CHAPTER XX.

THE LAW RELATING TO WILLS.

SECTION I.

PRELIMINARY DISCOURSE.

Ancient Arab customs.

THE records that have been handed down to us from antiquity regarding the customs and usages of the pre-Islâmite Arabs seem to establish abundantly that testamentary dispositions were not unknown among the pagan tribes of the peninsula. But it is difficult to say, from the materials in our possession, what were the conditions which regulated the validity or invalidity of wills made by them.

The Rabbinical Law.

The Rabbinical Law which was in force among the Jewish tribes prohibited the testator from depriving his lawful heirs from succession; it also precluded him from constituting a stranger as an heir. But when a disposition was effectuated by the immediate delivery of possession, the Rabbinical Law apparently regarded it as valid. A will could be made either verbally or in writing, but, generally speaking, the first mode was considered as the more preferable of the two.

The rule of the Koran.

The Koran expressly sanctioned the power of making a testamentary disposition, and regulated the formalities and conditions to which it is subjected.(1)

"Wills," says the *Hedâya*, "are lawful on a favourable construction. *Analogy* would suggest that they are unlawful, because a bequest signifies an endowment with a thing in a way which occasions such endowment to be referred to a time when the property has become void in the proprietor (*i.e.*, the testator), and as an endowment with reference to a future period (as if a person were to say to another, 'I constitute you proprietor of this article on the morrow,') is unlawful, supposing even that the donor's property in the article still continues to exist at that time, it follows

(1) Koran, Chap. V, verse 75.

that the suspension of the deed to a period when the property is null and void (as at the decease of the party), is *à fortiori* unlawful. The reasons, however, for a more favourable construction in this particular are two-fold:—*First*, there is an indispensable necessity that men should have the power of making bequests, for a man, from the delusion of his hopes, is improvident and deficient in practice, but when sickness invades him, he becomes alarmed and afraid of death. At that period, therefore, he stands in need of compensating for his deficiencies by means of his property—and this in such a manner that if he should die of that illness, his objects (namely, compensation for his deficiencies and merit in a future state) may be obtained—or, on the other hand, if he should recover, that he may apply the said property to his wants—and as these objects are attainable by giving a legal validity to wills, they are, therefore, ordained to be lawful. *Secondly*, wills are declared to be lawful in the Koran and the traditions, and all (our) doctors, moreover, have concurred in this opinion."

The remarks of M. Sautayra on this subject are deserving of special consideration :—

"A will from the Mussulman's point of view is a divine institution, since its exercise is regulated by the Koran. It offers to the testator the means of correcting to a certain extent the law of succession, and of enabling some of those relatives who are excluded from inheritance to obtain a share in his goods, and of recognising the services rendered to him by a stranger, or the devotion to him in his last moments. At the same time the Prophet has declared that the power should not be exercised to the injury of the lawful heirs."

"The tradition reported by Abi Wakkâs supports the above view and forms the foundation for the restriction which the Mahommedan Law imposes on the power of testamentary disposition possessed by a Mussulman. He says :—'In the year of the conquest of Mecca, being taken so extremely ill that my life was despaired of, the Prophet of God came to pay me a visit of consolation ; I told him that, by the blessing of God, having a great estate but no heirs except one daughter, I wished to know if I might dispose of it all by will.' He replied : 'No.' And when I severally interrogated him, 'if I might leave two-thirds or one-half,' he also replied in the negative—but when I asked if I might leave

The rule of law prescribed by the Prophet.

a third, he answered, 'Yes, you may leave a third of your property by will, but a third part to be disposed of by will is a great portion, and it is better you should leave your heirs rich than in a state of poverty which might oblige them to beg of others.'"

The result of these directions is, that under the Islâmic Law, a testator cannot by a testamentary disposition deprive his lawful heirs of their share in the inheritance nor dispose of more than one-third of his estate.(1) A bequest to an heir is under no circumstance valid, though a bequest in favour of a non-heir is valid to the extent of a third of the estate of the testator, although the heirs of the testator may not give their assent thereto. These principles, however, will be developed fully in their proper place.

Having so far pointed out the basis on which the Mahommedan Law relating to wills is founded, I shall now proceed to discuss what is the definition of a will under the law of Islâm, and the conditions requisite for making a valid testamentary disposition, or giving a valid testamentary direction; in other words, the testamentary capacity of the person making a will.

SECTION II.

FORM AND CHARACTERISTICS OF A WILL OR WASIAT.

Under the Mahommedan Law a will may be made either verbally or in writing.

A will is defined by Jarman to be "an instrument by which a person makes a disposition of his property to take effect after his decease, and which is, in its own nature, ambulatory and revocable during his life."(2) Under the Mussulman Law, however, a will may be made either verbally or in writing.(3) And consequently a *wasiat* is defined in the *Fatâwai Alamgiri* "to be the *conferment* of a right of property in a specific thing, or in a profit or advantage, in the manner of a gratuity to take effect on the death of the testator."(4)

The *Sharâya* defines a *wasiat* somewhat similarly, namely, as the act of conferring a right in the substance or the usufruct of a thing after death.

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(1) Tirmizi; Ibn Mâja; *Radd-ul-Muhtâr*, Vol. V, p. 639.

(2) Jarman on Wills, p. 16.

(3) A written will is termed a *wasiatnâmah*, while a noncupative will is called simply a *wasiat*. A will need not, under the Mahommedan Law, be in writing; *Tumeez Begum* v. *Furihut Hussan*, 2 N. W. P. R., 15

(4) Compare also the *Radd-ul-Muhtâr*, Vol. V, p. 640.

Under the Mussulman Law, a testamentary disposition need not be in writing, nor is any particular form even of verbal declaration necessary to constitute a *wasiat*;(1) so long as it is apparent that the intention of the testator is to make a disposition operative on his death, any expression that sufficiently indicates that intention will be regarded as a *wasiat*. The devise may be either to the legatee beneficially or in trust for some purpose or object, and may be constituted, by saying, "I have bequeathed such a thing to such an one,"(2) or "I have bequeathed towards such an one," or by any other words or expressions that convey the idea of a disposition dependent for its operation upon the death of the testator. How a *wasiat* may be constituted.

In the case of *Aulia Bibi* v. *Ala-ud-din*(3) it was found that a document purporting to be the will of a Mahommedan lady was in fact drawn up in accordance with instructions given by the testatrix to a vakil at a time when the testatrix was competent to make a will; the High Court of Allahabad held that such a document was a valid will notwithstanding the absence of the signature of the testatrix.

A letter written by the testator containing directions as to the disposition of his property to take effect after his death has been held to constitute a valid will.(4)

A will may be made also by signs, as in the case of a dumb person who does not possess the faculty of speech, but who can express his meaning by signs. So also in the case of a person who is a *marîz*, that is, suffering from a mortal illness and unable from weakness to speak.(5) "A sick man makes a bequest, and being unable to speak from weakness, gives a nod with his head, and it is known *that he comprehends what he is about*; in these circumstances, if his meaning be understood, the bequest is lawful but not otherwise. And it is implied that he dies without regaining the

(1) "According to the Mahommedan Law, a will may be made either verbally or in writing and no special form or solemnity for making or attesting a will is prescribed," Stanley, C. J., and Banerji, J., in *Aulia Bibi* v. *Ala-ud-din*, infra; Comp. *Mahomed Altaf Ali Khan* v. *Ahmed Baksh* [1876], 25 W. R., 12.

(2) The difference between the two expressions arises from the use of the two prepositions "towards" (*ila*) and "to" (*le*), the first signifying the conveyance of a beneficial interest to the legatee and the second by way of trust.

(3) [1906], I. L., 28 All., 715.

(4) *Mazhar Hussein* v. *Bodha Bibi* [1898], I. L., 21 All., 91.

(5) *Radd-ul-Muhtâr*, Vol. V, p. 636.

power of speech; for then it is evident that there was no hope at the time of the bequest of his being able to speak, and his condition was therefore the same as that of a dumb man."(1)

In some cases the disposition may, *primâ facie*, appear to convey an immediate interest, and yet the intention may not be to give it operation during the lifetime of the testator; when that is so, the disposition will take effect as a *wasiat*. Mere postponement of the actual enjoyment of a property conveyed to a person does not necessarily make the disposition testamentary, as appeared in the case of *Nawab Amjad Ally Khan* v. *Mohamdi Begum*.(2) The character of the disposition, whether it is a will or a disposition *inter vivos*, whether it operates *in præsenti* or *in futuro* as a *wasiat*, is dependent upon the intention of the testator.

A contingent *wasiat*.

A *wasiat* may be conditional or contingent. In such a case its operation will be dependent upon the happening of the contingency, and if the contingency does not happen, it will not be given effect to.(3) A reference to some impending danger is common to most of these cases. For example, a man may say, "should I die of such a malady," or "should I not return from the pilgrimage to the Holy Shrine I leave, &c.," or "I bequeath so-and-so in case anything happens to me on my voyage to Mecca," the *wasiats* in these cases would not take effect if the contingencies apprehended do not happen, whether the will be in writing or by word of mouth. The jurisconsults, however, draw a distinction between a contingent *wasiat* in writing and one made verbally. They hold that when there is only a verbal *wasiat* dependent for its operation on the happening of a contingency which does not happen, the *wasiat* is revoked *ipso facto*. But if the wish of the testator has been reduced into writing, and that writing has been confided into the hands of a third person, and after the possibility of the contingency ever happening has ceased, if the testator does not withdraw the writing from the hands of such person, it will be presumed that he did not intend to revoke his *wasiat* made before, and effect will be given to it. If the

(1) Baillie, p. 652; *Fatâwai Alamgiri*, Vol. VI, p. 168.

(2) [1867] 11 Moore's I. A., p. 517.

(3) And it will not be admitted to probate, 1 Jarman, p. 16; *Parsons* v. *Lance*, 1 Ves., 190; *Sinclair* v. *Home*, 6 Ves., 607.

will always remained in the hands of the testator no such presumption would arise. But when the *wasiat* is in the following terms "should I die" or "if I die, such a thing," or "so much of my inheritance shall belong to such an one," it will not be a contingent will but a *wasiat*, pure and simple, because it is the essence of a *wasiat* that it should take effect upon the death of the testator.(1)

SECTION III.

THE CAPACITY OF TESTATORS.

The capacity of testators.

There is considerable difference between the several schools regarding the capacity to make a will. Freedom, however, is regarded by all the schools as a necessary condition. A slave, whether in the absolute control of his master, or one who has obtained a qualified freedom upon a covenant for ransom,(2) cannot make a testamentary disposition of his property. But a bequest made by a person labouring under this disability would be valid when its operation is referred to a time subsequent to his attaining his freedom.(3) A prisoner incarcerated for an offence is not subject to this disability, for he is not debarred by his loss of freedom under the direction of the law, from dealing with his property, as his conviction of the offence does not vest the property in anybody else, whereas the slave, whether absolute or qualified, can only hold property subject to the control of his master.

Freedom.

Sanity also is a necessary condition to the validity of a *wasiat*. "A bequest," says the *Fatâwai Alamgiri*, "by any one who is incompetent to perform a gratuitous act is null. Hence, bequest by an insane person or a *mokâtib*(4) or a *mâzoon*(5) is void. And if a person is insane at the time of making a *wasiat*, but afterwards recovers from his insanity and then dies, still the bequest is unlawful for want of competency at the time of making it."

Sanity.

According to the English Law, a will made during a lucid interval is valid. In other words, though the fact of a person being

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(1) Sautayra, p. 341.

(2) A *mokâtib*.

(3) Example of this will be given later.

(4) A slave who has entered into an agreement with his master for his ransom or emancipation.

(5) Licensed slave—a slave who has obtained license to work for himself.

found insane is *primâ facie* evidence of habitual insanity, and consequently of the invalidity of the will, yet it does not preclude proof that the execution occurred during a lucid interval. The principle of the Mahommedan Law is apparently different,—for, according to Kâzi Khân, if a person makes a *wasiat* and subsequent thereto becomes a permanent lunatic, in such a case the *wasiat* will become void. But when the madness has not lasted over six months, the bequest will not be voided.

The law requires a perfectly disposing mind, and a person who becomes mad shortly after making a bequest, or who is mad at the time, is presumed not to be capable of exercising the faculty of properly considering the nature of the act. Similarly, if a person were to make a bequest, and then become subject to hallucinations and afterwards lose his mind, and remain in that condition until his death, the *wasiat* would be void.(1) It would follow from the above *dictum* that when a person is a lunatic, and makes a bequest during a state of lucidity, the bequest would be invalid, for the reasons upon which the *waisat* of a person who loses his mind after the bequest, is held to be void. Is perfect sanity, however, an essential condition? The *Sharâya* speaks of "perfect understanding" as necessary to the valid constitution of a will; but it would seem from the cases given in the *Jâm'aa-ush-Shittât* and the general purport of the Hanafî Law, that what is required is a mind that comprehends the nature of the testamentary act, in other words, a disposing mind. So long as the capacity to understand the nature of the act is present, and the person entering into the obligation is possessed of understanding sufficient to comprehend the effect of the disposition, the mere existence of partial delusions will not destroy the capacity to make a will.(2) As a general rule, it may be stated that the principles of the Mussulman Law with regard to the disposing capacity of persons afflicted with any mental delusion on any particular subject, which, however, does not interfere with their powers of comprehension, are analogous in the main to the principles recognised by the English Law.

Hanafî and Shiah Law. Disposing mind necessary to the validity of a *wasiat*.

Absolute insanity may not be the only cause of destroying the disposing capacity. The will of an idiot is of course void. Mental

(1) *Radd-ul-Muhtâr*, Vol. V, p. 651.
(2) See the case of *Banks* v. *Goodfellow*, L. R., 5 Q. B., 549.

imbecility arising from advanced age, illness, or any other cause may destroy the testamentary power. The loss of the disposing capacity may be either temporary or permanent. A temporary loss may be caused by drinking, drugging, illness, &c. Undue influence exercised over a weak mind may also lead to the same effect.

Dispositions by a person suffering from a fatal illness.

Under the Mussulman Law, the acts of disposition by a person suffering from an illness which induces the apprehension of death and which eventually causes death, have only a qualified effect given to them. For example, when a person suffering from such an illness makes a gift or *wakf*, such disposition, though an act of immediate operation, takes effect like a will and is valid only so far as a *wasiat* may be valid.(1)

This is independently of any question regarding the disposing condition of the testator's mind or the spontaneity of his action. The law presumes that a person in such a state is devoid of a complete disposing faculty. In considering, therefore, the operative character of voluntary dispositions to which effect is given immediately, regard is to be had to the state of the disposing party at the time of the disposition. If he was then in health, they are valid as against the whole of his property; and if he was not then in health, they are valid as against a third of it, provided the disposition is not in favour of an heir. By acts of disposal are to be understood such acts as are initiatory or creative of right, and have in them something gratuitous. For the acknowledgment of a debt in sickness operates against the whole of a person's estate, and a marriage contracted in sickness is in like manner operative against the whole to the extent of the proper dower. An act of disposal which is not to take effect till after the death of the disposing party, as when a man says—"Thou art free after my death," or "This is to Zaid after my death," is good only to the extent of a third of his property even though it were made in health. Emancipation, *muhâbât*,(2) *wakf*, gift and *ziman* or suretyship by a sick man have all the same effect as bequests, and operate only

(1) The will of a person suffering from a *marz-ul-mout* is valid only as to a third; *Radd-ul-Muhtâr*.

(2) *Muhâbât* is an act by which the donor makes a gratuity to the donee either by reducing the price or increasing the value of the property sold. *Muhâbât* is derived from *hubwat*.

against a third of his property.(1) The diseases which naturally give rise to an apprehension of death and which are technically called *marz-ul-mout* or *death-illness* have been explained in a previous chapter.(2) Some further explanations may usefully be added here.(3)

Marz-ul-mout (Hanafî doctrines).

"The approved doctrine as stated by Kahastâni is that *marz-ul-mout* is an illness from which death results though the sufferer be not confined to his bed. A long-standing illness is not regarded as a death-illness so as to restrict a person's capacity to make a disposition of his entire estate, on the ground that when it has existed for a long period, it has become a part of his nature as in the case of the blind, the lame, &c., and he no longer apprehends the imminence of death. A death-illness is, accordingly, a disease from which death is imminent, and this happens when it goes on increasing until it ends in death; but where it remains stationary for a long time, or the progress is so imperceptible as to cause no fear to the sufferer, or when he becomes habituated to it, it is not."

"When a death occurs after the lapse of a full twelve-month from the commencement of the disease, the disposition is valid with reference to the entire estate. But when a death has occurred before that period from a disease which usually ends fatally, and the deceased was disabled by it from leaving his house to attend to his ordinary avocations, or, if a woman, from performing domestic duties in the house, such a disease is regarded as death-illness and the disposition will take effect with reference to one-third."(4) "A gratuitous disposition by a woman about to be confined is valid with reference to one-third; so also if two bodies of men come into collision with each other which ends in bloodshed and the death of some, the rule of *Marz-ul-mout* would apply (*i.e.*, the disposition made after the people had started for the fight would only take effect with reference to a third, but not if there was no collision). So also the disposition of a person overtaken by storm at sea and of the prisoner ordered to be executed."(5)

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(1) *Fatâwai Alamgiri*, Vol. VI, p. 168; Baillie's Dig., p. 651.
(2) *Ante*, p. 57.
(3) From the Chapter on Wills, *Radd-ul-Muhtâr*, Vol. V, p. 639.
(4) This is according to Zailye and others.
(5) *Radd-ul-Muhtâr*, Vol. V, p. 650; according to the *M'irâj*.

The provisions of the Shiah Law on this branch of the subject are analogous, and yet there are some features of difference which deserve especial attention. According to the *Jawâhir-ul-Kalâm*, "dispositions of property by a person suffering from a mortal illness are of two kinds:—such as are deferred and not intended to have operation until after the death of the testator; and such as take effect immediately. The first are to be treated in every respect as legacies according to the unanimous opinion of 'our' doctors and like the acts of a person in health, which are done with reference to his death so as not to take effect till after it. The second description of acts are such as are of immediate operation like *mūhâbât* or connivance at loss in contracts of exchange, and gift, *wakf* and emancipation. These are good according to some of 'our' doctors as against the whole of the settlor's property, and according to others only as against a third. Both opinions, however, agree in this that if he should recover from his sickness they are valid against himself and against his heirs, and the difference of opinion is only when he dies of the same disease." Shiah Doctrines. Shiah doctrines as to *Marz-ul-mout*.

"Here it is necessary to note the diseases which restrain a man from disposing of more than a third of his property. Upon this point we may say that every disease which is usually accompanied with apprehension of death is said to be dangerous,(1) such as hectic fever, consumption, hemorrhage, &c. Diseases, again, from which there is usually recovery have no other effect on a man's disposal of his property than if he were in a state of health, such as temporary fever, headache, whether with continued augmentation or not, ophthalmia, and a tubercle on the tongue Diseases, again, which admit of being classed as either, that is, as *dangerous* and *undangerous* are putrid fever, diarrhœa, and a phlegmatic swelling. It were, however, better to ascribe the effect under consideration to all diseases which are, in fact, accompanied with, or terminate in death, whether they are customarily dangerous or not. *But occasions of actual conflict in war, or of a childbirth with women, or of storms at sea have not the effect alluded to, namely, that of impairing a person's power to dispose of his property, because, in point of fact, the term disease is quite inapplicable* to them."(2)

(1) Comp. Query, *Droit Musulman*, I, p. 635.
(2) On this point the Hanafis differ.

The effect of testamentary dispositions by a person labouring under an illness of which he eventually dies, is thus explained in the *Sharâya* :—

"(*a*) When a person in sickness has made a gift and also entered into a *muhâbât* transaction, and the third of his property suffices for both purposes, there is no question that effect is to be given to both. But if it should fall short, the first act of the deceased is entitled to preference, and effect would be given to the other acts in succession until the third is exhausted when the deficiency would fall solely upon the last.

(*b*) When a gift of immediate operation and one whose effect is postponed or suspended are made at the same time, preference is to be given to the former, but effect will also be given to the latter if the third of the estate is sufficient for both purposes, but if not, the latter is valid so far as the third will bear and void as to the remainder.

(*c*) When a sick person having no more than a *kurr* (measure) of grain of some kind of the value of six dinars sells it for a *kurr* of inferior grain of the value of two dinars the loss by the *muhâbât* is a half of his whole estate, whereas all that he can lawfully dispose of is no more than a third and the purchaser should accordingly restore a sixth to the heirs, but that would be usurious, and in order to make a valid transaction it is necessary that he should give back to the heirs one-third of their good *kurr*, and that they should give back to him one-third of his inferior *kurr* ; there will thus remain with the heirs two-thirds of the *kurr*, or two dinars in value, and with the purchaser two-thirds of a *kurr*, or four dinars in value, which will only be an excess of two dinars or one-third of six (the whole estate) which is just the amount which the seller could lawfully dispose of in his last illness.

(*d*) If a sick person should sell some article of the value of two hundred for one hundred and afterwards recover of his disease, the contract is necessarily binding. But if he should die, and the heirs refuse to ratify the sale, it would be valid so far as a half of the article is opposed to what he actually paid, and that is three parts out of six and the *muhâbât* is good as to two-sixths or one-third of the six, and these together, amount to five-sixths of the article to which extent then the sale is valid, and void only as to the remaining one-sixth which, therefore, must be returned to the

heirs. The purchaser, however, has an option and may cancel the sale on account of the partial invalidity of the bargain or abide by it, but should he adopt the latter alternative and offer the heirs a compensation for a sixth of the article, they also have an option either to reject or accept, their right being involved in the substance of the article."

The result of these provisions is, that a testamentary disposition by a person suffering from a death-illness is valid as to a third of his estate, if at the time of the *wasiat*, the testator was sufficiently in his senses, and the act was a spontaneous expression of his own wish or intention.

Acknowledgment of a liability on death-bed.

There is considerable difference, however, between a gratuitous disposition made on a death-bed or in contemplation of death, and the acknowledgment of a liability.

"It is to be observed as a general rule," says the *Hedâya* "that where a person performs with his property any gratuitous deed of immediate operation (that is, not restricted to his death), if he be in health at the time, such deed is valid to the extent of all his property—or, if he be sick, it takes effect to the extent of one-third of his property, and where a person performs such deed with his property restricted to the circumstance of his decease, it takes effect to the extent of a third of his property, whether at the time he be sick or in health. If, on the contrary, a person make an acknowledgment of debt, such acknowledgment is of effect to the whole extent of his property, notwithstanding it be made during sickness as this is not a *gratuitous* deed. Still, however, a declaration of this nature made in health precedes a declaration of the same nature made in sickness. It is also to be remarked that a sickness, of which a person afterwards recovers, is considered in law as health."

"If a sick person make an acknowledgment of debt in favour of a strange woman, or make a bequest in her favour, or bestow a gift upon her and afterwards marry her and then die, the acknowledgment is valid, but the bequest or gift is void; for the nullity of an acknowledgment in favour of an heir depends on the person having been an heir at the time of making it; whereas the nullity of a bequest in favour of an heir depends on the legatee being so at the time of the testator's death as has been already explained, and as the woman was not an heir at the time of the

ac[illegible]but had become so (by marriage) at the time of the testator's death, the acknowledgment is therefore valid, but the bequest is void, and so likewise the gift, it being subject to the same rule as the bequest."

"If a sick person make an acknowledgment of a debt due by him to his son, or make a bequest in his favour, or bestow a gift upon him at a time when the son was a Christian, and he (the son) afterwards previous to his father's death became a Mussulman, all those acts of acknowledgment, gift or bequest are void, the bequest and the gift, because of the son being an heir at the death of his father as above explained, and the acknowledgment, because, although the son on account of the bar (namely, difference of religion) was not an heir at the time of making it, still the cause of inheritance (namely, consanguinity) did then exist, which throws an imputation on the father, as it engenders a suspicion that he may have made a false declaration in order to secure the descent of part of his fortune to his son. It is different in the case of marriage as above stated, for there the cause of inheritance (namely, marriage), occurred posterior to the acknowledgment and had no existence previous thereto, for supposing the marriage to have existed at the period of making the acknowledgment, and that the wife being then a Christian, should afterwards, before the husband's death, become a Moslemah, in that case it (the acknowledgment) would not be valid."

"If a sick person make an acknowledgment of a debt due by him to his son who is an absolute slave or a *mokâtib*, or bestow a gift upon him, or make a bequest in his favour, and the son should afterwards, before the death of his father, obtain his liberty, in that case none of these acts is valid, because of the reasons explained in the preceding example."

Similarly, Kâzi Khân declares, "When a sick man has acknowledged a debt to a woman who is a stranger to him, or bequeathed a legacy to her, or made her a gift and has subsequently married her and then died, the acknowledgment is lawful according to 'us,' but the legacy and the gift are void. And when a sick man has made a bequest to his son who is an infidel, or a slave, or has made a gift to him with delivery, or acknowledged a debt to him, and the son is then converted to the faith, or is emancipated before his death, the whole of his act is void."

