insane person, is void.

Khoolâ made by a woman in her last illness.

When a woman has entered into a *khoolâ* in sickness for the dower due to her by her husband, and then dies in her *iddut*, he is entitled to the less of his share in her inheritance, and the dower, if it came out of the third of her property; and if she have no other property than the dower, he is entitled to whichever may be the less of his share in the inheritance and the third; but if she does not die till after the expiration of the *iddut*, he is entitled to the dower from a third of her property.

CHAPTER IX.

OF ZIHAR.

ZIHAR is derived from *zuhr*, the back, and, as rendered in the dictionaries, is the saying by a man to his wife, "Thou art to me as the back of my mother." In legal parlance it is a man's comparing, or likening his wife, or any undivided part of her, or any member which implies the whole person, to a part that it is not lawful for him to see of a woman that is perpetually prohibited to him, though only by fosterage or affinity. And it makes no difference whether the wife be free or a slave, or a *moodubburah*, *mookatibah*, or *oom-i-wulud*, or a *kitabeeah*. But it is a necessary condition of the woman that she should be a wife, and of the man that he should be one capable of making expiation, for *zihar* by a *zimmee*, a boy, or an insane person is not valid. If a man should marry a woman without her authority, then *zihar*[1] her, and she should subsequently sanction the marriage, the *zihar* would be void;[2] and though a slave, or a *moodubbur*, or *mookatib*, should *zihar* his wife, the *zihar* would be valid; yet *zihar* to a female slave, whether enjoyed or not, is not valid. So, also, if the likening were to a woman prohibited to the husband only by a temporary illegality, as a thrice repudiated wife, the *zihar* would not be valid. Definition.

[1] Literally, "back her," though in a different sense from the expression as used in English. To avoid periphrasis and ambiguity, I use the original word, both as a verb and a substantive, as if it were English.

[2] Because, till the sanction, she would be unlawful to him, and the pillar of *zihar* is the comparison of one that is lawful to one that is not. *Inayah*, vol. ii. p. 280.

How it is constituted.

The pillar of *zihar* is a husband's saying, "Thou art to me like the back of my mother," or expressions of the like effect. When a man has said, "Thy head is to me," or "thy face," or "thy neck," or "thy nakedness," he becomes a *moozahir*.[1] So, also, when he has said, "Thy body is to me like the back of my mother," or "the fourth," or "half of thee," or any other undivided portion. But if the part mentioned be one that does not imply the whole person, such as the hand, or foot, *zihar* is not established. If he should say, "Thy back is to me like the back of my mother," or "her belly," or "her nakedness," or "her thigh," it would not be a *zihar*. But if the person herself is likened to any member of his mother that it is unlawful for him to look on, it is the same as likening to her back. So, also, if the likening be to any other woman among those who are perpetually prohibited to him, as his sister or aunt, or foster-mother, or foster-sister. When the likening is to what may be lawfully seen, as the hair, the face, the head, the hand, the foot, it is not a *zihar*. If he should say, "Thou art to me like the back of thy mother," he would be a *moozahir*, whether she were enjoyed or not; but if for mother, "thy daughter" were substituted, it would only be in the case of the wife having been enjoyed that he would be so. If the likening were to the wife of his father, or of his son, it would be a *zihar*, whether the father or son had consummated with the wife or not. So, also, if the likening were to a woman with whom the father or son had illicit intercourse, according to Aboo Yoosuf, and this is correct. And if the likening were to the mother or daughter of a woman with whom the husband had illicit intercourse, it would be a *zihar*. But if he had only kissed a woman, or seen her nakedness with desire, and should then liken his wife to her daughter, he would not be a *moozahir*.

Effect of *zihar*.

The effect of *zihar* is to illegalize matrimonial intercourse, or any solicitation to it, till expiation has been

[1] Active participle of a conjugation that signifies reciprocal action. It means the "comparer," or husband who makes *zihar*.

made. And if intercourse should take place before expiation, pardon must be asked of God; but no other penalty is incurred than the first expiation, and the husband should refrain from her till expiation. Though, after the *zihar*, he were to repudiate her irrevocably, and then marry her, sexual intercourse or any other enjoyment with her would be still unlawful till expiation. So, also, if the wife were a slave and he should *zihar* her, and then purchase her, so as to cancel the marriage by virtue of her becoming his property; or, if being free, she should apostatize from *Islam*, join herself to the *dar ool hurb* or a foreign country, be captured and then purchased by her husband; or if after *zihar*, he should himself apostatize from the faith (according to Aboo Huneefa), or if he should repudiate her three times, and she were then married to another husband, and should subsequently return to the first; in none of these cases would sexual intercourse be lawful till expiation. And if they should apostatize together and then return to the faith, they would still be under the *zihar*, according to Aboo Huneefa.

Distinction between a perpetual and a temporary *zihar*.

In all that has been said of the effect of the *zihar*, it is implied that the *zihar* is absolute and perpetual. But when it is limited, as if it were for a known time, as a day or month, or year, then, if he approach her within the time, expiation is obligatory on him, but if he do not approach her till the expiration of the time, expiation drops, and the *zihar* itself is cancelled.

Wife may insist on a restitution of conjugal rights.

Remedy in case of refusal.

A wife is entitled to call on her *moozahir* husband to return to his matrimonial duties, but she may also prevent him from any enjoyment with her till he has made expiation. And if a *moozahir* should not make expiation, and the matter is brought before the judge, he is to imprison him till he does so or repudiates his wife. When he has said, "I have expiated," he is to be believed, unless he is known to be addicted to lying.

Zihar takes effect without intention.

If a man should say to his wife, "Thou art to me like the back of my mother," he is a *moozahir*, whether he intend *zihar* or not, or had no particular intention; and though he should actually intend repudiation, there would

still be nothing but *zihar*. So also if he were to say, "I am a *moozahir* to thee," he would be a *moozahir*, whether he intended it or not, and whatever he might intend, still it would be nothing but *zihar*. And, in like manner, if his words were, "Thou art to me like the belly," or "thigh," or "nakedness of my mother," it would in all respects be the same as if he had said, "like the back of my mother." If he were to say, "Thou art *from* me as the back of my mother," or "to me," or "*with* me," or "*at* me," he would be a *moozahir*. But if he should say, "Thou art my mother," though it is abominable to say it, he is not a *moozahir*; and similar to that would be his saying, "O my daughter," or "O my sister," and the like. And if he were to say to her, "Thou art like my mother," or "as my mother," intending repudiation, it would be irrevocable, and if he intended by it *zihar*, it would be according to his intention.[1] Even though he should say, "If I have intercourse with you I have it with my mother," nothing would be incumbent on him. When he has said, "Thou art unlawful to me as my mother," intending repudiation, or *eela*, or *zihar*, it is as he intended; and if he had no intention it is *zihar*, according to Moohummud, whose *dictum* is said to be correct. A woman cannot be *moozahir* to her husband, according to Moohummud, and the *futwa* is with his opinion.

Condition of *zihar* as to the husband.

It is a condition of *zihar* that the husband be a person capable of making expiation, hence the *zihar* of a *zimmee*, a boy, or an insane person is not valid, as already mentioned. It is also a condition that he should not be lunatic, astonished, pleuritic, or in a faint or asleep; and *zihar* by any one in these states is not valid. But it is not necessary that he be in earnest; so that *zihar* by one in jest is valid: nor that he be acting willingly or with design, so that the *zihar* of one under compulsion or a mistake is

[1] The expression is ambiguous, and he should be asked for an explanation. If he were to say it was to do her honour, the expression would also be taken according to his intention. *Hidayah*, vol. ii. p. 296.

valid. Nor is it necessary that *zihar* be free from a stipulation of option, for it is valid with such a stipulation. *Zihar* by a drunken man is valid; so also by a dumb man when made in writing or by intelligible signs and with intention, as repudiation is valid in like circumstances. The husband of a *mujooseah* having embraced the faith, a *zihar* by him, before *Islam* has been submitted to her, is valid, for he has then become one capable of making expiation.

As to the woman.

Zihar is valid to an infant wife, or one under physical obstruction, or in her courses, or under purification after childbirth, or one who is insane or unenjoyed. If a man should give his wife a revocable repudiation, and then a *zihar* while she is in her *iddut*, the *zihar* is valid. But not so if given to a wife thrice or irrevocably repudiated, or to one under *khoolâ*, even though the *iddut* were unexpired. And if a *moozahir* should repudiate his wife continuously with the *zihar*, expiation would not be required, according to general agreement.

Zihar with a reference to time.

When a man has said to his wife, "Thou art to me like the back of my mother to-morrow or after to-morrow," it is but one *zihar;* but if he were to say, "Thou art to me like the back of my mother to-morrow, and when after to-morrow has come," there would be two *zihars*, and if he should make expiation to-day, it would not suffice for the *zihar* which would take effect after to-morrow. If he were to say, "Thou art to me like the back of my mother every day," there would be only one *zihar*, which would be cancelled by one repudiation. But if he were to say, "Thou art to me like the back of my mother *in* every day," the *zihar* would be renewed each day, and when one day had passed, the *zihar* of that day would be void, but he would become *moozahir* by a new *zihar* for the next day; he might, however, have intercourse with her in the night, and if he should make expiation in the day, the *zihar* of that day would be void, but it would return on the morrow.

By association with another.

If a man should *zihar* his wife, and then associate another with her in the *zihar*, or say, "Thou art to me like this,"

intending *zihar*, it would be valid. And if he should say to a third, "I have associated thee in the *zihar* of those two," he would be a *moozahir* to the third for two *zihars*. If he should say to several wives at once, "Ye are to me like the back of my mother," he would be *moozahir* to them all, and liable in an expiation for each.

When suspended on a condition.

A *zihar* may be suspended or made dependent on a condition; as if one were to say, "If thou enterest the house, or speakest to such an one, thou art to me like the back of my mother." And when one has said to a stranger, "If I marry thee, then thou art to me like the back of my mother," and subsequently marries her, he is a *moozahir*. But if he should say to her, "Thou art to me like the back of my mother if thou enterest the house," it would not be valid; so that if he were subsequently to marry her, and she should enter the house, he would not be a *moozahir*, by general agreement. When a man has suspended *zihar* on a condition, and then irrevocably repudiated his wife before the occurrence of the condition, but the condition subsequently occurs while she is still in her *iddut*, the *zihar* does not descend. When a man has said, "Thou art to me like the back of my mother, if God will," it is not a *zihar;* but if the words were, "if such an one will," or "if thou wilt," it then depends on the will being expressed at the meeting. And when a man has said, "If I approach thee, then thou art to me as the back of my mother," he is a *moolee;* and if he abstain from her for four months, she is irrevocably repudiated by the *eela*, but if he approach her within the four months he is liable to expiation as for *zihar;* while, if he should marry her again after she has become repudiated by the *eela*, he would be a *moozahir*.

Section.

Of Expiation.

When expiation is obligatory.

It is obligatory on a *moozahir* to make an expiation if he intends to have intercourse with his wife after a *zihar;* but if he is content that she should remain unlawful to him, and has no intention of returning to matrimonial

intercourse with her, he is not liable to expiation. When he has once resolved on renewing such intercourse, and expiation has in consequence become incumbent on him, he may be compelled to make it; but if he should again determine to refrain, the necessity for expiation would drop; and so, also, if either of the parties should die after the resolution to renew.

How it is to be made —1st, by emancipating a slave.

The expiation for *zihar* is the emancipation of an absolute slave, of whom the husband is the owner, and who is in possession of all his useful capacities, without any exchange, and with the intention of making expiation. It makes no difference whether the slave be Mooslim or infidel, male or female, an infant or adult. If a man should emancipate half of his slave, and then the other half before having intercourse with his wife, the expiation would be lawful; but not so, according to Aboo Huneefa, if the second half were not emancipated till after the intercourse. When a slave has been emancipated without any intention of expiation, but intention is superadded after the emancipation has taken place, the expiation is not lawful. A deaf slave is lawful for expiation if he can hear at all, but not so if he is totally deaf. And a dumb slave is not lawful, for want of one useful quality—which is speech. Where there is only a partial loss of the useful quality, it does not prevent the legality of the expiation; so that a a slave with one eye is lawful. So, also, a slave that is maimed of one hand and one leg, if they are on opposite sides of the body; but if they are both on the same side, he is not lawful. And palsy in both hands is a disqualification, being the entire loss of one useful quality. A *mujboob* is lawful; but a slave that is blind, or has lost both his hands, or both his feet, a *moodubbur* and an *oom i wulud* (who are in a measure free already), and a *mookatib* who has paid a part of his ransom—are all unfit objects for expiation. If none of the ransom is paid, the emancipation of a *mookatib* is sufficient, and he becomes entirely released from the ransom. A eunuch, and a slave who has lost his ears, or his nose, or his lips, if still able to eat, are lawful; but not so one who has lost the thumbs of

both hands, or three fingers on each hand. Females with physical obstructions to intercourse, and males who are impotent, are lawful; but not so the insane, nor one that is sick and *in extremis;* nor a male apostate, according to some, though he is lawful according to others; but a female apostate is lawful, according to all. The emancipation of a fugitive slave is also good, if he is known to be alive, but not of one who is absent without any information of where he is. A child at the breast is sufficient, but not a *fœtus* in the womb; and neither does the emancipation of a *hurbee* slave who is in the enemy's country expiate, though the case is otherwise with one who is within the mooslim territory. If a relative within the prohibited degrees comes into one's possession without his own exertions, as, for instance, by inheritance, to emancipate him is not enough for expiation, but it would be sufficient if he was acquired by exertion, and if, at the time of making the exertion, the *moozahir* intended expiation. When a man has incurred two *zihars*, and has emancipated two slaves without intending to particularize one to each *zihar*, the expiation is lawful. And it would be so likewise if a double expiation were made in any other of the ways hereafter mentioned, that is, by fasting four months, or feeding one hundred and twenty poor persons.

