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النهر الفائض في علم الفرائض والم
في حقوق النساء واحكام النكا
للشيخ عبد القادر بن محمد المكي

The Muhammedan Law of Inheritance, Marriage, and the Rights of Women.

By

SHAIKH ABDUL KADIR,
bin Muhammed Al-Mekkawi.

M.A.B.I.G.E. AND THE RIGHTS OF WOMEN

'Abd al-Kādir ibn Muhammad, al-Makkāwī.

النهر الفائض في علم الفرائض والايضاح في حقوق
النساء واحكام النكاح
للشيخ عبد القادر بن محمد المكي

A TREATISE ON

The Muhammedan Law,

ENTITLED,

"THE OVERFLOWING RIVER OF THE SCIENCE OF INHERITANCE AND PATRIMONY,"

TOGETHER WITH AN EXPOSITION OF

"THE RIGHTS OF WOMEN, AND THE LAWS OF MATRIMONY."

BY SHAIKH ABDUL KADIR,
BIN MUHAMMED AL-MEKKAWI, OF ADEN.

Second Edition.
طبعة ثانية

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TO

GENERAL CHARLES ALEXANDER CUNINGHAM,

Late Political Resident at Aden,

IN TESTIMONY OF ADMIRATION FOR HIS

ENLIGHTENED RULE

THIS WORK IS DEDICATED

BY

THE AUTHOR.

بسم الله الرحمن الرحيم

هذا الكتاب ينقسم الى قسمين القسم الاول شامل لاحكام الفرائض الاسلامية والثاني يتضمن ايضاح حقوق النساء واحكام النكاح وكنت جمعت القسم الاول ونشرتهُ باللغة العربية في سنة ١٣٠٤ موافقاً لسنة ١٨٨٦ مسيحية وسميتهُ "النهر الفائض في علم الفرائض" فكما قد ذكرتُ في مقدمتهِ كان قصدي بتأليف ذلك الكتاب الصغير ان اجمع مجموعة في الفرائض خالية عن التطويل سهلة المأخذ والتأويل فيبان من تقاريض بعض علماء المسلمين الذين تصفحوهُ انهُ يفوق ما سبقهُ من الكتب في هذا الباب باختصارهِ وبيانهِ وترتيبهِ وكذلك بحسن اسلوبهِ المبتكر

ولعل ذلك الكتاب قد حظي باكثر ما يستحقهُ من الفوز وترجمهُ المستر ليُوهرش الالماني البارع بلغتنا العربية ونشرهُ بالعربية والالمانية فتصفحتهُ بعض الجرائد الالمانية من جملتها قازيتة الالمان الشمالية العمومية الشهيرة وفي انتقادها للكتاب بتاريخ ٢١ من ايلول سنة ١٨٩١ مسيحية بسطت الكلام في نفعهِ

PREFACE.

THIS book is divided into two Parts, the First of which comprises the Muhammedan Law of Inheritance, and the Second Part contains an Exposition of the Rights of Women and the Laws of Marriage. The First Part was compiled by me, and published in Arabic in the year 1304 of Alhejra (1886 A.D.) It was entitled "The Overflowing River on the Law of Inheritance." As I stated in the preface to it, my object in compiling this little book was to supply a compendium of the Law of Inheritance, which should be free from prolixity, and easy of comprehension and interpretation. The testimony of some learned Arabs who reviewed it shows that the book excels other books of a similar nature that have been produced before in point of conciseness, clearness, and arrangement, as well as in the utility and originality of its design.

That book has perhaps met with more success than it deserved, and has been translated by Mr. Leo Hirsch, who is an accomplished Arabic scholar, and who published it in Arabic and German. It was reviewed by some German newspapers, including the renowned *North-German General Gazette,* which in its critique on the 29th April, 1891 A.D., dedicated much space to the usefulness of the work in reference to Germany's colonies, and passed a high eulogism on the clever representation of the law itself. The following

لمستعمرات المانيا واطنبت في مدح اصول شريعتنا في الميراث وهاك ترجمة ما يظهر لنا فائدته من كلامها لمقصدنا

من المعلوم في درس علم الاحكام ان الحقوق الارثية هي القضية التي يدنو منها المبتدي بنفس ابيّة لانهُ يستثقلها ويتكلفها ويتضجر منها مع ان العلماء ينجذبون اليها بالخصوص فان الفرائض تعرّفنا اكثر من غيرها من الاحكام الشرعية باختلاف الامم في مجاري افكارهم الشرعيّة فلذلك كشف احكام الميراث هو المحكّ الحقيقي لمدرّس القوانين سواء اعترف بسلطة الحروف الميّتة او احيى علمهُ بحيوة لولب الهمة وهذا القول يصحّ على هِدِلْبَرغ وبوْلونيا (يعني مدينتين مشهورتين بالعلم الاولى في المانيا والثانية في ايطاليا) كما يصحّ على بمبي ثم ان الجريدة اشارت الى كلام المؤلّف في مقدمة تلك النشرة فقالت في الحقيقة عبارة الكتاب واضحة سهلة المأخذ فابواب الكتاب ستة عشر منقسمة باسئلة واجوبة حسب الضرورة ومنها يبان لنا بيانًا واضحًا صورة اساس الاحكام الارثية والوصايا وذوي الفروض والعصبات ومخارج الفروض وقواعد الحساب وكذلك تفاصيلها العديدة المنحرفة عن مناظر الاوربايين والالمانيين كلها جاذبة للخاطر كما ان المقابلة بين اختلافات مذهبي ابي حنيفة والشافعي تحصل الفائدة بمطالعتها فنحن نرحّب بذلك برغبة لاسباب نحن نعلم بها وهي

is a translation from it of some passages which appear relevant to our purpose :—

"It is known that in the study of the science of law the hereditary right is that matter to which beginners approach most reluctantly considering it dull, pedantic and tedious, while the learned are especially attracted by it, because the rights of inheritance, more than all other departments of law, introduce us to the lines of juridical thought of the different nations ; therefore the way of exposing the hereditary right is a real touchstone for a professor of law, whether he acknowledges the domination of the dead letter or animates his science with the living spring of the spirit. This is valid for Heidelberg and Boulogna, also for Bombay." Then alluding to the Author's statement in the preface to that edition, the paper says :—"In fact the system of the book is lucid and easily comprehended, sixteen chapters, essentially divided into questions and answers, give us a clear and intelligible idea of the foundation of the hereditary claim, of the testamentary consignation, the legal sharers and residuaries, the general denominators of the legal shares and the rules of account, the numerous details, so far deviating from our European and German views, are highly attractive, as it is also interesting to compare the differences of the opposite schools of Abu Hanifah and Ash-Shafa'ee. We readily welcome this, for aught we know the first initiative given by Mr. Hirsch in the preface, practically to accupy ourselves with the legal views of just the heredi-

المبدأ الاول الذي اشار اليه المستر هرش في مقدمة الكتاب بان نجتهد بالعمل ونشغل انفسنا بالافكار الشرعية والحقوق الارثية المتعلقة باهل الشرق الذين اتصلوا بنا من قريب ونرجو ان هذا المبدأ تتبعهُ منشورات اخرى

كذلك عرّفني صاحبي الالماني المذكور ان الاستاذ الدكتور ساكو مدير جمعية العلوم الشرقية الالمانية والدكتور وَانْ سبيجل الذي كان سابقًا شيخ مدرسة ارلانجن اظهر كلٌّ منهما حُسن رأيهِ في الكتاب والدكتور ساكو المذكور في مقدمة كتاب نشرهُ بعد ذلك في الفرائض على مذهب الأباضية من عرب زنجبار وافريقية الشرقية ذكر ايضًا ان كتابي يستحق المدح (انظر مذاكرات ديوان العلوم الملوكي الالماني المجلد الثامن الصحيفة الخامسة)

وانما الانتفاع بالكتاب باللغة الالمانية محصور فالانكليزية هي اللغة التي بنشرهِ فيها يكثر نفعهُ فان احكام شريعتنا في الميراث والنكاح داخلة في شروط الامتحان الذي يلزم على الوكلاء والحكام ان يجروهُ في الهند حيثما ابقت الدولة الانكليزية للمسلمين احكامهم في هذه الامور ولا بد من معرفة تامة بهذه الاحكام لصحة اقامتها وهي من اوثق الوسائط التي تسرّ المسلمين وتطيّب خواطرهم

tary right of the Oriental people lately drawn nearer to us, which initiative, we trust, will be followed by other publications."

My friend Mr. Hirsch informed me also that both Professors Dr. Sachau, Director of the German Oriental Seminary, and Dr. von Spiegel, who was formerly Professor at the University of Erlangen, gave a very favourable opinion about the book. The said Dr. Sachau, in the preface of a work published by him on the hereditary right of the Ibaditic Arabs of Zanzibar and East Africa, has also mentioned my book as a meritorious one. (*Vide* transactions of the Royal Academy of Science, 1894, VIII., page 5.)

The use of the book in German is, however, limited. It is in English that its publication will be more useful, for the rules of our law on the two subjects of inheritance and marriage are included in the examination tests which pleaders and subordinate judges are bound to pass in India, where Government have reserved to the Muslims their laws in these matters. A thorough acquaintance with these laws is indispensably necessary to their efficient administration, and it is one of the surest means of making the Muslims contented and happy.

وقد وسّعت الآن الباب الاول في الوصايا والاوصياء وخصصت القسم الاول بباب في حجر القصّار والمجانين والسفهاء ويعرض القسم الثاني على نظر القاري خمسة عشر بابًا شاملة لحقوق النساء واحكام النكاح بصورة مختصرة ولكنها مرتبطة ببعضها البعض وجامعة للفوائد وقد جعلت الكتاب بصورة اسئلة واجوبة وسبكت عبارته بما يسهّل فهمه للمبتدئين من الطلبة وكذلك للمتقدمين وتجنبت من النكت الدقيقة والمباحث الطويلة التي لا فائدة منها واخترت الاقوال الصحيحة من معتمدات مذهبي ابي حنيفة والشافعي رضي الله عنهما فالمذهب الاول شائع منتشر في الهند وافغانستان وهو مذهب الدولة العثمانية وجميع الترك والتركمان وله اتباع كثيرون في مصر والحجاز ومذهب الشافعي منتشر في اليمن وحضرموت وارض الصومال والدناكل وهرر وسيلان وجاوه وجزيرة الملايو ومصر

وليس المقصود بالكتاب فقط نفع الطلبة الذين يريدون ان يحترفوا بحرفة الوكلاء بل ايضًا استفادة الحكام الذين يلزمهم فصل الدعاوي بين المسلمين فارجو انه يكون وسيلة موصلة الى اقامة الاحكام بين المسلمين طبق شريعتهم وان فيه ما يكفي الطلبة من المؤنة لاجابة كلما يمكن وضعه من المسائل لهم في امور النكاح والميراث في الامتحان السنوي للوكلاء والحكام وان ينتفع به خصوصًا اولئك المأمورون الذين يستخدمون في محكمة عدن

I have now enlarged the First Chapter on Wills and Executors, and concluded the First Part with a Chapter on the Legal Disabilities of Minors, Lunatics, and Indiscreet Persons. The Second Part presents to the reader a concise yet connected and comprehensive view of fifteen separate subjects comprising the Rights of Women and the Laws of Marriage. The book has been put in the form of questions and answers, and the style has been so cast as to make it easy for students as well as beginners to master it. I have avoided nice subtleties as well as prolix and irrelevant discussions, adopting the correct doctrines from the most approved authorities of the two schools of Abu Hanifah and Ash-Shafa'ee. The former predominates in India, Afganistan, and it is the creed of the Ottoman Government and all Turks and Turcomans, and is followed by many people in Hedjaz and Egypt, and the latter is followed by the people of Yemen and Hadramout, Somaliland, Dankaliland, Harar, Ceylon, Java, the Malay Peninsula and Egypt.

The book is intended not only for the use of students intending to practise as attorneys, but also for reference by judges who have to decide cases between Muslims, and I hope that it will be the means of adjudicating cases between Muslims conformably to their laws, and that it contains a sufficiency of materials for students to answer all questions that may be placed before them on the Law of Marriage and Inheritance in the annual examination papers for pleaders and subordinate judges, and that it will be useful especially

فانهم سيحوزون به معرفة تلك الاحكام التي يتعيّنون لاجرائها في عدن وتوابعها ومع ذلك يتعلمون اللغة التي يلزمهم ان يجروا الامتحان فيها بطريقة احسن مما يمكنهم ان يتعلموها بقراءة شيء من الكتب كنفحة اليمن المستعملة للتعليم والحاوية لخرافات وحكايات نادرة الوقوع فان جميع المأمورين من العسكرية والملكية الذين اجروا الامتحان الكبير الذي يقال له "هَيْهَر سْتَانْدَرْدْ" في عدن في مدة الخمس والعشرين سنة الماضية ما علمهم غيري انا او ولدي واخي وكلاهما تعلما عندي فاعلم بالخبرة ان هذا الكتاب يصلح ايضاً لاكتساب معرفة طيبة بالعربية ويسهّل للحكام بان يفهموا الغرماء الحاضرين امامهم من دون اعانة ترجمان وان يتكلموا معهم في المسائل التي يجب عليهم البحث عنها وفصلها وكذلك لمتعلمي العربية لا يخلو الكتاب عن الفائدة لانهُ مشحون باصطلاحات والفاظ شرعية قلّما توجد في قاموس عربي وانكليزي وسيُطلعهم على اساليب العبارة وصفات الانشاء التي تختص بها هذه اللغة وقد بذلت الجهد في الترجمة بان لا ابعد عن الاصل وذلك لحفظ مبانيهِ التي يمتاز بها

واما علماء القوانين الذين يهتمون بدرس شريعتنا ويتشوقون فهمها فهذا الكتاب يكشف لهم الامر بصورتهِ الصحيحة واني لا ارى من بأس في ذكر ملاحظات قليلة فيما يتعلق باحكام

to those officers who are employed in the Court of Justice at Aden ; they will acquire by it a knowledge of those laws which they are appointed to administer in Aden and its dependencies, and at the same time they will learn the language in which they should pass an examination in a better way than could be done be reading such books as "Nafhat-al-Yemen," which is used as a text book, and which contains fables and tales of rare occurrence. Almost all the Civil and Military Officers who passsd the higher standard in Arabic at Aden during the last twenty-five years were taught by me or my son or brother, both of whom received tuition from me only, and I can say from experience that this book is well calculated to impart to them a good knowledge of Arabic, and to enable officers to understand parties before them without the aid of an interpreter, and to talk to them on subjects which it is their duty to investigate and decide. Similarly to students of Arabic the book cannot fail to be serviceable, for it abounds in legal terms and words which are rarely found in Anglo-Arabic dictionaries, and will acquaint them with those modes of expression and qualities of style which are peculiar to this language. In making the translation I have endeavoured to keep close to the original so as to preserve its distinguishing structural features.

To professors of law who are taking great interest in the study of our laws, and who are anxious to have a clear idea of them, this book will show the matter in its true light. I think that it will not be amiss to make a few observa-

الفرائض وفي بعض العادات التي يذم اهل اوربا المسلمين عليها لاني ما ابديت ارائي في بطن الكتاب ولا حدّثتهُ بشيء فاقول انهُ بشريعتنا لا فضل للابن الاكبر ولا للاصغر على اخوانهِ ولا يجوز لرجل ان يوصي بمالهِ كلهِ للاجانب ويحرم اولادهُ وزوجتهُ ويتركهم مخذولين في الدنيا فالشريعة تبيح للشخص بان يوصي بقدر الثلث من التركة وتأمر وجوبًا بقسمة الباقي اي الثلثين فاذا لم يكن قد اوصى بشيء منها فبقسمة جميع التركة بين ورثتهِ بمقادير معلومة بقدر درجة قرابتهم وقوتها ولا يحجبن النساء عن ميراث المنقولات ولا العقارات وانما اذا ورثن مع اخوانهن فللاخ مثل حظ الاختين وقد شرحنا سبب ذلك في القسم الثاني من هذا التأليف فعلى الاورباوي المنتقد ان يمعن نظرهُ في احكامنا الارثية كما هي آتية في ابواب هذا الكتاب ويقابل بينها وبين قوانينهِ حتى يرى ايها اثبت اساسًا بالتفكر في العدل والانسانية

واما حالة النساء في الاحكام فشريعتنا تحسب المرأة كالرجل قادرة على تدبير امورها والنظر في مصالحها ولا حجر عليها كالصغار سواء كانت مزوّجة ام لا وعقودها نافذة في البيع والشراء وسائر المعاملات ولازمة عليها وحدها (اي لا على الزوج شيء من ذلك) ولا يملك الزوج حقًّا في اموالها وعلى كلٍّ من الزوج والزوجة ان يعامل الآخر بالمعروف كما قال

tions here on our Law of Inheritance and on certain practices for which the Muhammedans are condemned by Europeans, as I have not expressed my views in the body of the book nor made any notes to it. Under our law neither primogeniture nor postremogeniture confer any superior right. No man can bequeath all his fortune to strangers and disinherit his widow and children and cast them adrift on the world. The law allows a person to bequeath as much as one-third of his or her estate, and ordains the compulsory division of the remaining two-thirds, or the whole of it if nothing is disposed of it by will, amongst his heirs in certain proportions according to their degree and strength of relationship. Females are not excluded from inheriting real or personal property, but when inheriting at the same time with their brothers, the brother's share is double that of his sister, and the reason for this is set forth in Part Second of this treatise. It is for the European critic to examine minutely our Law of Inheritance as set forth in the following Chapters, and to contrast it with his own law on the subject, so that he may see which of the two is most strongly based on considerations of justice and humanity.

With regard to the legal status or condition of females, our law considers the woman as capable as man of managing her affairs and appreciating her concerns. Whether married or not, she labours under no legal disability as children do ; her contracts in buying and selling and other transactions are valid, and she only is bound by them. The husband does not acquire any right to his wife's property. Both husband and wife are bound to treat each other equitably as the Koran says :—"And the women ought to behave towards their husbands in the same equitable way that the husbands should behave towards

الكتاب العزيز " وَلَهُنَّ مِثْلُ ٱلَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ وَلِلرِّجَالِ عَلَيْهِنَّ دَرَجَةٌ " (سورة البقرة)

والبنت التي مات ابوها وجدّها لا يجوز نكاحها على مذهب الشافعي حتى تبلغ وترضى بذلك وعند ابي حنيفة اذا فُقد ابوها وجدّها جاز لغيرهما من الاقارب تزويجها ولكن لها الخيرة بالفسخ عند البلوغ

وقد شرحنا احكام النكاح والطلاق شرحًا وافيًا في هذا الكتاب اما الزواج باكثر من امرأة كان امرًا تعوّدت عليه القدماء وهو مباح في الكتب المقدسة التي يؤمن بها النصارى وكان عدد الزوجات غير محصور عند العرب قبل ظهور الاسلام فجاءت الشريعة الاسلامية وحصرت عدد الزوجات بالاربع ومن المعلوم انهُ يعسر استئصال العادات والطبائع المتمكنة من قديم الزمان اعسارًا عظيمًا ومع ذلك فان شريعتنا تشير على الرجل بان يقتصر على امرأة واحدة واوجبت على المتزوج باكثر من واحدة ان يعامل نساءهُ بالعدل والسوية ويجعل لكلٍّ منهنَّ منزلاً منفردًا ونفقة كافية وعرضتهُ للتعزير اذا خالف هذا الامر فبهذه الصعوبات التي تلقيها الشريعة في طريق المتزوج باكثر من امرأة قلما يتجاسر رجل على ذلك الاَّ اذا ساقتهُ شدَّة الضرورة كعقر المرأة الاولى او طول مرضها او كغربة

them, but men have a superiority." (Chapter II.)

A minor girl whose father and grandfather are dead cannot be given in marriage according to the Shafa'ees' doctrines until she becomes of age and agrees to it ; but according to Abu Hanifah, though after the death of her father or grandfather, she may be disposed of in marriage by her other nearest relations : she has the option of dissolving the marriage on attaining to puberty.

The laws of marriage and divorce are fully set forth in this book. Polygamy was practised amongst the Ancients, and it is allowed in the Holy Scriptures which Christians believe in. Unlimited polygamy prevailed amongst the Arabs before the Islamic era. The Islamic law has restricted the number of wives to four. It is well known that it is very difficult to eradicate customs and feelings of very ancient standing, nevertheless, the Koran recommends the man to restrict himself to one wife, and imposes on the polygamist the obligation of treating his wives alike and equitably, and of providing for each of them a separate lodging and sufficient maintenance, and renders him liable to punishment for infringing this law. By these difficulties which the law throws in the way of the polygamist, very rarely can any man venture to do it unless he is driven to it by extreme necessity, such as the barrenness or the long sickness of the first wife, or a long sojourn in a place to which she would not accompany him, or unless he were a hard-hearted, wealthy voluptuary, who would lead a worse life if he were restricted to one wife, or unless he were one of those pious men who, like holy patriarchs, profess to marry more than one wife through a desire of multiplying the human species. In fact,

طويلة في ارض لم ترضَ الزوجة بمرافقته اليها او كان قاسي القلب وغنيًّا من المتلذذين اواذا كان من المتورّعين كالبطارقة القديسين الذين يظهرون انهم يتزوجون باكثر من امرأة رغبةً في تكاثر نسل بني آدم وفي الحقيقة نكاح اكثر من زوجة واحدة نادر الوقوع حتى انهُ لا يوجد بين الازواج واحد من الثلاثين لهُ اكثر من زوجة واحدة

وزيادة على ذلك ان افواجًا من الرجال يهلكون بالحروب ويلاقون الموت من عوارض واسباب عديدة النساء سالمات منها فلو لزم الرجل الاقتصار على زوجة واحدة لوفُرت وكثُرت النساء المعطَّلات عن الازواج فيُقضى عليهنَّ بالتعزّب طول اعمارهنَّ ففي هذا الحكم اضرار عظيم بهذه النساء لانهُ يمنعهنَّ من الزواج ومن جهة اخرى منع المتلذذين من نكاح اكثر من واحدة يسوقهم الى الفسق فاباحة الزواج باكثر من واحدة كثيرًا ما تخلّص النساء الفقيرات من الحاجة والعوَز وهي مانعة لحرفة الفساد المنتشرة في بعض البلدان المتمدنة المفسدة لجميع الاخلاق والتي يتولد منها امراض مهولة كريهة ما تقدر حذاقة جميع الاطباء على استئصالها فلو لم تكن الاباحة بازيد من زوجة نافعة وجالبة لحسن الاخلاق لما اجازتها التوراة وما كان البطارقة القديسون اعتادوا عليها

polygamy is of such rare occurrence that not more than one husband among thirty has more than one wife.

Moreover, multitudes of men are annihilated in wars, and others meet their death by numerous accidents and causes from which women are safe. If monogamy were enforced, there would be a large surplusage of unmarried women who will be doomed to celibacy during the whole of their life. Such a law would by very injurious to this class of women because it will prevent them from marrying. On the other hand, to prevent voluptuaries from marrying more than one wife would drive them to profligacy. The license of polygamy often saves poor women from want and destitution, and it is an obstacle to that professional vice which prevails in some civilized countries, and which undermines the foundation of all morals and produces abominable and terrible diseases that cannot be stamped out by the skill of all medical science. If polygamy were not conducive to morality, the Pentateuch would not have allowed it and the patriarchs would not have practised it.

وكذلك الطلاق نادر عند اعيان الناس واوساطهم لكنهُ منتشر بين العوام وذلك لقلة تربيتهم وقد اباحتهُ شريعتنا كغيرها من شرائع القدماء ولكن نبينا عليهِ الصلوة والسلام اضاف لهذه الاباحة موعظة زاجرة بقولهِ ابغض المباحات عند الله الطلاق وقال ابو حنيفة بتحريمهِ الاَّ لسبب كريبة او تنافر الطباع فلا يطلّق رجل مسلم ذو اعتبار زوجتهُ الاَّ اذا اضطرَّ لفعل ذلك من سوء سيرتها كما اذا صار بقاء اتحادهما من المستحيل او كان جالبًا لشقائهما دون سعادتهما ولا توجب شريعة الاسلام على الرجل اظهار سبب لطلاق زوجتهِ او ان يقدّم دعوى في المجلس وينشر بذلك عيوب الفريقين بل انها تأمرهُ عند طلاقها بأن يدفع لها مهرها ويسلم لها جميع ما كان وهبهُ لها وان ينفق عليها مدة عدتها

واما حجبة النساء فالكتاب العزيز يقول "قُل للمؤمنين يَغُضُّوا مِنْ أَبْصَارِهِمْ وَيَحْفَظُوا فُرُوجَهُمْ ذلكَ أَزْكَى لَهُمْ إِنَّ اللهَ خبيرٌ بِمَا يَصْنَعُونَ وَقُلْ للمؤمنات يَغْضُضْنَ مِنْ أَبْصَارِهِنَّ وَيَحْفَظْنَ فُرُوجَهُنَّ وَلا يُبْدِينَ زِينَتَهُنَّ إِلاَّ مَا ظَهَرَ مِنْهَا وَلْيَضْرِبْنَ بِخُمُرِهِنَّ على جُيُوبِهِنَّ" (سورة النور) فهذه الاحكام موجهة على الرجال والنساء جميعًا والمقصود بها تحسين الآداب والاحتشام والعرب يرون ان تفريق الجنسين يزيد في سعادتهما

Divorce is also rare amongst the higher and middle classes, but it prevails to a great extent amongst the lower orders owing to their want of culture. Our laws, like those of the ancient nations, permit it, but the Prophet has annexed to this premission a deterrent warning, *viz.* : Of all lawful acts, the most abominable in the sight of God is divorce. And Abu Hanifah has declared its prohibition unless it were for a proper cause, such as suspicious conduct or incompatability of temper. No respectable Muslim divorces his wife unless he is compelled by her bad conduct to do so, as when the continuance of their union has become impossible or when it would be productive of their misery rather than their happiness. The Islamic law does not require a man to show cause for divorcing his wife or to institute a suit in court, and thereby publish the vices of both parties, but it directs him, when divorcing her, to pay her the dower due to her, and to deliver to her all that he had given to her, and to provide maintenance for her during her term of iddet, *i. e.,* the time before which she is not allowed by law to remarry.

As for female seclusions, the Holy Koran says: Tell the believing men that they should restrain their looks and observe continence, this will be more pure for them, for God is knowing that which they do. And say unto the believing women that they should restrain their looks and preserve their modesty, and should not display their ornaments except what necessarily appeareth therefrom, and let them throw their kerchiefs over their bosoms. (Chapter XXIII. on Light). These directions are addressed to men and women both, and have for their object the promotion of good manners and decency. In

وفي دوام اتحاد المتزاوجين وما انهُ يزيل جميع اسباب الغيرة فقط بل انهُ ايضاً يحفظ النساء من السب والاهانة ولسن النساء مخزونات في البيوت كالمسجونات فانهن يزرن بنات جنسهن ولهن اماكن يتنزهن فيها كما للرجال ولا يحتجبن من اقاربهن المحرّمين عليهن واذا لم توجد طبيبة يجوز للطبيب النظر الى المريضة ومداواتها بشرط حضور احد محارمها فبسبب تفريق الجنسين يختلط كل جنس باولاد جنسهِ وان اختلفت احوالهم ومراتبهم فالرجال يعاشرون الرجال والنساء يعاشرن النساء بزيادة حرية ولا يتضررن المحجبات من حجبهن بل انهُ بخلاف ذلك هن مسرورات بها ويتكدرن جدًّا من عرضهن لنظر الاجانب لانهن تربّين على الحجبة من صغرهن ومهما تراهُ اهل اوربا بانقيادهم لعوائدهم واعتقاداتهم في حالة النساء عندنا فالعرب يحترمون النساء احترامًا عظيمًا ولفظة الاحترام مشتقة من الحرم وهو ما لا يحل انتهاكهُ والحريم هو ما يحميهِ الرجل ويقاتل عنهُ ولذلك سُمّيت بهِ نساء الرجل ومن يهن امرأة يُعدّ عند العرب بانهُ انتهك المحارم ويُعاقب اشدّ العقاب والشريعة المحمدية تحث المسلمين على صلة الارحام ومواساتهن ونفقتهن والذبّ عنهن ويُعدّ عارًا عظيمًا على الرجل ان يهوّن في اعانة ارحامهِ والذبّ عنهن وقد جعلت الشريعة للنساء حقوقًا ما كنّ

the opinion of the Arabs, the separation of the sexes promotes their happiness and conduces to the continuance of the union of married people, and not only does it remove all causes of jealousy, but it also conduces to the protection of females from insult and indignity. Women are not confined in houses like prisoners, they visit persons of their sex, and have their places of resort as men have theirs. They are not excluded from men who are related to them within the prohibited degrees. Where there is no female doctor, a sick woman can be examined and treated by a male doctor provided one of her said relations is present there. In consequence of such separation persons of the same sex, though of different ranks, associate and mix together more freely. Secluded women do not feel their separation very keenly, on the contrary, they are much pleased with it, and feel very degraded by being exposed to public view, for they are brought up to it from infancy. Whatever Europeans may be led by their habits and convictions to think about the condition of females amongst us, they (women) are held in high veneration by the Arabs ; the word to " venerate " is derived from haram, which means sacred or that which it is not lawful to violate. The harem means that which a man should protect and fight in defence of, hence it is applied to denote a man's women or Zenana. Anyone who insults a woman is treated by the Arabs as one who has committed a sacrilege and is punished most severely. The Muhammedan law exhorts Muslims to treat kindly their female relations, and to assist and maintain them and to defend them. It is regarded as very disgraceful in a man to neglect in assisting or defending his female relations. Our law has bestowed on women rights which they had not possessed before for it has placed the woman on equal footing

يملكنها من قبل فانها ساوت بين الرجل والمرأة في التصرفات الشرعية وفي تدبير امورها والتمتع باموالها واثبتت حقوقها في النكاح والميراث وحضانة اولادها الصغار

واني عالم بقصور باعي وعجزي عن حق القيام بهذا العمل فارجو من الذين يعرفون الصعوبة الحاصلة في ترجمة كتاب علمي او فقهي الى لغة اجنبية ان ينتقدوا الكتاب بعين اللطف وساكون شاكراً لكل من يتفضل عليّ بالاشارة لاصلاح خلل او لايضاح شيء مبهم ربما يراهُ فيهِ

عبد القادر بن محمد بن عبد الله النقشبندي المكي

عدن ١٦ جمادالاول سنة ١٣١٧

with man in legal power and in the management of her affairs and the enjoyment of her property. and it has also recognized her conjugal and hereditary rights as well as her right to have custody of her little children.

I am aware of my own imperfections and inability to do full justice to the task. The book teems with legal phrases, many of which have no proper equivalents in English. I hope that those who know the difficulty of translating a legal or scientific book into a foreign language will judge the book with an indulgent eye. I shall be grateful to anyone who would favour me with any suggestions which would supply any defect or elucidate any ambiguity that he may see in it.

ABDUL KADIR BIN MUHAMMED ABDULLA

AN-NAKSHABENDI AL-MECKEE.

Aden, 20th August, 1899.

تقريض السيد الفاضل العلامة ابو بكر بن شهاب

الحمد لله وحدهُ ان افضل ما أُنفقت في تحصيلهِ النفائس واجل ما ازدانت بهِ صدور المحافل والمجالس هو كسب العلوم التي تكسو مقتنيها حلل الشرف والكمال وتربأُ بذويها عن حضيض النقص اذا امتحنت الرجال وان من اجلّها مقدارًا وارفعها بين العلوم منارًا علم الفرائض الجليل شانه ونفعه المستخرج من الكتاب العزيز اصله وفرعه وقد وقفت على مؤلف في هذا الفن غريب التركيب منسجم العبارة عجيب الترتيب وضعهُ جامعهُ على اسلوب مخترع فنعم الجامع وما جمع سهّل بهِ اخذ الشوارد للمبتدئين واستخرجهُ ذريعة الى افادة المتعلمين وقرّبهُ الى الافهام اي تقريب وساهم مع اختصارهِ من الفوائد باوفر نصيب وحين نزهت طرفي في حدائقهِ ومراتعهِ الفيحة مترجمًا بالفضائل لجامعهِ واتمنى ان يعظم بهِ نفع العباد وان يكون وسيلة موصلة الى غاية المراد هذا وجامعهُ اخونا اللابس من الفضائل الحلة السابغة المقيم ببدايع الفاظهِ الحجة البالغة الشيخ المكرم عبد القادر بن الحاج محمد المكاوي وقاه الله ما عاش من مكروهات المساوي وابقاه متمتعًا في هذه الدار بما يحب وسلك بهِ مناهج الترقي كما ينبغي او كما يجب والحمد لله اولاً واخرًا وباطنًا وظاهرًا

REVIEW I.

By the illustrious and learned Sayyid Abu Bekr bin Shahaab.

Praise be to God only! In truth the most excellent thing for the acquisition of which wealth is expended and the greatest glory by which the centres of assemblies and meetings are adorned is the acquisition of knowledge which clothes those who acquire it in robes of honour and accomplishment and raises its possessors out of the abyss of incompetency when men are put to the test. And one of the noblest sciences and the most conspicuous in eminence amongst them is the science of the laws of inheritance which is very valuable and useful — its principles and branches being derived from the Holy Book. I have seen a book on this science, original in composition, fluent in style, admirable in arrangement and framed by its author in a newly invented manner. Excellent are both the composition and the composer. In it he has made easy for beginners the comprehension of its intricacies, simplified it for the advantage of students, brought it very near to the understanding, and has combined therein brevity with the largest share of usefulness. When I feasted my eyes on its gardens and pastures, I found it to be the exponent of the virtues of its compiler, and I hope that it will be of great use to men, and the means of supplying a great desideratum. Its author is our brother who is clothed in the most ample robe of virtue, one who works by the eloquence of his words the greatest miracle—the honoured Shaikh Abdul Kader ibn Alhaj Mahomed Al-Mekkawi. May God protect him during his life from evils and give him enjoyment in this world as it

كتبه الفقير الى الله

ابو بكر بن عبد الرحمن بن شهاب الدين

العلوي الحسيني عفى الله عنهُ

تقريض السيد الجليل العلامة يحيي بن محمد قاضي عدن

الحمد لله وبعد فاني قد تصفحت هذا السفر الجليل الذي جمعهُ الفذ النبيل الشيخ عبد القادر بن محمد بن عبد الله المكي فالفيتهُ في غاية الايضاح والبيان وقد نهج فيهِ نهجاً لم يسبقهُ غيرهُ اليهِ في التبيان فلقد بين غرائبهُ ومعانيهِ وسهّل شواردهُ ومبانيهِ فلله درّهُ من جامع ينطق بفضل منشيه ويعرب عن بديع اختراعه في حاضرهِ وباديه فجزى الله جامعه افضل الجزاء وكافاه بزيادة الحسنى

كتبهُ الفقير يحيى بن محمد قاضي عدن

تقريض الشيخ المحقق والعلاّمة المدقق احمد بن علي محسن السالمي

الحمد لله — اما بعد فقد سرّحت النظر الفاتر والذهن

pleaseth Him and lead him on in the paths to progress as it may be expedient or necessary. And praise be to God at the beginning and at the end, both inwardly and outwardly. This was written by one who stands in need of God: Abu-Beker Abdul Rehman bin Shahaab-ud-Din Alalawy Alhosainy. God be gracious unto him!

REVIEW II.

By the noble and learned Syid Yahya bin Mahomed Cazee of Aden.

Praise be to God! I have examined this excellent book which is compiled by the esteemed and noble Shaikh Abdul Kader bin Mahomed bin Abdulla Al-Mekkawi, and I have found it extremely clear and lucid. He has adopted in it a method of exposition such as no other has surpassed, and has in fact cleared all difficulties and meanings, and has simplified its intricacies and constructions. Being excellent in every respect, it speaks of the excellence of its author, and bears witness to his wonderful talent whether in the most simple or the most difficult matters. May God bestow on the author the highest recompense and best reward. Written by the humble one Yahya bin Mahomed Cazee of Aden.

REVIEW III.

Of the experienced and learned Shaikh Ahmed bin Ali Mohsin As-Salimee.

الكليل القاصر في بديع ازهار رياض ما جمعهُ سيدي الاريب
الفاضل اللوذعي النبيل الباسل المتحلي بانواع الفضائل والفواضل
الشيخ عبد القادر بن الحاج محمد المكي من مختصر في فن علم
الفرايض على مذهب الامام الاعظم النعمان نفع الله بهِ فوجدتهُ
كتابًا اتي بهِ مؤلفهُ النجم الاديب على اسلوب عجيب ونهج بديع
مبتكر غريب يحسن وقعهُ عند ذوي الالباب ويدخل المسرّة
على الناظر فيهِ من كل باب مهذب مسالك التصنيف عذب
الترصيع والترصيف فيا حبذا مؤلف يرد منهلهُ الرائح والغادي
وينوّه بعظيم فضلهِ الحاضر والبادي فجزا الله مؤلفهُ خير الجزاء
ومنحهُ الزيادة والحسنى انهُ وليّ ذلك والقادر عليهِ وهو حسبنا
ونعم الوكيل وصلى الله على سيدنا محمد وآله وصحبه وسلم

كتبهُ العبد المسكين المفتقر الراجي عفو ربهِ المقتدر
احمد بن علي محسن السالمي عفى الله عنهُ

تقريض السيد الحسيب النسيب اللوذعي
علي بن احمد الاهدل قاضي لحج

الحمد لله — لما تصفحت هذه المجموعة بحسب الامكان

Praise be to God! I refreshed my languid sight and my wearied and deficient understanding with the excellent flowers of the orchards of what my sagacious and noble and courageous master, who is adorned with every kind of virtue and excellency, Shaikh Abdul Kader bin Alhaj Muhammed Al-Mekkawi, has compiled, that is, a compendium of the science of the law of inheritance according to the doctrines of the great Imam Annoman (Abu Haneefah). May God benefit us through him. I found it to be a book which has been produced by its author—the cultivated star—in an admirable style introducing a new and excellent method which commends itself to men of understanding and imports pleasure to its reader in every way. Its way of composition is graceful, while it is pleasing in point of arrangement and good order. How excellent is the work! Its fountain will be frequented by goers and comers, and townsmen and villagers will speak highly of its great excellence. May God reward its author with the best recompense and shower on him an increase of His favours and bounties. He is in truth the bestower of the same and is able to do it, and He is sufficient for our needs and is the best Protector. And blessings and peace be on our Master Mohammed and on his children and companions. Written by the poor, the indigent slave, who hopes for the pardon of his Powerful Lord: Ahmed bin Alli Mohsin As-Salimee. God have mercy on him!

REVIEW IV.

Of the noble-born and talented Sayyid Alli bin Ahmed Alahdal Cazee of Lahrj.

وجدتها من اعجب موجود ابتكر في هذا الزمان فجزى الله مؤلفها
اخانا العلاّمة الذكي الشيخ عبد القادر بن محمد المكي خير الدارين
ووفقهُ لما تقرّ بهِ العين انهُ على ما يشاء قدير وبالاجابة جدير
وهو نعم المولى ونعم النصير وصلى الله على سيدنا محمد وعلى آلهِ
وصحبهِ وسلم كاتبهُ الفقير الى الله عزّ وجل
علي بن احمد الاهدل

حرّر في ١١ محرم الحرام ١٣٠٢ هجري

Praise be to God! After I have examined this treatise, according to my ability, I found it to be one of the most admirable productions that have been originated in our age. May God reward its author who is our learned and talented brother —Shaikh Abdul Kader bin Muhammed Al-Meckee, with the blessings of this world and the world to come and may He guide him on pleasant paths, for He is powerful in whatsoever He wills and willing to grant prayers, and He is the most excellent Lord and the best Helper; and blessings and peace be on our Master Muhammed and on his children and companions.

Written the 11th of the Holy Muharram, 1303 of the Hejira by one who is poor to the Almighty God—Alli bin Ahmed Alahdal.

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PART I.

الباب الاول

في الوصية والوصي

سؤال . ما معنى الوصية

جواب . معناها باللغة الايصال من وصّى الشيء وشرعًا هي هبة مال من مالكهِ لآخر معلقة بموتهِ

س . ما هي صيغة الوصية

ج . يُشترَط فيها لفظ تفهم منهُ الوصية بالصريح كاوصيت لزيد بالدار الفلانية او بالكناية كاعطوهُ خمسين روبية اى وهبتها لهُ بعد موتي

س . ممن تصح الوصية

ج . من كل مَن كان مطلق التصرف يعني بالغًا عاقلاً مختارًا حرًّا فلا تصح الوصية من مجنون وصبي وقاصر ومكرَه اي مغصوب

س . هل يجوز لانسان ان يوصي لاجنبي او لاحد من اقاربهِ بمالهِ كله او بعضه

ج . اولاً لا تصح الوصية لوارث بشيء الاَّ اذا رضي بها واجازها بقية الورثة ولا عبرة باجازتهم في مدَّة حياة الموصي مثلاً

CHAPTER I.

On Bequests, Wills and Executors.

Q. What is the meaning of a bequest?

A. It means in common language "to convey," the root being "wassa," he conveyed, and in a legal sense, it means a gift of property by its owner to another contingent on his (the giver's) death.

Q. What are the essentials of a bequest?

A. It is essential that it should have a wording from which the legacy can be understood expressly, as: "I have bequeathed to Zaid such and such a house; or by implication, as, "Give him Rupees fifty; or, I give it to him after my death."

Q. Whose will is valid?

A. The will of every one who is competent to dispose of his property, that is to say, who is of full age and discretion, and who has independent choice and freedom, is valid. The will of every one who is *non-compos mentis*, or a minor, or under coercion, that is to say, who is forced or under duress, is invalid.

Q. Is it lawful for a person to bequeath to a stranger or to one of his relations (1) all his property, or (2) a part of it?

A. (1) A legacy in favor of one heir is invalid, unless the other heirs consent to and approve of it, and their consent is immaterial if it is given in the lifetime of the testator; for instance, a man dies and leaves a father, a son,

مات رجل وخلف ابًا وابنًا وبنتًا وكان قد اوصى في حياتهِ بنصف مالهِ للابن فلا تصح هذه الوصية الاَّ إن سامحت عنها واجازتها البنت والاب بعد وفاة الميت

ثانيًا لا تصح الوصية لاجنبي بازيد من ثلث تركة الموصي فلا تجوز الوصية بازيد من ثلث التركة بعد اخراج مؤنة تجهيز الميت ودينه الاَّ ان اجازها الورثة مثلاً مات زيد وخلف ابنًا وتركتهُ بعد مصاريف تجهيزهِ ودينهِ تساوي الف وخمسمائة ريال وكان قبل موتهِ اوصى لعمرو بالف ريال فلا تصح الوصية لعمرو الاَّ بخمسمائة ريال الاَّ ان اجازها الابن

س . اذا مات الموصى لهُ قبل الموصي فلمن ترجع الوصية

ج . لورثة الموصي

س . اذا اوصى احد لشخصين ولم يميز حصة كل واحد منهما ومات احد الموصى لهما وخلف ورثة فمن ياخذ الوصية

ج . ورثة الميت الموصى لهُ ما لم شيء والموصى لهُ العايش احق بها كلها على مذهب ابي حنيفة رض واما على مذهب الشافعي رض فنصفها للموصى لهُ الحي والنصف الآخر يرجع لورثة الموصي

س . ما الذي يبطل الوصية

ج . الوصية تبطل بالرجوع عنها كقول الموصي قد ابطلتها

and a daughter behind him. He had in his lifetime bequeathed the half of his property to the son; this bequest is not valid, unless the daughter and father approve of and agree to it, after the death of the deceased.

(2) A bequest or legacy in favor of a stranger amounting to more than a third of the property of the testator is not valid and takes effect only to the extent of one-third of the estate after deducting the funeral expenses of the deceased and his debts, unless the heirs agree to it.

For instance, Zaid dies leaving a son, after paying his burial expenses and his debts, his assets amount to one thousand and five hundred (1,500) dollars; he had before his death bequeathed to 'Amr one thousand (1,000) dollars; the legacy is only valid to the extent of five hundred dollars, unless the son approves of it.

Q. If the legatee dies before the legator upon whom does the legacy devolve?

A. Upon the heirs of the testator.

Q. If any one makes a bequest or legacy in favor of two persons, and does not specify the share of each of them, and one of the two legatees dies, and leaves behind him heirs, who will receive the legacy?

A. According to the doctrine of Abu-Hanifa, the heirs of the deceased legatee shall have nothing; and the surviving legatee is entitled to the whole of it. But according to the doctrine of Ash-Shafa'ee half of it falls to the legatee living and the second half devolves upon the heirs of the testator.

Q. How is a revocation of a legacy made?

A. The legacy or will is revoked by withdrawing it, *i. e.*, by the declaration of the

او بدّلتها او رجعت عنها وتبطل بالتصرف في الموصى بهِ بفعل يفيد الرجوع او يشعر بهِ كبيع المال الموصى بهِ او رهنهِ او عرضهِ للبيع فعلى ذلك لو اوصى بدار لفلان ثم اوصى بها لآخر صحت للثاني

س . هل تصح الوصية بالمجهول والمعدوم

ج . الوصية تجوز بالمجهول اذا يمكن تحقيقهُ كقول الموصي اوصيت لزيد بما في هذا الصندوق او بما في هذا الدار من الرز او بما يطلع في هذه النخلة من الثمر هذه السنة ولا تصح بالمعدوم الاَّ اذا كان حاصلاً في ملك الموصي عند وفاتهِ

س . زيد اوصى لاحد ورثتهِ بثلث مالهِ ولرجل اجنبي بثلث مالهِ وفي حيوة زيد بقية الورثة اجازوا الوصيتين كلتيهما وبعد وفاتهِ عارضوا فيهما فهل تصح الوصيتان كلتاهما او احداهما او البعض من كل وصية

ج . لا عبرة على اجازتهم في وقت زيد فالوصية للاجنبي بثلث مالهِ صحيحة نافذة واما الوصية للوارث لا تصح ما لم يجزها بقية الورثة

س . زيد اوصى لكل من عمرو وصالح بالثلث من مالهِ ولهُ ورثة عارضوا في ذلك بعد وفاتهِ فهل تصح الوصيتان

ج . لا تصح الوصيتان الاَّ بقدر الثلث فيأخذ عمرو السدس

testator, I annul it or replace it or withdraw it, and it is also annulled by the disposal of the thing bequeathed in any way which notifies the withdrawal or implies it, such as selling the property bequeathed, or mortgaging it, or offering it for sale, therefore if a man bequeaths a house to one person and afterwards bequeaths it to another, the legacy to the second is valid.

Q. Is a legacy of property unknown (ambiguous) or non-existing valid?

A. The legacy of ambiguous property is allowed if it is capable of being ascertained, for instance, if the legator declares I bequeath to Zaid what is contained in this chest, or the rice which is in this house, or the fruit this palm-tree will bear this year, and a legacy of a thing not existing is not valid, unless at the time of his death, the testator was in possession of it.

Q. Zaid bequeaths to one of his heirs one-third, and to a stranger another third of his property; in the lifetime of Zaid the other heirs consent to the whole of both legacies, but after his death they object to them. Are both legacies valid in full, or only one of them, or only a part of each legacy?

A. Their consent in the lifetime of Zaid is immaterial. The legacy to the stranger of a third of the property is valid and is capable of being carried into effect. The legacy to the heir is not valid unless the other heirs consent to it.

Q. Zaid bequeaths to 'Amr and Saleh, each, one-third of his property; his heirs, however, contest the will after his death. Are the two legacies valid?

A. The two legacies are not valid above the value of a third, so 'Amr will take a sixth and

وصالح السدس وان اوصى بثلث مالهِ لزيد ولآخر سدسه ولم تجز الورثة ذلك فالثلث بينهما اثلاثًا فيأخذ زيد سهمين وللآخر سهم

س . ما هي الوصايا الباطلة

ج . لا تصح الوصية لقاتل اي لمن يقتل الموصي مباشرةً كالخاطي والعامد لا تسبباً كمن حفر بئرًا فوقع فيها آخر الاَّ اذا كان الموصي لهُ مجنونًا او صبيًا فالوصية صحيحة وعند الشافعي تصح الوصية لقاتل كما اذا اوصى لرجل فقتلهُ ولكافر كالصدقة عليهما وانما لا تصح في معصية كبناء معبد يُعبَد فيهِ غير الله تعالى ولا لشخص لارتكاب ذنب

س . هل تنفذ الوصية اذا كانت معلقة بشرط فاسد

ج . نعم الوصية نافذة والشرط باطل مثلاً لو اوصى بعتق امة على ان لا تتزوج عُتقت وان تزوجت لم يبطل العتق وكذلك لو اوصى من ثلث مالهِ بالف ربية لامرأة بشرط ان لا تتزوج فالوصية نافذة والشرط باطل

س . هل تصح الوصية للحمل

ج . نعم تصح اذا وُضع الحمل حيًّا لاقل من ستة اشهر من

Saleh a sixth. If he bequeaths one-third of his property to Zaid and one-sixth to another, and the heirs would not sanction the same, the third of the property will be divided into thirds, of which Zaid takes two shares and one goes to the other.

Q. What legacies are invalid?

A. A legacy is null and void if made to a murderer, *i. e.*, one who murders the testator by his own act whether it was manslaughter or murder; but not if he was merely the cause of it; as if he digs a well on a public road and another falls in it and dies; if, however, the legatee is a lunatic or a child, the legacy is valid; but Ash-Shafa'ee holds that a legacy in favor of a person who afterwards kills the testator, or one in favor of persons of other faith is valid and should be regarded as an act of charity. A bequest for an unlawful object is invalid; for instance, if it is made for building a place of worship for the purpose of worshipping any deity other than God, or for the purpose of inducing a person to commit an offence.

Q. Can a legacy or will be carried out if it is contingent on an illegal condition?

A. Yes, the legacy is valid and the condition is void; for instance, if he directs by his will the emancipation of a slave-woman on condition that she should not marry, she will be emancipated, even if she has married, the legacy does not become void. Similarly if he bequeaths to a woman from the third of his property one thousand Rupees on condition that she shall not marry, the legacy is valid and the condition is void.

Q. Is a legacy in favor of a posthumous child valid?

A. Yes, if the child is born alive within six

وقت الوصية اذا كان زوج الحامل حيًا وان كان ميتًا وهي معتدة حين الوصية فلاقل من سنتين بدليل ثبوت نسبهِ كما لو اقر الموصي بانها حامل لان وجودهُ في البطن عند الوصية ثبت باقرار الوصي وعند الشافعي تصح الوصية لحمل إن انفصل حيًا لدون ستة اشهر من الوصية للعلم بانهُ كان موجودًا في وقت الوصية فان كانت الولادة لاربع سنين فاقل منها ولم تكن فراشًا لزوج او سيد امكن كون الحمل منهُ استحق الولد الوصية لان الظاهر وجودهُ عندها في ذاك الوقت وفي تقدير الزنا اساءة الظن ولا تصح الوصية لحمل سيحدث لعدم وجودهِ

س . اشرح لي الاحكام المتعلقة بالوصايا اذا كان الموصى لهم جمعًا ولم تتعين اسماؤُهم

ج . عند ابي حنيفة رض لو اوصى رجل بثلث اموالهِ لامهات اولادهِ وهن ثلاث وللفقراء والمساكين فلامهات الاولاد ثلاثة اسهم وللفقراء سهم وللمساكين سهم ولو اوصى بثلثهِ لزيد وللمساكين فلزيد نصفهُ ولهم نصفهُ ولو اوصى لجارهِ فهم الجيران الملاصقون

months from the date of the legacy if the husband of the pregnant woman is alive; but if he is dead and she was at the time of the will undergoing her probation (Iddet, *i. e.*, the time in which she is not to re-marry), then if the child is born within two years from it, the legacy is valid by reason of the proof of its paternity; for instance, if he had admitted that she was pregnant; because its existence in the womb is established by the admission of the testator. According to Ash-Shafa'ee the legacy to a child in the womb is valid if it is born alive within six months from the will; because it is known that it existed at the time of the will. If the birth took place within four years and the woman was not united to a husband or master to whom the pregnancy could be attributed, the child is entitled to the legacy, for according to appearances he must have existed at the time, and to presume adultery is to form a wrongful opinion. A legacy in favor of a child not yet existing in the womb is not valid.