But when the acknowledgment is not for a specific amount, or for a specific thing, it will be given effect to from the one-third of the estate. For example, if a person were to say to his heirs on his death-bed, "I am indebted to Zaid, and you must credit what he says," in that case the claim of Zaid to any amount not exceeding a third of the estate must be admitted, although the heirs should claim it. "This proceeds upon the basis of a favourable construction."(1)

Similarly, if the testator were to say to his heirs, "if Zaid come and claim anything from you on my behalf, pay him the same to whatever amount," which declaration would be recognised and complied with to the amount of one-third of the estate, and the acknowledgment being thus equivalent to a bequest, the declaration of Zaid must be credited to the amount of one-third of the acknowledgor's estate and no more. If, therefore, besides the acknowledgment in question, the testator had made various bequests, in favour of others, one-third of his estate must be set apart for the legatees and two-thirds for the heirs. And the heirs and legatees will be called upon to declare if the testator said anything to Zaid, and if they admit any liability, it will be discharged out of the estate and effects of the acknowledgor in proportion to the respective shares of the heirs, and the legatees must be required to verify the declaration to Zaid to such extent as they may think proper." "Now, if both parties acknowledge that there is something owing to Zaid, it is evident that there rests a debt upon the estate affecting the shares of each respectively and consequently this being so, it follows that if Zaid should claim more than what is admitted by the heirs and legatees [and has no other proof, excepting the unspecific acknowledgment of the testator], the affirmation on oath of the heirs and legatees, 'to the best of their knowledge,' or, in other words, to the effect that they do not know of any more being due to Zaid will be believed; for they cannot be required to swear positively, as their oath regards a matter between the claimant and the acknowledgor merely, and in which they are not principals."

If a person bequeath any article jointly to one of his heirs and a stranger, in this case the bequest in favour of the heir is not

(1) *Hedáya* (Hamilton), Vol. IV, p. 494.

admitted, and a moiety only of the legacy is given to the stranger, because as an heir does not possess the capacity of being a legatee, he therefore obstructs the stranger in the title which he would otherwise have to the complete legacy. It is not so when a legacy is left jointly to one person living and another dead, for here the whole goes to the living legatee, since a dead person cannot take a bequest.

The capacity of an infant. Shiah Law. Shâfeï and Mâliki doctrines.

Regarding the capacity of an infant to make a testamentary disposition, the divergence between the schools is very great. The Shiah Law declares that perfect intellect and freedom are indispensably requisite to the validity of a bequest, and the will of a *majnûn*(1) and of a *sabî* (youth or child) under ten years of age is not valid; when he has attained to that age all bequest by him for proper purposes in favour of his relatives and others are lawful according to the most common and approved doctrine, provided *he is capable of discernment.*

The Shâfeïs and Mâlikis agree generally with the Shiahs. According to the Shâfeï doctrines, an infant may validly constitute a *wasiat* if he is morally in a condition to understand the nature of his act.(2) In other words, there is no hard-and-fast rule as to the limit of age when capacity would be presumed. The Mâlikis, also, do not regard infancy in itself a disability, but the jurists of this school do not seem to be agreed as to the characteristics of a *wasiat* made by an infant. Whilst some of them hold that only such dispositions by a minor should be regarded as valid as are in favour of pious objects, others are of opinion that the right of a minor to make a *wasiat* should not be restricted to these objects alone, but should be extended to all dispositions when it appears that they are not contradictory and the minor possesses the comprehension to understand the nature of his act.

The Mâliki views.

Hanafî doctrines; incapacity of an infant to devise by will.

The Hanafîs, on the other hand, consider an infant who has not attained puberty as wanting in reason or comprehension and refuse him the power of making a *wasiat*. The *Multeka* expressly declares "that the validity of a *wasiat* requires several conditions, one of them being that the testator should be adult." So also the *Fatâwai Alamgiri*; "a bequest by a youth under puberty whether

(1) A lunatic.

(2) Sautayra, p. 319.

he be a *murâhik*(1) (adolescent) or not is unlawful according to us. And it makes no difference whether the youth be permitted to trade or be under inhibition, or whether he die before or after puberty. So also, though he should say, 'if I arrive at majority, a third of my property is to such an one,' the *wasiat* is not valid for want of competency at the time of making it."

According to the *Radd ul-Muhtâr*, "the *wasiat* of a minor, though possessed of discernment, is not valid, except with respect to the provision for his funeral expenses (on the authority of Omar, may God be pleased with him, in the matter of the *wasiat* of an adolescent)."

The *Hedâya* points out the difference between the Hanafî and Shâfeï Law in some detail. "Bequest by an infant is not valid. Shâfeï maintains that it is valid, provided it be made to a discreet and advisable purpose, because Omar confirmed the will of a *sabî* (a youth who has nearly attained maturity), and also because in the execution of it a degree of advantage results to the infant inasmuch as he acquires the merit of the deed—whereas in the annulment of it he is deprived of all advantage. The argument of 'our' doctors in support of their opinion upon this point are two-fold. *First*, a will is a voluntary act concerning which an infant has not a capacity of forming a proper judgment. *Secondly*, the declaration of an infant is not of a binding nature, but if the validity of a bequest by such were admitted, that effect would follow of course. With regard to the tradition of Omar, the term *sabî* there used must be understood to mean a person just arrived at the age of maturity, or 'the will of the *sabi*' relates merely to the celebration of the obsequies which is lawful in the opinion of 'our' doctors. Besides the annulment of the will is advantageous to the infant, since in allowing his property to pass to the heirs, the rights of natural affection are maintained, as before mentioned. With respect to the assertion of Shâfeï that, in the execution of the will an advantage results to the infant, it may be replied that the point to be attended to in cases of advantage or loss is the immediate tendency of any act or deed, and not what may eventually result from it; in other words, if the deed itself, in its immediate tendency, produce advantage, the execution of it on account of the

Hanafî doctrine.

(1) One approaching puberty.

infant is preferable, but in the case here considered the deed (that is, the bequest) in its immediate tendency leads to a loss of property, although eventually the infant have an advantage, the bequest having been made with a view to obtain merit in the eye of God, and since the bequest of the infant, in its immediate tendency, occasions a loss, it is not valid, in the same manner as in the case of a divorce, in other words, if an infant divorce his wife or his guardian do so on his behalf, it is not binding notwithstanding a divorce may on many occasions be attended with advantage, as where an infant having a wife who is poor wishes to divorce her and marry her sister who is rich and handsome. In short, bequest by an infant is invalid according to 'our' doctors, and in the same manner if an infant should make a will and die after he had attained majority, the will is not valid as having been made at a time when he was unqualified for such an act, and so likewise if an infant should say, 'It is my will whenever I reach the age of maturity that a third of my estate be considered as a legacy in favour of a particular person,' the will is not valid, because an infant being unqualified, is not competent to make a will that shall be deemed valid immediately, or that can be rendered so by being suspended to a future period, in the same manner as he is incapable of divorcing or emancipating.(1) It is otherwise with respect to a bondsman or a *mokâtib*, for they possess a complete competency obstructed merely by the right of their master, and therefore all their acts (such as divorce, bequest and so forth) are perfectly valid if referred to a period when that bar no longer exists, as where a bondsman (for instance) says, 'I declare my wife to be divorced whenever I am free.''

Bequest by an infant invalid.

Ratification after the attainment of majority.

The provisions of the Hanafî Law amount to this, that an infant *under the age of puberty* does not possess the capacity of making a disposition of his property by will. What would be the limit of age under the Indian Majority Act (Act IX of 1875) is a question which has been considered at some length at a previous stage of this work.(2) But a *wasiat* made by a minor becomes effective *ab initio* upon his confirming or ratifying the same after attaining majority.

(1) Comp. the *Radd ul-Muhtár*, Vol. V, p. 645.
(2) See Vol. II in *loco*.

As regards the capacity of a person who is condemned to death for an offence, there is no provision in the law to deprive him of the power of making a will. A soldier engaged in an expedition, a person travelling and away from his property, in fact, every sane and free person, whether man or woman, can validly make a bequest.

Difference of creed is no objection to the power of devising by will. The *Multeka* lays this down expressly ; " the difference of religion between the testator and the legatee is no ground for impugning the lawfulness of a *wasiat*. Accordingly, a Mussulman can make a disposition in favour of a non-Moslem (unless he is an alien) as a non-Moslem can make one in favour of a Mussulman."(1) With regard to the validity of a will made by a Moslem who afterwards apostatises there seems to be some divergence between the schools. According to the Mâlikis the *wasiat* is annulled by the fact of apostacy. According to the Hanafis, the will would have effect given to it if it is valid according to the sect to which he has apostatised.

The will of an apostate from Islâm ; Hanafî doctrine.

" If a Moslem should apostatise to Christianity, Judaism or Magianism, and then make some of the bequests referred to, such of them as would be valid, if made by a Moslem, remain in suspense until he returns to the faith or is put to death, or dies naturally, or takes refuge in a foreign country, and such of them as are not valid, if made by a Moslem, are void according to Abû Hanîfa ; but, according to the two Disciples, the acts of an apostate are operative for the present, so that whatever is valid according to the sect to which he apostatises is valid in him, and if the bequest be an act of piety with them, but sin with ' us,' it is valid though to a sect of persons who are not particularised. With regard to a female apostate, her bequests are valid so far as the bequests of the sect to which she has apostatised would be valid, because she is not liable to be put to death for her apostacy."(2)

Under the Mahommedan Law the will of a suicide is held to be invalid.(3) But where certain dispositions of a testamentary

(1) The Shâfi'is differ.

(2) *Fatâwai Alamgiri*, Vol. VI, p. 141 ; Baillie's Dig., p. 675 ; *Radd ul-Muhtâr*, Vol. V, p. 643 ; *Hedâya*, Vol. IV, p. 537.

(3) *Muzhar Hussain* v. *Bodha Bibi* (1898), I. L., 21 All., 91 ; s. c., L. R., 25 I. A., 210.

character were made in a letter written shortly before the testator's death in which he stated that he had taken poison, the statement was construed by the Judicial Committee of the Privy Council as a representation of the state of things as they would present themselves when the letter arrived; and it was held that the onus was on the party impugning the will to show that the letter was written after he had taken the poison.(1)

Another essential requisite to the validity of a testamentary disposition is, that the testator should be proprietor of the subject of the will or should be entitled to it when it happens to be a right.(2)

Bequests of an insolvent testator.

But when the subject of the bequest is the property of a testator who is so burdened with debt that his liabilities exceed his assests, the disposition will not have effect given to it unless the creditors discharge the estate from the payment of their debts.(3)

The Shiah doctrines on this point are explained thus in the *Sharâya*:(4)—"When a person who is in debt directs by will the emancipation of his bondsman,(5) and the value of the bondsman is twice the amount of the debt, the bondsman is emancipated, but must labour for five-sixths of his value, but if his value is less than the debt the legacy is valid. The reason is that debts

(1) *Muzhar Hussain* v. *Bodha Bibi*, supra.

(2) Sautayra, p. 421.

(3) In Baillie's Digest this principle is stated as follows:—"When a man makes a bequest, being in debt to the full amount of all his property, the bequest is not lawful, unless the creditors agree to release the property *pro tanto*." It will be observed that the way in which the principle is stated here is in its effect somewhat different from the principle as given in the text. And the English version of the *Hedâya* accentuates the difference in the following passage: "if a person," it says, "deeply involved, bequeaths any legacies such bequest is unlawful and of no effect, because debts have a preference to bequests, and the discharge of debts is an absolute duty, whereas bequests are gratuitous and voluntary and that which is most indispensable must be first considered. If, however, the creditors of the deceased relinquish their claims, the bequest is then valid, the obstacle to it being removed, and the legatee being supposed to stand in need of his legacy." But an analysis of the expressions used in all the texts shows clearly that the dicta refer to the invalidity of testamentary dispositions by persons whose debts leave no margin for the payment of legacies, and who, to use Arabian phraseology, are "drowned in debt."

(4) *Jawâhir ul-Kâlâm*; *Sharâya*.

(5) The illustration is somewhat characteristic of the modes of thought prevailing at this time, but it seems to explain fully the meaning.

taking precedence of legacies must be first discharged, and it is only out of a third of what remains of the estate that the emancipation can take effect. It is otherwise in the case of a gratuitous emancipation by a master on his death-bed when the law is, as before mentioned, on the ground of an express decision recorded by Abdur Rahman as coming from the Imâm Jaâfar as-Sâdik on whom be peace.''

A *wasiat* is lawful for any purpose which is considered proper under the law, and which may be carried into effect at the time of the testator's decease. This principle, however, is subject to certain limitations, the consideration of which is necessary before we come to the discussion of the person for whom a *wasiat* may validly be constituted.

A bequest to a person who causes the death of the testator; Hanafî doctrines.

(1) A *wasiat* in favour of a person who intentionally causes the death of the testator is unlawful according to all the schools. According to the Hanafîs, a bequest is not lawful to a person who causes the death of the testator even unintentionally, by accident or misadventure, unless the person causing the death is an infant or an insane person.(1) And the bequest is unlawful whether it was made before or after the injury resulting in death. But if the heirs assent to the bequest it will be valid according to Abû Hanîfa and Mohammed, though not according to Abû Yusuf. When the death is caused by an infant or a lunatic legatee, the assent of the heirs is not necessary to the validity of the bequest. ''The Prophet has declared,'' says the *Radd ul-Muhtâr*, '''there is no legacy for the person slaying,' for he has hastened an event which God might have delayed, and therefore a bequest to the murderer is unlawful whether it was made before the mortal wound was given or subsequently, for the tradition is general and this is the view of Zailye. By hastening the event is meant that the act of the murderer is the immediate cause of the death of the deceased, for otherwise, as held by the followers of the true doctrine, the death was an event which was inevitable.'' ''If a person simply wounds another, but the actual slaying is done by a third person, the legacy to the person wounding is not invalid, for he is not the murderer, this is the view of Ula'l-walji. The person causing the death of

(1) ''This exception in favour of an infant and a lunatic is made,'' says the *Radd ul-Muhtâr*, ''because they are not liable to punishment.''

another forfeits the legacy whether his act was intentional, or the result of accident or misadventure, for example, if a man digs a well and the person who has left him a legacy falls into it, the legatee forfeits the legacy.''

''A bequest to a slayer will be valid according to Abû Hanîfa and Mohammed if the heirs of the testator should consent. Abû Yusuf, however, disagrees on this point, and holds that it is absolutely void though the heirs should consent. According to Sharnibilâlièh, a bequest made before the murder is void according to all of them though the heirs should consent.''(1)

Mâliki doctrines.

According to the Mâlikis the testator has the power of condoning the offence committed on his person, and if after receiving the mortal wound he makes a *wasiat* in favour of the person causing the wound, it will be presumed that he pardoned the offence and the bequest would be valid.

Shiah principle.

According to the Shiahs, the homicide must be intentional to avoid the legacy to the person causing the death. According to the Hanafî Law if the person causing the death is the only heir of the testator, the bequest to him would be lawful according to Abû Hanîfa and Mohammed, though not according to Abû Yusuf.

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(1) ''A bequest,'' says the *Alamgiri*, ''to a person who slays the testator either intentionally or by accident is not lawful whether the bequest were made before the death-wound or after it. But if the heirs assent to the bequest, it is lawful according to Abû Hanifa and Mohammed. And if the slayer be a youth under puberty or insane, the bequest to him is lawful without the consent of the heirs, or if the slayer be himself the sole heir, a bequest to him is lawful according to Abû Hanîfa and Mohammed. A bequest to the conditionally enfranchised bondsman or *umm-ul-walad* (the bondswoman who has borne children to her master) of the slayer is also unlawful without the consent of the heirs.''

The *Hedâya* states as follows :—''If a person makes a bequest in favour of another from whom he has received a mortal wound, it is not valid whether the murderer be one of his heirs or a stranger, or whether he may have wounded him wilfully or by misadventure provided he be the actual perpetrator of the deed, because it is recorded in the traditions that there is no legacy for a murderer, and also as the person who gave the wound has hastened the death of the testator, he is by way of punishment excluded from the benefit of the will in the same manner as a person under similar circumstance is excluded from inheritance. So likewise where a man having made a bequest in favour of a particular person is afterwards killed by that person, such bequest in invalid. If, however, in these cases the heirs should give their consent, the bequest then becomes valid according to Abû Hanifa and Mohammed. Abû Yusuf is of a contrary opinion because the offence of the murderer which is the cause of the invalidity of the will still exists.'' The former view is the one generally accepted by the sect.

But though a legacy to one's murderer or homicide is unlawful, a bequest in favour of his parents, children or any other ascendant or descendant would be lawful.

Bequest to an heir. Hanafî doctrine.

(2) According to all the schools a bequest to any one of the heirs is invalid without the consent of the others.(1) Whether the person in whose favour the devise is made is an heir or not must be determined not at the time of the will but at the testator's death. A grandson whose father has died in the lifetime of the testator is a non-heir when he co-exists with a son; and a bequest to him not exceeding a third is valid.

Consent of the heirs to a bequest.

"A bequest," says the *Radd ul-Muhtâr*, "to a stranger (or non-heir) is valid to the extent of one-third of the testator's estate, but it may be validated respecting a larger proportion with the assent of the heirs after the death of the testator; *consent given during the lifetime of the testator is of no effect;* the consent in order to be effectual must be not only after the death of the testator, but the parties must be adult and *sui juris*. The consent of heirs before the death of the testator is ineffectual because the right to the inheritance does not vest in them until his death. When consent is given according to 'us' the legatee would derive his title from the testator; according to Shâfeî, the right will be derived from the consenting heir. When some of the heirs consent and others do not, the legacy will be valid in proportion to the shares of the assenting heirs. It is requisite that the consenting heirs should be adult and possessed of understanding. Consequently the consent of the infant and the *non compos mentis* is not valid. The consent of the person who is sick is subject to the same rules as his legacy. Whether a person is an heir or not must be considered with reference to his right of inheritance at the time of the testator's death. Therefore, when a person leaves a legacy to his brother at a time when he has no children, and afterwards children are born to him and he dies, the legacy to the brother is valid, for in the presence of the children he has no right of inheritance. Similarly, if a person were to make a bequest to his wife and afterwards were to divorce her, the legacy would be valid for she is not an heir at the time of the testator's death;

(1) See *Bafatun* v. *Belaiti Khanum* [1903], I. L., 30 Cal., 683; *Khajooroonissa* v. *Roushan Jehan* [1876], L. R., 3 I. A., 291; s. c., I. L., 2 Cal., 184.

the marriage relation having been dissolved, the right of inheritance also falls to the ground."(1)

Consent of the heir—how far valid.

If the heir is sane and adult and, therefore, possessed of the capacity of disposition but happens to give his consent at a time when he is suffering from illness, if he recovers from that illness, his consent is valid. But if he were to die of the illness, his assent would have the same effect as if it was a bequest, so that if the original legatee was an heir of the assenting heir, the assent is not lawful unless concurred in by the other heirs of the sick person, but if the original legatee was not the heir of the assenting heir who has died, the assent would validate the legacy to the extent of one-third of his share in the inheritance of the original testator.(2)

Such consent may be given either expressly or may be indicated by unequivocal conduct such as signing the will with a full understanding of its meaning, without outside pressure or undue influence, or allowing the devisee to enter into possession without objection.(3)

Acknowledgment of a debt.

But though a bequest in favour of an heir is invalid, an *ikrâr* or acknowledgment of a debt, as stated before, is valid.(4)

If a man were to make a bequest in favour of a part of his heirs, it is not valid because of a traditional saying of the Prophet, "God has allotted to every heir his particular right," and also because a will in favour of a part of the heirs is an injury to the rest, and therefore, if it were deemed legal, it would induce a breach of the ties of kindred. Besides it is said in the traditions "a bequest to particular heirs is unjust." It is to be observed that in judging whether the legatee be an heir or otherwise, regard is paid to the time of the testator's death and not, as pointed out already, to the period of making the will. If some of the heirs should give their consent and part withhold it, the bequest then becomes valid in proportion to the amount of the shares of those who consent, and invalid in proportion to the amount of the shares of the others.

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(1) *Raddul-Muhtâr*, Vol. V, p. 644.

(2) *Ibid.* Comp. Baillie's Dig., p. 626; *Fatâwai Alamgiri*, Vol. V, p. 148.

(3) *Doulatram* v. *Abdul Kayum* [1902], I. L., 26 Bom., 497; *Sharifa Bibi* v. *Gulam Mahomed Dastgir Khan* [1892], I. L., 16 Mad., 43.

(4) See *ante*, p. 579, *Radd-ul-Muhtâr*, Vol. VI, p. 644; *Heddya*, Vol. IV, p. 472.

To recapitulate :—The persons who cannot be excluded from succession by a testamentary disposition are those who are entitled upon the decease of the testator to a share in his inheritance whatever may be the category of their heirship. This principle is founded upon the direction contained in Chap. IV, verse 7, of the Koran : "To every one have we appointed kinsfolk as heirs from their parents and relatives, and those with whom we have joined their right hands ; so give them their portions, for verily God is over all a witness." The rights of the heirs, say the jurists, are thus irrevocably fixed by the Koran, and the harmony which has been established by the divine law among the different degrees of relations who would be entitled to succession to the estate of a deceased person should not be broken by his leaving a larger share to one heir. The author of the *Multeka* has declared in consequence that a testamentary disposition is null from the time when the succession opens, when the legatee is an heir, and the Mâliki lawyer, Khalîl ibn-Ishâk, has held that all legacies to the heirs are void.

In consequence of these directions, the Mussulmans scarcely ever make bequests in favour of an heir. When they intend making any variation in the shares of their heirs, they either make a *hiba* or an acknowledgment of a debt in favour of the heir whom they desire to prefer. Occasionally, the devise is made nominally in favour of one who is not an heir but really in favour of an heir.

But a bequest in favour of a relation who is not entitled to a share in the inheritance of the testator or who, though an heir at the time of making the devise, is excluded by any circumstance from succession at the time when the inheritance opens, is valid in law ; for example, when a person has two sons and one grandson, —the son of a predeceased son,—to whom he makes a bequest not exceeding one-third of his property, such bequest is valid. Similarly, if a man has a son and a daughter's son or a daughter's daughter, the daughter's son, not being an heir, a bequest to him is valid. When a person has only a brother, and no children, the bequest to him would be invalid, but if a child be born to the testator after the bequest, it would be valid, provided, of course, it does not exceed the disposible third. If a man were to make a *wasiat* in favour of his wife, it would be invalid, but if she is divorced before his death, it would be valid.

A case given by Sautayra will exemplify one branch of these principles. A man of the name of Bou-Medina acknowledged himself to be a debtor of his wife to the extent of 250 dirhems, and subject to the payment of that debt, left all his estate and effects in equal shares to his said wife and two strangers; held under the Mahommedan Law that the debt should be first paid out of the estate, and that the estate should be thereafter divided in the following manner among the legatees and heirs,—

To the widow	..	3/12 being 1/4 the share of the widow.
To each of the legatees	..	4/12 being 1/3 of the quantity disposable.
To the heirs	..	5/12
Total	..	12/12

Bequest to an heir valid with consent of the other heirs.

All the Sunni schools agree in holding that a bequest in favour of an heir is invalid. A legacy, says the author of the *Multeka*, in favour of one heir is valid if the other heirs consent thereto. And the Shâfeï lawyer, Abû Khoja, has laid down the principle in similar terms, and the Mâliki jurist, Khalîl ibn-Ishâk, has declared that where a disposition is made in favour of an heir and ratified by the other heirs, the legacy will take effect as an act of liberality on their part.

Shiah doctrines consent may be given either *before* or *after* the death of the testator.

According to the Shiah law, however, as we shall see presently, a testator can leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs, but where it exceeds one-third it is not valid without the consent of all the heirs. Such consent may be given either *before* or *after* the death of the testator. Under the Sunni law ratification must always be *after* the death, an assent before death being of no effect.

Under the Sunni law, the assent must be a free and voluntary act on the part of the heirs, and accordingly where the testator has held out any threat in his will, the effect of which may be to bias the mind improperly, the bequest will not take effect. "A legacy to an heir," says Khalîl ibn-Ishâk, "would be annulled when the testator has used the following expression, namely, 'if my heirs do not ratify these my dispositions my property shall go to the poor.' But a legacy expressed in the following terms: 'I

it to my son ' is valid, because the heirs are free either to give or refuse their consent.''

Of the heir's consent during the last illness of the testator.

The voluntary assent given by the heirs during the last illness of the testator is irrevocable because the heir is supposed to have then acquired a right.

When a person has no heir he can leave his entire property to any one whom he likes.

Shiah doctrines.

The author of the *Sharâya* has laid down that when a testator has excluded one of his children from succession and left the property wholly to the others his direction is entirely invalid, and the inheritance will be apportioned among the heirs according to their legal shares.

But supposing a father makes an unequal division of property among his children or other heirs to take effect after his death (a *taksîm-bi'l-wasiat*), if it is assented to by the heirs it is lawful without question, but if no such assent is given what would be the effect ? An example of such a case is given in the *Jâmaa ush-Shittât*. A person who was going on a pilgrimage made a partition of his estate among his children in the following manner :—(*a*) To some he gave properties in excess of their legal shares on account of the dower due to their mother ; (*b*) to others he gave certain sums of money in excess of their shares to defray the expenses of their marriages. A question was raised by the heirs, who received smaller shares, as to the validity of the *taksîmnâmah-bi'l-wasiat*. The dictum of the Mujtahid was to the following effect :—

'' The dower is a debt which is bound to be discharged before the payment of the legacies. The properties given in lieu thereof have been lawfully devised. The sums of money left to some of the children in excess of their legal shares are in the nature of legacies and must come out of one-third of the testator's estate. The remainder of the property must be divided among the children according to their legal shares.''(1)

As under the Hanafî law, a bequest in excess of the one-third is valid with the assent of the heirs. When there are several heirs, and one or more of them allow the excess it is valid to the extent of his or their share in it. The assent of an heir is effective when given after the testator's death. Whether it is equally valid

(1) *Jâmaa ush-Shittât ;* comp. Baillie's *Imâmia Law*, p. 233.

before his death is a question on which there are two opinions, *the more common and approved of which is in favour of its being binding on the heir.* When the consent is given after the testator's death it is a ratification of his act and not a gift *de novo* from the heir, consequently it does not require possession by the legatee to complete its validity.