2nd, by fasting for two months.

When a *moozahir* cannot obtain a slave to emancipate, the proper expiation is for him to fast for two consecutive months which do not include the month of Ramzan,[1] nor the day of *fitr*,[2] or of *nuhr*,[3] nor any of the days of *tushreeh*.[4] If he should have intercourse with the wife to whom he is a *moozahir* during the day, whether through forgetfulness or

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[1] When it is an appointed duty for all Mooslims to fast.

[2] The day of breaking Lent; the festival which follows the Ramzan.

[3] The day of sacrifice, the 10th of *Zool Hijjah*. This and the former are both termed the greater and lesser *eed*, and it is unlawful to fast on either, being expressly forbidden by the Prophet.—See Lane's *Egyptians*, vol. i. p. 131.

[4] Three days after the *nuhr*—and so called because the flesh of the victim slain in them is dried—or because the victim should be slain only while the sun is shining.—*Freytag*.

wilfully,[1] he must recommence the fast, according to Aboo Huneefa and Moohummud; and if it were wilfully in the day, the fast must be recommenced according to them all. When the intercourse is with another woman than the one to whom he is *moozahir*, then, if the intercourse be one which vitiates the fast, it must be recommenced, by general agreement; and if it be not one that vitiates the fast (as, for instance, if it occurred during the day through forgetfulness, or in the night, however it may be), there is no necessity for its renewal, according to general agreement. When the expiation is by fasting, and the fast is broken by reason of any cause, such as sickness or a journey, it must be recommenced. So, also, if the day of *fitr*, or of *nuhr*, or the days of *tushreeh* should intervene, the fast must be recommenced; and even though the husband should not avail himself of them, but should actually fast during these days, yet the fast must be recommenced. When he has fasted two months, by the appearance of the new moon, they are sufficient to expiate him, though each month were only twenty-nine days; but if he has not fasted by the moon, then if he should break the fast on the completion of the fifty-ninth day, still he must recommence; while, if he should fast fifteen days, and then a month by the moon (or twenty-nine days), and after that fifteen days more, they would suffice, according to the two disciples, though not so in the opinion of Aboo Huneefa. If the *moozahir* should eat during the fast of *zihar* through forgetfulness of his fast, it would do no harm. But though he should have fasted for two consecutive months, yet if he is able to emancipate a slave before sunset of the last day, he must do so, and his fasting is a mere voluntary abstinence. It

[1] The definition of fasting is "to refrain from eating, drinking, or sexual intercourse, from the dawn of day to sunset;" and when intercourse takes place during the day wilfully, there is a clear breach of the fast. Where, again, it is through forgetfulness during the day, or at night, whether wilfully or not, there is no breach of the fast. Still, the fasting must be recommenced, when it is with the woman herself; because the expiation should precede the intercourse with her. See *Hedaya*, vol. i. p. 338.

is better for him, however, to complete the fast of that day; though if he should not do so, but break the fast, he is under no obligation to complete it. Though he should be able after sunset of the last day to emancipate a slave, his fast would suffice to complete his expiation.

Ability or inability to emancipate has reference to the time of expiation, not of *zihar*.

The wealth or poverty of the *moozahir* is to be regarded, not with reference to the time of the *zihar*, but with reference to the time of expiation; so that, though he were rich at the former time, yet if he were straitened in his circumstances at the latter, fasting would be sufficient for expiation; but not so if the circumstances were inverted. When a person is possessed of a female slave which is necessary to him, still emancipation is incumbent on him. In like manner, if he should have the price of a slave, in either of the two kinds of coin (*dirhems* or *deenars*); but no regard is to be had to his dwelling, or to the clothes that may be in it, except as to the excess of what may be necessary for his own use. When a poor man has a debt owing to him which he cannot recover from his debtor, he is to be accounted unable to expiate by property, and may do so by fasting; but when he is able to recover the debt from his debtor, it is not lawful for him to make expiation by fasting; and when the debts which he owes are equal to those which may be due to him, he may also expiate by fasting after he has paid his debts.

Fasting is the only expiation lawful to a slave.

No expiation, except by fasting, is lawful to a slave, even though he be a *mookatib*, or be working out his emancipation by labour; and if his master should emancipate for him, or feed the poor by his direction, there would still be no expiation, contrary to the case of a *fakeer*, for whom another may emancipate a slave or feed the poor. A master cannot prevent his slave from keeping this fast. The fast by a slave is fixed at two consecutive months.

When one is unable to emancipate or fast, ex-

When the *moozahir* is unable to fast, he must feed sixty poor persons. In this respect the *fakeer* and *miskeen*[1] are

[1] Both words are applicable to persons in want. By the term *faheer*, is to be understood a person possessed of property, the whole of which amounts to less than a *nisab*; by *miskeen*, a person who has no property whatever. *Hedaya*, vol. i. p. 54. A *nisab* is the lowest amount assessable to *zukat*, or poor's rate.

alike. It is not lawful to give to any one out of this expiation to whom it is not lawful to give out of *zukat* (or poor's rate), with the exception only of poor *zimmees*, to whom it is lawful to give out of this expiation, according to Aboo Huneefa and Moohummud, though a poor *miskeen* should be preferred. But it is not lawful to give any of it to poor enemies, though they should be living as *moostamins* within the Mooslim territory. When the *moozahir* has directed another to feed the poor for him, and it is done, the expiation is lawful; but the person so directed has no right of recourse against him on account of the food bestowed; for it is susceptible of being a *kurz* (or *mutuum* loan), or a gift, and recourse cannot be had, by reason of the doubt. If, however, in giving the direction he had said, "On condition that you may have recourse against me," the person directed might have such recourse. The portion for each person is half a *saa*[1] of wheat, or a whole *saa* of dates or barley, or the value. So that if one *munn* of wheat be given, or two *munns* of dates or barley, it is lawful, as fulfilling the design, which is to feed and appease hunger, and that can be done by making up the complement of the one out of the other.[2] In reckoning the half *saa* of wheat, its flour and its meal are alike; and so in reckoning the full *saa* of barley, its flour and meal are alike. If, instead of the half *saa* of wheat, a half *saa* of good dates of equal value were rendered, it would not be lawful; and, in like manner, if less than half a *saa* of wheat were rendered, though equal in value to a *saa* of dates, it would not be lawful; the principle being that there can be no change of one of the things expressly enjoined for another of them, even though the substitute were of greater value. If one poor man were fed for thirty days, at half a *saa* a day, it would suffice for the purpose of this expiation; but if the whole were given to one poor person in one day, it would not be lawful, except for that day. Nor would a whole *saa* to each one of thirty persons be sufficient except

piation is to be made —3rd, by feeding sixty poor persons.

The fixed portion for each;

[1] A dry measure containing four *moodd*, one of which is equal to 1½ lb. *Freytag*;—about 8 lbs. *Hedaya*, vol. i. p. 339, note.

[2] *Hidayah* and *Kifayah*, vol. ii. p. 309.

for thirty days; and the *moozahir* would still have thirty *saas* to give to other thirty persons—that is, half a *saa* of wheat to each. If a man were to feed sixty poor persons, by giving each a whole *saa* of wheat on account of two expiations, whether for the same woman or for two women, it would not be lawful, except on account of one of the two, according to Aboo Huneefa and Aboo Yoosuf; but if he were to give half a *saa* on account of one of the expiations, and then half a *saa* on account of the other, it would be lawful according to them all. And if a man should emancipate half of a slave, and fast for a month, or feed thirty poor persons, it would not be lawful for the expiation.

or two good meals a day.

If the *moozahir* should give the poor persons their breakfast and dinner,[1] and satisfy them, it would be lawful, whether they were satisfied with little or much. But if he should give breakfast to sixty, and dinner to sixty others, it would not suffice for expiation, unless another breakfast or dinner were added to one set of sixty. The breakfast and dinner should be of bread with some relish; and when it is barley bread, or bread of any kind of millet, a relish is necessary, in order that they may eat to the satisfying of their appetites; but not so when it is wheaten bread. If there were a sucking child in the number, it would not suffice; nor if some of the parties were satiated before beginning to eat. If one poor person were fed for sixty days, two satisfying meals a day, it would be lawful. But if 120 poor persons were fed at once, the *moozahir* would have to give one of the sets another satisfying meal. If breakfast is given and the value of a dinner, or a dinner and the value of a breakfast, it is sufficient.

The feeding, if interrupted, need not be recommenced.

The feeding should be before approaching the wife, who is under *zihar;* but if she should be approached in breach of the expiation, the feeding would not require to be recommenced.

[1] The two principal meals.

CHAPTER X.

OF LIÁN.

Definition.

LIÁN,[1] according to "us," are attestations confirmed by oaths[2] on both sides, referring to a curse on the part of the man, which is a substitute for the *hudd-ool-kuzf*, or specific punishment of scandal,[3] and to wrath on the part of the woman, which is a substitute for the *hudd-ooz-zina*, or specific punishment of adultery.[4] Though a man should have slandered his wife several times, only one *lián* is incumbent on him. And all are agreed that *lián* is to be taken between spouses only once. It does not admit of forgiveness, or release, or composition: so that, if the wife should forgive her husband before the matter is brought before the judge, or should enter into a composition with him for property, the composition would not be valid, and she would be liable for restitution of the amount received in exchange, and might still demand the *lián*. Neither does it admit of agency; and if one of the parties should appoint an agent for *lián*, the appointment would not be valid; though an agency for proof is lawful, according to Aboo Huneefa and Moohummud.

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[1] The word is in a common plural form, but is also used in the singular as an irregular form for *mooláunut*, or "reciprocal cursing." —*Kifayah*, vol. ii. p. 316.

[2] The ordinary attestation by a witness in a court of justice is not upon oath.

[3] Which is eighty stripes if the slanderer be free, and forty if a slave.

[4] See *ante*, p. 1.

What occasions *lián*.

The cause for *lián* is a husband's scandalizing his wife in such a manner as would call for the infliction of *hudd*, if the parties were strangers to each other, though it induces only *lián* between married persons. Where a man has said to his wife, "O adultress!" or, "Thou hast committed adultery;" or, "I have seen thee in the act of adultery,"—*lián* is obligatory. When a man has slandered his wife for adultery, and she is a person whose slanderer is not liable to the *hudd*, *lián* does not pass between them. As, for instance, when she has been enjoyed under only a semblance of right, or has previously been notorious for a loose life, or has borne a child of unknown paternity. If he should say to her, "Thou wert joined in an unlawful joining;" or, "wert enjoyed unlawfully," there would be no *lián* and no *hudd*.[1] So, also, according to Aboo Huneefa, if the charge were of an unnatural offence.

Conditions of *lián*.

It is a condition that the parties be husband and wife, and that their marriage be a valid one, whether consummated or not; so that if he were to slander her, and then repudiate her three times, or irrevocably, there would be neither *hudd* nor *lián*.[2] In like manner, if the marriage were invalid, there is no *lián*, for he is not absolutely a husband. If a man should repudiate his wife three times, or absolutely, and then slander her, there would be no obligation to *lián*, by reason of the extinction of the marriage relation; but if he were to repudiate her revocably, and were then to slander her, the *lián* would be obligatory, unless the slander were after her death, when there would be no *lián*.[3]

Who are competent to the *lián*.

The persons who are competent to take the *lián* are

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[1] Because the charge of *zina* must be express, otherwise there is no *hudd*.—*Hidayah* and *Kifayah*, vol. ii. p. 629.

[2] No *hudd*, because at the time of the slander the marriage was subsisting, and *lián* a necessary preliminary; and no *lián*, because the marriage is at an end.

[3] There would be no *hudd* for scandal in that case.—*Hedaya*, vol. ii. p. 63.

those who are competent to be witnesses. So that it does not pass between spouses, both or one of whom has undergone the specific punishment for scandal, or is an absolute slave, or infidel, or dumb, or under puberty, or mad; but it does pass between all others except these; and must, therefore, be imposed, though both the parties be profligates, or blind, for they are persons who are competent to give testimony, on the whole:[1] and if a deaf man should slander his wife, he would be liable to the *lián*.