Q. Explain to me the rules regarding legacies to collective bodies whose names are not specified in the will?

A. According to Abu-Hanifa (may God be pleased with him) if a man bequeaths one-third of his property to three (emancipated slaves) mothers of his children and to the Fakeers and poor, then such mothers shall have three shares and the Fakeers one share and the poor one share; and if he bequeaths it to Zaid and the poor, then Zaid shall have half of it and the other half goes to the poor. If he makes a bequest to his neighbours, it is understood to mean those who are adjacent to him (but the Shafa'ee says his neighbours are those who live within

لهُ (وقال الشافعي الجار الى اربعين دار من كل جانب) ولصهرهِ
فالصهر كل ذي رحم محرم من عرسهِ كابائها واعمامها واخوانها
واخوالها بشرط موتهِ وهي منكوحتهُ او معتدتهُ من رجعي ولختنهِ
زوج كل ذي رحم محرم منهُ كازواج بناتهِ واخواتهِ وعماتهِ ولاهلهِ
زوجته وقال ابو يوسف ومحمد كل من في عيالهِ ونفقتهِ ولآلهِ
اهل بيتهِ وكل من ينسب اليهِ من قبل ابائهِ الى اقصى اب لهُ في
الاسلام الاقرب والابعد والذكر والانثى والمسلم والكافر فهو سواء
ولا يدخل في لفظة آل اولاد البنات واولاد الاخوات ولا احد
من قرابة الام وان اوصى لاقاربهِ او لارحامهِ اولانسابهِ فهي
للاقرب فالاقرب من كل ذي رحم محرم منهُ ولا يدخل الوالدان
والولد والوارث ويكون للاثنين فصاعدًا فان كان لهُ عمان
وخالان فهي لعميهِ وقال ابو يوسف ومحمد انها تكون بينهم ارباعًا
ولو لهُ عم وخالان كان لهُ النصف ولهما النصف وقالا اثلاثًا ولو

(40) forty houses on each side of his house). A legacy to his connections by marriage means every one who falls within the prohibited degrees to his wife, such as her parents, uncles, sisters, brothers and maternal uncles, on condition that he dies while she is married to him, or while she is undergoing her terms of probation (Iddet) after being separated from him by a reversible divorce. And a legacy to his Khatns means one made in favor of the husbands of all female relations who are within the prohibited degrees to him, such as the husbands of his daughters, sisters and aunts; and a legacy to his Ahl means his wife, and according to Abu-Yousseff and Mahomed every one of his family and whom he is bound to maintain; and a legacy to his Al means the people of his house and every one who is related to him on his father's side up to his remotest ancestor in Islam, and it includes distant as well as near relations, males and females, Muslims as well as people of other faith who will share in it equally; but the word Ahl does not include children of daughters and sisters, or mother's relations. If he makes a bequest to his Akarib or Arham or Ansab, it means the nearest relation to every female who is prohibited to him in marriage excluding father and son and heirs, and it should be given to two or more. If he has two paternal uncles and two maternal uncles, the paternal uncles shall have it; but Abu-Yousseff and Mohamed (the disciples of Abu-Hanifa) say that each should have a fourth, and if there should happen to be one paternal uncle and two maternal uncles, the former shall have one-half and the two latter one-half, but the two (disciples) hold that it should be in thirds. If he has one paternal

له عم واحد لا غير فله نصفها ويرد النصف الآخر لورثة الموصي لعدم من يستحقه ولو له عم وعمة استويا لاستواء قرابتهما ولولد فلان فهي للذكر والانثى سواء لان اسم الولد يحمل الكل ولورثة فلان للذكر مثل حظ الانثيين لانها صارت بالنظر لحقوقهم في الميراث

وعند الشافعي اذا اوصى للفقراء والمساكين فاقل كل صنف ثلاثة لانها اقل الجمع فان دفع الوصي او الوارث او الحاكم بلا اجتهاد الى اثنين غرم للثالث وان اوصى لزيد والفقراء كان كاحدهم في اعطائه اقل متمول ولو اوصى لجمع معين غير منحصر كالعلماء وكالعلوية المنسوبين لعلي صحت وله الاقتصار على ثلاثة وان اوصى لاقارب زيد فهي لكل قريب مسلمًا كان او كافرًا فقيرًا اوغنيًا وارثًا او غيره من اولاد اقرب جد ينسب زيد او امه له لا اصلاً ولا فرعًا ولا تدخل قرابة الام وان اوصى لاقرب اقارب زيد دخل فيها الاصل والفرع وتقدم الفروع كابن وبنت وذريتهما على اب واخ وذريته على جد ولا يرجح بذكورة

uncle and no other relative, then the paternal uncle shall have half of it and the other half reverts to the heirs of the testator; because there is no one else entitled to it; and if there are a paternal uncle and a paternal aunt, they shall share it equally by reason of the equality of their proximity. If a bequest is made to the children of a particular person, the males and females shall share it equally because the word "child" includes both; but if it is made to the heirs of a person, then the male shall have the share of two females; because the legacy is made with reference to their right as heirs.

According to Ash-Shafa'ee if a person bequeaths to the Fakeers and poor, then the smallest number of each set is three; because three is the smallest plural. If the executor, or heir, or judge, pays it without due effort to two men, he is personally liable to pay the third one. If a legacy is made to Zaid and the poor, Zaid will have as little as one of them. So if a legacy is made to a collective body, *i. e.*, to the learned or to Allowiahs (Sayids who are descended from Ali) it is valid and he (the executor) may pay it to so few of them as three. If a legacy is made to the (Akarib) relatives of Zaid, it includes every relative whether he is Moslem or Kaffir, poor or rich, heir or not, from the children of the nearest male ancestor to whom Zaid or his mother is related, but not his parents and children, nor does it include the mother's relations. If a legacy is left to the nearest relations of Zaid, it includes his root and offspring. The offspring such as sons, daughters and their children have a prior claim to the father, and the brother and his children are preferred to the grandfather, but the male sex is

بل يستوي الاب والام والابن والبنت ويقدم ابن البنت على ابن ابن الابن لانهُ اقرب منهُ في الدرجة ولو اوصى لاقارب نفسهِ لم يدخل ورثتهُ ولو اوصى لاهلهِ فهم من تلزمهُ نفقتهم غير الورثة

س . هل تنفذ تبرعات الانسان المنجزة في مرض الموت

ج . لا تصح الهبة وغيرها من التبرعات المنجزة في مرض الموت لوارث ما لم تجزها بقية الورثة ولكن تصح هبة المريض ووقفه لاجنبي من ثلث اموالهِ فقط كالوصية

س . هل يصح الاقرار في مرض الموت

ج . اقرار المريض بدين لاجنبي نافذ من كل اموالهِ ولكن اقرارهُ لوارثهِ باطل الاَّ اذا صدقتهُ بقية الورثة واذا لم يكن لهُ وارث آخر صح الاقرار وكذلك اقرار المريض بقبض دين لهُ عند الوارث لا يصح بخلاف اقرارهِ لوارثهِ بوديعة استهلكها وكذلك النفي كلا حق لي قبل ابي او امي او قولهُ هذا الشيء الفلاني ملك ابي او امي كان عندي عارية حيث لا قرينة بخلاف ذلك

not taken into account. So the father, mother, son and daughter, are all equals; the daughter's son is preferred to the son of the son's son; because the former is nearer than he in degree. If he (testator) bequeaths to his own relations, his heirs are not included; and if he bequeaths to his Ahl (people) it means those whom he is legally bound to maintain, his heirs being excluded.

Q. Are charitable dispositions of property made by a person on his death-bed valid?

A. Gift and other charitable dispositions of property made and carried out during death-sickness (marrath-ul maut) in favor of an heir are void if the other heirs do not pass it, but a gift or wakf in favor of a stranger takes effect, just as legacies do, only to the extent of one-third part of the estate.

Q. Is an admission of debt made by a person on death-bed admissible?

A. Admission of debt made in favor of a stranger is admissible as against his whole estate; but if it is made in favor of an heir it is invalid unless the other heirs acknowledge it. If he or she has no other heirs, it is admissible, and likewise an acknowledgment made by a person on his or her death-bed of having received a debt due to him or her from his or her heir is not admissible, but it is different where a sick person acknowledges having received from his heir some property on trust and used it; or if it is a negative admission. For instance, he says: there is no right owing to me by my father or mother, or that such and such a thing is the property of my father or mother; I had it on loan, (in these cases) it is admissible where there is nothing to show the contrary.

والعبرة بكونهِ وارثًا وقت الموت لا وقت الاقرار فلو اقرَّ لاخيهِ مثلاً ولم يكن لهُ ولد ثم وُلد لهُ صح الاقرار لعدم ارثهِ الآن صار وارثًا عند الموت بسبب جديد كموت الولد وانما لو اقرَّ لاجنبية ثم تزوجها صح الاقرار بخلاف الوصية والهبة حيث لا يصحان لها وعند الشافعي يُقبَل اقرارهُ في مرض الموت لوارثهِ كالاجنبي لانهُ انتهى الى حالةٍ يصدق فيها الكذوب والظاهر انهُ لا يقرّ الاَّ بتحقيق

س . هل يسن الايصا اي نصب الوصي ام هو واجب

ج . يسن لكل احد الايصا ويشترط فيما يوصى بهِ كونه تصرفًا ماليًا مباحًا كقضاء دين وأداء الحقوق وتنفيذ الوصايا والنظر في امر الاطفال والمجانين والسفهاء وحفظ اموالهم

س . هل يصح الايصا باللسان او الكتابة

The fact that he (the person in whose favor an acknowledgment is made) is an heir at the time of the (acknowledgor's) death, not at the time of admission, is to be taken into account; so if he (the sick man) who has no child acknowledges being indebted to his brother and afterwards a child is born to him, then the admission is valid, by reason of his not being an heir, unless indeed he (the brother) becomes an heir at the time of the acknowledgor's death by a new cause, such as the death of the child, in which case it is void. Exception—If a man acknowledges being indebted to a woman who is an outsider and afterwards he marries that woman, the acknowledgment is admissible, the rule is different as regards a legacy and gift to her which are both invalid.

According to Ash-Shafa'ee, an acknowledgment of debt made on a death-bed whether in favor of an heir or a stranger is admissible, on the ground that he (the acknowledgor) has reached a state in which even a liar may be believed, and it is evident that he will confess nothing but the truth.

Q. Is it merely commended or obligatory on a person to make a will?

A. It is commended (by the Prophet) to every person to make a will, and it is essential that its subject should be a lawful administration of the estate, such as the discharge of debts, the payment of legacies, and to look after the affairs of children, lunatics and indiscreet persons (who are legally incompetent) and to protect their property.

Q. Is a non-cupative will valid or must the will be in writing?

ج . تصح بالنطق وبالكتابة فان كانت بالكتابة لابد من الاعتراف بها نطقاً من الموصي كقوله هذا خطي وما فيه وصيتي

س . ما هي شروط الوصي

ج . شروطه التكليف اي البلوغ والعقل والعدالة والاسلام فلو اوصى الى صبي او فاسق او كافر او مجنون او عبد غيره بدّلهم القاضي ولو اوصى الى عبده وورثته صغار صحّ والاّ لا وعند الشافعي لا يصح الايصا الى من بو رق واذا عجز الوصي عن القيام بالوصية حقيقةً اي بان ثبت ذلك بالبينة ضم القاضي غيرهُ اليه رعاية لحق الموصي ووزنته وللقاضي عزله اذا ظهر له عدم اهليته واما الوصي الخائن فعزله واجب كما اذا كان الاب مبذراً متلفاً مال ابنه الصغير فالقاضي ينصب وصياً وينزع المال من يدهِ

س . هل يجوز الايصا الى امرأة

ج . نعم لا تشترط الذكورة في الوصي فام الاطفال في الحقيقة اولى من غيرها بالوصية وبتفويض القاضي امرهم اليها

A. A will may be either written or oral. If it is in writing, the testator must by words acknowledge it by saying, for instance: "This is my hand-writing and that which it contains is my will."

Q. What are the essential qualifications of a person appointed as an executor?

A. Its essentials are: Competency, *i. e.*, full age and sound mind, good moral character, and Islamic faith. So if one appoints as his executor a child or a person of a different religion or of bad moral character or who is a lunatic or the slave of another, the judge (Kadhi) should substitute others in their place, but it is valid if he appoints his own slave to be his executor and his heirs are minors but not otherwise. Ash-Shafa'ee holds that the appointment of a slave as an executor is illegal. If the executor is incapable of carrying out the intentions of the will in reality, that is if his incapacity is established by evidence, the judge may attach another person to him in the executorship in order to protect the rights of the testator and his heirs; and the judge may remove him if his incapacity becomes manifest to him. The removal of a dishonest executor is, however, obligatory; thus when a father is extravagant, and misspends the property of his minor son, the judge should appoint another executor and remove the property from his possession.

Q. Is it lawful to appoint a woman as an executrix?

A. Yes, to be a male is not an essential qualification of an executor; and the mother of the children is in fact entitled to the executorship in preference to any one else, and to have a delega-

حيث لا وصية اذا كانت مستجمعة للشروط ولكن لا تكون لها عليهم ولاية في النكاح فان الولاية صادرة من الشرع لابي الميت ثم لجدهِ ثم لعصبتهِ فان الوصي لا يعتني بدفع العار من عدم الكفاءة ولا تقدر المرأة على التمييز بين الاخيار والاشرار وحبط مساعي المحتالين من الرجال

س . هل يجوز للوصي توكيل غيره

ج . ليس للوصي توكيل غيره الاَّ فيما لا يتولاَّهُ مثلهُ ولكن يصح لهُ ان ينصب وصيًّا بعد موتهِ في تركة موصيهِ فوصي الوصي سواء اوصى اليهِ في مالهِ او مال موصيهِ وصي في التركتين خلافًا للشافعي وان مات احد الوصيين وكان قد اوصى الى الحي فلهُ التصرف في التركة وحدهُ وان لم يوصِ ضم القاضي اليهِ غيرهُ وعند الشافعي لا يصح للوصي الايصاء الاَّ اذا اذن لهُ الموصي كقولهِ اوصِ بتركتي فلانًا او من شئت

tion (*i. e.*, letters of administration) from the judge of their affairs where no will exists, provided she possessed all the qualifications; but she shall not act as their guardian in marriage contracts, because guardianship is vested by law in the father of the deceased, and on his failure, in his grandfather and then in his residuary heirs, (See Chapter V.) for an executor does not take care to avert the disgrace arising from the want of equality (where a woman is married to a man who is not a match for her), (See Chapter on Equality) and a woman is not capable of discriminating between good and bad men or of triumphing over the machinations of cunning men.

Q. Can an executor delegate his authority to another?

A. No, an executor cannot appoint an agent except in matters which one like him cannot personally perform, but he can appoint a person to be an executor after his death to his testator's estate, and an executor's executor becomes an executor to his own estate and to his testator's estate whether he is appointed an executor in respect of his or his testator's estate. This is contrary to Ash-Shafa'ee. If one of two executors dies having appointed the surviving one, the latter can alone administer the whole estate, but if he has not appointed him, the judge has the power to attach another to him. According to Ash-Shafa'ee an executor cannot oppoint an executor (to succeed him with regard to his testators's property) unless the testator has expressly given him permission to do so; for instance, by saying "Appoint so and so or any one whom you please as executor to my estate."

س . هل يجوز لاحد الوصيين ان ينفرد

ج . لا بد من اجتماعهما بان يصدر عن رأيهما او باذن احدهما للآخر الاّ بشراء كفن الميت وتجهيزه والخصومة في حقوقه وشراء حوائج الطفل ورد وديعة معينة وتنفيذ وصية معينة وبيع ما يخاف تلفه وجمع اموال ضائعة وعند الشافعي لا يجوز الانفراد الاّ اذا صرّح به الموصي كما لو قال اوصيت الى كل منكما

س . هل يجوز للوصي عزل نفسه

ج . لا يجوز له ذلك اذا قد قبلها في مدة حيوة الموصي او تصرف ببيع شيء من التركة فان رد الوصي بعلم الموصي يرتد والاّ لا يصح الرد بعد موته او قبله بغير علمه لئلاّ يصير الميت مغروراً من جهته لانه اعتمد عليه ففيه اضرار بالميت فان سكت الوصي ومات موصيه فله الرد والقبول واذا تصرف الوصي ببيع شيء من التركة وان جهل بكونه وصيًا لا يمكنه الرد وعند الشافعي يجوز للوصي عزل نفسه متى شاء ولكن يلزمه اعلام الحاكم على الفور والاّ ضمن وكذلك ان لم يوجد كاف غيره او

Q. Can one of two executors act singly?

A. They must act jointly or with the permission of each other except in the following transactions:—

Purchasing shrouding sheets for the deceased, preparing his body for burial, litigating in his interests and buying necessaries for children, returning a specific trust or discharging a specific legacy, selling perishable property and collecting or recovering lost property. According to Ash-shafa'ee neither executor can act singly unless the testator has expressly authorized it; for instance, by saying "I appoint each one of you to be my executor."

Q. Can an executor withdraw?

A. That is not lawful for him if he has already accepted the appointment during the lifetime of the testator, or if he has already exercised his power in selling anything of the assets. If an executor declines it with the knowledge of the testator, it shall be cancelled, otherwise the withdrawal shall not be valid after his death or previous to it if it was without his knowledge, lest the deceased became deceived from his side; because the deceased had relied on him and it would be injurious to the deceased. If the executor was silent and his testator died, he may decline or accept, but when the executor had once exercised his power by selling anything of the estate even if he is ignorant of his being appointed an executor he cannot withdraw. According to Ash-Shafa'ee it is lawful for an executor to withdraw whenever he pleases, but he should immediately inform the judge, otherwise he will be civilly responsible, also if no suitable substitute for him can be found, or if

غلب على الظن تلف المال بسبب انعزاله لم يجز له عزل نفسه ولم ينفذ ولكن لا يلزمه ذلك مجانًا بل باجرة بقدر اجرة مثله

س . هل يجوز للوصي بيع عقار اليتيم

ج . يجوز للوصي بيع عقار الصغير من اجنبي لا من نفسه بضعف قيمته او لنفقة الصغير او لقضاء دين الميت حيث لا وفاء له من غيره او لاداء وصية مرسلة لا نفاذ لها الاَّ منه او لكون غلاته لا تزيد على مؤنته او خوفًا من خرابه او نقصانه او وقوعه في يد متغلب

ولا يُقبَل اقرار الوصي بدين على الميت ولا بشيء من تركته الاَّ ان يكون المقر وارثًا فيصح في نصيبه وجاز للولي ان يتجر في مال اليتيم لليتيم ولكنه لا يجبر على التجارة بذلك ولا يجوز له بيع شيء باقل من ثمن المثل وانما يصح بيعه وشراؤه بما يتغابن الناس فيه

س . لمن الولاية في مال الصغير

there is a strong reason to believe that the property will be lost (injured or damaged) by reason of his withdrawal, it is not lawful for him to withdraw and it will not be allowed to pass, he is not, however, bound to act gratuitously, on the contrary he shall have a reasonable remuneration.

Q. Can an executor sell the landed property of the orphan (ward)?

A. Yes, be can sell it to a stranger but not to himself under the following conditions: (1) if he can get for it a price double its value, (2) if he does it in order to pay for the child's maintenance, or to discharge debts of the deceased which cannot be liquidated from anything else or to pay a general legacy which cannot be paid from any other source, (3) if the expenses of keeping up the property equal or exceed the income derived from it, (4) if there is reason to fear that the property may become ruined or reduced in value, or may pass into the hands of an usurper.

An admission by an executor of a debt being due from the deceased or against anything of his estate is not receivable, unless he who makes the admission is an heir, in which case it shall be valid only as against his own share. The executor may trade with the property of the orphan for the orphan's benefit, but he cannot be compelled to trade with it, and it is not lawful for him to sell anything for less than the price of a like thing (*i. e.*, less than its proper price), but his buying and selling are valid so far as they are conducted in a reasonable manner just as other people do.

Q. To whom belongs the right of guardianship in respect of the property of a child?

ج . للاب ثم لوصيه بعد موته ثم لابي الاب ثم لوصيه ثم للوالي ثم للقاضي وانما ليس للجد بيع العقار والعروض لقضاء الدين وتنفيذ الوصايا فيرفع الغرما والموصى لهم امرهم الى القاضي ليبيع بقدر ما يكفي لقضاء الدين وأداء الوصايا

(رد المحتار على الدر المختار والبجيرمي على المنهج وتحفة ابن حجر)

الباب الثاني

في اسباب الميراث

سؤال . ما هي اسباب الميراث

جواب . للميراث ثلاثة اسباب وهي النسب والنكاح والولاء

س . اشرح لي معنى هذه الالفاظ الثلاث

ج . اولاً — النسب هو العلاقة الكائنة بين الاهل بالابوة والاخوة والعمومة مثلاً — اذا كان للميت ولد واب وام فهم يرثونه كما سياتي شرحهُ

ثانيًا — النكاح هو الزواج يعني الزوجان يرث بعضهما البعض فاذا مات الزوج ترث منهُ الزوجة وان ماتت الزوجة يرث منها الزوج كما سيأتي بيانهُ بعد هذا

A. To the father, and then to his executor after his death, then to the father's father, then to his executor, then to the Ruler, then the Kadhi (judge). The grandfather cannot, however, sell the immoveable or moveable property in order to pay debts or carry out legacies; so creditors and legatees should report their cases to the Kadhi who shall sell so much as is sufficient to pay debts and legacies.

(Rudd-ul-Muktar ala Addur, and Begairimee ala Al-Minhaj, and Tohfat ibn Hajar).

CHAPTER II.

On the Sources of Inheritance.

Q. What are the causes of inheritance?

A. Inheritance has three causes, namely: (1) Nusab, (2) Nikah, (3) Wula.

Q. Explain the meaning of these three words.

A. Nusub means consanguinity or the relationship existing between relatives such as exists between father, children, brothers and paternal uncles; for instance, if the deceased at the time of his death has a son, a daughter, a father, and a mother, they will inherit his property as will be hereinafter explained in detail.

Secondly: Nikah is relationship by marriage, that is, the husband and wife inherit each other's property; if the husband dies, the wife inherits some of his property, and if the wife dies, the husband inherits some of her property as will be more clearly shown hereafter.

ثالثًا — الولاء هو العلاقة التي بين العبد المعتوق ومعتقهِ فاذا مات المعتوق يرثهُ معتقهُ

س . ما هي الاسباب او الموانع التي تحرم الانسان من الميراث

ج . ثلاثة اسباب تمنع الشخص عن الميراث وهي الرق والقتل واختلاف الدين اعني ان العبد لا يرث اصلاً ولا يرث القاتل المقتول ولا يرث المسلم ابنهُ او اخاهُ النصراني او اليهودي وذلك لاختلاف دين الميت ووارثهِ

تنبيه — القتل يحرم من الميراث سواء كان عمدًا كما اذا قصد ضرب مورثهِ بحديد او ما يجري مجراهُ في تفريق الاجزاء او كان شبه عمد وهو ان يتعمد قتلهُ بما لا يقتل غالبًا كالسوط او خطأً كأن رمى صيدًا فاصاب مورثهُ فخرج القتل بسبب كما لو حفر بئرًا او وضع حجرًا في الطريق وتسبب بذلك في موتهِ او ساق دابة فوطئتهُ او قتلهُ قصاصًا او رجمًا او دفعًا عن نفسهِ وعند الشافعي لا يرث القاتل مطلقًا سواء كان بحق او لا مباشرةً او لا اذ لو ورث لاستعجل الورثة قتل مورثهم فيؤدي الى خراب العالم

Thirdly: Wula is the relationship that exists between an emancipated slave and his emancipator; if the freedman dies, his master who has freed him inherits his property.

Q. What reasons disqualify a person from inheritance?

A. Three causes exclude a person from inheritance, viz.: (1) Slavery, (2) Homicide, and (3) Difference of religion, thus: A slave cannot inherit at all; a murderer cannot inherit the murdered man's property, and a Mahommedan cannot inherit the property of his Jew or Christian brother or son, owing to the difference of the deceased and his heir in religion.

Note: — Homicide excludes from inheritance whether it was intentional: as if he intentionally strikes his ancestor with a blunt weapon or with a like instrument which has the effect of dismembering the body; or whether it was manslaughter: as if he intended to kill him by means which do not kill in the ordinary course of nature, such as a whip; or whether it was accidental: as if he shot at a game and hit his ancestor. The exception is causal homicide; for instance, he dug a well or placed a stone on a public road and thereby caused his death, or drove an animal which trampled him to death, or caused him to be killed by the law of retaliation, *i. e.*, under a legal sentence, or by stoning (as a punishment for adultery), or in self-defence. According to Ash-Shafa'ee, a murderer shall not inherit at all whether it was justifiable or not; wilful or otherwise; because if he were to inherit, heirs would accelerate the death of the persons whose heirs they are; and this will lead to the ruin of the world.

الباب الثالث

في الحقوق المتعلقة بالتركة

سؤال . ما هي الحقوق المتعلقة بتركة الميت اعني كيف تُصرَف تركتهُ

جواب . تركة الميت ملزومة بخمسة حقوق وهي

اولاً — الحقوق المتعلقة بعين التركة كالرهن والزكوة

ثانيًا . مؤنة تجهيزهِ يعني خرج تكفينهِ وتحنيطهِ ودفنهِ من غير تبذير ولا تقتير

ثالثًا — تقضى ديونهُ من جميع ما بقي من مالهِ

رابعًا — تنفذ أي تسلم جميع وصاياهُ من ثلث ما بقي بعد الدين والتكفين لا من ثلث اصل المال

خامسًا — يقسم بين الورثة ما بقي من تركة الميت بعد مصاريف التجهيز والدين والوصية فهذه الخمسة الحقوق مقدم بعضها على البعض على هذا الترتيب مثلاً

مات زيد وخلف ابنًا وبنتًا وتركتهُ قيمتها اربعمائة وستون روبية وعليهِ دين مائة وخمسون روبية لعمرو فعند موتهِ خرجت عشر روبيات في مصاريف تكفينهِ ودفنهِ فالباقي اربعمائة

CHAPTER III.

On the Rights to which the Estate is Subject.

Q. What are the rights attached to the estate of a deceased person, that is to say, how is his property to be disposed of?

A. The property left by the deceased is subject to five charges or rights, viz.:—

First—The charges to which the property is subject, such as mortgage and tithes.

Second—His funeral expenses, that is to say, the expenses of shrouding, embalming, and burying him without extravagance or penuriousness.

Third—His debts are to be discharged out of all the remainder of his property.

Fourth—All legacies are to be paid out of a third of the remaining property after deducting the debt and the funeral expenses but not out of a third of the original assets.

Fifth—What is left from the property of the deceased after deducting funeral expenses, debts, and legacies, is to be divided amongst the heirs of the deceased These five rights take precedence of each other in the order above mentioned as per illustration given below.

Zaid dies and leaves one son and one daughter, the value of the property left by him is 460 rupees; at the time of his death, he (Zaid) owes Amr 150 rupees. On his death 10 rupees were expended on his funeral expenses, and from the remaining rupees 450, the debt of 150, is paid

وخمسون روبية يخرج منها الدين مائة وخمسون روبية وما بقي بعد ذلك الثلثمائة الروبية يأخذها الولد والبنت للذكر مثل حظ الانثيين يعني للولد مائتان روبية وللبنت مائة روبية فان كان قد اوصى زيد لعمر بمائة وخمسين روبية لا تصح هذه الوصية كلها لان بعد الدين بقت ثلثمائة روبية فقط والوصية تزيد من ثلثها وانما تصح بقدر الثلث فيأخذ عمرو مائة روبية والباقي مائتان روبية تنقسم على الابن والبنت للذكر مثل حظ الانثيين

س . الى كم قسم تنقسم الورثة

ج . الورثة تنقسم الى اربعة اقسام وهي

اولاً — اهل الفرائض الذين لهم فروض معينة

ثانياً — العصبة الذين ما لهم سهام مقدرة بل يأخذون ما بقي بعد اصحاب الفروض

ثالثاً — اهل الرد وهم اصحاب الفروض المستحقون لما يرد بعد اخذ فروضهم اذا لم تكن للميت عصبة فالرد يرد على اهل الفروض دون الزوج والزوجة

رابعاً — ذوي الارحام وهم الذين لهم قرابة وليسوا بعصبة ولا ذوي فروض كاولاد البنات واولاد بنات الابن وابي الام

to Amr; what is left after this is 300 which is taken by the son and the daughter, the male taking a share of two females; so that the son will have 200 and the daughter 100 rupees. Had Zaid bequeathed to Amr 150 rupees, this legacy would not have been valid in full; because after payment of the debt of 150, there would only remain 300 rupees, and the legacy would exceed one-third of this, whereas it can be valid only to the value of one-third, therefore Amr can only get 100 rupees and the remaining 200 rupees should be divided between the son and the daughter in the proportion of one man's share being equal to that of two females (*i.e.*, $133\frac{1}{3}$ and $66\frac{2}{3}$ respectively).

Q. Into how many classes are the heirs divided ?

A. The heirs are divided into four classes, viz. :—

(1) The legal sharers whose shares are specified.

(2) Residuaries who are entitled to no prescribed shares, but take what remains after the legal shares are satisfied.

(3) The heirs in reversion: they are the legal sharers who are entitled to the return which is left over after the legal sharers are taken. (See Chapter XI.). If there is no residuary heir to the deceased, the return then devolves upon the legal sharers, excluding husband and wife.

(4) The uterine kindred: and they consist of those who are relatives by the famale side, but are neither residuary heirs nor legal sharers, such as the children of the daughters, and the children of the daughters of the son and the father of the mother. (See Chapter VI.). And in default of

فاذا عدم من تقدم ذكرهم يرث مولى الموالات وهو شخص مجهول النسب قال لآخر انت مولائي ترثني اذا مت وتعقل عني اذا جنيت وقال الآخر قبلت فعند الحنفي يصح هذا العقد وعند الشافعي لا يصير وارثًا وان عدم مولى الموالات يرث المقر لهُ بالنسب بحيث لم يثبت نسبهُ باقرارهِ من ذلك على الغير اذا مات المقرّ على النسب يرث المقرّ لهُ بالنسب كارث الثابت نسبهُ بشرط موت المقر على اقرارهِ وهو مقدم عند الشافعي على المعتق ثم اذا عدم من تقدم ذكرها يأخذ التركة الموصى لهُ بجميع المال لان منعهُ عما زاد عن الثلث كان بسبب الورثة فاذا لم يكن للميت وارث اخذ جميع الوصية وعند الشافعي لهُ الثلث فقط واذا لم يوجد احد من المذكورين اعلاهُ توضع التركة في بيت المال على انها مال ضائع فصارت لجميع المسلمين وعند الشافعي اذا كان بيت المال منتظمًا فهو اقدم من ذوي الارحام والرد وان لم يكن منتظمًا يرد اولاً على ذوي الفروض النسبية بنسبة فرائضهم ثم يصرف على ذوي الارحام

those mentioned above, the Maula-l-Mawalat or the successor by contract will inherit. For instance, a person of unknown paternity says to another: "You are my Maula (master), you will inherit my property if I die, and you must pay for me the blood wage, if I commit a crime, *i. e.*, be 'civilly responsible for me.' The other replies, I agree to this." With the Hanafees such an agreement is valid, but with the Shafa'ees he shall not inherit, and in default of the Maula-l-Mawalat the acknowledged kinsman shall inherit, provided his acknowledged relationship did not affect others. And if the man who confirms the relationship dies, he whose relationship he has confirmed inherits as if it were an inheritance on proved parentage, provided he persisted in his acknowledgment till his death. According to the Shafa'ee he (the acknowledged heir) is given preference over the slave's emancipator. In the cases of the non-existence of the two before-mentioned persons, the universal legatee takes the entire estate; because the restriction of legacies to one-third is only to protect the interests of heirs, so if there is no heir to the deceased, he takes the whole legacy. With the Shafa'ee he can have only the third part. If there exists none of the above-mentioned individuals, the assets are put into the public treasury as unclaimed property, and thus become the property of all Muslims. According to the Shafa'ee if the treasury is an organized one, its claims take precedence of those of the uterine kindred and of the people entitled to the return, but if the treasury is not an organized one, the property goes firstly to the legal sharers in proportion to their shares and afterwards to the uterine kindred.

الباب الرابع

في ذوي الفروض

س . كم عدد ذوي الفروض

ج . اربعة من الرجال وثمان من النساء يعني (١) الاب (٢) الجد الصحيح وهو ابو الاب (٣) الاخ لام (٤) الزوج (٥) الزوجة (٦) البنت (٧) بنت الابن (٨) الاخت لاب وام (٩) الاخت لاب (١٠) الاخت لام (١١) الام (١٢) الجدة الصحيحة

س . هات بيان سهامهم

ج . (١) الاب لهُ السدس فرضاً مع الابن او ابن الابن وان سفل وان لم يكن للميت ابن او ابن ابن بل بنت او بنت ابن فالاب يأخذ السدس فرضاً والبنت تأخذ النصف وما بقي فللاب تعصيباً وعند عدم الولد وولد الابن وان سفل بان كان للميت اب وام فالام تأخذ الثلث والباقي الثلثان للاب

(٢) اذا عدم الاب فالجد ابوهُ يأخذ السدس اذا كان الميت ابن او ابن ابن مهما سفل وعند الشافعي رض اذا كان الجد مع الاخوة او الاخوات لاب وام فهو يقاسمهم ما لم ينتقص

CHAPTER IV.

On Legal Sharers.

Q. What is the number of legal sharers?

A. Four men and eight women, viz.: (1) father, (2) the true grandfather, that is, the father of the father, (3) the uterine brother, (4) the husband, (5) the wife, (6) the daughter, (7) the daughter of the son, (8) the sister by the same father and mother, (9) the half-sister on the father's side, (10) the uterine sister, (11) the mother, (12) the true grandmother.

Q. Explain clearly their legal shares?

A. (1) To the father belongs a sixth part as a legal share when there is a son or son's son how low soever in the degree of descent. And if the deceased has no son or grandson, but has a daughter or a son's daughter, the father takes a sixth as a legal share, and the daughter takes a half, and what remains devolves on the father as a residuary. (See the Chapter on the Return). And in the absence of a child, or a child of the son how low soever, if the deceased left only a father and a mother, the mother takes one-third and the father the remaining two-thirds.

(2) If there is no father, the true grandfather, *i. e.*, his father will take the sixth, if the deceased has a son, or the son of a son how low soever. According to Shafa'ee (God be pleased with him) if the grandfather inherits at the same time with brothers and sisters by the same father and mother, *i. e.*, of the whole blood, he (the grandfather) shares with them, provided his share

حظهُ من السدس فان انتقص يُعطَى السدس فهو كالاخ في قسمة الميراث ما دامت المقاسمة خير لهُ واذا كان معهُ اثنان من الاخوة فلهُ الثلث وان كان ستة فالسدس خير لهُ واذا كان للميت بنتان وام وزوج فيفرض لهُ السدس وتعول المسئلة

(٣) الاخ لام لهُ السدس وان كانوا اثنان اولاد لام او اكثر فلهم الثلث ذكورهم واناثهم في القسمة والاستحقاق سواء ولكن يسقطون بالابن او ابن الابن وان سفل او البنت او بنت الابن وكذلك بالاب والجد

(٤) الزوج يأخذ النصف اذا لم يكن للميتة ولد او ولد ابن وان سفل فان كان لها ولد او ولد ابن فلهُ الربع

(٥) الزوجة لها الربع عند عدم الولد او ولد الابن وان سفل ولها الثمن سواء كانت زوجة واحدة او اكثر مع الولد او ولد الابن وان سفل

(٦) البنت الواحدة لها النصف والثلثان للبنتين فصاعدًا اذا لم يكن لهنَّ اخ فان كان لهن اخ فما لهن فرض مقدر بل تأخذ البنت الواحدة نصف ما يأخذ الابن مثلاً مات

be not diminished thereby to less than a sixth; but if it comes to less than this, the sixth will be given to him and he will be like a brother in the division of the inheritance, so long as his sharing with them is advantageous to him; thus if the deceased had two brothers, the grandfather shall get a third, but if there were six brothers, the sixth part would be better for him (for if he shares with them, he will get only a seventh part). If the deceased had two daughters, a mother and a husband, the sixth is assigned to him (the grandfather), and the number of shares will be augmented accordingly.

(3) The brother from the mother's side obtains a sixth, and if there are two or more of the mother's children, they obtain a third, males and females in their claim and partition are equal; but they become excluded from the inheritance by the son or the son of the son though of low descent, or the daughter, or son's daughter, as also by the father or grandfather.

(4) The husband takes the half if the deceased wife has no child or child of a son though of low descent, and if she (the wife) had a child or a child of a son, he obtains a fourth.

(5) The wife or wives take a fourth, if her or their husband left no child or child of the son though of low descent, but one-eighth only is the share of one or more wives, if there is a child or son's child though of low descent.

(6) When there is only one daughter, she obtains the half, two daughters or more take two-thirds if they have no brother. If they have a brother, they have no fixed share but each daughter takes half of what the son gets. For instance, a man dies leaving a son and a

رجل عن ابن وبنت فللبنت الثلث وللابن الثلثان

(٧) بنات الابن يقمنَ مقام البنت اذا عدمت البنت فان كان للميت بنت فبنت الابن تأخذ السدس تكملة الثلثين وكذلك بنات الابن يأخذنَ السدس مع البنت وان كان للميت ابن او بنتان او اكثر فما لبنات الابن شيء اما اذا كان للميت ابن ابن او ابن ابن ابن فبنت الابن تاخذ نصف ما ياخذهُ ابن الابن ان ساواها او كان انزل منها في الدرجة والاَّ فليس لها شيء

(٨) الاخت لاب وام تاخذ النصف ان كانت واحدة والثلثان للاثنتين فصاعدًا ولكن مع الاخ لاب وام يصرنَ عصبة بهِ فتاخذ الاخت نصف ما ياخذهُ وهنَّ مع البنات وبنات الابن عصبات فياخذن ما بقي بعد قضاء فروض البنات او بنات الابن ما لم يكن معهن اخ فيكون النصف للاخوات مع البنت او بنت الابن والثلث مع البنتين او بنتي الابن فصاعدًا

(٩) الاخوات لاب كالاخوات لاب وام النصف للواحدة والثلثان للاثنتين فصاعدًا عند عدم الاخوات لاب وام ولا يرثن مع الاختين لاب وام الاَّ ان يكن معهن اخ لاب فيعصبهن ويكون

daughter, in this case the daughter will obtain one-third and the son two-thirds.

(7) If there is no daughter, the son's daughter takes her place. So, if the deceased had a daughter, the daughter of the son takes a sixth as a completion of two-thirds, and likewise more daughters of the son take a sixth with the daughter. If the deceased had a son or two daughters or more, the daughters of the son will have nothing. But if the deceased has a son of a son, or the son of the son of a son, the daughter of the son will take half of what the son of the son obtains if he is equal to her in degree or lower, otherwise she does not obtain anything.

(8) The sister by the same father and mother (*i. e.*, a sister of the whole blood) takes the half, if she is the only one, and two-thirds if there are two or more. If there is, however, a brother of the whole blood inheriting at the same time with them, they (the sisters) become residuaries through him, in this case the sister takes half of what the brother takes, but with daughters or daughters of the son, they (the sisters) are residuaries and take what remains after satisfying the legal shares of the daughters or daughters of the son, provided there is no brother with them; so the sisters of the whole blood obtain the half, if there exists a daughter or a daughter of a son, and a third, if there are two or more daughters or daughters of a son.

(9) The sisters by the same father like the sisters of the whole blood obtain the half if there is one of them, and two-thirds go to two or more in the absence of sisters of the whole blood. They will not inherit if there are two or more sisters of the whole blood, unless they have a

الباقي بينهن للذكر مثل حظ الانثيين اما مع الشقيقة الواحدة فلهن السدس تكملة الثلثين وهن عند عدم الاشقاء عصبة مع البنات او بنات الابن كما سبق في الاخوات لاب وام (تنبيه) بنو الاعيان اي الاخوة والاخوات لاب وام وبنو العلات اي الاخوة والاخوات لاب كلهم يسقطون بالابن او ابن الابن وان سفل وبالاب وعند ابي حنيفة رض بالجد ايضاً وعند الشافعي يشترك الجد مع الاخوة في الميراث على التفصيل الآتي بيانهُ في باب العصبات ويسقط بنو العلات ايضاً بالاخ لاب وام

(١٠) الاخت لام لها السدس كالاخ لام وقد سبق بيان فروض اولاد الام في الفصل الثالث من هذا الباب لكل منهم السدس كان ذكراً او انثى وان كانوا اثنين او اكثر فلهم الثلث ذكورهم واناثهم في القسمة والاستحقاق سواء ويحجبهم الولد وولد الابن وان سفل وكذلك الاب والجد وانما لا تحجبهم الاخوة لاب

brother by the same father. In this case he associates with them as a residuary and after the shares of the sisters of the whole blood are satisfied, the remainder will be divided between them, the male's share being equal to the shares of two females. But if there is only one sister of the whole blood, they (the half sisters by the same father only) obtain a sixth, as the complement of two-thirds. And in default of brothers or sisters of the whole blood, they are residuaries, when inheriting at the same time with daughters or daughters of a son, as stated hereinabove in regard to sisters by the same father and mother.

Note :—Brothers and sisters by the same father and mother and the children of the fellow-wives, viz.: the brothers and sisters by the same father (but by different mothers) all of them become excluded by the son or the son's son, in how low a degree soever. They are also excluded by the father, and according to Abu-Hanifa by the grandfather also. With Ash-Shafa'ee, the grandfather shares with the brothers in the inheritance, according to the details explained in the Chapter on the residuaries. The children of the fellow-wives become equally excluded by a brother of the whole blood.

(10) An uterine sister, like an uterine brother, gets a sixth. The shares of mothers' children have already been stated in the third section of this chapter; each of them, whether male or female, obtains a sixth ; if there are two or more of them, they take a third, males and females are equal in their claim and partition, but they are excluded by a child of the deceased or son's child how low soever, and also by the father and grandfather, but they are not excluded like

وام كما تحجب الاخوات لاب

(١١) الام لها احوال ثلاث وذلك انها تاخذ السدس مع الولد او ولد الابن وان سفل او مع الاثنين من الاخوة او الاخوات

ثانيًا — لها ثلث الكل عند عدم هولاء المذكورين او كان للميت اخ او اخت واحدة وكان معها الزوج او الزوجة

ثالثًا — ان كان للميت اب فلها ثلث ما بقي بعد فرض الزوج او الزوجة

(١٢) الجدة لها السدس سواء كانت لاب او لام واحدة كانت او اكثر اذا كن صحيحات متحاذيات

تنبيه — الجدة الوارثة هي من ادلت الى الميت باناث خلّص او ذكور خلّص او اناث خلّص الى ذكور خلّص كام ام الام وام ام الاب

تنبيه ثانٍ — يسقطن الجدات الأميات كلهن بالام وعند الشافعي رض يسقطن بالام من اي جهة كن وعند الحنفي الابويات بالاب والجد الأ ام الاب وان علت كام ام الاب فالجد لا يحجبها وتحجب القربى البعدى منهن مثلاً

مات رجل عن اب وام اب وام ام الاب فالمال كلهُ للاب

sisters by the same father, by brothers of the whole blood.

(11) The mother has three conditions, viz. :—

(a) She may take a sixth, when there is a child or a child of the son, how low soever, or two or more brothers or sisters.

(b) She obtains a third of the whole in the absence of those just mentioned or if the deceased had one brother or sister and there is a wife or husband inheriting at the same time with her.

(c) If the deceased had a father, she obtains a third of the residue after the legal share of the husband or wife is satisfied.

(12) The grandmother obtains a sixth, no matter whether she is from the father's or mother's side, or whether there is one grandmother or more, if they are right ones and equal in degree.

Note:—The inheriting grandmother is she who leads to the deceased by females in pure lineage, or males in pure lineage, or females in pure lineage to males in pure lineage, such as the mother of the mother's mother or mother of the father's mother.

Second Note:—All the maternal grandmothers become excluded by the mother, and with Ash-Shafa'ee they become excluded by the mother no matter from which side they come. With the Hanafee the paternal grandmothers become excluded by the father and grandfather, except the mother of the father, even if she is high in ascent, as the mother of the father's mother, the grandfather will not preclude her; but the nearer excludes the more distant of them. For instance: A man died leaving behind him a father,

لان الاب يحجب امهُ وامهُ تحجب ام ام الاب وعند الشافعي القربي من جهة الام تحجب البعدى من جهة الاب مثالهُ ام الام تحجب ام ام الاب والقربى من جهة الاب لا تحجب البعدى من جهة الام والقربي من كل جهة تحجب البعدى من تلك الجهة

س . هل للابن فرض معين

ج . لم يتعين للبنين ولا لبنيهم عند عدمهم فرض معين بل انهم يأخذون جميع الباقي بعد ذوي الفروض واذا لم يوجد احد من ذوي الفروض المستحقين فالمال كلهُ للبنين وعند عدمهم لبنيهم

س . من الوارثون المستحقون دائمًا اي الذين لا يحجبون حجب حرمان

ج . خمسة انفار وهم الاب والام واولاد الصلب والزوج والزوجة

امثال

مات رجل عن زوجة وام واب وابن فالزوجة لها الثمن والام لها السدس والاب لهُ السدس والباقي للابن

مات رجل وخلف زوجة وابًا وامًا فللزوجة الربع وللام الربع ثلث الباقي وللاب النصف

a father's mother and a mother of the father's mother; so the whole property belongs to the father, because the father excludes his mother, and his mother excludes the mother of his father's mother. According to Ash-Shafa'ee she who is nearer in relationship from the mother's side excludes the more distant from the father's side; for instance, the mother's mother excludes the mother of the father's mother. And she who is nearer in relationship from the father's side will not preclude the more distant from the side of the mother, but she who is nearer in relationship from one side precludes the more distant from the same side.

Q. Is there a fixed share for the son?

A. No fixed share is assigned to the sons, and on their failure, to their sons, but they take all the remainder after the legal sharers are satisfied, and if there is no entitled legal sharer, all the property belongs to the sons, and on their failure, to their sons.

Q. Who are the heirs always entitled to inherit, *i. e.*, who can never be excluded *in toto.*

A. Five persons: the father, mother, children, husband, and the wife.

EXAMPLES.

A man dies leaving a wife, a mother, a father, and a son. The wife will obtain one-eighth, the mother one-sixth, the father one-sixth, and the remainder belongs to the son.

A man dies leaving behind a wife, a father, and a mother. In this case the wife obtains one-fourth, the mother one-fourth, viz.: a third of the remainder, and the father gets one-half, *i. e.*, two-thirds of the residue.

مات رجل عن بنتين واختين فللبنتين الثلثان والباقي الثلث للاختين تعصيباً

ماتت امرأة عن زوج واربع بنات فللزوج الربع وللبنات ثلاثة ارباع ومسئلتهم تصح من ستة عشر للزوج اربعة وللبنات من ثلاثة

مات رجل عن زوجة وبنت واخت لاب فللزوجة الثمن وللبنت النصف والباقي للاخت للاب ومسئلتهم من ثمانية

ماتت امرأة عن زوج وابن وبنت وام اب وام ام فللزوج الربع وللجدتين السدس والباقي للابن والبنت للذكر مثل حظ الانثيين ومسئلتهم تصح من ستة وثلاثين

س . هل يرث ولد الزنا

ج . يرث من جهة الام وقرابتها فقط وهم يرثونه

الباب الخامس

في العصبات

س . قد فهمت صفة ذوي الفروض وسهامهم فاشرح لي صفة العصبات واستحقاقهم

A man dies leaving behind two daughters and two sisters. So two-thirds are the share of the two daughters, and the remaining third falls to the two sisters as residuaries.

A woman dies leaving behind a husband and four daughters. The husband obtains a fourth, and the daughters three-fourths; their case is calculated on sixteen shares, four of which go to the husband and three to each daughter.

A man dies leaving a wife, a daughter, and a half-sister by the same father, the wife will obtain an eighth, the daughter one-half, and the sister by the father will take the remainder, and their case is established on eight shares.

A woman dies leaving a husband, a son, a daughter, a father's mother, and a mother's mother. The husband takes one-fourth, the two grandmothers one-sixth, and the remainder belongs to the son and the daughter, to the male the share of two females, and their case is established on thirty-six shares.

Q. Is an illegitimate child entitled to inherit?

A. He inherits from his mother and her relations only, and they inherit from him.

CHAPTER V.

On the Residuaries.

Q. I have understood the description given of the legal sharers and their shares. Now explain to me the position of the residuaries and their claims.

ج . العصبة في اللغة معنى عصبة الرجُل قرابة ابيهِ وفي اصطلاح الشرع يعني الورثة الذين لهم قرابة نسبية بالميت كالاب والابن والاخ كما سيأتي بيانهم ولفظة العصبة تشتمل على كل من ياخذ ما ابقتهُ اصحاب الفروض من التركة واذا انفرد المعصب كالابن ولم يكن للميت غيرهُ من الورثة حاز جميع المال مثلاً اذا مات عن بنت وابن اخ فقط فللبنت النصف والباقي لابن الاخ لانهُ انفرد وحاز جميع باقي المال

س . الى كم تنقسم العصبة

ج . الى ثلاثة اقسام

الاول — يسمى عصبة بنفسهِ وذلك كل ذكر لم يدخل في نسبتهِ الى الميت انثى

الثاني — العصبة بغيرهِ وهنَّ اربع من النسوة اي البنت وبنت الابن والاخت لاب وام والاخت لاب فهولاء الاربع يصرنَ عصبة باخوانهن لانهن اذا ورثن مع اخوانهن تاخذ الواحدة نصف ما ياخذهُ اخوها ولم يبقَ لهن فرض حينئذٍ فياخذ الذكر مثل حظ الانثيين

الثالث — عصبة مع غيرهِ وذلك كالاخوات اذا ورثن

A. In common speech the "Asabah" of a man denotes his relations on the father's side; in the language of the law it means the heirs related to the deceased by consanguinity, such as the father, the son, and the brother, as will be explained hereinbelow; and the word "Asabah" comprises every one who takes what the legal sharers leave from the estate. If there is only one residuary, such as the son, and the deceased has left no other heirs, he obtains the whole property; for instance, if a man dies leaving only a daughter and the son of a brother, the daughter obtains the half, and the nephew takes the remainder, because he is alone (*i. e.*, the only residuary, there being no other heirs) and obtains all the remaining property.

Q. Into how many classes are the residuaries divided?

A. Into three classes:—

The first is called residuary by himself or on his own right; that is, every male in whose line of relation to the deceased no female enters.

The second class are those who are made residuaries by others; and they are four women, viz.: the daughter, the daughter of the son, the sister of the whole blood, and the sister by the father's side; these four become residuaries, through their brothers, because if they inherit together with their brothers, each one takes half of what her brother takes, and then they have no fixed share; so the male takes the share of two females.