(3) A *wasiat* by a Moslem in favour of an alien infidel is unlawful according to all the schools.(1)

(4) Bequest for the following purposes were discountenanced by the old Hanafî Law.(2)

"If a person should direct by his will that his body after his death should be carried to a certain place and there interred, and that a *rubât* is to be erected at the place, Abu'l Kâsim has held that the bequest is lawful as to the *rubât*, but is void as to the removal of the body, and that if the executor should incur any expense in removing it without the sanction of the heirs he will be responsible for the amount expended, though if he has their authority for the removal he does not incur any responsibility. A direction by will to ornament the testator's tomb is void. But with regard to a direction to provide food for mourners after the testator's death and for those who may be present at his funeral, the lawyer Abû J'aafar has said that it is lawful as regards a third of the estate, and that all may lawfully partake of the provision who prolong their stay at the funeral, or who come from a distance, rich and poor alike, but that if there is any lavish expenditure in the preparations the executor is liable for the excess. According to Shaikh Imâm Abû Bakr of Balkh, a direction by will to provide food for three days after the testator's death is void. * * * In the *Wakiât-i-Nâtiki* it is stated that if a person should direct that a thousand dinârs or ten thousand dirhems be expended on his shroud, no more than a medium expense is to be incurred on that account and only the cloth which the testator used, for going to the mosque on Fridays should be used. And if a woman should direct her husband to pay for her shroud out of the dower due to her by him, it has been said that whatever she may direct or forbid on that subject, is alike void. When a person directs that he shall

(1) *Radd ul-Muhtâr*, Vol. V, p. 643. *Fatâwai Alamgiri*, Vol. VI, p. 141. *Sharâya*; *Jawâhir ul-Kalâm*.

(2) See Baillie's Dig., p. 633.

be buried in his mansion, the bequest is void unless he direct the mansion is to be converted into a general cemetery for Moslems. A direction that the testator's grave be plastered and a vault or arch placed over is unlawful except in places where such precautions are required against the ravages of wild beasts. So also a direction that so much of one's property be given to persons for reading the Koran over the testator's grave is void even though special readers be appointed for the purpose."

This passage embodies a number of sumptuary regulations which, according to present usage, have fallen into complete desuetude.(1)

Under the Shiah Law bequests are lawful for the following purposes :— Shiah doctrines.

(*a*) for offering prayers for the testator in perpetuity or for a limited period ;

(*b*) for carrying the body of the deceased to Kerbela or any other holy place ;

(*c*) for some one to perform a pilgrimage on behalf of the testator ;

(*d*) for burning lights and putting flowers on his grave or in the shrines of the Imâms ;

(*e*) for relieving the poor Syeds of Kerbela and Najaf ;

(*f*) for feeding the poor on particular holy festivals ;

(*g*) for reading *mursias* (elegies) in the Imâmbaras ;

(*h*) for offering *sherbet* or supplying water in the time of the *Moharram* and such like objects ;

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(1) See the *Radd ul-Muhtâr*, Vol. V. p. 677. The illegality of hiring a person for reading the Koran over the grave of the testator is founded on the unlawfulness of hiring people for performing one's devotions ; " it is only in cases of necessity," says the *Radd*, " that persons may be hired to perform devotional functions, such as the teaching of the Koran or law or performing the *azân*. The jurists are agreed that a person cannot be hired for performing fasts, prayers, *hajj*, etc." As regards the reading of the Koran over the grave, the modern doctrine, founded on Imam Mohammed's opinion, is that it is legal ; see *ante*, p. 431.

(*i*) A *wasiat* may be made by one person to another for the performance of religious ceremonies on the testator's behalf; for example, *A* on the point of death may ask *B* to perform the prayers which he has left unperformed during his lifetime, and *B* accepts the *wasiat*, it is valid and he will be bound to perform the same.(1)

(1) *Jámaa ush-Shittát.*

CHAPTER XXI.

THE CONSTITUTION OF A WASIAT.

SECTION I.

WHO MAY BE LEGATEES OR DEVISEES.

The Musi-lahu.

IN principle, a *wasiat* is lawful for any person or object actually or constructively in existence at the time of the disposition.(1) Shiah rule. "It is an indispensable condition," says the *Shâraya*, "that the legatee be in existence at the time of the bequest, and if he should not be alive, the legacy is not valid, in the same way as a legacy to a person deceased, or to one supposed to be alive, but who is afterwards proved to have been dead at the time of the bequest." Hanafî doctrine. So also it is stated in the *Alamgiri*, that "there is no bequest for the *non-existing* or the dead."

We will now consider the objects or persons in whose favour a *wasiat* may validly be made:—(*a*) With the exception of the Shâfeïs, who regard a bequest by a Moslem to a non-Moslem to be unqualifiedly unlawful, all the other schools admit the validity of a *wasiat* in favour of a non-Moslem who does not belong to the *Dâr ul-Harb* and, consequently, is not an alien.(2) The *Radd ul-Muhtâr* and the *Fatâwai Alamgiri* lay down this principle with the utmost distinctness. "A Moslem," says the *Alamgiri*, "may lawfully make a bequest to a *Zimmi* or *vice versâ*, but a bequest to an alien who is not a *Mustâmin* (3) is not lawful. If a Moslem make a bequest to an alien living in a *dâr ul-harb* or hostile country, the bequest is not lawful, even though the heirs should give their

A bequest to a *Harbi* invalid.

(1) *Radd ul-Muhtâr*, Vol. V, p. 661.

(2) For the reasons which compelled the Moslems to withhold the privilege from the *Harbis*, see "*The Spirit of Islam.*" The Mahommedan Law is decidedly more generous than the English Law was until a few years ago. The incapacity of aliens in England was removed only in 1870.

(3) A non-Moslem subject of a non-Moslem State who had taken up his residence in a Moslem country.

consent. And if the alien should come into Moslem territories under an *âmân* or protection, intending to take his legacy, he cannot do so even with the consent of the heirs. This is when the testator and the alien legatee were both in the *dâr ul-Islâm* at the time. If the testator were also in the *dâr ul-harb* 'our' doctors differ as to the legality of the bequest. When the alien is a *Mustâmin* residing in Moslem territory, it seems, on the authority of the *Zâhir ur-Rawâyèt*, that a bequest to him would be lawful to the extent of a third of the testator's property without the consent of the heirs and beyond that amount with their consent."(1)

Shiah doctrines.

A similar rule obtains among the Shiahs on the subject. The *Sharâya* declares—"With regard again to legacies in favour of *harbis* or hostile infidels there is some doubt, but according to the most authentic traditions they are forbidden and null."(2) And in the *Radd ul-Muhtâr* a *harbi* or hostile non-Moslem is regarded as civilly dead.

But whilst a devise by will is invalid in favour of an alien, presents and gratuities may lawfully be made to him. "In the *Sharh ul-Kabîr* of Sarakhsi it is stated," says the *Radd ul-Muhtâr*, "that there is no objection to a Moslem making presents or giving rewards to infidels whether they be relatives or not, and whether they be aliens or *Zimmis*, and the legality of this is founded on the tradition that the Prophet (may the blessings of God rest on him) sent various presents to Abû Sufiân ibn Harb and Sufiân ibn Ommeyya for distribution among the poor of Mecca.(3) And the reason of this is that presents to one's relations is commendable to every man and acceptable in every religion, and to strangers because it is an act of kindness and generosity. Accordingly, presents may lawfully be made to aliens, excepting of arms and armour."(4) But a bequest to an apostate is not lawful under any of the schools.(5)

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(1) For the rules relating to the Wills of the non-Moslem subjects of Mussulman sovereigns, see *post*.

(2) *Sharâya*; Baillie's *Imâmia Law*, p. 244.

(3) Who were infidels at the time.

(4) *Radd ul-Muhtâr*, Vol. V, p. 643.

(5) *Ibid*, p. 664; see also *Fatâwai Alamgiri*, Vol. VI, p. 140; *Sharâya*; Sauṭayra, II, p. 342. Act XXI of 1850 makes no difference in the provisions of the Mahommedan Law on this subject.

(*b*) A disposition in favour of an infant *en ventre sa mere* is valid according to all the sects, but, according to the Hanafî Law, the child should be born within six months from the date of the *wasiat*, in which case it is presumed to have been in existence at the time of the bequest.(1) In the case of infants (including an infant *en ventre sa mère*), acceptance will be presumed unless it would cause injury to the devisee or legatee. The right of the infant *en ventre sa mère* to the bequest is established upon birth, and until then no person can exercise any right on its behalf, for example, commute the bequest or compromise the claim of the unborn legatee. The *Radd ul-Muhtâr* expressly lays down that for the "child in the womb there is no *walî*,(2) for the word (*mowla*) requires a *walî* in order to secure tender care and the infant in the womb does not stand in that need ; as a matter of fact it is a part of the mother, and as the father has no right of guardianship in respect of the mother, consequently the father cannot be the *walî* of the child in the womb, nor can the mother be the *walî* of the child in her womb, and accordingly she cannot exercise any right in respect of any legacy left to such child, for though it is a part of her body, yet really it is a soul entrusted to her charge, *and the soul being in existence a bequest to it is lawful.*"(3) "A *wasiat*, from one point of view, is *tamlîk* and from another point of view appointing a successor to the rights of the testator (in a portion or the whole of his estate) and therefore though no *walî* can be appointed for an infant *en ventre sa mère*, according to all the authorities, such as Allâmah Ibn-Shibli, Halwâni and other *Mashâikh*, an appointment of a *wasî* or executor for such an infant is lawful, as is lawful the appointment of a *wasî* in the case of a *wakf* for unborn children. Such appointment takes effect upon the birth of the child when its right vests in the bequest."(4)

A bequest to an unborn child.

Bequest to an infant *en ventre sa mère.*

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(1) A bequest to a child in the womb if born within six months from the date of the bequest is valid ; *Fatâwai Alamgiri*, Vol. VI, p. 140 ; *Radd ul-Muhtâr*, Vol. V, p. 661. Baillie's Dig., p. 627. In the *Nihâya* it is stated that the six months should be computed from the date of the death of the testator ; *Radd ul-Muhtâr*, Vol. V, p. 662.

(2) "A fœtus can neither be constituted a *wali* (guardian) nor can a *wali* be constituted for it."

(3) *Radd ul-Muhtâr*, Vol. V, p. 642.

(4) *Ibid.*

When the father of the child is alive, the birth of the child should be within six months from the date of the bequest in order that the right to the legacy may vest in it, but when the father is dead or the mother is divorced, the birth should be within six months from date of bequest and within the longest period of gestation (recognised by law) computed from the date of the father's death or the *talâk* of the mother. For, should the birth take place after this period, the child cannot be presumed to have been conceived at the time of the bequest.

A testamentary *wakf* to an unborn child.

But though a direct *wasiat* or a legacy, in other words, a *testamentary gift* to an unborn child is valid only when it is *en ventre sa mère* and is born within six months from the date of the bequest, yet the law recognises the validity of a *wakf bi'l wasiat, viz.*, a testamentary *wakf* in favour of unborn children to come into existence at any time, *when a commencement is made with a person in existence.* For example, a *wasiat* in favour of *A* (a living person) and his unborn children and descendants in perpetuity *is valid according to all the schools.* Such a *wakf* will have effect given to it by the appointment of *wasîs* who would carry out the trusts of the *wakf.*(1)

Shiah Law.

Under the Shiah Law there is no restriction as to the time when the child should be born to take the benefit of the bequest. It will be sufficient if the child is born within the longest period of gestation recognised by the Shiah Law from the date of the bequest.(2) "A bequest to a fœtus in the womb actually existent is valid, but it requires that the child be produced alive, and if it is still-born, the *wasiat* is void; while if it is born alive, though it should die immediately after, the legacy descends to its heirs."(3)

Hanafi Law.

Under the Hanafî Law a child must also be born alive to be entitled to the legacy. "When a person makes a bequest to what is in the womb of a woman and she is delivered of a dead child, after his death, and a month after the bequest, the legacy is not for such child, but if the child be born alive, and then die, the bequest is lawful to the extent of a third of the testator's property, and is divisible among the child's heirs. If the woman should

(1) *Raddul-Muhtâr, in loco.* (2) See Mahommedan Law, Vol. II, *in loco.*
(3) *Sharâya-ul-Islâm*, p. 253.

bring forth two children, one dead and the other alive, the living child takes the whole legacy, but if both be born alive and one of them die, the legacy is divided into moieties, one for the living child, and the other for the heirs of the dead one by way of inheritance. When a person makes a bequest in these terms : 'If there be in the womb of such a person a girl, she is to have a legacy of a thousand dirhems, and if there be a boy, I bequeath to him two thousand dirhems,' and the woman is delivered of a girl within a day of the six months after the bequest, and of a boy two or three days later, the legacies to both are valid to the extent of a third of the estate."(1)

(3) A *wasiat* is also lawful in favour of the following objects :—

(*a*) To the poor generally or a particular body of them ;

(*b*) To the Holy Shrine of the K'aaba or any mosque ;

(*c*) To Almighty God or to spend in the way of God (*sabîl illâh*) ;

(*d*) For *wujûh-ul-khair* or *wujûh-ul-birr* (good or meritorious purposes) generally ;

(*e*) "To fight in the way of God," *i.e.*, in the propagation of the Faith ;

For the performance of religious ceremonies over the tombs of deceased person (*urs*), celebration of the *moharram*, &c.; (2)

(*f*) For the children of one's heir, the kindred, neighbours, *kowm* (community or nation), *&c.* ;

(*g*) For the emancipation of slaves ;

(*h*) For the payment of one's debts ;

(*i*) A bequest for feeding cattle is also lawful.(3)

Wasiat for poor Christians : Hanafî doctrine.

(*a*) A bequest for the poor is lawful. It may be for the poor generally or for a particular body of them. According to the Hanafî Law, "it is lawful for a Moslem to make a *wasiat* in favour of poor Christians, for that is no sin, contrary to building a church for them which is sinful, and he who assists in building churches for them is a sinner.(4) And this principle applies to the

(1) *Fatâwai Alamgiri*, Vol. VI, p. 142.

(2) See the will in the case of *Bishen Chand Basawat* v. *Syed Nadir Hossain*, L., R., 15 I. A., 1.

(3) *Radd ul-Muhtâr*, Vol. V, p. 652.

(4) *Fatâwai Alamgiri*, Vol. VI, p. 148.

poor of all creeds. Therefore, when a *wasiat* is generally for the poor, it will be applied to the poor of all creeds.

A *wakf* for the poor —Shiah Law.

Under the Shiah Law, it is different. "When a Moslem," says the *Sharâya*, "has made a bequest to beggars [in general terms], it is payable only to those of his own religion, and in like manner if the testator be an infidel such a bequest is only to those of his own persuasion."

Abû Yusuf's views.

A bequest for providing shrouds for the *Moslems generally*, or for digging their graves, or constructing aqueducts for them is bad according to Abû Yusuf as mentioned in the *Nawâdir*. But a bequest for the same or like purposes for *poor* Moslems is lawful. But this view does not seem to be followed and when a bequest is made for such purposes for Moslems *generally*, it is applied to *poor* Moslems only.

Bequests in favour of a mosque.

(*b*) Regarding a *wasiat* in favour of the Holy Shrine or a mosque, the *Fatâwai Alamgiri* provides as follows:—"If a person should bequeath a third of his estate to the Holy Shrine, the *wasiat* is lawful, and the third should be expended upon its buildings, lamps and the like; so also the bequest of a third of one's estate to be laid out on a *masjid* is lawful, and the third should be expended on its buildings and lamps." A man may, according to all the jurists, devise his land for the construction of a mosque. Similarly, it is stated in the *Radd ul-Muhtâr* that "where a bequest is made of a third in favour of the *Bait-ul-Mukaddas*(1) it is lawful, and it will be applied in [maintaining] the building and lighting it and for like purposes. The same rule applies to a bequest in favour of a *masjid*, and the legacy will be applied in its maintenance and preservation, and according to Kâzi Khân, in lighting it in the Ramazân [and other seasons]. In the *Mujtaba*, it is laid down, however, that when a bequest of a third is made in favour of the K'aaba, it should be expended for the benefit of the poor of the K'aaba (*i.e.*, who derive alms from there); and similarly in the case of *wasiats* to a *masjid* and the *Bait-ul-Mukaddas*." Then the author proceeds to add—"respecting a bequest in favour of a *masjid* there are two opinions, *one* that it is not valid, and *the other* that it is valid. There is some difference among those who uphold the validity of

(1) The Holy Shrine [at Jerusalem].

such a *wasiat* regarding the mode of its application; some say, that it should be applied in maintaining the mosque, that is, in keeping the building in repair and in lighting it; whilst others hold that it should be spent in charity for the poor attached to that mosque. Mohammed upholds the former view; whilst the latter is adopted by the author of the *Mujtaba*. As regards the question of invalidity, two jurists alone hold that opinion, but when the bequest is made in specific terms that it should be spent for the mosque, it is valid by *consensus*.....It is advisable, however, to give the *Fatwa* to the effect, that when it is made in favour of a *masjid*, it should be expended in charity to the poor of that mosque. And Saijâni has explained this in detail and reference ought to be made to the *Sharh-i-Wahbânieh* also. In the *Khulâsa* it is stated that it is preferable to spend on them, but is lawful to give to the other poor also. This is the opinion of Abû Yusuf and *Fatwas* are given according to it."(1)

A man may lawfully devise by will his land in favour of a *masjid*, though according to Abû Hanîfa, he may not bequeath the same to make a burying-ground for the indigent, or for the purpose of erecting an inn for the passers-by.(2) It is somewhat difficult to understand the reason of this distinction. The Disciples, however, differ from the master and uphold bequests in favour of the latter objects also.

(*c*) When a person makes a *wasiat* in the following terms, "I bequeath a third of my property to Almighty God," the devise is valid according to Mohammed,(3) and it would be applied or expended on good objects, *i.e.*, meritorious or pious purposes generally. A *wasiat fi-sabîl-illâh* (*i.e.*, in the way of God) will be applied in striving to spread the religion and can be applied lawfully to the help of a poor Hâji who has lost his means. In the *Nawâzil* it is

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(1) *Radd ul-Muhtâr*, Vol. V, pp. 652, 653.

(2) *Fatâwai Alamgiri*, Vol. VI, p. 149.

The following passage, which occurs in the *Fatâwai Alamgiri*, must be read with the light of the comment in the *Radd ul-Muhtâr*: "When a person has said I have bequeathed a hundred dirhems to such a masjid, or such a bridge, the bequest is valid according to Mohammed, and should be laid out in preparing and improving it, but according to Ibn Zyâd when no mention has been made of repairs and improvements, the bequest is void, and the *Fatwa* is in accordance with his opinion."

(3) "And decisions are given according to his word."—*Radd ul-Muhtâr*. Abû Hanîfa holds such a bequest void.

Shiah doctrines.

stated, the bequest may be applied in lighting lamps and promoting religion generally. According to the Shiah Law "if the testator should direct a bequest to be expended in the way of God, it must be applied in some way for which reward is promised in a future state, but according to some exclusively in the propagation of the Faith. The first opinion, however, appears to be *better founded.*"(1)

Bequests for good purposes.

(*d*) When the bequest is made for good purposes (*wujûh-ul-khair* or *wujûh-ul-birr, objects of charity or liberality*), it includes all meritorious and pious objects and may be applied in erecting bridges or *masjids*, colleges or hospitals, or supporting the students of learning, or the poor, &c.(2)

"When a bequest is made 'to fight in the way of God' on the part of the testator, maintenance is to be given to a *ghâzi* or religious warrior for his sustenance in going and returning and remaining with an expedition; but no part of it is to be expended on his family, and if there is any surplus it must be restored to the heirs. Though the warrior be rich that is no objection, and the executor himself or the son of the testator may fight on his account."(3)

Bequests to the children of one's heirs.

(*e*) A bequest is valid for the children of one's heirs without difference, since they are in the position of strangers. In fact, a legacy may validly be left to any relation who does not take a share in the inheritance.

Bequest in favour of the kindred. (Shiah doctrines)

The *Sharâya* declares that a bequest in favour of one's kindred is highly proper whether they be his heirs or not. When a person bequeathes a legacy to his *akriba* or nearest of kin it is to be regulated by the rules of inheritance, and nothing is to be given to a remote heir while there is a nearer in existence.

Under the Shiah Law, "If a person should make a bequest to his kindred (*zû karâbat*) it is to be understood as intended for all known to be of his *nasab* or the same paternal descent. Some writers have said that it includes all those who are related to him through his most remote progenitors, both father and mother, who professed the faith of Islâm; but this opinion is destitute of any testimony in its support. If, again, the bequest be to his *kowm* or race it includes all those who speak the same language, and if

(1) *Mafâtih; Jawâhir ul-Kalâm.*

(2) "It cannot, however, be applied in erecting prisons, for that duty belongs to the Sultan."—*Radd ul-Muhtâr*, Vol. V, p. 653.

(3) *Fatâwai Alamgiri*, Vol. VI, p. 143.

to the people of his house (*ahl-ul-bait*) it includes his children, father and paternal grandfather. Further, if he were to say to his family, the nearest only of his *nasab* are to be understood as included in the bequest."(1)

"If a person make a bequest to his neighbours (*jirân*), it includes, according to some doctors all those whose houses are within forty cubits (*zir'aas*) of his, in every direction. But there is another opinion, which is far-fetched and unreasonable, that extends it to the occupants of forty houses on either side of his."

(*f*) The emancipation of bondsmen is highly commendable under the Mahommedan Law and religion and consequently we find the regulations relating to the testamentary emancipation of slaves laid down in some detail by the jurists of all the schools. The subject is, however, of no practical importance, and therefore it is unnecessary to dwell upon it.

(*g*) The testator can by will direct his executor to sell his property, and after paying his debts, invest the remainder, either as *wakf* for charitable purposes, or distribute it among his heirs.

SECTION II.

RULES OF INTERPRETATION.

Rules of interpretation. (Hanafî Law.)

The following rules have been adopted by the Hanafî lawyers, for the purpose of supplying a safe guide to the interpretation of devises and bequests, which may be involved in doubt and obscurity :—

(1) When the testator uses the expression, "I bequeath to the relations of my wife," the bequest would be for the benefit of her relations, both paternal as well maternal.

(2) When a legacy is left to "the nearest of kin," it would go to the maternal kindred only in default of paternal kindred.

(3) When a disposition is made in favour of the relatives of a stranger, it would be for the benefit of all his relatives, be they his blood-relations or not.

(4) When the testator bequeathes his goods to the orphans, the blind, or "the people" of such a race, or of such a locality, the legacy would be divided among all those who answer the description, without distinction of age, or sex, or fortune.

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(1) *Sharâya in loco.*

(5) When the testator makes a disposition in favour of the *heir* of *A*, and *A* dies leaving several heirs, the legacy would be divided among them, in the proportion of their legal shares.

(6) When the bequest is in these terms, "I bequeath to such a family" (mentioning it by name), according to Abû Hanîfa, the bequest will be in favour of the head of that family. According to Abû Yusuf and Mohammed, the legacy will be divided, as in the preceding case, among all the members of his family.

(7) When the legacy is left to the neighbours, it will go to such of them as are nearest, or whose residence is contiguous to the testator's. Abû Yusuf and Mohammed hold that if several people reside in that house, the legacy will go to all of them in equal shares including women and children.

(8) When a legacy is in favour of soldiers and "the afflicted," it does not impose on the heir, or the executor, or the Kâzi, the obligation of finding out all those people who satisfy the condition. It is allowable to the administrator or executor to distribute it among those who are forthcoming, unless they are specifically mentioned or indicated.

Bequest to a neighbour.

If a person make a bequest in the following terms:—"I bequeath one thousand *dirhems* to my *neighbour*," according to Abû Hanîfa it would go to the person whose house is contiguous to that of the testator. Abû Yusuf and Mohammed maintain that it should go to all the inhabitants of the vicinity, who belong to the same mosque. The *Fatwa*, however, is with Abû Hanîfa if only one neighbour is meant; but if the testator meant more than one, the matter should be left to the discretion of the Judge.(1)

The passage in the *Fatâwai Alamgiri* on this subject is to the following effect:—"When a person bequeathes a third of his property to his neighbours, some say, that if they can be numbered, the third is to be divided among them all, rich and poor. And it is to be divided in like manner if he should say 'to the people of this *masjid*.' The definition or meaning of 'cannot be numbered,' according to Abû Yusuf is, that the persons cannot be computed without the aid of a written account but according to Mohammed it refers to a number exceeding a hundred. Others, however, have said that the matter should be left to the discretion of

(1) *Fatâwai Alamgiri*, Vol. VI, p. 142.

the Judge and the *Fatwa* is to that effect, though Mohammed's rule is easier. If the neighbours cannot be numbered, the legacy is void; and so also when the legacy is to the people of the *masjid*, or of the *sijn* (or prison), and they cannot be numbered. Mohammed has said that when a bequest is made to the orphans of the *bani* (posterity) of a particular person and they can be numbered, the legacy is to be expended on all, in the same way as if it were on 'the orphans of *this* street or 'of *this* mansion,' rich and poor participating alike: but if they cannot be numbered, the legacy is to be expended on the poor among them."