When the husband is incompetent, he is liable to *hudd*.

Whenever *lián* drops by reason of incompetency to bear witness, and the incompetency is on the part of the man, he is liable to the *hudd;* but if it be on the part of the woman, there is neither *hudd* nor *lián;* and though they had both previously undergone the *hudd* for scandal, he would still be liable to it.

Legal effect of *lián*.

The legal effect of *lián*, as soon as it has passed between the parties, is to render sexual intercourse between them, and all excitement to it, unlawful; but a separation is not effected by the mere *lián*. So that if the husband should repudiate his wife while in this condition by an irrevocable repudiation, it would take effect; or if he should retract, by declaring that he lied, intercourse would again become lawful without a renewal of the marriage. Aboo Huneefa and Moohummud have said that the separation which takes place in *lián*[2] is an irrevocable repudiation, and that it puts an end to the marital power, and establishes the illegality of intercourse and of re-marriage while they remain in the state of *lián*.[3] It is a condition of *lián* that the wife shall demand it;[4] and if the husband refuses to take the *lián*, the judge should imprison him until he submits, or retracts by giving himself the lie; whereupon

[1] Arab, *fee'l joomlut*, which may mean generally, or the majority, though the Hanifite sect reject their testimony. See *Hedaya*, vol. ii. pp. 671 and 682.

[2] That is, the separation which is made after the *lián*, either by the husband or the judge. See *post*, p. 336.

[3] That is, of persons who have taken the *lián*. See *post*, p. 341.

[4] This is a condition of the *hudd* of scandal, for which *lián* is the substitute on the husband's part.

he would become liable to the *hudd* for scandal. If he take the *lián*, it is then obligatory on the wife to do so; and if she refuses, the judge should imprison her till she takes it, or acknowledges the truth of the charge. It is better for the woman to abandon litigation, and refrain from suing; and if she should not abandon it, but persists in bringing the matter before the judge, he should ask her to abandon it, by saying, "Abandon and refrain from this matter." If she do so, good and well; but if she persist in her demand, she is entitled to do so, even though a considerable time should have elapsed; for this right is a right of the individual, and such a right does not drop by delay in prosecuting it.[1]

Form of *lián*.

The proper form of *lián* is for the judge to begin with the husband, who should bear witness four times, saying each time, "I attest, by God, that I was a speaker of the truth when I cast at her the charge of adultery," and that he should then say, the fifth time, "The curse of God be upon him if he was a liar when he cast at her the charge of adultery;" and in all this he should distinctly point to her. The woman is then to bear witness four times, saying each time, "I attest, by God, that he is a liar in the charge of adultery that he has cast upon me," and saying, the fifth time, "The wrath of God be upon me if he be a true speaker in the charge of adultery which he has cast upon me." It is not a condition that she should stand up at the time of the *lián*, though proper. The *lián* rests on the word of testimony with "us;" so that if he or she were to say, "I swear by God," &c. (instead of "I attest"), the *lián* would not be valid.

After *lián*, the parties are to be separated by a decree of the judge.

When both parties have taken the *lián*, the judge is to separate them; and no separation takes place till a decree is passed by the judge, directing the husband to make the separation by repudiating his wife; and if he refuse to repudiate her, the judge himself is to pronounce a separa-

[1] In the other offences liable to *hudd* or specific punishment, viz. theft, drinking, and fornication, the right is the right of God, and drops by delay.

tion between them; but before he does so there is no separation, the marriage remaining still in existence. So that the husband may repudiate her, or pronounce a *zihar*, or *eela*, and there are mutual rights of inheritance if either should happen to die. Yet, though they should both join, after the *lián* is over, in requesting the judge not to separate them, he cannot assent, but must make the separation notwithstanding.

Effect of a mistake in the decree.

If a judge should, by mistake, pronounce a separation before the completion of the *lián*, then, if the parties had respectively gone through more than one-half of the form, the separation is operative; and if both or one of them had not gone through the greater part of the form, the separation is not operative. But if it were completed on the part of the husband, and the separation were then pronounced, before imprecation by the wife, it would be operative. And if the mistake were by beginning with the woman before the man, the judge may return to the woman, though if he decree the separation without doing so it still takes effect. If the *lián* were made before a judge who is removed or dies, the second judge ought to put the parties again through the form, according to Aboo Huneefa and Moohummud. If anything should happen to the parties, or either of them, before the decree of separation, that would have prevented the *lián*, it becomes void; and this may happen by both or one of the parties becoming dumb after it, or apostatizing, or recanting, or slandering another person, and being subjected to the *hudd* for it, or by the woman's committing adultery; in which cases the *lián* would be void, and there would be no *hudd*, nor separation of the parties; but though one of them should become mad after the *lián*, the separation should still be made.

What is scandal, so as to call for *lián*.

If a man should scandalize the wife of another, and the other should say, "I believe that she is what thou hast said," he would be a slanderer of his own wife, so as to call for the *lián*; but if he should merely say, "I believe," without anything further, he would not be a slanderer.

If a man should say to his own wife, "Thou art thrice

repudiated, O adulteress," he would be liable to *hudd* without *lián;*[1] but if he were to say, "O adulteress, thou art repudiated three times, there would neither be *hudd* nor *lián.*[2] If he should say, "O adulteress, daughter of an adulteress," it would be scandal of both her and her mother; and if they should combine in suing for the *hudd* against him, a beginning must be made with the *hudd* for the mother, and then the *lián* would drop; but if the mother should make no demand, and the daughter alone should sue, the *lián* must be put to her and her husband, and he would then be liable to the *hudd* for scandal if the mother should afterwards sue for it; and in like manner if the mother were dead, and the words had been, "O adulteress, daughter of an adulteress," the daughter may sue,[3] and if she does for both scandals together, he is liable to the *hudd* for the mother, and *lián* would drop; but if she should not sue on account of the scandal against her mother, and only for the scandal on herself, the *lián* would take effect.

Scandal of a *zimmeeah*, or slave wife, does not induce *lián*.

When a free man has slandered his wife who is a *zimmeeah*, or a slave, and the woman is then converted to the faith or emancipated, he is liable neither to *hudd* nor *lián;* but if the slave wife be emancipated and then scandalized by her husband, he is liable to the *lián* on account of the marriage still subsisting between them at the time of emancipation. If, however, she should choose to avail herself of her option, and be freed from the marriage, the *lián* would drop, and she would have no title to dower if she were unenjoyed; but if she do not make her choice until the *lián* has taken place, and a separation is made between them, he would be liable for half the dower; and in like manner if he had enjoyed her, and they were then separated by the *lián*, she would be entitled (besides her dower) to maintenance and lodging during her *iddut*.

[1] The scandal being of the woman after she ceased to be his wife.

[2] Being his wife at the time of the scandal, *lián* was the proper course, but that is now prevented by her ceasing to be so.

[3] By reason of the imputation on her own birth.—*Hedaya*, vol. ii. p. 61.

When scandal is suspended on a condition, neither *hudd* nor *lián* is obligatory, so that if a man should say to a woman, "When I have married thee, then thou art an adulteress," or "Thou art an adulteress if such an one will," the words would be nugatory.

Slander suspended on a condition does not induce *lián* or *hudd*.

Scandal is scandal, whatever be the language in which the imputation of adultery is conveyed, and when applied to a female of nine years old, it incurs the penalty of *hudd*, and may be sued for when she attains to puberty; when she is under nine years, that is an excuse. But if a man were to say to his wife, "I did not find thee a virgin," it would not be scandal, according to general agreement, nor if he should say, "I found with her a man in conjunction with her;" or "Thou committedst *zina* under compulsion," or "with a boy."[1]

Scandal may be expressed in any language.

If a man should say, "Thou committedst adultery, and this pregnancy is the fruit of it," they must both take the *lián* because of the scandal, as there is here express mention of *zina;* but the judge is not to negative the paternity of the child, because his order can have no effect on it before its birth, and also because of a prohibition by the Prophet.[2] When a man has said to his wife, "This pregnancy is not of me," there is no *lián*. This is according to Aboo Huneefa and Zoofr; but, according to the other two, if she should be delivered of a child within six months, the *lián* ought to be administered, and it is only when the delivery is beyond six months that there is no *lián*, and this is correct.[3] When the delivery is beyond six months (which is the shortest period of gestation according to Moohummudan lawyers) there is no certainty that she was pregnant at the time that he made use of the expression, and it is the same thing as if he had

Lián may be incurred by the denial of a child of which a wife is pregnant, but the denial does not affect the child,

[1] There being no express charge of *zina* in the case. See *ante*, p. 333, *note*.

[2] The reasons are from the *Door-ool-Mookhtar*, p. 262.

[3] Two authorities are cited; but the author of the *Hidayah* adopts the opinion of Aboo Huneefa, supporting it by an argument for which the reader is referred to the *Translation*, vol. i. p. 351.

said, "if thou art pregnant," &c., and scandal cannot be validly suspended on a condition.[1]

unless it is made after its birth.

When a man has denied the child of his wife after its birth, or at the time that he is receiving congratulations on the event, or necessaries connected with the birth are being purchased, his denial is valid, and the *lián* must be administered to him; but if he should not deny it till after this, though the *lián* is still to be administered, the *nusub*, or paternity of the child, is established. If, however, he were absent from his wife and not aware of the child's birth till informed of it, he would have, according to Aboo Huneefa, as much time for denial as is usually occupied with congratulations, or, according to the other two, the whole time of the *nifas*,[2] after receiving the intelligence; for the paternity does not become binding on a man till after the child's birth is made known to him, so that the time of receiving intelligence is like the time of the birth itself.

And a child cannot be disavowed that has been once acknowledged,

When he has once acknowledged the child, either expressly or circumstantially, his denial of it afterwards is not valid, whether it be at the time of the birth or after it. Express acknowledgment is saying, "The child is of me," or "This is my child," and circumstantial is silence when congratulated on it. Still, if he deny, he must take the *lián*.

nor when *lián* drops.

A man whose wife has been delivered of a child denies it by saying, "This child is not of me," or "This child is of *zina*," and the *lián*, for some reason or other, has dropped, the denial is not valid, whether he suffer the *hudd* or not. So also, if he be one of these who are competent to take the *lián*, but fails to take it, his denial is not valid. When a man has denied the child of his wife, who is a free woman, and she confirms the statement, there is neither *hudd* nor *lián*, and the child is held to be the offspring of both. If a man should deny the child of his wife, and they are both in such a condition as not to be able to take the *lián*, it is not a denial. So also if the

[1] *Door-ool-Mookhtar*, p. 262.

[2] The puerperal discharge. The extreme legal term is forty days, but it may be only for an hour.

denial were at a time that there could be no *lián*, though the impediment should afterwards be removed, as for instance, if she were a *zimmeeah* or a slave, and were afterwards converted to the faith or emancipated.

Form of the *lián* when the scandal is by the denial of a child,

When the scandal on a woman is by denying her child, the judge is to negative its descent or paternity, and assign it to its mother. The form of the *lián* in this case is as follows:—The judge is to direct the man, who is to say, "I testify by God that I was a true speaker in what I imputed to her by denying her child." And so, upon her side, she is to say, "I testify by God that he was a liar in what he imputed to me by denying the child."

or when a charge of adultery and denial are combined.

When the slander is both by imputing *zina*, or adultery, and also by denying the child, both facts are to be mentioned in the *lián*, and the husband should say, "I testify by God that I was a true speaker in what I imputed to her by *zina*, and the denial of the child;" and the wife should say, "I testify by God that he was a liar in what he imputed to be by *zina*, and denying the child." And when the judge has separated them after the *lián*, he is to affiliate the child to the mother; and Bushr has reported, as from Aboo Yoosuf, that it is necessary that the judge should say, "I have separated between you, and cut off the paternity of this child;" so that if he were not to say so, the paternity of the child would not be negatived. And this is stated in the Mubsoot to be correct.

Parties may re-marry after the *lián* on the transpiring of any fact that would have prevented it if known at the time.

When it is found after the *lián* that there was some impediment at the time which would have prevented it, the parties do not continue with respect to each other in the condition of *mootulamein*, or persons who have mutually taken it;[1] so that it is lawful for them to re-marry. And this may happen in various ways, as for instance, by his giving himself the lie,[2] and being subjected in consequence to the *hudd;* or by her giving herself the lie, or by one of them having slandered another person and suffered the *hudd* for it; or by one of them having been dumb, or

[1] See *ante*, p. 335.

[2] That is, receding from the charge of adultery.—*Hedaya*, vol. i. p. 348.

the woman mad, or guilty of illicit intercourse; or if one of them should have apostatized and then returned to the faith; in all which cases it would be lawful for the parties to re-marry, according to Aboo Huneefa and Moohummud.

The *status* of the child of a *mooláunah*, or imprecated woman.