The third class are those who become residuaries when inheriting with others, such as sisters inheriting together with daughters, or with

مع البنات اومع بنات الابن فانهن يعصبن وياخذن ما ابقتهُ البنات او بنات الابن

س . مَن العصبة بانفسهم

ج . العصبة بانفسهم اربعة اصناف

الاول — جزء الميت اي البنون ثم بنوهم وان سفلوا فهذا الصنف اولى اي احق من غيرهِ من العصبة بالميراث

الثاني — اصل الميت اي الاب وعند عدمهِ الجد ابو الاب وان علا وعند الشافعي رض يشترك الجد مع الاخوة عند فقد الاب على تفصيل فيهِ

س . كيف توريث الجد مع الاخوة وكم حالة لهُ على مذهب الشافعي رض

ج . ثلاث حالات وهي ان اجتمع بهِ اخوة لابوين او لاب وكان معهم ذو فرض كزوج او ام فلهُ اما ان ياخذ سدس جميع المال او ثلث ما بقي بعد الفروض او مقاسمة الاخوة للذكر مثل حظ الانثيين فالخيرة لهُ يختار ما شاء من هذه الثلاثة الاشياء

daughters of the son, becoming in this way residuaries, as they take what the daughters or son's daughters have left.

Q. Who are the residuaries by themselves?

A. The residuaries by themselves are of four classes:—

(1) The offspring of the deceased, viz.: the sons and in their default their sons how low soever; this class is the first, that is, more entitled to the inheritance than the remaining residuaries.

(2) The root of the deceased, viz: the father, and on his failure, the grandfather, *i. e.*, the father of the father, how high soever in the paternal line. With Ash-Shafa'ee (God be pleased with him) the grandfather shares with the brothers in the absence of the father according to some details.

Q. How is the grandfather constituted an heir conjointly with the brothers? and how many conditions has he according to the doctrine of Ash-Shafa'ee?

A. The grandfather inherits in three cases:—

If he is associated with brothers of the whole blood or by the same father, and if there is together with them a legal sharer, such as the husband or the mother, he may take either a sixth of the whole property, or a third of what remains after the legal sharers have been satisfied, or he may share with the brothers and sisters in the proportion of the share of one male being equal to that of two females; so he is at liberty to choose which of these three courses he pleases.

١ – فالسدس خير له اذا ماتت الميتة عن بنت وزوج وجد واخ فالمسئلة من اثني عشر من ذلك للبنت ستة وهو النصف وللزوج الربع ثلاثة وللجد السدس اثنان وللاخ واحد

٢ – ثلث الباقي خير له في مثل ما اذا مات عن زوجة وجد وثلاثة اخوة المسئلة من اثني عشر للزوجة الربع ثلاثة والباقي تسعة للجد ثلثها ثلاثة وستة للاخوة لكل واحد اثنان

٣ – المقاسمة خير له في مثل ما اذا ماتت امرأة عن زوج وجد واخ المسئلة من اثنين وتصح من اربعة للزوج النصف اثنان وللجد واحد وللاخ واحد وللجد حالة رابعة وهي

انه اذا اجتمع الجد مع الاخوة ولم يكن معهم ذو فرض فله ثلث المال او المقاسمة ايهما شاء فالثلث خير له في كمن مات عن جد وثلاثة اخوة المسئلة من ثلاثة وتصح من تسعة للجد ثلثها ثلاثة وستة للاخوة من اثنين

والمقاسمة خير له في مثل من مات عن جد واخت واخ فالمسئلة من خمسة للجد اثنان وللاخ اثنان وللاخت واحد واذا

(1) The sixth will be more profitable to him when a deceased woman leaves a daughter, a husband, a grandfather, and a brother, the estate is made into 12 shares; of these the daughter takes six as a half, the husband a fourth, *i. e.*, three, the grandfather a sixth, *i. e.*, two, and the brother one share.

(2) The third of the remainder is better for him in the case of a man dying and leaving a wife, a grandfather, and three brothers. This is also a question of twelve shares; the wife takes a fourth, *i. e.*, three, and from the remainder of nine the grandfather obtains a third, *i. e.*, three, and the brothers six: each brother obtaining two.

(3) The division is better for him in the case of a woman dying and leaving a husband and a grandfather and a brother; it is a question of two, but is established on four shares. The husband takes the half, *i. e.*, two shares, the grandfather one, and the brother one. The grandfather has a fourth condition, viz.: if he is joined by brothers, and there not being with them at the same time a legal sharer, he may have either one-third of the property or may share with them, whichever of the two courses he may choose. The third part will be better for him in the case of a man dying and leaving a grandfather and three brothers. The estate is an object of three shares and is established on nine; the grandfather takes three and the brothers six, *i. e.*, two each.

But it is better for him to share with them in the case of a man dying and leaving a grandfather, a sister and a brother. The estate is an object of five shares; two go to the grandfather, two to the brother, and one to the sister. If

كان مع الجد اخوة لابوين واخوة لاب فالاشقاء يحجبون الاخوة للاب وانما يعدونهم على الجد في المقاسمة ثم اذا اخذ الجد نصيبه اقتسموا الباقي ولم يعطوا اولاد الاب شيئاً مثالهُ جد واخ لابوين واخت لاب المسئلة من خمسة للجد اثنان وثلاثة للاخ الشقيق حسابهُ وحساب الاخت المحجوبة

ويُحسَب الجد مع الاخوات كالاخ فيعصبهن ويكون لهُ معهن كحظ الانثيين ويحجب الجد بني الاخ

س . هل يخالف الجد الاخوة بوجهٍ من الوجوه في الميراث

ج . اولاً – انهُ لا يحجب الام عن الثلث الى السدس كما تحجبها الاخوة

ثانياً – انهُ يفرض لهُ السدس ولو عائلاً اي ولو كثرت الفروض او ضاقت بها التركة ولا يفرض شيء للاخ مثالهُ ماتت عن بنت وزوج وام وجد واخ فالمسئلة من اثني عشر وتعول الى

there are together with the grandfather, brothers of the whole blood and brothers by the father's side, the brothers by the same father and mother preclude the brothers by the father's side, but they (the latter) are counted by them against the grandfather in the division. So when the grandfather has taken his portion, they (the brothers of the whole blood) divide between themselves the remainder and don't give anything to the children of the father. An instance of this in the case of a grandfather and a brother of the whole blood and a sister by the same father only, the estate is divided into five shares, two go to the grandfather, three to the brother by both parents, counting for him his own share and that of the precluded sister.

The grandfather when he inherits together with the sisters is counted as a brother; and he makes them residuaries and obtains, in such a case, the portion of two females. The grandfather excludes the sons of brothers.

Q. Does the grandfather differ from the brothers in any respect in the matter of inheritance?

A. (1) He does not exclude the mother from the third, by reducing her share to a sixth, as brothers do.

(2) A sixth is legally assigned to him, even in case of increase, viz.: if the legal shares are in excess (of the shares into which the estate is divided), or the inheritance become straitened by them; but no legal share devolves upon the brothers; for instance, a woman dies leaving a daughter, a husband, a mother, a grandfather, and a brother. It is a question of twelve shares and is augmented to thirteen: the half goes to

بثلاثة عشر للبنت النصف ستة وللزوج الربع ثلاثة وللام السدس اثنان وللجد السدس اثنان ولا شيء للاخ

س . قد فهمت تفصيل توريث الجد مع الاخوة فاشرح لي بيان بقية العصبة بانفسهم فقد اتضح لي الصنف الاول والثاني

ج . الصنف الثالث — هو جزء ابي الميت اي بنو ابيه وهم اخوانه ثم بنوهم عند عدمهم

الرابع — جزء جدهِ اي الاعمام ثم بنوهم على هذا الترتيب الاقرب فالاقرب فان الابن مقدم على الاب في التعصيب والاب يحجب الجد والاخ يحجب ابنه

س . كيف يكون تفضيل اصناف العصبة على بعضهم البعض

ج . يكون ترجيحهم بقرب الدرجة من الميت وبقوة القرابة لان ذا القرابتين اي المتصل بالميت من جهتين احق من ذي قرابة واحدة اذا كان في درجة واحدة كالاخ لاب وام فانهُ مقدم على الاخ لاب والاخت لاب وام اذا صارت عصبة مع البنات

the daughter, *i. e.*, six, to the husband a fourth or three, to the mother a sixth or two, to the grandfather a sixth or two, and nothing to the brother.

Q. I have understood the explanation as to how a grandfather is constituted an heir conjointly with the brothers. Now explain to me the remainder of the residuaries by themselves, the first and second classes being quite clear to me.

A. The third class is the offspring of the father of the deceased ; that is, they are sons of his father and are his (the deceased's) brothers, and on their failure, their sons.

The fourth class is the offspring of his grandfather, viz : his (the deceased's) paternal uncles, and in default of them their sons, in this order: the nearer excluding the more distant. So the son is prior to the father as a residuary, and the father precludes the grandfather and the brother precludes his son.

Q. How are the different classes of residuaries preferred to each other?

A. They are preferred to each other according to the proximity of the degree of kindred to the deceased, and in proportion to the strength of their relationship, because he who has a double relation, that is to say, he who is related to the deceased by two sides, is more entitled to the inheritance than he who is related by one side only, if he is in the same degree; thus the brother by the same father and mother is preferred to the brother by the father only, and the sister by the father and mother, if she becomes a residuary together with the daughter, is preferred

فانها مقدمة على الاخ لاب وابن الاخ لاب وام اولى من ابن الاخ لاب فانهما متساويان في الدرجة مع كون الاول ذا قرابتين وهذا الترتيب يجري على الاعمام ثم على اعمام ابيهِ ثم على اعمام جدهِ فعم الميت مقدم على عم ابيهِ وعم ابيهِ مقدم على عم جدهِ وذلك لقرب الدرجة وكذلك عم الميت لاب وام احق من عمهِ لاب وذلك لاتصال الاول بقرابتين

س . مَن من النساء يصرنَ عصبة بالرجال

ج . اربع من النسوة يعصبن باخوانهن يعني بوجود اخوانهن ولم يبقَ لهن فرض معين بل تاخذ الواحدة منهن نصف ما يأخذهُ اخوها كما قال الله تعالى وان كانوا اخوة رجالاً ونساء فللذكر مثل حظ الانثيين

س . مَن الاربع النسوة

ج . هن اللاتي فرضهن النصف والثلثان اي البنات اذ للواحدة النصف وللاثنتين فصاعداً الثلثان

الثانية — بنت الابن فانها تقوم مقام البنت عند عدمها

الثالثة — الاخت لاب وام اذا لم توجد بنات الصلب او بنات الابن

to the brother by the father's side, and the son of a brother by the same father and mother is preferred to the son of the brother by the father only, because though they are both equal, yet the former is doubly related. This order applies to the paternal uncles, and then to the paternal uncles of his (deceased's) father, and then to the paternal uncles of his grandfather. The paternal uncle of the deceased is preferred to that of the deceased's father, and the paternal uncle of his father to that of his grandfather; this is owing to the proximity of degree, in the same way the paternal uncle of the deceased by the same father and mother is preferred to his paternal uncle by the father's side only, and this because the former is doubly related.

Q. Which of the women are made residuaries by the men?

A. Four classes of women become residuaries by their brothers, that is to say, by the existence of their brothers, and there remains to them no fixed share, but one of them takes half of what her brother takes, as God Almighty said (in the Chapter on Women): "If there are both brothers and sisters, a male shall have as much as the portion of two females."

Q. Which are the four classes of women?

A. They are (1) Those whose legal shares are a half and two-thirds, *i. e.*, the daughters, because one of them obtains a half, and two or more two-thirds.

(2) The daughter of the son, for she stands in the place of the daughter in default of the latter.

(3) The sister by the same father and mother, if there exist no daughters of the deceased or daughters of his son.

الرابعة — الاخت لاب عند عدم الثلاث المتقدم ذكرهن

س . هل تعصب باخيها الانثى التي لا فرض لها

ج . لا . لان الاناث يعصبن بالذكور في موضعين البنات بالبنين والاخوات بالاخوة فاذا لم تكن الانثى بانفرادها صاحبة فرض فلا تحصل شيء كالعم والعمة اذا كانا لاب وام او لاب كان المال كلهُ للعم دون العمة وكذا الحال في ابن العم مع بنت العم للاب وفي ابن الاخ مع بنت الاخ لاب

س . مَن الذي يكون عصبة مع غيرهِ

ج . الاخت لاب وام او لاب مع البنت او بنت الابن سواء كانت واحدة او اكثر

س . هل يوجد احد من العصبات غير السابق ذكرهم

ج . نعم اخر العصبات هو مولى العتاقة اي المعتق او المعتقة وهو مقدم على ذوي الارحام وعلى الرد لذوي الفروض فان مات المعتوق او المعتوقة ولم يترك وارثًا كان معتقهُ عصبة يرثهُ والمعتق يرث من معتوقهِ مطلقًا سواء كان اعتقهُ لوجه الله ام لا

(4) The sister by the father's side in default of the three mentioned above.

Q. May a female who is not a legal sharer become a residuary by means of a brother?

A. No, because females become residuaries by the males in two places: the daughters through the sons, and the sisters through the brothers. So if a female when alone by herself is not a legal sharer, she will not obtain anything; as in the case of the paternal uncle and the paternal aunt: if they are by the same father and mother, or by the father, the paternal uncle takes all the property excluding the aunt; this is also the case with the son of the paternal uncle conjointly with the daughter of the paternal uncle by the father's side, so the daughter of the brother by the father's side does not inherit with the son of the brother.

Q. Who becomes a residuary with others?

A. The sister of the whole blood or by the father's side only when she inherits together with the daughter or the son's daughter, whether there being one or more.

Q. Do there exist any residuaries besides those mentioned above?

A. Yes, the last class of the residuaries is the master of the freed man (enfranchized slave), *i. e.*, the liberator or liberatrix of a slave, and he is preferred to the uterine kindred and takes precedence over the legal sharers in taking the return. If the liberated man or woman die leaving no heir, his or her liberator becomes a residuary who inherits his or her property; and the liberator inherits from his liberated slave absolutely, no matter whether he liberated him

حتى ولو شرط ان لا ولاء له او اعتقه على مال او بطريق الكتابة فانهُ يرث ثم عند عدم المعتق يرث عصبة المعتق على الترتيب الذي ذكرناهُ في العصبات ولا شيء للاناث من ورثة المعتق ولكن عند الشافعي رض اخو المعتق وابن اخي المعتق مقدمان على الجد في الارث بالولاء مخالفًا لما سبق من ترتيب العصبات عندهُ

س . كيف ترتيب العصبات عند الشافعي

ج . يقدم الابن ثم بنو الابن مقدمًا منهم الاقرب الى الميت ثم الاب ثم الجد وان علا مع الاخوة الاشقاء ثم الجد مع الاخوة لاب ثم ابن الاخ وان سفل ثم العم للابوين ثم العم لاب ثم ابن العم ثم عم ابي الميت ثم بنو عم ابي الميت ثم عم الجد ثم المعتق ثم عصبتهُ الذكور يحجب كل متقدم من بعدهِ على هذا الترتيب فان اجتمع بنو اخوة لابوين ولاب قُدّم الاعلى درجة منهم كابن ابن اخ شقيق وابن اخ لاب قُدّم ابن الاخ لاب لانهُ اقرب درجة فان استووا

for God's sake or not; even if he stipulated that he renounced his right of patronage, or liberated him for money, or by a written treaty, he (the liberator) inherits his property. In default of the liberator, his residuaries inherit, in the order we have mentioned respecting the residuaries, but the females among the heirs of the liberator are entitled to nothing. But according to Ash-Shafa'ee, the brother of the liberator and the son of the liberator's brother have prior claims to the grandfather in the inheritance of the Wala (patronage) contrary to what has already been said regarding the order of the risiduaries by his (the Shafa'ee's) doctrine.

Q. What is the order of the residuaries according to Ash-Shafa'ee?

A. The son precedes, and after him come the sons of the son, the nearest to the deceased being preferred; afterwards the father, then the grandfather, even if high in ascent, together with the whole blood brothers, then the grandfather together with the brothers by the father, then the son of the brother, even if he is low in descent, then the paternal uncle by both parents, then the paternal uncle by the father's side, then the son of the paternal uncle, then the paternal uncle of the deceased's father, then the sons of the paternal uncle of the deceased's father, then the paternal uncle of the grandfather, then the liberator, then his male residuaries. The first mentioned excludes the second or next in the above order according to this arrangement. So if the sons of the brothers by both sides, and the sons of brothers by the father only, come together, the highest of them in degree is preferred, as in the case of the son of the son of the brother of the whole blood and the son of the brother by the father's side,

في الدرجة كابن اخ شقيق وابن اخ لاب قُدّم الاقوى وهو ابن الشقيق وتجري هذه القاعدة في بني الاعمام لابوين او لاب

الباب السادس

في ذوي الارحام

سؤال . ما معنى ذوي الرحم

جواب . ذو الرحم هو في اللغة بمعنى ذي القرابة مطلقاً وهو في الشريعة كل قريب للميت ليس بذي سهم اي صاحب فرض مقدر ولا عصبة

س . متى يرث ذوو الارحام

ج . ذوو الارحام يرثون عند عدم ذوي الفروض (غير الزوجين) والعصبة مثلاً اذا لم يكن للميت ولد ولا ابن ابن وان سفل ولا بنت ابن ولا اب ولا جد ولا ام ولا جدة وان علوا ولا اخوة ولا بني اخوة لابوين او لاب وان سفلوا ولا اخوات ولا عم ولا ابن عم فعند عدم هولاء المذكورين يرث ذوو الارحام

the latter is preferred, because he is nearer in degree, and if they are equal in degree, such as the son of the brother by both parents, and the son of the brother by the father's side, the stronger is preferred, that is, the son of the brother by father and mother; the same rule applies to the sons of paternal uncles by both parents or by the father only.

CHAPTER VI.

On the Uterine Kindred (Relations through the Mother's or the Female's Side).

Q. What is the meaning of Dhawi-Arrahm (uterine relations)?

A. Dhoo Arrahm, in common speech, has the meaning of a relation in an absolute sense, and legally, it implies every relation of the deceased who is neither a legal sharer to whom a specific portion is assigned, nor a residuary

Q. When are the uterine kindred to inherit?

A. The uterine kindred are to inherit in the absence of the legal sharers (except the husband and wife) and of the residuaries; for instance, if the deceased had no child, nor son's son how low soever, nor son's daughter, and no father, grandfather, mother nor grandmother, even if they are high in ascent, nor brothers, nor sons of the brothers by both parents or by the same father only, how low soever, and no sister, and no paternal uncle, nor a son of a paternal uncle, so in the absence of those mentioned above, the uterine kindred inherit.

س . الى كم صنف ينقسم ذوو الارحام

ج . الى اربعة اصناف مقدم بعضها على البعض كترتيب العصبة اذ يقدم منهم الابن ثم الاب

س . اشرح هذه الاصناف

ج . الصنف الاول ينسب الى الميت وهم اولاد البنات وان سفلوا ذكوراً كانوا او اناثاً واولاد بنات الابن

٢ – الصنف الثاني ينتمي اي ينتسب اليهم الميت وهم الاجداد الساقطون اي الفاسدون وان علوا كابي ام الميت وابي امه والجدات الساقطات اي الفاسدات كام ابي ام الميت

٣ – الصنف الثالث ينتمي الى ابوي الميت وهم اولاد الاخوات وان سفلوا سواء كانوا ذكوراً او اناثاً وسواء كانت الاخوات لاب وام او لاب او لام وبنات الاخوة وان سفلوا سواء كانت الاخوة من الابوين او من احدهما وبنو الاخوة لام وان سفلوا

٤ – الصنف الرابع ينتمي الى جدي الميت وهما ابو الاب وابو الام او جدتيه وهما ام الاب وام الام وهنّ العمات على الاطلاق

Q. Into how many classes are the uterine kindred divided?

A. Into four classes, each of which take precedence of the other in an order similar to that of the residuaries, of whom the son takes precedence and the father follows.

Q. Explain these classes to me.

A. The first class is derived from the deceased, and consists of the children, how low soever, of the daughter, no matter whether they are males or females, and the children of the daughters of the son.

(2) The second class are those to whom the deceased was related. They consist of the precluded grandfathers, *i. e.*, the false ones, even if high in ascent, such as the father of the mother of the deceased, and the father of his mother, and of the precluded grandmothers, viz.: the false ones, such as the mother of the father of the mother of the deceased.

(3) The third class is derived from both parents of the deceased and consist of (1) the sister's children how low soever, no matter whether they are males or females, or whether they are true sisters by the same father and mother, or by the same father, or by the mother; and (2) the daughters of the brothers even if low in descent, no matter whether they are brothers by the same father and mother or by one of them; and (3) the sons of the brother by the same mother, even if low in descent.

(4) The fourth class is derived from both grandparents of the deceased; that is from the father's father and the mother's father, or both his grandmothers, *i. e.*, the mother of the father

فانهنّ اخوات لابي الميت والاعمام لام فانهم اخوة لابيه من امه (اما العم من الابوين او الاب فعصبة) والاخوال والخالات من هذا الصنف

فهذه الاربعة الاصناف وكل من يُدلي الى الميت بها يكون من ذوي الارحام والمراد وان علوا وان سفلوا في اصناف الثلاثة ويتناول اولاد الصنف الرابع وانما لا يتناول من يعلو من الاعمام المذكورة والعمات والاخوال والخالات كعمومة ابوي الميت وخؤولتهما

س. كيف القاعدة في توريث ذوي الارحام وتقديمهم على بعضهم البعض

ج. اما عند الشافعي رض اذا اجتمعوا ذوي الارحام يُنزّل كل منهم منزلة الوارث المدلي به فيُعطى كل حصة من ادلى به ويقسم المال بينهم على تقدير كونهم موجودين كبنت بنت وبنت بنت ابن فالمال بينهما ارباعًا وسببه ان بنت البنت تنزل منزلة البنت وتأخذ النصف وبنت بنت الابن تنزل منزلة امها

and the mother of the mother, and they are the paternal aunts in an absolute sense; for they are the sisters of the father of the deceased, and the paternal uncles by the mother's side, for they are the brothers of his father from his mother; (but the paternal uncle by both his parents or by the father are residuaries) and the maternal uncles and aunts are of this description (*i. e.*, the uterine kindred).

These are the four kinds or classes, and every one who lays a claim of relationship to the deceased according to them, belongs to the uterine kindred, and should be understood to include their ascendants or descendants in the first three classes; the fourth class included their children, but it does not include those who are high in ascent from the aforesaid paternal and maternal uncles and aunts; for instance, the paternal uncles of the deceased's parents and their (the parents) maternal uncles.

Q. What are the rules in constituting the uterine kindred as heirs, and how is their priority to each other determined?

A. According to Ash-Shafa'ee, when the uterine kindred come together, each takes the place of that heir through whom he claims relationship; so to each one is given the portion of that person whose relationship he claims, and the property is divided amongst them on the supposition that they (the deceased's relatives through whom they claim) are still existing as in the case of the daughter's daughter and the daughter of the son's daughter; the property will be in fourths, because the daughter's daughter occupies the place of the daughter and takes the half, and the daughter of the son's daughter takes the place of her mother and obtains a

فلها السدس تكملة الثلثين والثلث الباقي يرد عليهما باعتبار نصيبها فيصير لبنت البنت ثلاثة ارباع ولبنت بنت الابن الربع

اما عند الحنفي رض فالصنف الاول اولاهم اي احقهم بالميراث لانهُ اقربهم الى الميت كبنت البنت فانها اولى من بنت بنت الابن لان الاولى تدلي الى الميت بواسطة واحدة والثانية بواسطتين فيكون المال كله لبنت البنت فان استووا في الدرجة فولد الوارث احق من ولد ذوي الارحام كبنت بنت الابن فانها اولى من ابن بنت البنت لان الاولى ولد بنت الابن وبنت الابن صاحبة فرض واما في ولد بنت البنت فبنت البنت ما لها فرض بل من ذوي الارحام وان استوت درجاتهم ولم يكن فيهم ولد وارث كبنت ابن البنت وابن بنت البنت او كانوا كلهم يدلون بوارث كابن البنت وبنت البنت فالمال ينقسم بينهم باعتبار حال ذكورتهم وانوثتهم فللذكر مثل حظ الانثيين ويُعتبر ابدان الفروع ان اتفقت صفة الاصول اي ابائهم واجدادهم في

sixth, in completion of two-thirds, and the remaining third reverts to both of them, in proportion to their shares; so the daughter's daughter obtains three-fourths, and the daughter of the son's daughter one-fourth thereof.

According to the Hanafee, the first class has priority of claim, *i. e.*, it is more entitled to the inheritance than any other of them, because it is the nearest of them to the deceased; thus the daughter's daughter has a stronger claim than the daughter of the son's daughter, because the former's relationship to the deceased is only distant by one intermediate link, and the second by two; so the whole property belongs to the daughter's daughter. If they are equal in degree, then the child of the heir is preferred to the child of the uterine kindred; thus the daughter of the son's daughter is preferred to the son of the daughter's daughter, because the former is the child of the son's daughter, and the son's daughter is possessed of a legal share, whereas the other being the child of the daughter's daughter, as such she has no legitimate share but is classed among the uterine kindred; but if they are equal in degree of relationship and there is amongst them no child of an heir, (*i. e.*, a legal sharer or residuary), such as the daughter of the daughter's son and the son of the daughter's daughter, or if they are all of them leading to an heir, such as the son of the daughter and the daughter's daughter, the property will be divided between them, due regard being paid to the proportion of males and females amongst them, the male obtaining the share of two females. The persons of the branches (children) should be taken into consideration if the sexes of the roots (*i. e.*, the fathers or grand

الذكورة والانوثة ويعتبر الاصول ان اختلفت صفاتهم ويُعطى الفروع ميراث الاصول كما اذا ترك الميت ابن بنت وبنت بنت فيكون المال بينهما للذكر مثل حظ الانثيين فثلثا المال لابن البنت وثلثهُ لبنت البنت كذلك لو ترك الميت بنت ابن بنت وابن بنت بنت فيكون ثلثاهُ لبنت ابن البنت لان ذلك نصيب ابيها وثلثهُ لابن بنت البنت لانهُ نصيب امهِ موافقًا لقاعدة الشافعي

اما الصنف الثاني وهم الساقطون من الاجداد والجدات فاولاهم بالميراث اقربهم الى الميت من اي جهة كان سواء كان الاقرب من جهة الاب او الام فابو الام اولى من ابي ام الام وكذلك ابو ام الاب اولى من ابي ام ام الاب وقس على ذلك حال الجدات وعند الاستواء في درجة القرب فمن كان يدلي الى الميت بوارث فهو احق ممن لا يدلي اليهِ بوارث فابو ام الام اولى من اب اب الام لانهما تساويا في الدرجة لكن الاول يدلي بالجدة وهي وارثة والثاني يدلي بغير وارث لان ابا الام جد ساقط

fathers agree; and the roots are taken into consideration if their sexes are different, and to the branches the inheritance of the roots is given; for instance, if a deceased left a daughter's son and a daughter's daughter, the property will be divided between them, giving the male the share of two females; so the daughter's son takes two-thirds, and the daughter's daughter one-third; likewise if the deceased left a daughter of the daughter's son, and a son of the daughter's daughter, the daughter of the daughter's son takes two-thirds, because this is the share of her father, and one-third is taken by the son of the daughter's daughter, because it is the share of his mother. This is also according to the rule of Ash-Shafa'ee.

As to the second class comprising the precluded grandfathers and grandmothers, the most entitled of them to the inheritance is he who is the nearest to the deceased from either the male or the female side whether he is the nearest from the father's or mother's side; thus the father of the mother is nearer than the father of the mother's mother, and equally the father of the father's mother is nearer than the father of the mother of the father's mother, the same rule applies to the claims of the grandmothers. In case of the degree of proximity being equal, he who has a claim of relationship to the deceased through an heir is more entitled than one who claims through a person who is not an heir; thus the father of the mother's mother is more entitled than the father of the mother's father, because both of them are equal in degree, but the former claims through the grandmother who is an heir, and the latter claims through a non-inheriting person, because the mother's father is

لا يرث مع ام الام والشافعي يعتبر القرب الى الوارث لا القرب الى الميت وان اتحدت ايضاً قرابتهم بان كانوا كلهم من جانب ابي الميت او من جانب امو واتفقت صفة من يدلون بهم في الذكورة والانوثة فالقسمة على ابدانهم للذكر مثل حظ الانثيين فيكون المال ثلثاهُ لابي ام الاب وثلثهُ لام ام الاب

وان اختلفت مع استواء الدرجة صفة من يدلون بهِ يقسم المال على اول بطن اختلفت فيهِ كما في الصنف الاول للذكر ضعف نصيب الانثى وان اختلفت قرابتهم مع استواء درجتهم فالثلثان لقرابة الاب والثلث لقرابة الام كما اذا ترك ام ابي ام ابي الاب وام ابي ابي ابي الام فالثلثان لقرابة الاب والثلث لقرابة الام

الباب السابع

في مخارج الفروض

سؤال . كم الفروض المذكورة في كتاب الله والى كم نوع تنقسم

a false grandfather who does not inherit together with the mother's mother; and Ash-Shafa'ee considers the proximity of degree to the heir, not the proximity of the deceased. If the proximity of their degree is equal, as when they are all on the side of the deceased's father, or on his mother's side, and the sexes of those through whom the relationship is claimed agree, the division will be according to the persons, the male obtaining the shares of two females; so two-thirds of the property will be given to the father of the father's mother, and one-third to the mother of the father's mother.

If the equality of the degree in which they stand is accompanied by a difference in the sexes of those through whom the relationship is claimed, the property is divided on the foundation of the first generation or ancestor that deviates, as it is in the first class, the male obtains double the share of the female; and if their parentage or relationship differs though they are equal in degree, the two-thirds are given to the relations of the father and one-third to those of the mother, as in the case of one leaving the mother of the father of the mother of the father's father, and the mother of the father of the father of the father of the mother, then two-thirds are given to the (former) relations of the father and to the (latter) relations of the mother one-third.

CHAPTER VII.

On the Roots (i. e., Denominators) of Legal Shares.

Q. How many are the legal shares mentioned in the Book of God, and into how many sorts or classes are they divided?

جواب . اعلم ان الفروض ستة ثلاثة منها نوع وثلاثة اخرى نوع آخر الاول – النصف والربع والثمن والثاني الثلثان والثلث والسدس

س . كيف مخارج هذه الفروض

ج . مخرج كل فرض منفرد سميه من الاعداد الاَّ النصف فهو من اثنين وليس الاثنان سميا له فالربع من اربعة والثمن من ثمانية والثلث من ثلاثة والسدس من ستة فان الربع سميه الاربعة وكذا الباقي والثلثان في حكم الثلث فان كان في المسئلة نصف فقط كما فيمن خلف بنتًا واخًا لاب وام فهي من اثنين للبنت النصف وللاخ النصف وان كان فيها الربع فقط كما فيمن خلفت زوجًا وابنًا كانت من اربعة للزوج واحد وللابن ثلاثة وان كان فيها الثمن فقط كما فيمن خلف زوجة وابنًا فهي من ثمانية للزوجة واحد وللابن سبعة

وان كان فيها الثلث وحدهُ كما اذا ترك امًّا واخًا لأب وام فالام لها الثلث وللاخ الثلثان

وان كان فيها الثلثان كما اذا ترك بنتين وعمًّا فهي من ثلاثة فللبنتين الثلثان والباقي الثلث للعم

A. Know that the legal shares are six, three of which are of one sort, and the other three are of the second sort; of the first sort are a moiety, a fourth, and an eighth; and of the second sort are a third, two-thirds, and a sixth.

Q. How are the roots or denominators for these legal shares determined?

A. The root of every legal share is singly its denomination from the numbers or number which gives it its name (except the half which is from two, whilst the two is not its namesake); thus a fourth is denominated or derived from four, an eighth from eight, a third from three, a sixth from six; as the fourth derives its name from the four, and so is the case with the rest; two-thirds are subject to the rule of the third.

In a case where only the question of halves arises, as when a man leaves a daughter and a brother by the same father and mother, the matter resolves itself into a question of two, *i. e.*, the estate will be divided into two shares, one-half going to the daughter, and the other to the brother; if it is a question of four shares, as when a woman dies leaving a husband and a son, of the four the husband will take one, and the son three. If there is in a question only one-eighth, as when a man leaves a wife and a son, the estate is divided into eight shares, one going to the wife, and the remaining seven to the son.

If there is only a third, as when a man leaves a mother and a brother by the same father and mother, the mother gets one-third, and the brother the remaining two-thirds.

If there are two-thirds, as when a man leaves two daughters and a paternal uncle, the division will be by three; the two daughters will get two-thirds, and the remaining third goes to the paternal uncle.

وان كان فيها السدس كما اذا ترك ابًا وابنًا فهي من ستة للاب واحد وللابن الخمسة الاسهم الباقية

فاذا حصل في هذه المسائل مثنى وثلاث وهما من نوع واحد فلكل عدد يكون مخرجا الجزء اي الكسر من ذلك النوع فذلك العدد يكون مخرجًا لذلك الجزء ولضعفهِ ولضعف ضعفهِ كالستة هي مخرج السدس ومخرج لضعفهِ الثلث ولضعف ضعفهِ اي الثُلثين والثمانية هي مخرج الثمن والربع والنصف والسبب هو ان مخرج ضعف كل جزء داخل في مخرج ذلك الجزء مثلاً مخرج الثلث والثلثين ثلاثة وهي داخلة في مخرج السدس الذي هو ستة فاذا ترك الميت امًّا واختين لاب كانت مسئلتهم من ستة واحد للام واربعة للاختين وواحد الباقي فهو ردًّا او اذا ترك امًّا وابًا فالام لها الثلث وللاب الثلثان بالتعصيب المطلق وكذا اذا اجتمع فيها الثلث والثلثان كما اذا ترك اختين لابوين واختين لام فهي من ثلاثة للاختين من الاصلين الثلثان والباقي الثلث للاختين للام واذا اجتمع في المسئلة الثمن والنصف كما اذا ترك زوجة وبنتًا كانت من ثمانية للزوجة واحد والبنت لها اربعة والباقي ثلاثة ترد على البنت

If there is a sixth, as when a man leaves a father and a son, the division must be by six shares; to the father goes one, and to the son the remaining five shares.

When they occur in these questions by two and three, and both of them being of the same sort, the root or denominator of every number will be the part, *i. e.*, the fraction of this sort. So this number is the root of this part or fraction of it, and of the double of it, and of the double of the last; for instance, six is the root of a sixth, and of its double which is a third, and of the double of its double, *i. e*, two-thirds, and eight is the root of the eighth, the fourth, and the half, the reason being that the root of the double of every part enters into the root of this part; as the root of the third and two-thirds is three which enters into (measures) the root of the sixth, *i. e.*, six. If the deceased leaves a mother and two sisters by the same father, the question is one of six shares, one goes to the mother, four to the two sisters, and the remaining one reverts to them (this is explained later on in Chapter XI.). If he left a mother and a father, the mother obtains a third, and the father two-thirds as a simple residuary. And the same is the case if one and two-thirds come together in the question, as when a man leaves two sisters by both parents and two sisters by the mother's side, the question will be of three: to the sisters by both parents go two-thirds, and the remaining third to the two sisters by the mother. If there come together in the question an eighth and a half, as when a man leaves a wife and a daughter, the division must be by eight; one goes to the wife, and four to the daughter, and the remaining three revert to the daughter.

واذا اجتمع فيهما الربع والنصف كزوج وبنت كانت من اربعة للزوج واحد وللبنت اثنان فرضًا والباقي واحد يرد عليها

وان اختلط السدس بالثلثين كمن خلف ابًا وبنتين فمسئلتهم من ستة للاب واحد فرضًا وللبنتين اربعة الثلثان والباقي واحد يرد للاب تعصيبًا — لا يجتمع السدس والثلث والثلثان مرة في دعوى ولا يجتمع الربع والثمن ولا يجتمع الثمن والثلث في مسئلة واذا اختلط النصف بالثلث فقط كما فيمن خلفت زوجًا واختين لام او اختلط بالثلثين فقط كزوج واختين لاب وام او اختلط بالسدس وحدهُ كما اذا خلف امًّا وبنتًا او اختلط بالثلث والثلثين معًا كما اذا تركت زوجًا واختين لاب وام واختين لام او اختلط بالثلثين والسدس معًا كما اذا خلفت زوجًا واختين لاب وام وامًّا او اختلط بالثلث والسدس معًا كمن خلفت زوجًا واختين لام وامًّا فاختلاط النصف في جميع هذه الصور من ستة وذلك لان مخرج النصف اثنان ومخرج الثلث والثلثين ثلاثة وكلاهما داخلان في الستة واذا اختلط الربع بالسدس او الثلث او الثلثين فالمسئلة من اثني عشر كما اذا خلف زوجة وامًّا واختين لاب وام او زوجًا وبنتين او زوجة وامًّا او زوجة وواحدًا من

If a fourth and a half come together, as in the case of a husband and a daughter, the question is of four shares: to the husband goes one and to the daughter two as a legal share, and the one remaining reverts to her.

If a sixth is mixed with two-thirds, as when a man leaves a father and two daughters, the question becomes one of six shares: to the father goes one as a legal share, and to the two daughters four, *i. e.*, the two-thirds, and the one remaining reverts to the father as a residuary. A sixth, a third and two-thirds cannot come together in the same case, nor a fourth and an eighth, nor can an eighth and a third come together in one question. If a half is mixed with a third only, as when a woman leaves a husband and two sisters by the mother, or if it is mixed with two-thirds only, as in the case of a husband and two sisters by the same father and mother, or with a sixth only, as when a man leaves a mother and a daughter; or with a third and two-thirds together, as when a wife leaves a husband and two sisters of the whole blood, and two sisters by the mother, or if it is mixed with two-thirds and a sixth together, as when a wife leaves a husband, and two sisters of the whole blood, and a mother; or with a third and a sixth together, as when a woman leaves a husband, two sisters by the same mother, and a mother, the introduction of the half in all these cases is based on six, because the root (denominator) of the half is two, and the root of the third and two-thirds is three, and both of them measure the six. If a fourth is mixed with a sixth or a third or two-thirds, the question is of twelve, as when a man leaves a wife, a mother, and two sisters of the whole blood, or if there are a husband and two daughters, or a wife and a mother,

اولاد الام او زوجة واختين لاب وام واختين لام فالمسئلة تكون من اثني عشر لان مخرج اقل جزء هو الستة وقد دخل فيها الثلث والثلثان فتكفي مخرجًا للكل ومخرج الربع هو الاربعة بينها وبين الستة موافقة فتضرب نصف احدهما في كل الآخر فصار اثني عشر ومخرج الثلث والثلثين ثلاثة وهي مباين الاربعة فضربنا الكل في الكل فحصل اثنا عشر واذا اجتمع الثمن والسدس او الثمن والثلثان فهو من اربعة وعشرين لان الستة مخرج السدس والثمانية مخرج الثمن فبين الستة والثمانية موافقة بالنصف فضربنا نصف احدهما في كل الآخر فحصل اربعة وعشرون مثلاً مات رجل وخلف زوجة وامًّا وبنتين فالمسئلة من اربعة وعشرين منها الثمن ثلاثة للزوجة والسدس اربعة للام والبنتان لهما الثلثان ستة عشر والباقي واحد يرد على البنات والام

الباب الثامن

في قواعد حساب القسمة

س . ما هي قواعد الحساب اللازم معرفتها في قسمة التركة

or a wife and one of the children of the mother, or a wife and two sisters by the same father and mother, and two sisters by the mother, then it will be a question of twelve, because the root of the smallest part is six which the third and the two-thirds enter (measure); thus it is a sufficient denominator for all of them; and the denominator of the fourth is four, and between four and six there is an agreement, therefore multiply the half of one of them by the whole of the other, and so it becomes twelve. The denominator of one-third and two-thirds is three, but three is not commensurable with four, so we multiply the whole by the whole and obtain twelve. If an eighth and a sixth come together, or an eighth and two-thirds, it (the denominator) is twenty-four, because six is the denominator of the sixth, and eight is so of the eighth, and between six and eight there is agreement by the half, *i. e.*, they have a common measure. So we multiply half of one of them by the whole of the other, and then it becomes twenty-four: for instance, a man dies leaving a wife, a mother, and two daughters; the question will be one of twenty-four, from these an eighth or three goes to the wife, a sixth or four to the mother, to the daughters two-thirds or sixteen, and the remaining one reverts to the daughters and the mother.

CHAPTER VIII.

On the Rules of Calculating the Distribution.

Q. What rules of arithmetic is it necessary to know in the division of the estate?

ج . اولاً — ينبغي على المتعلم ان يعرف معاني التماثل والتداخل والتوافق والتباين كما هي مفصَّلة ادناه

١ — يقال لعددين انهما متماثلان اذا كان احدهما مساوياً للآخر كثلاثة وثلاثة واربعة مع اربعة

٢ — تداخل العددين هو ان يعدّ اقلّهما الاكثر كالثلاثة مع الستة فانك اذا قسمت الستة على الثلاثة فنيت الستة كلها وكذا التسعة والاثنا عشر بالثلاثة وكذا الثمانية بالاربعة فان الثلاثة جزء الستة نصفها تعدّها مرّتين والثلاثة تعدّ الاثني عشر اربع مرّات

٣ — اذا كان العددين لا يعدّ احدهما الآخر ولكن يعدّهما ثالث فهما متوافقان كالثمانية مع العشرين فان الثمانية لا تعدّ العشرين ولكن تعدّهما اربعة فانها تعدُّ الثمانية مرّتين والعشرين خمس مرّات وكذا الاربعة مع الستة والستة مع التسعة او الاربعة مع العشرة

٤ — تباين العددين هو ان لا يعدّ العددين المختلفين عدد ثالث كالتسعة مع العشرة فانهُ لا يعدّهما شيء سوى الواحد او يفصل منهما واحد بالاقلّ

س . ما هي القواعد اللازمة لتصحيح مسائل القسمة

ج . يحتاج في تصحيح المسائل الى سبعة اصول ثلاثة منها

A. First, the learner ought to know the meanings of the equalities, concord, commensurability and incommensurability, as explained below.

(1) Two numbers are said to be equal (mutam'athil) if one of them is the same as the other, as 3 = 3, and 4 = 4.

(2) Two numbers are said to be concordant (mutad'akhil) when the smaller number measures the larger, as three measures six. So if you divide six by three, it goes twice exactly without any remainder; the same applies to 9 and 12 if divided by 3, and 8 if divided by 4, because three is a part (factor) of six being its half, which measures it two times, and 12 is measured or divided by 3, four times.

(3) If one of the numbers does not measure the other, but both of them are measured by a third number, they are commensurable or having a common measure (mutaw'afik) as eight and twenty. The eight does not measure the twenty, but four measures both, it measures twice the eight and five times the twenty. And so is the case with the four and the six, and with six and nine, or four and ten.

(4) In commensurability (Tabáyun) of two numbers takes place when two different numbers are not measured by a third one, as nine and ten; thus nothing measures them except one, or there will remain a surplus of at least one.

Q. What are the rules necessary for adjusting or rectifying the questions of the division?

A. For rectifying the question of the division it is necessary to know seven principles, three of which are dependent on a comparison between the shares taken from their roots (denominators)

متوقفة على المقابلة بين السهام المأخوذة من مخارجها وبين رؤس الورثة واربعة منها بين الرؤس والرؤس

الاوّل — اذا كان سهام الورثة منقسمة عليهم بلا كسر فلا حاجة الى الحساب كأبوين وبنتين فالمسئلة من ستة لكل من الابوين واحد سدسها وللبنتين الثلثان وهو اربعة لكل واحدة اثنان فاستقامت السهام على رؤس الورثة بلا انكسار

الثاني — اذا كان الورثة ما يمكنهم اخذ نصيبهم من دون كسور ولكن بين رؤسهم وسهامهم موافقة اي يعدّها عدد ثالث كأبوين وعشر بنات فأصل المسئلة من ستة السدسان وهي الاثنان للابوين مستقيمان عليهما والثلثان وهما اربعة للبنات العشر فلا يستقيم عليهنّ لكن بين الاربعة والعشرة موافقة بالنصف فان العدد العاد لهما هو الاثنان فاضرب نصف عدد الورثة العشرة في الستة اصل المسئلة فيصير الحاصل ثلاثين للابوين منها عشرة او خمسة لكل واحد وذلك لان للابوين من اصل المسئلة اثنان فاذا ضربناهما في الضرب الذي هو خمسة صار عشرة والباقي العشرون للبنات لكل واحدة اثنان وان كان في المسئلة عول كزوج وابوين وست بنات فان اصل المسئلة من اثني عشر لاجتماع الربع والسدس والثلثين على ما

and the heads (persons) of the heirs, and the remaining four of them on a comparison between the heads and the heads (*i. e.*, the numbers of the different sets of heirs).

The first is when the shares of the heirs are divisible amongst them without a fraction, then there is no need for calculation; as in the case of two parents and two daughters, the division must be by six, one or one-sixth going to each parent, and the two daughters will have two-thirds or four shares, each gets two. The shares are therefore even with the numbers of the heirs without involving a fraction.

(2) The second is when the heirs cannot take their shares without a fraction, but their (the heirs') numbers and their shares are commensurable, that is to say, a third number measures them both, as in the case of two parents and ten daughters. The root of the question, *i. e.*, the division, must be by six, of which two-sixths, *i. e.*, two shares belong to both parents which are in right proportion to them, and two-thirds, *i. e.*, four shares belong to the ten daughters; but this is not in right proportion to their number, *i. e.*, cannot be divided amongst them without a fraction, but between four and ten there is a commensurability or agreement by the half, for the number measuring both of them is two; therefore multiply half of the number of the ten heirs by six, the root of the question, and the result is thirty, of which the parents are to have ten, or five each, because the parents had from the root of the case (original division) two shares, and if we multiply these two shares by the multiplicand, which is five, it becomes ten, and the remaining twenty will be given to the daughters, two to each one. If it is a case of increase, as

سلف تحريرهُ فللزوج ربعهـا وهو ثلاثة وللابوين سدساها وهما اربعة وللبنات الست ثلثاها فقد عالت المسئلة الى خمسة عشر وانكسرت الثمانية سهام البنات على عدد روسهنَّ فقط ولكن بين عددي السهام وبين روس الورثة توافق بالنصف فرددنا عدد روسهنَّ الى نصفهِ وهو ثلاثة ثم ضربناها في خمسة عشر اصل المسئلة مع عولها فحصل خمسة واربعون واستقامت منها المسئلة فكان للزوج من اصل المسئلة ثلاثة فاضربها في ثلاثة المضروبة يصير تسعة للزوج وللابوين اربعة في ثلاثة باثني عشر لكل واحد منهما ستة وللبنات ثمانية في ثلاثة باربعة وعشرين لكل واحدة منهنَّ اربعة

الثالث — من الاصول اذا انكسرت السهام ايضًا على طائفة واحدة ولم تكن بين روسهم وسهامهم موافقة بل مباينة اذا زاد سهم على عدد روسهم كأبوين وخمس بنات فاصل المسئلة من ستة اي اثنان للابوين والثلثان اربعة للبنات الخمس منكسر على روسهنَّ وبين الاربعة والخمسة مباينة فتضرب عدد روسهنَّ

the husband and the two parents and six daughters, the root of the question will be twelve, because a fourth; a sixth, and two-thirds come together in it according to the rules laid down in the preceding chapter. So the husband will take a fourth, or three shares, the two parents two-sixths, or four shares, and to the six daughters go two-thirds, or eight shares. So the shares (into which the estate was originally divided) are augmented to fifteen, and the eight shares of the daughters cannot be divided amongst their numbers without a fraction, but the two numbers of the shares and the heirs are both commensurable by the half, so we reduce the number of their heads (persons) to its half, *i. e.*, three which we mutliply by fifteen, that is by the root of the question with the addition of the increase: thus we get forty-five, and with this the question is really settled. The husband was to get from the root of the case three, which is multiplied by three, total nine shares for the husband, and both parents have four multiplied by three which is twelve or six for each, and the six daughters have eight multiplied by three equals twenty-four, *i. e.*, four for each.

The third principle occurs when one set of heirs cannot get their shares without a fraction, and the heads of the heirs and their shares are not commensurable, but there is disagreement (incommensurability) between them, because there is one share over and above the numbers of their heads; as in the case of two parents and five daughters. Here (according to Chapter VII.) the question will be one of six, *i. e.*, two for the two parents, and two-thirds or four for the five daughters which cannot be divided amongst them

وهو الخمسة في اصل المسئلة فصار الحاصل ثلاثين منها للابوين عشرة وللبنات عشرين فلكل واحدة اربعة

الاصل الرابع — ان يكون كسر السهام على طائفتين من الورثة او اكثر ولكن بين اعداد روءس من انكسر عليهم سهامهم مماثلة فالحكم في هذه الصورة ان يُضرَب احد الاعداد المتماثلة في اصل المسئلة مثلاً ست بنات وثلاث جدّات وثلاثة اعمام فالمسئلة من ستة للبنات الست الثلثان يعني اربعة لا تستقيم عليهنّ لكن بين الاربعة والستة عدد روءسهنّ موافقة بالنصف فتاخذ نصف عدد روءسهنّ وهو ثلاثة وللثلاث الجدّات السدس وهو واحد لا يستقيم عليهنّ ولا موافقة بين الواحد وعدد روءسهنّ فتاخذ جميع عدد روءسهنّ وهو ثلاثة وللاعمام الثلاثة الباقي وهو واحد وبينهُ وبين عدد روءسهم مباينة ايضًا فتاخذ جميع عدد روءسهنّ وهو الثلاثة فاذا نسبنا هذه الاعداد المأخوذة بعضها الى بعض وجدناها متماثلة مثلاً ٣ = ٣ = ٣ فنضرب احدها وهو ثلاثة ٣ في اصل المسئلة ٦ فصار الحاصل ١٨ منها للبنات اربعة

without a fraction, and four and five are incommensurable or have no common measure, so you multiply the number of their heads which is five, by the root of the question, *i. e.*, the original division, the product of which will be thirty. From this the two parents take ten or five each, and the daughters twenty or four each.

The fourth principle is that, when two or more sets of heirs cannot get their shares without a fraction, but between the numbers of those whose shares become fractional, there is equality or likeness. The rule in this case is that one of the like numbers is to be multiplied into the root of the question; as in the case of six daughters, three grandmothers, and three paternal uncles. The question will be one of six shares, the six daughters have two-thirds, *i. e.*, four shares which cannot be divided amongst them without a fraction; but four compared with six—the numbers of heirs—are commensurable by the half (mutawáfik, that is, they agree in two), so you take half the number of their heads which is three, and three grandmothers obtain a sixth which is one, and one cannot be divided amongst them without a fraction, and there is no agreement between one and three—the number of their heads, so you take the whole number of their heads which is three. The three paternal uncles take the residue which is one; and between this and the number of their heads there is disagreement too, so you take the whole number of their heads which is three. If we compare these numbers, which are taken, with each other, we find them to be equal or alike, $3=3=3$, so we multiply one of these, *i. e.*, three by six—the root of the question, the product will be eighteen, of which, *i. e.*, of the original division the daugh-

فنضربها في المضروب اي الثلاثة = ٤×٣=١٢ فصار اثنا عشر لكل واحدة منهنّ اثنان وللجدّات السدس وهو ثلاثة لكل واحدة واحد وللاعمام السدس ثلاثة لكل واحد منهم واحد

الاصل الخامس — ان يكون بعض اعداد روس الورثة المنكسرة عليهم سهامهم من طائفتين او اكثر متداخلاً في البعض فالحكم ان تضرب ما هو الاكثر من تلك الاعداد في اصل المسئلة كاربع زوجات وثلاث جدّات واثني عشر عمًّا فأصل المسئلة من اثني عشر الربع ثلاثة للزوجات وبين روسهنّ وسهامهنّ مباينة فتاخذ عدد روسهنّ بتمامهِ وللجدّات الثلاث السدس اثنان لا يستقيم عليهنّ وبين روسهنّ وسهامهنّ مباينة فتاخذ مجموع عدد روسهنّ وهو الثلاثة وللاعمام الباقي وهو سبعة لا يستقيم على اثني عشر بل بينهما تباين فتاخذ عدد الروس بتمامهِ فاذا طلبنا النسبة بين اعداد الروس وجدنا الثلاثة والاربعة داخلين في الاثني عشر الذي هو اكثر عدد الروس فضربناهُ في اصل المسئلة ١٢×١٢ = ١٤٤ فصار مائة واربعة واربعون منها للزوجات الربع ٣×١٢ = ٣٦ لكل واحدة تسعة وللجدّات السدس ٢×١٢=٢٤ لكل واحدة ثمانية وللاعمام ٧×١٢=٨٤

ters obtain four, and multiplying this by the above multiplicand, *i. e.*, three, we get $4 \times 3 = 12$; so it becomes twelve, each of them is to have two, the grandmother will take one-sixth, *i. e.*, three or one each, and the paternal uncles will have a sixth, which is three or one each.