"With regard to who among the neighbours are entitled to share in the bequest, the *Mashâikh* are of opinion that every person may be included under the description of neighbour, whether the proprietor of a house or not, or whether a man or a woman, a Mussulman or a *Zimmi*; the term neighbour being equally applicable to all of them. Abû Hanîfa also holds that an absolute slave possessed of a house in the neighbourhood is entitled to the benefit of the will."

Bequest in favour of the *ashâr*.

If a person were to make a bequest in favour of his *ashâr*,(1) all the relations of his wife within the prohibited degrees (such as her father, brother and so forth), are included in the description, and likewise all the relations of his father's wife [his step-mother] and of his son's wife [his daughter-in-law], within the prohibited degrees, as these all stand in the relation of *ashâr* to the testator. It is to be observed that all the kindred of the wife within the prohibited degrees are included in the bequest notwithstanding that she was at the time of the death of the testator observing the *iddat* from a reversible divorce. But if the divorce was irreversible, her relations are not to be included, as the existence of the relationship entitled *ashâr* depends on the actual existence of the marriage at the time of the testator's death, and by an irreversible divorce marriage is utterly annulled.

If a person were to make a will in favour of his *relations* (*akriba*), it is construed to be in favour of the nearest of kin within the prohibited degrees, and in their default to be in favour of the next in proximity, and so on in regular succession. According to Abû Hanîfa, the bequest in question is restricted in its operation to the

(1) With a *add*, *i.e.*, people connected to him by affinity.

prohibited relations of the testator, whereas according to the two disciples it extends to all the descendants of the most distant progenitor, professing the faith of Islâm; whilst Shâfeï maintains that it is confined solely to the testator's father [and his offspring.]

Bequest in favour of relations.

If a person, having two paternal and two maternal uncles, were to make a will "in favour of his relations" [*akriba*], according to Abû Hanîfa, it will be in favour of the paternal uncles only. According to the disciples, all the four uncles will be included. If, on the other hand, the testator were to leave only one paternal and two maternal uncles, the half of the legacy in that case goes to the paternal uncle, and the other half to the two maternal uncles. If the bequest had been for the next of kin the whole legacy would go to the paternal uncle, and nothing to the two maternal uncles. When there is only one paternal uncle, he is entitled only to a moiety.(1) If, however, the testator died leaving him surviving a paternal uncle and aunt and a maternal uncle and aunt, the legacy would be divided in equal shares between the paternal uncle and aunt both being related to him within an equal degree of affinity, and the tie of blood between them and the testator being regarded as stronger than that existing between him and the maternal uncle or aunt. A paternal aunt, moreover, although she is not entitled to inherit, is nevertheless capable of taking a legacy, "in the same manner," adds the *Radd ul-Muhtâr*, "as a relation who is a slave or an infidel. In all these cases, if the testator leaves no relation within the prohibited degrees, the bequest is null, because it is confined in its operation to those relations only".

Bequest in favour of orphans, etc.

"When a bequest is made in favour of the orphans, the blind, the lame, or the widows of the race of a particular individual, and they are determinate in their number, the bequest would be in favour of all of them indiscriminately, whether rich or poor, male or female; for the execution of the bequest is practicable in this instance because of the ascertainment of the legatees. According to Abû Yusuf, this phrase, 'if they can be enumerated' comprehends as many as can be counted, without the aid of written calculations; whereas Mohammed holds that it extends no further than to one hundred, any greater number being considered as beyond enumeration.

(1) For the reasons of these principles, see the *Hedâya* and the *Radd in loco*.

Some, on the other hand, allege that the determination of this point rests entirely with the Kâzi, *and decrees pass accordingly*. But, if the individuals of the race named be incapable of being enumerated the poor only are included in the bequest, not the rich, for it [the bequest] is of a pious nature, and the object of it (namely, the approval of God) is best attainable by removing the wants of the poor. Besides, as the very description used indicates a degree of want and distress on the part of the legatees, it is proper to admit this to have been the testator's meaning. It is otherwise where a person makes a bequest 'to the youths or the maids of a particular race,' who are innumerable; in such case the bequest is void, because, as the description used does not indicate want, the words of the testator cannot be construed to apply to the poor; neither can the bequest possibly hold valid in favour of all the individuals of the class named, since as they cannot be enumerated it is impracticable to define them, and a bequest to unknown legatees, is void. For a bequest is an act by which the testator invests another with the right of property, and it is impossble to confer that right on persons unknown. It is to be observed that in the case of bequests to the poor or distressed, the legacy must be paid at least to two paupers, two being the smallest number of plurality in *wasiat*."

Bequest to the *awlâd* of a particular person.

Where a bequest is made to the children (*awlâd*) of the race of a particular person—the males and females have an equal right in such bequest, as the term *awlâd* comprehends all the descendants. A bequest to the heirs of a particular individual will be divided among the heirs of the person named, according to the rules of intestate succession, a male getting double the share of a female because there is reason to imagine, that the object of the testator in using the word "heirs" was, that the same distinction might be observed in the partition of the legacy, as in the case of inheritance.

If a person were to bequeath to a certain person a portion of his property exceeding the disposible third, his disposition would be reduced to the third.

Hanafî Law.

"And when a man," says the *Fatâwai Alamgiri*, "has bequeathed a third of his property to one person and a third of it to another, and both bequests are allowed by the heirs, the legatees have two-thirds and the heirs one-third, and if the bequests are not allowed by them, the legatees have the third between them in halves. Where the testator has bequeathed a third of his

property to one person and one-sixth to another, the reduction must be proportionate, for example, the first legatee instead of getting one-third will get two-ninths, and the second legatee one-ninth, together constituting one-third."

So also in the *Radd ul-Muhtâr* :—" If a person were to bequeath a third of his estate and effects to Zaid, and a third to another and the heirs do not assent to the bequest, a third will be divided equally between the two legatees. If he were to give a third to one and one-sixth to another, the third would be divided among the two in the proportion of two to one. If he were to bequeath the whole of his property to one and one-third to another, the third will be divided among them equally."

There is considerable dispute, however, as to the division of the bequest, should the heirs consent, though in the result it appears that the entire estate and effects will be divided into four *sahams* or shares, one of which will be given to the latter legatee, and three to the former.

Shiah Law.

Under the Shiah Law the second legacy would fall to the ground, the first legatee getting the entire disposible third. The *Sharâya* has stated the principle in the following terms :—

" If a person should bequeath a third of his estate to one legatee, a fourth to another, and a sixth to another, and the heirs should refuse to confirm his bequests, a third of the estate is to be given to the first legatee and the other legacies are void. But if he should bequeath a third of his estate to one person, and then a third or the same portion to another, this would be a revocation of the legacy to the first in favour of the second, and should a doubt arise as to the person first mentioned it must be determined by drawing lots. If a person bequeathes one article to two persons, and the value of the article exceeds a third of his estate while the heirs refuse their assent to the excess, so much of the article as is covered by a third of the estate is the joint property of the legatees. If, on the other hand, he were to bequeath a thing to each of the two, a beginning must be made in favour of the person to whom the bequest was made first and the deficiency must fall solely on the second."(1)

(1) All this is when the heirs do not assent.

The operation of this principle extends equally to indeterminate as well as specific legacies; for example, if a person were to bequeath to one person a sum of money, or a share in his inheritance, and to another that which would be sufficient for his maintenance for a limited period of time, this last legacy would be appraised or valued, and then the two legacies will be dealt with according to the principles already stated.

When a bequest is made to two persons respectively of a half and one-fourth of the testator's estate and effects, the legatees will receive the shares given to them, provided the heirs consent, the residue going to the heirs. But if the heirs do no assent to the bequest, according to Abû Hanîfa the legacies will have effect given to them out of the disposible one-third, which is to be divided into seven parts, four being given to the legatee of the half, and three to the legatee of the one-fourth. But, according to Abû Yusuf and Mohammed, whose opinion seems to be recognised for the *fatwa*, the third is to be divided into three shares, two of which will be given to the legatee of the half, and one to the legatee of the fourth.(1) Hanafî Law.

Where a bequest is made of specific sums of money,(2) say of a thousand dirhems to one person, and two thousand dirhems to another, and the disposible third only amounts to one thousand dirhems, according to Abû Hanîfa, each legatee takes in proportion to the full amount of his legacy, and the thousand is divided between them accordingly. In all these cases, the legatee takes in proportion to the full amount of his legacy, because *primâ facie* it is valid since the testator may have left so much other property that this amount may come within a third of it. And all the jurists are agreed that when each one of several legacies does not exceed a third of the property, as for instance, when a third is bequeathed to one, and a fourth to another, and the heirs do not allow both, each legatee is entitled to a share in proportion to the full amount of his legacy whatever it may be, and the third is to be divided among them accordingly.

When a bequest is made in an indefinite form, for example, if a testator were to say, "I give a portion of my property to so-and-so," he can at any time whilst alive explain his intention. After

(1) *Fatâwai Alamgiri*, Vol. VI, p. 150. (2) Technically called *mursalla*.

his death the explanation of the devise rests with the heirs. If the bequest is of a *saham* or *juzz*, some hold that the heirs are entitled to give what they please, but in the *Mabsût* it is stated that the legatee of a *saham* should have the equivalent of the smallest share of the heirs, provided it does not exceed a third; this is according to the disciples. When the testator bequeathes a *saham* of his property to a particular person and leaves no heirs, the legatee takes a half and the remaining half goes to the *bait-ul-mâl* or the public treasury,(1) "and the case is as if he had left two sons, when the estate would be equally divided between them."

Principles of construction.

If a person should bequeath *his son's or his daughter's share*, and he has a son or a daughter, the bequest is not valid because he is in fact giving away what belongs to another. But if he has neither son nor daughter the bequest is lawful. And if the bequest is of the *like of his son's or daughter's share*, the bequest is lawful, though he should have a son or a daughter, *for the like of a thing is not the thing itself but something different.* The son's *share* is then to be ascertained, and an equal amount given to the legatee; but if that should exceed a third of the estate, the bequest requires the consent of the heirs, while if it be only equal to or less than a third it is lawful without their consent. Consequently, if a person were to make to another the bequest of a son's share, and he has only one son, the legatee will take half of his property if the heir consents, otherwise only one-third. Similarly, if he has two sons the legatee will take one-third, according to Zailye. When the testator dies leaving him surviving an only daughter, and the legacy is "of a daughter's share" the legatee will get half provided the daughter consents, otherwise one-third. If there are two daughters, the legatee will get one-third according to the *Manah*, and if there are three daughters he will get only one-fourth. And this view is supported by the reference from the *Mujtaba* "which is the work of Imâm Zâhidi." If a testator leave him surviving a son and a daughter, and the bequest is "of a daughter's share," the legatee will get one-fourth. And if a testatrix leaves a husband, and three sisters of three kinds (*e.g.*, full, consanguine and uterine), and the bequest is of the share of a consanguine sister the legatee will take one-tenth. This is the doctrine laid down in the *Mujtaba*. And

(1) See *post*, p. 617, footnote.

Principles of construction. —contd.

the *Hindieh* (*i.e.*, the *Fatâwai Alamgiri*) explains this rule thus:—the husband takes his specified share, and the residue is divided among the legatees and the sisters in the proportions fixed for them by the law. If a testator dies leaving a mother and son, and the bequest is of "a daughter's share," the property will be divided into seventeen shares, five of which will be given to the legatee, ten to the son, and two to the mother.

To explain this case it is necessary first to take as if there were no legacy, and then the estate would be divisible into six shares, whereof the mother would have one, and the son the remaining five. The bequest of a daughter's portion, if there had been one, requires an addition to be made to such a share, which being half that of a son, the addition must be two shares and a half, which would make the whole eight and a half, or doubling them to get rid of the fraction, seventeen shares, whereof the legatee takes first five shares, for the legacy here is less than a third of the estate and takes precedence of the heritage of the heirs; and of the remaining twelve shares one-sixth or two shares are given to the mother and the other ten to the son.

If there be a daughter and sister, and the legacy is of a daughter's share, the legatee will take one-third whether the daughter and sister consent or not. This is laid down in the *Fatâwai Nomânia* by Saijâni.

And if a person should leave a wife and a son, and make a bequest of the share of another son, if there had been one, "the estate must be arranged into fifteen shares," *supposing the heirs to assent to the legacy.* Of these, the legatee would take seven shares, the wife one share, and the son seven shares. Here, as in the last case but one, let us first suppose that there was no legacy, and on that supposition the estate would be divided into eight parts, whereof the wife would take one and the son seven. But now taking the legacy as the share of another son, if there had been one, we must add seven more to the number of shares, thus making them up to the fifteen. In this case, however, as the legacy is more than a third of the whole estate, the assent of the heirs is made a condition without which the legacy would not be lawful.

When a person has died leaving a daughter and a brother, and has bequeathed to another person the share of a son, there being no son, the legatee has two-thirds of the estate, and the other third is

divided between the daughter and brother in halves, that is, when the heirs consent to the legacy ; but if they do not consent, the legatee has only one-third, and the other two-thirds are to be divided equally between the daughter and brother. When again the bequest is of *a like to the share of a son if there were one*, and the other circumstances are the same, the legatee has two-fifths of the property if assented to by the heirs. When again a person has died leaving a brother and sister, and has bequeathed to another person *the share of a son if there were one*, and the bequest is allowed by the heirs, the legatee takes the whole property, leaving nothing to the brother and sister ; while if he had bequeathed *the like of the share of a son if there were one*, and the heirs had allowed the legacy, the legatee would only have a half, and the other half would be divided between the brother and sister in thirds, (that is, two portions to the male and one to the female). In both cases, if the legacy were disallowed by the heirs, the legatee would only have a third, while the other two-thirds would be divided in the same way between the brother and sister.

All this refers to cases where the testator leaves heirs behind. In default of heirs, should a testator leave a legacy, describing it as the share of a particular heir, the legatee will get one moiety and the remainder will go to the *Bait-ul-mâl*. This is according to the approved doctrine and the *Jouhara*. The heir is the *sâhib-ul-hakk* and cannot be deprived absolutely of a share in the inheritance.(1)

Shiah Law.

Under the Shiah Law, when a legacy is bequeathed to several persons or to a class of persons, it is divisible among them all equally. For example, if a person were to make a bequest in favour of his children, some of whom are males and some females, the legacy will be divided among them all equally without distinction of sex. Similarly, when the legacy is in favour of uncles and aunts, whether paternal or maternal, or both together. But where the testator has made a distinct apportionment, giving more to some than to others, his directions must be given effect to.

Death of the legatee. Hanafî and Shiah doctrines.

Under the Hanafî Law, the death of the legatee in the lifetime of the testator causes the legacy to lapse ; under the Shiah Law, it is different. If the legacy is not adeemed by the testator, the death of the legatee does not cause a lapse. It descends to the

(1) *Radd ul-Muhtâr*, Vol. V, p. 659.

legatee's heirs; should he leave nobody, it would revert to those of the testator.

If a bequest is made of a third of the testator's estate to 'Amr and Zaid, but 'Amr is dead at the time of the bequest, the entire third will go to Zaid, and the rule is, that there is no right in the non-existing or dead. Abû Yusuf holds that if the testator was unaware of the death of 'Amr at the time of the bequest, a moiety only will be given to Zaid. This is according to Zailye. For a bequest to 'Amr and Zaid, when 'Amr is dead, is like a bequest to Zaid and an inanimate object. But when a legacy is left *between* 'Amr and Zaid, and 'Amr is dead at the time, half alone will be given to the surviving legatee, for the word "between" implies that it was to be given in moieties."(1) Hanafî Law.

If a person were to make a bequest in the following terms, "my executor shall give one-third of my property to *A* and to the son of 'Abdullah, if the latter is in want at the time of my death;" and at the decease of the testator, the son of 'Abdullah is found to be rich, only half of the third will be given to *A*.(2)

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(1) *Radd ul-Muhtâr*, Vol. V, p. 659.

(2) "If a man should bequeath a third of his property to Zaid and Bakr, Bakr being dead at the time, whether with or without the knowledge of the testator, or to Zaid and Bakr if he be alive, he being in fact dead, or to him and to the person in a house, no one being in that house, or to him and to his posterity (*'akab*), or to him and to a child of Bakr, and his child dies before the testator, or to him and to the poor of his children, or to him who may become poor of his children, and the condition fails at the time of his death, the whole legacy is to Zaid, in all of these cases, for the non-existing or the dead can have no right, and there being no one to contend with Zaid, the legacy is the same as if it were to him alone. With regard to the case of Zaid and his posterity as they are to follow him after his death, they are to be considered as non-existing at present. In all these cases the competitor with Zaid is out of the contest from the beginning, but if he were at first competent to contend with him, and should subsequently become disqualified by failure of a condition, Zaid would have only a half. Thus, if a person should say,—'A third of my property to Zaid and Bakr if I die, he being alive or poor,' and the testator dies when Bakr is dead, or rich, or if he should say 'to him and to Bakr if he be in the house' and he is not in it, or 'to him and the children of such an one if they become poor,' and they do not become poor till the testator dies or 'to him and to his heir;' in all these cases the legatee has only half of the third. The principle in these cases is, that when the person conjoined with another has entered into a bequest, and then comes out of it by the failure of a condition, he does not occasion any accession to the right of the other, and that when he has not entered into the bequest for want of personality or competence (*ahliat*) the other takes the whole. And if one should say—'A third of my property between Zaid and Bakr,' Bakr being dead at the time, Zaid would have only a half of the third, because the word 'between' implies a division in half, insomuch that if he were to say between Zaid and then stop,

Death of the legatee—its effect.

The same result would follow, if one of the legatees should die during the lifetime of the testator. The principle is this, that when the legacy is in favour of existing objects or persons, and one of them should cease to exist after the *wasiat*, the other legatees would receive their original shares, and the share of the deceased legatee would lapse into the residue of the estate ; but if one of the legatees was non-existing at the time, or not possessing the quality required by the testator to take the bequest, then the whole would go to the existing legatees. This is according to Zailye.(1) For example, if a bequest were made in favour of *A* and of persons residing in a particular house, the whole bequest would go to Zaid, for there is no bequest in favour of the *m'aadûm* or non-existing persons.(2) The same would happen if a person were to say " this is for *A* and

Zaid would have a half also, yet if one should say, 'A third of my property between the sons of Zaid and the sons of Bakr,' and one of them has no sons, the whole third belongs to the sons of the other. If one should bequeath a third of his property to Zaid and to 'Amr, or should say between Zaid and 'Amr, and should then die, and one of the legatees should die after him half of the third would belong to the survivor, and the other half of it to the heirs of the deceased legatee. So also if one of them should die after the testator, but before acceptance of the legacy and the survivor should then accept, both legatees would be entitled to the bequest. But if one of them should die before the testator, the share of the legatee so dying would revert to the testator."

"When a person says: 'A third of my property to such an one (*fulán*, a particular individual) and to whomsoever may become poor of the children of 'Abdullah' and then dies, all the children of 'Abdullah being rich at the time, such an one gets the whole third. But if some of them should become poor before the death of the testator, the third would be divided between such an one and the poor children of 'Abdullah according to the number of heads (*per capita*). If, again, the children of 'Abdullah had never ceased to be poor from the time of their birth to the death of the testator, it would seem that none of them would be entitled to any part of the third, but that the whole of it would devolve on the other legatee. If the children of 'Abdullah in existence at the time of the bequest should die, and other children be born to him who at first being rich should become poor before the death of the testator, 'the third would be divided between them and the other legatee' according to the number of heads. So also if the terms of the bequest were, 'A third of my property to such an one and to the child of 'Abdullah,' and the child of 'Abdullah dies but another is born to him before the death of the testator, the legacy is between that person and that child of 'Abdullah. And if one should say, 'A third of my property to such an one and to the offspring of 'Abdullah if they become poor,' and they do not become poor till the death of the testator, the other legatee is entitled to a share of the third, regard being had to the number of heads;" *Fatáwai Alamgiri*, Vol. VI, pp. 161-162 : Baillie's Dig., p. 642.

(1) *Radd ul-Muhtár*, Vol. V, p. 661.

(2) *Ibid.*

his '*akab*," for '*akab* are the people whom a person leaves surviving, and they cannot be determined at the time of the bequest. This is in the *Durrar*. Similarly, if he were to say " this legacy shall be for Zaid and for the son of 'Abdullah, if he lives in my house ;" and the son of 'Abdullah were not to live in that house, the entire legacy would go to Zaid. But when a legacy is in favour of 'Amr and Zaid, and 'Amr dies after the testator's death, 'Amr's share will go to his heirs.(1)

Under the ancient doctrine, if a woman died leaving a husband, and bequeathing half of her property to a stranger, the husband would take a third, the legatee a half, whilst, the remaining sixth would go to the *bait-ul-mâl*. The old lawyers reasoned thus : the legacy to a stranger has precedence to the extent of a third over the rights of the heirs, and there remain two-thirds of the property to be divided as inheritance. Of this one half, *i.e.*, a third of the whole, belongs to the husband, leaving a third to which no other heir is entitled. The remainder of the legacy therefore becomes operative against it, and the legatee thus gets the half bequeathed to him ; and there being no heir entitled to the remaining sixth, it goes to the *bait-ul-mâl*.(2) Under the modern rule, the remaining sixth reverts to the heir.

If a man died leaving a wife, and bequeathing *all his* property to a stranger, and the widow did not assent to the bequest, she would be entitled to a sixth of the property and the legatee to the remaining five-sixths. For he is entitled to a third by virtue of the bequest, and of the remaining two-thirds the widow takes a fourth, which is equivalent to a sixth of the whole, and the legatee takes the remainder.

When a man bequeathes a third of his property to the sons of a particular person, and the person has no son at the date of the bequest, but sons are subsequently born to him before the testator's death, these sons are entitled to the third. And even though the person had sons at the date of the bequest, yet if they were not mentioned by their names as Ahmed, Zaid and Bakr, or otherwise

(1) *Radd ul-Muhtâr*, Vol. V, p. 661.

(2) Public treasury *for the benefit of all Mussulmans ; see Mahommedan Law*, Vol. II, *in loco*. Any property coming by way of escheat to the *Bait-ul-mâl* was for the benefit of the general body of Moslems.

specifically indicated, the bequest would be for all the sons existing at the time of the testator's death. So that if those in existence at the date of the bequest should die, and others are subsequently born who are living at the time of the testator's death, these are entitled to the third of the property. If, however, the existing sons are mentioned by name, or are otherwise distinctly indicated, the bequest is only for them, and becomes void in the event of their death. Thus, when legatees are named or otherwise distinctly indicated, the bequest to them is said to be special, and regard must be had to the time at which it was made.

When a man bequeathes a third of his property to his *umm-ul-walad*(1) being three in number, *and to fakîrs* and *miskîns* (beggars and indigent persons), the property will be divided into five shares, out of which three will be given to the *umm-ul-walad*, one to the *fakîrs* and the remaining one to the *miskîns*. This is according to Abû Hanîfa and Abû Yusuf. Mohammed would divide the property into seven shares, and give three to the *umm-ul-walad*, and two each to the beggars and indigent. The former opinion is the one approved. Similarly, if a man should bequeath a third of his property to Zaid and the *miskîns*, Zaid takes half, and the latter take half according to Abû Hanîfa and Abû Yusuf.(2) When a person bequeathes one-third of his property to Zaid, the beggars and the indigent, according to Abû Hanîfa the property will be divided into three shares, according to Abû Yusuf into two moieties, and according to Mohammed into five shares, and this is the approved doctrine. When a person bequeathes a third to the poor, it may be expended, according to Abû Hanîfa and Abû Yusuf, on one poor person, but Mohammed holds that there must be at least two poor persons. But when a body of *miskîns* is indicated, the bequest cannot be expended on one only; there is general consensus on this point.

If a person were to make a bequest for the poor of Balkh, it may lawfully be expended on other poor also, according to Abû Yusuf. And the *Fatwa* is on this.

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(1) Bondswomen who have borne him children and have consequently become emancipated.

(2) *Radd ul-Muhtâr*, Vol. V, pp. 662, 663; Mohammed would divide the property into three shares.

When a person bequeathes a third of his property to one man, and then says to another, "I have made you a partner and joined you with him," the third belongs to them both. And if, after bequeathing to one man a hundred, and to another a hundred, he should say to a third, "I have made you a partner with them," the person addressed would be entitled to a third of each hundred.

When a man makes a bequest to *A* and *A's* heir, *A* takes half of the bequest, and the remainder is void, and in like manner if the bequest be to *A* and the testator's murderer.

If a person possessed of three garments of different qualities, one good, the other middling, and the third bad, bequeathes them to three different legatees, and one of the garments is then lost or destroyed, but which of them is not known, and the heirs refuse to make delivery of the remaining garments to any of the legatees saying to each of them, 'the garment in which you had a right has been destroyed,' under these circumstances since the right of the parties is not defined, and the ignorance of this fact prevents any valid judgment being pronounced in the matter, and no effect can be given to the testator's wishes the bequest must be pronounced as void, "unless the heirs will deliver up the remaining garments." "If they should do so, the objection is removed, and the legatee of the best is entitled to two-thirds of the better of the remaining garments, the legatee of the middling garment is entitled to the remaining third of the better and a third of the worse, while the legatee of the worst is entitled to the remaining two-thirds of the worst garment."

Any increment, such as the young of cattle or the produce of grain, arising out of the subject of a bequest before the death of the testator is the testator's property, and subject to the same liabilities as the rest of his estate. An increase that occurs after his death and after the partition or distribution of his estate belongs to the legatee. An increase that occurs between these events or after the testator's death, but before partition, may occur either before or after the acceptance of the legacy by the legatee. In the former case, it is a legacy because it is an accessory to the original subject of bequest and must come out of the third of the estate, that is, is valid only if it falls within the third. But is it so in the latter case also, that is, when it occurs after acceptance and before partition? On this point Mohammed has

Increments to bequests.