The child of a *mooláunah*, or imprecated woman, is to be regarded in some respects as if his paternity were established from her husband. So that it has been said that the testimony of such a child is not to be received for his father, nor the testimony of the father in favour of the child. In like manner, it is not lawful for the father to apply his *zukut* or poor's rate to the son, nor the son his to the father. So also, if the child should have a son, and the husband a daughter by another wife, and the son should marry this daughter, or the child of the *mooláunah* should have a daughter and the husband a son by another woman, and they, too, should intermarry, the marriage would not be lawful. In like manner, if another man should claim this child, the claim would not be valid, though assented to by the child himself. In some other respects, however, the parties are to be regarded as strangers; and it has accordingly been said that one of them does not inherit from the other; nor is either liable for maintenance to the other. If the *mooláin*, or imprecating husband, give himself the lie, and claim the child after the judge has made a separation between the parties, and ascribed the child to its mother, and the child is alive, its descent is established from him, but he is liable to the *hudd*, whether the mother be alive or not. If the child be dead, leaving property, the father is not to be credited, unless the child have also left a son or daughter, in which case he is to be credited and allowed to participate in the inheritance, but is subjected to the *hudd*, on the ground of his acknowledgment of the slander.[1]

A charge of scandal by a wife against her

If a woman should bring a suit against her husband, alleging that he had slandered her by charging her with adultery, and the husband should deny the charge, no

[1] *Fut. Al.* vol. iv. p. 182.

testimony, except that of two just men, can be received on the part of the wife in establishment of the charge; for neither the testimony of women, nor testimony to testimony, nor the letter of a judge, can be received in proof of it, any more than they can be received in establishing a charge of scandal against a stranger. If the wife should produce two male witnesses, and the husband should then produce two male, or one male and two female witnesses, to her admission of the truth of the charge, *lián* would drop, and he would not be liable to the *hudd*. And if she have no proof, but desires that the husband be put on his oath, she has no right to demand it. Nor if the husband should plead her admission, and desire that she be sworn, has he any right to her oath. If he should produce four witnesses to the charge of adultery against her,[1] he would not be liable to the *lián*, but she would be subject to the *hudd* for adultery. And even if the husband himself were one of the four, provided that he had never previously been guilty of slander, their testimony would be received, and the *hudd* inflicted on her. But if the husband should come with three witnesses who had been guilty of slander, then, whether he himself had been guilty of it or not, the witnesses would be subjected to the *hudd*,[2] and he to the *lián*; and if he and three should bear witness that she had committed adultery, they, the witnesses, not being just persons,[3] neither she nor they would be subjected to the *hudd*,[4] nor the husband to the *lián*. If a man who has slandered his wife should produce two witnesses to her having acknowledged the adultery, the *lián* would drop from the husband, but she would not be liable to the *hudd* any more than she would be on her own single confession.[5]

husband requires two male witnesses;

and failing these, she is not entitled to his oath.

Charge may be met by a counter-charge of adultery, and proof by witnesses.

or of her confession.

[1] The law requires *four* witnesses.

[2] By reason of their incompetency to be witnesses. See *Hedaya*, vol. ii. p. 42.

[3] Even if they were positively reprobates they would still, in a manner, be competent.—*Ibid.* p. 43.

[4] That is, neither she to the *hudd* for adultery, nor they to the *hudd* for slander.

[5] The confession must be repeated four times to justify conviction for *zina*.

If he plead generally that his wife is an adulteress, or that she has already been enjoyed unlawfully, he is liable to the *lián;* but if he claim to adduce proof that she is as he has alleged, the matter may be postponed till the rising of the judge, and if he should then produce his witnesses, good and well, if not, the *lián* must be administered to him. If the husband should say, "I slandered her when she was a child," and she allege that he slandered her after she was adult, the word is with him, but the proof is with her. If she should sue him for an old slander, and adduce witnesses, it would be lawful for her to do so, but if he should adduce proof that he repudiated her after that revocably, and courted and married her again, there would be neither *lián* nor *hudd* between them.

CHAPTER XI.

OF THE IMPOTENT.[1]

Definition.

An impotent person is one who is unable to have connection with a woman, though he has the natural organs; and a person who is able to have connection with an enjoyed woman, but not with a virgin, or with some women but not with others, whether the disability be by reason of disease, or weakness of original constitution, or advanced age, or enchantment, is still to be accounted impotent with respect to her with whom he cannot have connection.

Procedure on wife's complaint.

When a woman brings her husband before the judge, and sues him, demanding a separation on the ground of impotency, the judge is to ask him if he has had intercourse with her or not; and if he should admit that he has not had intercourse with her, the case is to be adjourned for a year, whether the wife be an enjoyed woman or a virgin. If the husband should deny the charge, alleging that he has had intercourse with her, and she is an enjoyed woman, his word is to be taken, accompanied by his oath that he has had intercourse with her; and if he should swear to that effect, her right is void; but if he refuse to swear, the case is to be adjourned for a year. If she should allege that she is still a virgin, an inspection by women is to be ordered; for though one woman is sufficient, yet an inspection by two is more cautious and more to be relied on. If they should declare her to be an enjoyed woman, the

Case to be adjourned for a year.

[1] Arab, *Inneen*.

word of her husband is to be taken with his oath; and if he should swear, her right is void; while if he refuse, the case is to be adjourned for a year. If they should declare her to be a virgin, her word as to non-intercourse is to be received without oath. When the fact is ascertained that there has not been any intercourse between the parties, the judge is to adjourn the case for a year, whether the man require it or not, and to take witnesses to the fact of the adjournment, and write down the date.

How the year is to be computed.

The year is to commence from the time of litigation; and there can be no proper adjournment except by the judge of the town or city; no regard being paid to postponements by the parties themselves, without the intervention of a judge. The adjournment is to be regulated by the lunar year, according to the Zahir Rewayut, confirmed by the *Hidayah*;[1] but there are several other authorities in favour of computation by the solar year; while Kazee Khan and Zuhee-ood-deen were of opinion that computation by the solar year is allowable by way of precaution, and according to the Khoolasa the *futwa* is so. According to Hulwaee, the solar year is 365 days, a quarter of a day, and $\frac{1}{100}$th part of a day,[2] while the lunar year is 354 days. The days of her courses, and the month of Ramzan, are all to be taken as falling within the year; but not so any days in which he or she may be sick. If then he should be sick during the year, the period of adjournment is to be enlarged by the number of days of his illness. But if he should perform the *hujj* (pilgrimage to Mecca), or should be absent, no allowance is to be made for the time so occupied. It is different, however, when she goes a pilgrimage, or is otherwise absent; for the time so occupied by her is not to be reckoned against him. When a woman finds that her husband is sick and unable for intercourse, the case is not to be adjourned until he is well, however much the disease may be prolonged. And if he should be in prison, and his wife prevented from access to him in the prison, the time is not to be reckoned

[1] *Hedaya*, vol. i. p. 357.

[2] 365 days, 6 hours, 12 minutes.

against him; but if she is not prevented from access, and opportunity is offered for retirement, the time is to be reckoned; but not so when there is no such opportunity; and it makes no difference though the imprisonment should be on account of her dower. If the woman be imprisoned on any account, and the husband is allowed access to her with free opportunity for retirement, the time is to be reckoned; but otherwise not.

Procedure on renewal of the complaint after the expiration of the time.

When the period has expired, and the woman comes again to the judge, alleging that her husband has not had connection with her, while he asserts that he has had it, then, if she were at first an enjoyed woman, his word is to be taken with his oath, and if he should swear, her right is void, but if he refuse to swear, the judge is to give her an option; and if the woman should say, "I am still a virgin," there must be an inspection by women (one will suffice, but it is more cautious to have two), and if they should say she is an enjoyed woman, her husband's word is to be taken with his oath; but if they should say that she is a virgin, or the husband should admit that he has not had intercourse with her, the judge is to give her an option to separate. If she should choose to abide by her husband, or should rise from the meeting, or the assistants of the judge should raise her from it, or the judge himself should rise, before she has made her choice, the option is void. Such is the report as from Moohummud, and the *futwa* agrees with it. If she should choose a separation, the judge is to order the husband to repudiate her, and if he refuse, the judge himself is to pronounce the separation. The separation is one irrevocable repudiation, and the woman is entitled to her full dower, and is under an obligation to keep *iddut* if there had even been a valid retirement; but if her husband had never retired with her, there is no *iddut*, and she has only half the dower if any had been named, or a *mootút* if none was mentioned.

Wife's option.

Decree of separation.

Wife's right is not barred by delay in proceeding with

If the prescribed period has passed, and the woman delays for a time to bring the matter again before the judge, her right is not cancelled, even though they should have mutually agreed to lie together during the interval.

the case after the expiration of the time.

But if the man should ask the judge to extend the time for another year, or a month, or more, it is not competent for him to do so without the consent of the woman; and though she should consent, she may retract, whereupon the fresh period is to be cancelled and the choice again given to her.

The separation is cancelled by a previous acknowledgment of intercourse before it, and claim entirely barred if intercourse has ever taken place, or she was aware of the impotency at the time of the marriage.

When the judge has made a separation between the parties, and witnesses afterwards testify that the woman had acknowledged previous to the separation that the man had connection with her, the judge's separation is void; but if the acknowledgment were not till after the separation it is not to be credited.

If intercourse should once have taken place between married parties, though the husband should subsequently become weak, the wife has no choice; and if she knew at the time of the marriage that the man was impotent and unfit for women, she has no right to raise the question afterwards. But if she did not know it at the time, and only afterwards become aware of it, she is entitled to raise the question, and her right to dispute it is not cancelled, however long the time may be till she is dissatisfied with her condition. When the husband of a female slave is impotent, the option of separation is with her master, according to Aboo Huneefa, and the *futwa* is so.

Case of an eunuch.

As time is allowed to an impotent person, so also the case of an eunuch is to be adjourned in the same manner; also that of an old man, though he should say that he has no hope of having intercourse with her.

Of physical obstruction in the wife.

Of a *mujboob*.

When the wife of an impotent person has herself a physical obstruction to generation, there is to be no adjournment. And when a wife has found that her husband is a *mujboob*, she is to be allowed an option at once, without any adjournment of the case. But if a man has once had intercourse with his wife, and is subsequently made a *mujboob*, she has no option; nor if she were aware at the time of her marriage that he was a *mujboob*.

Case of other defects.

When a defect is found in a wife, the husband has no option; nor a wife any option when her husband has madness, or leprosy, or elephantiasis. But Moohummud

has said that if the madness be occasional, the case is to be adjourned for a year, like that of an impotent person; and if, at the expiration of the year, the madness is not cured, the woman has an option; and that if the madness be continued, the case is like that of a *mujboob*, and we have adopted this opinion.[1]

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[1] The authority cited is the *Havee'l Koodsee*.

CHAPTER XII.

OF IDDUT.

Definition of *iddut.*

IDDUT is the waiting for a definite period, which is incumbent on a woman after the dissolution[1] of a rightful or semblable marriage that has been confirmed by consummation, or by death.[1]

When it is incumbent on a repudiated woman.

When a man has married a woman by a lawful contract, and has repudiated her after consummation, or after a valid retirement, it is incumbent on her to observe an *iddut.* But if the marriage were invalid, and the judge should make a separation between the parties before consummation, though after a valid retirement, the *iddut* would not be incumbent; while, if the separation should not take place till after consummation, she would have to observe an *iddut*, reckoning from the time of separation; and so, also, in the case of a separation effected without judicial decree. Any separation without repudiation comes within the same meaning in respect of *iddut*, as, for instance, when it takes place under the options of puberty and emancipation, or for want of equality, or by reason of one of the married parties becoming the property of the other, because it has been made incumbent for the purpose of ascertaining the state of the womb.[2]

It is not incumbent after *zina*,

Iddut is not due for connection under a marriage contracted by a *fuzoolee*,[3] nor for *zina*, or illicit intercourse,

[1] Arab, *zuwal*, which means literally a falling off, or decline; and marriage is supposed to continue for some purposes during the *iddut*.

[2] *Hidayah* and *Kifayah*, vol. ii. p. 332.

[3] It would seem from this that consummation is not, *per se*, an approval of the marriage. See *ante*, p. 86.

according to Aboo Huncefa and Moohummud. When a man has said, "Every woman that I marry is repudiated," and having forgotten what he said, marries and consummates with his wife, she is repudiated, and he is liable for one dower and a half.[1] An *iddut* also is incumbent on the wife, and the *nusub*, or paternal descent of the issue, is established from the husband. or illicit intercourse.

Four women are not liable to *iddut:* namely, first, a woman who has been repudiated before consummation; 2nd, a *hurbeeah*, or alien, who has come, under protection, into "our" DAR, having left her husband in the DAR-OOL-HURB; 3rd, two sisters married by one contract which has been cancelled; 4th, more than four women connected together in one contract which has been dissolved. Four women who are not subject to it.