The fifth principle applies to a case where some numbers of the heads of the heirs from two sets of heirs or more cannot get their shares without a fraction, but it is concordant (mutadakhil) with the other. In this case the rule is that you should multiply the greater of these numbers into the root of the question; as in the case of four wives, three grandmothers, and twelve paternal uncles. The root of the question is twelve, but the fourth, *i. e.*, the share of the four wives, is three, and three compared with their number is incommensurable. You should take the whole number of their heads; and the three grandmothers have two, *i. e.*, a sixth, which is not proportional to their number; and their heads and their shares are also incommensurable, so you take the whole number of their heads, which is three. The paternal uncles take the remainder, which is seven, and this number is not proportionate to twelve, there being disagreement between them, so you take the full number of their heads.

If we seek the relation between the numbers of the heads, *i. e.*, persons, we find the three and four measuring the twelve, which is the greatest number of heads; so we multiply this number by the root of the question, thus $12 \times 12 = 144$, and we obtain one hundred and forty-four; of which the wives take the fourth $= 3 \times 12 = 36$, *i. e.*, each gets nine, and the grandmothers take a sixth, *i. e.*, $2 \times 12 = 24$, or each eight, and

لكل واحد سبعة

الاصل السادس – اذا انكسرت السهام على طائفتين او اكثر ووافق بعض اعداد رؤسهم البعض فالحكم ان تضرب احد اعداد رؤسهم في وفق العدد الثاني ثم تضرب جميع المبلغ الحاصل في وفق العدد الثالث ان كان ذلك موافقاً للحاصل وان لم يوافقهُ تضرب المبلغ في جميع العدد الثالث ثم تضرب المبلغ الثاني في وفق العدد الرابع ان وافقهُ والاَّ في جميعهِ ان لم يوافقهُ ثم تضرب المبلغ الثالث في اصل المسئلة. مثالهُ اربع زوجات وثماني عشرة بنتاً وخمس عشرة جدَّة وستة اعمام اصل المسئلة من اربعة وعشرين للزوجات الاربع الثمن وهو ثلاثة لا يستقيم عليهنَّ وبين عددي سهامهنَّ ورؤسهنَّ مباينة فحفظنا جميع عدد رؤسهنَّ وللبنات الثماني عشرة الثلثان وهو ستة عشر لا يستقيم عليهنَّ وبين عدد رؤسهنَّ وسهامهنَّ موافقة بالنصف فحفظنا نصف عدد رؤسهنَّ وهو تسعة وللجدَّات الخمس عشرة السدس وهو اربعة لا يستقيم عليهنَّ وبين عددي رؤسهنَّ وسهامهنَّ مباينة فحفظنا جميع عدد رؤسهنَّ وللاعمام الستة الباقي وهو واحد لا يستقيم عليهم وبينهُ وبين عدد رؤسهم مباينة

the paternal uncles $7 \times 12 = 84$, or each seven (by the European method each paternal uncle gets $\frac{1}{12}$ of $\frac{7}{12} = \frac{7}{144}$).

The sixth principle applies where two or more sets of heirs cannot obtain their shares without a fraction, and some of the sets are commensurable (mutaw'fik) with the other. The rule in such a case is to multiply one of the numbers of the sets of heirs into the measure of the second number, and then you multiply the whole product by the measure of the third number, if this is commensurable with the product; but if it is not, multiply the product by the whole of the third number, and again multiply the second product by the measure of the fourth number if it accords with it; and if it does not, then by its whole; and after this, multiply the third product by the number of the original division; thus in the case of four wives, eighteen daughters, fifteen grandmothers and six paternal uncles. Here the original question is one of twenty-four shares; the four wives take an eighth, which is three, and three is not divisable amongst them without a fraction, as the two numbers (3 and 4) of their shares and their heads are incommensurable, so we preserve the whole number of their heads. The eighteen daughters take two-thirds, which is sixteen, and sixteen is not divisable amongst their number, but the number of their heads and their shares are commensurable by the half, so we preserve half of the number of their heads, which is nine. The fifteen grandmothers get one-sixth, which is four shares, and four is not divisable amongst their number without a fraction, and the two numbers of their heads, and their shares are incommensurable, so we preserve the whole number of their heads. The six paternal

فحفظنا عدد رؤسهم فحصل لنا من اعداد الرؤس المحفوظة اربعة وتسعة وخمسة عشر وستة ثم قابلنا بينها فوجدنا الاربعة موافقة للستة بالنصف فرددنا احداها الى نصفها وضربناها في الاخرى فصار المبلغ اثني عشر وهو موافق للتسعة بالثلث فضربنا ثلث احداها في جميع الاخرى صار المبلغ ستة وثلاثين وبين هذا المبلغ الثاني وبين الخمس عشرة موافقة بالثلث ايضاً فاذا ضربنا ثلث خمسة عشر وهو خمسة في ستة وثلاثين صار الحاصل مائة وثمانين ثم ضربنا هذا المبلغ الثالث في اصل المسئلة اعني اربعة وعشرين صار الحاصل اربعة آلاف وثلثمائة وعشرين فمنها تصحّ المسئلة فللزوجات من اصل المسئلة ثلاثة نضربها في المبلغ الثالث اعني المائة والثمانين فتبلغ خمسمائة واربعين لكل من الزوجات الاربع مائة وخمسة وثلاثون وللبنات ستة عشر نضربها في المبلغ الثالث يحصل منها الفان وثمانمائة وثمانون لكل واحدة منهنّ مائة وستون وللجدّات الخمس عشرة اربعة نضربها في المبلغ الثالث يبلغ سبعمائة وعشرين لكل منهنّ ثمانية واربعون وللاعمام الستة واحد اذا ضربناهُ في المبلغ الثالث صار مائة وثمانين لكل واحد منهم ثلاثون

الاصل السابع — اذا انكسرت السهام على طائفتين او اكثر وكانت اعداد رؤوسهم متباينة لا يوافق بعضها البعض

uncles take the remaining one share, which is indivisable without a fraction amongst their number, and the two numbers of their heads and their shares are incommensurable, so we preserve the number of their heads; thus we obtain from the preserved numbers of heads four, nine, fifteen and six. On a comparison of them, we find that four and six are commensurable by the half, that is, two is their common measure; so reducing one of them to its half, we multiply it by the other and get the result of twelve, which is also commensurable with nine by the third; we multiply the third of one of them into the whole of the other, and obtain the product of thirty-six. This second product and fifteen (36 and 15) are commensurable by the third, so if we multiply the third of fifteen, which is five, by thirty-six, we get the product of 180. Again we multiply this third product by the root of the question (*i. e.*, the number of the original division, twenty-four) thus $180 \times 24 = 4{,}320$, by which the question is settled. The wives obtain from the original question three, which, multiplied by the third product, 180, gives a result of 540. Each of the four wives gets 135. The daughters have sixteen shares, which, when multiplied into the third product, gives a result of 2,880; each of them obtains 160. The fifteen grandmothers have four, which, when multiplied into the third product, gives a result of 720, to each one forty-eight. The paternal uncles have one, which, when multiplied into the third product, amounts to 180, each one gets thirty.

The seventh principle is applied when two or more sets of heirs cannot get their shares without a fraction, and the numbers of their heads are incommensurable. In this case the rule is

فالحكم فيها ان تضرب احد الاعداد في جميع اثاني ثم تضرب ما بلغ في جميع الثالث ثم تضرب ما حصل في جميع الرابع ثم تضرب ما اجتمع في اصل المسئلة مثالهُ امرأتان وست جدّات وعشر بنات وسبعة اعمام فأصل المسئلة اربعة وعشرون للزوجتين الثمن ثلاثة لا يستقيم عليهنّ وبين رؤسهنّ وسهامهنّ مباينة فاخذنا عدد رؤسهنّ وهو اثنان وللجدات الست السدس وهو اربعة لا يستقيم عليهنّ وبين عددي رؤسهنّ وسهامهنّ موافقة بالنصف فاخذنا نصف عدد رؤسهنّ وهو ثلاثة وللبنات العشر الثلثان وهو ستة عشر لا يستقيم عليهنّ وبين رؤسهنّ وسهامهنّ موافقة بالنصف فاخذنا نصف عدد رؤسهنّ وهو خمسة وللاعمام السبعة الباقي وهو واحد لا يستقيم عليهم وبينهُ وبين عدد رؤسهم مباينة فاخذنا عدد رؤسهم وهو سبعة فصار معنا من الاعداد المأخوذة للرؤس اثنان وثلاثة وخمسة وسبعة وهذه كلها اعداد متباينة فضربنا الاثنين في الثلاثة صارت ستة ثم ضربنا الستة في الخمسة فصارت ثلاثين ثم ضربنا الثلاثين في السبعة فحصلت مائتان وعشرة ثم ضربنا هذا المبلغ في اصل المسئلة اربعة وعشرون فصار المجموع خمسة آلاف واربعين ومنها تستقيم المسئلة على جميع الطوائف فانهُ للزوجتين من اصل المسئلة ثلاثة نضربها في المضروب الذي هو مائتان وعشرة فيحصل ستمائة وثلاثون لكل واحدة منهما ثلاثمائة وخمسة عشر وكان للجدّات الست اربعة اذا

that you multiply one of the numbers by the whole of the second; then you multiply their product by the whole of the third; and again the latter product by the whole of the fourth, and the whole product by the root of the question; as in the following instance, two wives and six grandmothers, ten daughters and seven paternal uncles. The root of the question is twenty-four, to the wives go one-eighth = three, which is not divisable amongst them without a fraction, and the numbers of their heads and of their shares are incommensurable; so we take the number of their heads, which is two. The six grandmothers take one-sixth, which is four, and this is not divisable by six, but the numbers of their heads and of their shares are commensurable by the half, *i e.*, they agree in two, so we take half of the number of their heads which is three. The ten daughters take two-thirds, which is 16, and this is not divisable amongst them; but the numbers of their heads and of their shares are commensurable by the half; so we take half of the number of their heads which is five. The seven paternal uncles take the residue, which is one, and it is not divisable amongst seven, which is not commensurable with the number of their heads. So we take the number of their heads, which is seven; the numbers of heads we have thus obtained are 2, 3, 5 and 7. All these numbers are incommensurable, *i. e.*, have no common measure; so we multiply the two by the three obtaining six, then the 6×5 obtaining 30, then the 30 by the 7 which produces 210; afterwards we multiply this product by the root of the question, which is twenty-four, and obtain a total of 5,040, and thus the question is settled amongst all sets of heirs.

ضربناها في ذلك المضروب صارت ثمانمائة واربعين لكل منهن مائة واربعون وكان للبنات العشر ستة عشر ضربناها في كل المضروب فبلغت ثلاثة آلاف وثلثمائة وستين لكل منهن ثلثمائة وستة وثلاثون وكان للاعمام السبعة واحد ضربناهُ في ذلك المضروب فصار مائتين وعشرة لكل منهم ثلاثون

العلامة = معناها مثل

العلامة X معناها العدد المتقدم مضروب فيما بعدهُ مثلاً

٧X١٢=٨٤ يعني سبعة مضروبة في اثني عشر باربعة وثمانين

العلامة + معناها العدد المتقدم مضاف لما بعدهُ مثلاً

٧+١٢=١٩ يعني سبعة مضافة لاثني عشر تصير الجملة تسعة عشر

الباب التاسع

في المناسخة

س . ما هي المناسخة

ج . هي انتقال حصة بعض الورثة بموتهِ قبل قسمة التركة الى ورثتهِ

س . كيف القاعدة الجارية عليها

اولاً — لها قاعدة تقسم بها التركتان قسمة واحدة وهي اذا كان ارث الميت الثاني منحصراً في وارث الميت الاول بمطلق

The two wives have from the original division three, which we multiply into the multiplicand, viz., 210, the product is 630, each of them gets 315. The six grandmothers have $4 \times 210 = 840$, to each of them go 140, the ten daughters have $16 \times 210 = 3{,}360$, each obtaining 336. The 7 paternal uncles have $1 \times 210 = 210$, or each 30.

The sign = means equal to.

The sign × means the preceding number is multiplied into the next, thus $7 \times 12 = 84$.

The sign + means the preceding number is added to the next, thus $7 + 12 = 19$, that is, 7 added to 12, the total is 19.

NOTE.—This explanation is meant for Arabs who do not know what is the meaning of these signs. It is put in English in order to complete the translation.

CHAPTER IX.

ON THE MUNASAKHA; OR, VESTED INHERITANCE.

Q. What is "Vested Inheritance?"

A. It is the transfer of the share of an heir to his heirs in consequence of his death prior to the distribution of the estate.

Q. What rules govern it?

A. First, it has a rule according to which the two inheritances are divided by one division which takes place if the heritage of the second deceased is confined to the heirs of the first deceased, they being entitled to it simply as residuaries; then the second deceased is to be excluded from the first division, and the property is to be divided amongst the heirs then living. For instance, a man dies leaving four sons, or four brothers, or sons of a paternal uncle; afterwards one of the four heirs dies (prior to the distribu-

التعصيب فاسقط الميت الثاني من المسئلة الاولى واقسم التركة على الرؤس الباقين مثالهُ مات رجل عن اربعة بنين او اربعة اخوة او بني عم ثم مات واحد من الاربعة فاقسم التركة الاولى بعدد رؤسهم ثلاثة ويسقط الميت الثاني

ثانيًا — كذا الحكم ان كان في ورثة الميت الاول ذو فرض ولم يرث في الثانية مثالهُ مات عن زوجة واربعة اخوة ثم مات احد الاخوة عن باقي اخوانهِ فالمسئلة الاولى من مخرج الربع وهو اربعة واحد للزوجة وثلاثة للاخوة من واحد وليسقط الميت

س . كيف الحكم اذا كان في ورثة الميت الثاني من لا يرث في الاولى او يرث لكن يختلف قدر استحقاقهِ من المسئلتين

اولاً — يلزم ان تصحح اولاً مسئلة الميت الاول وتعرف سهام كل واحد منها ثم تصحح مسئلة الميت الثاني من الاولى وتنظر الى مسئلتهِ فان انقسمت سهامهُ على مسئلتهِ فاستغنِ بالاولى كما اذا ماتت عن زوج واختين ثم ماتت احدى الاختين عن اختها وبنت فالمسئلة الاولى بعولها من سبعة للزوج ثلاثة وللاختين اربعة والمسئلة الثانية من اثنين وسهام الميت الثاني من الاولى اثنين منقسمة على مسئلتهِ للبنت واحد وللاخت واحد

tion of the estate). In this case you should divide the estate of the first deceased amongst the three remaining heirs and omit the second deceased.

Secondly, the same rule applies if there is among the heirs of the first deceased a legal sharer, who does not inherit in the second case. For instance, a man dies leaving a wife and four brothers; afterwards one of the brothers dies leaving his surviving brothers; the denominator of the first question will be the fourth, that is four. One goes to the wife and three to the brothers, or one each, and the deceased is not to be taken into account.

Q. What is the rule, if among the heirs of the second deceased there are persons who do not inherit from the first inheritance, or who inherit, but whose measure of claim in both cases is different?

A. First, it is necessary that you arrange the case of the first deceased, and that you know the shares of each heir from it; then you should arrange the question of the second deceased from the first arrangement, and ascertain his case. If his shares (from the first inheritance) can be divided in his case amongst his heirs, then stick to the first arrangement; for instance, if a woman dies leaving a husband and two sisters, afterwards one of the sisters dies leaving her sister and a daughter, so the first question with the increase will be one of seven, the husband takes three, and the two sisters four. The second will be a question of two shares, and the shares of the second deceased from the first case are two, which are divisible between his heirs: to the daughter goes one, and to the sister one.

ثانيًا — اذا لم تنقسم سهام الميت الثاني على مسئلتهِ فانظر بين سهامهِ ومسئلتهِ فلا بد ان يكون بينهما تباين او توافق فان كان بينهما توافق فاضرب وفق المسئلة الثانية اعني اقلّ كسر سالم يتفقان فيهِ في جميع الاولى وتحصل المسئلة الجامعة وان كان بينهما تباين فاضرب جميع المسئلة الثانية في جميع الاولى فتحصل الجامعة ثم من كان لهُ شيء من المسئلة الاولى ياخذهُ مضروبًا فيما ضُربت فيهِ وهو وفق الثانية في الموافقة وكلها في المباينة ومن لهُ شيء من الثانية ياخذهُ مضروبًا في وفق سهام مورثهِ في الموافقة وفي جميع السهام في المباينة مثالهُ ماتت عن زوج وابوين ثم مات الزوج عن ستة بنين المسئلة الاولى من ستة للاب اثنان وللام واحد وللزوج ثلاثة والمسئلة الثانية من ستة وسهام الميت من الاولى ثلاثة بينهـا وبين مسئلتهِ وهي الستة توافق بالثلث نضرب وفق المسئلة الثانية وهو اثنان في جميع الاولى وهي ستة تخرُج الجامعة اثنا عشر للاب من الاولى اثنان مضروبان في اثنين اربعة وللام واحد في اثنين باثنين ولكل واحد من البنين

Second, if the shares of the second deceased are not divisible on his question, *i. e.*, amongst his heirs at the subsequent distribution, then see whether there is perhaps between his shares and his question agreement or disagreement. If they are commensurable, multiply the measure of the second question, that is the smallest sound fraction they agree in, by the whole of the first, *i. e.*, by the aggregate shares of the preceding division, and you will obtain the whole question.

If they are incommensurable, multiply the whole of the second question by the whole of the first, and you will obtain the aggregate, *i. e.*, the product will be the denominator in both cases. Afterwards the share of every heir from the first question, *i. e.*, of the first deceased, must be multiplied into that multiplicand, *e. g.*, the measure of the second question in case of commensurability, and into the whole of it in case of incommensurability, and he who has to take a share from the second question, takes it multiplied into the measure of the share of the person whose heir he is in case of commensurability, and into the whole of such shares in case of incommensurability. For instance, a woman dies leaving a husband and both parents; then the husband dies leaving six sons. The first question or distribution will be by six: the father takes two, the mother one, and the husband three. The second question will be by six, and the shares of the deceased from the first question were three. Between this and the second deceased's question, which is six, there is commensurability by the third. We multiply the measure of the second question, which is two, by the whole of the first, which is six, and the forthcoming product will

في المسئلة واحد يضرب في وفق مورثهِ وهو واحد لكل واحد واحد

ثالثًا — مثال تباين السهام ماتت عن اب وام وزوج ثم مات الزوج عن زوجة وثلاثة اخوة فالمسئلة الاولى من ستة للاب اثنان وللام واحد وللزوج ثلاثة والمسئلة الثانية من اربعة للزوجة واحد ولكل واحد من الاخوة واحد فاذا نظرنا فيها الى سهام الميت من الاولى وهي ثلاثة والى مسئلتهِ وهي اربعة وجدنا بينهما تباينًا فنضرب جميع المسئلة الثانية في جميع الاولى فتصح الجامعة من اربعة وعشرين وللاب من الاولى اثنان في اربعة ثمانية وللام واحد في اربعة باربعة وللزوجة من الثانية واحد مضروب في سهام مورثها ثلاثة وللاخوة من الثانية ثلاثة مضروب في سهام مورثهم الثلاثة يخرج لهم تسعة لكل واحد ثلاثة

be twelve; the father takes from the first two, multiplied by two, which becomes four, to the mother goes one multiplied by two, that is two, and the share of every one of the sons in the question is one, multiplied by the measure of the person whose heir he is, *i. e.*, the second deceased, whose measure is one, so that each son will get one share (each son gets $\frac{1}{6}$ of $\frac{1}{2} = \frac{1}{12}$).

Third, to give an instance of the shares being incommensurable; a woman dies leaving a father, a mother, and a husband; afterwards the husband dies leaving a wife and three brothers. So the first estate is distributed into six shares, the father takes two, the mother one, and the husband three. The second question will be one of four shares: to the wife goes one, and to each brother one. If we compare in this the shares of the deceased, coming from the first distribution, which are three, with his question which is made into four shares, we find incommensurability between them. So we multiply the whole of the second question into the whole of the first. The total will amount to twenty-four, and the father will take two from the first inheritance multiplied by four, *i. e.*, eight, to the mother goes one multiplied by four, *i. e.*, four, and to the wife from the second question goes one multiplied by the shares of the second deceased whose heir she is, which is three, and the brothers have from the second question three multiplied by three, which are the shares of their (second) deceased, the product will be nine, *i. e.*, three go to each of them (according to European method each brother gets $\frac{1}{3}$ of $\frac{3}{4}$ of $\frac{1}{2} = \frac{3}{24}$).

الباب العاشر

في العول

س . ما هو العول

ج . العول في اللغة الغلبة وفي الاصطلاح ازدياد السهام اذا تزاحمت الفروض المجتمعة مثالهُ مات الميت عن زوج واختين فاصل المسئلة من ستة وتعول الى سبعة للزوج النصف عائلاً ثلاثة وللاختين الثلثان عائلة اربعة

س . في كم مسئلة يصير العول

ج . ثلاثة من الاصول تعول وهي الستة تعول الى سبعة وثمانية وتسعة وعشرة (٢) الاثنا عشر تعول الى ثلاثة عشر وخمسة عشر وسبعة عشر (٣) الاربعة والعشرون تعول الى سبعة وعشرين فقط

س . اضرب لي مثلاً في عول كل من هذه الاصول

ج . اولاً — عول الستة الى السبعة قد تبين بمسئلة الزوج والاختين

CHAPTER X.

On the Increase.

Q. What is the "'aul" (Increase?)

A. The "'aul" in common speech means "overcoming," and in conventional language it is an excess of the number of the legal shares of the claimants taken together, *i. e.*, the legal shares of the claimants are more than the shares into which the estate is divided; for instance, a deceased leaves a husband and two sisters; the question will be one of six shares, which are augmented to seven (this augmentation is termed "'aul" or increase), the husband is entitled to half, or three of the augmented shares, and the two sisters take two-thirds, or four shares of the augmented shares.

Q. In how many cases is this procedure of increase adopted?

A. Three of the roots (denominators) are increased, viz.: (1) The denominator, six, is increased to seven, eight, nine or ten. (2) The twelve can be increased to thirteen, fifteen and seventeen. (3) The twenty-four to twenty-seven only.

Q. Give me an example of every increase from these roots?

A. (1) The increase from six to seven has already been explained in the case of the husband and the two sisters.

(٢) تعول الى ثمانية اذا اجتمع النصف والثلثان والسدس كزوج واختين لاب وام واخت لام فللزوج النصف وللاختين من الابوين الثلثان وللاخت من الام السدس

(٣) تعول الى تسعة كزوج واختين لابوين واختين لام لانهُ اجتمع فيها نصف وثلثان وثلث

(٤) تعول الى عشرة اذا اجتمع فيها نصف وثلثان وثلث وسدس كزوج واختين لاب وام واختين لام وام

ثانيًا — الاثنا عشر تعول الى ثلاثة عشر كما فيمن خلفت زوجًا وبنتًا وأبًا وامًّا فللزوج الربع عائلاً ثلاثة وللبنت النصف عائلاً ستة وللاب السدس عائلاً اثنان وللام السدس اثنان

(٢) تعول الى خمسة عشر اذا اجتمع ربع وثلثان وثلث كزوجة واختين لاب وام واختين لام

(٣) تعول الى سبعة عشر اذا اجتمع ربع وثلثان وثلث وسدس كزوجة واختين لاب واختين لام وام

(2) The increase to eight takes place if a half, two-thirds and a sixth come together, as in the case of a husband, two sisters by the same father and mother, and a sister by the same mother; the husband gets the half, the two sisters by both parents two-thirds, and the sister by the mother takes a sixth.

(3) The increase to nine takes place in the case of a husband, two sisters by both parents, and two sisters by the mother, because there come together in this a half, two-thirds, and one-third.

(4) The six is increased to ten if there are involved in the question one-half, two-thirds, one-third, and a sixth; as in the case of a husband, two sisters of the whole blood, two sisters by the mother, and a mother.

Secondly: (1) The twelve is increased to thirteen in the case of a woman leaving a husband, a daughter, a father, and a mother; the husband takes a fourth or three of the increased shares, the daughter a half or six of the increased shares, the father a sixth or two of the increased shares, and the mother takes two, *i. e.*, a sixth.

(2) The twelve is augmented to fifteen if there come together one-fourth, two-thirds, and one-third, as in the case of a wife, two sisters by the same father and mother, and two sisters by the mother.

(3) It is augmented to seventeen if there come together a fourth, two-thirds, one-third, and a sixth, as in the case of a wife, two sisters by the father, two sisters by the mother, and a mother.

ثالثًا — الاربعة والعشرون تعول الى سبعة وعشرين عولاً واحداً كزوجة وبنتين وابوين للزوجة الثمن ثلاثة وللبنتين الثلثان ستة عشر وللاب السدس اربعة وللام السدس اربعة

الباب الحادي عشر

في الرد

س . ما هو الرد

ج . الرد ضد العول وهو ان تنقص فروض المستحقين للتركة عن سهام المسئلة ولا مستحق له من العصبة فيرد ذلك الباقي على ذوي الفروض بنسبة سهامهم الاَّ الزوجين فلا يرد عليهما

س . ما هي مسائل الرد

ج . مسائل الرد محصورة في اربعة اقسام

اولاً — اذا كان في المسئلة جنس واحد ممن يرد عليهِ اجعل المسئلة من روءسهم لان جميع المال لهم بالفرض والرد معاً وروءسهم متماثلة فلا مزية لراس على آخر كما اذا ترك الميت بنتين او اختين او جدتين فاجعل المسئلة من اثنين تاخذ كل واحدة منهما نصف التركة اعني واحداً لتساويهما في الاستحقاق ورجوع المال اليهما بالسوية

Thirdly: (1) The twenty-four is increased to twenty-seven in one case only, as in the case of a wife, two daughters, and both parents. The wife takes an eighth, or three, the two daughters two-thirds, or sixteen, and the father a sixth, or four, and the mother a sixth, or four.

CHAPTER XI.

On the Return.

Q. What is the Return or Reversion?

A. The Return is the converse of the Increase, and takes place when the legal shares of those entitled to the assets are less than the number of shares in the question (*i. e.*, the shares into which the estate is divided) and there being no residuary entitled to it, *i. e.*, the residue, the surplus reverts to the legal sharers in proportion to their shares, except the husband and wife, to whom nothing reverts.

Q. In how many cases does the question of return occur?

A. Questions of return are confined to four classes; first, if there is in the question only one class of sharers to whom the return falls back, then settle the question according to their heads (numbers) because the whole of the property belongs to them as legal sharers and by the return together, and their numbers are alike, so no one of them is to be given preference to the other; as if a deceased person leaves two daughters, or two sisters, or two grandmothers. So make it a question of two; each one of them would take a half of the estate, *i. e.*, one share on account of their equality in their claim, and the Return (surplus) falls back to them in equal shares.

القسم الثاني – اذا اجتمع في المسئلة جنسان او ثلاثة اجناس ممن يرد عليهم عند عدم من لا يرد عليهِ فاجعل المسئلة من مجموع سهام الورثة المجتمعين الماخوذة من مخرج المسئلة مثاله جدة واخت لام مسئلتهما من ستة ولهما اثنان بالفرض فاجعل الاثنين اصل المسئلة واعطِ لكل واحدة واحدًا نصف المال واذا كان في المسئلة ثلث وسدس كولدي الام مع الام فمسئلتهما من ستة ومجموع سهامهم ثلاثة فاجعلها اصل المسئلة واقسم التركة اثلاثًا بقدر تلك السهام فياخذ والدا الام ثلثين وتاخذ الام ثلثًا

واذا كان في المسئلة نصف وسدس كبنت وبنت ابن او بنت وام مسئلتهما ايضًا من ستة ومجموع السهام الماخوذة منها اربعة ثلاثة للبنت وواحد لبنت الابن او للام فاجعل الاربعة اصل المسئلة واقسم التركة ارباعًا ثلاثة للبنت وواحد لبنت الابن او للام

واذا كان في المسئلة ثلثان وسدس كبنتين وام او كان فيها نصف وسدسان كبنت وبنت ابن وام او كان فيها نصف وثلث كاخت لاب وام واختين لام او كاخت لاب وام وام فالمسئلة

The second is when there are in the question two or three classes of those to whom the Return should go back in the absence of those who are not entitled to it. Settle the question according to the total number of the shares of the existing heirs, which should be taken from the denominator of the question; as in the case of a grandmother and a sister by the same mother. The denominator of their question is six, and they get two as a legal share; so make two to be the root of the question, and give each of them one, *i. e.*, half of the property.

If in a question a third and a sixth come together, as two brothers or sisters by the same mother, together with the mother, their question will be one of six, and the aggregate number of their shares is three, so make it the root of the question, and divide the estate into thirds according to these shares; the brothers (or sisters) by the mother take two-thirds, and the mother one-third.

If there are in a question a half and a sixth, as the daughter and the daughter of a son, or a daughter and a mother, their question will be also of six, and the whole of the shares taken from it are four; three should be given to the daughter, and one to the daughter of the son or to the mother; therefore four is made the root of the question, and the estate is divided into fourths, three go to the daughter, and one to the son's daughter or mother.

If there are in the question two-thirds and a sixth, as in the case of two daughters and a mother, or if there are in it a half and two-sixths, as a daughter and a daughter of a son and a mother, or if there are in it a half and a third,

في هذه الصور الثلاث ايضاً من ستة والسهام الماخوذة منها خمسة ففي الصورة الاولى للبنتين اربعة اسهم وللام سهم واحد فاجعل التركة اخماساً للبنتين اربعة وللام واحد وفي الصورة الثانية للبنت ثلاثة من الستة ولبنت الابن واحد وللام واحد فاقسم التركة عليهن اخماساً بقدر سهامهن للبنت ثلاثة اخماس ولبنت الابن خمس وللام خمس وفي الصورة الثالثة تكون السهام الماخوذة خمسة من الستة فاجعلها اخماساً منها للاخت من الابوين ثلاثة اسهم وللاختين للام سهمان وكذا الام مع الاخت من الابوين للام سهمان وللاخت الشقيقة ثلاثة اسهم

س . كيف القاعدة في تصحيح المسئلة اذا لم تستقم السهام على الورثة

ج . يكون تصحيحها على قياس ما سبق بيانه في باب قواعد حساب القسمة مثاله مات عن بنت وثلاث بنات ابن فللبنت ثلاثة اسهم ولبنات الابن سهم واحد لا يستقيم عليهن فاضرب الثلاثة عدد رؤس من انكسر عليهن في اصل المسئلة وهي

as a sister by the same father and mother, and two sisters by the mother, or as in the case of a sister by the same father and mother, and a mother, the question in these three examples will be also of six, and the shares taken from it are five. In the first example the daughters take four shares and the mother one, so therefore you should make the estate into fifths, four for the two daughters and one for the mother. In the second example the daughter takes three from six, and to the daughter of the son goes one, and the mother one; so divide the estate amongst them into fifths in proportion to their shares, the daughter takes three-fifths, the daughter of the son one-fifth, and the mother one-fifth. In the third example the shares taken are five from six, therefore the estate is divided into fifths, from which the sister by both parents takes three-fifths, and the two sisters by the mother two, and it will be the same in the case of the mother, together with the sister by both parents; the mother takes two shares, and the sister of the whole blood gets three.

Q. What are the rules for adjusting (rectifying) the question if the shares are not proportionate to the heirs, *i. e.*, if they become fractional?

A. Its adjustment is made according to the rules previously explained in the chapter on the rules of calculating the distribution. For instance, a man dies leaving a daughter and three daughters of a son; the daughter is entitled to three shares, and the daughters of the son to one share, which is not proportionate to their number, so multiply three—the number of the heads of those who cannot get their shares without a fraction—by the root of the question, which is

الاربعة تصير اثني عشر للبنت منهـا تسعة ولبنات الابن ثلاثة منقسمة عليهن

س . قد فهمت القسم الاول والثاني فاشرح لي القسم الثالث والرابع

ج . القسم الثالث — ان يكون في المسئلة جنس واحد ممن يرد عليهِ ويكون معهُ من لا يرد عليهِ كالزوج او الزوجة فياخذ من لا يرد عليهِ فرضهُ من اقل مخارجه ويُقسَم الباقي من ذلك المخرج على عدد روءس من يرد عليهم فان استقام الباقي على عدد روءسهم كان ذلك ولا حاجة الى الضرب وان لم يستقم على عدد روءسهم اضرب على قياس ما مرَّ في باب الحساب وفق روءس من يرد عليهم في مخرج فرض من لا يرد عليهِ ان وافق الباقي روءسهم كزوج وست بنات للزوج الربع واحد من اربعة اقل مخارج فرضه تبقى ثلاثة لا تستقيم على عدد روءس البنات الست ولكن بينهما موافقة بالثلث فاضرب وفق عدد روءسهن وهو اثنان في الاربعة تصير ثمانية للزوج منهـا اثنان وللبنات ستة ولكل واحدة واحد

four, and it becomes twelve, from which the daughter takes nine, and the daughters of the son three, which is divisible amongst them.

Q. I have already understood the first and the second classes, so explain to me the third and the fourth classes?

A. The third class is when there is in the question one class of those who are entitled to the return associated with those to whom nothing returns, *i. e.*, no surplus reverts, as a husband and a wife; so he or she who is not entitled to the return should take his legal share from the smallest of his denominators, and the remainder from this denominator is divided amongst the number of the heads of those who are entitled to the return. If the remainder can he divided amongst their heads (persons) this will answer the purpose, and there is no need for multiplication; but if it cannot be so divided amongst the number of their persons, then calculate according to the rules which preceded in the chapter on calculating the distribution questions, and multiply the measure of the heads of those who are entitled to the return by the denominator of the share of him or her to whom no return falls back if the remainder and the heads are commensurable; as in the case of a husband and six daughters, the husband will take one-fourth, which is one of four, being the smallest denominator of his legal shares, but the remaining three shares are not divisible amongst the six daughters without a fraction, but the two numbers (of shares and daughters) are commensurable by the third; so multiply the measure of the number of their heads, which is two, by the four, which makes eight, from which the husband takes two and the daughters six, each one.

وان لم يوافق الباقي عدد روسهم فاضرب جميع عدد روسهم في مخرج فرض من لا يرد عليهِ وتصح المسئلة من المبلغ الحاصل كزوج وخمس بنات فاصل المسئلة من اثني عشر لاجتماع الربع والثلثين لكنها مسئلة ردّية فترد الى الاربعة لانها اقل مخارج الزوج فاذا اعطيت الزوج منها واحداً بقيت ثلاثة لا تستقيم على الخمس البنات بل بينها وبين عدد الروس مباينة فاضرب جميع عدد روسهن في مخرج فرض الزوج اعني الاربعة تصير عشرين للزوج واحد من اصل المسئلة تضربهُ في المضروب الخمسة تصير خمسة وللبنات ثلاثة تضربها في الخمسة تحصل خمسة عشر لكل واحدة منهن ثلاثة

القسم الرابع — ان يكون مع الجنسين ممن يرد عليهِ من لا يرد عليهِ كزوجة واربع جدات وست اخوات لام فاقل مخارج فرض الزوجة اربعة اذا اعطيناها واحداً بقيت ثلاثة وهي ههنا مستقيمة على مسئلة من يرد عليهِ لانها ايضاً ثلاثة وذلك ان الاخوات للام لهن الثلث والجدات السدس فللاخوات الست اثنان لا يستقيم عليهن والجدات واحد لا يستقيم عليهن وبين

If the remainder is not commensurable with the number of their heads, multiply the whole of the number of their heads into the denominator of the legal share of him or her to whom nothing returns, and the question is settled by the result obtained; as in the case of a husband and five daughters, the root of the question will be twelve, because a fourth and two-thirds come together in it; but it is a question of return, so it is reduced to four, for this is the smallest denominator of the husband's share. After giving the husband one of them there remains three, which number is not divisible amongst the five daughters, but between it and the number of the heads there is disagreement (that is, they have no common measure) so multiply the whole number of their heads by the denominator of the husband's share, *i. e*, four, and it becomes twenty. To the husband goes one from the root of the question, which you multiply by the multiplicand, five, and it becomes five, and to the daughters belong three, which you multiply by five, the product being fifteen, each of them therefore gets three.

The fourth case occurs when there are two classes of those entitled to the return associated with those who have no right to it, as in the case of a wife, four grandmothers, and six sisters by the same mother. The smallest denominator of the wife's legal share is four; after giving her one there remain three, which settles here the question of those on whom the return devolves, because it is also three (shares,) *i. e.*, the sisters by the mother obtain a third, and the grandmothers a sixth. Now the two shares of the six sisters are not divisible amongst them, nor is the one share of the grandmothers divisible amongst

نصيب الاخوات الست وعدد روسهن موافقة بالنصف فترد عدد روسهن الى نصفهِ وهو ثلاثة فاذا نظرنا بين اعداد الروس والروس وجدناها مباينة لبعضها البعض فنضرب وفق روس الاخوات وهو الثلاثة في جميع عدد روس الجدات وهو الاربعة يحصل اثنا عشر ثم نضربها في الاربعة التي هي مخرج فرض من لا يرد عليهِ فتبلغ ثمانية واربعين ومنها تصح المسئلة للزوجة واحد في اثني عشر باثني عشر وللجدات واحد في اثني عشر باثني عشر لكل واحد منهن ثلاثة وللاخوات للام اثنان في اثني عشر باربعة وعشرين لكل واحدة منهن اربعة

اما اذا لم يستقم ما بقي من مخرج فرض من لا يرد عليهِ على مسئلة من يرد عليهِ فاضرب جميع مسئلة من يرد عليهِ في مخرج فرض من لا يرد عليهِ والمبلغ الحاصل يكون مخرج فروض الفريقين كاربع زوجات وتسع بنات وست جدات اصل المسئلة من الاربعة وعشرين لاجتماع الثمن والثلثين والسدس ولكن ترد مثلها الى اقل مخرج فرض من لا يرد عليهِ وهو الثمانية فاذا اخذت ثمنها الزوجات بقيت سبعة لا تستقيم على خمسة التي هي مسئلة من يرد عليهِ بل بينهما مباينة فاضرب جميع مسئلة من يرد

them without a fraction, and the shares of the six sisters and the number of their heads are commensurable by the half; we therefore reduce the number of their heads to its half, which is three. If we compare the numbers of the heads and the heads (*i. e.*, persons and persons) we find them incommensurable with each other, so we multiply the measure of the heads of the sisters, which is three, by the whole of the number of the heads of the grandmothers, which is four, the result is twelve, then we multiply it by four, which is the denominator of the legal share of her (*i. e.*, the wife) on whom no return devolves, it amounts to forty-eight, by which the question is settled; to the wife goes $1 \times 12 = 12$, the grandmothers get $1 \times 12 = 12$, to each of them goes 3, and the sisters by the mother have $2 \times 12 = 24$, each of them gets four.

But if the remainder from the denominator of the legal share of him or her on whom no return devolves is not proportionate to the question of those who are entitled to the return, multiply the whole of the question of those on whom the return devolves by the denominator of the legal share of him or her to whom no return falls back, and the result obtained will be the denominator of the shares of both parties; as in a case of four wives and nine daughters and six grandmothers, the root of the question is twenty-four, because there are collected in it an eighth and two-thirds and a sixth; but such a question is reduced to the lowest denominator of the share of him or her to whom no return falls back, which is eight; after the wives have taken their eighth there remain seven, which are not proportionate to the five (shares) in the question of those on whom the return devolves; but seven

عليهِ وهي الخمسة في مخرج فرض من لا يرد عليهِ وهو الثمانية يصير الحاصل اربعين منها للزوجات واحد مضروب في الخمسة التي هي مسئلة من يرد عليهِ تصير خمسة وللبنات من المسئلة الردّية اربعة مضروبة في السبعة الباقية من مخرج فرض من لا يرد عليهِ تبلغ ثمانية وعشرين وللجدات من المسئلة الردّية واحد مضروب في السبعة وبهذه الطريقة استقامت فروض من يرد عليهِ ومن لا يرد عليهِ وان كانت السهام المأخوذة من مخرج فروض الفريقين منكسرة على احاد كل فريق فيلزم تصحيح المسئلة بالاصول السبعة المشروحة في باب الحساب ففي هذه الصورة كان خمسة من الاربعين للزوجات الاربع وبين رؤسهن وسهامهن مباينة فناخذ مجموع عدد رؤسهن وللبنات التسع منها ثمانية وعشرين وبين رؤسهن وسهامهن مباينة ايضاً فنترك عدد الرؤس بحالهِ وللجدات الست منها سبعة وبينهما ايضاً مباينة فناخذ عدد رؤسهن باسره فاذا نظرنا بين اعداد الرؤس وجدنا بين رؤس الجدات والزوجات موافقة بالنصف فنضرب نصف الاربعة في الستة تبلغ اثني عشر وهي موافقة

and five are incommensurable, or have no common measure, so multiply the whole of the question, *i. e.*, shares of those entitled to the return, which is five, by the denominator of the share of her to whom no return falls back, which is eight, and the result is forty. From these the wives take one multiplied by five, which are the shares of those entitled to the return, and the product is five, and the four shares of the daughters from the question of return should be multiplied by seven that are remaining from the denominator of the share of the wives ; the result is twenty-eight (or by the European method the two daughters are entitled to $\frac{4}{5}$ of $\frac{7}{8} = \frac{28}{40}$); the grandmother takes one from the question of return multiplied by seven. In this way the shares of those entitled to the return, as well as those who have no right to it, are settled. When the shares taken from the denominator of the legal shares of both parties cannot by divided without a fraction amongst the individuals of each party, then it is necessary to adjust the question according to the seven principles set forth in the chapter on calculating the distribution. In the above examples there are five shares from forty for the four wives, and both their heads (persons) and their shares are incommensurable : so we take the number of their heads, and the nine daughters have twenty-eight shares which are incommensurable with their heads, so we leave unchanged the number of their heads; the six grandmothers have seven, but six and seven are incommensurable, so we take the whole number of their heads. If we compare the numbers of the heads, we find the heads of the grandmothers and the wives are commensurable by the half ; so we multiply half of the

لرؤس البنات التسع بالثلث فتضرب ثلث التسعة في الاثني عشر تبلغ ستة وثلاثين نضربها في الاربعين تصير الفًا واربعمائة واربعين ومنها تصح المسئلة على احاد الفريقين فكان نصيب الزوجات خمسة نضربها في المضروب الستة والثلاثون يبلغ مائة وثمانين لكل واحدة من الزوجات خمسة واربعون وللبنات ثمانية وعشرون نضربها في ذلك المضروب تبلغ الفًا وثمانية لكل واحدة منهن مائة واثنا عشر وكان للجدات سبعة نضربها في ذلك المضروب تصير مائتين واثنين وخمسين لكل واحدة منهن اثنان واربعون

الباب الثاني عشر

في المشتركة

س . ما هي المسئلة المشتركة

ج . المسئلة المشتركة هي التي يشارك فيها الاخ الشقيق اخوتهُ للام مثلاً ماتت امرأة وخلفت زوجًا وامًّا واخوة لام واخًا شقيقًا فالمسئلة من ستة للزوج النصف ثلاثة وللام السدس واحد وللاخوة للام الثلث اثنان ولم يبقَ للشقيق شيء ففي هذه المسئلة يشارك اخوتهُ في الثلث لانهُ ادلى بالام مثلهم ويقاسمهم في الثلث للذكر مثل الانثى اما لو كانوا اخوة لاب فيسقطون

four by six, obtaining twelve which is commensurable with the heads of the nine daughters by the third (that is, three is a least common measure of 12 and 9), so we multiply the third of nine by twelve obtaining thirty-six, which being multiplied by the forty becomes 1440, from this the question is settled for the individual persons of both parties. The shares of the wives were five which we multiply into the multiplicand thirty-six, which becomes 180, each of the wives get 45, the daughters get $28 \times 36 = 1008$, each of them obtaining 112. The six grandmothers will have $7 \times 36 = 252$, each gets forty-two.

CHAPTER XII.

On the Mushtaraka.

Q. What is the "Mushtaraka" question?

A. The "Mushtaraka" or the reciprocal question is that in which a brother of the whole blood partakes with his brother by the mother's side. For instance: a woman dies leaving a husband, a mother, brothers by the mother, and a brother of the whole blood. So the question is one of six: the husband takes a half or three, the mother a sixth or one, the brothers by the mother a third or two, but for the brother of the whole blood nothing remains. So in this question he partakes with his brothers in the third, because he is related to the deceased, through the mother just like themselves, and he shares with them the third, the male obtaining the same as the female, but if they were brothers by the father's side only, they will be excluded.

الباب الثالث عشر

في المفقود

س . ما الحكم في مال المفقود

ج . المفقود حي في مالهِ وميت في مال غيرهِ

س . الى مدة كم يتوقف ماله

ج . الى حتى يصح موتهُ او تمضي عليهِ مدة بحيث لم يبقَ احد من اقرانهِ

س . كم غاية المدة التي يلزم توقيف ماله فيها

ج . على الاصح تسعون سنة من يوم ولادته لان من المعلوم لا يعيش احد في زماننا هذا ازيد منها الاَّ نادراً ولا عبرة بالنادر في الاحكام الشرعية بحيث ان مدارها على الغالب

س . هل هذا موافق لمذهب الشافعي رض

ج . عنده يكون مال المفقود متوقفاً على اجتهاد الامام فاذا قضى القاضي ان بالغالب لا احد يعيش اكثر من المدة التي غاب فيها فيقسم على ورثتهِ الموجودين حال الحكم

CHAPTER XIII.

On Missing Persons.

Q. What is the rule as to the property of a missing person?

A. A missing person is considered as living in regard to his own property, and dead as regards the estate of others.

Q. How long is his property to be kept in abeyance?

A. Until his death is ascertained or such a long time passes away (in his absence) that none of his contemporaries remain alive.

Q. What is the longest term for keeping his property in suspense?

A. According to the most authentic doctrine, ninety years from the day of his birth; because it is well known that no one in this our time can live longer than this period, except very rarely, and in administering the law, the rare or extraordinary is not taken into account, because the law's axis revolves on the ordinary course of occurrences.

Q. Is this according to the doctrine of Ash-Shafa'ee (God be pleased with him)?

A. According to him, the property of the deceased is kept in suspense according to the efforts, *i. e.*, judgment of the Iman (spiritual and temporal ruler or Khalif), therefore, if the judge decrees that ordinarily no one can live any longer than the period during which he (the missing person) has been absent, he divides the estate amongst his heirs who are existing at the time of the judgment.

س . كيف الحكم فيهِ في حق غيره

ج . يوقف نصيبهُ من مال مورثهِ كما في الحمل فان كان المفقود ممن يحجب الحاضرين لم يصرف اليهم شيء بل يتوقف المال كلهُ وان كان لا يحجبهم يعطى كل واحد منهم الاقل من نصيبهِ على تقدير حيوة المفقود ومماته مثلاً مات رجل وخلف بنتين وابنًا مفقودًا وابنًا وبنتًا للابن المفقود فهنا البنتان ياخذان النصف لانهُ اقل نصيبهما حتى اذا كان المفقود حاضرًا واما اولاد المفقود فلا ياخذوا شيئًا لان اباهما يحجبهما بحيوتهِ حتى يتحقق موته او يحكم القاضي بموته

الباب الرابع عشر

في الغرقى والحرقى

س . صف لي مسئلة الغرقى والحرقى

ج . اذا مات جماعة بينهم قرابة يتوارثون بها ولم يتحقق ايهم مات اولاً كمن غرقوا في سفينة معًا او حُرقوا او سقط عليهم سقف او قُتلوا في معركة ولم يُعرف ايهم السابق في موتهِ فاحسبهم

Q. What is the rule in his case as regards the right of others?

A. His share is preserved from the property of him whom he inherits, as in the case of pregnancy. If the missing person belongs to those who exclude the present persons, nothing is to be paid to such persons, but the whole property shall be kept in abeyance, and if he does not exclude them, every one of them is given the least of his share on the supposition of the life of the missing person and of his death. For instance: a man dies and leaves two daughters, and one son missing, and a son and daughter of the missing son. So here the two daughters take a half, because it is their smallest portion even if the missing person should reappear. As to the children of the missing person, they will not take anything, because their father excludes them in his lifetime till his death is ascertained or the judge decrees that he is dead.

CHAPTER XIV.

On Persons Drowned or Burnt at the Same Time.

Q. Describe to me the question of drowned and burnt persons?

A. When a number of persons die between whom there is a relationship by which they inherit each other, and it cannot be ascertained which of them died first; as those who are drowned together by the wreck of a ship, or burnt (in a fire) or on whom a roof falls down, or who are killed in a battle, and it is not known which of them has preceded in death, you must

كأنهم ماتوا معًا فال كل واحد منهم يصير لورثتهِ الاحياء واما هولاء الاموات فلا يرث بعضهم البعض وهذا موافق لمذهب الشافعي رض

الباب الخامس عشر

في الخنثى

س . ما هي الخنثى

ج . هو من لهُ آلة الرجال وآلة النساء واما من لا لهُ شيء منهما فهو لا ذكر ولا انثى فيقال لهُ الخنثى المشكل اي المشتبه

س . كيف يزول الاشكال او الاشتباه

ج . تتبين ذكورتهُ او انوثتهُ من حيث يبول فان بال من آلة الرجال فهو ذكر ولا عبرة بالآلة الاخرى وان بال من آلة النساء او صارت لهُ ثديان كثدي المرأة او حاض كالنساء او ظهر بهِ حبل فهو انثى ويرث نصيب الانثى

س . كيف توريث الانثى المشكل

ج . لهُ نصيب الذكر او الانثى ايهما كان الاقل

س . كيف نصيب الذكر او الانثى ونصيب الذكر مثل حظ الانثيين

ج . لا قد تساوي الانثى الذكر في نصيبهِ وقد تزيد عليهِ

count them as if they had died together. The property of every one of them devolves on his living heirs, but as to those dead persons, no one of them inherits the other, and this is according to the doctrines of Ash-Shafa'ee (God be pleased with him).

CHAPTER XV.

On the Hermaphrodite.

Q. What is a hermaphrodite?

A. He is one who has the organ of men and the organ of women; but he who has nothing of both of them, he is neither male nor female, and is called the dubious hermaphrodite.

Q. How is the doubt (about his sex) cleared?

A. His manhood or womanhood becomes clear whence he passes water. If he passes water by the organ of man, he is a male, and no consideration is given to the other member, and if he does so by the organ of woman, or his breast is like that of a (suckling) woman, or if he has menstrual courses like a woman, or he appears to be pregnant, he is a female, and inherits the share of a female.