Hanafî doctrines.

not left any express *dictum*, but Kudûri has related that in this case the increase is not a legacy and comes out of the whole of the property. The general opinion, however, seems to be that it is a legacy and must come out of the third.

When a separable accession to the subject of a bequest takes place after the death of the testator, if the original subject and the accession both come out of the third, they belong to the legatee. If they exceed the third, effect is to be given to the legacy, in the first place as against the original subject, and then as against the accession according to Abû Hanîfa, but against both *equally* according to the two Disciples. "For example if the testator has left six hundred dirhems and a mare, of the value of three hundred dirhems, which, after the testator's death but before the partition of his estate, foals and the young animal is also valued at three hundred dirhems. Under such circumstances (the principal and accessory bequests amounting together to six hundred dirhems), the legatee is entitled, according to Abû Hanîfa, to the mare and one-third of the foal (making together four hundred dirhems or a third of the whole) while according to the two Disciples, he is entitled to two-thirds of each. This is on the assumption that the mare foals before the acceptance by the legatee of the original bequest, as well as before partition. If the mare foals after the legatee has accepted the bequest and after partition, it belongs to him; but if after acceptance but before partition, Kudûri holds that it is not a bequest, while 'our' Shaikhs have held that it is a bequest, and is to be regarded as coming out of the third in the same way as if the mare had foaled before acceptance. If it takes place before the death of the testator, the foal never comes within the bequest, but is subject to the same rules as the rest of the deceased's property."

Shiah doctrines.

According to the Shiah Law, "if a person should make a bequest of half of his property, and the heirs at first should assent, but afterwards declare that they thought the amount to be trifling, decree is to be given against them for the amount which they insist that they thought the legacy to be, and they are to be put upon their oaths as to the excess, but this is subject to some doubt. And if the bequest were of a slave or a mansion, and the heirs after first assenting to it should then allege that they thought it was no more than a third of the deceased's estate, or if more,

only so in a trifling degree, such claim or allegation on their part cannot be attended to, because their consent in this case involves a known object of the value of which they cannot pretend ignorance at the time of assenting to the bequest. If a person should bequeath a third of his property by way of *mushâ'a*, the legatee is entitled to a third of everything of which he died possessed. If, again, he bequeathes a specific article which is of the value of a third of his estate, the legatee becomes by his death the sole proprietor of the article bequeathed, nor have the heirs any ground of objection thereto. And if the deceased should have left both present and absent effects (such as ready-money and debts,) so much of the specific thing must be surrendered to the legatee as a third of the property presently available will admit of, while he will have to wait for the remainder of it until it is recovered by the heirs, since what is not forthcoming is liable to loss or destruction and may never be realised. Shiah doctrines—contd. Specific legacies

"When a person has made a bequest, and then another which is repugnant to it, effect must be given to the latter." Two bequests, one repugnant to the other.

"When a person has said, 'if there be a male in the womb of this woman, he is to have two dirhems, and if there be a female she is to have one dirhem' and the mother is delivered of both a male and a female they are to have three dirhems; but should he have said, 'if what is in her womb be a male he is to have so-and-so, and if a female so-and-so' and the woman is delivered of both a male and a female they are not to have anything."

"If a person should bequeath the service of his bondsman the fruit of his garden, the residence of his house or anything else of a usufructuary nature for ever, or for a fixed time, the advantage or profit to arise therefrom must be valued and should it not exceed a third of a testator's estate, the bequest is valid, while if more than a third the legatee is to have as much as the third will cover, and the legacy is void as to the excess." Usufructuary wills.

Where the subject of a bequest is a mere right of residence for a fixed period, the obligation of maintaining the house in proper repair rests on the testator and not on the legatee, as this is a duty which is dependent on the ownership of the house and the legatee is entitled to no more than to a right of residence while all the other rights of ownership appertain to the heirs. as

sale, mortgage and the like, none of which, however, has the effect of invalidating the rights of the legatee.

"In all cases where a testator may have employed a term which is common or equally applicable to several things, the heirs have an option to fix on whichever of the things they please and give it to the legatee. If, again, the testator should say, 'give him my bow' and only one is found in his possession, that one must be given to the legatee of whatsoever description it may be."

Bequest of a portion of an heir.

"When a person has bequeathed to a stranger the like of his son's portion having only one child, this is in fact a partition of his estate between them, and the legatee is entitled to a half of it unless the heir refuses his consent to the full bequest, in which case the legatee's interest is reduced to a third. If, again, the testator has two sons, the legacy is a third of the estate, and if three, it is a fourth. The general rule is that the legatee should be added to the other heirs and treated as one of them, if they are all entitled to share equally in the inheritance; while if their shares differ, the shares of some being more and of others less, he ranks with the weakest of them or the one whose share is the least, unless the testator has expressly said that his share is to be equal to that of the highest, in which case effect must be given to the terms of the bequest. Further, if the testator should have said like the share of my daughter, the legatee according to 'us' is entitled to a half when there is no other heir besides the daughter, but his share is reduced to a third if she refuses her consent to the full legacy, because according to our doctrine daughters inherit the whole estate to the exclusion of the *asabâh* [agnates] and the legatee thus becomes like a third daughter."

"If a person having three half-sisters by the mother and three half-brothers by the father, should bequeath to a stranger the like of the portion of one of his heirs, the legatee is to be treated as one of the sisters, and so to receive one share out of ten parts into which the estate must be divided, while the half-sisters take three and the half-brothers the remaining six conformably to the rules of intestate succession. If, again, the testator having a wife and daughter bequeathes the like of the share of the daughter and the heirs assent, the legatee is entitled to seven parts of the estate, the daughter to as many, and the wife to two, the whole being

divisible in such a case into sixteen portions. Nevertheless it would be more proper to say in this case that the wife is entitled to no more than one part out of fifteen, that being the number of shares into which the estate should be divided. If, again, a person having four wives and a daughter should say, 'like the share of one of them,' the division of the estate would be into thirty-two portions, whereof an eighth or four shares would be equally divided among the wives, the legatee would take one share like one of them and the remaining twenty-seven would pass to the daughter."

"If a person should bequeath to a stranger 'the portion of his child,' the bequest according to some is void, because it is a bequest of what belongs to another, but it is more agreeable in principle to say that the bequest is valid and should be construed in the same way as if it were the like to his share.(1) If, again, the testator having a son who, afterwards becomes his murderer, should bequeath the like of his share, here though some say that the bequest is valid, yet it is more in conformity with the principles of law to say that it is invalid."

"When a person has bequeathed the double of his child's portion, the legatee has two equivalents of the portion and if he were to say *zuafân* (in the dual) or two doubles of it, the legatee would have an equivalent to four portions, but only to three according to some whose opinion is preferred as being more certain; and the same is the law when the testator has used the expression *zuaf-i-zuaf* or double of the double of his portion."

"When a person whose property is scattered about in different places has bequeathed a third of it to the poor, it is lawful to apply whatever is found in the city to the poor of the place, and even the whole of it may be lawfully expended on the poor of the testator's city and on those of them who are on the spot, without following or searching for any who are absent. According to the best authority the number of those who are to share in the gift must, however, be three or more by reason of the testator's expression being in the plural. In like manner, if he should say,—emancipate slaves (in the plural), it is incumbent on the executor

(1) The *bequest* of a child's share to another is invalid under the Hanafi Law as being the testamentary gift of the right of another, *i.e.*, of the child who can under no circumstance be excluded from inheritance,.

to emancipate at least three, unless a third of the testator's estate should fall short of the object.''

'' When a person has bequeathed a mansion which falls down and is levelled to the ground before the testator's death, the legacy is void because the name of mansion (*dâr*) is no longer applicable to it. But this is liable to doubt.''

'' When a testator has said, ' Give Zaid and the poor a certain sum,' Zaid, according to some doctors, is entitled to a half, but according to others only to a fourth. But the first doctrine is the best supported.''(1)

The acknowledgment of a debt. (Hanafî Law.)

In order to avoid the operation of the rule by which legacies over a third are reduced to the disposable quantity, recourse is usually had to the acknowledgment of a debt; but when the acknowledgment is made on a death-bed or is not founded upon a prior actual consideration, the law treats such acknowledgment also as a simple legacy subject to reduction. '' If a person,'' says the *Hedâya*, '' on his death-bed say to his heirs, ' I am indebted to Zaid and you must credit what he says,' in that case the claim of Zaid to any amount not exceeding a third of the estate must be admitted although the heirs should falsify it.''

(1) These principles of the Shiah Law have been given from the *Sharâya* illustrated from the *Jawâhir*. It will be noticed that throughout these doctrines, there are two divergent views running side by side. The Mohakkik, the author of the *Sharâya*, invariably states both the views, but gives the preference to those of his own school. The contrary views are those entertained by Shaikh Murtaza, Ibn Junaid, Mohammed ibn Idris al-Hilli and Ibn Zuhra Halabi (author of the *Ghunia*), who in most matters, are in advance of the patristic school of the author of the *Sharâya*. I have given these extracts from the *Sharâya*, in preference to clothing the old views in my own words. I have followed in the main Mr. Baillie's rendering, though I prefer, for general accuracy, M. Querry's French version.

CHAPTER XXII.

RULES RELATING TO WILLS BY NON-MOSLEMS.

THE rules with reference to the wills of the non-Moslem subjects of Mussulman sovereigns are thus stated in the *Fatâwai Alamgiri* :—

"The will of a *Zimmi* for secular purposes is valid, according to all opinions. Other than secular purposes are of four different kinds. *First*, there are purposes which are a means of approach (*kurbat*) to Almighty God, both with them and with us, and bequests for such purposes are valid whether they be to a set of particular persons or not ; *second*, there are purposes which are sinful both with them and with us, and bequests for these purposes are valid if they are to a specified body of individuals and the bequest is a *gift without regard to the purposes*, but if the persons are not specified, the bequest is void ; *third*, there are purposes which are pious according to us but sinful with them, and a bequest for these purposes is valid if in favour of a body of specified persons and is a gift without regard to the purposes, while if the persons are not specified, the bequest is void ; *fourth*, there are purposes which are sinful according to us, but pious according to them and bequests for these are valid, according to Abû Hanîfa, whether the persons be specified or not, but void according to the Disciples when the persons are not specified. Thus when a *Zimmi* has directed by his will that slaves be purchased and emancipated on his account, whether with or without a specification of the individuals, or that a third of his property be bestowed in charity on beggars and the indigent, or expended in lighting the Holy Shrine, or in making war against the Turks [the infidel Tartars], the bequest is valid. And if a *Zimmi* bequeathes a third of his property to mourners and singers the bequest is valid if they are specified and it is a gift to them, but if they are not specified, it is void. And if the third is to be expended in sending a set of Mussulmans on pilgrimage, or building a *masjid* for Moslems, and the persons are specified the bequest is valid, and a gift, so that they may perform the

pilgrimage and erect the buildings or not as they please, but if the persons are not specified, the bequest is void. If he were to bequeath a third of his property for the erection of a church or a synagogue, or direct that his house should be converted into a church or a synagogue, the bequest according to the Disciples is void, unless it is for a specified body, when it is a gift to them; but according to Abû Hanîfa it is valid under all circumstances." The opinion of Abû Hanîfa is the law in force, although the later Hanafî jurists have endeavoured to confine its operation to villages.

Bequest of a *Mustâmin.*

"When an alien, who is a *Mustâmin*, makes a bequest to a Moslem or a *Zimmi*, it is valid for the whole of his property, unless his heir had come into the *Dâr-ul-Islâm* or Moslem territory with him, and in that case the bequest as to the excess over a third is dependent on the assent of the heir. But if he has no heir, it is valid as to the whole of his property in the same way as the will of a Moslem or *Zimmi* is valid in the like case. So, also, though he has an heir in the foreign country. If he has bequeathed only a part of his property, the remainder is to be given to his foreign heir. If a *Zimmi* bequeathes more than a third of his property or makes a bequest to one of his heirs, it is not valid as in the case of a similar bequest by a Moslem. But if he bequeath to a person of a different religion, it is valid as in the case of inheritance. If, however, the bequest is to an alien who is not a *Mustâmin* it is not valid."

So also in the *Hedâya* :—If a Jew or a Christian, not suffering from a mortal disease were to build a church or a synagogue and then die, such building would descend to his heirs because Abû Hanîfa holds an erection of this nature to be equivalent to a *wakf* or pious appropriation, which (agreeably to his tenets) is not absolute, whilst Abû Yusuf and Mohammed hold all such erections to be sinful in their nature and, therefore, not valid as lawful *wakf*. But if a *Zimmi* were to declare that, after his death, his house shall be converted into a church or synagogue as the case may be for a specified sect of people, the bequest would be valid according to all the doctors, and would take effect to the extent of a third of the testator's property "because a bequest has two different characters—the appointment of a successor and an actual endowment, and the testator is competent to do either of these."

"If a Jew or Christian will that 'his house be converted into a church or synagogue for a sect of people,' without specifying the particular sect, the bequest is valid according to Abû Hanîfa. According to the two Disciples, on the contrary, it is not valid, for a deed of that nature is in reality sinful, although it may appear pious to the testator; and a will for a sinful purpose is null because the execution of it would be a confirmation of sin. The argument of Abû Hanîfa is that the founding of churches or synagogues is held by these persons to be an act of piety, and as we are enjoined to leave them to the exercise of whatever may be agreeable to their faith, the bequest is therefore lawful in conformity with their belief."

"*Objection.*—What is the difference between the building a church or synagogue at the time of health and the bequeathing it by will that Abû Hanîfa should hold it inheritable in the former instance and not in the latter?"

"*Reply.*—The difference is this: that it is not the mere erecting (of the church, &c.), which extinguishes the builder's property, but the exclusive dedication of the building to the service of God, as in the case of mosques erected by Molsems; and as an infidel place of worship is not dedicated to God indisputably, it, therefore, still remains the property of the founder, and is consequently inheritable (in common with his other effects)—whereas a bequest, on the contrary, is used for the very purpose of destroying a right of property." The opinion of Abû Hanîfa is recognised as law.

"The bequests of *Zimmis*," says the *Hedâya*, "are of four kinds:—(1) Those made for purposes held pious in their belief but not in the belief of Mussulmans, such as the building a church or a synagogue (as already mentioned), or the slaughter of hogs to feed the poor of their sect, in which cases Abû Hanifa holds the bequest to be valid in conformity with the faith of the testator, whereas the two Disciples deem it invalid as being sinful. (2) Those made for purposes held pious with Moslems but not with *Zimmis*, such as the erection of a mosque, a pilgrimage to Mecca, or burning a lamp in a mosque, in all of which instances the bequest is invalid in conformity with the belief of the testator according to all our doctors, unless, however, it be made in favour of some particular persons, in which case it is valid—as under such circumstances it is an investiture, the mention of building a mosque or so forth being considered merely in the

light of a counsel—(in other words, as if the testator had bequeathed his property to particular persons counselling them to erect a mosque therewith). (3) Those made for a purpose held pious both by Mussulmans and *Zimmis*, such as burning a lamp in the holy temple (of Jerusalem), or waging war against infidel Tartars which are valid whether made in favour of specific persons or not. (4) Those made for purposes not held pious either by *Zimmis* or Mussulmans, such as the support of singers, and dissolute women—which are invalid as being of a sinful tendency—unless, however, they be made in favour of particular persons and then they are valid."

"If a *Mustâmin* were to bequeath the whole of his property to a Mussulman or a *Zimmi*, it would be valid, for a bequest of the whole of an estate is deemed illegal only as it affects the right of the testator's heirs (whence it is that if they assent, such bequest is valid); but the heirs of the *Mustâmin* [if resident in an alien land] are possessed of no cognisable rights they being as it were dead, so far as they relate to the Mussulman government, because of their being in a hostile country. Besides, the property of a *Mustâmin* is in security only in virtue of the protection he receives from the State, which protection he enjoys in his own right, not in right of his heirs."

"If a *Mustâmin* bequeath a part of his property the bequest is executed accordingly, and the remainder is transmitted to his heirs, notwithstanding they be residents in a hostile country such being the law with respect to *Mustâmins*."

"If a *Mustâmin*," says the *Hedâya*, "immediately before his death, were to emancipate his slave or make him a *mudabbar* (*i.e.*, give him conditional enfranchisement) in the territories of Islâm, it would be valid and the slave would be free, notwithstanding his value were to exceed a third of his master's estate, for a bequest beyond a third of the property is deemed illegal only as it affects the right of the testator's heirs, but a *Mustâmin's* heirs (residing in a hostile country) possess no cognisable right as already mentioned."

"If a Mussulman or *Zimmi* were to make a will in favour of a *Mustâmin* it would be valid, for a *Mustâmin* so long as he resides in a Moslem country is considered in the light of a *Zimmi* and as the exercise of generosity and benevolence in favour of

such is, therefore, allowed to Mussulmans during life, it is also permitted them to extend such acts to a period after their death. (It is said that Abû Hanîfa and Abû Yusuf held wills in favour of *Mustâmins* to be illegal because of their intention to return to their own country, and also because the Mussulmans not only allow this, but even do not suffer them to reside in their dominions, more than a year, unless they submit to the payment of the capitation tax.—The former is, however, the better opinion.)"

"If a *Zimmi* were to bequeath more than a third of his estate to a stranger or to an heir, it would not be valid as being contrary to the laws of the Mussulmans to which they have agreed to conform with respect to all temporal concerns."

"If a *Zimmi* were to make a will in favour of a non-Moslem of a different persuasion it would be valid, because of the analogy of legacies to succession by inheritance, all the different descriptions of those persons who disbelieve in the true faith being considered as of one class."

"If a *Zimmi* residing in a Moslem country were to make a will in favour of a non-Moslem subject of a State at war with that country, it would not be valid, for as inheritance does not obtain between them because of the difference of country, it follows that a bequest from the one to the other is of no effect, bequest being similar to inheritance."(1)

NOTE I.

ACKNOWLEDGMENTS BY A PERSON SUFFERING FROM DEATH-ILLNESS.

"If a person suffering from a mortal disease were to make an acknowledgment of debt in favour of a woman not related to him or were to make a bequest or gift in her favour and afterwards were to marry her and were then to die, the acknowledgment would be valid, but the bequest or gift would be void, for the nullity of an acknowledgment in favour of an heir depends on the person having been an heir at the time of making it, whereas the nullity of a bequest in favour of an heir depends on the legatee being so at the time of the testator's death as has already been explained, and as the woman was not an heir at the time of the acknowledgment, but had become so by [marriage] at the time of the testator's death the acknowledgment is therefore valid, but the bequest is void and so likewise the gift, it being subject to the same rule as the bequest."

(1) See also the *Radd ul-Muhtâr*, Vol. V, p. 683.

"If such a sick person were to make an acknowledgment of a debt due by him to his son or were to make a bequest or gift in his favour at a time when the son was a Christian, and he [the son] afterwards, previous to his father's death became a Mussulman, all those deeds of acknowledgment, gift or bequest are void, the bequest and the gift, because of the son being an heir, at the death of his father as above explained; and the acknowledgment, because, although the son on account of the bar (namely, difference of religion) was not an heir at the time of making it, still the cause of inheritance (namely, consanguinity) did then exist, which throws an imputation on the father as it engenders a suspicion that he may have made a false declaration in order to secure the descent of part of his fortune to his son. It is different in the case of marriage as above stated, for there the cause of inheritance (namely, marriage) occurred after to the acknowledgment and had no existence previous thereto, for supposing the marriage to have existed at the period of making the acknowledgment, and that the wife, being then a Christian, should afterwards, before the husband's death, become a Mussulman in that case [the acknowledgment] would not be valid."

CHAPTER XXIII.

WHAT MAY BE DEVISED.

ANYTHING, movable or immovable, over which the right of property may be exercised or which may form the subject of exchange or barter, or a fractional share thereof, or the usufruct of a thing, may be lawfully disposed by will.

The *Sharâya* says :—" A bequest may be either of the substance or the usufruct of a thing, but with regard to both, it is indispensable that they are such as can lawfully be possessed or enjoyed." The bequest of anything which is unlawful for a Moslem to possess or from which no benefit can be derived is invalid. " But the bequest of trained dogs used for hunting or catching of game or for domestic purposes, such as guarding houses and watching in corn-fields, is lawful."

A bequest remains valid and operative, though the subject-matter should undergo a change or improvement after the constitution of the will, unless the alteration is so substantial as to give rise to the presumption that the testator, in making such change or improvement, intended revocation.

In the same way, the legatee bears any loss or deterioration to which the property may have been subjected during the interval. Should any encumbrance have been created by the testator upon the property, the legatee will receive it subject to the same. Where a piece of land has been left to a person by *wasiat*, and subsequent thereto a building is erected upon it by the testator, the rule is that the land should, upon the decease of the testator, go to the legatee, and the house to the heir ; both being co-proprietors with regard to their respective rights.

If the testator, instead of building on the land bequeathed by him, pulls down the existing structures, houses, sheds, &c., the legatee will receive the land devoid of any erection. But where a building is bequeathed, and it is pulled down subsequently by the testator, the legacy is adeemed, and the *wasiat* becomes annulled *ipso facto*.

The legacy of even a lawful object is void, if it is made on condition that the legatee should commit an unlawful act, for example, that he should set fire to any building or kill somebody, or prevent a person from going on a pilgrimage. When any property forms the subject of a *hiba*, to which operation has been given, it cannot be bequeathed.

Extent of the power of disposition.

A testator, as pointed out already, has the power to dispose by will not more than a third of the property belonging to him at the time of his death. This is an invariable rule fixed by the Law, and there is a general consensus of opinion on the point among the jurists of the various schools. The authors of the *Multeka*, the *Hedâya* and the *Minhâj-ut-Tâlibîn* have laid down the principle in distinct terms, and the author of the *Sharâya* enunciates the rule thus:—"Further legacies, whether of substance or of usufruct, are restricted to one-third of the testator's estate, and if the whole of his bequests should exceed that amount they are void as to the excess, unless allowed by the heirs. The third of a testator's property, and consequently the extent to which he may lawfully bequeath out of it, is determined by its state at the time of his death, and not by its state at the time of making the will. So that if a person, who was in good circumstances at the time of making his will, should be indigent at the time of his death, no regard is to be paid to his previous wealth in determining the amount of his valid bequests. In like manner, if he were poor at the time of making his will, and has become opulent at the time of his death, it is his latter condition, and not the former, that must determine the legal amount of his legacies."(1)

And these principles have been repeatedly affirmed by the Courts of Justice in India. One difference, however, between the various schools is worthy of note. Under the Hanafî Law, when a man, having no heir, bequeathes his whole estate, the bequest is valid, and there is no need of assent on the part of the *bait-ul-mâl* or public treasury, though it is the *ultimus hæres*. Under the Shiah Law the rule is the same.(2)

(1) See also the *Radd ul-Muhtâr*, Vol. V, p. 248.

(2) According to the Shiah doctrines, in no case is there an escheat to the *bait-ul-mâl*. The *Jâm'aa ush-Shitât* declares that "the idea of a *bait-ul-mâl* is abhorrent to us." (See *Mahommedan Law*, Vol. II, where I have discussed this subject very fully.)

But according to the Mâliki and the Shâfeï doctrines there is no power of constituting a universal legatee.(1)

When the bequest is of a specific sum of money and the testator leaves actual property and outstanding debts due to him, the legacy is to be paid immediately, if it do not exceed a third of his assets ; but if it exceed a third, one-third is to be delivered to him, and as the debts come in he is entitled to take a third out of every payment until his legacy is paid in full.(2)

According to Abû Yusuf *dirhems* and *dinârs* (*i.e.*, money in general) are *' ain* [objects in specie].

When the testator leaves a specific legacy of a thousand *dirhems*, and his property consists of cash and effects besides debts, the legatee is to get his thousand *dirhems* from the third of the assets ; but if the third does not satisfy the legacy, a third of the debts as they are realised will be paid to the legatee, until the legacy is satisfied. According to Abû Yusuf, whose opinion is recognised as law, the *assets* refer to the cash left by the deceased and not to the household effects, apparel, or ornaments left by him. So that the thousand *dirhems* will be paid out of the third of such cash left by him, and if that is not sufficient, out of the third of the debts owing to him as they are realised.(3)

When two legacies left to same person.

Supposing the testator leaves two legacies to the same person would both of them take effect ? Khalîl ibn Ishâk (the Mâliki jurist) says both legacies will take effect if they are composed of different things, provided they do not together exceed a third of the estate, but if they are not different either in quantity or number, the last legacy will take effect. So also the *Fatâwaî Alamgiri* :—" When a person has said, ' a sixth of my property to such an one,' and then says on the same or a different occasion ' a third of my property to him,' and the heirs consent, he is

(1) According to the earlier Hanafî jurists, when a person died leaving a particular heir who took only a specific share, and was not entitled to the residue by right of return, such residue went to the *bait-ul-mâl*. If there was a general legatee he took the residue. But the modern jurists have held and the Courts of Justice in India have given effect to the rule laid down by them that whenever there is an heir, there is no right in the *bait-ul-mâl*. Consequently, if a person died leaving a widow and bequeathing half his estate to *S.*, the one-sixth which remained over after allotting the widow's share and the legacy would be given to the widow.

(2) *Radd ul-Muhtâr*, Vol. V, p. 560.