When a man has repudiated his wife absolutely, or revocably, or three times, or a separation has taken place between them without repudiation, and she is free and subject to the monthly courses, her *iddut* is three terms of the courses, whether the free woman be mooslim or *kitabeeah*. The *iddut* of one who, from extreme youth or old age, is not subject to the courses, or who, though she has arrived at the age of puberty, has never menstruated, is three months. So also of one who has seen the discharge for a day, after which it has disappeared, the *iddut* is by months; but if the discharge has appeared for three days and then ceased, the *iddut* is by courses; while if it continue for anything less than three days the *iddut* is by months. When a young girl, who is under *iddut* by months, menstruates, the reckoning is void, and she must commence anew by courses. When an *iddut* by months has become incumbent, either for repudiation or death, and it has happened to commence on the first day of the month,[2] regard is to be had to the end of the month, though it should fall short of thirty days; but if it commenced in the middle of the month, then, according to Aboo Huneefa and one report of Aboo Yoosuf, regard is The *iddut* of repudiation for a free woman is three terms of courses, if she is subject to them. Otherwise, it is three months.

[1] See *ante*, p. 134 *et seq.*

[2] That is, the appearance of the new moon.

to be had to the number of days; and ninety days are to be reckoned for a repudiation, and one hundred and thirty for a death. If a woman be repudiated in the evening of the first day of the month, and she is one of those whose *iddut* is reckoned by months, the computation is still to be by natural months, no regard being paid to the passing of part of a day; but if the commencement should not take place till the second or third day of the month, then the full number of days must be completed. If the repudiation should take place during the courses, the *iddut* is three full courses, without regard to the one in which the repudiation was given.

The *iddut* of repudiation for a slave is two terms of the courses, or a month and a half if she is not subject to them.

The *iddut* of an absolute slave, or a *moodubburah*, *oom-i-wulud*, or *mookatibah*, is two terms of the courses after repudiation or cancellation; or if she be not subject to the courses, it is a month and a half. And a *moostifah*, or slave working out her emancipation, is like a *mookatibah*, according to Aboo Huneefa, but like a free woman according to his two disciples.

The *iddut* of death or separation for an invalid marriage is the same as the *iddut* of repudiation for one that is valid.

When a man has consummated with a woman under a semblance of right, or a marriage that is invalid, he is liable for the dower, and she to an *iddut* of three courses if she be free, and two if a slave, and that, whether her husband have died leaving her surviving, or has separated from her while living; while, if from extreme youth or old age, she is not subject to the courses, her *iddut* when free is three months, and one month and a half when a slave. When a man has purchased his wife, having already consummated with her, the marriage is rendered invalid, but no *iddut* is required so far as he is concerned; so that his connection with her is not prohibited; but she is his *mooâtuddah*,[1] with respect to others, and he cannot bestow her in marriage to another man, until she has had two returns of her courses. When a *mookatib* has purchased his wife, the marriage is not invalid; and if he is unable to complete his ransom, the marriage remains as before; but if he pays the amount agreed

[1] Woman in her *iddut*.

upon, and is emancipated accordingly, the marriage is then invalidated, though no *iddut* is incumbent on the wife.

The *iddut* of a pregnant woman continues till her delivery, whether she be free, an absolute slave, or a *moodubburah*, *mookatibah*, *oom-i-wulud*, or *moostifah*, and also whether she be a Mooslim or *kitabeeah*, or the *iddut* were occasioned by repudiation, death, relinquishment, or connection under a semblance of right, and whether the pregnancy be such that the *nusub*, or paternal descent of the issue, is established or not, as, for instance, where a man has married a woman already pregnant by *zina* or fornication.

The *iddut* of a pregnant woman is till her delivery.

If a woman be an *ayessah*, that is, one who has despaired of having issue, and free, her *iddut* is three months. But if, after beginning to reckon by months, she should perceive the discharge, she must begin anew and reckon by courses, that is, when it has come in the usual way, for its return negatives her despair. When an *ayessah* has kept part of her *iddut* by months, and then is pregnant, the *iddut* is to be completed by delivery.

The *iddut* of an *ayessah*, or one that despairs of issue is three months, if free.

The *iddut* of a free woman for the death of her husband is four months and ten days, whether the marriage were consummated or not, or the woman be a Mooslimah or *kitabeeah* married to a Mooslim, or an infant or an adult, or *ayessah*, or her husband were free or a slave, and whether she have menstruated within the period or not, provided she does not appear to be pregnant. This *iddut* is not incumbent except for a valid marriage. And by ten days are meant ten nights and ten days, according to general agreement.

The *iddut* of death for a free woman is four months and ten days.

When a married woman is a slave, and her husband has died leaving her surviving him, her *iddut* is two months and five days; and the same rule applies to a *moodubburah*, *mookatibah*, *oom-i-wulud*,[1] and *moostifah*, according to Aboo Huneefa.

For a slave, two months and five days.

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[1] When the master of an *oom-i-wulud* dies, or she is emancipated, it appears that she should keep an *iddut* of three months as a *firash*, or concubine.—*Hidayah*, vol. i. p. 338.

Case of a wife whose husband being absent, she receives information of his death, and re-marries.

When the wife of an absent man has been informed by one man of his death, and by other two that he is alive, and the first informant has attested that he saw his death or his dead body, and is, besides, a just man, she is at liberty to observe an *iddut*, and to intermarry with another, that is, provided that none of the informants have given a date to their intelligence; but if they give a date, and the date of those who speak to his being alive is the later date, their testimony should be preferred. The husband of a woman being absent, a man came to her and informed her that he was dead, whereupon she and the people of the house did what is usual in cases of such calamity, and she, having kept her *iddut*, married a second husband, who consummated with her, after which there came another man, who informed her that her first husband was still alive, saying, "I have seen him in such a city." In these circumstances it was asked, What is the condition of her marriage with the second man, and is it lawful for her to abide with him; or what are she and the second husband to do? and the answer was, If she believed the first informant, she cannot believe the second, and the marriage between her and the second husband, therefore, is not nullified, and they may both lawfully abide by it.[1]

Case of the widow of a boy.

If a boy should die, leaving his wife surviving him, and the signs of pregnancy appear in her after his death, she is to keep *iddut* by months; but if she were pregnant at the time of his death, the *iddut* is to be by delivery, on a favourable construction of law. In neither case, however, is the *nusub*, or paternal descent of the child, established. If the birth take place within six months from the death of the boy, conception must have taken place in his lifetime; but if the birth does not happen till six months or more have elapsed from the time of his death, then it is evident that conception must have taken place after it.

[1] The Buhr-oor-Raik is cited as the authority, but the name of the person who gave the answer is not mentioned.

When an insane person dies, leaving his wife surviving, the rules with regard to *iddut* and the child are the same as in the case of one of sane mind.

The *iddut* of death for an insane husband same as for one that is sane.

When a man has repudiated his wife and then died, if the repudiation were revocable, the *iddut* is to be reckoned from his death, whether the repudiation were given in a state of health or sickness; but if repudiation were absolute or triple, and the woman does not inherit from him by reason of his having been in health at the time of the repudiation, the *iddut* is not to be reckoned from death; while, again, if she does inherit from him by reason of his having been sick at the time, and subsequently dying before the expiration of the *iddut*, she is to keep *iddut* for a period of four months and ten days, during which there must be three returns of the courses; so that if these should not be completed during the period, the *iddut* is to be carried on till their completion. A young girl being repudiated by her husband, three months of her *iddut* have passed except one day, when the courses appear; in these circumstances, the *iddut* is not completed until they have occurred three times. A man having repudiated his wife revocably, she has kept *iddut* for three terms of her courses except one day, when the husband dies: four months and ten days are now incumbent on her. When a repudiated woman has kept *iddut* for one or two terms of the courses, and they then cease, the *iddut* is not completed until she despair of their return, whereupon she must commence anew by months.

How the *iddut* is determined when death follows repudiation.

The *iddut* of repudiation commences from the repudiation, and that of death from the death; so that if the events are not known until the period of the *iddut* has actually passed, it is held to have expired. The *iddut* for an invalid marriage runs from the separation, or the day that the man has determined on abandoning the connection. When a man has repudiated his wife and then denied the fact, whereupon she establishes it against him by proof, and the judge pronounces a decree of separation, the *iddut* is to be reckoned from the time of the repudiation, not from the decree.

From what dates the *iddats* of repudiation and death are held to run.

Two *idduts* may be running at the same time.

Two *idduts* may be running on to accomplishment at the same time, whether they be of the same kind or of different kinds. As an example of the first, take the case of a repudiated woman, who, having menstruated once, is married to, and enjoyed by, another man, after which they are separated, and her other occurrences of the courses take place after the separation; in these circumstances, the second husband may lawfully re-marry her, for the *iddut* due to the first has expired; but another cannot marry her till the expiration of three terms of the courses after the separation, because the *iddut* due to the second is still in existence with regard to a third party; and if the first repudiation were revocable, the first husband might recall her before she had twice menstruated after separation from the second; and when three terms of the courses have occurred after separation from the second, the two *idduts* expire together. An example of the second is found in the case of a woman whose husband has died, and who is enjoyed under a semblance of right; here her first *iddut* is completed by four months and ten days, and her second by three courses which appear during the months.

Iddut of a *kitabeeah.*

When a *kitabeeah* is married to a Mooslim, she is liable for what a Mooslim wife would be liable to in the same circumstances; that is, if free, she is like a free Mooslimah, and if a slave, like a Mooslimah slave; but when married to a *zimmee*, no *iddut* is incumbent on her, either for death or separation, according to Aboo Huneefa, if that be agreeable to their own religion. According to the disciples, however, she is liable.

CHAPTER XIII.

OF HIDAD,[1] OR LAYING ASIDE OF ORNAMENTS.

A woman during *iddut* must avoid the use of ornaments and everything intended to adorn or beautify the person.

The observance of *hidad* is incumbent on every woman during her *iddut*, who is a Mooslim, and has been irrevocably repudiated, or whose husband has died, leaving her a widow. By *hidad* is to be understood abstaining from the use of perfumes, oil, *kohl*,[2] *henna*,[3] and *khuzab*,[4] and from the wearing of perfumed clothes, and such as are tinged with safflower, or are red, or have been coloured with saffron, except when the colour is fast and does not fly in washing; and from the putting on of fine linen, or silk, whether floss or thrown, or ornaments, and from beautifying the person or combing the hair. It is only when the clothes above mentioned are new that they fall within the prohibition of beautifying the person, for when threadbare they may be worn without any objection. And combing with a comb, the teeth of which are wide apart, is not objected to; but the use of any other is abominable, for it cannot be required except with a view to the beautifying of oneself. Abstinence is required only when there is freedom of choice; and there is no objection to the use of oils and *kohl* when necessary, as in the case of headache, or for relieving the eyes. When a woman is poor, and has only one coloured garment, there is no

[1] The original meaning is to forbid, or prohibit.—*Inayah*, vol. ii. p. 278.

[2] A pigment used for blackening the inside of the eyelids.

[3] Red dye used for staining the palms of the hands.

[4] Tingeing (the nails or hair) with cypress or saffron.

objection to her wearing it, when done without the intention of beautifying herself.

Women on whom this is not incumbent.

Hidad is not incumbent on a little girl, nor on a grown woman who is insane, or a *kitabeeah*, or in *iddut* for an invalid marriage, or who has been repudiated revocably. But if an infidel woman should be converted to the faith during her *iddut*, all that is incumbent on a Mooslim woman for the remainder of it is incumbent upon her. *Hidad* must be observed by a female slave who is married, whether it be for death or irrevocable repudiation; and it is in like manner incumbent on an *oom-i-wulud*, a *moodubburah*, a *mookatibah*, and a *moostifah*; but not on an *oom-i-wulud* who is in *iddut* for the death of her master, or in consequence of emancipation.

A woman should not be courted during her *iddut*.

It is not lawful for a stranger openly or expressly to court or solicit a *mooâtuddah*, or woman in her *iddut*, whether she have been irrevocably repudiated, or her husband has died leaving her a widow; but in the case of the widow he may indirectly propose for her. The manner of doing this is to say to her, "I wish to marry," or "I love a woman with such qualifications" (describing those of the lady herself); or he may say, "You are good," or "beautiful," or "have inspired me with admiration," or "for me there is none like thee," or "I hope that God may make a junction between me and thee."

A free woman in *iddut* for separation should confine herself to the house. But a widow may go abroad; also a slave on her master's service.

When a woman is in *iddut* for a valid marriage, and is absolutely free, adult, sane, and a Mooslim, and has freedom of choice, she ought not to go out by night or by day, whether the repudiation were triple, irrevocable or revocable. But a widow may go out by day and part of the night, though she ought not to sleep from home; and a *mooâtuddah* for an invalid marriage may go out, unless forbidden by her husband. A slave in her *iddut* may go out on her master's service, whether the *iddut* be for death, or *khoolâ*, or repudiation, revocable or irrevocable; but if she is emancipated during her *iddut*, whatever is incumbent on a free woman is incumbent on her, for the remainder of it. A *kitabeeah* may go out with the permission of her husband, but not otherwise, whether the

repudiation be triple, or irrevocable, or revocable; but when the *iddut* is for her husband's death, she may even sleep from home. A free Mooslim woman is not at liberty to go out without the permission of her husband; but a girl may do so with his permission, though the repudiation were revocable; and if it were irrevocable, she may go out without his permission, unless she be near to puberty. An *oom-i-wulud*, when emancipated by her master, may lawfully go out.