Q. How is the doubtful hermaphrodite made to inherit?

A. He obtains the share of a male or female whichsoever is the smallest.

Q. What is meant by the share of a male or female, the share of a male being equal to that of two females?

A. No. Sometimes a female's share is equal to that of a male, and sometimes it exceeds it, as

كما اذا تركت الميتة زوجًا وامًّا واخنًا لام وخنثى لاب فالمسئلة من ستة وتصحّ منها اذا جعلت الخنثى ذكرًا فللزوج نصفها ثلاثة وللام سدسها واحد ولولد الام سدسها واحد وللخنثى واحد بالعصوبة وان جعلتهُ انثى كانت اخنًا لاب فتعول المسئلة الى ثمانية منها ثلاثة للزوج وواحد للام وواحد للاخت للام وثلاثة للخنثى لانها صاحبة فرض وهو النصف

(تنبيه) اما اذا تركت زوجًا واخنًا لاب وام وخنثى لاب فان جعلتهُ انثى كان لهُ سهم من سبعة وان جعلتهُ ذكرًا لم يكن لهُ شيء والحاصل ان لهُ اقل النصيبين او اسوأ الحالين كما اذا ترك الميت ابنًا وبنتًا وخنثى فللخنثى هنا نصيب بنت واحدة وهو واحد من الاربعة

س . كيف الحكم في الخنثى على مذهب الشافعي رض

ج . يُعطى الخنثى اقل التقديرات الى ان يُكشف الحال كما اذا ترك اخًا لاب وام وولدًا خنثى فللخنثى نصف المال لانهُ اخس

in the case of a deceased woman leaving a husband, a mother, a sister by the mother, and a hermaphrodite by the father : thus the question will be one of six shares, and it can be arranged from it if you make the hermaphrodite a male; the husband would take a half or three, the mother a sixth or one, the child by the mother a sixth or one, and the hermaphrodite will take one as a residuary. But if you make it a female, being a sister by the father, the root (denominator) of the question will be increased to eight (*Vide* Chapter on the Increase), of which the husband takes three, the mother one, the uterine sister one, and three are given to the hermaphrodite, because she is entitled to a legal share which is a half.

Note:—If in this case the deceased left a husband, a sister by the same father and mother, and a hermaphrodite by the father : if you make him a female, he will have one share from seven, and if you make him a male, he will have nothing.

The result is that he obtains the smaller of the two shares, or the worst of the two conditions. For instance, the deceased left a son, daughter and a hermaphrodite, the latter will have here the share of one daughter, that is, one from four.

Q. What is the rule as to the hermaphrodite, according to the doctrine of Ash-Shafa'ee ?

A. The hermaphrodite is given the smallest portion according to presumption, until his condition becomes clear ; for instance, when a man leaves brother by the same father and mother, and a hermaphrodite child, the latter will obtain the half of the property, because it is the worst of his conditions if he were a female ; the remaining half is reserved until his condition be-

احواله ان يكن انثى ويتوقف النصف الباقي الى ان يكشف الحال كما في المفقود والحمل

الباب السادس عشر

في الحمل

س . ما هي اكثر مدة الحمل واقلها

ج . اكثر مدة الحمل سنتين عند ابي حنيفة رحمهُ الله وعند الشافعي رض اربع سنين واقل مدة الحمل ستة اشهر

س . هل يلزم توقيف قسمة التركة اذا خلّف الميت زوجة حاملة

ج . عند ابي حنيفة يوقَّف للحمل نصيب اربعة بنين او اربع بنات ايهما كان الاكثر وتُعطى بقية الورثة اقل نصيبهم للاحتياط لانهُ قد ولدت امرأة اربعة بنين وانما حمل الاربعة في بطن واحدة نادر لاعبرة بهِ والاصح انهُ يوقف للحمل نصيب ابن واحد او بنت واحدة ايهما كان الاكثر وعند الشافعي رض لا يدفع لاحد من الورثة شيء الاَّ من كان لهُ فرض لايتغير بتعدد الحمل وعدم تعدده وكذلك ان ترك الميت وارثًا لايتغير فرضهُ بالحمل فانهُ يُعطى فرضهُ كما اذا ترك جدَّة

comes clear, as it is in the case with missing persons or in cases of pregnancy.

CHAPTER XVI.

On Pregnancy.

Q. What is the longest time of pregnancy, and what is the shortest?

A. The longest period of pregnancy is two years according to abu Hanifa (God have mercy on him), and according to Ash-Shafa'ee (God be pleased with him), four years, and the shortest time of pregnancy is six months.

Q. Is it necessary to keep in suspense the division of the estate, if the deceased has left a pregnant wife?

A. According to Abu Hanifa, in a case of pregnancy, the share of four sons or four daughters, whichever of the two is largest, should be reserved, and the remaining heirs are given the smallest of their portions for caution's sake, because it has already happened that a woman had borne four (children) in one womb (at one time), but a pregnancy with four in one belly being uncommon, it is not taken into consideration. The most correct doctrine is that in case of pregnancy the portion of one son or of one daughter should be reserved whichsoever is the largest. With Ash-Shafa'ee, none of the heirs is to be given anything except those who get a legal share which is not changeable by the pregnancy numbering more than one. Similarly, if the deceased left an heir whose share is not changeable by the pregnancy, his legal share

وامرأة حاملة فتاخذ الجدّة السدس وايضاً اذا ترك ابناً وامرأة حاملة فتاخذ الجدة السدس وايضاً اذا ترك ابناً وامرأة حاملة فانهُ يُعطى للامرأة الثمن لانهُ اقل نصيبها

س . هل يرث الولد اذا خرج ميتاً

ج . اذا كان في وقت خروجهِ بان منهُ شيء يدل على حيوتهِ كالبكا والعطس والصياح وكذلك ان خرج اكثرهُ مستقيماً يعني خرج راسهُ اولاً ثم صدرهُ وهو حي ثم مات فهو يرث اما عند الشافعي رض لا يرث الاّ اذا انفصل كلهُ حيًّا

الباب السابع عشر

في الحَجْر

س . ما معنى الحَجْر

ج . هو منع الشخص عن التصرف في مالهِ قولاً لا فعلاً فلا يصح تصرف صبي ومجنون لا يفيق بحال بلا اذن وليهما ولا تصرف العبد بلا اذن سيدهُ والمعتوه كالصبي في تصرفاتهِ واما المجنون اذا كان يجن تارةً ويفيق اخرى فهو كالعاقل في تصرفهِ حال افاقتهِ

should be given to him; thus, when the deceased leaves a grandmother and a pregnant wife, the grandmother takes a sixth; and equally so if he left a son and a pregnant wife, the grandmother would take a sixth; and so is the case if he left a son and a pregnant wife the wife is given an eighth, because this is the smallest of her share.

Q. Will a child inherit if it is born dead?

A. If in the time of its coming forth, there appeared anything that gave an indication of its being alive, as weeping, sneezing or crying, and equally so if the greater part of the child come forth straight, that means, first came its head, then its breast, and it was alive and died afterwards, it will inherit, but with the Shafa'ee, it will not inherit, unless the whole of it was separated alive.

CHAPTER XVII.

On Legal Restraint or Disability.

Q. What is meant by a legal restraint?

A. It means restraining a person by words and not by deed (*i. e.*, by a prohibitory order) from exercising his power. So dispositions of property by a child or a mad person who has no lucid interval under any condition, without the permission of their guardians, are not valid, and so is the contract of a slave without the sanction of his master. An idiot is like a child in his contracts, but a lunatic who loses his reason at one time, and recovers it at another, is like a sane person for acts done *lucido intervallo.*

س . هل يصح عقد الصبي المميز

ج . اذا عقد عقداً بان باع او اشترى شيئاً وهو يعقل العقد بان يعرف ان البيع سالب الملك والشراء جالب له فللولي ان يجيزهُ اذا رأى فيهِ مصلحة او يفسخهُ وان اتلف الصبي او المجنون شيئاً ضمن ولا ينفذ اقرار الصبي والمجنون لا بمال ولا بحد ولا بطلاق ولا بعتاق

س . هل يحجَر على الحر المكلف بسفه وما هو السفه

ج . السفه هو تبذير المال وتضييعهُ على خلاف مقتضى الشرع والعقل والاسراف في النفقة ودفع المال الى المغنين واللعابين والغبن في التجارات من غير محمدة فابو حنيفة لا يرى السفه سبباً للحجر وعند ابي يوسف ومحمد يحجر عليهِ بالسفه والغفلة وبقولهما يفتى صيانةً لماله فيكون في احكامهِ كصغير الاَّ في نكاح وطلاق وعتاق واستيلاد وعند الشافعي يحجر عليهِ ولا ينفذ شيء من تصرفاتهِ بعد الحجر سوى الطلاق

س متى يبلغ الصبي وهل يلزم الوصي او الولي دفع ماله

Q. Is the contract of a child who is capable of discriminating valid?

A. Where he enters into a contract as if he sell or buy anything while he has a sense of the obligation, that is, he understands that a sale deprives one of possession, and a purchase secures it, then the guardian may ratify it if he thinks it beneficial, or he may repudiate it. If a child or lunatic damage or destroy anything, he is civilly responsible, but an admission by a child or a person of unsound mind in respect of property, or crime, or divorce, or emancipation, is not receivable.

Q. Can a freeman of full age and sound mind be put under restraint by reason of his foolishness, and what does foolishness mean?

A. Foolishness means the extravagant expenditure of property, and its being wasted contrary to the requirements of law and reason, or extravagance in maintaining himself or giving property to singers and players, and incurring losses in an unreasonable manner in trade without any praiseworthy motive. Abu Hanifah does not regard foolishnese as a reason for legal restraint, but with Abu Yussef and Mahommed, a person is to be restrained for foolishness and recklessness, and according to their doctrines decisions are made with a view to preserve his or her property, so he or she should be subject to the same law as a child is in cases other than marriage, divorce, emancipation, and childbirth. According to Ash-Shafa'ee he is to be restrained, and after the legal restraint is declared, none of his contracts are valid, except divorce.

Q. When does a child become of age, and is

اليهِ عند البلوغ

ج . يُفتى بالبلوغ في الغلام والجارية بخمس عشرة سنة وسياتي بيان ذلك في بابهِ واذا بلغ الصبي غير رشيد لم يدفع اليهِ مالهُ حتى يبلغ خمساً وعشرين سنة عند ابي حنيفة وعند صاحبهِ لا يدفع اليهِ مالهُ ابدًا حتى يؤنس منهُ الرشد لقولهِ تعالى فان انستم منهم رشدًا فادفعوا اليهم اموالهم . وبهِ قالت الثلاثة الأئمة ولو بلغ الصبي مفسدا وحُجر عليهِ اولا فسلم لهُ الوصي مالهُ وضاع ضمنهُ الوصي

والرشد هو كونهُ مصلحًا في مالهِ فقط فلا يحجر بفسق وقال الشافعي يحجر عليهِ زجرًا لهُ وعقوبة عليهِ (شرح العيني على الكنز)

the executor or guardian bound to deliver to him his property?

A. The age of fifteen in the boy and girl is declared by decisions to be full age, and this is explained later on in its proper chapter. If a child becomes of age without having attained discretion, his property should not be delivered to him until he attains the age of twenty-five years according to Abu Hanifah; but according to his two companions, his property shall never be delivered to him until his discretion is perceived, for God said:—"When you perceive discretion in them, give them their property," (Chapter on Women), and so the other three Imams hold. When a child becomes of age and mismanages his property, whether he is put under legal restraint or not, the executor is civilly responsible if he deliver the property to him and it should be lost.

Discretion means his being an improver of his property alone, and therefore he cannot be placed under a legal restraint by reason of his bad moral character, but Ash-Shafa'ee says he should be incapacitated as a deterrent and punishment to him.

(Alainee's Commentary A'la al Kanz).

القسم الثاني

الباب الاول

في حقوق النساء

س . هل يمتاز الذكر عن الانثى في الحقوق الشرعية

ج . نعم في حقوق الميراث واهلية الشهادة والولاية . اما الميراث فقد تقدم بيانهُ ومنهُ يتضح المطالب ان البنات وبنات الابن والاخوات لابوين او لاب اذا ورثن مع اخوانهن يصرن عصبة بهم فتاخذ الواحدة نصف ما يأخذهُ اخوها كما ورد في الكتاب العزيز "يوصيكم الله في اولادكم للذكر مثل حظ الانثيين" (صورة النساء)

ويرث الزوج ضعفي نصيب الزوجة او الزوجات كما تقدم شرحه

وكان اهل الجاهلية يجعلون جميع الميراث للذكور دون الاناث والصغار فلما فرض الله للولد الذكر والانثى وللابوين كرهها الناس او بعضهم وقالوا تُعطى المرأة الربع او الثمن وتُعطى

PART II.

CHAPTER I.

On the Rights of Women.

Q. Is man distinguished from woman in legal rights?

A. Yes, in the hereditary rights, competency to give evidence, and the right of guardianship. A full exposition of the law of inheritance has already preceded, from which it will be clear to the student, that daughters, or son's daughters, or sisters of the whole blood or by the same father only when inheriting together with their brothers, become residuaries through them, and therefore, each takes half of what her brother gets just as it is mentioned in the Holy Book:—A male shall have as much as the share of two females. (Chapter on Women).

The husband inherits twice as much as the portion of a wife or wives as hereinbefore explained. The people of the Dark Ages (before Islamic Era) used to give all the inheritance to the males excluding females and infants. When God prescribed a portion to the male as well as to the female, child, and to parents, the people or some of them hated it, and said:—The wife is to be given a fourth or one-eighth, and a daughter one-half, and a male infant is to inherit! and none of these can fight with the people nor capture a booty. They said, "Oh Apostle of God, is a girl to be given half of what her father leaves behind? and she does not ride the horse nor can

الابنة النصف ويُعطى الغلام الصغير وليس من هولاء احد يقاتل القوم ولا يحوز الغنيمة . فقالوا يا رسول الله تُعطى الجارية نصف ما ترك ابوها وليس تركب الفرس ولا تقاتل القوم ويعطى الصبي الميراث وليس يغني شيئًا وكانوا في الجاهلية لا يعطون الميراث الاّ لمن قاتل القوم ويعطونهُ الاكبر فالاكبر فانزل الله الآية "للرجال نصيبٌ مما ترك الوالدان او الاقربون والنساء نصيب مما ترك الوالدان او الاقربون مما قلّ منهُ او اكثر نصيبًا مفروضًا" فجعل للذكر مثل حظ الانثيين وذلك لاحتياج الرجل الى موءنة النفقة لزوجتهِ واولاده الصغار ومعاناة التجارة والتكسب وتحمل المشاق فناسب ان يُعطى مثل حظ الانثيين (تفسير القرآن للحافظ ابن كثير)

اما اذا لم يكن للميت ابن او ابن ابن وان سفل فالبنت الواحدة تأخذ النصف والثلثان للبنتين فصاعدًا وقد تحوز البنت ازيد مما يستحقهُ الابن لو كان هو في محلها مثالهُ ماتت امرأة عن زوج وابوين وبنت فالمسئلة من اثني عشر لكل من الابوين السدس اثنان وللزوج الربع ثلاثة وللبنت النصف ستة وتعول المسئلة الى ثلاثة عشر اما لو خلفت ابنًا بدلاً عن البنت فلهُ الخمسة الاسهم الباقية فقط لانهُ لم يكن ذو فرض بل ياخذ ما بقي بعد قضا الفروض بالتعصيب

she fight with the people, and a child is to be given the inheritance, and he avails nothing." During the Dark Ages they used to give the inheritance only to those who can fight with the people, and they gave it to the eldest. God sent down this verse :— "Men shall have a part of what their parents and kindred leave behind, and women shall also have a part of what their parents and kindred leave, whether it be little or much—a prescribed portion. So He fixed for the male a double share of the female, that is, because the man stands in need of providing maintenance for his wife and little children, and has to carry on trade, and to earn a livelihood, and to undergo hardships, so it has become expedient to give him twice as much as the female." (Exposition of the Koran by Al-Hafidh bin Katheer).

But if the deceased left no son, nor son's son how low soever, but one daughter, she takes one-half, and two daughters or more, two-thirds. The daughter sometimes obtains more than what the son would be entitled to if he were in her place. For instance, a woman dies leaving a husband, both parents and a daughter, the estate is divisible into twelve shares, each parent gets one-sixth or two shares, and the husband one-fourth or three shares, and the daughter one-half or six shares, so the shares are increased to thirteen, but if she left a son instead of a daughter, the son would get only the five remaining shares, as he is not a sharer but gets only the residue after the legal sharers are satisfied as a residuary.

س . هل تساوي الانثى الذكر في نصيبهِ في غير المسائل المذكورة

ج . نعم قد تساويه في كمن خلَّف ابوين وابنًا فللاب السدس وللام السدس والباقي للابن كما قال الله تعالى " ولابويهِ لكل واحد منهما السدس مما ترك ان كان لهُ ولد فان لم يكن لهُ ولد وورثه ابواه فلامهِ الثلث فان كان لهُ اخوة فلامهِ السدس من بعد وصية يوصي بها او دين اباؤكم وابناؤكم لاتدرون ايهم اقرب لكم نفعًا فريضة من الله ان الله كان عليمًا حكيمًا " (سورة النساء)

وكذلك الاخوة لام في القسمة والاستحقاق سواء كما سبق في باب ذوي الفروض

س . هل تعادل شهادة الرجل شهادة امرأتين وما هو سبب ذلك

نعم . قال الله تعالى في سورة البقرة " واستشهدوا شهيدين من رجالكم فان لم يكونا رجلين فرجل وامرأتان ممن ترضون من الشهداء ان تضل احداهما فتذكر احداهما الاخرى ". واجمع العلماء على ان شهادة النساء غير جائزة في العقوبات وشُرط لاثبات الزنا شهادة اربعة رجال ولبقية الحدود والقصاص رجلان

Q. Does the share of the female equal that of the male in any case other than these?

A. She is equal to him sometimes as in the case of one leaving both parents and a son; the father and mother each gets one-sixth, and the residue belongs to the son, as God said:—And to each of his parents goes one-sixth of what he leaves, if he have a child, but if he has no child and his parents inherit him, then his mother shall have the third part. And if he has brothers, his mother shall have the sixth part after (the payment of) legacies that he bequeaths or his debts, you don't know whether your parents or children be of greater use to you. This is an ordinance from God, and God is knowing and wise. (Chapter on Women).

The mother's children, *i. e.*, uterine brothers and sisters are equal in claim and partition. (See Chapter on Sharers).

Q. Is the evidence of one man equal to that of two women, and what is the reason for this?

A. Yes, the Almighty God said:—Call two witnesses of your men, but if there be not two men, then one man and two women of those whom you approve as witnesses (in point of moral character), lest one of the two (women) err, so that the other shall cause her to recollect. (Koran, Chapter II.). The learned are unanimous that the evidence of women is not admissible in criminal cases, and the evidence of four men is required to prove adultery, and of two men in other heinous criminal cases termed Hudud and Kisas.

وعند الحنفي شُرط لاثبات البكارة والولادة وعيوب النساء فيما لا يطّلع عليهِ رجل شهادة امرأة ولغير الدعاوي المذكورة تكفي شهادة رجلين او رجل وامرأتين سواء كان الحق مالاً او غيره كالنكاح والطلاق والعتاق والوكالة والوصايا ونحو ذلك وقال الشافعي لا بد من شهادة اربع نسوة في عيوب النساء ولا تقبل شهادتهن مع الرجال الاّ في الاموال وتوابعها كالاجل وشرط الخيار لا النكاح (شرح العيني على الكنز)

والاصل قبول شهادة النساء لوجود ما يبتنى عليهِ اهلية الشهادة وهي المشاهدة والضبط والاداء وما يعرض لهن من قلة الضبط بزيادة النسيان فهو مجبور بضم الاخرى اليها فلم يبقَ بعد ذلك الاّ الشبهة ولذلك لا تقبل شهادتهن فيما يندرئ بالشبهات وهذه الحقوق تثبت بالشبهات وحقق الاكمل في العناية بانهُ لانقصان في عقلهن فيما هو مناط بالتكليف بل فيما هو العقل بالملكة ففيهن نقصان بمشاهدة حالهن في تحصيل البديهيات فانهُ لو كان في ذلك نقصان لكان تكليفهن دون تكليف الرجال في

According to the Hanifite doctrines, the evidence of one woman is required to prove virginity, childbirth, and women's physical defects, such as no man can be acquainted with, and in cases other than the above mentioned, the evidence of two men, or one man and two women is sufficient whether the right (in dispute) is property or something else such as marriage, divorce, emancipation, agency, or legacy, and the like. Ash-Shafa'ee holds that the evidence of four women is required in connection with female defects or matters affecting them, and that the evidence of women is not receivable together with that of men, except in connection with property and its incidents, such as time (of credit, etc.) and the condition of option. (Alainee's Commantary on al-Kanz).

The principle is to admit the evidence of women owing to the existence of those qualities on which the competency to give evidence is based, viz., the power of seeing, comprehending and giving evidence. As for their defective accuracy which is brought about by excessive forgetfulness to which they are subject, it is counterbalanced by adding another to her, *i. e.*, the female witness. After this nothing remains except a doubt (concerning her accuracy), therefore, her evidence is not admissible in what is warded off by doubts (*i. e.*, in criminal cases in which the benefit of a doubt is given to the accused). But civil rights are established even when there are doubts. Al-Akmal has made it clear in the treatise Ali'nayah, that there is no defect in their (female's) reason in so far as it relates to responsibility, but it is only in practical reason (intellect) there is a defect in them which can be noticed

الاركان وقولهُ صلى الله عليهِ وسلم ناقصات عقل المراد بهِ العقل بالفعل ولذلك لم يصلحن للقضاء والولاية والخلافة (بحر الرائق على الكنز)

س . هل تصح الولاية للنساء في مال الصغير ونكاحه

ج . الولاية في المال للاب ثم لوصيه ثم للجد الصحيح ثم لوصيه ثم للوالي ثم للقاضي والمراد بالوالي من اليهِ تقليد القضاء واذا لم يكن احد منهم فلوصي الام الحفظ وبيع المنقول وليس لهُ بيع عقار الصغير ولا ولاية الشراء للتجارة الاَّ شراء ما لابد منهُ من نفقة وكسوة وما ملكهُ اليتيم من مال غير امهِ فليس لوصي امهِ التصرف فيهِ منقولاً او غيره بخلاف النكاح فانهُ لا مدخل فيهِ للاوصياء بل هو للاولياء وعند الحنفي للام ولايته ايضاً عند عدم العصبة (رد المحتار على الدرّ المختار)

س . هل للرجل رياسة على الامرأة

ج . قال الله في سورة النساء " الرجال قوّامون على النساء بما فضل الله بعضهم على بعض وبما انفقوا من اموالهم " اي من

in witnessing their condition when forming intuitive perceptions, for if there were a defect of that, *i. e.*, reason, their responsibility would have been less than that of men in the Main Articles of Faith. The Prophet's saying that they are deficient in reason, means practical reason or judgment, and therefore they are not fit for judgeship, governorship or Khalifate. (Bahr-ur-rayik'ala Al Kanz).

Q. Does guardianship vest in women in respect of the property of a minor or of his marriage?

A. Guardianship regarding property belongs to the father, then to his executor, then to the true grandfather, then to his executors, then to the governor, then to the Kadhi; the word "governor" means one who has the power of appointing Kadhis (judges). If there be none of them, then the mother's executor can keep it in custody and sell movables; but he cannot sell the minor's immovable property, nor exercise a guardian's right by buying for commercial purposes, but he may buy what is necessary for maintenance and clothing, what the minor has become possessed of, from the property of a person other than his mother, the mother's executor shall not exercise power over, whether it is movable or not. The case is different with marriage, because an executor has nothing to do with it, but the guardians have, and according to Abu Hanifah the mother may have its guardianship in default of male blood relations. (Rudd ul Muhtar).

Q. Has man superiority over woman?

A. God said:—Man shall have the preeminence over women for those advantages in

المهور والنفقات والكلف التي اوجبها الله عليهم للنساء ولان الرجل له الفضل بالعقل والقوّة وكونه من اهل الجهاد ويصلح للقضاء والولاية والامامة (تفسير القرآن للبغوي وابن كثير)

الباب الثاني

في حقوق الزوجية

س . ما يجب للزوج على الزوجة

ج . يجب عليها معاشرتهُ بالمعروف وتسليم نفسها لهُ وملازمة المسكن وطاعته في كل امر مباح يأمرها بهِ

س . ما يجب على الزوج للزوجة

ج . يجب عليهِ معاشرتها بالمعروف والنفقة والسكنى وبقية المؤن والقسم اي اذا كانت لهُ اكثر من زوجة يجب عليهِ ان يعدل بينهن في القسم بالتسوية في البيتوتة وفي الماكول والملبوس والسكنى والصحبة والموانسة قال الله تعالى فان خفتم الاَّ تعدلوا فواحدة

ومن المعلوم ان وجوب القسم انما هو للصحبة والموانسه

which God has caused the one of them to excel the other, and for what they expend from their property, *i. e.*, in dower and maintenance, and the hardships which God imposed on them for the sake of women, and because man has superior intellect and strength, and is one of the people who fight in defence of religion, and is fit to be a judge, governor, or Khalifah. (Expositions of the Koran by Al Baghawi and ibn Katheer).

CHAPTER II.

On Conjugal Duties.

Q. What are the duties of a wife towards her husband ?

A. Her duties are (1) to live with him in an equitable manner, (2) to surrender herself to him, (3) to keep his house, (4) to obey what he orders her to do in any matter that is lawful.

Q. What are the husband's duties towards his wife ?

A. He is bound to live with her in an equitable manner, (2) to provide her with maintenance, lodging, and the remaining necessaries, and to make a just division, *i. e.*, if he has more than one wife, he is bound to act impartially towards each of them in making equal division of his night residence, and in providing food, clothes, and lodging, and in friendship and society. The Almighty God said :—If you fear that you cannot act impartially (towards so many as two, three or four wives) then marry only one.

It is known that the obligation for making equal division is only for company and society,

فيجب القسم سواء كان الزوج فحلاً او خصياً او عنيناً او مجبوباً او مريضاً او صحيحاً او كانت الزوجة حائضاً او ذات نفاس او مجنونة لا تخاف او رتقاء او قرناء ولو اقام عند واحدة شهراً في غير سفر ثم خاصمتهُ الاخرى في ذلك يُؤمر بالعدل بينهما في المستقبل وهدر ما مضى وان أثم به لان القسمة تكون بعد الطلب فان عاد الى الجور بعد نهي القاضي عزّرهُ بغير حبس ويأمرهُ بالعدل لانهُ اساء الادب وارتكب ما هو محرم عليهِ

والبكر والثيب والجديدة والقديمة والمسلمة والكتابية سواء في القسمة وقال الشافعي رح اذا تزوج الرجل بكراً اقام عندها سبعة ايام او ثيباً اقام عندها ثلاثة ايام ثم دار بالقسمة على نسائهِ الاخر وللامة نصف ما للحرّة من البيتوتة والسكنى معها ولا قسم للزوجات في سفر الزوج دفعاً للحرج فله السفر بمن شاء منهن والقرعة احب تطييباً لخاطرهن وعند الشافعي ان سافر بغير قرعة ولا تراض منهن وجب عليهِ القضا لهن

so division is obligatory whether the husband is potent, eunuch, impotent, castrated, sick or healthy, and whether the wife has the menstrual courses or is in confinement after childbirth, or a lunatic (provided she is not dangerous) or impotent. If he stays with one of them for a month not being on a journey, and the others sue him regarding it, he shall be ordered to act impartially towards them in future, and the past shall be remitted, though he will be a sinner, because division is to be made after demand. If he again act inequitably after the prohibition by the Kadhi, he shall punish him exemplarily without imprisonment, and shall order him to be impartial, because he has misbehaved and has committed what is forbidden to him.

The wife, whether a virgin, woman, new, old, Mussulman, Christian or Jew, has the same rights in the division. Ash-Shafa'ee says that when a man (who has already one wife) marries a virgin, he should reside with her for seven days, and if she were a woman, he should reside with her for three days, and then he should go round by turn to his other wives. A slave-wife is entitled to half the time the husband passes in night residence and company with a free wife. The wives have no right to the division during a journey of the husband, so as to avoid inconvenience; he may go on a journey with any one of them he please, but it is better to draw a ballot so as to comfort their heart. Ash-Shafa'ee holds that if the husband journey with one of them without drawing a ballot, and without their mutual agreement, he is bound to compensate his other wives (by keeping company with each of them for the same space of time as he spent in the journey with that one).

ويقيم الزوج عند كل واحدة من الزوجات يوماً وليلة وان شاء ثلاثة ايام ولياليها ولا يقيم عند احداهن اكثر الاَّ باذن الاخرى ولا يدخل الزوج ليلاً على غير المقسوم لها لغير حاجة كعيادتها فيجوز للضرورة كمرض مخوف وشدة طلق وخوف حريق ولو مرض هو في بيتهِ دعا كلاً في نوبتها ولو تركت احدى الزوجات قسمتها اي نوبتها لضرّتها صحّ ولها الرجوع في ذلك في المستقبل

وينبغي للزوج ان يحسن خلقهُ مع الزوجة ويحتمل الاذى منها ترحماً عليها لقصور عقل النساء قال الله تعالى وعاشروهن بالمعروف في تعظيم حقهن وقال تعالى واخذن منكم ميثاقاً غليظاً وقال عليهِ الصلاة والسلام لاتكلفوهن ما لا يطقن فانهن عوان اي اسرى في ايديكم اخذتموهن بامانة الله

س . هل يحق للزوجة ان تشتكي بالزوج اذا ما اوفاها قسمها

ج . اذا منعها الزوج حقاً لها كقسم ونفقة الزمهُ القاضي توفيتهُ اذا طلبتهُ فان اساء خلقهُ معها واذاها بضرب او غيره بلا سبب منها نهاه عن ذلك اول مرة

The husband shall reside with each wife for one night and day or for three days and nights if he please, but he shall not stay with one of them for a longer period without the permission of the others, nor shall he enter at night to any wife other than that whose turn it is, unless there is a necessity, such as that of visiting her in a dangerous sickness, or when she is in severe labour, or when there is an apprehension of fire. If he becomes sick in his house in which there is not any one of them, he should call to him each at her turn. It is valid for one of the wives to grant her turn to a fellow-wife, and she can withdraw it in future.

A husband ought to be well disposed towards his wife, and to bear her annoyance through mercy to her owing to the weak intellect of women; God Almighty said:—Live with them in an equitable manner, which magnifies their rights, and He said:—They (women) have taken from you a solemn covenant, and the Prophet (peace and blessings be upon him) said:—Don't bother them with what they cannot bear, for they are prisoners in your hand whom you took on trust from God.

Q. Can a wife sue her husband when he fails to perform his social duties towards her?

A. If the husband refuses to perform in full her right as a share of the division above-mentioned or maintenance, the Kadhi should direct him to make it good to her when she demands it, and if he misbehaves towards her and annoys her by beating or otherwise without any cause arising from her act, he should prohibit him for the first time.

س . لمَ لا يعزرهُ اول مرة

ج . لان اساءة الخلق تكثر بين الزوجين والتعزير عليها اول مرة يورث وحشة بينهما فيقتصر القاضي اولاً على النهي لعل الحال يلتئم بينهما وقد يكون كل منهما مسيئًا

س . ما الذي يجب على القاضي اذا ادعى كل منهما تعدي الآخر

ج . يجب ان يتعرف حالها بخبر ثقة يعرف حالها بجوار او غيره ثم يمنع الظالم منهما من عوده لظلمهِ ولو بتعزير يليق واذا اشتد الشقاق بينهما بعث القاضي وجوبًا حكمين مسلمين حرين عدلين عارفين بالمقصود منهما لينظرا في امرهما ويُسن كون حكم الزوج من اهلهِ وحكم الزوجة من اهلها ويسن ايضًا كونهما ذكرين وهما وكيلان لهما لا حاكمان من جهة الحاكم على الاصح فان امكن الصلح صالحا بينهما وان لم يمكن التئام الحال بينهما وكّل

Q. Why does he not punish him for the first time?

A. Because a bad temper often makes its appearance between the married couple, and to punish for it the first time is to engender an ill-feeling between them, so the Kadhi should first confine himself to an injunction; perhaps their condition will be reconciled, and it often happens that each of them is in fault.

Q. What is the Kadhi bound to do when every one of them alleges that the other has offended?

A. He should acquaint himself with their condition by obtaining information from a trustworthy person who is well acquainted with their condition as being in their neighbourhood or otherwise, and then he should prevent the wrongdoer from repeating his wrong, even if it were by a proper deterring punishment. If the dissension grow more and more between them, the Kadhi should necessarily send two arbitrators, who should be Mussulmans, free men, and of good moral character, and who should be acquainted with the object required of them, so that they may examine their case. It is recommended that the husband's arbitrator should be selected from his own people, and that of the wife from her own people, and that they should be males, and they will act as their agents and not as deputies from the judge, according to the approved doctrine. If a reconciliation is possible between them, they should reconcile them, and if their condition cannot be settled, the husband should authorize his arbitrator to divorce or free her from the bond of marriage on

الزوج حكمهُ في طلاق او خلع وتوكل الزوجة حكمها في قبول طلاق وبذل خلع فان اختلف رأيهما بعث القاضي اثنين غيرها حتى يتفق رأيهما على شيء

س . كيف الحكم اذا لم يرضَ الزوجان ببعث الحكمين

ج . يحكم القاضي باجتهاده ويؤدب الظالم منهما ويستوفي للمظلوم حقهُ (رد المحتار والبجيرمي)

الباب الثالث

في الحضانة

س . ما هي الحضانة ومن يستحقها

ج . هي تربية الولد الصغير مأخوذة من الحضن والام احق من غيرها بحضانة الولد الصغير قبل الفرقة وبعدها ما لم تتزوج بزوج آخر بالاجماع

ثم بعد الام بأن ماتت الام او لم تقبل الحضانة او اسقطت حقها او تزوجت بغير محرم الصغير فام الام وان علت احق

compensation ; and the wife should authorize her arbitrator to accept the divorce or to offer compensation (as may seem fit). If they differ in opinion, the Kadhi should send two others until they concur in opinion on something.

Q. What is the rule if the husband and wife do not agree to send two arbitrators ?

A. The Kadhi should pass judgment according to his best ability, and should punish whichever of them is the wrongdoer, and deal out justice to the wronged party. (Rudd ul Mahtar and Al Begairimee).

CHAPTER III.

On the Custody of Children.

Q. What is meant by Hidhanah, and who is entitled to it ?

A. It means the rearing or breeding of a little child, derived from "Hidhn" (bosom). The mother is more entitled than anyone else to the custody of her little child, whether before, or subsequent to her separation, provided she did not marry another husband according to all doctrines.

Next to the mother's right, when she is dead or would not agree to have the custody, or when her right is forfeited by her, or if she marry one who is not a relative within the prohibited degrees to the child, the mother's mother how high soever is entitled to the custody of the child, then the father's mother how high soever, then the sister of the whole blood, then the uterine

بحضانة الولد ثم ام الاب وان علت ثم الاخت لاب وامّ ثم لامّ ثم الاخت لاب (وعند الشافعي الاخت لاب احق من الاخت لامّ) ثم الخالات لابوين ثم لاب ثم لامّ ثم العمّات بهذا الترتيب ثم خالة الامّ كذلك واولاد الاخوات لاب وامّ او لام احق من العمّات والخالات ثم عمّات الامهات والاباء بهذا الترتيب ثم العصبات بترتيب الارث واذا اجتمعوا فالاورع ثم الاسن سوى فاسق ومعتوه وابن عم لمشتهاة فاذا لم يكن عصبة فلذوي الارحام حق الحضانة

والحاضنة امًّا او غيرها احق بالغلام حتى يستغني عن النساء بان ياكل ويشرب ويلبس ويستنجي وحدهُ وقُدّر بسبع سنين وعليهِ الفتوى والامّ والجدة احق بالصغيرة حتى تحيض اي تبلغ لانها تحتاج الى معرفة آداب النساء والغزل والطبخ والغسل ونحوها والقول للامّ في حيضها وغير الامّ والجدة احق بالجارية حتى تُشتهى وقُدّر بتسع سنين وبهِ يفتى في زماننا لكثرة الفساد

sister, then the half-sister by the same father (who, according to Ash-Shafa'ee, take precedence of the uterine sister), then the maternal aunts of the whole blood, then those by the same father, then those by the same mother, then the paternal aunts in the same order, then the mother's maternal aunts in the same order. The children of the sisters of the whole blood, or by the same mother, are more entitled than the paternal and maternal aunts, then the paternal aunts of mothers and fathers in this order, then the residuaries in the order of inheritance. When they come together, the most pious, and then the eldest one should be selected, excluding any one who is of bad moral character, or who is an idiot, or a cousin in the case of a marriageable girl. If there are no residuaries, then the uterine relations have the right to the custody of children.

The female custodian, whether she is the mother or another person, has a right to the custody of the child until he can dispense with female assistance in eating, drinking, dressing, or washing, which is presumed to be seven years, and it is so declared by precedent. And the mother or grandmother is entitled to the custody of the female child until she has the courses, *e.g.*, attained full age, because she is in need of acquiring a knowledge of the good manners of women, and of spinning, cooking, washing, and the like. The mother's statement about her courses is to be accepted. Other persons who succeed to the right of custody in default of the mother and grandmother are entitled to have the girl's custody until she becomes marriageable, which is presumed to be nine years, and according to this, decisions are made in this our time owing

وبنت احد عشر مشتهاة اتفاقًا

ولا خيار للولد مميزًا اولا غلامًا او جارية وعند الشافعي الامّ احق بالغلام والجارية الى سبع سنين ثم يخيران فمن اختاراهُ منهما كانا عندهُ

ثم اذا بلغ الغلام رشيدًا فلهُ ان ينفرد بالسكنى وليس للاب ان يضمهُ الى نفسهِ بغير اختياره الاَّ ان يكون مفسدًا مخوفًا عليهِ فحينئذٍ لهُ ان يضمهُ الى نفسهِ اما لدفع الفتنة او لدفع العار واما الجارية اذا كانت بكرًا فلابيها ان يضمها الى نفسهِ بعد البلوغ لانهُ يُخاف عليها واما الثيب فليس لهُ ان يضمها الاَّ اذا كانت غير مأمونة يخاف عليها من الفتن

وتستحق الحاضنة اجرة الحضانة اذا لم تكن منكوحة او معتدة لابيهِ وهي غير اجرة ارضاعهِ ونفقتهِ فيجب على الاب اجرة الرضاع واجرة الحضانة ونفقة الولد فتستحق المطلقة اجرة بسبب حضانة ولدها خاصة من غير ارضاع لهُ وكذا اذا احتاج الى خادم يلزم الاب بهِ واذا لم يكن للحاضنة مسكن فيلزم الاب اجرة مسكن لتحضن الولد فيهِ

to the prevalence of bad morals. A girl, eleven years old, is marriageable without any dissent.

The child, whether male or female, capable of understanding or not, has no option to elect; but, according to Ash-Shafa'ee, the mother has a right to the custody of the boy and girl up to the age of seven years, and then they (children) are at liberty to choose, and they shall remain with either of the two they choose to live with.

When a boy attains full age with discretion he may live alone, and the father cannot keep him in his charge without his consent, unless he is demoralised, and his state causes fear, in which case his father can keep him in his charge, in order to avert temptations or disgrace. As for the girl, if she is a virgin, her father can keep her in his *charge after her becoming of age, because she* is an object of anxiety; but if she were a woman, he has no right to keep her in his charge unless she were not trustworthy, and there is reason to apprehend bad temptations.

Unless she is actually married to the father, or undergoing the term of 'Iddet, after being separated from him, the female custodian is entitled to remuneration for the custody, in addition to that for giving suck to the child and its maintenance, which the father is bound to pay. A divorced wife is entitled to special remuneration for the custody of her child, even without giving it suck, and also if it stands in need of a servant, the father is bound to supply one. If the female custodian has no dwelling-house, the father should pay the rent of a dwelling, in which she will breed up the child

ولا تجبر من لها الحضانة على الارضاع الاَّ اذا تعيَّنت لهُ بان لم ياخذ ثدي غيرها او لم يكن للاب او للصغير مال فحينئذٍ تُجبر ولا تقدر الحاضنة على ابطال حق الصغير فيها حتى لو اختلعت الزوجة على ان تترك ولدها عند الزوج صحَّ الخلع وبطل الشرط لانهُ حق الولد فليس لها ان تبطلهُ بالشرط

ويسقط حق الحاضنة امًّا او غيرها اذا تزوجت بغير محرم الصغير او ارتدت او كانت فاجرة او غير مأمونة بأن تخرج كل وقت وتترك الولد ضائعًا او اذا ابت الام ان تربي الولد مجانًا والحال ان الاب معسر والعمة او غيرها من المحارم تقبل تربيتهُ مجانًا ومؤنة الحضانة لازمة في مال الصغير فان لم يكن لهُ مال فمن مال ابيهِ فاذا كان الاب معسرًا او عاجزًا فعلى من تلزمهُ نفقته وحق الحضانة اذا سقط بنكاح الحاضنة لاجنبي عاد لها بالفرقة البائنة منهُ

ليس للمطلقة بائنًا الخروج بالولد من بلدة الى اخرى الاَّ اذا كانت قريبة بحيث يمكن الاب ان يمضي ويبصرهُ ولدهُ ثم يرجع في نهارهِ ولها ان تنقلهُ من القرية الى المصر وفي عكسهِ لا ولها

Anyone who is entitled to the custody of the child cannot be compelled to give it suck, unless she is the only specific for it, that is, it would not suck the breast of anyone else, or unless the father and infant have no property, in which case she shall be compelled to do the same. A female custodian cannot determine the right of the child. Even where the wife obtained her freedom from the bond of marriage on condition that she would leave the child with the husband, the separation was held to be valid and the condition void, because it is a right of the child which she cannot avoid by a condition.

The right of a female custodian becomes forfeited when she marry one who is not within the prohibited degrees to the child, or (2) when she becomes an apostate, or (3) when she bears a bad moral character, or (4) when she is not trustworthy, as if she go out and leave the child uncared for, or (5) where the mother refuse to breed the child gratuitously, the father being, in fact, poor and unable to pay, and the father's sister or any other female relation volunteer to breed it gratis. The charges for the child's custody and maintenance are chargeable against the child's property; if it has none, then against its father's property. If the father is poor and incapable, then against those (relatives) who are bound to maintain it. The right to have the custody, if forfeited by the woman's marriage to a stranger, is restored to her on her becoming absolutely separated from him.

A wife who has been divorced irreversibly has no right to remove with the child from one town to another, unless it were so near that the father

ان تسافر بالولد الى وطنها وقد نكحها الزوج ثمة واذا اراد الاب السفر الى بلدة اخرى بنية الاستيطان فليس لهُ اخذ الولد من الام وعند الشافعي الاب احق بولدهِ سواء كان هو المتنقل ام هي

الباب الرابع

في النفقة

س . ما معنى النفقة

ج . هي شرعًا الطعام والكسوة والسكنى

س . باي سبب تجب نفقة الغير على الغير

ج . باسباب ثلاثة زوجية وقرابة وملك اي نفقة المملوك من بني آدم والحيوانات

س . ابدأ بالاول لانها اصل الولد ولان الولد الذي تكوّن ابنًا وأبًا وأخًا وعمًّا لا يحصل الاَّ بالزوجيّة

can go and see his child and return on the same day; but she can remove from a village to the metropolis, and not *vice-versa*. She can also remove with the child to her native country where the husband had married her. If the father desires to go to another country with the intention of making it his domicile, he cannot take away the child from its mother. According to Ash-Shafa'ee, the father has a right to take the child, whether it is he or she who desires to remove.

CHAPTER IV.

On Maintenance.

Q. What is the meaning of the word Maintenance?

A. In a legal sense it denotes food, clothing, and lodging.

Q. By what causes is it obligatory on one person to maintain another?

A. There are three causes: marriage, relationship, and possession, *i. e.*, the maintenance of one of the children of Adam, or of animals held in possession.

Q. Begin with the first because it is the root of the child, and the child who becomes son, father, brother and uncle is only the issue of marriage?

ج . تجب النفقة على الزوج للزوجة سواء كانت مسلمة او كافرة غنية او فقيرة مدخولاً بها او لا ولو كانت مانعة نفسها لاجل قبض المهر وان كان كلهُ مؤجلاً على المفتى بهِ اذا كان الزوج لم يشرط الدخول قبل حلول الاجل وكذلك تستحق النفقة من حين العقد الصحيح وان كانت في بيت ابيها ولم يطالبها الزوج بالنقلة او اذا طالبها ولم تمتنع او امتنعت لعدم قبض المهر وقال الشافعي تجب النفقة بالتمكين التام لا بالعقد

س . ما هو قدر النفقة

ج . هي مقدَّرة بحال الزوجين فيجب على الموسرة للموسرة نفقة الموسرين وعلى الفقير للفقيرة اقل الكفايات واذا كان الزوج موسراً والزوجة فقيرة يلزم عليهِ نفقة متوسطة بين النفقتين وعلى الفقير للموسرة نفقة الوسط فيخاطب بقدر وسعهِ والباقي دَين الى الميسرة وقال الشافعي يُعتبر حال الزوج

A. Maintenance is due from a husband to his wife, whether she is a Mussulman or infidel, rich or poor, and whether the marriage was consummated or not, even if she refuse to surrender herself until she receives the dower, though its payment might have been wholly deferred according to approved precedents, provided the husband has not stipulated for its consummation before the time of payment arrives, likewise she is entitled to maintenance from the time of the execution of the legal contract, though she may be in her father's house, the husband not having requested her to remove, or having so requested her, she did not refuse to do so, or she refused on the ground of the non-payment of dower.—Ash-Shafa'ee says that maintenance is only due on a complete surrender (by the wife to her husband), not on the execution of the contract.

Q. What is the scale of Maintenance?

A. It is proportioned to the condition of the husband and wife; so a solvent husband ought to provide a solvent wife with a first-rate maintenance; a poor husband should provide a poor wife with the smallest competence. If the husband is solvent and the wife poor, he should provide a middling maintenance, which is a mean between the two. A poor husband should give to a solvent wife a middling maintenance, but he should be called upon to pay according to his ability, and the balance shall become a debt until he becomes solvent. Ash-Shafa'ee says, "The condition of the husband is to be taken into consideration."

س . هل تجب النفقة للمطلقة في مدّة عدّتها

ج . تجب النفقة والسكنى لمعتدة الطلاق رجعيًا كان او بائنًا وللمفارقة بغير معصية من جهتها كتفريق بعدم كفاءة الزوج وخيار البلوغ ولكن لا تجب لها الكسوة ان قصرت المدة وعند الشافعي لا نفقة للمبانة الاّ ان تكون حاملاً ولكن لها السكنى فقط

س . بأي سبب يبطل حق الزوجة للنفقة

ج . لا نفقة للمرأة بالاسباب الآتية ادناه

الاول – الناشزة وهي الخارجة من بيت الزوج بلا حق حتى تعود فان ادعى انها ناشزة وشهدوا انهُ اوفاها المعجل ولم تكن في بيتهِ سقطت النفقة وان شهدوا انها ليست في طاعتهِ للجماع لم تُقبل الشهادة لكونها في بيتهِ ولان الزوج يغلب عليها وبالنشوز تسقط النفقة المفروضة لا المستدانة على الزوج بامرهِ او بامر القاضي ولو كانا يسكنان في بيت الزوجة ومنعتهُ من

Q. Is maintenance payable to a divorced wife during her iddet (the period during which she has to wait before re-marrying)?

A. Maintenance and lodging should be furnished to a divorced woman during her term of iddet, whether the divorce was reversible or absolute, and also to a woman who has obtained her separation, not through any illegal act arising from her side, but for such causes as her separation on account of the husband not being equal to her in position or descent, or by exercising her right of option on attaining to puberty (the marriage having been contracted during her minority), but the divorced woman is not entitled to clothing if the time of iddet was short (less than six months). According to Ash-Shafa'ee a woman who has been divorced absolutely has no right to maintenance unless she is pregnant; but she shall have lodging only.

Q. By what causes is the wife's right to maintenance barred?

A. No maintenance is allowed to the wife under the following circumstances. First, the deserting woman who leaves her husband's house without a proper cause has no right to maintenance until she returns. If he alleges that she is a deserter, and evidence is given that he has paid her in full the prompt dower, and that she is not in his house, her maintenance is forfeited; but if they depose that she is not obedient to him in regard to sexual duties, such evidence is not accepted, because she is in his house, and the husband can overcome her. By desertion the allotted maintenance shall be forfeited, but not that which is borrowed on account of the

الدخول عليها لا نفقة لها الا اذا سألته النقلة وعند الشافعي الناشزة هي الخارجة عن طاعة الزوج (١) كمنع تمتع الا لعذر كمرض وحيض ونفاس وعبالة (٢) وكخروج من مسكنها بلا اذن منه الا لخوف من انهدام منزل او لعذر آخر او لنحو زيارة اهلها كعيادتهم في غيبته بان علمت رضاه او كانت عادة امثالها ان تفعل ذلك وتسقط النفقة عند الشافعي اذا ابت النقلة مع الزوج الى بلد اخر الا ان يتمتع بها زمن الامتناع

الثاني — زوجة صغيرة لا تطيق الوطء ولا تصلح للاستمتاع وان كانت في بيت الزوج وقال الشافعي لها النفقة كالحائض والنفساء والمريضة والرتقاء الثالث — محبوسة بدين لغير الزوج الرابع — مغصوبة بان اخذها رجل وهرب بها سواء كان بصورة الغصب ام برضاها وقال ابو يوسف اذا كانت مغصوبة فهي تستحق النفقة الخامس — زوجة حاجّة مع غير الزوج او اذا سافرت باذن الزوج في غير حاجته وقال

husband, by his or the Kadhi's order. If the husband lives with the wife in her house, and she prevents him from entering to her, no maintenance is due to her unless she has already asked him to remove. According to Ash-Shafa'ee, a deserting wife is she who refuses obedience to the husband; for instance, (1) withholding her society unless there were a proper excuse, such as her sickness, menstrual courses, childbirth confinement, or deformity of the husband rendering coition impossible without injury to her; (2) leaving her house without his permission, unless it were through fear of the collapse of the house, or for other causes, or it was for the purpose of visiting her sick people during his absence believing his acquiescence, or if it is customary for her equals to do so. According to Ash-Shafa'ee, maintenance is forfeited if she refuses to remove with the husband to another country, unless he enjoys her society during the time of her refusal.