(3) *Ibid*, p. 660.

entitled to a third of the property, that is, to no more than a third, though they consent, because the sixth is comprehended in the third, whether it precedes or follows. And if a person should say, 'sixth of my property to such an one,' and then say on the same or another occasion, 'a sixth of my property to such an one,' he would have only one-sixth unless there is evidence that another sixth was intended."(1)

If a person were to bequeath a particular or determinate share of his estate and effects, reference would be made to what he leaves at his death, and not to his possession at the time of the bequest. But where a specific property or a determinate share thereof is bequeathed, *e.g.*, a third of the testator's flock, and the flock is destroyed before his death, the legacy falls to the ground. For, where the *wasiat* was respecting a particular share in a particular flock, the non-existence of that flock destroys the legacy, even though he may have acquired other flocks afterwards. But if he was not possessed of any flock at the time of the bequest, and subsequently acquired one, according to the approved doctrines, the legacy would take effect for the legacy being demonstrative, effect should be given to it when the objects, from which the legacy should be paid, come into existence after the bequest.(2) If the testator were, however, to say, "my executors shall give to so-and-so a sheep out of my property," and there are no sheep belonging to the testator at the time of his death, the value of a sheep would be given to the legatee. But if he had said, "my executors shall give Zaid a sheep out of my flock," and he died without leaving any flock, the legacy would be void. This rule applies to all kinds of property.(3)

(1) Comp. the *Radd*, p. 660.

(2) *Ibid.*

(3) When a man who bequeathes a third of his property has no property at the time of the bequest, the legatee is entitled to a third of whatever he may be possessed of at the time of his death. But if the bequest be specific or of some particular kind of property, as a third of his flocks and they all perish before his death, the legacy is void in so much that if he should afterwards become possessed of other flocks, or another specific thing of the same kind the right of the legatee would not attach to the subsequent acquisition, yet if he had no flocks at the date of the bequest, but afterwards acquires them and then dies, the bequest is valid. And if he should say 'a sheep from my property' and have none, the value of a sheep must be given. If the bequest were only of a sheep without the addition of words referring it to his property, the bequest, according to some, would be valid, while according to others it would be invalid. But if the expression were 'a sheep from my flocks' and the testator had no flocks, there is no doubt that the bequest

It often happens, that the testator, instead of leaving a legacy to a grandchild, simply provides by will that he should take a son's share in his inheritance. Supposing then the testator leaves a son as his only heir, and the son consents, the inheritance will be divided between him and the grandson equally; otherwise the legatee would take one-third and the son two-thirds. But if there be two sons, the assent of the sons is not necessary, and the property is divided in equal shares among the sons and the grandson. Similarly, if there be four sons and a grandson, and the testator leave a son's share to the grandson, he takes a fifth. If a testator leave a widow, two sons and a daughter, and a grandson by a predeceased son, and will that the grandson should take a son's share in his inheritance, the division would be made in the following way:—

Widow $=\frac{1}{8}$	Each son $=\frac{1}{4}$
Daughter $=\frac{1}{8}$	Grandson $=\frac{1}{4}$

If there had been only one son, the widow would have taken

$$= \frac{1}{8}$$

Son	$= \frac{2}{6}\frac{1}{0}$
Daughter	$= \frac{7}{4}\frac{}{0}$
Grandson	$= \frac{2}{6}\frac{1}{0}$

Total $= \frac{1}{1}\frac{2}{2}\frac{0}{0} = 1.$

would be void. And in like manner with regard to other kinds of property such as cows, camels and the like. When a person says, 'I have bequeathed to thee a sheep, from my property,' the bequest is confined to the sheep that he may have at his death, but applies to the sheep that may be among his property at his death, and since this is the case, if the testator should afterwards die leaving property comprehending sheep with other things, the heirs are at liberty to give one of the sheep or its value. There is nothing in the books as to the sheep being of the best, worst or medium quality, but according to a report of Hassan bin-Ziâd, the Companions [of the Prophet] were of opinion that the heirs might in such a case either give a sheep of medium quality or its value. When a person says, 'My roan Turkish horse is a bequest to such an one,' these words are held to refer to a horse then in his possession, not to one which he may afterwards acquire. So also, if the expressions were 'my blind slave or my Sindian or Abyssinian slave' while if the terms of the bequest were only 'my slave to such an one' or 'my Turkish horse to such an one' without further addition or qualification it would include his property at the time, and his subsequent acquisitions."

"When a person says, 'This cow for such an one,' according to Abû Nasr the heirs would have no right to give its value, but if it were bequeathed to the poor it would be lawful for them to bestow its value in charity."

Sunni Law. We have seen already that when there are several legacies, all of the same degree of importance, which, together exceed a third, according to the Sunni Law, all of them suffer a proportionate abatement. This is a general rule, subject, however, to the exception that when the bequests are for the accomplishment of religious duties or pious purposes, they must be given effect to in their entirety in the following order :—

(1) for purification ;
(2) for prayers ;
(3) for alms ;
(4) for fasting ; and
(5) for pilgrimage.

This exception applies equally to duties of a religious and pious character, though not of the same degree of importance as the fundamental religious practices. These duties have to be carried into effect before the payment of legacies to individuals, and they are classified as follows :—

(1) Ransoming of prisoners.

(2) Emancipation of slaves to whom freedom has been promised by the testator.

(3) The payment of the dower due to the woman whom the testator marries in his last illness and consummates the marriage.

(4) The payment of the *zakât*.

(5) The payment of the *zakât-ul-fitr* and *uzzha* (Id and Bairam festivals).

(6) The expiation for *zihâr*.

(7) The expiation due for a vow.

(8) Expiation due for the non-observance of the obligatory fast.

(9) Emancipation of slaves.

(10) Performance of the non-obligatory pilgrimage.

The *Radd ul-Muhtâr* has the following on this subject :—It should be remembered that bequests are necessarily of two kinds, either entirely in favour of Almighty God, or for His servants, or for both jointly, and it is laid down that bequests in favour of Almighty God should have precedence over all others, for the legatee is One, but when the legatees are several, there is no precedence for one over the other. Therefore, when a bequest is for human beings, no legatee can be preferred over another. For

example, if a person make a bequest of one-third to one person and then to another, both bequests would take effect, unless it is distinctly specified that either of them has preference over the other, or where it is a *muhâbât* or emancipation. But when a bequest is in favour of Almighly God, if all the directions are (i) for the performance of that which is *farz* (absolutely obligatory duties) as *zakât* or *hajj*; (ii) or for the performance of duties which are simply obligatory, such as the payment of expiations, fulfilment of vows, the *Fitr* alms; (iii) or for the performance of *nafliat*, such as non-obligatory pilgrimage and alms to the poor,—then commencement should be made with that which the testator directed should be performed first; but if they are all mixed together, then commencement should be made with those which are absolutely obligatory, whether the testator mentioned them first or not; then with the *wâjibât*, the simply obligatory, and the third will be applied proportionately in fulfilment of the testator's last wishes.....Consequently, if a man were to say that a third of his property should be applied to defray the expenses of *hajj*, *zakât*, expiations and of Zaid, the third will be divided into four shares, Zaid will get one share and the remaining three shares will be applied to the three purposes respectively. But if the person for whom the legacy is intended is not specified such as the poor, there will not be a division into four shares for all belongs to God, and the most obligatory duties will be discharged first.(1)

(1) See the *Fatâwai Alamgiri*, Vol. VI, pp. 177-178, where also the question is fully discussed. "When the legacies have been added up," says the *Fatâwai Alamgiri*, "and the third of the estate is sufficient to meet them all, they are all to be paid out of it, whether they be bequests to Almighty God or to mankind. By bequests to Almighty God are to be understood 'bequests of approach,' or which are the means of drawing nigh to Him, such as the obligatory *hajj* or pilgrimage to Mecca, the *zakât*, fasting, prayers, expiations, vows, *sadakat-ul-fitr* and *uzzha*, non-obligatory *hajj* and fasts, the erection of masjid and the like. And by bequest to mankind are to be understood such as bequests to Zaid, Bakr and Khâlid. All the legacies are to be paid in like manner, when, though the third of the estate is sufficient to meet them, they are allowed by the heirs. If the third of the estate be insufficient to meet all the legacies and they are not allowed by the heirs, then it is to be considered whether they all be to Almighty God, or all to mankind or some be of one class and some of the other. If they are all to Almighty God, then it is further to be considered either whether they are all *fardiz* [that is obligatory duties], or *wâjibât* [that is, things which though not actually obligatory are yet incumbent], or *nawâfil* [which are voluntarily assumed obligations], or whether they are partly of one kind and partly of another. When they are all equally prescribed and appointed duties, beginning

Shiah Law. According to the Shiah Law "when a person has bequeathed property for the performance of certain duties some of which were incumbent on the testator and others only discretionary, they are all to be carried into effect if a third of his estate be sufficient for the purpose." If the third be not sufficient and the heirs should refuse their consent, those duties that were incumbent on the testator must first be discharged out of the general mass of his estate and then the others out of a third of what remains, beginning with the first mentioned by the testator, and so on in order. If none of the duties are of an incumbent nature but merely optional, they can take effect only to the extent of a third of the estate, and are to be discharged beginning with the first mentioned by the testator, and so on in order until the third is exhausted.

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is to be made with that which the testator began with; when the bequest is for *hajj* and *zakât*, a commencement is to be made with the former though it were verbally last. It has been said with regard to *hajj* and *zakât* that they both take precedence of expiations, and expiations take precedence of the *sadakat-ul-fitr* (or alms of the *fitr*) and these of sacrifices, though sacrifices are also *wâjib* [or necessary] according to us. With regard to the alms in question all are agreed that they are *wâjibât*, but whether sacrifices be so is a point that is still within the province of *ijtihâd* or juridical discussion and what all are agreed about is still stronger. Thus, also the alms of the *fitr* are preferred to expiation of the *fitr* in the month of Ramazan. And it has been said that the former have also precedence of vows, and vows of sacrifices, and these of *nâwâfil* or voluntary obligations. In all this that has been said it is assumed that there are no legacies of emancipation to take effect at once during death-sickness and no emancipation dependent on death, which is *tudbîr*. If there be any such they have preference, for those emancipations do not admit of being revoked, and are, therefore, stronger and entitled to preference. A bequest of emancipation, if it be *wâjib* or necessary as an expiation, is like other expiations of which we have spoken already, but if they are *not wâjib*, their effect is like that of spontaneous bequests to the poor, the building of musjids, voluntary pilgrimage and the like."

"When the legacies are partly to Almighty God and partly to mankind, as for instance, to a class of persons, the portion of the latter is to be taken out of the third and to be divided among them without preference of any one over the others, and with regard to the portion of Almighty God it is to be applied first to *farâiz*, next to *wâjibât* and then to *nawâfil*. And if, with the legacies to Almighty God there is a legacy to one person in particular, each of the kinds of approach is to be treated as single. Thus, if one were to say, 'A third of my property in *hâjj*, *zakât*, expiations and to Zaid,' the third would be divided into four portions —one for Zaid, one for *hâjj*, one for *zakât*, and one for expiations."

"When all the legacies are to mankind, preference is to be given to the strongest, so that if there be among them an emancipation to take effect immediately, it is to have the precedence; but if all are equal in strength, each is to rank for its amount against the third of the property without any regard to the order in which they may have been mentioned by the deceased;" Baillie's Dig.

CHAPTER XXIV.

GENERAL PRINCIPLES.

SECTION I.

THE LEGAL EFFECT OF A WASIAT.

Wasiat is defined as "the conferment of a right of property (*tamlîk*) in a specific thing or in a profit or advantage, to take effect after the death of the testator." "It is proper for a man to make a will when there is no right against him on the part of Almighty God, but it is a duty to do so when there is such a right, as for instance, when he has omitted to pay his *zakât* or to fast, or to perform the *hajj* or pilgrimage to Mecca, or to say the prescribed prayers."

Any expression which signifies the intention of the testator is sufficient for the purpose of constituting a bequest. Examples of this are given in detail in the *Fatâwai Alamgiri*.(1) Hanafi doctrines.

"When a person has said, 'this my slave to such an one, and this my mansion to such an one,' without using the word bequest, and there is no mention of bequests nor of the words 'after my death,' the expressions constitute a gift both by analogy and on a favourable construction, and if possession be taken during the life of the donor the gift is valid, but if possession is not taken of it till after his death the gift is void. If a person should say, 'I have willed that a third of my mansion be given to such an one after my death,' this is a bequest, and possession during the lifetime of the testator is unnecessary. So also when one, whether in sickness or in health, has said, 'if any event should happen to me, then such thing to such person' this is a legacy, death being understood by 'us,' as the event alluded to. So also if he should say, 'to such an one a thousand *dirhems* from my third,' this would be a bequest though no allusion is made to

(1) *Fatâwai Alamgiri*, Vol. VI, p. 145.

death. But if the words were 'to such an one from my property, or 'from the half' or 'the fourth of my property,' they would be of no effect unless uttered in connection with bequests, in which case they would constitute a legacy. When a person has said, 'if I die on this my journey, to such an one there is against me a debt of a thousand *dirhems*,' it is a bequest out of his third."

Shiah doctrines.

Under the Shiah Law there are certain rules relative to ambiguous legacies, which are deserving of notice, though in their application they will need some modification in view of the different conditions of society prevailing in our times :—

"When a person has bequeathed a *juzz*, or part of his property there are two traditions as to the proper interpretation of his words. Of these, the most authentic assigns a tenth of the testator's estate to the legatee ; but according to the other, he should receive only a seventh of the third. If, again, he should bequeath a '*saham*,' or share, the proper interpretation is an eighth; while if it were a *shai*, or a thing, it should be interpreted as meaning a sixth."

"If a person should make a bequest for several purposes, of which the executor has forgotton one or more, he should dispose of it in some good or proper way, although some of our lawyers have expressed an opinion that it should fall back into the deceased's inheritance."

"If a person should bequeath a particular sword which is in a scabbard, the scabbard and mounting or ornaments are included in the bequest. In like manner, if a person should bequeath a box containing clothes, or a boat or vessel which has merchandise on board, or a bag containing linen, in all these cases, the things actually bequeathed, and the other things contained in them, are included in the legacy. Some jurists, however, hold another view, though it does not deserve much consideration."

"If a person should make a will excluding some of his children from their share in his succession, the exclusion is not valid. But whether his words are to be treated as entirely inoperative is a question on which there are two opinions. According to one of these, they are quite futile and of no efficacy whatever ; but, according to the other, the same effect should be given to them as in the case of the bequest of the whole of a person's estate to a stranger, excluding his heirs, when the bequest is valid as far as a third

of his property, and the heirs have their legal portion in the remaining two-thirds. The first opinion, however, appears to be better founded in law, though the other is supported by a tradition which is now rejected.

"If a person should make a bequest in terms so ambiguous that the law affords no interpretation of them, it must be left to the heir to explain them as he may think proper.

"It is preferable that legacies should be kept below a third of the testator's property, and consequently the bequest of a fourth is better than that of a third and of a fifth better than of a fourth.

"In cases of ambiguous legacies, like the preceding, if the legatee should demand any particular thing as being conveyed in the testator's meaning, the statement of the heir would be preferred. If the legatee should still insist upon it, the heir would be required to confirm his statement by his oath not otherwise."

When property is devised in absolute terms, conditions in restraint of the power of alienation on the part of the devisees have been held to be ineffective.(1)

SECTION II.

THE REVOCATION OF WILLS.

A will is esse tially revocable in its nature. It may be revoked at any time, even during the last illness of the testator.

Revocation may be either express or implied, made either directly or indirectly. It is express when the testator revokes the *wasîat* in express terms. It is implied or indirect when the testator indicates by his conduct or his subsequent acts that he does not intend to maintain the legacy.(2) "Every act the effect of which is to extinguish the proprietary right in any property, when committed by a testator in respect of the subject of a bequest, causes revocation; and in like manner every act of the testator which occasions an addition to the subject of a bequest, when it cannot be delivered without the addition, has the effect of revoking it; similarly, any disposition subsequently made to which operation is given has also that effect."(3) Revocation of wills.

(1) *Abdul Karim Khan* v. *Abdul Qayum Khan* [1906], I. L., 28 All., 342.
(2) *Fatâwai Alamgiri*, Vol. VI, p. 144.
(3) *Radd-ul-Muhtâr*, Vol. V, pp. 657, 658.

As regards the mode and capability of revocation, bequests are usually divided into four categories; the first can be revoked either in express terms or by implication, *i.e.*, by conduct. The second kind may be revoked only by express words. The third by conduct only; and the fourth cannot be revoked at all. The first kind of bequests consists of specific legacies which can be revoked by an express declaration of the testator to that effect, or by his selling or transferring the subject of the bequest in such a manner as to place it beyond his power to cancel or reverse the transfer. The second kind of bequest is where the testator bequeaths a third or fourth share of his property to any person. In such a case, the legatee is entitled to that particular share in any property which might be left by the testator at the time of his death, and consequently unless a revocation of the bequest is made in express terms, the legacy will take effect. The third kind of bequest is qualified emancipation which can be withdrawn only by express conduct. The fourth kind of *wasiat*, which cannot be cancelled either expressly or impliedly, is absolute emancipation.

The different modes in which revocation may be effected.

According to Abû Hanîfa, on whose opinion in this matter the *Fatwa* seems to be, a mere change in the shape of an article effected at the instance of the testator does not amount to a revocation. For example, if a person were to bequeath to another a piece of silver which he subsequently made into a ring, this is not a revocation of the bequest according to Abû Hanîfa, though according to Abû Yusuf and apparently Mohammed, it would be so. If a person should sell a specific thing which he had bequeathed and then re-purchase it, or make a present of it and then revoke the gift, the bequest would continue valid. "The slaughter of a bequeathed sheep is the revocation of a bequest of it, but the washing of a bequeathed garment is not so." The mere denial of a bequest does not, according to Abû Yusuf, amount to a revocation, but Mohammed holds a different view. If the testator were to say the legacy left by him to *A* or *B* was void, it would have the effect of revoking the will though it would not be so, if he merely said it was unlawful (*harâm*) or usurious.

Abû Hanîfa's opinion.

If a testator were to devise a specific thing to *A*, and afterwards to *B*, the subsequent devise does not necessariiy avoid the first. If it appears from the phraseology used or otherwise, that

the intention of the testator was to give the subject of the bequest to both legatees jointly, effect will be given to such intention.(1) But if it appears that the intention was to give the legacy to the second legatee by cancelling the first bequest, it would amount to revocation. The general rule, however, is that the last legacy takes effect.(2) Hanafî doctrines—contd.

If the second legatee were dead at the time when the subsequent bequest was purported to be made, the first bequest would remain valid by reason of the second being void, while if the second person were living at the time when the bequest was made and should subsequently die before the testator, both legacies would be void, and the subject of the bequest would revert to the heirs of the testator.

Under the Hanafî Law the pledging of a property will not avoid the bequest,(3) for it does not extinguish the right of the proprietor in the subject of the pledge; the right of the testator to redeem would devolve on his death to the legatee; in other words, the legatee takes the devised property *cum onere*,(4) unless the testator whilst creating the mortgage, use terms expressly from which a distinct revocation of the previous devise may be clear.

If one should bequeath a mansion and then whitewash it or pull it down, that would not amount to a revocation, but if he were to plaster it over with earth, that would be a revocation, if done "largely." If he should bequeath land and sow it with vegetables that would not be a revocation, while if he makes a vineyard of it or plants trees on it, the bequest would be revoked according to Kâzi Khân.

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(1) According to the *Fatawai Alamgiri*, the pledge of a slave already bequeathed amounts to a revocation; but this effect is restricted to the special kinds of property analogous to the property referred to.

(2) This is different from the English Law, where the legatee, unless a contrary intention appears, is entitled to have the estate disencumbered out of the personal estate of the testator not specifically bequeathed.

(3) Sometimes the attempt to convey may have the effect of revoking a devise, though owing to some want of formality the conveyance itself may not take effect. But where the conveyance is initially invalid, for example, when it has been executed by a person who was under an incapacity it will not act as a revocation.

(4) *Fatâwai Alamgiri*, Vol. VI, p. 143; Baillie, p. 628; *Radd-ul-Muhtâr*. Vol. V, p. 647.

Shâfeï doctrines.

Similarly, under the Mâliki and the Shâfeï Law, among the various acts by which a *wasîat* is indirectly revoked are the sale and gift of the subject of the bequest.

The *Sharâya* gives the Shiah principle in these terms :—

Shiah doctrines.

"A *wasîat* is an *'akd jâiz* on the part of the testator whether it be [the bequest] of property or the nomination of a *walî* ; and it may be revoked during his lifetime either by express language or by any act which ignores or contradicts the *wasîat*. Thus, if the testator should sell the subject of the bequest, or by another will direct it to be sold, or should bestow it in gift putting the donee in possession of it, or should pledge it, every such act would amount to a revocation. In like manner, if he should make such a use of it that it could no longer be called by the same name ; as for instance, if he had made a bequest of grain and afterwards ground it into flour or meal, or a bequest of flour or meal and then converted it into leaven or bread, this would be a revocation of the bequest. Further, if a person should bequeath a quantity of oil and afterwards mix it with some of a better quality, or of grain and then mix it with some of another species so as to remove the possibility of distinguishing and separating one from the other, that likewise would be equivalent to a retractation of the bequest. Whereas if he should make a bequest of bread and subsequently break it into crumbs there would be no revocation of the legacy."(1)

It will be observed that both under the Sunni and Shiah laws although various examples are given in the law-books as to what would amount to revocation and what would not, the general rule is that revocation depends on intention which may be evidenced by a variety of acts or circumstances.

Acceptance of the legatee.

The validity of a *wasîat* is submitted to another formality, namely, the implied or express acceptance of the *wasîat* by the legatee. "The acceptance of a bequest," says the Mâliki lawyer, "is a necessary condition ;" and the Hanafî jurist lays down that "in default of acceptance a *wasîat* is null." Similarly, under the Shiah Law the acceptance of the legatee is required to vest the legacy in him. But there is considerable divergence between the Shiah school on one side and the Hanafî on the other regarding the period when the acceptance should be made.

(1) *Sharâya-ul-Islam*, p. 247.

Shiah doctrines—acceptance before testator's death valid.

According to the Shiah doctrines, an acceptance *before* the death of the testator is lawful, though it is discretionary with the legatee. An acceptance *after* the testator's death is conclusive, even though it should be delayed for some time after the occurrence of that event, provided there was no rejection on the part of the legatee after the testator's decease and before acceptance. But when the rejection was during the lifetime of the testator, the legacy may still be accepted after his death, as such a rejection has no effect in law. But if rejected after his death without having been accepted, the legacy is cancelled. A *wasîat* would similarly be cancelled if rejected by the legatee even though possession had been actually taken, provided there was no acceptance. Where there has been no possession, but the legacy is rejected after the testator's death as well as the legatee's prior acceptance, it is cancelled, according to some of the jurists, while others maintain that it is not, and this opinion is more approved. If, however, there has been both acceptance and possession, and the legacy is subsequently rejected, there is no doubt that the rejection is ineffectual and the legacy is not cancelled because the right of property has then become already established in the legatee.

If a legatee should reject part of a bequest and accept the remainder, such partial acceptance would be valid and his right established to that extent. If a legatee should die before acceptance his heirs take his place and may accept the bequest.(1)

Hanafi doctrines.

According to the Hanafi Law, *an acceptance before the death of the testator is of no effect*. The bequest may be accepted either expressly or by implication. If the legatee died before expressing either rejection or acceptance of the bequest, his death becomes, and would be presumed to amount to, an acceptance and his heirs would inherit the legacy. There is this difference between testate and intestate succession,—an heir enters upon the possession of inherited property without acceptance, but a legatee does not enter upon the possession of bequeathed property without acceptance. The acceptance of a bequest must be made *after* the death of the testator insomuch that if it be accepted or rejected during his life, either act is void and the rejector is still at liberty to accept after the testator's death.

(1) *Jawâhir-ul-Kalâm.*

Legal effect of a bequest.

The legal effect of a bequest is to confer on the legatee a right of property in the same way as in the case of a gift, (1) and the bequest becomes vested in him on acceptance, "so that if he were to accept after the death of the testator his ownership in the thing bequeathed would be established, whether he takes possession of it or not; but if he were to reject the bequest it would be cancelled." But when a bequest is made to a body of people such as the poor, or is in favour of a *general* religious or pious purpose, the acceptance of the legatee is presumed.

Section III.

The Wasiat of Usufruct of Lands, Gardens, Houses, Securities, Stocks, &c.(2)

As pointed out already, the Mahommedan Law distinctly recognises perpetuities. So long as commencement is made, in the case of a settlement or devise, with a life in being, it is not necessary that the persons who take the remainder should be in existence.

Accordingly, one may lawfully bequeath to another, for a limited period or in perpetuity, the produce (*ghallat*)(3) of lands and gardens, the rent or occupancy of a house, the use of animals or trees, income accruing from securities, stocks, going concerns, &c.

If the term for which the bequest is made is indefinite, it would be regarded as made in perpetuity.(4)

The effect of such a bequest is to *detain* the subject thereof in the ownership of the testator's heirs and to give to the legatee only the right to take its profits, "in the same way as a person in whose favour a *wakf* has been made."

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(1) Comp. *Abdul Karim Khan* v. *Abdul Kayum Khan*, supra.

(2) The title of this Chapter in the *Fatâwai Alamgiri* (Vol. VI, p. 188), furnishes a sufficient indication of the scope of the provisions in the Arabian Law regarding the bequest of usufruct:

فى وصية بالسكنى و الخدمة و الثمرة و غلة العبيد و غلة البستان و غلة الارض و ظهر الدابة و غيرها

See also the *Radd-ul-Muhtâr*, Vol. V, p. 678.