Iddut should be kept in the house where the woman is residing when the occasion for it takes place.

A *mooâtuddah* should keep her *iddut* in the house where she was residing at the time when the separation from her husband, or his death, took place. If she were on a visit to her friends, or in any other than her own house at the time of the occurrence, she should remove to her own house without delay. If she is under any apprehension of the house falling down, or is alarmed for her property, or the house is a hired one, and she is unable to pay the rent during the *iddut* for death, there is no objection to her removing. And if the house belonged to her husband, and he has died, leaving her a widow, and her share of it (by inheritance from him) is sufficient for her accommodation, and entire seclusion from the other heirs who are not within the forbidden degrees to her, she should live in her share of the house; but if the share be insufficient for these purposes, or the heirs turn her out, she may lawfully remove from it; while if they allow her to occupy their portions of the house for rent, and she is able to pay it, she has no right to remove from the house. When a man has repudiated his wife three times, or once absolutely, and has only one apartment, he must put up such a curtain or screen between him and her as would prevent their residing in it from being a retirement with her if she were a stranger. If he be a profligate, and she is under any apprehension from him, she may live in another house; but it is better for him to leave it; or the judge may, if he think proper, place a woman with her, in whom he can confide, to protect her.

A woman in *iddut* should not

A *mooâtuddah* should not go on a journey, either for pilgrimage or other cause, nor should her husband take

go on a journey.

her on a journey with him; but if he do so without intending to recall her, it is not a revocation. A *mooâtuddah* is not obliged to confine herself to her own room, but may freely go out into the yard of the house, or into the other rooms, provided they are not occupied by other persons.

BOOK IV.

OF SLAVERY.

CHAPTER I.

OF THE ORIGIN OF SLAVERY.

THE original condition of the race of Adam is freedom.[1] But for their security in this condition, one of two things is necessary; religion (by which is meant the Mussulman faith), and the protection of the Mussulman territory,[2] which is essentially free.[3] This protection can be obtained by unbelievers only on the condition of submission. Moreover, it is supposed to be the duty of all men to embrace the Mussulman religion, or to submit to the dominion of the true believers; and until they adopt one or other of these alternatives they are *Hurbees*, or enemies, and deemed to be *moobah*, or permitted, as a consequence or punishment of their fault.[4] They are even classed with inanimate things, so that all unbelievers who are not *zimmees*, or the subjects of some Mussulman state, are thus liable to be reduced to a state of property,[5] like things which were originally common by nature.

Man is by nature free.

When the Imam or head of the Mussulman community has subdued a country by force of arms, prisoners, or such

Infidels conquered by Mussul-

[1] *Hidayah*, vol. ii. p. 823.
[2] *Ibid.* p. 709.
[3] *Ibid.* p. 828.
[4] *Ibid.* vol. ii. p. 757.
[5] *Inayah*, vol. ii. p. 755.

mans may be reduced to slavery.

of the inhabitants as have fallen into his hands, are at his absolute disposal, and may be lawfully reduced to slavery, or even put to death.[1] Before commencing war, it is proper to invite the inhabitants of the country about to be invaded to embrace the true faith; but, as they are without the pale of the law, no penalty is incurred by the neglect of this precaution.[2] In like manner, if two or more Mussulmans, or persons subject to Mussulmans, should enter into a foreign country without the permission of the Imam, and merely for the purpose of pillage, and should seize some of the property of the inhabitants, and secure it within the Mooslim territory, the property would be theirs.[3] The same principle seems equally applicable to the foreigners themselves, whose persons as well as property are *moobah*, as already mentioned.

Infidels conquered by infidels may be purchased as slaves by Mussulmans.

When Turks have subdued Room,[4] and have made captives of the inhabitants, or seized their effects, they become the proprietors of them; and if the Turks should be conquered by the Mussulmans, the latter may lawfully appropriate whatever of Room they may find in the possession of the former, even though there should have been a treaty of peace between the people of Room and the Mussulman community.[5] Or if a Mussulman should enter the Turkish territory under a safe conduct, he may lawfully purchase from the inhabitants the persons or property of the people of Room.[6] So, also, when a Mussulman enters a foreign country under protection, and purchases from one of the people his son, and brings him against his will within the Mooslim territory, he becomes his proprietor; though, according to the majority of doctors (whose opinion is held to be correct), he would not be so while they were still within the foreign territory.[7]

[1] *Inayah*, p. 346. [2] *Hidayah*, vol. ii. p. 709.

[3] *Fut. Al.*, vol. ii. p. 307.

[4] Asia Minor, which was part of the Greek Empire in the time of the writer of this extract, the Turks being then unbelievers in the Mussulman religion.

[5] *Fut. Al.*, vol. ii. p. 320. [6] *Ibid.*

[7] *Jama-oor-Rumooz*, as cited in the P.P.M.L. Ap. p. 63.]

A child in respect of slavery follows the condition of its mother.

Legal qualities established in a woman pass from her to her offspring. Hence, the child of a free woman is free, and the child of a slave mother is in all cases a slave, except only when acknowledged by her master as his own offspring, which makes it free.[1]

Who are lawful slaves according to Moohummudan law.

From what has been stated, it may, I think, be inferred, that the following persons are recognized by the Moohummudan law as slaves:—First, persons who, being neither Mussulmans nor the subjects of any Mussulman state, have been captured in public or private warfare, or bought from their captors, or foreign and unbelieving parents, and brought against their own will and secured within the Mussulman territory. Secondly, the descendants, through females, of females so circumstanced.[2]

Cases in which the sale of a freeman by himself is said to be lawful.

In an extract from the Mooheet, cited in the "Principles and Precedents of Moohummudan Law" (App. p. 65), it is stated that the sale of a freeman is unlawful, except when he is unable to pay property for which he is liable, or is nearly dead of hunger, and sees no means of preserving his life otherwise than by the sale of himself, or is reduced by famine to such an extremity that it is lawful for him to eat a dead body, but rather than do so he prefers to sell himself. From which it would seem that the sale of a freeman by himself in the excepted cases is lawful. A freeman, however, if a Mussulman, or subject to Mussul-

[1] *Hidayah*, vol. ii. p. 464.

[2] According to the opinion given by the law officers in the case reported at p. 312 of the P.P.M.L., and apparently approved of by the learned author himself (Prin. i. p. 65), persons seized or obtained otherwise than in public warfare undertaken by orders of the Imam, are not legal slaves; and their opinion is confirmed by a subsequent decision of the S. D. A. of Calcutta (vol. v. p. 61). But the inference which I have ventured to draw from the original authorities agrees with the description of a slave given by Mr. Lane, who says expressly:—"A slave among Muslims is either a person taken captive in war, or carried off by force, and being at the time of capture an infidel, or the offspring of a female slave by another slave, or by any man who is not her owner, or by her owner, if he does not acknowledge himself to be the father; but the offspring of a male slave by a free woman is free." —*Arabian Nights' Entertainment*, vol. i. p. 62, note.

mans, is not *moobah* under any circumstances; and it is not certain that the author of the Mooheet had any such in his view. It is also worthy of remark that, though it has been by no means an uncommon practice in India for parents in a famine to sell their children to save them from starving, this extract from the Mooheet does not appear to have been introduced by the compilers of the Futawa Alumgeeree into that digest. There is no doubt, however, that a freeman may let himself to hire, and that the hiring may be effected by the word sale when a time is limited.[1] But it has been said that he cannot hire himself for any great length of time, such as seventy years, as that would be a mere pretext; and whatever the term may be, it would be cancelled by the death of either party.[2]

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[1] *Fut. Al.*, vol. iv. p. 574.

[2] *Inayah*, vol. iv. p. 91.

CHAPTER II.

OF THE GENERAL CONDITION OF SLAVES, AND OF SLAVES AS INHIBITED AND LICENSED.

Condition of a slave with respect to his master.

A SLAVE is the property of his master, and is therefore a fit subject for inheritance and all kinds of lawful contracts. He is also subject to his master's power; in so much that if a master should kill his slave he is not liable to retaliation.[1] With female slaves a master has the *milk-i mootût*, or right of enjoyment, as already frequently observed; and his children by them have the same rights and privileges as his children by his wives.

His general disabilities.

A slave's power over himself is necessarily suspended while he is subject to that of another. He is accordingly incompetent to anything that implies the exercise of authority over others. Hence, a slave cannot be a witness,[2] or a judge,[3] or an executor or guardian to any but his master and his children;[4] neither can he inherit from any one,[5] and a bequest to him is a bequest to his master.[6]

Inhibited and licensed slaves.

A slave is inhibited or prevented from engaging in any manner of business, lest he should impair his master's rights over him; but the inhibition can be removed by a licence. A slave who is not licensed is termed *muhjoor*, from *hujr*, inhibition. A slave who is licensed is termed *mazoon*, from *izn*, permission. *Izn*, as described in law,[7] is a remission

Licence described.

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[1] *Hidayah*, vol. iv. p. 282.
[2] *Hedaya*, vol. ii. p. 683.
[3] *Ibid.* p. 612.
[4] *Fut. Al.*, vol. vi. p. 212.
[5] *Sirajiyyah*, p. 13.
[6] *Kifayah*, vol. iv. p. 1466.
[7] The authorities for the remainder of this chapter will be found in the *Book of Mazoon*, *Fut. Al.*, vol. iv.

or abatement of right, without any limitation in respect of time, place, or kind of business. It is constituted by the master saying to his slave, "I have licensed thee to trade." Though the licence be for a day, or a month, it continues until the slave is again inhibited. As it is established by express words, so also it may be inferred from the master's conduct. Thus, when a master has seen his slave buying or selling, and has remained silent, the slave becomes licensed generally, though the particular act of disposal requires a special sanction in words to render it lawful; and it is only for what may take place subsequently that the slave is licensed. Though the licence were for one particular kind of business to the exclusion of all others, the slave would still be licensed for all; and it makes no difference whether the master expressly forbids all others, or is merely silent with regard to them.

What a licensed slave may and may not do.

A licensed slave may buy or sell, even at a great inadequacy of price, according to Aboo Huneefa; but the two disciples held that if the inadequacy be very glaring, the sale is not lawful. The slave may also appoint an agent for purchase or sale, and give and accept a pledge. So also he may take land in lease, or give or hold it in *moozaraût*,[1] and give and take property in *moozarubût*.[2] But he cannot marry without the permission of his master, nor give a slave in marriage, nor make a gift, nor bestow a *dirhem* in charity, though he may do so with *fooloos*, or even silver under the value of a *dirhem*. He may, however, acknowledge a business debt, and his acknowledgment is valid, whether assented to or denied by his master. He may also be sued for matters relating to trade or business, and testimony may be received against him without requiring the presence of his master.

Debts of a licensed slave are of different kinds.

The debts which a licensed slave may contract are of three kinds: First, debts that attach to his person, without any difference of opinion, and these are debts incurred by

[1] Literally, mutual sowing. A contract between the proprietor of land and a cultivator, by which they agree to divide the produce in certain proportions.

[2] See note, p. 161.

the destruction of property. Second, debts which, by general agreement, do not attach to his person, such as the *ookr* for consummation of a marriage entered into without his master's permission. Third, debts with regard to which there is some difference of opinion; and these are debts contracted in the usual course of business and dealing.

Debts for which he may be sold;

When creditors bring a licensed slave before the judge on account of debts contracted in the course of trade and business, and the master is present, the slave may be sold if his gains and available property are not sufficient for their payment; but he cannot be sold in his master's absence. When a judge has sold a slave in the presence of his master, the proceeds are to be divided among his creditors, and if there be any surplus it is to be paid to the master. If the proceeds are insufficient to pay all the debts, the creditors are to be paid rateably as far as the proceeds will go. For the difference they have no remedy unless the slave be emancipated, when they can proceed against him; but they have no recourse against his master, even though he should become the purchaser of the slave.

and which attach to his gains and acquisitions.

The debts contracted in business by a licensed slave attach to his gains and acquisitions by gift or alms, whether acquired before or after the debts were contracted. But the debts do not attach to the capital stock given to him by his master to begin business with, if the articles comprising it can be distinguished from the other property in his possession. Nor can his master be called upon to refund any part of the *zureeba* (or stipulated allowance which he was to have received out of the slave's gains) that may have actually been paid to him.

Question as to the master's right to his gains when he is in debt.

It was a question between Aboo Huneefa and his disciples whether the master of a licensed slave has a right to his gains when he is in debt. According to the former, he has no such right if the gains are wholly absorbed by the debts, but otherwise he has; while according to the disciples, the existence of debt does not prevent the master's right of property in the gains, though it prevents him from disposing of them when the fact of the slave's being in debt is established.