Second, an infant wife who is incapable and not fit for social company, though she may be in the husband's house. Ash-Shafa'ee holds that she has a right to maintenance like one who is in courses, or in confinement after childbirth, or who is sick or impotent. Third, a wife who is imprisoned for a debt due to a person other than her husband. Fourth, a kidnapped wife, *i. e.*, one whom a man has taken away and eloped with, whether it was in a compulsory manner or with her own free will. Abu Yussef says that she is entitled to maintenance if she were forced to do so. Fifth, a wife who is making a pilgrimage in company with a person other than

الشافعي لا تسقط لانها غير ناشزة السادس – مريضة لم تزف الى بيت زوجها ولا يمكنها الانتقال اليهِ اصلاً السابع – المفارقة بمعصية من جهتها لا نفقة لها في مدة عدّتها الثامن – المرتدة التاسع – معتدة للموت ولو حاملاً لان احتباسها هنا لمقتضى الشرع العاشر – منكوحة بنكاح فاسد او معتدة بهِ مثلاً غاب عنها زوجها فتزوجت بآخر ودخل بها وفرق بينهما بعد عود الزوج الاول فلا نفقة لها في عدتها لا على الاول ولا على الثاني الحادي عشر – الامة المنكوحة لا تجب نفقتها الا بالتبوئة اي بان يدفعها سيدها الى زوجها ولا يستخدمها

س . هل يجب على الزوج نفقة خادم المرأة

ج . نعم لو كانت حرة وكان الزوج موسرا لان كفايتها واجبة عليهِ وهذا من تمامها او اذا مرضت وجب عليهِ اخدامها ولو كانت امة بامرأة او باحد من محارمها ولو له اولاد كثير

the husband, or who is going on a journey with the permission of her husband, but not on his business, Ash-Shafa'ee says the maintenance is not thus forfeited, because she is not a deserter. Sixth, a sick wife who has not been conveyed to her husband's house, and who cannot be removed to him at all. Seventh, one who has become separated through a sinful act on her part is not entitled to maintenance during her term of iddet. Eighth, an apostate. Ninth, a wife who is undergoing her iddet after the death of her husband, even if she is pregnant, because her detention here is required by law. Tenth, one who has been married through a nullified form of marriage, or who in undergoing iddet after it; for instance, her husband went away and she married another, who consummated the marriage. After the return of the first husband they were separated: no maintenance is due to her during her iddet, either by the first or the second husband. Eleventh, a slave woman who has been married is not entitled to maintenance unless she were lodged with the husband, *i. e.*, if her master delivers her to the husband and ceases to employ her.

Q. Is the husband bound to maintain the servant of the wife?

A. Yes, if she is a free woman, and the husband is solvent, because he is bound to provide her with a sufficiency, and this is incidental to it. When she becomes sick, it is incumbent on him to have her served (though she may be a slave wife) by a woman or relative who is within the prohibited degrees to her. If he has many children for whom one servant is not sufficient,

لا يكفيهم خادم واحد او كانت من الاشراف فرض على الزوج نفقة خادمين او اكثر

من زاد دخله على خرجه فموسر ومن استوى دخله وخرجه فمتوسط ومن زاد خرجه على دخله فمعسر (الشرقاوي على التحرير)

س . هل يجب على الزوجة طحن الطعام وخبزه

ج . ان كانت ممن تُخدم في بيت ابيها او كان بها علّة فعليه ان يأتيها بطعام مهيإ والاّ لا يجب عليه ولا يجوز لها اخذ الاجرة على ذلك لوجوبه عليها ديانةً وعند الشافعي يجب على الزوج طحنه وعجنه وخبزه بنفسهِ او باجرة وان اعتادتها

س . ما هو قدر الكسوة للزوجة

ج . تُفرض لها الكسوة في كل نصف حول مرة معجلة لتجدّد الحاجة حرًّا وبردًا وتقدير الكسوة يختلف باختلاف الاماكن والعادات فيجب على القاضي اعتبار الكفاية بالمعروف في كل وقت ومكان فان شاء فرضها اصنافًا وان شاء قوّمها وقضى بالقيمة

س . هل يحق للزوج الانفاق عليها بنفسهِ

ج . نعم الاّ ان يظهر للقاضي مطله وعدم انفاقه فيأمره ان

or if she is one of the nobility, maintenance for two or more servants may be awarded against him. He whose income exceeds his expenditure is solvent; one whose income and expenditure are equal is a middling man; and he whose expenditure exceeds his income is insolvent. (Asharkavi on Attahrir).

Q. Is the wife bound to grind (prepare) and cook the food?

A. If she were one of those who are served in their fathers' houses, or if she were sick, the husband should provide her with prepared meals, otherwise he is not bound to do so, and she should not take remuneration for it, because it is morally incumbent on her to do it; but according to Ash-Shafa'ee the husband ought to grind, knead and cook it by himself, or to have it done by hire, even if she is accustomed to it.

Q. What is the scale of clothing or apparel for the wife?

A. Clothing is allotted to her every half year, as there is fresh necessity for it in the hot and cold season. The scale of clothing varies in different places and with different customs. The judge should award a sufficiency in a reasonable manner according to every time and place. He can award it in kinds if he please, or he may estimate it and pass a decree for its value.

Q. Has the husband a right to maintain her by himself?

A. Yes, unless his dilatoriness and lack of maintaining her are manifest to the judge, who can order him to pay her the sum fixed by him (the judge); so that she may spend it on herself,

يدفع لها ما يقدّرهُ القاضي لنفقتهُ على نفسها فان لم يعطِ ذلك حبسهُ القاضي وان رضيت ان تأكل معهُ فيها ونعمت وان خاصمتهُ يفرض لها بالمعروف واذا امتنع الزوج الموسر عن الانفاق على زوجتهِ باع القاضي مالهُ وصرفهُ في نفقتها فان لم يجد مالهُ يحبسهُ حتى ينفق عليها والقاضي يفرض النفقة بأي مدة يراها مناسبة ولها ان تاخذ كفيلاً بنفقة شهر فاكثر خوفًا من غيبتهِ

واذا فرض القاضي نفقة المعسر لاعسار الزوج ثم ايسر تمَّ نفقة الايسار

س . هل يجب على الزوج شيء سوى الطعام والكسوة والمسكن

ج . نعم يجب عليهِ آلة طحن وخبز وانية شراب وطبخ وسائر ادوات البيت كحصر وطنفسة وفراش ومخدة وما تتنظف بهِ كمشط ودهن واشنان وصابون على عادة البلد وما يقطع بهِ السهوكة ويمنع الصنان من الطيب وما تحتاج عليهِ من الماء للشرب ولغسل ثيابها وبدنها

س . هل يجب على الزوج ان يصرف على مداواة الزوجة اذا مرضت

ج . ثمن الادوية في مرضها من مالها ليست واجبة على

and the judge shall imprison him if he would not give it. If she consents to eat with him, well and good, but if she sues him, a reasonable allowance should be awarded to her. Where a solvent husband refuses to maintain his wife, the judge shall sell property and spend it on her maintenance. If the judge could not find out his property, he shall imprison him until he maintains her. The judge shall award maintenance for any period he thinks convenient, and she can take security for the maintenance of a month or more through fear of the husband absenting himself.

Where the judge has awarded maintenance on a low scale on account of the insolvency of the husband, who afterwards became solvent, the judge should increase it to a full scale.

Q. Is the husband bound to supply anything more than food, clothing and lodging?

A. Yes, he should supply the tools of grinding and baking, and the utensils of drinking and cooking, as well as all articles of furniture for the house, such as mats, carpets, beds and pillows, and those used in cleaning, such as a comb, oil and alkali, or soap, according to the custom of the place, and such perfume as is necessary to remove bad smells, and such water as is wanted by her for drinking, washing her clothes and body.

Q. Is the husband bound to bear the expenses of her treatment when she is sick?

A. The prices of medicines during her sickness should come out of her own property, and the husband is not liable for the same; but if he pays on her behalf the price of medicines and

الزوج لكن اذا صرف عليها ثمن الادوية واجرة الحكيم فهو متبرع لا يرجع عليها بشيء ولكن ان لم يكن لها مال يجب عليهِ ذلك ديانةً من حيث انها اغاثة للمضطر ويرجع عليها بذلك اذا ايسرت ان لم ينوَ تبرعًا بهِ

س هل يجب على الزوج اسكان الزوجة في بيت خالٍ عن اهلهِ

ج . نعم اذا لم ترضَ بالسكنى مع اهلهِ او كان لهُ اكثر من زوجة لكل منهن مطالبتهُ ببيت على حدة ويلزم لهُ بيت الخلا ومطبخ ولو اخلا لها بيتًا من دار وجعل لها مرافق وغلقًا على حدة كفاها والمسكن يختلف باختلاف احوال الناس

فان اشتكت من الزوج الايذاء بسوء العشرة يامرهُ القاضي باسكانها بين جيران صالحين ويسأل الجيران عن سيرتهِ والبيت الذي ليس لهُ جيران ليس بمسكن شرعي ولا يلزم الزوج اتيانها بمؤانسة الاَّ اذا كان الدار خاليًا من السكان ومرتفعة الجدران وخشيت على عقلها من سعتهِ او كان يخرج عنها ويغيب ليلاً وليس لها خادمة او ولد تستأنس بهِ او لم يكن عندها من يدفع عنها اذا خشيت اللصوص او ذوي الفساد

س . هل يحق للزوجة ان تزور اهلها

ج . لاهلها النظر والكلام معها في اي وقت شاءوا ولا يمنعها

the doctor's fees, he is a volunteer, and cannot recover anything from her; but if she has no property, he is morally bound to do it as an act of succour to one in distress, and can recover it from her when she becomes solvent unless he has intended to act gratuitously.

Q. Is the husband bound to lodge her in a house devoid of his people?

A. Yes, if she is not willing to live with his people; or if he has a plurality of wives, each of them can dun him for a separate house, which should have a kitchen and privy. If he vacates for her a tenement of the same house, provided with bolts and locks, it would suffice for her. The house varies (in description and dimensions) with the condition of different people.

If she complains of the husband's annoyances and bad conduct, the judge shall order him to give her a dwelling amongst good neighbours, and he shall inquire of the neighbours about his conduct. A house which has no neighbours is not a legal house. The husband is not bound to provide her with a female companion unless the house is empty of inmates, and has such lofty walls that she apprehends harm to her mind from its large dimensions, or if he goes out and absents himself at night while she has no servant or son to dispel her fears, or there is no one with her who can defend her when she is in fear of thieves or mischief-doers.

Q. Has the wife a right to visit people?

A. Her people can see her and speak to her at any time they please, and he shall not prevent her from going out to her parents every Friday, or once a week, if they cannot come over to her, nor shall he prevent them from entering to her

من الخروج الى الوالدين في كل جمعة ان لم يقدرا على اتيانها ولا يمنعهما من الدخول اليها في كل جمعة وفي غيرها من المحارم في كل سنة وقيل شهرًا ويمنعهم من البيتوتة عندها ولو ابوها زمنًا مثلاً فاحتاجها فعليها تعاهده بقدر احتياجه ولو كافرًا وان ابى الزوج

س . هل يفرق القاضي بين الزوجين لعجز الزوج عن النفقة

ج . عند ابي حنيفه لا يفرق بينهما سواء كان الزوج غائبًا او حاضرًا وتؤمر بالاستدانة عليه وهي الشراء بالنسيئة ليقضى الثمن من مال الزوج ويمكنها احالة الغريم على الزوج فيطالبهُ بهِ واذا كان الزوج معسرًا والمرأة معسرة ولها ابن من غيرهِ موسرًا او اخ موسر فنفقتها واجبة على زوجها ويؤمر الابن والاخ بالانفاق عليها ويرجع بهِ على الزوج اذا ايسر ويحبس الابن او الاخ اذا امتنع لان هذا من المعروف فتبيّن بهذا ان الادانة لنفقتها اذا كان الزوج معسرًا وهي معسرة تجب على كل من كانت تجب نفقتها عليهِ لولا الزوج وعلى هذا لو كان للمعسر اولاد صغار ولم يقدر على انفاقهم تجب نفقتهم على من تجب عليهِ لولا الاب كالام او الاخ او العم ثم يرجع بهِ على الاب اذا ايسر

every Friday. As regards relatives (other than the two parents) who are within the prohibited degrees to her, they can visit her once a year; but according to another version, once a month; but he shall prevent them from putting up at night at her house. If, for instance, her father was infirm and stood in need of her, she should frequent him as often as he needs her, even if he is an infidel and the husband objects to it.

Q. Can the Kadhi decree separation between husband and wife on the failure of the husband to provide maintenance?

A. According to Abu Hanifa they cannot be separated, whether the husband is present or absent, and she will be ordered to buy on his credit; so that the price shall be paid out of the property of the husband, and she may give an order on the husband in favour of the creditor, who can dun him. If the husband and wife are both insolvent (indigent), and she has a son by a former husband, or a brother, who is solvent, though the husband is liable for her maintemance, yet the son or brother will be ordered to maintain her, and to recover the cost from the husband when he is solvent. The son or brother will be imprisoned if they refuse to do it, for this is equitable, and it shows that if the husband and wife were indigent, her maintenance should be lent by those whose duty it is to maintain her, were there no husband. Therefore, where a destitute father has little children whom he is incapable of maintaining, those relatives, such as mother, brother, and paternal uncle, who would be liable for their maintenance if there were no father, are bound to maintain them, and afterwards they can recover the same from the father when he becomes solvent.

وعند الشافعي اذا اعسر الزوج مالاً او كسباً بأقل النفقة او الكسوة مما لابد منها او بمسكن ولو كان غير لائق لزوجتهِ او بمهر واجب قبل وطء فان انفقت الزوجة على نفسها من مالها فغير كرا المسكن دين عليهِ لا يسقط بمضي الزمان وان لم تصبر لها فسخ النكاح بثبوت الاعسار عند قاضٍ ويمهله القاضي ثلاثة ايام ونهار الرابع يفسخ النكاح ولكن لا فسخ اذا امتنع الزوج من الانفاق وهو موسر او متوسط الحال حضر او غاب ويؤمر بالانفاق عليها ويُحبس ويباع مالهُ لذلك

س . هل تسقط النفقة بمضي الزمان

ج . عند ابي حنيفة لا تجب النفقة مدة مضت لم ينفق الزوج عليها فيها الاَّ بالقضا او الرضا اي بان كان القاضي فرض لها النفقة او بان صالحت الزوج على قدر معيَّن فحينئذٍ يقضي لها بنفقة ما مضى وسبب ذلك ان النفقة صلة لا تملك الاَّ بالقبض كرزق القاضي وفي الذخيرة نفقة ما دون الشهر لا تسقط وعند

According to Ash-Shafa'ee, where the husband is incapable by means of property or earnings to provide the minimum scale of maintenance or clothing which is indispensably required, or to furnish a dwelling however unfit ordinarily for the wife, or to pay a dower that has become due before the consummation of the marriage, and the wife maintains herself out of her property, it shall become a debt due from him (with the exception of the rent of the house), and shall not become barred by lapse of time. If, however, she would not wait, she can obtain a dissolution of the marriage by proving his insolvency (*i. e*, inability), before a Kadhi, who should give him three days' time, dissolving the marriage on the fourth day; but it cannot be dissolved when a husband, who is solvent, or one of a middling condition refuses to maintain her, whether he is present or absent, and he should be imprisoned, and his property be sold for the same.

Q. Does maintenance money become barred by lapse of time?

A. According to Abu Hanifa maintenance for a past period, during which the husband did not maintain her, is not recoverable unless it were decreed or agreed upon, *e. g*., when the Kadhi has awarded maintenance money for her, or she has settled with the husband for a specified sum, in which case she should be awarded maintenance money for the past. The reason for this is that the maintenance allowance is a donation which no one becomes owner of, unless it were accompanied by seisin, just like the salary of the Kadhi. In the treatise—Dhakhirah—past maintenance for less than a month is not time-

الشافعي تصير النفقة ديناً بلا قضاء ولا رضاء كالمهر وبهِ قال مالك واحمد لكونها معاوضة في مقابلة التمكين

وعند الحنفي تسقط النفقة المقضية اي المفروضة بموت احد الزوجين الّا اذا استدانت بأمر قاضٍ ولا تسقط بطلاق وعند الثلاثة لا تسقط بحال

س . هل تردّ النفقة والكسوة المعجلة بموت او طلاق

ج . لا تردّ ولو كانت قائمة لانها صلة كالهبة اتصل بها القبض ولا رجوع في الصلات بعد الموت وعند الشافعي يحتسب لها بنفقة ما مضى وما بقي يسترد منها مثلاً اسلفها نفقة سنة ثم مات احدهما بعد شهر

وعند ابي حنيفة اذا ادعت المطلقة الحبل فلها النفقة الى مدة سنتين منذ طلقها فلو مضتا ثم تبين ان لا حبل فلا رجوع للرجل عليها كما اذا قالت ظننت الحبل ولم احض وانا ممتدة الطهر اما اذا اقرّت ان عدتها انقضت منذ كذا وانها لم تكن

barred. According to Ash-Shafâ'ee maintenance for the past is a debt without either decree or agreement, just like a dower, and so Malik and Ahmed hold, because it is a consideration for the usufruct of the enjoyment.

According to Abu Hanifa the decreed maintenance-money becomes irrecoverable on the death of one of the married couple, unless she has borrowed it by order of the Kadhi; but it is not barred by divorce. According to the three other schools it is not barred under any circumstance.

Q, Are the advanced maintenance and clothing recoverable on death or divorce?

A. It is not recoverable even if it were intact, because it is a donation, like gift, which has been accompanied by possession, and donaticns are not returnable after death. According to Ash-Shafa'ee she should be allowed for past maintenance, and the balance should be recovered from her; for instance, he advanced her one year's maintenance-money, and one of them died after a month.

According to Abu Hanifa, when a divorced wife alleges that she is pregnant, she can have maintenance for a period extending to two years since he divorced her. If the two years pass away, and then it appears that she is not pregnant, the man cannot recover it from her; as when she says, "I thought I was gone with child, and my period of purity (*i. e.*, the interval between her courses) was so delayed." But if she admits that her iddet (*i. e.*, last course) has passed since such and such a time, and that she was not pregnant, he would recover from her what she took after its expiration. According

حاملاً رجع عليها بما اخذت بعد انقضائها وعند الشافعي يسترد الزوج ما انفقهُ بعد انقضائها ولو ما اقرت لتبين خطاء الزوج

س . هل تجب على الرجل نفقة اولاده

ج . تجب النفقة بانواعها الثلاثة المذكورة على الحر لطفلهِ وابنهِ الكبير الفقير العاجز عن الكسب ولبنتهِ الكبيرة الفقيرة لان مجرد الانوثة عجز وتجب عليهِ النفقة ايضاً لوالديه واجداده وجداتهِ لو كانوا فقراء بشرط يسار المنفق بفاضل عن نفقة نفسهِ وعيالهِ

لانفقة مع اختلاف الدين الاَّ بالزوجية والولادة اي للاصول والفروع علوا او سفلوا ولا يشارك الانسان في نفقة ولدهِ وابويهِ احد من الاقارب اذا كان موسراً فان كان الاب معسراً والام موسرة أُمرت بالانفاق ويكون ديناً على الاب فان كان الاولاد موسرين فنفقة الوالدين على الذكور والاناث بالسوية في الصحيح وقيل بقدر الارث وهو قول الشافعي وعلى الانسان نفقة زوجة

to Ash-Shafa'ee the husband can recover what he expended after its expiration, though she makes no admission, for the mistake of the husband is evident.

Q. Is a man bound to maintain his children?

A. Maintenance of the three descriptions (*i. e.*, food, clothing, and lodging) are to be provided by a free man (1) to his infant child, and (2) to his full-grown son who is poor and incapable of earning a living, and (3) to his poor full-grown daughter, because to be a female is itself an incapacity. Maintenance is also due from him to his parents, and his true grandfathers and grandmothers, if they are poor, provided the maintainer is so solvent as to have a saving from his income over and above the cost of maintaining himself and his children.

No maintenance is due when there is a difference of religion, except in case of marriage and birth, that is, of the roots and branches (parents and children) however high or low they may be in the ascending or descending line, and no solvent person shall have any one of his relations to contribute a share with him in the cost of maintaining his child and parents; but if a father were insolvent and the mother solvent, she shall be ordered to provide maintenance, which will become a debt due by the father.

Where the children are solvent, the maintenance of their parents shall be paid by them — males and females equally, according to the approved doctrine ; but it is said that it should be contributed in proportion to the hereditary rights, and this is also the doctrine of Ash-Shafa'ee. A man shall also maintain the wife of his father, or the slave mother of his children,

ابيهِ وام ولدهِ لو كانوا فقراء وفي المختار والملتقى نفقة زوجة الابن على ابيهِ ان كان صغيرًا فقيرًا او زمنًا ويُجبَر الاب على نفقة زوجة ابنهِ الغائب وولدها وعند الشافعي لا تجب مؤنة زوجة الابن وام ولدهِ

س . هل تجب على الانسان نفقة القريب

ج . تجب لذي رحم محرم فقير عاجز عن الكسب لصغر او لعمى او لزمانة او لعته او لأنوثة القريب بقدر الارث لقولهِ تعالى — وعلى المولود لهُ رزقهنَّ وكسوتهنَّ بالمعروف لا تكلف نفس الاَّ وسعها لا تضار والدة بولدها ولا مولود لهُ بولدهِ وعلى الوارث مثل ذلك (سورة البقرة) فجعل العلة هي الارث فيتقدر الوجوب بقدر العلة ويجبَر الانسان على ذلك لانهُ حق مستحق عليهِ — فلو للعاجز اخت شقيقة واخت لاب واخت لام مؤسرات فثلاثة اخماس النفقة على الشقيقة وخمس على الاخت للاب وخمس على الاخت للام ولو لهُ اخ شقيق واخ لام فسدسهُ على الاخ للام والباقي

if they are poor. In the treatises—Al-Mukhtar and Al-Multaka—the maintenance of the son's wife is due by his father if he were a child, or poor, or infirm; and a father shall be compelled to maintain the wife and child of his absent son. Ash-Shafa'ee holds that the maintenance of the son's wife, or the slave mother of his child, is not due.

Q. Is maintenance to be provided for relations?

A. Yes, it should be furnished to a relation who is within the prohibited degrees, and who is poor and incapable of earning a living, owing to his or her infancy, blindness, infirmity, idiocy, or the relation being a female—the maintenance being provided in proportion to the hereditary rights; for God says, "And he for whom a child is begotten, *i. e.*, the father shall be obliged to maintain them (wives) and clothe them in a reasonable manner. No person shall be taxed beyond his ability. A mother shall not be overtaxed on account of her child, nor a father on account of his child; and the heir shall be obliged to do in like manner." (Koran, Chapter II.). He made the hereditary right a cause, so the obligation is fixed in proportion to the cause; and a person shall be compelled to do it, because it is a right that is due. If an incapable person has a sister of the full blood, and a half sister by the same father, and a uterine sister, and they are solvent, then three-fifths of the maintenance is to be provided by the full sister, and one-fifth by the half consanguineal sister, and one-fifth by the uterine sister. If he has a brother of the whole blood, and a uterine brother, then one-sixth shall be provided by the latter,

على الشقيق وانما تجب نفقة ذي الرحم المحرم على الشخص اذا كان مؤسراً والمؤسر هو الذي كسبهُ يفضل عن نفقة نفسهِ وعيالهِ وعند الشافعي لا تجب على الانسان الاَّ نفقة اصولهِ وفروعهِ

ويفرض القاضي النفقة لزوجة الغائب مدة سفرهِ ولطفلهِ وابنهِ الكبير الزمن والانثى ولابويهِ المحتاجين ولو قادرين في مال لهُ من جنس حقهم كالنقود والطعام والكسوة والتبرعند من يقرُّ بهِ وبالزوجة او النسب امانة كان او ديناً اما اذا لم يقر المستودع او او المديون ولم يعلم القاضي بالزوجية او النسب واردات المرأة اثبات وجود المال والزوجية تسمع بينتها فيقضى بالنفقة لا بالنكاح وتعطى النفقة من مال الزوج ان كان لهُ مال وبهِ قال الشافعي

ويؤخذ ضامن من الزوجة ويحلفها القاضي ان الغائب لم يعطها النفقة ولا كانت ناشزة ولا مطلقة مضت عدتها

وصحَّ للوالد بيع عرض ابنهِ الغائب لا بيع عقارهِ لنفقتهِ

and the remainder by the full brother. Maintenance for an incapable relative within the prohibited degrees is to be provided by a person if he is solvent, *i. e.*, one from whose earnings a surplus is saved after maintaining himself and his family. According to Ash-Shafa'ee a person is bound only to maintain his roots and branches (*i e.*, his parents and offspring).

The Kadhi shall award maintenance to the wife of an absentee, and to his infant child, and his full-grown child who is infirm, or is a female, and to his needy parents, even if they were capable, to be paid out of any property belonging to him which is of the kind due to them, such as money, food, clothes, and gold, such property being found with one who makes an admission of it, and of the marriage or relationship (*i.e.*, who knows that the claimants are the wife, child, or parent of the owner) whether such property is a trust or a loan. But if the trustee or debtor does not admit, and the Kadhi does not know the facts of the marriage or relationship, and the woman desires to prove the existence of the property and the marriage, her evidence shall be heard, and a decree shall be passed for the maintenance, but not for the marriage, and she shall be given maintenance out of property belonging to him, if he has any, and so holds Ash-Shafa'ee.

Security shall be taken from the wife, and the Kadhi shall swear her that the absentee has not provided her with maintenance, and that she is not a deserter, nor has she been divorced, and her term of iddet has expired.

It is valid for the father to sell the movable, not the immovable property of his son, so much

بقدر حاجتهِ لا فوقها ولا في دين لهُ سواها ولو انفق مودعه او مدينهُ على ابويهِ وزوجتهِ وولدهِ بلا امر المالك او القاضي ان وجدهُ ضمن ولو انفقا الوالدان ما عندهما من مال الابن او انفق ولدهُ وزوجتهُ ما عندهما من مالهِ وهو من جنس حقهم لا يضمنون فلو قضى القاضي بنفقة الولادة والقريب ومضت مدة طويلة سقطت لان وجوبها باعتبار الحاجة وقد وقعت الغنية عن الماضي بخلاف نفقة الزوجة لانها للاحتباس ولهذا تجب عند يساره ولكن اذا باذن القاضي استدان عليهِ الولد او الاب او القريب لا تسقط

الكتب المُسْتَنَد اليها العيني على الكنز ورد المحتار على الدر للحنفيَّة والبجيرمي وتحفة ابن حجر والشرقاوي على التحرير للشافعية

الباب الخامس

في النكاح واغراضهِ واحكامهِ

س . ما معنى النكاح

as is needed for his maintenance, but not in excess of it, nor for any debt due to him exclusive of it. If his trustee or debtor maintain his (owner's) parents and wife and child without the order of the owner or Kadhi (provided he could find him), he shall be responsible. If the parents, wife, and child spend, in maintaining themselves, any property belonging to the son, husband or father (as the case may be), which they have possession of, such property being of the kind due to them, they shall not be responsible. Where the Kadhi has decreed maintenance for parents, children or relations within the prohibited degrees, and a long time has passed (without their having received the same), it shall be barred, because the obligation for it has arisen in view of necessity, whereas they have now done without it in the past. The case is different in regard to the maintenance of the wife, because it is owing to her coverture, and therefore it shall be payable when he becomes solvent; but if, with the permission of the Kadhi, the child, or father, or other relations have contracted debts on his behalf for their maintenance, it shall not be time-barred.

Books consulted—Al'ainee ala Alkanz Hanafites, and Begairimee, Tohfat-ibni-Hajar, and Ash-Sharkawi' Ala Attahrir Shaf'aites.

CHAPTER V.

On Marriage: Its Objects and Laws.

Q. What is the meaning of the word "Nikah" (marriage?)

ج . معناهُ في اللغة الضم وفي الشرع هو العقد والوطء او عقد يتضمن اباحة وطء بلفظ انكاح او تزويج ولو بعجمية يفهم معناها العاقدان والشاهدان (بجيرمي على شرح المنهج) وعند الحنفية هو عقد يفيد ملك المتعة اي حل استمتاع الرجل من امرأة لم يمنع من نكاحها مانع شرعي (الدر المختار)

س . هل النكاح واجب وما هو المقصود منهُ

ج . هو من العقود المسنونة باصل الشرع واتفق الائمة على استحبابهِ لمن تاقت نفسهُ اليهِ وخاف الزنا ويكون في حقهِ افضل لهُ من الجهاد والحج والصلوة والصوم التطوع (الميزان للشعراني) ويأثم بتركهِ ويثاب ان نوى تحصيناً وولداً حال القدرة على وطء ومهر ونفقة (در)

والاصل الذي وُضع لهُ النكاح والمقصود هو ابقاء النسل وان لا يخلو العالم عن جنس الانس وانما الشهوة خُلِقت باعثة مستحثة كالموكل بالفحل في اخراج البذر وبالانثى في التمكين

A. It means in common language "embracing or bonding," and in a legal sense it means both the contract and cohabitation, or a contract which purports to legalise cohabitation by words denoting giving in marriage or wedlock, even if it were through a foreign tongue understood by the contracting parties and witnesses. (Begairimee on the Commentary of Al-Minhaj). According to the Hanafee doctrine, it is a contract which implies the possession by a man of the right to enjoy a woman, who is not deterred by any legal obstacle from marrying. (Durr-ul-Mukhtar).

Q. Is marriage obligatory, and what is the object of it?

A. It is one of the legal contracts which are commended by the principles of law, and the Imams (*i. e*, the different Sunnee schools) are unanimous in recommending it to any person whose soul longs for it, and who is afraid of being tempted to commit fornication, in which case it will be more righteous to marry than to make a pilgrimage, or jehad, or optional prayers and fasting. (Al Mizan-Li-Shaâranee). He sins by omitting to do it, and by doing it gets divine reward if his intention is to protect himself from bad temptations, and to have children when he is able to perform conjugal duties, and to pay the wife's dower and maintenance. (Durr-ul-Mukhtar).

The object for which marriage is instituted is to propagate the species, so that this world may not be devoid of human beings; but lust has been created as a stimulating instrument or agency in inducing the male to produce the seeds, and the female to allow the cultivation,

بالحرث تلطفا بهما في السياقة الى اقتناص الولد بسبب الوقاع كالتلطف بالطير في بث الحب الذي يشتهيه ليساق الى الشبكة وكانت القدرة الازلية غير قاصرة عن اختراع الاشخاص ابتداء من غير حراثة وازواج ولكن الحكمة اقتضت ترتيب المسببات على الاسباب اظهارًا للقدرة واتمامًا لعجائب الصنعة وتحقيقًا لما سبقت بهِ المشيئة وحقت بهِ الكلمة (احياء العلوم للغزالي)

س . بين كم من النساء يجوز للرجل ان يجمع

ج . يجوز للحر ان يجمع بين اربع فقط الاَّ إن تتعين الواحدة في حقهِ كسفيه على مذهب الشافعي رض لانهُ انما يُزوَّج للحاجة باذن وليهِ وقد يقصد اتلاف مالهِ لسفههِ ونحوه المجنون فانهُ تتعين فيهِ الواحدة وللعبد ان يجمع بين اثنتين فقط وعند مالك يجوز لهُ ان يجمع بين اربع كالحرّ (الميزان)

س . ما الاصل في نكاح الاربع

ج . الاصل فيهِ قولهُ تعالى (في سورة النساء) فان خفتم الاَّ تقسطوا في اليتامى فانكحوا ما طاب لكم من النساء مثنى وثُلاث ورُباع فان خفتم الاَّ تعدلوا فواحدة

قال الحسن كان الرجل من اهل الجاهلية تكون عندهُ

both being driven gently to chase the birth of children by means of sexual intercourse, in the same way that a bird is led gently into a trap by scattering some grains that he wishes to have. Eternal providence was not incapable of bringing into existence persons spontaneously without cultivation and sexual intercourse; but divine wisdom required that effects be arranged on causes as a display of omnipotence, and as a finishing touch to the wonders of creation, ensuring what His will hath wished and ordained. (Al Ghazali's Ihya-Ulum-uddin).

Q. How many wives can a man take in marriage at the same time?

A. A free man can marry four free women, unless, according to Ash-Shaf'aee, he is restricted to one wife, as it is the case of an extravagant man (indiscreet) disqualified by law from contracting, who is only married with the sanction of his guardian in case of necessity; for he might intend to squander his property through his indiscretion; and so is the case of a madman, for whom one is fixed. A slave can only marry two; but according to Malik he may marry four, like a free man. (Al Mizan).

Q. What is the authority for marrying four wives?

A. The authority is the Koran (Chapter IV. on women) where the Almighty God says, if you fear that you cannot act justly towards female orphans, then marry such women as are agreeable to you, two or three, or four; but if you fear that you cannot act impartially towards so many, marry only one.

Al Hasan-al-Busree said, during the dark ages (*i.e.*, before Islamic era) any man who had in his

الايتام وفيهنّ من يحل له نكاحها فيتزوجها لاجل مالها وهي لاتعجبهُ كراهةَ ان يأخذها غريب فيشاركه في مالها ثم يسيء صحبتها ويتربص بها ان تموت فيرثها فعاب الله تعالى ذلك وانزل هذه الآية

وقال المحدّث عكرمة كان الرجل من قريش يتزوج العشرين من النساء والاكثر فاذا صار معدمًا من مؤن نسائهِ مالَ الى مالِ يتيمهِ الذي في حجرهِ فانفقهُ فقيل لهم لاتزيدوا على اربع حتى لايحوجكم الى اخذ اموال اليتامى وهذه رواية طاؤوس عن ابن عباس رضى الله عنهما

وقال سعيد بن جبير وقتادة والضحاك والسدي معنى هذه الآية انهُ كما خفتم ان لاتقسطوا في اليتامى فكذلك خافوا في النساء ان لاتعدلوا فيهنّ فلا تتزوجوا اكثر مما يمكنكم القيام بحقهنّ لان النساء في الضعف كاليتامى ثم رخص في نكاح الاربع فقال فانكحوا ما طاب لكم مثنى وثلاث ورباع فان خفتم الاّ تعدلوا (فيهنّ) فواحدة (تفسير القرآن للبغوي)

كان في شريعة موسى عليهِ السلام جواز النساء من غير حصر تغليبًا لمصلحة الرجال وفي شريعة عيسى عليهِ السلام لايجوز

charge female orphans, one of whom it was lawful for him to marry, used to take her in marriage for the sake of her property, though he did not like her, lest an outsider should marry her and share with him her property. After marrying her the guardian used to ill-treat her, and lived with her on bad terms, wishing that she might die, so that he might inherit her property. God therefore stigmatised this, and sent down this verse.

Traditionist Akramah says, a man of Koreish used to marry as many as twenty women or more, and when he became so destitute as to be unable to maintain his wives, he set about the property of his female ward which was in his custody, and spent it; it was therefore said to them that they should not marry more than four wives, so that they might not be obliged to appropriate the property of orphans. This exposition was given by Tawoos on the authority of Ibn Abbas.

The traditionists Saeed bin Jubair and Kotadah and Adhhak and Assudie said, the meaning of the above passage is, that as you fear that you could not act with equity towards orphans, you should also fear doing wrong to women, and therefore don't marry more than those whom you can maintain and perform their rights; because women are as weak as orphans, so He said marry one, two, three or four, but if you fear that you cannot act impartially towards them, marry only one. (Albaghawee's Exposition of the Koran).

By the law of Moses (peace be upon him) more regard was given to the interest of men who were allowed to marry women without restriction

غير واحدة تغليباً لمصلحة النساء فراعت شريعة نبينا محمد صلى الله عليهِ وسلم مصلحة النوعين (بجيرمي)

س . اشرح لي احكام النكاح

ج . على مذهب ابي حنيفة رض يُشترَط فيهِ بلوغ العاقدين وحريتهما ورضاهما فلا يصح نكاح القاصر والمجنون الاَّ باذن وليهما ونكاح العبد يتوقف صحتهُ على اذن سيدهِ ونكاح المكرَه يفسخ عند ازالة الاسباب التي اكرهتهُ على ذلك فينعقد نكاح الحرة المكلفة اي العاقلة البالغة ولو كانت بكرًا بلا رضا وليها والاصل فيهِ ان كل من تصرف في مالهِ تصرف في نفسهِ وما لا فلا ولا للولي الاعتراض على الحرة المكلفة الاَّ ان تضع نفسها في غير كفء او زوَّجت نفسها باقل من مهر مثلها فان لم يكن الزوج كفأً او لم يتم لها مهر المثل فرَّق القاضي بينهما ما لم تلد منهُ

س . كيف ينعقد النكاح

ج . ينعقد بايجاب من احد العاقدين وقبول من الاخر

of number, and under the laws of Jesus Christ (peace be upon him) the interest of women is taken into more consideration, and only one wife is allowed. The law of our Prophet Mohammed (peace be upon him) took into account the interest of both sexes. (Begairimee).

Q. State the rules regarding the marriage contract?

A. According to the doctrine of Abu Hanifah the essentials are puberty, freedom, and free consent of both contracting parties; so a minor's and lunatic's marriage is not valid unless his guardian ratify it, and the validity of a slave's marriage depends on the sanction of his master, and the marrying of one who has been forced can be repudiated on the cessation of the causes which have forced him to enter into it. A woman who has become of full age, and is of sound mind, can contract herself into marriage, even if she is a virgin. The principle is, that any person who has a right to dispose of his or her own property can dispose of himself or herself, and he who cannot do the one cannot do the other. The guardian has no right to interfere against a woman who is of full age and sound mind, unless she has married a man who is not a match for her, or unless she has married for less than the proper dower. If the husband is not a match, or if he does not pay the balance of the proper dower, the Kadhi should separate them, provided she has not given birth to a child by the husband.

Q. How is a marriage contract concluded?

A. It is concluded by proposal from one party, and acceptance from the other; both

ويلزم اتحاد المجلس والزمان فلو اوجب احدهما فقام الاخر واشتغل بعمل اخر بطل الايجاب ويلزم ان يكون العقد بحضور شاهدين مسلمين مكلفين سامعين قول العاقدين فاهمين انهُ نكاح ولو كانا فاسقين او ابني العاقدين ويصح العقد بحضور حرٍّ وحرَّتين لان الحقوق المالية تثبت بشهادة رجل وامرأتين ويُشترَط سماع كل من العاقدين لفظ الاخر ليتحقق رضاهما وانما لايشترط في الشاهدين العدالة لان الاشاعة تحصل بشهادة شاهدين ولو كانا فاسقين (رد المحتار)

س . هل ينعقد النكاح بتعاطٍ او كتابة

ج . لا يصحّ بتعاطٍ كقبض مهر او بكتابة حاضر كما اذا كتب الرجل الى امرأة تزوجتك فكتبت قبلت لم يصحّ بل يصحّ عند الحنفي بكتاب غائب وصورتهُ ان يكتب اليها يخطبها فاذا بلغها الكتاب احضرت الشهود وقرأتهُ عليهم وقالت زوجت نفسي منهُ او تقول فلان كتب اليّ يخطبني فاشهدوا اني زوّجت نفسي منهُ اما لو لم تقل بحضرتهم سوى زوجت نفسي

should be made at the same time and place, for if one of them proposes and the other gets up and does some other business, the proposal becomes void. The contract should be performed in the presence of two Mussulman witnesses, who should be free men of full age and sound mind, and who should hear the statement of the two contracting parties, and understand that it is a contract of marriage, even if they (the two witnesses) are of bad moral character, or if they are sons of the contracting parties; and the contract will be valid if made in the presence of one man and two free women, for civil rights are determined by the evidence of one man and two women. It is essential that both parties should hear the words of each other, so that their consent may be ascertained. It matters not whether they (the witnesses) were upright or not, for publicity is obtained by the evidence of two witnesses, though they may be of bad moral character. (Rudd-ul-Muhtar).

Q. Can a contract of marriage be concluded merely by an act of giving or by a writing?

A. It cannot be effected by giving or taking, such as receiving the dower, nor by a writing made by a person who is present; for instance, when a man writes to a woman, "I have married you," and she writes, "I have accepted," no contract is concluded, but it may be effected by a writing from an absent person, and the form of doing it is that he should write to her, betrothing her, and when the letter reaches her, she should call the witnesses and read it over to them, and she should say, "I have married myself to him;" but if she says in their presence nothing more than, "I have married myself to him," it is not valid, because

منهُ لم يصح لان سماع الشطرين شرط صحة النكاح (رد المحتار)

س . هل يثبت النكاح بالاقرار

ج . ان كان الاقرار بمحضر من الشهود صحّ وجُعل الاقرار انشاء ولو اقرّ ولي صغير او صغيرة او وكيل رجل او امرأة بالنكاح لم ينفذ لانهُ اقرار على الغير الّا ان يشهد الشهود بالنكاح وينصب القاضي خصمًا على الصغير حتى ينكر فتقام البينة او يدرك الصغير فيصدقهُ (رد المحتار)

س . هل تختلف احكام الشافعي في هذه الامور

ج . عندهُ نكاح الصغير والسفيه والمجنون باطل من اصلهِ اذا لم يعقدهُ وليهُ وكذلك نكاح العبد وعند ابي حنيفة يصحّ نكاح هولاء الاشخاص ولكن صحتهُ موقوفة على اجازة الوليّ

(٢) يُشترط في الشاهدين الاسلام والبلوغ والعقل والحرية والذكورة وان يكونا مستوري العدالة

(٣) اذا كان الزوجان بالغين عاقلين فلا يصح نكاحهما الّا برضاهما ولكن للاب او الجد ان يزوج البكر من غير رضاها

to hear both sides is an essential condition of the contract of marriage. (Rudd-ul-Muhtar).

Q. Can a contract of marriage be proved by an admission ?

A. If the admission is made in the presence of witnesses it is valid, and the admission shall be taken for an execution of the contract; but when the guardian of a minor, or the agent of a man or woman admits the marriage it shall have no effect, because it is an admission against other persons, unless evidence is given of the marriage, and the Kadhi appoints an opposing friend on behalf of the minor; so that he may deny, and evidence be established, or until the minor becomes of age and admits it. (Rudd-ul-Muhtar).

Q. Do the rules of Ash-Shafa'ee differ in these matters ?

A. According to him a contract of marriage by a minor, or one who is indiscreet and disqualified by law from contracting, or a *non compos mentis*, is null and void *abinitio* unless the guardian has concluded it, and equally so is the marriage of a slave. With the Hanafee the marriage of such persons is valid, but its validity is subject to the sanction of their guardian.

(2) The essential qualifications of the two witnesses are profession of the Mussulman faith, full age, sound mind, and freedom, and they should be males, and of apparently good moral character.

(3) If the husband and wife are of full age and sound mind, their marriage can only be valid with their own free consent; but the father, or, in his default, grandfather, may give in marriage a virgin daughter without her consent on certain

بشروط سيأتي بيانها في باب الولاية

(٤) لايصح النكاح الاّ بحضور ولي من جهة المرأة يتولى النكاح فان عقدت المرأة نكاحها بنفسها فهو باطل

(٥) اذا طلبت المرأة التزويج من كفء بدون مهر مثلها لزم الوالي اجابتها

(٦) يقبل اقرار مكلفة بنكاح لمصدّقها وان كذبها وليها لان النكاح حق الزوجين فيثبت بتصادقهما ويُقبل اقرار مُجبر من اب او جد او سيد على موليتهِ بالنكاح لقدرتهِ على انشائهِ (بجيرمي وتحفةُ ابن حجر)

س . هل يثبت النسب بالشهرة — زيد وهند كانا يسكنان في بيت واحد مدة سنين كرجل وزوجتهِ وكذا عرفهما الناس وولدت لهُ ولدًا ثم ماتت وبعد ذلك مات الرجل فجاء عامل البلدة وضبط اموال الميت وانكر نسب الولد فقال الولد انهُ ابن المتوفى والجيران يشهدون بذلك بالشهرة ولكن لا احد يدري

conditions which will be detailed in the Chapter on Guardianship.

(4) No marriage contract is valid without the attendance of a guardian who, on behalf of the woman, should enter into the contract. If the woman personally performs the contract of her marriage it is null and void.

(5) When a woman asks that she should be married to a certain man who is a match for her for less than her proper dower, it is obligatory on her guardian to comply with her request.

(6) An admission by a woman who has attained to puberty, and is of sound mind, that she is married to a certain man who acknowledges her claim is admissable, even if her guardian give her the lie; because to marry is the right of husband and wife, and it is proved by their own admission. An admission (of the contract of marriage) by a compulsory guardian, such as the father or grandfather, or the master of a slave against his ward, is receivable, as he (the father, or grandfather, or master) is capable of entering into the contract. (Begairimee and Tohfat ibin-Hajar).

Q. Can paternity be proved by notoriety, *i.e.*, hearsay evidence? Zaid and Hind (a woman) had lived in the same house like husband and wife for many years, and so they had been known to the people. She gave birth to a son by him, then she died, and afterwards the man also died. The collector of the town came and attached the property of the deceased, and denied the parentage of the son. The boy asserted that he was the son of the deceased, and the neighbours bore evidence to it as a matter of notoriety; but no one knows who performed the

من عقد بينهما ومن كان الشهود

ج . نعم يكفي ما ذكرتهُ في اثبات الزوجية بينهما ويتوارثان وينسب الى الزوج ما توالداهُ ولا عبرة بعدم الاطلاع على من عقد بينهما عقد النكاح وهذه من المسائل الستة والعشرين التي تثبت بالشيوع والسماع (الكواكب الدرّية للايباري)

س . هل يجوز للرجل النظر الى مخطوبتهِ قبل العقد

ج . يسن للرجل عند عزمهِ على نكاح امرأة النظر اليها لقولهِ صلى الله عليهِ وسلم للمغيرة ابن شعبة وقد خطب امرأة انظر اليها فانهُ احرى ان يؤدم بينكما المودّة والالفة ووقت النظر قبل الخطبة فاذا لم تعجبهُ يسكت ولا يقول لا اريدها او هي كذا وكذا لئلاَّ تتأذى بذلك ونظر المرأة الى الرجل لاجل النكاح يُسنّ لها اذا ارادت تزويجهُ لانهُ يعجبها منهُ ما يعجبهُ منها ولكل منهما تكرير النظر عند حاجتهِ ليتبيّن هيئة منظوره فلا يندم بعد نكاحهِ (بجيرمي)

ceremonies of marriage, and who were the witnesses.

A. What you have mentioned is sufficient to establish the marriage, and they should inherit each other, their offspring should be ascribed to the husband. The question as to whom performed the ceremonies of the contract of marriage between them is immaterial. This is one of the twenty-six questions which are established by notoriety, or hearsay evidence. (Al-Kawakib Ad-durriyah lilabiaree).

Q. Is it lawful for a man to see his fiancée before the contract is entered into ?

A. It is recommended that a man, intending to marry a woman, should see her, as the Prophet (peace and blessings be upon him) said to Al-Moghirah bin Sho'abah, who had asked for a certain woman in marriage, "Look at her, for it will be conducive to the durability of friendship and harmony between you." The time for seeing her should precede the betrothing. If he is not pleased with her, he should keep silence, and should not say, "I don't want her, or she is so and so," lest she feel annoyed at the same. The woman is recommended to have a look at the man, if she wants to marry him; because anything that would please her with him will please him with her (*i.e.*, both will be pleased with good features) and each of them can renew his or her glances whenever he or she wants, in order to discern the features of his or her object, so that he or she may not repent after marriage. (Begairimee).

الباب السادس

في البلوغ والبكارة والثيوبة والانكحة الباطلة

س . ما هو سن البلوغ

ج . بلوغ الغلام يكون بالاحتلام او الاحبال او الانزال لانها امارات البلوغ وهذا بالاجماع وان لم توجد علامة من هذه العلامات فحتى يتمّ لهُ ثماني عشرة سنة عند ابي حنيفة وبلوغ الجارية بالحيض والاحتلام والحبل وهذا بالاجماع ايضاً والاّ فحتى يتم لها سبع عشرة سنة ولكن يُفتى بالبلوغ في الغلام والجارية على قول ابي يوسف ومحمد بخمس عشرة سنة لقصر اعمار اهل زماننا وهذا موافق للثلاثة الأئمة ايضاً لانهُ سن البلوغ المعتاد الغالب وادنى مدة البلوغ في حق الغلام اثنتا عشرة سنة وفي حق الجارية تسع سنين فان راهق الغلام والجارية اي بلغا هذا السن وقالا

CHAPTER VI.

On Puberty, Virginity, Womanhood, and Illegal Marriages.

Q. What is the age of puberty?

A. The puberty of a boy is established by the discharge of semen, or by nocturnal discharges of semen (amorous dreams), or by his generating power; because these are the symptoms of puberty according to all doctrines. If none of such symptoms exist, then when be completes his eighteenth year, according to Abu Hanifah. The puberty of a girl is attained on her having the menstrual courses, or discharges of nocturnal semen, or becoming pregnant. This is also according to all doctrines, otherwise she attains to puberty when she completes her seventeenth year. It is, however, given us as an authoritative decision that fifteen years is the age of puberty in the male and female according to the opinions of Abu Yuseff and Mahomed (companions of Abu Hanifah); the reason for it is the short human life in our times. This is conformable to the other three Imams also; because, generally, this is the ordinary age of puberty. The minimum age of puberty is, in the case of a boy, twelve years, and, in the case of a girl, nine years; when they (the male and female) become Morahiks, *i.e.*, attain to this age, and say, "We have become of age," they should be believed, unless appearances show their falsehood, because it is a matter which can only be ascertained from their sides (*i.e.*, it lies only within their knowledge) so their statement should be accepted in

بلغنا صُدِّقا ان لم يكذّبها الظاهر لانهُ امر لا يوقَف عليهِ الاَّ من جهتها فيُقبل فيهِ قولها كما يُقبل قول المرأة فيما لا يطّلع عليهِ غيرها كالحيض (شرح العيني على الكنز)

س . ما معنى البِكر .

ج . البكر اسم امرأة لم تجامع رجلاً ومن زالت بكارتها بوثبة او حدة حيض او حصول جراحة او تعنيس اي كبر فهي بكر ويكون احكامها احكام البكر في التزويج ومن زالت بكارتها بزنا خفي فهي كذلك لان الناس عرفوها بكرًا ان لم يتكرّر الزنا اما اذا اشتهر زناها فحكمها حكم الثيّب (در) وعند الشافعي الثيّب من زالت بكارتها بوطء ولو حرامًا واما من خُلقت بلا بكارة او زالت بكارتها بغير ما ذُكر كسقطة وحدّة حيض فحكمها كحكم البكر لانها لم تمارس الرجال وهي على غباوتها وحيائها (بجيرمي)

س . هل يصح نكاح المُتعَة وما هي المتعة

ج . نكاح المتعة باطل بالاجماع وصفتهُ ان يتزوّج الرجل امرأة الى مدة بكذا وكذا دينار فيقول تزوجتك الى شهر او سنة او نحو ذلك بكذا وما ورد في اباحتهِ منسوخ باجماع العلماء حديثًا وقديمًا خلافًا لطائفة من الشيعة وهم رووهُ عن ابن

the same way that a woman's statement is admittel in matters with which others cannot become acquainted, such as the menstrual courses. (Al'ainee-ala-Al-Kanz).

Q. What is meant by a virgin?

A. A virgin is a woman who has had no carnal knowledge of man, and she whose virginity has been destroyed by a jump, or the severity of the courses, or ulceration, or old age is a virgin, and subject to the same rules as a virgin; and equally so is she who has lost her virginity by a clandestine fornication, unless her improper act is repeated and becomes notorious, in which case she is a thayyib (like a woman who was married and bedded). According to Ash-Shafa'ee, Ath-thayyib is a woman whose virginity has been destroyed by sexual intercourse, even if it were unlawful; but she who is born without virginity, or whose virginity has ceased in any manner other than what is mentioned, is a virgin; because she has not practised (intercourse with) men, and still retains her ignorance and modesty.