(3) *Radd-ul-Muhtâr*, Vol. V, p. 677. See also 4 H ed., Chap. V, Bk. II, p. 527; the term *ghallat* is a generic expression and includes produce, rent, income, profits of all kinds, the service of slaves, &c.; *Jâm'aa-ul-Lughât*.

(4) *Radd-ul-Muhtâr*, Vol. V, p. 679.

The bequest may be for a particular year, *e.g.*, the year of the Hegira 460. If the year is past at the time of the testator's death, the bequest is void. If a portion only of the year has expired, it would take effect with respect to the unexpired portion.

If the subject of the bequest falls within the third of the testator's estate, its usufruct would be given to the legatee, in accordance with the use thereof provided in the *wasîat*. For example, if the bequest is of the right of occupancy of a house, and the house falls within the disposable one-third, it would be made over to the legatee for use and occupation.(1) If the rents and profits of the house alone are bequeathed, the legatee would get the same, but he would not be entitled to occupy it. If the subject of the bequest exceeds the third, the legatee will get the benefit of that portion which is covered by the third. Where the bequest is of the use of some property which is in its nature impartible, the legatee will have the right to its service or use for one period and the heirs for double that period. The example given in the *Fatâwai Alamgiri* of a slave explains this principle thoroughly :—

"If the slave does not come within a third of the property he is to serve the legatee for one day and the heirs for two days alternately, until the completion of the year, and when it has been completed he is finally to be delivered up to the heirs. If one year in particular be specified, and the slave falls within a third of the property, or the legacy is allowed by the heirs, he is to be delivered up to the legatee to serve him for a whole year and then to be restored to the heirs. If he does not come within a third of the property, and the legacy is not allowed by the heirs, the slave is to serve the legatee for one day and the heirs for two days alternately for three years, and when the three years have passed the bequest is fulfilled by the service. If the legatee should die, the slave reverts to the heirs of the testator, and if he die in the testator's lifetime the bequest is void."

Death of the legatee

If the legatee should die before the expiration of the term limited for the bequest, the subject of the legacy would immediately revert to the heirs of the testator. If the legatee dies during the lifetime of the testator the bequest at once falls to the ground. The testator may bequeath the usufruct of a thing to one person

(1) Similarly, if the *wasîat* be of the service of a bondsman, and he were to fall within the third, he would be made over to the legatee for the period fixed.

and the *corpus* to another; and if the subject of the bequest falls within the disposable third, each legatee is entitled to his particular bequest. And if the bequest of the usufruct is absolute, the legatee is entitled to hold possession of the subject till his death, after which it is to be transferred to the legatee of the *corpus* if he be alive; if not, it is to be transferred to the heirs of the testator.(1)

In the case of a bequest of usufruct—mode of enjoyment.

When the bequest is of the rents and profits of a house, and the legatee wishes to occupy it himself he cannot lawfully do so.(2) "If the bequest be of the occupancy of a mansion and there is no property besides, the legatee may occupy a third of the mansion and the heirs have no right to sell the two-thirds of the mansion in their possession.(3) Neither is the legatee of the occupancy of a house entitled to let it,(4) nor to remove the slave whose services are bequeathed from the testator's place of residence to another, unless the legatee and his family (*ahl*) are in the latter place, when the slave may be taken there for the purpose of serving them. "(5) The reason of this decision is, that the bequest must take effect and be executed in conformity with the intent of the testator, and in a case where the family of the legatee reside in the same place with the testator, his intention is that the legatee should avail himself of the services in that place, but where the legatee resides in a different city, the testator's intention must be presumed to be that the legatee should have the slave's services there.

When the occupancy of a house is bequeathed to a person without any limit of time, he is entitled to it as long as he lives. And when the income is bequeathed, if the house falls within a third, though the income may exceed the same, still it would be valid. Similarly, with regard to the income of an estate or earn-

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(1) *Radd-ul-Muhtâr*, Vol. V, p. 679.

(2) *Ibid.* According to Allâmah Sharnibilâlîch there seems to be some difference of opinion on this point, but he himself upholds its validity.

(3) According to the *Zâhir-ur-Rawâyét*, the heirs are not entitled to sell the two-thirds share allotted to them, as that would be prejudicing the interests of the usufructuary legatee. Abû Yusuf seems to think such sale lawful. The doctrine in the *Zâhir-ur-Rawâyét* is more approved. "Besides," says the *Hedayâ*, "the legatee has a controlling power over the heirs with respect to their portions, so far as to restrain them from executing any deed which may injure his share."

(4) According to the Shâfeïs he is entitled to do so.

(5) *Radd-ul-Muhtâr*, Vol. V, p. 680.

ings from a business, or the produce of a garden, etc. "When a bequest is of a slave to serve the legatee until he can do without those services,—if the legatee is a child, the service is to continue till he is of age; if he is adult and poor the service is to continue until he is able to buy a slave to serve him: but if he is adult and rich the legacy is void."(1)

If a person were to leave one year's earnings of his business or the income of his house to another, and he has no other property except such business or such house the legatee in that case receives one-third of a year's earnings or income, because such income, as being property, is capable of division. But the legatee cannot require the heirs to make a partition of the house in order that he may himself collect the rent of his own share (*viz.*, the third).

When the bequest is of the *produce* of the testator's garden, the legatee is entitled to the existing and the future produce. But when the bequest is of the fruit of his garden in *perpetuity*, the legatee is entitled to the fruit thereof until his death. But if the word "*abad*" (*for ever*) is not used, and there is fruit in the garden on the day of the testator's death, the legatee is entitled to it to the extent or value of the disposable third, but he is not entitled to the future fruit, it being supposed that the intention of the testator was to give one set of fruit. But where there is no fruit in the garden on the day of the testator's death, the bequest takes effect on the fruit which comes into existence subsequent to the death of the testator but prior to that of the legatee.(2) When a bequest is of something which is an accretion to something else, the specific accretion in existence at the time of the testator's death will be given to the legatee, though the words "for ever" may have been used. This is different from the legacy of the rents and profits.(3) Bequest of the produce.

If the legacy be of the third of the *income* of a house, according to Abû Yusuf, the heirs may partition the house, giving the legatee

(1) This is according to the *Fatâwai Alamgiri*.

(2) *Fatâwai Alamgiri*, Vol VI, p. 148; *Radd-ul-Muhtâr*, Vol. V, p. 681; *Hedâya*, Vol. VI, p. 527.

(3) The reason of this is explained in the *Radd-ul-Muhtâr*. In the *Alamgiri* the rule is stated thus:—"When a man has bequeathed to another the wool of his flock or their progeny or milk for ever and has then died, the legatee is entitled only to the wool that may be on their backs or the young that may be in their bellies, or the milk that may be in their udders—whether he say 'for ever or not.'"

Bequest of the produce —contd.

a third. If the third yields any income, the legatee gets it, while if it is not productive he has nothing. The heirs may also sell him their two-thirds, whether before or after the partition.

When the bequest is of the *produce* of a piece of land and there are no trees upon it and no other property besides, the land is to be let and a third of the rent given to the legatee. If there be palm or other trees on the land, a third of the produce is to be given to him and the land is not to be given out in *muzâribât*.(1)

When the bequest is of the produce of a garden, the legatee may purchase the garden from the heirs of the testator, but that would cancel the legacy. In like manner, if they satisfy him with something else, he may surrender his third of the produce and release them from it. "So also the occupancy of a house or the service of a slave may be lawfully compounded for, though a sale to an outsider of these rights is not lawful."(2)

A bequest of the income of a house or of the income arising from securities, stock, etc., or of the earnings of a business to the poor generally is lawful, but a bequest of the *occupancy* of a house to the poor is not lawful unless the persons are particularised.

When a bequest is made of the principal and the accessory to two persons respectively in one and the same will, each legatee takes the legacy specifically given to him. For example, if the testator were to say, "I give this ring to so-and-so and the stone to so-and-so."

But when one of the declarations is separated from the other though the effect is the same according to Abû Yusuf, according to Mohammed the legatee of the principal is exclusively entitled to the principal and the two legatees are partners in the accessory.

The following is important as showing how effect is to be given to two legacies respecting the same article, one arising out of the other: "If a person should bequeath 'this slave to one and his service to another,' or this mansion to one and its occupancy to another,' 'or this sheep to one and its wool to another' both persons being specified, each legatee takes what is bequeathed to him and there is no difference of opinion on this point, whether the bequests are made separately or together. But if a beginning is made

(1) *Muzâribat* here means an arrangement by which the cultivator and the landlord divide the produce according to certain shares.

(2) *Radd-ul-Muhtâr*, Vol. V, p. 681.

in these cases with the accessory, and the principal is then bequeathed, as, for instance, if the service of the slave is first bequeathed to one person and then the slave to another, or the occupancy of a mansion to one person and the mansion itself to another, or the fruit to one and the tree to another, it is only when the bequests are made connectedly that each legatee is entitled to what has been named for him specially, for if they are mentioned separately, the legatee of the principal is exclusively entitled to the principal, and the accessory belongs to them both in halves. And if a mansion is bequeathed to one person and a particular apartment in it to another, the apartment is to both in equal shares. So, also, if a thousand dirhems are bequeathed to one person and a hundred out of them to another, the legatee of the thousand is entitled to nine hundred exclusively, and the hundred is to be equally divided between them and in this there is no difference of opinion." Subsidiary bequests.

When the bequest is of the use of the young of an animal which is unfit for service, the person in whom the right to the substance of the thing is vested is bound to maintain it. So, also, when the produce of palm-trees has been bequeathed to one person for ever, and the trees themselves, being yet immature, to another, the latter is liable for the expense of watering and tending them until they arrive at maturity and are in bearing, after which the liability is on the former, and when they have begun generally to bear, though they should subsequently fall off and produce nothing, the legatee of the produce would still be liable for the expense, in the same way as a legatee of service is liable for the maintenance, "both during night and day, though the slave sleeps and does no work during the night."

If twenty dirhems a year are bequeathed to a person from the produce of a garden, which is sometimes more productive and sometimes less, the legatee is entitled to have a third of the produce appropriated or set aside every year, and twenty dirhems out of it applied to his maintenance so long as he lives. Similarly, if a person were to declare that *A* should get a monthly sum for his support out of the testator's property, however small the allowance may be, a full third of the property must be appropriated or put aside that the legatee may obtain his monthly maintenance as directed by the testator.(1)

(1) *Fatâwai Alamgiri*, Vol. VI, p. 150; *Radd-ul-Muhtâr*, Vol. V, p. 680.

Rules relating to annuities.

If a testator should bequeath a third of his property to one person, five dirhems a month for maintenance to another so long as he lives, and five dirhems a month for the maintenance of a third person so long as he lives, and the heirs allow all the legacies,—the estate is to be divided, according to Abû Hanîfa, into nine parts, one of which is to be given to the legatee of the third, and the remaining eight to be appropriated for the other legatees, four parts each ; but according to Abû Yusuf and Mohammed, the property is to be divided into seven parts, whereof one is to be given to the legatee of the third, and the remaining six is to be appropriated for the other legatees, three for each. This principle applies to those cases where the heirs allow all the legacies. But suppose that they do not assent, in such a case the division is to be into seven parts as before according to Abû Yusuf and Mohammed ; but according to Abû Hanîfa, the case is to be treated as if all the legatees were equally entitled to the third, which is consequently to be divided into three parts among them. Under these circumstances, if both the annuitants should die before the fund is exhausted, the surplus is to revert to the legatee of the third ; and if one of them should die, the surplus is to be divided and one share given to the legatee of the third and the other reserved for the survivor, according to Abû Hanîfa ; while according to the Disciples only a fourth is to be given to the legatee of the third and three-fourths is to be reserved for the survivor. The views of the Disciples are adopted for the *Fatwa*.

If the testator should bequeath five dirhems a month for the maintenance of *A* so long as he shall live and ten dirhems a month for the maintenance of *B* and *C* so long as they shall live (whether jointly or separately), and the heirs allow the legacies, the property is to be divided into two equal shares, one-half to be reserved for *A* and the other half for *B* and *C*, for *A* is to be considered as a legatee of the whole, and *B* and *C* are to be considered together as one legatee of the whole, so that the property is to be divided between them in halves according to all opinions ; and if *A* should die, what remains is to be reserved for *B* and *C* and ten dirhems a month applied to their maintenance, and if one of them should die before *A*, the share set apart for them together would be applied for his

surviving co-legatee, and five dirhems would be given for the latter's maintenance every month. If the heirs do not allow the legacies, a third of the property is to be divided, by general consensus, into halves, one-half of the third being set apart for *A* and the other half for *B* and *C*. But if a person were to bequeath out of the third of his property a maintenance of four dirhems a month to *A* so long as he shall live, and a maintenance of ten dirhems a month to *B* and *C* so long as they shall live, and the heirs allow both legacies, one-third of the property is to be appropriated for *A* and another third for *B* and *C* jointly and on the death of *A*, the third set apart for him, or so much thereof as is not exhausted reverts to the heirs of the testator; and if either *B* or *C* should die, what remains of his share is to be reserved for his co-legatee, and when the other dies if anything should remain, it is to revert to the heirs. If the heirs do not allow the legacies, the third is to be divided into halves and one-half of it is to be reserved for *A* and the other half for *B* and *C*. Bequest of annuities—contd.

According to Mohammed, when a bequest is in the following terms, "I bequeath my third to be set apart for Zaid, that he may have four dirhems out of it for his maintenance every month so long as he lives, and I bequeath my two-thirds to Bakr and 'Amr that they may have ten dirhems laid out for maintenance every month as long as they live," and the heirs allow the legacies, a full third of the property is to be delivered up to the first legatee in his absolute right, and the other two-thirds to be delivered to the two legatees between them in the same way, and when any of them dies, his portion goes to his heirs. But if the heirs do not allow the legacies, the first legatee is to have a half of the third, and the other two legatees to have the other half. Similarly, if the bequest were as follows, "I bequeath my third to Zaid that he may have four dirhems a month out of it for his maintenance, and I make a bequest to Bakr and 'Amr that they may have five dirhems a month out of it for their maintenance," and the heirs allow the legacies, the first legatee is to take a third of the whole property and the other two legatees to take another third between them in halves in absolute right; while if the heirs disallow the legacies, Zaid is to have half of the third, and Bakr and 'Amir to have the

other half of it between them, and the share of whoever of them may die, goes to his *own* heirs.

Shiah doctrines.

According to the Shiah Law, if a person should bequeath the fruit of his garden, the residence of his house, the earnings of his business or anything else of a usufructuary nature for ever or for a fixed time, the advantage or profit arising therefrom must be valued, and should it not exceed a third of the testator's estate the bequest is valid, while if more than a third, the legatee is to have as much as the third will cover and the legacy is void as to the excess.

When a person has bequeathed a right of residence in a house for a fixed period, its upkeep must be defrayed by his heirs, as this is a duty which follows or is dependent on the ownership of the house, and the legatee is entitled to no more than a right of occupation while all the other rights of ownership appertain to the heirs of the deceased, as sale, mortgage and the like, none of which, however, has the effect of invalidating the rights of the legatee.

Nuncupative wills valid.

A verbal will is valid according to all the schools.(1)

The *Sharâya* declares that "wills or bequests are established in law by the testimony of two witnesses who are Moslems and just persons, or, in case of necessity, when two just Moslems, witnesses are not to be had, by that of two *Zimmis* or non-Moslems subjects. And in cases where property only is concerned, the testimony of one witness on oath may be received, or of one male witness and two females, and the testimony of even a single female witness may be received as establishing the right of a legatee to a fourth part of what she testifies to; of two women as supporting his claim to a half, of three as to three-fourths and of four as to the whole. But an appointment of executors or guardians by will can be established only by the testimony of two male witnesses, and in this case the testimony of women cannot be received, nor further, according to the most obvious analogy, can that of one male witness on his oath be received." These views, however, relate to procedure and cannot be treated as substantive law.

"The testimony of an executor cannot be received in matters connected with his own executorship, nor as to anything from which he may derive advantage to himself or to his office. And if

(1) *Aminooddowlah* v. *Roshun Ali Khan*, 5 M. I. A., 199.

appointed executor for the expenditure of a specific part of his testator's property, his testimony cannot be received in favour of the deceased to prove that his property does not exceed a third of his estate.''

In Mahommedan countries, when a will is made in the presence of witnesses the usual rule is for these witnesses to embody their depositions on the will; subjoined is a copy of one of such depositions made in Algeria :—'' We bear witness to God we were present when Sâlih-ibn-Rafah said to us, 'I take you as witness against my person that I bequeath to Zaid the third of my goods that I may have, the rest will be for my heirs.' ''

As stated before, a bequest may be made by any form of expression or even by signs, which may serve to indicate the idea and intention of the testator. In India, however, *wasîats* are generally embodied in writing and attested by witnesses when they are called *wasiat-nâmahs*.

CHAPTER XXV.

EXECUTORS.

SECTION I.

WHO MAY BE APPOINTED AS EXECUTORS.

THE testator has the power of confiding the execution of his last wishes to whomsoever he likes; and subject to certain restrictions to which I shall presently call attention, the executorship may be entrusted to either a man or a woman, a stranger or a relative. And though a testamentary disposition may be invalid, the appointment of the executor, so far as the guardianship of the minor children and their education are concerned, would be valid. The executor(1) is bound to carry out the wishes of the testator that are valid in law with the utmost fidelity,(2) to watch the interests of his children, and to administer to his estate and effects.

The appointment may be either limited to a special purpose or may be general.

"If a person were to appoint as executor a minor (*sabî*) or the bondsman of another (*'aabdi ghairihi*) or a non-Moslem or a *fâsik* (*lit.* reprobate) he should be replaced and the Kâzi should appoint another in his stead for the completion of the work; and the word *bada* (substitution) implies the validity of the *wasiat*, and that any act committed by them before removal is valid, so in the *Sirâjia.*"(3) "And if [before the removal] the infant attains majority or the slave is enfranchised, or the non-Moslem or apostate adopts or reverts to Islâm, or the *fâsik* abandons his evil ways (*lit.* repents), according to the *Mujtaba*, the Kâzi must not remove him (as in the case of the appointment of a minor as trustee of a *wakf* which is valid by *istehsân*,) for the reason for his

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(1) The executor is called a *wasi* or *musa-ilehi*

(2) *Jâm'aa ush-Shittât*; *Rukd-ul-Muhtâr* and *Fatawai Kâzi Khân in loco*

(3) *Durr ul-Mukhtâr*, p. 835

removal has ceased ; excepting when the *wasî* commits breach of trust."(1)

The *Fatâwai Alamgiri* states the principle thus :—" When a person appoints as executor an infant or an insane person, whether permanently so or with lucid intervals, it is not valid.....But if he entrusts the executorship to a woman, or a blind person, and similarly to one who has undergone the specific punishment (*hadd*) for slander," it is valid. When a minor has been appointed an executor, the Kâzi should remove him and appoint another in his stead, says Khassâf. And jurists have differed as to whether any act committed by the minor before his removal by the Kâzi takes effect like the act of a *Zimmi* (non-Moslem subject) or a bondsman ; some have said it takes effect whilst others have said it does not, and this is *correct* (وهو الصحيح.) (2) A minor executor.

It will be seen, therefore, that there is a pronounced difference of opinion between the *Durr ul-Mukhtâr* and the *Fatâwai Alamgiri* on the question of the validity of the acts of a minor executor before he attains majority. The latter authority has evidently adopted the view expressed in the *Sharh-i-Wahbânieh* where it is stated that " when a person has appointed as executor a minor or a bondsman [of another] the Kâzi should remove him, for a minor does not possess the capacity of entering into legal transactions. And jurists have differed as to whether any act done by him (the minor) is operative or not ; some have said it is, whilst others have said, not—and this is correct."

The opinion of the author of the *Radd-ul-Muhtâr* seems to incline in the same direction.(3)

As regards the question whether a person laboring under the disability of status (like a *Zimmi* or bondsman) or under the disability of non-age continues as executor and his disability ceases *before* removal, he would remain lawfully in office, the *Fatâwai Alamgiri* answers it in the affirmative. In other words the *Zimmi* on becoming a Moslem or the bondsman on being emancipated remain in their offices. With regard to the minor it states there is a difference between Abû Hanîfa and his disciples—the

(1) *Durr ul-Mukhtâr*, p. 835. (2) *Fatâwai Alamgiri*, Vol. VI, p. 214.
(3) *Radd-ul-Muhtâr*, Vol. V, p. 689.

former holding that the minor ceases to be the executor, whilst Abû Yusuf says he does not, and Mohammed agrees with him. And the jurist Abu'l Kâsim has held similarly.(1)

A minor, though he cannot validly be appointed an executor by himself, can be associated with an adult in the office, but he cannot interfere in the administration of the estate until he has attained puberty.

Joint executors, one of whom is a minor.

When two persons are appointed executors, one of whom is a minor and the other adult, the adult executor may act alone until the minor has arrived at puberty, but when that happens the adult executor can no longer act singly. If, however, the minor should die, or, on attaining puberty, should prove to be of unsound judgment, the other may continue to act singly, and the Judge cannot in this case force an associate on him because there is still an executor to the deceased appointed by himself. Further, whatever may have been done by the adult executor during the minority of the other cannot be undone by the latter on his attaining puberty, unless contrary to the nature and object of the trust.

An alien infidel cannot be appointed executor.

The appointment of an executor being for the education of the testator's children, for the protection of their interests and the due execution of the testator's last wishes, the law jealously provides against the appointment of an alien (non-Moslem) as executor.(2) According to all the schools, a Moslem cannot appoint a *harbi*, a non-Moslem subject of a hostile power, to be his executor whether such non-Moslem be a *Mustâmin*(3) or not. In case of such an appointment it is incumbent on the Kâzi to cancel it. The appointment of a *Zimmi*, a non-Moslem fellow-subject, stands on a different footing; for the Kâzi *may* set it aside. It follows, therefore, that whilst the appointment of a non-Moslem alien is void *ab initio*, the appointment of a *Zimmi* is valid unless set aside by the Judge. And this was the view enunciated by the Law Officers in two cases decided by the Sudder Court in 1825.

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(1) *Fatâwai Alamgiri*, Vol. VI, p. 214; s. 8 of the Probate and Administration Act (V of 1881) declares that probate cannot be granted to a minor.

(2) "Because he is an enemy;" *Radd-ul-Muhtâr*. "An infidel cannot be lawfully appointed executor to a Moslem even though he be his relation by blood, but an infidel may be the executor to one like himself:" *Alamgiri*, Vol. VI, p. 214.

(3) A *Mustâmin* is a non-Moslem subject of a non-Moslem sovereign who has entered the country of Islâm under a guarantee of protection.

In *Moohammud Ameen-oodeen and another* v. *Moohummud Kubeer-oodeen* (the first of these cases), a Mussulman female had bequeathed the whole of her property to a stranger and had appointed a Hindu as the executor to her will. Upon a reference by the Judges of the Sudder Court to the *Kâzi-ul-Kuzzât* and the Law Officers of the Court, they pronounced, (*a*) if the testatrix left no heirs she was at liberty to bequeath the whole of her property; (*b*) if she had heirs, the bequest of more than one-third would depend on the consent of such heirs; and (*c*) though the appointment of other than a Moslem as executor to the will of a Moslem is lawful, yet it is incumbent on the Kâzi to eject him from being executor. "The reason why the appointment," added the Law Officers "though not perfectly correct is said to be legal is because his official acts are valid until he be ejected by the Kâzi. The appointment does not affect the validity of the will so far as relates to the right of the legatee."(1)

Moohummud Ameen-ooddeen and another v. *Moohummud Kubeer-ooddeen.*

The other case, *Henry Jarlach and another* v. *Mussumaut Zuhurunnissa Khanum*,(2) reiterates the same principle. The Kâzi is vested with this discretion, from an apprehension that a non-Moslem executor may interfere with the religion of his testator's children. That reason does not, however, seem to hold good under the present conditions of society. And, therefore, when a testator has expressly appointed a non-Moslem as his executor, the Judge would hardly be justified in removing him and placing in his stead a Moslem, unless, of course, the executor endeavours to tamper with the religion of his wards or educates them improperly, or against the directions of the testator, when the Judge would be bound to remove him, or to revoke the probate of the will. Until such removal, whether owing to such conduct, or because it is expedient he should be removed, his appointment remains valid and his administration is effectual.

Henry Jarlach and another v. *Mussumaut Zuhurunnissa Khanum.*

A Moslem husband married to a *Kitâbi* wife (*i.e.*, following one of the revealed religions), may lawfully appoint her his executrix and the guardian of her children.

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(1) [1825], Sel. Rep. IV, pp. 49, 55.

(2) [1828], Sel. Rep. IV, p. 301; See also *Jehan Khan* v. *Mandy* [1868], 1 B. L. R. S. N., 16; s.c., 19 W. R., 185.

But though the appointment of a non-Moslem executor is valid unless set aside by the Judge, and until then he is the lawful guardian of the children of the testator, the Kâzi or Judge *cannot* appoint a non-Moslem as guardian to the children of a Moslem.