How the licence is cancelled.

A licence may be cancelled by inhibition at any time. But the inhibition must be made known in the same way as the licence was made known. That is, if the licence was intimated generally in the market-place, the inhibition must be intimated in the same public manner; while if the licence were granted in the presence of one, two, or three persons, the inhibition may be imposed in their presence also. A licence is also cancelled by the death, or continued madness, or apostasy and flight to a foreign country of either master or slave.[1] So also by the sale of the slave; and if he is not in debt, inhibition takes place on the instant of the sale. But if he be in debt, it does not take effect till the purchaser has taken possession of the slave. When the licensed slave is a female, inhibition is incurred by her bearing a child to her master; who thereupon becomes responsible for her debts if there are any.

[1] *Door-ool-Mookhtar*, p. 685.

CHAPTER III.

OF QUALIFIED SLAVERY.

SLAVERY may be permanently modified in three different ways. 1st, by *Kitabut*, or an agreement for emancipation in lieu of a ransom; 2nd, by *Tudbeer*, or gratuitous emancipation, to take effect at the master's death; and 3rd, by *Isteelad*, which is a slave's bearing a child to her master; and it has the same effect of emancipating at his death. Slavery may thus be said to be of two kinds, absolute and qualified. The absolute slave is termed *kinn* and *rukeek*. The qualified slave is either a *mookatib*, a *moodubbur*, or an *oom-i-wulud*, terms corresponding to the modified conditions before mentioned. These conditions, however, affect the disabilities of slaves only in so far as the master is concerned. Hence the testimony of all slaves is alike inadmissible, whether they be absolute, *mookatib*, *moodubbur*, or *oom-i-wulud*.[1] So, also, they are all alike incapable of inheriting,[2] and of marrying without the consent of their masters;[3] while a bequest to them by any other than their own master is a bequest to him.[4] But a man may lawfully make a bequest to his own *mookatib*, *moodubbur*, or *oom-i-wulud*.[5]

How slavery may be qualified.

Three kinds of qualified slaves.

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[1] *Fut. Al.*, vol. iii. p. 552.
[2] *Sirajiyyah*, p. 13.
[3] *Ante*, p. 159.
[4] *Fut. Al.*, vol. vi. p. 140.
[5] *Ibid.* p. 141.

Section First.

Of Kitabut and the Moookatib.[1]

Definition. *Kitabut* is a contract between a master and his slave, the object of which is to make the latter free immediately as to his hand (or powers of action), and eventually as to his person. Its pillars are declaration on the part of the master and acceptance on the part of the slave. It is the declaration that manifests the nature of the transaction, as a master's saying to his slave, "I have entered into *kitabut* with thee for so much," or, "Thou art free for a thousand, which thou art to pay me by instalments, every month so much," or words to the like effect. With regard to acceptance, it is the slave's saying, "I have accepted," or "am content."

Effects. The effect of *kitabut* on the part of the slave is to take off the inhibition under which he labours, to establish the freedom of his hand (or power of action) immediately, so as to give the slave a peculiar right in his own person and acquisitions, and to establish against the master responsibility for any injuries which he may inflict on his person or property, with an eventual right to compel emancipation on payment of the ransom, while it forbids his sale in the meantime. On the side of the master it empowers him to demand the ransom when it is due, and re-affirms his right of property in the slave in the event of non-payment. But he has no right to the gains of the slave, nor to exact service from him; and if he should have connection with his *mookatibah* he is liable for the *ookr*, because she has acquired a peculiar right in her own person by the *kitabut*. He is also liable if he trespass against her or her child or property. With regard to marriage and *iddut* the same rules are applicable to her as to an absolute slave.

On payment of the While a *dirhem* of the ransom remains unpaid the

[1] The selections, when not otherwise indicated, are from the *Book of Kitabut, Fut. Al.*, vol. v.

mookatib is a slave,[1] but on full payment he becomes immediately free, as by the mere force of the contract,[2] though the master should not have said, "If thou payest it thou art free," or, in other words, should not have suspended the emancipation on the condition. And if a pledge were taken for the ransom and it should perish, the slave would become immediately free.[3]

ransom the slave is free.

Kitabut is of two kinds, one limited to the person, and the other extending to person and property. Under the first, whatever may be in the possession of the slave before the *kitabut* belongs to his master, but his after gains are his own; and if there should be any surplus of them after payment of his ransom it must be delivered to himself. Under the second, whatever may be in the slave's possession at the time of the *kitabut* or may subsequently be acquired by him is his own, whether it be more or less than his ransom. By the slave's property is to be understood whatever may come to him by gain, trade, free gift, or charity; and if any dispute should arise between the master and his *mookatib* with respect to his gains, the preference is to be given to the word of the latter. When a *mookatib* is unable to complete his ransom, and relapses into a state of absolute slavery, all the property in his hands belongs to his master.

Two kinds of *kitabut*.

A *mookatib* is under the same restrictions as to buying and selling, marrying, and gratuitously disposing of property as a *mazoon*. Nor can he give his son, or daughter, or male slave in marriage, but he may his female slave, whether absolute or *mookatibah*, because there is some advantage in that, from the dower which he is entitled to.[4]

What a *mookatib* may and may not do.

When a *mookatib* has purchased his father or son they enter into the *kitabut* and are emancipated, or fall back into slavery with him, and he cannot sell them. The rule is the same with regard to any other relatives, between whom

The parent and child of a *mookatib* purchased by him enter into his *kitabut*.

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[1] *Hidayah*, vol. iii. p. 759.

[2] *Ibid.* p. 760.

[3] Because the loss of the pledge is equivalent to payment of the debt.

[4] *Hidayah*, vol. iii. pp. 771-2.

and himself there is the relation of paternity, of whom he may become the proprietor, as grandfathers and grandmothers and children's children.

But not his other relatives.

If a *mookatib* should purchase his brother, or sister, or other relative within the prohibited degrees (not being a lineal ascendant or descendant), as a paternal uncle and aunt, or the like, they would not on a favourable construction take part in his own *kitabut*, so that he might lawfully sell them, according to Aboo Huneefa; and all are agreed that if he should purchase a cousin (or uncle's son) he would not enter into the *kitabut*, yet if when he pays his ransom they are still his property they become emancipated without having to work out their freedom.

Nor his wife, unless purchased with his child by her.

When a *mookatib* has purchased his wife he may lawfully sell her unless she has borne a child to him. In that case, if he should become the proprietor of both the wife and the child, he cannot sell the wife, but if he should become possessed of the wife alone he is not prevented from selling her, according to Aboo Huneefa; and this is correct. When he has purchased both, the child enters into his *kitabut*, and the mother into that of the child; and if he should die neither mother nor child would be required to perform emancipatory labour, but both be free on paying up what was due of the ransom at the time of his death.

Conjugal intercourse between them is lawful;

When a *mookatib* has purchased his wife he may lawfully have conjugal intercourse with her, and the child, if any should be the fruit of the intercourse, would enter into the *kitabut* of the father, and the mother into that of the child. If then in these circumstances the father should die without paying up his ransom, the child would come into his place, and, on paying up the instalments, both he and his mother would be emancipated by the payment. If the child should die in the father's lifetime and the *mookatib* himself should then die, the mother would be free if able to pay up the ransom at his death; if not she must return to slavery.

as also between a *mookatibah*

When a *mookatibah* has purchased her husband, the marriage is not cancelled, and he may lawfully have con-

jugal intercourse with her, for she does not in truth become the proprietor of him by the purchase.

and her purchased husband.

When a *mookatibah* has borne a child to her master, which he has acknowledged, the paternity of the child is established without the necessity of any assent on her part, for she is still a slave as to her person; and she becomes an *oom-i-wulud* to her master. She may, however, abide by her *kitabut*, and in that case is entitled to *ookr*. If her master should die, she becomes free by virtue of the *isteelad* (or bearing a child), and the ransom falls to the ground. While, if she should die leaving property, the ransom would be paid out of it, and the surplus pass as heritage to her child, by reason of the establishment of her freedom in the last moments of her life; and if she should not leave any property, the child would be free without any obligation to emancipatory labour. A man may lawfully enter into *kitabut* with his *oom-i-wulud;* but if he should die she would be free by virtue of the *isteelad*, the ransom falling to the ground; while if she should pay the ransom during his life, she would become free by virtue of the *kitabut*.

A *mookatibah* may become an *oom-i-wulud*,

and *vice versâ*.

A man may also enter into *kitabut* with his *moodubburah;* and if he should die leaving no other property besides her, she would have to work for two-thirds of her value, or pay the whole ransom of the *kitabut;* while if he should die leaving property, she would be entitled to her freedom to the extent of one-third of his property, without any necessity for emancipatory labour. So, also, a man may enter into *tudbeer* with his *mookatibah*, and she may either abide by the *kitabut*, or declare her inability. If she should adopt the latter alternative, and her master should die without leaving any other property besides her, she has an option, and may either work for two-thirds of her ransom under the *kitabut*, or two-thirds of her value under the *tudbeer*.

So also a *moodubburah*.

When a *mookatib* has failed to pay an instalment of his ransom, and it appears, after waiting for two or three days at the most, that he has no means, and the master presses for a decree of inability, the judge is to pronounce it and cancel the *kitabut*. It may also be cancelled by *Ikalah*, or

On failure of an instalment of the ransom, the *kitabut* may be

cancelled by the judge.

a mutual dissolution, or by the slave alone without the consent of his master, whether the contract be invalid or valid. But is it cancelled by death? Not by the death of the master, according to general agreement; for if the slave be able to pay his ransom he can pay it to the heir and be emancipated, or otherwise fall back into slavery. Nor by that of the *mookatib* himself, according to "our" sect, if he die leaving means sufficient for his ransom; but if he die without leaving sufficient means there is a cancellation by general agreement. The *kitabut* is not cancelled by the master's apostasy, for as it is not cancelled by his natural death, so neither is it by his civil death.

But it is not cancelled by the master's death; nor by that of the slave when he has left enough to pay his ransom.

A child born in *kitabut* is allowed to work it out by its instalments.

When a mookatib has died without leaving property enough to pay his ransom, but is survived by a child born to him during his *kitabut*, the child is allowed to work out the *kitabut* of the parent according to its instalments. When he has done so, decree is pronounced for the father's emancipation as having taken place before his death, and the child is free; but if the *mookatib* be survived by a child purchased during his *kitabut*, the child may be called upon to pay up the ransom immediately, or be remanded back to slavery. When a *mookatibah* has borne one child and purchased another, and then died, the child born in the *kitabut* is allowed to work out the ransom by instalments, and whatever the purchased child may acquire his brother may seize and pay the ransom out of it, the surplus of his acquisitions, if any, being divisible equally among them both. The born child may also, under the directions of the judge, let out the purchased child to hire.

Difference as to a purchased child.

Application of *mookatib's* estate when he has died in debt.

When a *mookatib* has died leaving a sufficiency of property for the payment of his ransom, but in debt, and having bequeathed legacies, being also survived by a son who is a freeman, and by another who was born to him during his *kitabut* by a bondswoman,—the debts to strangers are to be paid first out of his estate, then any debts which he may owe to his master besides the ransom, next the ransom; and when all these have been discharged, he is to be declared free, and the surplus, if there be any of his estate, is to be divided among his heirs, without any regard

to the legacies, which being gratuitous acts are void. But if the *mookatib* should die leaving a thousand, and a debt of as much to his master, besides the ransom, the latter is to be paid first on a favourable construction, though according to analogy preference should be given to the debt. When a *mookatib* has died in debt, having also committed trespasses, and being liable for the dower of a wife whom he has married with the permission of his master, commencement is to be made with the debt; after which what is due on account of the trespasses is to be paid, then the ransom, and last the dower. In like manner, if, instead of leaving property, he should have left children born to him during his *kitabut*, they are to work, as has been described, because leaving a child to pay, is like leaving property to pay.

Section Second.

Of Tudbeer[1] *and the Moodubbur.*

Tudbeer is the suspending of emancipation, or making it dependent, upon death;[2] and it is not susceptible of revocation.[3] It is of two kinds; *Mootluk*, or absolute, and *Mookuyyud*, or restricted. The former is emancipation suspended simply on the master's death, without any further addition; for which the appropriate expressions are either *sureeh* or plain, as "Thou art a *moodubbur*," or "I have made thee a *moodubbur*," or such as are employed for freeing and emancipating, as, "Thou art free after my death," or, "I have emancipated thee after my death," or, for a *yumeen* (or suspending on a condition), as, "If I die, then thou art free," or, "When I die, then thou art free," or, "If anything should happen to me," or, "When anything has happened to me." The *tudbeer* may also be in the language of bequest, as by the master's saying, "I have bequeathed thyself," or "thy person," or "thy neck to thee," or any part that implies the whole body, or, "I

Definition.

First kind of *tudbeer*.

[1] The selections are from chapter vi., *Book of Emancipation*, *Fut. Al.*, vol. ii., when not otherwise indicated.