Q. Is Nikah-ul-Mota'a legal, and what is Mota'a?

A. Nikah-ul-Mota'a (a temporary marriage) is null and void according to all doctrines. Its description is this:—A man marries a woman for a certain period for such and such dinars, and he says, "I marry you for a month or a year, or the like, for such and such a dower." What had been related about its lawfulness is abolished by the concurrence of the learned in ancient and modern times, contrary to a sect of the Sheahs, who ascribe its authority to Ibn Abbas, whereas its abolition has been proved on his authority. (Al-

عباس والثابت عنهُ بطلانه ويسمى بالمتعة لان الغرض منهُ مجرّد التمتع اي التنعم والتلذّذ دون التوالد وغيره من اغراض النكاح كالتوارث

س . ما هو نكاح الشغار وهل يصح ذلك

ج . هو عقد بهِ يزوج الرجل ابنتهُ او اختهُ على ان يزوجهُ الزوج ابنتهُ او اختهُ مثلاً ليكون احد العقدين عوضاً عن الاخر فعند الشافعي العقد باطل وعند ابي حنيفة صحيح ولكل منهما مهر المثل اعني الشرط باطل

س . ما هو المحلِّل وهل يصح نكاحهُ

ج . المحلل هو الذي يتزوج امرأة على ان يحلّها لمطلّقها ثلاثًا بشرط اذا وطئها فهي طالق فعند الحنفي صح النكاح وبطل الشرط وانما عند الشافعي لا يصح النكاح

س . هل يصح النكاح اذا شرطت المرأة على الزوج ان لا يتزوج غيرها

ج . لا يبطل النكاح بالشرط الفاسد فاذا تزوج رجل امرأة بشرط ان لا يتزوج غيرها او تزوجها على ان لا يكون لها مهر فالعقد صحيح والشرط باطل لانهُ يحرم الحلال ولو شرطت

Mizan and Rudd-ul-Muhtar). It has been called Mota'a because its object is merely to have enjoyment, that is, voluptuousness and sexual pleasure, but not to have children, and other objects of marriage, such as inheriting each other.

Q. What is Nikah-ush-Shighar, and is it valid?

A. It is a contract by which a man gives in marriage, for instance, his daughter or sister, on condition that the husband gives in marriage to him his daughter or sister; so each contract becomes the consideration for the other. According to Ash-Shafa'ee it is null and void, but with the Hanafee the contract is valid, and each of them is entitled to a proper dower, that is to say, the condition is void.

Q. What is the Muhallil, and is his marriage valid?

A. The Muhallil is he who marries a woman on the understanding of making her lawful to one who has divorced her three times, on condition that when the marriage is consummated by him she becomes divorced (so that she may legally be re-united to her former husband). According to the Hanafee the marriage is valid and the condition is void, but with the Shafa'ee the marriage is invalid.

Q. Is a contract of marriage valid when the woman stipulates with the husband that he should not marry any other woman in addition to her?

A. Marriage does not become void by an illegal condition. When a man marries a woman, on condition that he would not marry another at the same time with her, or if he marry her on condition that she should have no dower, the

ان لا يسافر بها الى بلد اخرى فعند الشافعي اذا اوفاها الزوج المهر لهُ ان يسافر بها حيث شاء وقال ابو حنيفة انهُ لا يخرجها من بلدها الى بلد اخرى بلا رضاها لفساد الزمان لان الغريب يُؤذى ويتضرّر وقد يكون الزوج غير مأمون عليها يريد نقلها من بين اهلها ليؤذيها او يأخذ مالها وقيل يسافر بها الى قرى المصر القريبة لانها ليست بغربة (رحمة الأُمة في اختلاف الأَئمة ورد المحتار)

الباب السابع

في المحرمات وموانع النكاح

س . ما هي اسباب التحريم

اسبابهُ سبعة (الاول) قرابة فيُحرم على الانسان نكاح اصولهِ وفروعهِ وفروع ابويهِ وهم امهاتهُ وامهات امهاتهِ وآبائهِ وان علون وبناتهِ وبنات اولادهِ وان سفلن واخواته وبنات

contract is valid and the condition is void, because it makes unlawful what is lawful. If he stipulates that he would remove her with him to another country, Ash-Shafa'ee holds that when the husband pays her in full the dower, he may take her with him wherever he pleases. Abu Hanifah says that he should not remove her from her country to another, because a stranger becomes annoyed and injured owing to the corruption of times, for the husband may not be a trustworthy custodian of her, and he may wish to take her away from her people with a view to annoy her or to misappropriate her property. It is, however, said that he may remove her to villages near the city, for that is not a journey. (Rudd-ul-Muhtar and Ruhmut-ul-Ummah-fi-ikhtilafi-l-aaemmah).

CHAPTER VII.

On the Prohibited Degrees and Impediments to Marriage.

Q. What are the causes of the prohibited degrees?

A. Its causes are seven. The first is consanguinity; thus a man is forbidden to marry his roots and branches, and the branches of his parents, that is to say, his mother and grandmothers, and the mothers of his fathers, or ancestors how high soever, and his daughters, and children's daughters, and his sisters and nieces, and the daughters of his nephews and nieces how low soever, and it is forbidden to marry the

الاخوة والاخوات وان نزلن وتُحرم فروع اجداده وجداته ببطن واحد فلهذا تحرم العمات والخالات وتحل بنات العمات والاعمام وبنات الخالات والاخوال

(الثاني) مصاهرة يُحرَم بها على الرجل ربيبته اي بنت زوجته ان دخل بها وام زوجته وجداتها مطلقًا بمجرّد العقد الصحيح وان لم توطأ الزوجة لما تقرّر من ان وطء الامهات يحرّم البنات ونكاح البنات يحرّم الامهات وتُحرَم زوجة اصله وفرعه ولو بعيدًا دخل بها او لا ولكن بنت زوجة ابيه او ابنه من زوج كان لها من قبل حلال

عند ابي حنيفة الزنا واللمس والنظر بشهوة الى العورة وهي ما بين السرّة والركبة يوجب حرمة المصاهرة خلافًا للشافعي فتُحرَم هي على آباء الواطئ وان علوا وعلى اولاده وان سفلوا وتحرم على الواطئ امهاتها وان علون وبناتها وان سفلن لقوله عليه الصلوة والسلام من مسّ امرأة بشهوة حُرِّمت عليه امها وبنتها

س . هل يجوز نكاح الزانية

ج . اذا تزوج رجل بامرأة رآها تزني جاز وطئها من

branches of his grandfathers and grandmothers in one degree (generation); therefore paternal and maternal aunts are forbidden, but the daughters of paternal and maternal uncles and aunts are lawful.

The second is affinity. A man is forbidden to marry the daughter of his wife, whose marriage was consummated, and her mother and grandmothers absolutely by reason of a contract of marriage being entered into, even if the wife was not bedded, because it is held that carnal intercourse with mothers renders the daughters unlawful, and a contract of marriage with daughters renders the mothers unlawful. The wife of his ancestor or offspring, how far he may be, is forbidden, whether he had carnal access to her or not, but a daughter which his father's or son's wife had (by another husband) is lawful.

Abu Hanifah holds contrary to Ash-Shafa'ee that to commit adultery or fornication with a woman, or to touch her lustfully, or to see lustfully her naked part (between the knee and navel), has the same effect as the affinity prohibition; so she becomes unlawful to the father and grandfathers of the fornicator and to his children how low soever, her mother and grandmothers how high soever, and her daughters how low soever, are forbidden to the fornicator, because he, the Prophet (peace and blessings be upon him) hath said: "He who touches a woman lustfully is forbidden to have her mother or daughter." (Al Kanz).

Q. Is it lawful to marry an adulteress or a prostitute?

A. If a man marry a woman whom he saw commit fornication, he may cohabit with her

غير استبراء وعند ابي حنيفة لا يجوز وطئها من غير استبراء بحيضه فان كانت حبلى من غيره يُحرم وطوءها حتى تضع لئلاً يسقي ماؤهُ زرع غيره وان كان الحمل ثابت النسب فلا يحل تزوجها وعند الشافعي يجوز التزوج والوطء جميعاً

(الثالث) رضاع اذا وقع في مدة سنتين من يوم الولادة سواء كان الرضاع قليلاً او كثيراً حتى لو كان رضعة واحدة وقال الشافعي لا يثبت الرضاع الاَّ بخمس رضعات فيحرم بالرضاع ما يحرم من النسب الاَّ ام اخيهِ وام اخته من الرضاع واخت ابنه وبنته من الرضاع واخت اخيه من الرضاع فانهُ يجوز التزوج بهن

وزوج المرضعة الذي لبنها نزل منهُ يصير ابًا للرضيع وابن زوج المرضعة اخًا لهُ وبنتهُ اختًا لهُ وابوهُ جدًّا وامهُ جدةً لهُ واخوهُ عمًّا لهُ واختهُ عمة لهُ ولا حل بين رضيعي ثدي ولا بين الرضيعة وولد مرضعتها وولد ولدها لانهُ ولد الاخ من الرضاع

(الرابع) الجمع بين المحارم فلا يجوز للرجل ان يجمع

without waiting until she has had her courses; but with Abu Hanifah it is unlawful to cohabit with her until she has had one course. If she is pregnant by another man, it is unlawful to cohabit with her until she is delivered of the child, lest his water irrigates the crop of another. If, however, the embryo is of proved parentage, it is unlawful to marry her; but according to Ash-Shafa'ee it is lawful both to marry and cohabit with her.

The third cause is fosterage, when it occurs within two years from the date of birth, whether it was much or little, even if it were one suck. Ash-Shafa'ee says: "Fosterage is only established by five sucks." Whatsoever is prohibited by reason of consanguinity is prohibited by reason of fosterage, excepting the mother of a foster-brother or foster-sister, and a foster-son's or daughter's sister, or a foster-brother's sister, whom it is lawful to marry.

The husband of a foster-woman, who caused the production of her milk, shall become a father of the sucking child, the son of the husband of the foster-woman shall become its brother, and his daughter shall become its sister, and his father its grandfather, and his mother its grandmother, and his brother its uncle, and his sister its aunt. It is not lawful for two who have sucked one breast to marry each other, nor can a sucking female child (when full grown) marry the child, or child's child, of its foster-mother, because he is a foster-brother's son.

The fourth cause is marrying, at the same time, women who are within the prohibited degrees; thus it is not lawful to marry two sisters at the same time, or to marry a woman and her

بين الاختين ولا بين المرأة وعمتها ولا عمة ابيها ولا الخالة على بنت اختها ولا يجمع بين امرأتين لو كانت احداهما ذكرًا لما جاز له ان يتزوج بالاخرى

(الخامس) ملكٌ حُرِّم نكاح المولى امته والعبد سيدته لان المملوكية تنافي المالكية فان النكاح ما شُرع الاَّ مثمرًا ثمرات مشتركة في الملك بين المتناكحين منها ما تختص هي بملكو كالنفقة والسكنى والقسم ومنها ما يختص بملك الزوج كوجوب التمكين والقرار في المنزل والتحصن عن غيره ومنها ما يكون الملك في كل منهما مشتركًا كالاستمتاع مجامعةً ومباشرةً أما اذا تزوجها متنزهًا عن وطئها حرامًا فهو حسن لاحتمال ان تكون حرّة او مُعتَقة الغير

(السادس) شركٌ يحرّم به نكاح من لا كتاب لها كوثنية

paternal aunt, or her father's aunt, or a woman and her brother's or sister's daughter, or to marry two women, supposing one of them were a male, he could not have married the other.

The fifth cause is possession or ownership; it is forbidden to marry one's slave, because to be held in possession is opposed to being a possessor; for marriage has been instituted but to bear fruits which are held in possession jointly by the married partners, some of which are possessed solely by the woman, as the right to maintenance, lodging, impartial treatment (by the husband of more than one wife;) some are possessed solely by the husband, such as the duty of allowing sexual intercourse, and of remaining in his house, and of preserving her modesty from others, and some of such fruits are held in possession jointly by them both as social and sexual intercourse. But it would be well if he marry her (*i. e.*, his slave woman), desiring to abstain from cohabiting with her unlawfully on the supposition that she is a free woman, or a slave who has been emancipated by another person.*

Sixth, Polytheism: it is forbidden to marry a woman who has no scriptures, such as an idolatress, or a magi, or the worshipper of a star; but

*It is lawful for a man to cohabit with his she slave, and his children by her are legetimate, provided he does not deny the parentage of the firstborn child; but the slave woman has not the same right as free wives in regard to separate maintenance and lodging, etc., etc, nor does she get a dower, nor inherit anything of her master's estate unless it is bequeathed to her, though she becomes emancipated on the death of her master to whom she has borne a child or children, and, as such children are legetimate, they inherit their father in the same way as if they were borne by a free wife.

ومجوسية وعبادة كوكب وتحلّ كتابية اي يهودية ونصرانية مؤمنة بنبي مرسل ومقرّة بكتاب والكتابية المنكوحة كمسلمة في نفقة وقسم وطلاق وتُجبر على غسل حيض ونفاس وجنابة وترك اكل خنزير وشرب خمر واما المرتدّة من الاسلام فلا تحلّ ولو ارتدّ احد الزوجين نجزتَ الفرقة

(السابع) ادخال امة على حرّة لا يجوز عند ابي حنيفة تزويج امة على حرّة وانما يجوز تزويج الحرّة على الأمة وعند الشافعي لايجوز نكاح الحر لأمة الاّ بشرطين (١) ان لا تكون تحتهُ حرة تصلح للاستمتاع (٢) العجز عن صداق الحرّة وخوف العنت — ولا تحل لمسلم الامة الاّ اذا كانت مسلمة وقال ابو حنيفة يجوز ذلك مع عدم الشرطين

س . هل توجد موانع اخرى للنكاح

ج . نعم (الاول) ان تكون المرأة منكوحة الغير او تكون معتدة الغير سواء كانت عدة وفاة او طلاق او وطء شبهة او

it is lawful to marry a woman who has a scripture, *i. e.*, a Jewess or a Christian female who believes in a prophet and in a bible. The Jewess or Christian woman stands on the same footing as a Mahomedan woman as to maintenance, impartial treatment, and divorce; and she should be compelled to wash (clean herself) from the menses, childbirth, and sexual pollution, and to desist from eating pork and drinking wine. A female apostate from Islam is not lawful. If one of a married couple becomes an apostate, separation becomes inevitable.

Seventh, adding a slave wife to a free woman. According to Abu Hanifah it is not lawful for one to marry a slave woman when he has already a free wife; but it is legal to add a free woman to a slave wife. Ash-Shafa'ee holds that it is unlawful for a free man to marry a slave woman, except on two condition: (1) that he has not a free woman fit for enjoyment; (2) that he is unable to pay the dower of a free woman, and is afraid of being tempted to commit fornication. And it is not lawful for a Mussulman to marry a slave unless she is a Mussulman; but Abu Hanifah says that it is lawful to do so in the absence of the two conditions.

Q. Are there other impediments to marriage?

A. Yes. First, when the woman is already married to another man, or is undergoing the prescribed term of iddet (before which she could not remarry), whether it was in consequence of the death (of her husband), or of divorce, or of a nullified marriage, or whether she was (a slave woman) waiting until she passes the menses in consequence of cohabitation with her master. Second, when this man (who wants to marry) has

كانت في استبراء وطء عن ملك يمين (الثاني) ان يكون هذا الناكح قد طلقها ثلاثًا فهي لا تحل له ما لم يتزوجها ويطأها زوج غيرهُ بنكاح صحيح (الثالث) ان يكون الناكح قد لاعنها فانها تحرم عليهِ ابدًا بعد اللعان (الرابع) ان تكون محرّمة لحج او عمرة او كان الزوج كذلك فلا ينعقد النكاح الاَّ بعد تمام التحلل (الخامس) على مذهب الشافعي ان تكون يتيمة او تكون ثيبًا صغيرة فلا يصح نكاحها الاَّ بعد البلوغ اما عند ابي حنيفة يصح نكاح الثيب الصغيرة اذا زوّجها ابوها او جدّها ويصح نكاح اليتيمة ولها الخيار بعد البلوغ اذا كان المزوّج غير الاب والجد (السادس) اذا كان للرجل اربع زوجات اما في نفس النكاح او في عدّة الرجعة تحرم عليهِ الخامسة (راجع العيني على الكنز ورد المحتار على الدر والبجيرمي)

الباب الثامن

في الولاية

س . ما هي الولاية في النكاح وكيف تثبت عند ابي حنيفة رض

divorced her three times (*i. e.*, irreversibly), she becomes prohibited to him until she is married by a valid contract, and bedded by another man. Third, when this man had imprecated her (and disowned her child), for she becomes prohibited to him for ever after imprecation. Fourth, when the woman is actually performing the ceremonies of Ihram on pilgrimage, and of Omrah, or when the husband is doing so, the marriage contract cannot be concluded until the ceremonies are over. Fifth, when the girl is an orphan (*i.e.*, her father is dead), or when she had already been married and divorced, and she is still a minor, her marriage will not be valid until after she attains to puberty; but according to Abu Hanifah the marriage of a minor thayyib is valid if given in marriage by her father or grandfather; and the marriage of a girl, whose father is dead, is valid; but she has the option of obtaining a dissolution of it on attaining to puberty when she is given in marriage by any guardian other than her father or grandfather. Sixth, when the man has four wives, whether they are actually in the bond of marriage, or are undergoing the prescribed term of iddet from a reversible divorce, he is forbidden to have a fifth one. (Ala'inee ala Kanz, and Rudd-ul-Muhtar, and Begairimee).

CHAPTER VIII.

On Guardianship.

Q. What is meant by guardianship for marriage, and how is it established according to Abu Hanifah?

الولاية تعريفها الفقهي تنفيذ القول على الغير وتثبت باربعة اسباب (١) قرابة يدخل فيها العصبات والارحام (٢) ملكٌ اي ملك السيد لعبدِهِ اوامتهِ (٣) ولاء اي ولاء العتاقة او الموالاة (٤) امامة دخل فيها القاضي المأذونُ بالتزويج لانهُ نائب عن الامام — والولاية هنا نوعان اي ولاية ندب على المكلفة اعني البالغة العاقلة سواء كانت بكرًا او ثيبًا وولاية اجبار على الصغيرة ولو كانت ثيبًا او معتوهة او مملوكة (در)

س . من الولي على مذهب ابي حنيفة

ج . الولي في النكاح هو العصبة بنفسهِ وهو من يتصل بالميت بلا توسط انثى على ترتيب الارث والحجب فيقدم ابن المجنونة على ابيها لانهُ يحجبهُ حجب نقصان فان لم يكن عصبة فالولاية للام ثم لام الاب ثم للبنت ثم لبنت الابن ثم لبنت البنت ثم لبنت ابن الابن ثم لبنت بنت البنت ثم للجد الفاسد ثم الاخت

A. Guardianship is defined in law as the exercise of power by words over another, and it is established by four causes: (1) relationship, which includes residuaries, *i.e.*, blood relations, as well as distant (uterine) kindred. (2) Ownership, such as the possession by a man of his slave, whether male or female. (3) Wala, *i.e.*, the right of a slave emancipator, or of a successor by contract, and (4) Imamship or Mahomedan sovereignty, which includes a Kadhi authorised to give in marriage, because he is the representative of the Imam. Guardianship is here of two sorts (1) a commendatory guardianship, which is recommended to a competent woman, that is, one who has attained to puberty and is of sound mind whether she is a virgin or woman, and (2) a compulsory guardianship in the case of a minor, even if she is a thayyib (woman), or an idiot, or slave.

Q. Who is the guardian according to the doctrine of Abu Hanifah?

A. The guardian for marriage purposes is the residuary in his own right, in whose line of relation to the deceased no female enters, according to the order of inheritance and exclusion (*vide* Chap. V. on the Law of Inheritance), so the son of a mad woman takes precedence of the father, as he (the former) excludes him partially. If there are no such residuaries, *i.e.*, male blood relations, the guardianship devolves on the mother, then the father's 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 false grandfather, then the sister of the whole blood, then the sister by the same father, then the mother's children (by a different father),

لاب وام ثم الاخت لاب ثم لولد الام الذكر والانثى سواء ثم لاولادهم ثم لذوي الارحام وهم العمات ثم الاخوال ثم الخالات ثم بنات الاعمام ثم لاولادهم بهذا الترتيب الاقرب فالاقرب ثم مولى الموالاة ثم عند عدم الاولياء فالولاية للسلطان ثم لقاضٍ نُصَّ عليهِ في منشورهِ ثم لنائبهِ ان فوّض لهُ ذلك وليس للوصي من حيث هو وصي ان يزوج اليتيم مطلقًا وان اوصى اليهِ الأَب بذلك الاّ ان يكون قريبًا للموت

س . ما هي شروط الولاية في النكاح عند ابي حنيفة

ج . حرّية واسلام وتكليف

س . هل يجوز للابعد من الاولياء ان يعقد نكاح امرأة مع وجود مَن هو اقرب منهُ

ج . يجوز للابعد ان يلي عقد النكاح اذا غاب الاقرب مسافة القصر وهي ثلاثة ايام بلياليها او اذا كان الاقرب في

male and female have equal rights, then their children, then the uterine (*i.e.*, more distant) relations, namely, the paternal aunts, then maternal uncles and aunts, then the daughters of paternal uncles, then their children; in this order the nearer excludes the more distant, then the successor by contract, than, in default of all guardians aforesaid, the guardianship devolves on the Sultan (Mahomedan ruler), then the Kadhi, if it is expressly included in his commission, then his deputy, if that is delegated to him. An executor has absolutely no power, as such, to give in marriage an orphan, even if the father has charged him with the same in his will, unless, indeed, he is a relation of the deceased (father of the minor).

Q. What are the qualifications of a guardian for marriage according to Abu Hanifah?

A. (1) freedom; (2) profession of the Islamic faith; (3) puberty, and sound mind.

Q. Is it lawful for a distant guardian to enter into a contract of marriage on behalf of a woman while there is one nearer than he?

A. It is lawful for the distant (guardian) to perform the contract of marriage when the nearer one absents himself on a Kasr journey, which is a distance of three days and nights, or if the nearer one is in such a place that if it were postponed until he arrives, or until his opinion is obtained, a proposed husband, who is a match for the woman, would be lost. Similarly, it is lawful for a distant guardian to give in marriage the woman on the restraint of the nearer one, *i.e.*, on his refusal to give her in marriage to one who is a match for her. Ash-Shafa'ee says the ruler should then give her in marriage. The reason

موضع لو انتظر وصولهُ او استطلاع رأيه فات الكفء وكذلك يجوز للابعد التزويج بعضل الاقرب اي بامتناعهِ من تزويجها من كفء وقال الشافعي يزوجها الحاكم وللحنفية ان للابعد ولاية لوجود القرابة الداعية الى الشفقة

س . هل يجوز للاب وعند عدمهِ للجد ان يجبر البالغة على النكاح

ج . لا تجبَر البالغة على النكاح لانقطاع الولاية بالبلوغ وقال الشافعي للاب والجد ولاية الاجبار على البكر البالغة لجهلها بامر النكاح فاشبهت الصغيرة وللحنفية قولهُ عليهِ الصلوة والسلام البكر يستأذنها ابوها — فان استأذنها الولي الاقرب بان قال اريد ان انكحكِ فلانًا فسكتت او ضحكت غير مستهزئة فهو رضا لان سكوتها رضا دلالةً لحيائها واما الثيب فلا بد من رضاها بالقول لان حياءها قد قلّ بالممارسة فلا يدل سكوتها على الرضا (شرح العيني على الكنز)

س . اذا عدم الاب او الجد هل يجوز لغيرهِ من الاقارب تزويج الصغير او الصغيرة

ج . نعم عند ابي حنيفة اذا عدم الاب والجد يجوز لسائر

of the Hanifites is that the right of guardianship belongs to the distant relative, owing to the existence of kinship, which gives rise to compassion (*i.e.*, the tie of kinship is a strong motive for guarding the rights of a woman).

Q. Is it lawful for a father, or, in his absence, a grandfather to compel a woman, who has attained to puberty, to marry ?

A. By reason of the termination of guardianship on attaining to puberty, a woman who has become of age cannot be compelled to marry; but Ash-Shafa'ee says compulsory guardianship belongs to the father and grandfather in the case of a virgin daughter who has arrived at puberty, as being unacquainted with the affairs of marriage, and therefore she resembles a minor. The Hanifites quote the saying of the Prophet (peace be upon him :) Let the father ask the virgin for permission. If the nearest guardian asks her for permission, saying, I wish to give you in marriage to so and so, and she keeps silence or laughs, not mockingly, then it is acquiescence, because her silence is consent by implication owing to her modesty. As for a thayyib, she must express her consent in words, for her modesty has decreased by practice, and therefore her silence does not imply consent. (Ala'inee's Commentary on Al Kanz).

Q. Is it lawful, in default (*i. e.*, after the death) of the father and grandfather, for any other relative to give in marriage a minor, whether male or female ?

A. Yes, according to Abu Hanifah, on the failure of father and grandfather it is lawful for all residuaries (male blood relations,) and, on their failure, for the uterine kindred in their

العصبة وعند عدمهم لذوي الارحام على ترتيبهم الاقرب فالاقرب تزويج الصغير والصغيرة سواء كانت بكرًا او ثيبًا بشرط ان الزوج كفوء للمرأة ويهر المثل فاذا لم يكن الزوج كفوًا او كان بغبن فاحش جاز للصغير او الصغيرة خيار الفسخ بالبلوغ ولو بعد الدخول او العلم بالنكاح بشرط القضا وبطل خيار البكر البالغة بالسكوت لو كانت عالمة باصل النكاح واذا لم تعلم به لا يبطل لانها لا تتمكن بالتصرف بحكم الخيار الا بعد العلم به وان دخل بها قبل البلوغ ثم بلغت لا يبطل خيارها ما لم تقل رضيت او يوجد منها ما يدل على الرضا وللصغير او الصغيرة خيار الفسخ ولو كان المزوج الام او القاضي لقصور الراي في الام ونقصان الشفقة في القاضي واذا مات احدهما قبل فسخ النكاح ورثهُ الآخر سواء مات قبل البلوغ او بعدهُ ويجب المهر كلهُ وان مات قبل الدخول اما اذا كان الزوج غائبًا فلا يفرّق بينهما القاضي ما لم يحضر الزوج

س هل يلزم النكاح اذا كان المزوج ابًا او جدًا وهل

order, the nearer excluding the more distant, to give in marriage a minor, whether male or female, or whether the latter is a virgin or thayyib (a woman,) provided the husband is a match for the woman, and it was for a dower payable to one like her. If the husband is not a match, or if it were for a grossly low dower, it is lawful for the male or female child to exercise the right of option, and dissolve the marriage on attaining to puberty, even if it were after consummation of the marriage, or on becoming acquainted with the marriage, provided a decree is obtained. The option of a virgin, who has become of age, is rescinded by her silence if she were acquainted with the origin of the marriage; but if she does not know of it, it does not become void, for she is not able to exercise her right of option until she comes to know of it. If he had carnal access to her before the age of puberty, and then she attained to it, her option is not rescinded so long as she does not say, "I consent," or she does anything which would imply consent; and the minor has the option of obtaining a dissolution, even if it were the mother or the Kadhi who entered into the contract of marriage, by reason of the weak judgment of the mother, and the want of compassion (interest) in the Kadhi. If either of them (*i.e.*, the married couple) die befor the marriage is dissolved the other shall inherit him or her, whether it was before or after the age of puberty, and the whole dower shall become due, even if he dies before the consummation of marriage. If, however, the husband is absent, the Kadhi shall not separate them until he puts in an appearance.

Q. Is the marriage binding if the contract was entered into by the father or grandfather,

للصغير او الصغيرة الخيار

ج.. النكاح لازم ولا خيار لهما بالبلوغ ولو كان بغبن فاحش بنقص مهرها وزيادة مهره او بغير كفء ان زوجها الاب او الجد ما لم يُعرف منهُ سوء الاختيار وان عُرف لا يصح العقد اجماعًا وكذا لو كان سكرانًا فزوّجها من فاسق او شرير او فقير او ذي حرفة دنيئة لان ذلك يظهر منهُ سوء اختيارهِ فلا تعارضهُ شفقتهُ المظنونة ولو زوجها الاب السكران او المعروف بسوء الاختيار من كفء بمهر المثل صح لعدم الضرر المحض لانهُ لوفور شفقتهِ بالابوّة لا يزوّج بنتهُ من غير كفء او بغبن فاحش الاَّ لمصلحة تزيد على الضرر بحسن العشرة معها وقلة الاذى ونحو ذلك وهذا مفقود في السكران وسيئ الاختيار اذا خالف لظهور عدم رأيهِ وسوء اختياره في ذلك (العيني على الكنز ورد المحتار على الدرّ)

س . أيحق للولي الاعتراض في نكاح الحرة المكلفة نفسها لو كان الزوج غير كفء وهل يصح النكاح اذا رضي الولي بغير كفء

and has the minor, whether male or female, the right of option?

A. The marriage is binding, and neither of them has an option on arriving at puberty, even were it for a grossly bad consideration by reducing her dower or increasing his dower, *i e.*, the one payable by him, or if the husband were not a proper match, provided it was the father or grandfather who entered into the contract, unless indeed he is known to make a bad choice. If he is so known, the contract is invalid according to all doctrines, and equally so if, while he was drunk, he gave her in marriage to a scoundrel, or a wicked man, or a mendicant, or one who pursues a mean occupation, because this shows his bad choice, and therefore his supposed paternal compassion will not overcome it (*i.e.*, his bad choice). If the father, who is drunk, or known for his bad choice marry her to one who is a match for her, and for a proper dower, it is valid merely by reason of the absence of injury, because on account of his parental affection he is not likely to give his daughter in marriage to one who is not a match for her, or for a grossly small dower, unless it were in her interest for an advantage which would outweigh the injury, such as the prospect of a happy union, and the absence of annoyance, while this (affection) is wanting in a drunken man, or one who makes a bad choice, when he does the contrary; because his want of judgment and his bad choice become manifest in the same. (Al A'inee on Al Kanz and Rudd-ul-Muhtar 'ala Addur).

Q. Has the guardian a right to object to the marriage of a woman who has become of age and is of sound mind, if the husband is not a match, and is the marriage valid when the guard-

ج . نعم للولي العصبة بنفسهِ الاعتراض في تزويجها نفسها من غير الكفء فيفسخهُ القاضي ما لم يسكت الولي حتى تلد من الزوج لئلا يضيع الولد بالتفريق بين ابويهِ فان بقاءها مجتمعين على تربيتهِ احفظ لهُ اما اذا رضي الولي بعدم الكفاءة صحَّ النكاح ورضا بعض الاولياء قبل العقد او بعدهُ كرضا الكل لثبوتهِ لكلٍّ كما اذا استووا في الدرجة والاَّ فللاقرب منهم حق الفسخ وان لم يكن لها ولي فالعقد صحيح مطلقًا وقبض الولي المهر ونحوهُ مما يدل على الرضا رضا (رد المحتار)

س . لمن الولاية في النكاح عند الشافعي رض

ج . عندهُ احق الاولياء بالتزويج اب ثم ابوهُ وان علا ثم سائر العصبة كترتيب ارثهم فيقدم الاخ لابوين ثم الاخ لاب ثم ابن

ian consents to have one who is not a match ?

A. Yes, the guardian, who must be a residuary in his own right, can interfere when she marries one who is not a match for her, and the Kadhi should dissolve it, provided the guardian does not keep silence until she gives birth to a child by the husband ; lest the child becomes lost by the separation of its parents, for their remaining in union to bring him up is more conducive to his preservation. But if the guardian consents to the inequality, the marriage is valid. The consent of one of the guardians, whether before or after the contract, is regarded as the consent of all ; for it (the right) is confirmed to each as a whole if they stand in the same degree of proximity, otherwise the nearest of them has the right to dissolve it. If she has no guardian, the contract is valid absolutely. The receipt by the guardian of the dower and the like, which imply acquiescence, is consent. (Rudd-ul-Muhtar).

Q. To whom does the right of guardianship in marriage belong according to Ash-Shafa'ee ?

A. According to him the best entitled of guardians to enter into a contract of marriage is the father, then his father how high soever, then all the residuaries according to their order of precedence in inheritance ; first the brother of the whole blood, then the brother by the same father, then the son of the full brother, then the son of the brother by the same father, howsoever low they may be, then the paternal uncle by the same father and mother, then the paternal uncle by the same father, then the son of the paternal uncle, then the emancipator, then his residuaries such as his son and brother. If none of the above mentioned guardians are found, then the Sultan shall enter into the contract of marriage

الاخ لابوين ثم ابن الاخ لاب وان سفلوا ثم العم لابوين ثم لاب ثم ابن العم ثم المعتق ثم عصبتهُ كابنهِ واخيهِ فان لم يوجد ولي من المذكورين يزوج السلطان بالولاية العامة والعبد المملوك وليه مولاه والامة كذلك يزوجها مولاها ولا ولاية لوصي مع وجود ولي لان عار المرأة لا يلحقهُ واما الابن فلا يزوّج امهُ او جدّتهُ لانهُ لا مشاركة بينهُ وبينها في النسب اي ليس هناك رجل ينسبان اليهِ بل هو لابيهِ وهي لابيها (بجيرمي ونحفة ابن حجر)

س . هل يجوز للولي الابعد ان يزوّج المرأة اذا غاب الاقرب

ج . اذا غاب الاقرب مرحلتين ولم يوكّل وكيلاً ليزوجها في غيبتهِ او اذا احرم او عضل اي منع من التزويج مكفئة دعت الى كفء ولو بدون مهر المثل زوّجها الحاكم او السلطان بخلاف ما اذا دعت وليها الى غير كفء لان لهُ حقًّا في الكفاءة ولا بد من ثبوت العضل عند الحاكم ليزوجها ومن تعيينها للزوج واذا عيّنت المرأة كفأً فللاب او الجد عند عدمهِ تعيين كفء اخر لانهُ اكمل نظرًا منها واما الثيّب فليس لهُ تزويجها من غير

as a general guardian. A possessed slave has his master for his guardian, and a slave woman shall similarly be given in marriage by her master. An executor has no right of guardianship so long as there exists a (natural) guardian; because a disgraceful connection resulting from the marriage of a woman with one who is not a match for her does not affect him. As regards the son, he cannot give in marriage his mother or grandmother, because there is no connection between him and her in consanguinity, for there is no man whom they both derive their descent from, as he is related to his father and she to hers. (Begairimee and Tohfat ibn Hajar).

Q. Can a distant guardian enter into the contract of marriage on behalf of a woman when the nearest one is absent?

A. When the nearest guardian is absent or on a journey of two days' distance, and he has appointed no agent to give her in marriage during his absence, or if he is undergoing the ihram ceremonies of pilgrimage, or if he has restrained her (*i.e.*, prevented a girl), who has become of age and is of sound mind, from marrying one who is a match for her, even if it were for less than a proper dower, the ruler or Sultan should give her in marriage. The case is different when she calls her guardian to have one who is not a match for her, because he has a right to insist on the equality. And it is necessary to prove the restraint to the ruler, so that he might enter into the contract of marriage on her behalf, and that she should specify the proposed husband. If the woman specify a husband who is a match for her, the father, or, on his failure, the grandfather, may specify another one, for he has a better judgment than she; but he cannot marry

مَن عينتهُ (بجيرمي)

س . ما هي موانع ولاية النكاح عند الشافعي

ج . موانع الولاية سبعة (الاول) رق (الثاني) صبا (الثالث) جنون (الرابع) حجر سفه كما اذا بلغ غير رشيد او بذر بعد رشدهِ ثم حجر عليهِ لانهُ لنقصهِ لا يلي امر نفسهِ فلا يلي امر غيرهِ (الخامس) فسق لانهُ نقص يقدح في الشهادة فيمنع الولاية ويزوج الابعد واما الامام الاعظم فلا يمنع فسقهُ ولايتهُ بناء على الصحيح من انهُ لا ينعزل بالفسق فيزوج بناتهِ وبنات غيرهِ بالولاية العامة (السادس) اختلال نظر بهرم او غيره كخبل وكثرة اسقام لعجزهِ عن البحث عن احوال الازواج ومعرفة الكفء منهم (السابع) اختلاف دين فلا يلي كافر مسلمة ولا مسلم كافرة (بجيرمي)

س . اذا فُقدت شوكة سلطان الاسلام في بلد او قطر مَن يقوم مقامهُ في الولاية

the thayyib to anyone other than he whom she specified. (Begairimee).

Q. What are the impediments to guardianship in marriage according to Ash-Shafa'ee?

A. The impediments to guardianship are seven: (1) slavery, (2) childhood, (3) unsound mind, (4) legal disqualification or indiscretion; for instance, when one has attained to puberty, but not to the age of discretion, or if after having reached the years of discretion he becomes extravagant, and then he was by law declared incompetent, for by his defect he cannot manage his own affairs, and so he cannot manage the affairs of another; (5) bad moral character, because it is a defect which discredits the evidence (of a witness), and therefore it disqualifies for guardianship, and in such case the distant guardian can enter into the contract of marriage; but the great Imam's bad moral character does not put an end to his guardianship according to the approved doctrine, as he shall not be deposed by reason of his immoral character, and therefore he can give in marriage his own daughters, and those of others, as a general guardian; (6) deranged judgment, through decrepitude or otherwise, such as idiocy and many infirmities by reason of his inability to make enquiries about the conditions of husbands, and to know which of them is a proper match; (7) difference of religion, so a Kaffir cannot become the guardian of a Mussulman woman, nor a Mussulman of a Kaffir woman. (Begairimee).

Q. When the power of a Sultan of Islam is missing (not existing) in a country or region, who is to occupy his place as regards guardianship?

ج . يلزم اهل الشوكة الذين هم اهل الحل والعقد ثم ان ينصبوا قاضياً فتنفذ احكامهُ للضرورة (تحفة ابن حجر)

س . هل يجوز للولي عند الشافعي ان يزوج المرأة بغير رضاها

ج . يجوز للاب وعند عدمهِ للجد تزويج البكر صغيرة كانت او كبيرة بغير اذنها ولكن يستحب استئذانها وذلك يرسل نسوة ثقات ينظرنَ ما في نفسها والام اولى بذلك ولكن لا يصح تزويج الثيب الاَّ باذنها وتوكيلها الولي فان كانت صغيرة لا يصح زواجها حتى تبلغ وتأذن واما ما كان على حاشية النسب كاخ وعم لا يزوّج صغيرة بحال ولا يزوج بنتاً كبيرة الاَّ برضاها وتوكيلها لهُ لخبر الدار قطني لا تنكحوا اليتامى حتى تستأمروهن

س . ما هي الشروط التي بها يجوز للاب او الجد اجبار البكر على الزواج

ج . يصح تزويج البكر بلا اذن منها بخمسة شروط (الاول) ان لا يكون بينها وبين الاب او الجد المزوّج عداوة ظاهرة بحيث لا تخفى على اهل محلتها (الثاني) ان يكون الزوج كفوًا لها (الثالث) ان يكون الزوج موسرًا بحال الصداق (الرابع) ان لا يكون بينها وبين الزوج عداوة ظاهرة

A. The people in power, those who are the leading men there should appoint a Kadhi, whose orders will be executed as a matter of necessity. (Tohfat-ibn-Hajar).

Q. Is it lawful, according to Ash-Shafe'ee, for the guardian to give in marriage a woman without her consent?

A. It is lawful for the father, and, in his absence, for the grandfather to give in marriage a virgin, whether she is a minor or has attained to puberty, without her consent; but it is recommended that her permission should be asked for, that is, he should send to her some trustworthy women to see what is in her soul (*i.e.*, to sound her), and the mother is more fitted for this; but it is not lawful to give a thayyib in marriage without her consenting and appointing her guardian as her agent. If, however, she is under age, her marriage cannot be effected until she attains to puberty and gives permission. As for anyone who stands on the margin of consanguinity (*i.e.*, collaterals), such as a brother or a paternal uncle, he cannot give in marriage a child under any circumstances, nor can he give in marriage a full-grown girl unless she consents and appoints him as agent, owing to the tradition of Addarkotnee:—Don't give in marriage orphans until you obtain their sanction.

Q. What are the conditions under which the father or grandfather can compel a virgin to marry?

A. The marriage of a virgin daughter will be valid without her permission on five conditions:—(1) there should not be between her and her father or grandfather who gives her in marriage any such manifest enmity as not to be

او باطنة (الخامس) ان لا يزوّجها بغير مهر المثل من نقد البلد . ومتى فُقد شرط من الشروط المذكورة فالعقد باطل (بجيرمي)

الباب التاسع

في الكفاءة

س . ما معنى الكفاءة

ج . معناها المساواة والمراد هنا مساواة مخصوصة او كون المرأة ادنى من الرجل في الاوصاف الآتي شرحها والكفاءة معتبرة من جانب الرجل لا من جانب المرأة لان الشريف لا يأبى ان يكون مستفرشاً للأمة والشريفة تأبى ان تكون فراشاً للدني وعند الشافعي الكفاءة معناها في اللغة التعادل والتساوي وفي الاصطلاح امر يوجب عدمه عاراً وضابطها مساواة الزوج للزوجة في كمال او خسة ما عدا عيوب النكاح

س . هل تعتبر الكفاءة في النكاح

ج . تعتبر للزوم النكاح خلافاً لمالك فان الكفاءة عنده مجرّد الاسلام لقوله عليه السلام الناس سواسية كأسنان المشط

hidden from the people of her locality; (2) the husband should be a match for her; (3) the husband should be able to pay the dower; (4) there should be no outward or inward enmity between her and the husband; (5) he should not give her in marriage for less than the proper dower in the currency of the country. If any one of the said conditions is wanting, the contract becomes null and void.

CHAPTER IX.

On Equality.

Q. What is the meaning of being a match?

A. It means equality, and here it is intended to be a peculiar equality, or that the woman should be inferior to the man in the qualities hereinafter mentioned. Equality is essential on the part of the man, not on the part of the woman; because a noble man does not disdain to marry a slave woman, while a noble woman disdains to be united to a low-born man. According to Ash-Shafa'ee equality means to be equal to, or to be a match for, and in conventional language it is a matter the absence or lack of which entails disgrace (on the male blood relations of a woman). Its criterion is that the man should be equal to the woman in accomplishment or meanness, besides the defects of marriage. (See next Chapter).

Q. Is equality essential in marriage?

A. It is essential in order to make the marriage binding. This is contrary to the doctrine of Malik, for, according to him, equality is merely

لا فضل لعربي على عجمي الاَّ بالتقوى وقال تعالى ان اكرمكم عند الله اتقاكم قلنا المراد بهِ في حكم الآخرة وكلامنا في الدنيا (العيني على الكنز)

س . هل الكفاءة حق للولي او للامرأة

ج . هي حق للولي العصبة بنفسهِ لانهُ يتضرر بعدمها والناس يتعايرون بعدم الكفاءة فاذا نكحت المرأة غير كفء بغير اذن الولي فرَّق بينها الولي العصبة لا غيرهُ ان شاء ما لم تلد فان ولدت لا حق لهُ لان سكوتهُ رضا دلالةً فلو نكحت رجلاً ولم يعلم حالهُ فاذا هو عبد لا خيار لها بل للاولياء ولو زوَّجها الاولياء برضاها ولم يعلموا بعدم الكفاءة ثم علموا لاخيار لاحد الاَّ اذا شرطوا الكفاءة او اخبرهم الزوج بها وقت العقد فزوَّجوها على ذلك ثم ظهر انهُ غير كفء كان لهم الخيار وكذلك الكفاءة

profession of the Islamic faith, owing to the saying of the Prophet (peace be upon him): People are equals like the teeth of a comb; no superiority has an Arab over a non-Arab otherwise than by piety. And God Almighty hath said: Verily the most honoured of you in the sight of God is he who is the most pious of you. We (the Hanifites) say this is meant to apply to the rules about the next world, and we are talking about this world. (Al'ainee's Commentary on Al Kanz).

Q. Is equality a right claimed by the guardian or woman?

A. It is a right which belongs to the guardian, who must be a residuary in his own right, because he will be aggrieved by its absence; and people are chaffed at for the non-equality (*i. e.*, when a woman of a good family marry a bad man, her blood relations feel aggrieved and degraded by it). If she marry one who is not a match for her without the permission of her guardian, the guardian who is a residuary, but no one else, can, if he please, separate them before the birth of an issue. If she gives birth, he has no right, because his silence implies consent.

If she marry a man, not knowing his condition, and, behold, he is a slave, she has no option; but the guardians have, and if the guadians give her in marriage with her own consent, and they did not know that the husband was not a match, and afterwards they discovered it, no one has the option (of dissolving the marriage) unless they stipulated for the equality, or the husband had informed them of it at the time of the contract, and they caused her to be married upon the same, after which it appeared that he was not a match, they should then have

حقّ للمرأة بدليل ان الولي لو زوّج غير كفء لا يصح ما لم يكن ابًا او جدًّا ولو تزوجت المرأة رجلاً على انهُ سنّي او حرّ او قادر على المهر والنفقة فبان بخلافهِ او على انهُ فلان بن فلان فاذا هو لقيط او ابن زنا لها الخيار وان فعلت المرأة ذلك فتزوّجها ثم ظهر بخلاف ما اظهرت فلا خيار للزوج سواء تبيّن انها حرّة او امة لان الكفاءة في جانب النساء غير معتبرة (رد المحتار على الدرّ)

س. فيمَ تعتبر الكفاءة

ج. تعتبر في النسب والدين والعمل والحرية والديانة والمال (١) اما النسب فقريش بعضهم اكفاء بعض وبقية العرب بعضهم اكفاء بعض والعجمي ليس بكفوء للعربية ولا غير قرشي لقرشية (٢) الديانة اي التقوى والعفة فليس فاسق كفوًا لصالحة او عفيفة (٣) حريةً واسلامًا فمسلم بنفسهِ او

the right of option. Equality (of the husband) is also a right belonging to the woman; the reason for it is that when the guardian gives in marriage a girl under age to one who is not a match, it is not valid unless he were a father or grandfather. If a woman marry a man on the understanding that he is a Sunnee, or a free man, or that he is able to pay the dower and maintenance, but the contrary appears afterwards, or that he is the son of so-and-so, and, behold, he is a foundling or bastard, she has the right of option. But if the woman does so, and he married her, and afterward the reverse of what she professed to be has come to light, the husband has not the option, whether it appeared that she is a free or a slave woman, because equality is not required on the part of the woman. (Rudd-ul-Muhtar ala Addur).

Q. In what respect is equality considered essential?

A. It is required in descent, religion, trade, freedom, morality, and property. (1) In descent or pedigree, members of the tribe of Koreish are equal to each other, and the remaining Arabs are equal to each other. A non-Arab is not a match for an Arab woman, nor is a non-Koreishite a match for a Koreishite woman. (2) Morality, *i.e.*, piety and virtuousness: a man who has a bad moral character is not a match for a virtuous or chaste woman. (3) Freedom, and profession of the Islamic faith. A convert to Islamism, or an emancipated man is not a match for one whose father was a Mussulman or a free man, or for one who is emancipated, but whose mother was of a free origin, and one whose father is a Mussulman is not a match for a woman whose parents were both Mussulmans, and

معتق غير كفء لمن ابوها مسلم او حرّ او معتق وامها حرّة الاصل ومن ابوهُ مسلم او حر غير كفء لذات ابوين في الاسلام والحرية (٤) صاحب حرفة دنيئة ليس كفوًا لمن هو ارفع منهُ فكنّاس او حجّام او قيّم الحمّام ليس كفء بنت خيّاط ولا خيّاط كفء بنت تاجر او بزّاز ولاهما بنت عالم او قاضٍ (٥) واما المال فلا يعتبر عند الشافعي ولكن عند ابي حنيفة ينبغي ان الزوج يقدر على المهر المعجل ونفقة شهر لو كان غير محترف والّا فان كان كل يوم يكسب كفايتها والصبي كفوء بغناء ابيهِ او امهِ او جدّهِ بالنسبة الى المهر المعجل لا بالنسبة الى النفقة لان العادة ان الآباء يتحملون عن الابناء المهر لا النفقة (ذخيرة) اما لو جرت العادة بتحمل النفقة ايضًا عن الابن الصغير كما في زماننا يكون كفوًا لان المقصود حصول النفقة من جهة الزوج بملك او كسب او غيره والكفاءة تعتبر عند ابتداء العقد فلا يضرّ زوالها بعدهُ فلو كان وقتهُ كفوًا ثم فجر لم يفسخ النكاح (رد المحتار على الدرّ) وعند الشافعي الكفاءة تعتبر ايضًا في السلامة عن العيوب كجنون وبرص وجذام (بجيرمي)

س . بنت رجل شافعي عمرها احدى عشرة سنة تزوجت

free. (4) One who pursues a low occupation is not a match for one who is higher than he: thus a sweeper or a cupping-man, or the keeper of a bath is not a match for the daughter of a tailor, nor is a tailor a match for the daughter of a merchant or a cloth seller, nor is either of them a match for the daughter of a learned man, or of a Kadhi. As regards property or wealth, it is not considered essential by Ash-Shafa'ee; but according to Abu Hanifah the husband ought to be able to pay the prompt dower and maintenance for a month if he had no trade, otherwise he should be able to earn daily what is sufficient for her. A child shall be (considered) a match by the riches of his father or mother, or grandfather with reference to the prompt dower, and not to maintenance, because, by usage, the father undertakes to pay on behalf of his sons the dower, but not maintenance. (Dakhirah). But if it was customary to undertake maintenance also on behalf of a minor son, as it is the case in our time, he should be taken for a match; because the object is to have maintenance from the husband, whether it is from his property or earnings, or otherwise. Equality is deemed essential at the beginning of the contract, so its cessation afterwards is immaterial. If he were a match for her at the time, and afterwards became a libertine, the marriage shall not be dissolved. (Rudd-ul-Muhtar). According to Ash-Shafa'ee, in order to be a match it is also essential that there should be freedom from bodily defects, such as madness, white, or corrosive leprosy. (Begairimee).

Q. The daughter of a Shafa'ee man, eleven years old, gave herself in marriage, independently of a guardian, in a country in which there is

بنفسها من دون ولي في بلد لم يكن فيها سلطان للاسلام ولم زوجها حاكم شرعي فولدت ولدين للزوج ثم مات الزوج فادّعى اخوانهُ ان عقد النكاح باطل والاولاد حرام فقالت المرأة انها كانت قد حاضت وبلغت قبل العقد وانها قلّدت ابا حنيفة في تزويجها نفسها من دون ولي

ج . تُصدَّق المرأة اذا ادّعت البلوغ بالحيض بعد ان تبلغ تسع سنين تقريبًا فاذا قلّدت الامام ابا حنيفة رض حينئذٍ في نكاحها بلا ولي مع استيفاء الشروط المعتبرة في مذهبهِ جاز وكان نكاحها صحيحًا شرعيًا يتوارثان فيهِ واولادهم اولاد حلال (فتاوي العلاّمة الحبيشي)

الباب العاشر

في العيوب المثبتة للخيار بفسخ النكاح

س . ما هي العيوب المثبتة للخيار

ج . عند الشافعي يثبت الخيار لكل من الزوجين اذا وقع

no Muslim Sultan, and no (Muslim) judicial judge gave her in marriage. Afterwards she gave birth to two children by the husband. The husband died, and his brothers alleged that the contract of marriage was a mere nullity, and the children were illegitimate. The woman asserted that she had already passed the menses and reached puberty before the time of contract, and that she had followed the doctrines of Abu Hanifah in giving herself in marriage without a guardian.

A. The woman should be believed when she states that she has reached puberty by passing the menses, after having reached the age of nine years, or thereabouts. If she had followed the doctrine of Abu Hanifah in marrying independently of a guardian, and the conditions imposed by his doctrines are fulfilled, it is legal, and her marriage will be valid and lawful, by which they will inherit each other, and their children are legitimate. (Fatwas of the learned Al-Hobaishee).

CHAPTER X.

On the Personal Defects Establishing the Right of Option to Dissolve the Marriage.

Q. What are the personal defects which establish the right of option?

A. According to Ash-Shafa'ee, the right of option is established in favour of either of the married couple when madness or confirmed white or corrosive leprosy befalls the other, even if it has occurred after the contract, provided the healthy party was not aware of the

بالاخر جنون او جذام او برص مستحكم وان حدث بعد العقد ما لم يكن السليم عالمًا بالعيب في وقت العقد وان تماثلا الزوجان في العيب فلكل الخيار لان الانسان يعاف من غيرهِ ما لا يعاف من نفسهِ ويثبت الخيار لولي الزوجة بكلٍ من الثلاثة العيوب ان قارن العقد وان رضيت بهِ لان الولي يُعيَّر بذلك اما ان حدث بعد العقد لا يعيَّر بهِ

وللزوج الخيار برتق الزوجة وقرنها وهما انسداد محل الجماع من المرأة وللزوجة الخيار اذا كان الزوج مجبوبًا او عنينًا ولكن لا خيار لها في العنة بعد وطء ولو مرّة واحدة

وفسخ العقد يكون فوريًا بعد رفع الامر الى الحاكم وثبوته عندهُ الاَّ في العنة فتؤجل بعد الرفع الى الحاكم سنة من يوم ثبوتها وتثبت عنة الزوج باقرارهِ عند قاضٍ او عند شاهدين يشهدان بهِ عندهُ فان لم يقرّ وادعى الوطء ولم تصدّقهُ صُدِّق بيمينهِ واذا ثبتت العنة يمهلهُ القاضي سنة وبعد السنة ترفعهُ الى القاضي فان

defect at the time of the contract. If the husband and wife are both suffering alike from the defect, each has the right of option, because a person abhors in another what he does not abhor in himself. The guardian of the wife has the right of option for any one of the said three defects if it co-exists with the contract, though she may be contented with it, because the guardian is jeered at for that defect; but if it occurs after the contract he will not be blamed for it.

The husband has the right of option in case she is impervious, *i.e.*, in case there is a malformation of the female sexual organ, rendering coition impossible. The wife has the option when the husband is a eunuch, or impotent; but in case of impotency no option is allowed to her if he has once cohabited with her, even if it were a single sexual act, *i.e.*, the impotency must exist at the time of contract, before the marriage is consummated.

The dissolution of the contract shall be made immediately after citing the case before the judge, and proving it before him; but in the case of impotency it shall be postponed after the citation before the judge for a year from the date on which it is proved. The impotency of the husband is proved by his own admission before the Kadhi, or before two witnesses, who shall give evidence of it before him. If he does not admit it, but alleges that he has copulated, he should be believed on his oath. If the impotency is proved, the judge shall grant him a year's time, and after the year she should cite him before the judge. If he alleges that he has copulated, and she is a woman (not virgin), but she does not admit his statement to be true, he should be sworn that he has copulated with

قال وطئت وهي ثيب ولم تصدّقهُ حُلف انهُ وطئ فلا يُطالب بوطء فلو كانت بكرًا بأن شهد اربع نسوة ببقاء بكارتها وتحلّف هي بأن بكارتها اصلية لاحتمال عود البكارة لعدم المبالغة فلا يُصدّق لان الظاهر معها فان حلفت او أقرّ فسخت بعد قول القاضي ثبت حق الفسخ وعند الحنفي تثبت البكارة بشهادة امرأة واحدة

لا خيار بالفسخ بالقروح السيالة كالمبارك المعروف والحكة والبخر ولا بكبر آلة الاّ اذا كان يفضي الامرأة ولا بالخصا (بجيرمي)

عند ابي حنيفة لا فسخ بشيء من العيوب المذكورة وانما للمرأة الخيار في الجب والعنة وكذلك الخصي يؤجل كما يؤجل العنين مدة سنة واذا تضررت الزوجة من عظم آلتهِ فالامر يفوّض الى القاضي بالنظر الى حالها واذا كانت البالغة لا تطيق الجماع لا يؤمر بدفعها للزوج سواء كان لضعفها او هزالها او لكبر آلتهِ واذا كانت الزوجة صغيرة لا تطيق الوطء لا تُسلم حتى تطيقهُ (رد المحتار)

her, and shall no longer be dunned for if. If, however, she is found to be a virgin by the evidence of four women that she is still a virgin, she should be sworn also that she retains her original virginity, as it is probable that virginity returns in case it was incompletely destroyed, then he should not be believed, because appearances are on her side. If in such a case she swears, or he admits it, it shall be dissolved by her after the Kadhi says the right of dissolution is proved. According to Abu Hanifah, virginity is established by the evidence of one woman.

No option is allowed in the case of fetid ulcers, as the well-known blessed disease (Syphilis) or itch, or stenching mouth, or if the man is castrated, nor by reason of the largeness of his sexual organ, unless it deforms the woman. (Begairimee).

According to Abu Hanifah no option is allowed for any of the said defects, but the woman has the option of dissolving the marriage in the case of the eunuch and impotent, and similarly a castrated person shall be given one year's time like the impotent. If the wife complains of his large organ, the case shall be delegated to the Kadhi, with reference to her condition. If a full-grown woman is unable to cohabit, her delivery to the husband should not be ordered, whether it is owing to her weakness, or emaciation, or the largeness of his organ. If the wife is too young to cohabit, she shall not be delivered until she becomes capable. (Rudd-ul-Muhtar).

الباب الحادي عشر

في الصداق

س . ما معنى الصداق

ج . الصداق والمهر بمعنى واحد وهما اسم لمال يجب دفعهُ للزوجة بعقد النكاح او الوطء

س . كم قدرهُ ومتى يجب دفعهُ

ج . لا حدَّ مقدَّر لهُ ولكن قدرهُ ما تراضيا عليهِ الزوجان او وليهما من المال او ما يقوم مقامهُ وعند ابي حنيفة اقلّهُ عشرة دراهم او فضة وزن سبعة مثاقيل فان سمّى الزوج اقل من العشرة لها عشرة دراهم وان سمّى ازيد منها لها المسمّى وعند الشافعي لاحدّ لاقله ولا لاكثره فللزوج جعل الصداق ملء جلد الثور ذهبًا وكلما صحّ ثمنًا صحّ صداقًا

والصداق اما ان يكون موّجلاً او معجلاً او بعضهُ يكون معجلاً وبعضهُ موّجلاً حسب الشرط المتفق عليهِ بين الزوجين فان

CHAPTER XI.

On Dower.

Q. What is meant by Sidak?

A. Mahr and Sidak are both synonymous, they both denote a name of property which should be given to the wife on making a contract of marriage, or on its consummation.

Q. What is its amount, and when is it payable?

A. There is no fixed limit to it, but its amount in property, or in that which stands in its place, *i.e.*, its equivalent is fixed by the mutual consent of the husband and wife, or their guardians. According to Abu Hanifah its minimum is ten dirhams, or seven mithkals of silver. If the husband has named less than the ten dirhams, she should have the ten, and if he named more than it, she should have the named amount. According to Ash-Shafa'ee its minimum and maximum are both not limited, and the husband may make the dower as much of gold as an oxen hide can contain. Anything that is a lawful consideration is a lawful dower.

The payment may be deferred or prompt, or partly prompt and partly deferred, according to the conditions agreed upon between the husband and wife. If it is not stipulated to defer it, it becomes payable on the consummation of marriage, or on the death of either of them. The wife can refuse to surrender herself to the husband until she receives the prompt dower; but according to Abu Yusseff, though it may be wholly deferred, she can withhold herself, and,

لم يُشترط تأجيلهُ لزم تسليمهُ عند الوطء او موت احدهما وللزوجة ان تمنع الزوج نفسها حتى تقبض المهر المعجل وان كان كلهُ مؤجلاً كان لها منعهُ عند ابي يوسف وعليهِ الفتوى ولها النفقة والخروج من بيتهِ لحاجة وزيارة اهلها بلا اذنهِ ما لم تقبضهُ وعند الشافعي يؤمر الزوج بوضع المهر عند عدل وتؤمر الزوجة بالتمكين وليس لها منعهُ بعد الدخول الاَّ اذا كانت مُكرهة او صغيرة او مجنونة وقال ابو حنيفة يجوز لها ذلك ويجب نصف المهر اذا طُلقت المرأة قبل الوطء

س . هل يجب تسمية المهر عند العقد وما تستحق المرأة اذا لم يتعيَّن المهر او كان المهر المسمى حراماً

ج . صحَّ النكاح بلا ذكر المهر ومع نفيهِ ووجب على الزوج مهر مثلها بالوطء او بموت احدهما فان تزوَّج رجل امرأة على ان لا مهر لها او على صداق فاسد كمال مغصوب او خمر او لحم خنزير او على صداق مجهول كدار او دابة ولم يبين جنسها فالنكاح جائز ولها مهر مثلها ان دخل بها او مات عنها اما اذا تزوَّجها على فرس فالواجب الوسط او قيمتهُ والمفوَّضة اي من تزوجت بلا

according to this, decisions are made, in which case she will be entitled to maintenance, and to go out from his house in case of need, or to visit her family without his permission, so long as she does not receive it. According to Ash-Shafa'ee the husband should be ordered to deposit the dower with a trustworthy person, and the wife should be ordered to deliver herself, and she has no right to refuse after he had sexual intercourse with her, unless she were forced, or she were a minor, or a lunatic; but Abu Hanifa says it is lawful for her to do so. Half the dower is to be paid if the woman was divorced before the consummation of marriage.

Q. Is it necessary to specify the dower, and what is the wife entitled to when no dower is specified, or if the specified dower is unlawful?

A. The contract of marriage is valid without the mention of dower, and even if it is negatived; but the husband is bound to pay the dower of one like her on consummation of the marriage, or on the death of either of them. If a man marry on condition that the wife shall have no dower, or for a dower which is unlawful, such as usurped property, or pork, or wine, or for an ambiguous dower; for instance, a house, or an animal, without showing its kind, the marriage is valid, and she will get the dower of one like her if he had consummated the marriage, or died leaving her; but if he marries her for a horse, a middling one or its price is to be given. A volunteering woman is she who gives herself in marriage without a dower; before its consummation she can demand the allotment of

NOTE.—In addition to her dower she is entitled to a share of the inheritance.—*Vide* Chapter IV., Part I.

مهر لها قبل الوطء ان تطلب فرض مهر وتحبس نفسها فلو امتنع الزوج من فرضهِ فرض القاضي مهر المثل

س . هل يجب على الزوج الصداق اذا اختلى بالمرأة وطلقها من دون ان يطئها

ج . نعم عند ابي حنيفة يستقر المهر بالخلوة الصحيحة اي التي لا فيها مانع حسّي كمرض باحدهما يمنع الوطء او كانت الزوجة رتقاء او قرناء او مانع طبيعي كوجود ثالث عاقل ولو اعمى او نائمًا الاَّ ان يكون صغيرًا لا يعقل او مجنونًا او مغمى عليهِ او مانع شرعي كاحرام لحج اما اذا خلا بها الزوج وكان مجبوبًا او عنينًا او صغيرًا لا يطاق معهُ الجماع استحقت تمام المهر

س . ما هو مهر المثل

ج . عند ابي حنيفة هو مهر امرأة تماثلها من قوم ابيها كالاخت وبنت الاخ والعمة وبنت العم ولا مدخل في ذلك لامها الاَّ ان تكون من قوم ابيها كبنت عمه ويعتبر ان يتساويا المرأتان في

a dower, and hold herself aloof; and if the husband refuse to allot it, the Kadhi shall allot a dower of one like her.

Q. Is the husband bound to pay the dower if he has retired with the wife to a place of privacy, and divorced her without having had sexual intercourse with her?

A. Yes, according to Abu Hanifah, the dower becomes due by the husband having access to her in a lonely place, if it were a proper state of privacy: that is if there was no physical obstacle, such as the illness of either of them preventing sexual intercourse, or if the wife were incurably impotent, or if there were a natural obstacle, such as the presence of a third person who is of sound mind, even if he were blind or sleeping, unless he (the third) were a child of no understanding, or *non compos mentis*, or was unconscious, or if there were a legal obstacle, such as performing the ceremonies of pilgrimage. If the husband had a lonely access to her, and he was a eunuch, or impotent, or a child incapable of consummating the marriage, she is entitled to the whole dower.

Q. What is meant by the dower of one like her?

A. According to Abu Hanifah it is the average amount of dower paid to a woman resembling her from the family of her (the wife's) father, such as her sister, niece, or paternal aunt, and the daughter of a cousin; and no regard is paid to her mother unless she belonged to the people of her father as being his cousin. It is necessary that the two women should be alike at the time of contract in age, beauty, wealth or means, reason (*i.e.*, the dower paid to

وقت العقد سنًّا وجمالاً ومالاً وعقلاً ودينًا وبكارةً وثيوبةً وبلدًا وعصرًا وان تعذّر اجتماع هذه الاوصاف في امرأتين يُعتبر بالموجود منها وان لم يوجد من يماثلها من قبيلة ابيها فمن قبيلة تماثل قوم ابيها وعند الشافعي مهر المثل هو قدر ما يُرغب به في مثلها ويُراعى مهر اقرب امرأة من نساء العصبات الى المنكوحة فتراعى الاخت لابوين وعند عدمها الاخت لاب ثم بنت ابن الاخ ثم العمة فان فقد نساء العصبات او جهل مهرهن اعتبر بذوات الارحام وهم قرابة الام كالجدة والخالة ويُعتبر ان يتساويا المرأتان في سن وعقل ويسار وبكارة وثيوبة وجمال وعفة وعلم فان اختصت منهن بفضل او نقص فُرِض مهر لايق بالحال وان سامحت واحدة لم تجب موافقتها لان العبرة بالغالب

س . هل يصح النكاح على خدمة معلومة

ج . عند ابي حنيفة ان تزوّج حر امرأة على خدمة سنة او

a mad woman is irrelevant), morality, virginity or womanhood, and that they both should be of the same place and generation. If all these qualities cannot be found in two women, it will be enough to act upon such of them as are found. If no female is found amongst the tribe of her father resembling her, then from a tribe resembling her father's people. According to Ash-Shafa'ee a like dower means the amount obtainable for one like her, considering the nearest female to the wife from amongst the blood relations of her father; so regard is given to a sister of the whole blood, and, on her failure, to a sister by the same father, then the daughter of a brother's son, then the paternal aunt. If females of the blood relations are wanting, or if their dower cannot be ascertained, then the uterine relations, *i.e.*, the relations of the mother, such as the grandmother and maternal aunt, are taken into account. It is necessary that the two women should be alike in age, reason, property, virginity, womanhood, beauty, virtuousness, and education. If she (whose dower is in dispute) is superior or inferior to them, a proper dower under the circumstances should be awarded. If one (female relation) has made a remission, it should not be acted conformably to her, because it is the ordinary which is taken into account.

Q. Is marriage valid in consideration of certain services?

A. According to Abu Hanifah, if a free man marry a woman for serving her for a period of one year, or for teaching her the Koran, she is entitled to the dower of one like her. If a slave marry a free woman with the permission of his master, the dower is a debt due by him, and for

تعليم القرآن فلها مهر المثل وان تزوج عبد على حرة باذن مولاه فالمهر دين عليهِ يباع فيهِ وان تزوج عبد حرة باذن مولاه على خدمتها سنة جاز واما عند الشافعي يجوز ان يتزوج رجل امرأة على منفعة معلومة كقراءة القرآن او خدمة

س . هل تثبت الزيادة على الصداق بعد العقد

ج . عند ابي حنيفة تلزم الزوج الزيادة سواء دخل بها او مات عنها فان طلقها قبل الدخول لها نصف المسمّى مع نصف الزيادة فقط وقال الشافعي هي هبة مستأنفة ان قبضتها مضت وان لم تقبضها بطلت

س . ما هو النكاح الفاسد وهل يجب اداء المهر فيهِ

ج . هو الذي فقد شرطًا من شرائط الصحة كحضور الشهود او تزوج رجل اختين معًا فيجب فيهِ الاقل من مسمى ومهر المثل ولكل واحد من الزوجين فسخهُ ولو بغير محضر من صاحبهِ دخل بها او لا بل يجب على القاضي التفريق بينهما وتجب على المرأة العدة بعد الوطء ويثبت النسب احتياطًا لاحياء الولد وتعتبر مدة النسب من وقت الدخول

س . ما هي المتعة

ج . هي لغةً ما يتمتع بهِ من حوائج وشرعًا هي مال يجب على

which he may be sold; but if he marry a free woman, with his master's permission, for serving her for a year, it is lawful. Ash-Shafa'ee, however, holds that a man may marry a woman for certain services, such as teaching her the Koran, or serving her.

Q. Is an addition to the dower valid if made after the contract was entered into?

A. According to Abu Hanifah the husband is bound by it, whether he has consummated the marriage or died, leaving her behind. If he divorces her before consummation, she shall have half the specified dower, together with half the addition only. Ash-Shafa'ee says it is merely a new gift which, if acquired by seizin, is valid, but if she did not receive it, it is void.

Q. What is a nullified marriage, and is the dower payable for it?

A. It is one which is wanting in one of its essentials, such as the presence of witnesses, or marrying two sisters at the same time. Either the specified dower, or the dower of one like her, whichever is the smallest, should be paid, and either of the married couples can dissolve it even if his friend is not present, whether it was consummated or not; nay, the Kadhi ought to separate them, and the wife should pass the fixed term of iddet after its consummation. The parentage of a child born in a nullified marriage is established as a precaution in order to preserve the life of the child, the period of gestation being taken into account from the date of consummation.

Q. What is Mota'a (divorce present)?

A. In common speech it means provisions

الزوج دفعهُ للمرأة اذا فارقها وكانت الفرقة بسببهِ كردته والطلاق والفرقة باللعان لا ان كانت من جهتها كردتها والخيار بالبلوغ وعدم الكفاءة وعند الشافعي ان كان الفراق بفسخها بعيبهِ او فسخهِ بعيبها لا متعة لها

س . لمن تجب المتعة

ج . تجب لمفوضة طُلقت قبل الوطء ولم يُفرض لها شيء وكذلك تجب لزوجة موطوءة طُلقت طلاقًا بائنًا او رجعيًّا وانقضت عدتها او فارقها زوجها بسبب غير صادر عنها وسنّ ان لا تنقص المتعة عن ثلاثين درهمًا او ما يساويها وان لا تبلغ نصف المهر فاذا تراضيا الرجل والمرأة على شيء فذاك وان تنازعا في قدرها قدّرها القاضي باجتهادهِ بقدر حالهما من يسارهِ واعسارهِ ونسبها وصفاتها كما قال الله تعالى "ومتّعوهن على الموسع قدرهُ وعلى المقتر قدرهُ متاعًا بالمعروف حقًّا على المحسنين" وعند

or necessaries which afford comfort, and legally it denotes some property which the husband is bound to pay his wife whom he has put away, if the separation was caused by him, as if it were by his apostasy from faith, or by divorce or separation by his imprecating her, but not if it arose on her side as by her apostasy, or by the exercise of the right of option on attaining to puberty, or for want of inequality (between the husband and wife). Ash-Shafa'ee says if the separation was caused by her dissolving the marriage owing to his defect, or by his dissolving it owing to her defect, no mota'a is due to her.

Q. To whom is mota'a due?

A. It is due to a woman who married without a dower, and who is divorced before the consummation of marriage, and nothing has been settled on her. It is also due to a woman whose marriage was consummated, and who has been divorced absolutely or reversibly, provided her term of iddet has expired, or to one whose husband has parted with her by a cause not arising from her. It is recommended that the mota'a present shall not be less than thirty dirhams, or its equivalent, nor should it amount to half the dower. If the man and woman agree upon something, that will do, and if they quarrel about its amount the Kadhi shall fix it, according to his best efforts, in proportion to their condition with reference to her husband's solvency or insolvency, and her descent and descriptions, because the Almighty God says (Koran, Chapter II.), provide them, *i.e.*, women (he who is at his ease shall provide the women according to his circumstances, and he who is strained shall

ابي حنيفة لا تجب المتعة الاَّ لمفوضة طُلقت كما سبق شرحه اعلاه وانما تُستحب لكل مطلقة بعد الوطء سُمي لها (بجيرمي والكنز)

الباب الثاني عشر

في الدفع والهدايا للزوجة

س . ما هو الدفع وهل هو مهر معجل

ج . كل ما يدفعهُ الخاطب لخطوبتهِ قبل العقد من دراهم وثياب وحلي حكمهُ حكم الهدية لانها هدية مشروطة قبل العقد تملكهُ الزوجة بالعقد واللفظة مشتقة من دَفَع لانها تُدفع للزوجة (تحفةُ ابن حجر)

س . ما هي الرَّضْوة وهل يلزم الرجل ان يدفعها لامرأتهِ

ج . هي ما يدفعهُ الرجل لزوجتهِ من ثياب ودراهم اذا تزوج عليها امرأة اخرى لارضائها ويلزم الزوج دفعها حيث جرت العادة بها (فتاوي ابن جمعان)

س . هل تُقبل دعوى الزوج بشيء من النقدين او

provide in proportion to his condition) with necessaries, in a reasonable manner, this is a duty incumbent on the righteous. According to Abu Hanifah mota'a present is only due to a woman who has married without a dower, as has been explained above, but it is recommended for every wife who has been divorced after consummation of marriage, and for whom a dower has been specified. (Begairimee and Al-Kanz).

CHAPTER XII.

On Marriage Present to the Wife.

Q. What is dafa'a (marriage present), and is it a prompt dower?

A. Whatever money, clothes or ornaments are given by a betrother to his fiancée before the contract of marriage is subject to the same rule as a present, because it is a present stipulated for before the contract is entered into, and it becomes the property of the wife by the contract. The word is derived from dafa'a "to give," because it is given to the wife. (Tohfat-ibin-Hajar).

Q. What is Radwah (satisfaction), and is the husband bound to give it to his wife?

A. It denotes some money or clothes, or both, which the husband gives to his wife in order to give her satisfaction when he marries another wife in addition to her. The husband is bound to give it where it is required by custom. (Fatwas of ibin Jom'aan).

Q. Is the husband's claim admissible in respect of gold and silver money, or goods, or any

العروض او مما يؤكل بعثهُ اليها قبل الزفاف او بعد ما بنى بها وادعى انهُ من المهر وقالت انهُ هدية

ج . اذا كان مما يؤكل فالقول لها بيمينها في ذلك لان المتعارف في ذلك كله ان يرسلهُ هدية والظاهر معها لا معهُ كذلك ما يرسلهُ الزوج اليها قبل الزفاف في الاعياد والمواسم من نحو ثياب وحلي وكذا ما يعطيها من ذلك او من دراهم او دنانير صبيحة ليلة العرس ويُسمّى في العرف صبحة (وفي اليمن صُبْحِيَة) فان كل ذلك تعورف كونه هدية لا من المهر وان كان المبعوث غير ما ذُكر فالقول لهُ بيمينهِ والبينة عليها (رد المحتار) وعند الشافعي لو دفع الزوج لمخطوبتهِ شيئًا قبل العقد صُدّقت الزوجة وان كان بعد العقد صُدّق الزوج (فتاوي الأشخر)

واذا اخذ اهل المرأة شيئًا عند التسليم كما اذا ابى ان يسلمها اخوها او يزوجها حتى يأخذ شيئًا فللزوج استردادهُ ان كان قائمًا او قيمتهُ اذا كان هالكًا لانهُ رشوة

س . هل تُقبل دعوى الاب ان الجهاز عارية

ج . اذا جهّز بنتهُ وسلمها ذلك في صحتهِ ليس لهُ ولا لورثتهِ

food which he sent to her before the marriage procession, or after he joined her? He alleges that it was on account of the dower, and she says it was a present.

A. If it were anything eatable, her statement about the same is to be credited on oath, because it is well known that all this which he sends is a present, and the appearances are on her, and not his, side. Similarly what he sends her during the holidays and seasons, such as clothes and ornaments, also what dirhams and dinars (silver and gold coins) he gives her on the morning of the honeymoon. All this is known to be a present, especially what is called Subha (and in Yemen, Subhyiah). *i.e.*, morning present because all that is known to be a present, and not from the dower. If the thing sent is other than what is above mentioned, his statement on oath is to be credited, and the onus of proof lies on her. (Rudd-ul-Muhtar). According to Ash-Shafa'ee, if the husband gives his fiancée anything before the contract is made, her statement is to be believed, and if it were after the contract, he should be believed. (Fatwas of Alaskhar).

When the people of the wife took anything on delivering her, as if her brother refused to convey her or to enter into the marriage contract on her behalf until he got something, the husband may recover it if it were in existence, or its price if it has perished, because it is a bribe.

Q. Is the (wife's) father's allegation that her marriage equipment was given on loan admissible?

A. When a man has furnished his daughter with equipment, and delivered the same to her

بعد استرداد ذلك منها بل تختص بهِ وان ادّعى ان ما دفعهُ لها عارية وقالت هي تمليك او قال الزوج ذلك بعد موتها ليرث منهُ فالمعتمد ان القول للزوج ولها اذا كان العرف مستمرًّا ان الاب يدفع مثلهُ جهازًا لا عارية واما ان كان العرف مشتركًا كما في مصر والشام فالقول للاب كما لو كان اكثر ما يُجهّز بهِ مثلها والعادة تعتبر اذا طُردت او غلبت اذ لا عبرة على النادر اذ لا شك في صدور العارية من بعض الاشخاص والعادة الفاشية الغالبة في اشراف الناس واوساطهم دفع ما زاد على المهر تمليكًا سوى ما يكون على الزوجة ليلة الزفاف من الحلي والثياب فان الكثير او الاكثر منهُ عارية فلو ماتت تلك الليلة لم يكن للزوج ان يدّعي انهُ لها بل القول فيهِ للاب والام انهُ عارية او مستعار لها والمعتمد البنـاء على العرف والأُم كالأَب في تجهيز البنت وكذا ولي الصغيرة اي ينبغي الحكم فيما تدعيهِ الام والولي اذا زوّج الصغيرة كما مرّ لجريان العرف في ذلك ولو دفعت الام في تجهيزها لابنتها شيئًا من امتعة الاب بحضرتهِ وعلمهِ وكان ساكتًا وزُفّت بنتهُ الى الزوج فليس للاب ان يسترد ذلك من ابنتهِ وكذا لو انفقت الام في جهازها ما هو

while he was in good health, neither he nor his heirs can afterwards take it back from her, but it shall belong solely to her. If he alleges that what he had given to her was on loan, and she said it was a gift with possession, or if the husband says so after her death that he might inherit it. According to the approved doctrine, her husband's or her own statement is to be credited if there was a uniform usage that the father gives the like of it as her equipment, and not as a loan ; but if the usage were fluctuating as in Egypt, and Syria, then the father's claim is admissible; for instance, where it was more than what such a woman is ordinarily equipped with. A usage is relevant where it is uniform or prevailing, because an extraordinary occurrence is not relevant, for there is no doubt that a loan is made by some individuals, but the prevailing and uniform custom amongst the higher and middle classes is to give what is in excess of the amount of dower as a gift, except those ornaments and clothes which the wife has upon her on the night of the procession, for much, or most of it, is on loan ; and if she dies on that night, the husband cannot claim it as her own, but the father's and mother's statement that it is a loan, or that it has been borrowed for her, is to be credited: the approved rule is to build (act) on usage. The mother is like the father in equipping the daughter, and so is the guardian of a female child, that is, the decision about what is claimed by the mother or the guardian who give the child in marriage should be made as above explained according to the custom obtaining in regard to the same. If, in equipping her daughter, the mother gives anything of the goods of the father in his presence, and with

معتاد والاب ساكت لا تضمن الام (رد المحتار) وعند الشافعي القول للاب فيما زيّن بهِ بنتهُ

س . هل يحق للخاطب ان يسترد ما بعثهُ الى المخطوبة اذا لم يزوجها ابوها او اذا ابت الزواج وهي كبيرة

ج . اذا كانت الاشياء التي بعثها مما اتفقا عليهِ من المهر يسترد عينه لو كان قائمًا فقط وان تغيّر بالاستعمال او قيمتهُ ان كان هالكًا لانهُ معاوضة ولم يتم العقد فجاز الاسترداد وكذلك يسترد ما بعثهُ هدية وهو قائم دون الهالك والمستهلك لانهُ في معنى الهبة والهلاك او الاستهلاك مانع للرجوع

الباب الثالث عشر

في الطلاق

س . ما معنى الطلاق في الشرع

ج . هو رفع القيد الثابت شرعًا بالنكاح

his knowledge, and he was silent, and the daughter was conveyed to her husband, the father cannot recover the same from his daughter. Similarly if the mother incurs such expenses as are usual in equipping her, and the father was silent, the mother will not be responsible. (Rudd-ul-Muhtar). According to Ash-Shafa'ee the father's words are to be believed about what he has equipped his daughter with. (Ibn Hajar's Commentary on Al Minhaj).

Q. Can a betrother recover what he has sent to his fiancée if her father would not give her in marriage, or if she refuses to marry when she becomes of age?

A. If the things sent by him form part of what they have agreed upon as dower, he can recover it only if it were intact, even if it deteriorated by use, or its price if it has perished, for it was a consideration and the contract was not completed, so it is lawful to recover it. He can also recover what he sent her as a present if it were intact, not if it were destroyed or used, because it comes within the definition of gift, in which destruction and wear are a bar to recovery.

CHAPTER XIII.

On Divorce.

Q. What is the legal definition of divorce?

A. It is the removal of the bond which is legally established by marriage.

س . هل يجوز لرجل ان يطلق زوجتهُ بلا سبب

ج . في الحديث ابغض الحلال الى الله عزّ وجلّ الطلاق لان فيهِ قطع النكاح الذي هو مقصود الشارع ولكنهُ مباح من دون اظهار سبب وانما يُكرَه لغير حاجة وقال ابو حنيفة بتحريمهِ الاَّ لحاجة فان الاصل في الطلاق الحظر الاَّ لعارض يبيحهُ للحاجة الى الخلاص فاذا كان بلا سبب لم يكن فيهِ حاجة للخلاص بل يكون حمقًا وسفاهة راي ومجرد كفران النعمة واخلاص الأيذا بها وباهلها واولادها ولهذا قالوا سببهُ الحاجة الى الخلاص عند تباين الاخلاق وعروض البغضاء الموجبة عدم اقامة حدود الله تعالى وحيث تجرّد من الحاجة المبيحة لهُ شرعًا يبقى على اصلهِ من الحظر ولهذا قال تعالى "فان اطعنكم فلا تبغوا عليهن سبيلاً" اي لا تطلبوا الفراق (رد المحتار على الدر وفتح القدير)

س . ما الاصل في الطلاق

ج . الاصل فيهِ قولهُ تعالى "الطلاق مرّتان فامساك بمعروف او تسريح باحسان" فان طلّقها الثالثة لا تحلّ لهُ من بعد

Q. Is it lawful for a man to divorce his wife without any cause?

A. According to the (prophet's) tradition, of all lawful things, the most hateful in the sight of God (who is most exalted and glorified) is divorce; because it puts an end to marriage which is the object of the lawgiver. It is, however, valid without assigning any reason. But it is condemned in the absence of necessity for it, and Abu Hanifah has declared its prohibition unless there is any need for it, because the principle on which divorce is allowed is prohibitive except when there is an occurrence which renders it lawful as a matter of necessity for seeking safety, but when it occurs without any cause, there is no occasion for seeking it; nay, it will be an act of folly and an abuse of discretion and sheer ingratitude for a blessing, it is simply an act intended to annoy her, and her people and children. Therefore they said that the need for seeking safety is the occasion for it when there is an incompatibility of tempers, and in the event of settled aversion which necessarily leads to the non-observance of the ordinances of the Almighty God. But when there is an absence of necessity which permits it legally, it should remain on its principle of prohibition. The Almighty had therefore said :—If they (women) obey you, don't seek an occasion for troubling them, that is, don't seek an occasion for separation. (Rudd-ul-Muhtar Aladdur, and Fathul-Kadeer).

Q. What is the principle on which divorce is based.

A. The authority is the Koran where it says: "You may divorce your wives twice, and then may either keep them with humanity or dismiss

حتى تنقضي عدتها وتنكح زوجًا غيره بنكاح صحيح فينبغي للزوج ان يقتصر على طلقة واحدة فلا يجمع بين الثلاث لان الطلقة الواحدة بعد انقضاء العدة تفيد المقصود ويستفيد بها الرجعة ان ندم في العدة وتجديد النكاح ان اراد بعد العدة واذا طلّق ثلاثًا ربما ندم فيحتاج الى ان يتزوجها محلّل والى الصبر مدّة وعقد المحلّل منهيّ عنهُ ويكون هو الساعي فيهِ ثم يكون قلبهُ معلقًا بزوجة الغير وتطليقهُ اعني المحلل ثم يورث ذلك تنفيرًا من الزوجة وكل ذلك ثمرة الجمع وفي الواحدة كفاية في المقصود من غير محذور (احياء العلوم للغزالي)

س . ما هي انواع الطلاق

ج . عند ابي حنيفة الطلاق على ثلاثة اوجه وهي احسن الطلاق وطلاق سني وطلاق بدعي

الاول هو ان يطلق الرجل امرأتهُ تطليقة واحدة في طهر لا وطء فيهِ ويتركها حتى تنقضي عدّتها لان الصحابة رضي الله عنهم

them with kindness." If he (the husband) divorce her the third time, she should no longer be lawful to him until she passes her term of iddet and marry another husband by a valid contract of marriage. The husband ought therefore to restrict himself to one divorce, and should not combine the three, because one divorce will fulfill the purpose after the expiry of the term of iddet, and by it he will have the benefit of taking her back if he repents or regrets during her term and he can renew the marriage if he please after the expiry of the iddet, whereas if he divorces her thrice at one time, perhaps he will regret it, so he will be put under the necessity of having her married by a Mohallil to legalize her for him (see Chapter VI.), and of waiting for a certain period, and the contract of the Mohallil is condemned, so he (the husband) will be the abettor of it, and his heart will hang upon the wife of another, and upon her being divorced by him, *i.e.*, the Mohallil, this will then cause an abhorrence of the wife, and all this is the fruit of the cumulative divorce, whereas one divorce suffices for the object in view without any fear of danger. (Ihya-ul-ulum-Lil-Ghazali).

Q. How many kinds of divorce are there?

A. According to Abu Hanifah, divorce can be made in thee ways, that is, (1) the best form of divorce, and (2) the Sunnee (commended) form of divorce, and (3) Bada'ee or heretical form of divorce.

The first is that where a man put away his wife by one divorce in a clean period (between two menstrual courses) in which there shall be no sexual intercourse, and he should leave her until she passes her iddet, because the

كانوا يحبون ان لا يزيدوا في الطلاق على واحدة حتى تمضي عدتها ولانهُ ابعد من الندم لتمكنهِ من التدارك

الثاني الطلاق الحسن السني هو ان يطلق الرجل المرأة المدخول بها ثلاثًا في ثلاثة اطهار لا وطء فيهِ اي في كل طهر واحدة اذا كانت المرأة ممن تحيض وفيمن لا تحيض لكبر او صغر والحامل صحّ طلاقهن عقب وطء واذا كانت المرأة لا تحيض واراد الزوج ان يطلقها للسنة يفرّق الثلاث الطلقات في ثلاثة اشهر اعني في كل شهر طلقة

الثالث الطلاق البدعي ان يطلقها ثلاثًا في كلمة واحدة او ثلاثًا في طهر واحد فاذا فعل ذلك وقع الطلاق وبانت منهُ وكان عاصيًا وقال الشافعي لا تكون الثلاث في طهر واحد او في كلمة بدعة

وعند الشيعة لا يقع الطلاق بلفظ الثلاث ولا في حالة الحيض لانها بدعة محرّمة عندهم (رد المحتار)

س . ما هو الطلاق البائن

ج . (١) هو ثلاث تطليقات اما بكلمة واحدة في وقت واحد او في ثلاثة اطهار (٢) اذا كان الطلاق مقرونًا

companion (of the Prophet) used not to add more to one divorce until her term of iddet expires, and because it is far from causing regret, as it is susceptible of a remedy.

Second—The good Sunnee divorce is that by which a man divorces his wife (whose marriage was consummated) three times in three clean periods in which there shall be no sexual intercourse, that is, one divorce in each interval between the menstrual courses, if the woman is one of those who pass the menses. As regard those who do not pass the menses owing to old or small age, or who are pregnant, it is legal to divorce them even after sexual intercourse. When a woman does not get her courses, and her husband desires to divorce her according to the Sunnee form, he should make three separate divorces in three months, *i. e.*, one divorce should be pronounced each month.

The third is the heretical form of divorce when he divorces her thrice by one word or sentence, or in one clean interval between the courses. When he does so, the divorce takes effect and she becomes absolutely separated from him though he will be a sinner. Ash-Shafa'ee holds that divorce of this description is not heretical.

The Shiahs hold that three divorces expressed in one sentence or at one time are not valid, and so is divorce pronounced during the courses, for it is a forbidden innovation in their opinion. (Rudd-ul-Muhtar).

Q. What is absolute or irreversible divorce?

A. It means (1) three divorces pronounced either in one sentence at one time or in three clean periods, (2) also a divorce accompanied by compensation to the husband is absolute (3) when

بعوض فهو بائن (٣) اذا طلق الرجل زوجتهُ تطليقة او تطليقتين ولم يراجعها قبل انقضاء العدة بانت منهُ

س . ما هو الطلاق الرجعي

ج . اذا طلق الرجل زوجتهُ تطليقة او تطليقتين جاز لهُ ان يراجعها ما دامت في عدتها رضيت بذلك ام لم ترضَ لاستدامة النكاح القائم ما دامت في العدة ولكن لا حق للزوج في الرجعة الاَّ برضاها وعقد جديد ومهر اذا كانت الفرقة بفسخ بعيب او بخيار بلوغ ولا في طلاق بعوض ولا بعد انقضاء العدة من طلاق رجعي ولا اذا طلق رجل امرأتهُ قبل الوطء

س . كيف تتم الرجعة

ج . يقول الزوج راجعتك او رددتك او راجعت امرأتي او بفعل منهُ يدل على انهُ راجعها وقال الشافعي لا تصحّ الاَّ بالقول عند القدرة عليهِ بان لا يكون اخرس او معتقل اللسان وانهُ يستحب لهُ ان يشهد على الرجعة فان لم يُشهد صحت الرجعة وان انقضت عدتها فقال قد كنت راجعتها فصدّقتهُ فهي الرجعة وان كذّبتهُ ولم يكن بينهما شاهد فالقول قولها بيمينها

س . ممن يصح الطلاق

a man put away his wife by one or two divorces, and does not take her back before the expiry of her iddet, she becomes absolutely divorced from him.

Q. What is a reversible divorce?

A. When a man put away his free wife by one or two divorces, it is lawful for him to take her back during her term of iddet, whether she consents to it or not, by reason of the continuance of the marriage, which lasts so long as she is undergoing the term.

But the husband has no right to the woman's return without her consent and a new contract and dower in case of dissolution of marriage owing to bodily defect, or the exercise of the right of option when coming of age, nor when the divorce is accompanied by compensation, nor after the expiry of the iddet in the case of a reversible divorce, nor when a woman was divorced by her husband before consummation of the marriage.

Q. How is her return effected?

A. By the husband saying, "I recall you or take you back, or I recall my wife," or by any act done by him implying that he has recalled her. Ash-Shafa'ee says that it is not valid if not expressed in words unless the husband were dumb or one whose tongue is fettered, and it is recommended that he should have witnesses to her recall. If he does not do so, her recall is valid. If her term expires and he says, "I have already recalled her," and she confirms him, it is a valid recall, but if she contradicts him and they had no witnesses, her statement is to be believed on oath.

Q. Whose divorce is valid?

ج . يصح طلاق الزوج العاقل البالغ ولو عبدًا او مكرهًا فلا يقع طلاق الصبي والمجنون والمعتوه والنائم وعند ابي حنيفة لايقع ايضًا طلاق المدهوش والمغمى عليهِ وقال الشافعي طلاق المكره لا يقع واما السكران فينفذ طلاقهُ عقوبةً لهُ الاَّ اذا كان غير متعدٍّ بشربهِ كما اذا لم يعلم بأنهُ مسكر او اذا شربهُ دواء وتعين بأن لم يقم غيرهُ مقامهُ

س . هل ترث المطلقة طلاقًا رجعيًّا

ج . نعم لان الرجعي لا يزيل النكاح فيتوارث الزوجان فيهِ قبل انقضاء العدَّة

س . هل ترث المطلقة طلاقًا بائنًا

ج . لا ترث الاَّ اذا طلقها زوجها في مرضهِ وهو مريض مرضًا يخاف منهُ الهلاك غالبًا بحيث يعجز بهِ عن اقامة مصالحهِ خارج البيت او كان مفلوجًا او مسلولاً او مقعدًا يزداد مرضه او بارز رجلاً اقوى منهُ او قُدِّم ليُقتل من قصاص او بقي على لوح من سفينة غارقة او افترسهُ سبع وبقي في فيهِ ترثهُ المطلقة اذا مات وهي في العدَّة لفرارهِ من ارثها فيرد عليهِ قصدهُ الى تمام

A. Divorce by a husband of full age and sound mind, even if he were a slave, or if he were forced to do it, is valid, A divorce pronounced by a child or a lunatic or an idiot or somnambulist, or according to Abu Hanifah, one who is stupefied or unconscious takes no effect. Ash-Shafa'ee says that divorce by one who is forced is not valid. As for a drunken man, his divorce shall be carried into effect as a punishment. unless he was not a transgressor in drinking it, as where he did not know that it was an intoxicating liquor, or if he drank it as a medicine and it was the only specific for which no substitute could be obtained.

Q. Can a woman who is separated by a reversible divorce inherit?

A. Yes, because a reversible divorce does not put an end to the marriage, and so both the husband and wife inherit each other before the expiry of the term of iddet.

Q. Does a woman who is divorced absolutely inherit?

A. She does not inherit unless her husband has divorced her while he is suffering from a sickness which generally causes apprehension of death, or which disables him from carrying on his outdoor duties, or if he were paralysed, or consumptive, or crippled, and his sickness was on the increase, or if he challenged to a duel a man who is stronger than he, or if he was taken out for execution under a legal sentence, or if he remained on the plank of a shipwreck, or he was seized by a beast of prey and remained in his mouth, the woman shall inherit from him if he dies while she is undergoing her iddet, because he ran away from her right of inheritance, and

عدتها اذا ابانها طائعًا بغير رضاها ومات بذلك السبب او بغيرهِ كما اذا قُتل في اثناء مرضهِ في العدة للمدخول بها ورثت هي منهُ لا هو منها لرضاه باسقاط حقهِ وقال الشافعي في الجديد لا ميراث للمبانة مطلقًا لزوال النكاح بجميع احكامهِ وقال مالك ترث قبل انقضاء عدّتها وبعدها وعند احمد ترث ما لم تتزوّج بزوج آخر (رد المحتار على الدر والعيني على الكنز)

وكذا ترث المرأة مَن لاعنها في مرضهِ او آلى منها حال كونهِ مريضًا اي حلف على ترك قربانها مدّة اربعة اشهر فاكثر ولم يحنث ثم مات وهي في العدّة ورثتهُ اما اذا ابانها بامرها او اختلعت منهُ او اختارت نفسها بتفويض الزوج لها وكذلك لو فارقتهُ بسبب الجب والعنة وخيار البلوغ والعتق ومات وهي في العدّة لم ترث لان الفرقة من قبلها (كنز)

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so his design will recoil on him so long until her term of iddet expires. If he divorces her absolutely of his own accord without her consent and dies from that or any other cause, as if he were killed during his sickness within the term of her iddet in the case of a wife whose marriage has been consummated, she will inherit from him and not he from her owing to his consent to forfeit his right. Ash-Shafa'ee, according to his new doctrines, says no right of inheritance accrues to a woman separated by an absolute divorce by reason of the termination of marriage together with all its laws. Malik says that she should inherit before and after the expiry of iddet. According to Ahmed, she inherits so long as she does not marry another husband. (Rudd-ul-Muhtar ala Addur and Alainee ala Al Kanz).

The woman shall also inherit him (her husband) who has imprecated her, *i.e.*, accused her of infidelity, or who made a vow of abstinence from her, that is, he swore that he would not approach her for four months or more, and did not violate the vow, and then died during her term, she shall inherit. But if he divorced her absolutely by her order, or if she obtained her separation from him for a compensation, or if she chose to have herself separated in consequence of her husband delegating its authority to her, and likewise if she separates from him on account of his impotence, or the exercise of her right of option on attaining to puberty, or emancipation and he died during her term, she shall not inherit because the separation ensued from her act. (Kanz).

الباب الرابع عشر

في الخُلْع

س . ما هو الخلع

ج . في اللغة هو النزع يُقال خَلَع ثوبهُ اذا نزعهُ تشبيهاً لفراق الزوجين بنزع الثياب لان كلاً من الزوجين كاللباس للآخر كما قال الله تعالى "هنّ لباسٌ لكم وانتم لباسٌ لهنّ" لان كلاً منهما يستر حال صاحبهِ ويمنعهُ عن الفواحش وشرعاً هي ازالة عقد النكاح على عوض معلوم راجع لجهة الزوج واتفق الأئمة على ان الخلع جائز وانهُ اذا كرهت المرأة زوجها لسوء معاشرة او لقبح منظر فلا بأس بهِ عند الحاجة للشقاق وعدم الوفاق والخلع تطليقهُ بائنة

س . ما الاصل فيهِ

ج . الكتاب كقولهِ "وآتوا النساء صدقتهنّ نحلةً فان طبنَ لكم عن شيء منهُ نفساً فكلوهُ هنيئاً مريئاً" واصرح من هذه الآية في الدلالة قولهُ تعالى "فلا جناح عليهما فيما افتدت بهِ"

س . هل يصح الخلع اذا اكرهها الزوج عليهِ

CHAPTER XIV.

On Khula'.

Q. What is Khula' ?

A. In common language it means to strip off, thus it is said he khala'a his dress, *i. e.*, he took it off. It likens the separation of the husband and wife to the act of stripping off clothes, because each of the married couple is like a garment to the other, as the Almighty God hath said, "They (women) are a garment to you, and you are a garment to them," because each of them screens the condition of his friend and prevents him from doing obscence things. In a legal sense, it denotes the dissolution of the contract of marriage for a certain consideration payable to the husband. The Imams are agreed that the khula' separation is valid, and that if a woman hates her husband owing to his bad society or conduct or ugly countenance, there is no harm in resorting to it when there is need for it owing to dissentions and the want of accord. Khula' is absolute divorce.

Q. What is the principle on which it is based ?

A. The Koran, where it says: "Give the women their dower freely; but if they remit of their own free will any part of it enjoy it with a good grace and pleasure." A clearer proof than this verse is what the Almighty says: There shall be no crime in either of them in respect of what she redeems herself for.

Q. Is the khula' valid where the husband has forced her to do it ?

ج . تُطلَق بلا مال لان الرضا شرط للزوم المال فلو ادّعى الخلع على مال وهي تنكر يقع الطلاق باقراره والدعوى في المال بحالها فاذا لم تكن له شهود القول لها

س . هل يصح خلع الاب صغيرته

ج . لا يصح سواء كان بمالها او مهرها فاذا فعل ذلك طُلقت ولم يلزم المال

س . هل يتميز الخلع بشيء غير العوض

ج . نعم لانه بالخلع الصحيح تملك المرأة نفسها ولا رجعة للزوج عليها الاّ برضاها ونكاح جديد ويجوز الخلع في الطهر والحيض

س . ما معنى المباراة

ج . معناها ابراء كل من الزوج والزوجة صاحبهُ من كل حق ثابت في وقت المباراة لكل منهما على الآخر متعلق بالنكاح فلو اختلعت على ان لا دعوى لكلّ على صاحبهِ ثم ادّعى ان له كلا من القطن عندها قُبلت الدعوى لاختصاص البراءة بحقوق

A. She shall become divorced without any compensation, because free consent is a condition essential to the payment of compensation. If he alleges that he has made khula' for a consideration which she denies, the divorce shall take effect on his own admission, while his claim for the compensation shall be left to itself, and if he has no witnesses, her statement on oath shall be believed.

Q. Can a father obtain the separation of his female child for compensation?

A. It is not valid whether it was with her own property or dower. If he does so, she shall be divorced, and the compensation shall not be payable.

Q. Is khula' distinguished from divorce otherwise than by payment of compensation?

A. Yes, by a valid khula' the woman obtains possession of herself, and the husband cannot take her back without her own consent and a new contract, and khula' separation may be made while she has her courses upon her, or during the clean interval.

Q. What is meant by Mubarat?

A. It means both the husband and wife releasing each other from every right actually due at the time of the mutual release from every one of them to the other in connection with the marriage. If she obtains her separation on condition that none of them has any claim against the other, and then he claimed a certain quantity of cotton (deposited) with her, the claim shall be admissible, because the baraat release is solely connected with the rights of marriage. But the iddet maintenance shall not be irrecoverable

النكاح الاَّ نفقة العدَّة لا تسقط الاَّ اذا نصَّ عليها واما سكنى العدَّة فلا تسقط لانها حق الشرع

س. هل تصح البراءة من نفقة الولد

ج. تصحّ اذا كانت لمدة معيَّنة كشهر او سنة فلو خالعتهُ على نفقة ولدٍ مدَّة شهر مثلاً وهي معسرة فطالبتهُ يُجبَر عليها ولو خالعتهُ على ان يمسك الولد عندهُ صحَّ الخلع وبطل الشرط لانهُ مخالف للشرع

الباب الخامس عشر

في العدَّة

س. ما معنى العدَّة وما المقصود بها

ج. العدَّة مأخوذة من العدد وهي مدَّة تتربص فيها المرأة المطلقة لمعرفة براءة رحمها قبل ان يحل لها ان تتزوَّج على رجل آخر والاصل فيهِ قولهُ تعالى "والمطلقات يتربصنَ بانفسهنَّ ثلاثة قروء ولا يحلّ لهنَّ ان يكتمنَ ما خلق الله في ارحامهنَّ ان كنَّ يؤمنَّ بالله واليوم الآخر" وشُرعت صيانةً للأنساب وتحصينًا لها من الاختلاط

unless expressly stipulated for, while the right to lodging during the term shall not be barred, as it is a requirement of the law.

Q. Is a release from the maintenance of a child valid?

A. It is valid if it is made for a specified period such as one month or one year. If, for instance, she obtains her divorce by remitting the maintenance of his child by her for one month while she is insolvent, and afterwards duns him for the maintenance, he shall be compelled to pay it, or if she obtains her divorce on condition that he shall keep the child with him, the khula' is valid, and the condition is void because it is contrary to law.

CHAPTER XV.

On Iddet.

Q. What is the meaning of Iddet, and what is its object?

A. It is derived from the word 'adad, *i e.*, number, and it means a space of time during which a divorced woman should wait before she should marry another husband in order to know the clearance of the womb, and the principle for it is derived from the Almighty's saying, "And the divorced women should wait concerning themselves for three periods, *i. e.*, until they have their courses thrice, and it shall not be lawful for them to conceal that which God has created in their wombs if they believe in God and the last day. (Koran, Chapter II.). It has been provided for in order to preserve pedigree and to save it from adulteration.

س . ما هو القروء

ج . عند ابي حنيفة معناهُ الحيض وعند الشافعي مدَّة الطهر بين دمي حيضين

س . ما هي عدَّة الحرَّة

ج . عدَّة الحرَّة المدخول بها ثلاثة قروء وان كانت ممن لا تحيض لصغر او كبر فعدَّتها ثلاثة اشهر

(٢) عدَّة الحامل تنقضي اذا وضعت حملها سواء توفي عنها زوجها او طلقت

(٣) اذا مات الرجل عن امرأته الحرَّة فعدَّتها اربعة اشهر وعشرة ايام

Q. What is the Karo or period ?

A. According to Abu Hanifah it means the monthly course, and according to Ash-Shafa'ee it means the clean interval between two menstrual courses.

Q. What is the term of iddet for a free woman ?

A. The iddet of a woman whose marriage has been consummated is three menstrual courses. If she is too young or too old to have the courses, her term is three months.

(2) The term of iddet for a pregnant woman expires on her delivering her burden, whether her husband died leaving her behind, or whether she has been divorced.

(3) Where a man dies leaving his free wife behind, her term is four months and ten days.

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