[2] *Door-ool-Mookhtar*, p. 304.

[3] *Ibid.* p. 305.

have bequeathed a third of my property to thee." So also, if he should bequeath to the slave a *suhum*, or share of his property, the slave would be emancipated at his death;[1] though bequest of a part of it would not have that effect.

Its effect.

The effect of the *Mootluk*, or absolute kind of *tudbeer*, is that the master cannot sell, or make a gift of, the slave, or marry him against his will, or dispose of him in charity, though he may emancipate or enter into *kitabut* with him. But if he should sell the slave, and the judge decree for the lawfulness of the sale, the decree would be operative, and a cancellation of the *tudbeer;* so that if the slave should at any time thereafter come by any means into his master's possession, and the master should then die, the slave would not be emancipated. The master may also require service of the slave, or let him out to hire; and if the slave be a female, the master may lawfully have sexual intercourse with her, and her dower, if she be married, belongs to him. He is also entitled to her gains, as well as those of the male slave. Upon the death of the master, the *moodubbur* is entitled to freedom out of a third of the master's property; but if his master have left no other property, the slave must work for two-thirds of his value; while if his debts absorb the whole of the property, the slave must work for the whole of his value.

Second kind of tudbeer.

Tudbeer Mookuyyud, or restricted *tudbeer*, is emancipation suspended on a particular kind of death, or on death with the addition of some condition; as when a master says to his slave, "If I die of this disease," or, "If I die on this journey, then thou art free;" and so of any other death that may or may not happen in the manner described, or of any other condition annexed to death, that is susceptible of happening or not happening. In all such cases the slave is a restricted *moodubbur*. So also the *tudbeer* is restricted when a man says to his slave, "If I die at a year or

[1] *Suhum* is a technical expression, which indicates that the slave is made a sharer in his master's property at death, that is, one of his heirs.

twenty years hence;" but if a time be mentioned beyond the usual period of human life, as when he says, "If I die at a hundred years, thou art free," the *tudbeer* is absolute. The effect, if the death take place in the manner or with the condition described, is the same as in the case of the absolute *moodubbur;* but in the meantime the master retains his full power of disposal by sale, gift, or otherwise, and consequently may require service of the *moodubbur* and let him to hire; and in the case of a female, may lawfully have connection with her.

Incidents of both kinds.

The child of an absolute *moodubburah* is a *moodubbur;* but the child of a restricted *moodubburah* does not follow the condition of its mother.[1] If a *moodubburah* should bear a child to her master, she would become his *oom-i-wulud,* and the *tudbeer* be cancelled; because the *tudbeer* would entitle her to freedom only to the extent of a third of his property, while the *isteelad* would entitle her to it to the extent of the whole.[2] The value of an absolute *moodubbur* is two-thirds of his value if he were a *kinn,* or absolute slave. The restricted *moodubbur* is valued as a *kinn.*[3]

Section Third.

Of Isteelad and the Oom-i-wulud.[4]

Definition, and how a female slave becomes an *oom-i-wulud* to her master.

Isteelad means literally to claim a child.[5] When a slave has borne a child to her master, she becomes his *oom-i-wulud,* or mother of a child, whether the child be alive or dead, or be a mere abortion; for if actually formed, though only in part, yet if acknowledged by the master, it is accounted the same as a perfect child, for the making of its mother an *oom-i-wulud.* But if there be no appearance of

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[1] *Door-ool-Mookhtar,* p. 305. [2] *Ibid.* [3] *Ibid.* p. 306.

[4] The selections, when not otherwise indicated, are from chapter vii., *Book of Emancipation, Fut. Al.,* vol. ii.

[5] *Inayah,* vol. ii. p. 375.

formation, as if it has come away in pieces, the mother does not become an *oom-i-wulud*. It is necessary, in all cases, that there should be an acknowledgment or claim of the child on the part of the master; for otherwise its descent from him, on which the *status* of its mother depends, is not established.[1]

Her condition.

When the master dies, the *oom-i-wulud* is emancipated as out of the whole of his property, according to a tradition that the Prophet ordered the mothers of children to be emancipated; and that they should not be sold for debt, nor taken out of the third of the property.[2] Hence, their emancipation, like funeral expenses, takes precedence of debts and the rights of heirs.[3] Hence, also, the sale of an *oom-i-wulud* by her master, and every other disposal of her, such as gift or bequest, that is incompatible with her inherent right to freedom at his death, is unlawful. But what is not incompatible with such right, as letting her to hire, requiring service from her, and taking her gains, is not unlawful. If she should again bear a child, that is, after her master has once acknowledged a child borne by her, his paternity of the second is established without any fresh acknowledgment, because by the first acknowledgment he has set her apart for family purposes, and she has become his *firash*, or concubine.[4] But there is still this difference between her and a wife, that her offspring may be rejected by a simple denial, whereas that of a wife cannot be rejected except by *lián* or imprecation. If an *oom-i-wulud* should become perpetually forbidden to her master, by his father or son having had connection with her, and she should subsequently be delivered of a child at more than six months from the fact, the paternity of the child so borne by her, after the incurring of the illegality, is not established in her master, without a claim on his part. But such a claim removes the objection, for his right in her is not impaired.

She may be given in

Though a man may give his *oom-i-wulud* in marriage, he

[1] *Hidayah*, vol. ii. p. 462. [2] *Ibid.* p. 464. [3] *Ibid.* p. 465.
[4] *Hidayah*, vol. ii. p. 463. The word means, literally, *bed*, but is applied metaphorically to a woman so set apart.

should not do so till after the purification of her womb by the return of her courses. If he should neglect this precaution, and she is delivered of a child within six months, the child is his, and the marriage is rendered invalid. But if the birth does not take place till after six months from the marriage, the paternity is established in her husband. Yet if the master should claim the child as his, it would be emancipated by reason of his acknowledgment, without affecting the paternity of the husband. The child of a married *oom-i-wulud* by her husband is in the same condition as its mother. Her master can neither sell, nor give, nor pledge it, and at his death it is emancipated out of the whole of his property. He may, however, exact service from the child, and let it to hire for that purpose. But if the child be a female, he cannot lawfully have connection with her. All these effects follow, though the marriage should be invalid.

marriage with certain precautions.

Condition of child by her husband.

When a man has married his female slave to his male slave, and she is delivered of a child, which is claimed by her master, the paternity of the child is established in the husband; but it is emancipated by the master's acknowledgment of its freedom involved in his claiming it as his own, and the mother becomes his *oom-i-wulud*, and is emancipated at his death. It is the same thing whether the death be the natural termination of life, or only a civil death through apostasy and joining the enemy. In like manner, when an alien living as a *moostamin*, or under protection in the Mooslim territory, has purchased a bondmaid, and got a child by her, and then returns to his own country, wishing to reduce her to absolute slavery, she is emancipated.

A female slave may be made *oom-i-wulud* to her master by his merely claiming her child.

When an *oom-i-wulud* is emancipated by the death of her master, whatever happens to be in her hands at the time is his property, unless in so far as it has been bequeathed to her by him.

The property of an *oom-i-wulud* belongs to her master.

When a man has had connection with the bondmaid of another, either by virtue of marriage, or under a semblance of right, and she is delivered of a child, and afterwards becomes his property, the paternity of the child is esta-

A slave who has lawfully borne a child to a man, and

is subsequently acquired by him, becomes his *oom-i-wulud.*

blished in him, and she becomes his *oom-i-wulud,* from the date of her so becoming his property, but not as from the time of the original connection. If the child were the fruit of illicit intercourse, and the mother should subsequently become the man's property, she would not be his *oom-i-wulud* according to all "our" doctors. The child, however, would be free, though the mother might be sold.

Acknowledgment by a man of the child of which a slave is pregnant makes her his *oom-i-wulud.*

A female slave being pregnant, her master acknowledges that her burden is from him;—she thereupon becomes his *oom-i-wulud.* In like manner, if he should say to her, "If thou art pregnant it is by me," and she should afterwards be delivered of a child within six months, she would become his *oom-i-wulud.* But if the delivery were not till after the expiration of six months or more, the acknowledgment of the child would not be obligatory on him, and the woman would not become his *oom-i-wulud.*

Circumstances which render it incumbent on a man to acknowledge the offspring of his female slave.

When a man has secluded his female slave, and has had intercourse with her without *izl,* and she is subsequently delivered of a child, he ought to acknowledge it; and as between himself and his conscience it is not lawful for him to sell the mother. But if he has not secluded her, or has practised *izl* in his intercourse with her, he may lawfully deny the child, according to Aboo Huneefa. If a man should say to a boy too old to be his son, "This is my son," the boy would be emancipated as against him, according to Aboo Huneefa; and the better opinion is that the mother also would become his *oom-i-wulud* by force of the acknowledgment.

A child of two or more fathers.

If a slave who is the property of two men should be delivered of a child which is claimed by one of them, its paternity from him is established, and the mother becomes his *oom-i-wulud.* If both should claim the child, his paternity would be established as from both; and he would take the full share of a son in the inheritance of each. Each of the partners also would take the full share of a father in the inheritance of the child. In like manner, if the woman should be the property of three, or four, or five persons, and they should all claim the child, its paternity would be established as from each of them, and the

woman would become the *oom-i-wulud* of each, according to Aboo Huncefa. Though the shares in her of the different proprietors were unequal, that would not affect her right to be the *oom-i-wulud* of all. Each, however, would remain entitled to her service only in proportion to his share.

CHAPTER IV.

OF SLAVERY IN BRITISH INDIA.

THE relation between master and slave has been greatly modified in the British territories in India by an Act of the Indian Legislature; which, as it is short, I insert at length, for the convenience of reference:—

"*Act No. V. of* 1843.

"AN Act for declaring and amending the law regarding the condition of slavery within the territories of the East India Company.—

"I. It is hereby enacted and declared, that no public officer shall, in execution of any decree or order of court, or for the enforcement of any demand of rent or revenue, sell, or cause to be sold, any person, or the right to the compulsory labour or services of any person, on the ground that such person is in a state of slavery.

"II. And it is hereby declared and enacted, that no rights arising out of an alleged property in the person and services of another as a slave shall be enforced by any civil or criminal court, or magistrate, within the territories of the East India Company.

"III. And it is hereby declared and enacted, that no person who may have acquired property by his own industry, or by the exercise of any art, calling, or profession, or by inheritance, assessment, gift, or bequest, shall be dispossessed of such property, or prevented from taking possession thereof, on the ground that such person, or that the person from whom the property may have been derived, was a slave.

"IV. And it is hereby enacted, that any act which would be a penal offence, if done to a free man, should be equally an offence if done to any person on the pretext of his being in a condition of slavery."

Two questions of some importance arise on the application of this Act to Moohummudan slavery. First, Does it remove the impediment to inheritance? Second, Does it leave enough of slavery to establish the paternity of a child borne to a Moohummudan by his slave, and acknowledged by him?

The Act does not confer any new capacities on the slave, nor take away any that he possessed, except in so far as these effects may be produced by the removal of the disabilities under which he labours with regard to his master. But these disabilities are equally removed by the contract of *kitabut*. Yet the slave is not qualified by it to inherit,[1] nor does it prevent the paternity of a child borne by a *mookatibah* to her master from being established, if acknowledged by him.[2] The modification of slavery by the Act is very similar to its qualification by *kitabut*. I am, therefore, inclined to infer the same consequences from both; as it does not appear to have been the intention of the legislature to make any alteration in the condition of the slave, beyond what was necessary to protect him in person and property against the acts and interference of his master.

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[1] *Ante*, p. 369.

[2] *Ante*, p. 373.

CHAPTER V.

OF EMANCIPATION.[1]

How emancipation is effected.

EMANCIPATION is effected verbally, or in writing, and by words that may either be plain, joined to plain, or ambiguous. The plain, or *sureeh*, are the words, "Thou art free," or "emancipated," or, "I have freed" or "emancipated thee," or, "O freed," "O emancipated;" being equally effective, whether used in the way of description, information, or address. The words that are said to be joined to plain, are such as, "I have given," or, "sold thyself to thee." The ambiguous, or *kinayát*, are such as, "I have no property in thee." But to give these expressions the effect of emancipation, it must be intended. Emancipation may also be effected in various other ways; as, for instance, by a claim of paternity, or by a slave's becoming the property of a relative within the prohibited degrees, or by an acknowledgment of freedom followed by the person in whose favour it has been made becoming the property of the acknowledger; or sometimes even by mere entrance into the *Dar-ool-Hurb*, or *Dar-ool-Islam*, as when a *Mooslim* slave is taken by an alien master into the former, or escapes from him and takes refuge in the latter.

Partial emancipation.

When a slave is partially emancipated, as, for instance, when a half, or third, or any other undivided share in him is emancipated, he has to work out the remainder of his freedom by emancipatory labour. His condition, in

[1] For the few selections in this chapter, see *Book of Emancipation*, chap. I., *Fut. Al.*, vol. ii.