As already stated, if an executor labouring under the incapacity of difference of creed or minority or slavery attains, by conversion to Islâm, or emancipation, or by coming of age, the capacity required by law he would continue to be executor unless he has been removed already. But there is this difference between the acts of a minor-executor and those of a non-Moslem and a slave-executor that whilst the latter are valid, the former are absolutely invalid.(1)

The appointment by the will of a Mahommedan of a non-Moslem executor does not invalidate the will. All the acts of such an executor and his dealings with the property under the will, until he is removed and superseded by the Civil Court, are good and valid.(2)

When it appears to the Kâzi that the executor appointed by the testator is really unable to perform the work, or is weak and inefficient, he should appoint another administrator to act with or assist the executor; or, if the inability appears to be permanent, he may appoint another person in the place of the *wasî*, which would be tantamount to removing him from the office.(3)

If the executor should represent himself unable to perform the work imposed on him, the Judge should not admit his representation without an inquiry to ascertain the fact; but should it appear that he is really incompetent, the Judge should appoint another in his stead. Some jurists have held, that if the Kâzi were to remove an executor appointed by the testator who was fit for his duties, such removal would take effect, though the Kâzi may have, in doing so, acted unjustly and be guilty of committing a sin. In the *Ashbâh*, however, it is stated that there is a conflict of opinion on this point among the jurisconsults. Many of them, says

(1) *Radd-ul-Muhtâr*, Vol. V, p. 687.
(2) *Jehan Khan* v. *Mandy*, 1 B. L. R. S. N., 16; 10 W. R., 185.
(3) *Durr ul-Mukhtâr*, p. 838; *Radd-ul-Muhtâr*, Vol. V, p. 687.

the *Sharh-Wahbânieh*, regard such an order of the Kâzi operative, but in the *Fusûlain* it is laid down that it is incumbent to hold such removal not to be valid, "though it is imperative [on the Judge] to remove the misfeasor and untrustworthy." The author then adds, "in the 27th section of the *Jâm'aa-ul-Fusûlain* it is stated, that when the executor appointed by the deceased is a just man, it is not proper that he should be removed by the Kâzi; and if he does so, many jurisconsults have held that the removal will not take effect. In my opinion this is correct, for the testator is more bounteous to himself than the Judge, and the *Fatwa* should be in accordance with this view, for the Kâzis of the day are the cause of disputes." "All this relates to an executor appointed by the testator, for the Kâzi is entitled to remove an administrator appointed by him at any time, whenever he considers it expedient.(1)

"When an executor is an *amîn* (a person worthy of trust) able to dispose of property, the Judge is not to remove him from office. So also when the heirs complain of an executor to the Judge, he ought not to remove him without malversation, but when that is established he should remove him."

The provisions of the Shiah Law regarding the qualifications requisite in an executor are analogous. It is requisite that an executor should be a person of understanding and a Moslem. Some jurists also require that he should be an *'aâdil* or just person, because a *fâsik* (dishonest person) is unworthy of trust. Whilst others consider this qualification as unnecessary, because all Moslems are trustworthy and because the executor is appointed by the testator. But the Judge is bound to remove one who, though trustworthy at the time of his appointment, proved to be otherwise after the death of the testator; for his appointment must be considered as nullified because the trust reposed in him by the testator was founded on a belief of his probity and would have been withdrawn on the confidence being found to be misplaced.(2) The Shiah Law.

It is not lawful to appoint another person's slave as an executor without the consent of the master. A person can lawfully

(1) *Fatâwai Alamgiri*, Vol. VI, p. 212.

(2) *Sharâya*, p. 253; Comp. the rules in the *Jâm'aa ush-Shittât*.

appoint his own slave an executor, if his children are minors, but not if they are adults.(1) Where an executor becomes permanently insane the Kâzi should appoint another in his place. If no such appointment is made and the executor recovers his reason, he remains as such.

Section II.

Appointment of Executors, how made.

The executor is termed *wasî* and is defined to be an *amîn* or trustee appointed by the testator to superintend, protect and take care of his property and children after his death. He is also his *Kâim-mukâm* or personal representative.(2)

There are three kinds of executors :(3)—The first is a trustee who is capable of performing the duty which has been committed to him by the testator and such an executor is fixed (*mukarrar*) and *cannot be removed by the Judge* without proved breach of trust.(4) The second is a trustworthy person but who is unable to do the work or who is weak and inefficient, with whom the Judge should associate another for assisting him. The third is a *fâsik*,(5) a non-Moslem or a bondsman [of another], whom it is proper that the Judge should remove and appoint another in his stead as is stated in the *Khazânat ul-Muftin*.(6) The word 'substitution' implies that the appointment is valid in the first instance, for otherwise there could be no removal.(7)

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(1) *Radd-ul-Muhtâr*, Vol. V, p. 687.

(2) "It is not advisable to accept the office of an executor, for it is a perilous matter on account of what Abû Yusuf is reported to have said—'To enter upon an executorship for the first time is a mistake, for the second a fraud, and for the third, a theft;'" *Fatâwai Alamgiri*, Vol. VI, p. 211; *Radd-ul-Muhtâr*, Vol. V, p. 685. This extreme view is not adopted in practice.

(3) There is considerable difference in the position of the *wasî* under the Mahommedan Law and that of an executor under the English Law. The *wasi* is the *locum tenens* of the testator for the management and preservation of the deceased's property, but the legal estate does not vest in him. Comp. the provisions of the Probate Act (V of 1881).

(4) See *ante*, p. 553.

(5) A corrupt or untrustworthy person.

(6) *Fatâwai Alamgiri*, Vol. VI, p. 211.

(7) *Radd-ul-Muhtâr*, Vol. V, p. 687; *Durr ul-Mukhtâr*, p. 835.

Acceptance

As stated before, the testator may appoint any person (subject to the exceptions already mentioned) as his *wasî*, and the appointment will take effect upon the acceptance of the person so appointed. Such acceptance may be either by word or deed, *i.e.*, may be either express or implied, and may take place either in the testator's lifetime or after his death. Any dealing with the testator's property after his death amounts to acceptance.(1)

The person appointed is entitled to renounce the executorship or to refuse to accept it, and if he does so, the appointment does not take effect. When the appointment and the refusal take place in the presence of the parties, there is no difficulty. But when an executor is appointed in his absence, and on being informed of the appointment after the testator's death, says, 'I do not accept,' but subsequently says, 'I accept,' the acceptance is lawful, "unless the Judge had removed him from office before he expressed his acceptance."(2) But if he had expressed his refusal during the testator's lifetime and should, after his death, desire to accept the office, the acceptance would not be valid. Though, if he were merely silent in the presence of the testator instead of saying, 'I do not accept,' and should subsequently, either in the lifetime or after the death of the testator, express acceptance it would be lawful, whether made in the presence of the Judge or not, unless the Judge had previously to his saying so removed him from office, when his subsequent acceptance would not be valid.(3)

After the appointment has once been accepted or property dealt with, the executorship cannot be renounced without the sanction of the Judge.(4) In other words the executor can only obtain his discharge from the Judge. Mohammed has laid down in the *Jâm'aa-us-Saghîr* that when a person has been appointed an executor and has accepted the office in the testator's lifetime, the executorship is binding on the acceptor, so that if he should wish to withdraw from the office after the death of the testator, he is not at

(1) *Durr ul-Mukhtâr*, p. 834.

(2) *Ibid*, p. 835; *Fatâwai Alamgiri*, Vol. VI, p. 211.

(3) *Fatâwai Alamgiri*, Vol. VI, p. 211.

(4) *Radd-ul-Muhtâr*, Vol. V, p. 686; *Fatâwai Alamgiri*, Vol. VI, p. 212. It would seem, however, from what is stated in the *Ashbâh* that he may do so, if there is a provision to that effect in the will.

liberty to do so. But if he renounces in the lifetime of the testator and " before his face," the renunciation is valid, but if it is not made " before his face " it is not valid. What is meant by saying, " before his face," is with *his* knowledge, and " not before his face " is without his knowledge. This is according to the *Muhît*.(1) If an executor should accept in the presence of his testator, and the testator should say when he is absent, ' take witness that I have discharged him from the executorship,' the discharge is valid.(2) But if an executor should reject his appointment in the testator's absence (after he has once accepted), the rejection according to the Hanafîs is void.(3)

If he should say in the absence of the testator, ' I do not accept,' and should communicate his refusal to him either by letter or messenger, and after this should say ' I accept,' the acceptance would not be valid.

Shiah Law. The provisions of the Shiah Law are analogous. It is declared that an executor may lawfully reject his office while the testator is alive, provided that he is duly informed of the rejection ; but if the testator should die before the rejection or after it, without the information having reached him, no effect can be given to the rejection, and it is incumbent on the executor to take upon himself the duties of the office.

If an executor is incapable of discharging the duties of his office, the Judge may appoint an assistant to him, but if he is guilty of fraud he must be displaced and another appointed in his stead.(4)

General doctrine. An appointment of an executor may be made in any terms which indicate the intention on the part of the testator to make him his *locum tenens* or *Kâim-mukâm* after his death. If a person were to say to another, " thou art my *wakîl* after my death," that would amount to the appointment of an executor.

Appointment of an executor. In the *Fatâwai Kâzi Khân*, the *Khulâsa* and other works, it is stated that if a person, were to say to another " I consign to you my children after my death," or " take care of my children after my death," or use any similar expression by which authority is given to another to do certain acts on behalf of the testator after

(1) *Fatâwai Alamgiri*, Vol. VI, p. 212.

(2) *Ibid ; Radd-ul-Muhtâr*, Vol. V, p. 686.

(3) " It would be fraud on the testator to keep silent in his lifetime and then refuse ; " *Radd-ul-Muhtâr*.

(4) *Sharâya-ul-Islâm*, p. 252.

his death, it would create an executorship. Ulal-w'aljih states that if a person were to say to some people, "do this for me after my death," that would constitute all of them as his executors. And if they all remain silent until after the death of the testator, when some of them only accept, these alone would be *wasis*. But if only one accepted, he will not be entitled to act as executor, until the Kâzi has associated another person with him in the administration of the testator's estate, for it was clearly the intention of the testator to confide the executorship to more than one person.(1)

An executor can be removed without his assent, and without his knowledge. This is different from the removal of an agent, who must be informed by his principal that he has been removed.

Generally speaking the powers and duties of executors in British India are now regulated by the provisions of the Probate and Administration Act (V of 1881), but as a Mahommeden executor is not bound to take out probate of the will, in order to entitle him to act, and as nuncupative wills are valid under the Mussulman Law, it is important to know its main principles on the subject.

The powers of several executors.

Under the recognised Hanafî rule when there are two executors one cannot act singly in the disposition of property. S. 92 of the Act, however, declares that "when there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary in the will or grant of letters of administration, be exercised by any of them, who has proved the will or taken out administration." But as apparently the procedure laid down in the Act is applicable only to a will in writing, the Hanafî rule remains intact in such cases where probate is not taken out or the will cannot be proved under the provisions of the Act.

When a man has appointed two executors, "the act of any one of them acting singly," says the *Durr-ul-Mukhtâr*,(2) "is void like the act of two joint-*Mutwallis* acting singly, for two *Mutwallis* are like two executors [in their legal position] as is stated in the

(1) "A man addressing a number of persons says to them 'Do so after my death.' If they accept they all become executors, and if they remain silent till the testator's death and two or more of them accept, these become executors and may lawfully carry the will into execution. But if only one of them accepts though he is the executor he cannot lawfully carry the will into execution without bringing the matter before the Judge who may either appoint another [to act] with him or authorise him to act by himself;" *Fatâwai Alamgiri*, Vol. VI, pp. 218-219.

(2) P. 835.

The powers of one of two executors acting singly.

Ashbâh and in the *Kinia.*" The acts of one of two executors acting singly is void, although they may have been appointed separately by the testator; some jurists have said that each may act singly and Abû Lais has held this to be correct and that we adopt it." "But" goes on the *Durr-ul-Mukhtâr,* "in the *Mabsût* the first is stated to be the *correct* doctrine and it is relied upon in the *Durrar-*[*ul-Ahkâm*] and [in the work of] Kahastâni as most worthy of acceptance." "I say that the principle declaring the act of an executor or *Mutwalli* acting singly to be invalid is applicable to cases where the executors or the *Mutwallis* have been appointed by one testator or under one *Wakf* or by one Kâzi. Where, however, two executors or two *Mutwallis* have been appointed by two Kâzis of two different cities each will be competent to deal with the property lying within the jurisdiction of the Kâzi appointing him..... "The act of one *wasi* acting singly is valid in the purchase of shrouds for the deceased for his funeral, the litigation of his rights, buying necessaries for his infant children, accepting donations for his infant children, emancipating specially designated bonds-people, return of deposits with the deceased, and the handing over to the legatees their specific legacies. And the *Sharh-i-Wahbânièh* has added ten more matters, among these being, the return of things usurped by the deceased,(1) cancelling invalid sales, demanding debts to the testator and such like. So also in the sale of things likely to be lost, and to collect things that were being wasted.(2) Abû Yusuf states that an executor can act singly unless the testator has laid down that the two must act jointly; this is according to the *Sharh-i-Wahbânièh*: should one executor die appointing his colleague or any other person his own *wasî*, the administration of such appointee will be valid and there will be no necessity on the part of the Kâzi to appoint another. But if the deceased executor has died without appointing any one, the Kâzi is bound to associate another with the surviving executor; this is according to the *Durrar-*[*ul-Ahkâm*]."(3)

(1) Evidently with the object of avoiding a judicial process.

(2) In the *Hedâya*, it is stated that one of the executors may act singly in the realisation of the testator's property but not in its disposal; *Hed.*, Vol. IV, p. 1043), though he may purchase shrouds and hire bearers, for carrying the body to the cemetery.

(3) Because as Zailye says, it was the intention of the testator that the administration of his estate should be in the hands of two persons. It is only when one executor dies appointing the other as his executor that the necessity of a second *wasi* is dispensed with; Tahtawi.

SECTION III.

POWERS AND DUTIES OF EXECUTORS.

Similarly it is stated in the *Fatâwai Alamgiri* that "when a man has entrusted the executorship to two persons, according to Abû Hanîfa and Mohammed, neither of them can act singly, and acts done by either of them singly are not operative without the sanction of his associate, except in the following matters such as the washing and shrouding of the deceased's body and its removal to the grave, the payment of debts out of assets of the same kind (*jins*) as the debts, the delivery of specific bequests, the restoration of deposits, or of things usurped by the deceased or acquired under invalid sales, the manumission of a specific slave. But they cannot act singly in taking possession of deposits belonging to him, nor in receiving payment of debts due to him, though they may in suing for his rights against people; in accepting a gift for a minor, sanctioning his acts, making partition of things weighable or measurable, and selling what is liable to spoil.(1) When the deceased has directed certain specified portions of his property to be bestowed in charities on beggars and indigent persons without particularising them, one executor cannot act separately from the other according to Abû Hanîfa and Mohammed, though he may do so according to Abû Yusuf, but if the objects of the charity are specified he may act alone according to them all. In what has been said it is supposed that the two executors have been appointed together at one and the same time, *lit.* in one sentence (*kalâm*). When one was appointed at one time and the other at another time, Shams-ul-Ulama Halwâni(1) has stated there is a difference of opinion among jurists, some holding that each of the executors may act separately, while others have declared that, according to Abû Hanîfa and Mohammed, they cannot act separately in any case in disposing of property, and this has been adopted by Shams-ul-Ulama as-Sarakhsi, according to the *Fatâwai Kâzi Khân.* If, however, the two executors are appointed with the express provision that either of them may act singly, or if the testator has declared that each of them is a complete executor (*wasî tamm*) each one of them may act singly, according to the *Khazânat-ul-muftiin.*(1)

How far two executors jointly appointed can act separately.

(1) *Fatâwai Alamgiri*, Vol. VI, p. 214.

It will thus be seen that when there are two executors, the acts of any of them are void unless ratified by the other like the acts of one of two *mutwallis*. The result is, that if one of them gives a lease of *wakf* lands, it would not be valid until consented to by the other, even though the executors may have been appointed separately. This is the case when the two executors or administrators are appointed by the deceased or by one and the same Judge; but as the author of the *Durr ul-Mukhtâr* points out if the administrators have been appointed by two separate Kâzis, they can act separately, for as the Kâzis can act validly in their separate jurisdictions, the administrators, as their *naibs* or delegates, can also validly do so.

The ratification of the co-executor does not amount to a renewal of the contract, it only imparts the necessary validity which was originally wanting. If one *wasî* acts without the knowledge or the consent of the other, and any property is lost, the trustee or executor so acting will be liable to recoup the loss. One executor can appoint his co-executor his *wakîl* or delegate, in which case the acts of the co-executor by himself will be valid.

Abû Yusuf's opinion.

As already pointed out, Abû Yusuf thinks that when there are several *mutwallis* each can act singly. So according to him one of several executors can act validly in all matters. But according to Abû Hanîfa and Mohammed none of them can act by himself whether they have been appointed jointly or separately. The latter doctrine is recognised as the binding rule. Where, however, the testator has declared by his will that the executors may act jointly or severally, each may act singly according to all jurists.

Commenting on the passage already quoted from the *Durr ul-Mukhtâr*,(1) the author of the *Radd-ul-Muhtâr* makes the same statement. "But the acts of one executor singly, like the acts of any one *mutwalli*, will not be *bâtil* respecting the purchase of shrouds for the testator, his funeral,(2) in the litigation of his rights,(3) in the

(1) *Ante*, p. 665.

(2) "This exception is founded on the reason of necessity, for delay in these matters would lead to the corpse decomposing. And for this reason neighbours are authorised to take charge of the funeral of a deceased; and fellow-travellers of a person dying on the road."—*Radd-ul-Muhtâr*.

(3) "Because several do not join in litigation and when they join, only one pleads."—*Durrar* of Mulla Khusru.

purchase of necessaries for his children,(1) in the acceptance of gifts made to the testator, in the emancipation of specified slaves, in returning deposits (with the testator) and payment of specified legacies. In the *Sharh-i-Wahbânièh*, the following matters are included as being within the scope of an executor acting singly, *viz.*, he may lawfully return things acquired by the deceased by 'embezzlement,' or under an invalid sale; partition things which can be measured or weighed (perishable commodities); he may demand from the debtors of the deceased specified debts due to the testator, and pay the same."

The acts of a single executor.

When there are two executors, and one of them is absent, the other executor can validly act by himself, if the absentee is at such a distance that no *kâfila* or caravan can reach him. Such an absence is technically called *ghîbat-i-munkat'aa*. The rule is founded on the necessity of two executors acting in consultation. When one is so far away or residing in such a place that no letter or news can either reach him or be received from him, the law regards him as non-existing for the time, and does away with the necessity of two executors acting together. And a single executor may validly sell any thing which it is feared may be lost.

Shiah Law—joint executors.

The Shiah Law is slightly different; it says that when two persons have been appointed in general terms or with an express condition that they are to act jointly, one of them cannot act singly without the other, and if either of them should do so, his

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(1) "This also is founded on the reason of necessity, for otherwise the infants would suffer."

"Things deposited with the deceased must be returned by one executor, but the deposits of the deceased can be received by the two: this is the view of Saijani given in the *Hindiyèh* (*Alamgiri*)."

"This is the view of Ibn Shalma; but where something is to be sold in order to pay the legacy, it cannot be done without the consent of the co-executor."

Kâzi Khân adds that "one executor can lawfully take possession of any inheritance which might have devolved on the testator before his death, provided there is no debt attached to it; and of properties and deposits in the residence of the testator, to preserve them from loss or damage. He can also redeem pledges."

He can also, it would seem, make a partition of such things with the partner of the testator.

Though one executor may not grant a receipt or discharge for a debt due to the deceased, yet he may validly make a demand for it and prefer a suit for the same.

In the *Hedâya* these principles are set forth with considerable distinctness and may be studied with advantage.

acts would not be lawful, except such as are positively incumbent or necessary, as for instance, the providing of clothes and food for the infant children of the testator. And it is held to be incumbent on the Judge to compel them to act jointly, and when that is impracticable he may appoint others in stead of both. So when there are two executors, they cannot apportion the property between themselves for the purpose of separate management. If one of them should fall ill or become incapable of performing the duties of the office, the Judge must appoint an associate to the other who is competent, but this power cannot be exercised when one of them dies or becomes *disqualified*, for the remaining executor is empowered to act singly, and the Judge has no authority while there is an executor of the deceased surviving and competent to act.(1) If the testator has made it a condition that the executors are to act jointly and separately, in that case the acts of each singly are lawful. They may, also, lawfully divide the property between them and each take upon him the management of a part, in the same way as they might have acted separately before the partition.(2)

Hanafî Law; executors for a special purpose.

According to the Hanafî rule when two executors are appointed for two different purposes, *e.g.*, one for the payment of the testator's debts and the other for the administration of his estate, according to Abû Hanîfa and Abû Yusuf, both are general executors, competent to act in all matters; though Mohammed differs and holds that the authority of each is restricted to the purpose for which he is appointed. But where it is made an express condition that one executor shall not act in the matter to which the other is appointed, Mohammed ibn ul-Fazl states that, according to all opinions, the powers of each executor will be restricted within the limits laid down by the testator, and it is only where he has not made such a condition that there exists the difference of opinion above-mentioned, "the *Fatwa* being with Abû Hanîfa and Abû Yusuf."(3)

"If a person should appoint another as executor and direct him to act in conformity with the instructions of a third person, *e.g.*, "with the knowledge of so-and-so," the executor may act

(1) The author of the *Sharâya*, however, thinks this view is open to doubt.
(2) *Ibid.*
(3) *Fatâwai Alamgiri*, Vol. VI, p. 215.

without that third person's knowledge. But if he (the testator) had said "do not act without his knowledge," it would not be lawful for the executor to act without his knowledge, and the *Fatwa* is to that effect. Or if he were to say, "Act in accordance with the opinion of so-and-so," or "Do not act except with the opinion of so-and-so," in the first case the person addressed would be the executor, in the second they will be both executors according to the approved doctrine(1) (*'ala'l mukhtâr*) according to the *Khazânat-ul-Muftiin*. Abû Nasr has declared that if [the testator] says to another "Act in the matter with the orders of so-and-so," he [the person addressed] would be a special executor; while if he had said, "Do not act without his orders," both would be executors, and this seems most in accord with the doctrine of "our" masters according to the *Muhît*....When a man appoints one person his executor and another *mushrif* or supervisor over him, the first is the executor for dealing with the property, not the *mushrif*, the effect of whose appointment is that the executor cannot act without his knowledge according to the *Khazânat-ul-Muftiin*."(2)

Derivative executors.

When one of two executors dies, appointing his co-executor as his own executor, in that case the surviving executor can act singly in respect of the original testator. If the deceased executor appoints another person as his executor, such person will become associated with the surviving executor of the original testator, who will not be entitled to act alone. Where the deceased executor has appointed no executor for himself, the Kâzi should associate another person with the surviving executor, for it was the intention of the testator that the execution of his will should be entrusted to two persons. "This is stated in the *Durrar-ul-Ahkâm*."(3)

If one of two executors becomes insane or otherwise incapable, the Kâzi shall appoint a substitute for him, but he cannot assign the executorship to the co-executor. But if one of them turns out to be dishonest, the Kâzi may either associate another person or authorise that other to act by himself.

The executor of an executor, however removed, can act as the executor of the first testator. Shâfeï differs on this point.

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(1) *Fatâwai Alamgiri*, Vol. VI, p. 218.
(2) *Ibid.*
(3) *Durr ul-Mukhtâr*, p. 836; *Fatâwai Alamgiri*, Vol. VI, p. 216.

With reference to the powers of a derivative executor, the doctrine is put by the *Radd-ul-Muhtâr* in four aspects. (*a*) Either the deceased executor, whilst appointing an executor, leaves his powers regarding the estate of the original testator, undefined, *e.g.*, he may only say, "I make so-and-so my *wasî*;" (*b*) defines his powers, *e.g.*, says, "I make so-and-so the *wasî* of my estate;" (*c*) or declares expressly "I make so-and-so the *wasî* of the estate of my *musi* (testator);" (*d*) or says "of both estates."

When the powers are left undefined or it is expressly declared that he is to be the executor of both estates, the executor of the deceased executor will, according to the majority of jurisconsults, become the executor of the original testator. On this point Shâfeï and Zuffar differ.(1)

Where it is simply declared that he is to be the executor of the estate of the deceased executor, Abû Hanîfa holds according to the most approved report that he would be the executor of both estates; whereas the Disciples, according to the most authentic account, have declared that his powers will be restricted to the estate of his own testator. And this seems to be the doctrine recognised as law. If the deceased executor said, "I constitute this person executor of the original testator," it would be so. "This is according to all the jurists as it is stated in the *Tâtâr-Khâniëh*, *Sharh-i-Tahtâwi* and other works of authority."

How far two executors jointly appointed can act separately.

In the *Fatawai Alamgiri*(2) the above principles are stated thus:—"When a man has appointed two executors and one of them dies, the survivor cannot, according to Abû Hanîfa and Mohammed, dispose of the property, but should lay the matter before the Judge, who, if he sees proper, may make him sole executor and transfer to him the power of disposal, or associate another with him in the place of the deceased. According to Abû Yusuf, however, the survivor can act alone, as he would have been while the other was alive. And this is one of three rules. The second is if a man appoints two executors and one of them accepts after the death of the testator and the other should not accept, the single executor is incompetent to act by himself according to Abû Hanîfa and Mohammed, while according to Abû Yusuf he is competent. The third is if one of two executors is *fâsik* (corrupt)

(1) *Durr ul-Mukhtâr*, p. 836, *Sharh-ul-Wikâya*.
(2) Pp. 215—216.

the Judge may authorise the other to act singly or may join another with him instead of the *fâsik*, in which case the just one could not act without the other according to Abû Hanîfa and Mohammed, while according to Abû Yusuf he could. . . . . A person appoints two executors, one of whom dies, having first appointed his co-executor to be his executor. this is lawful, and the co-executor may dispose of the property of the first deceased, for as he could have done so with the sanction of his co-executor in his lifetime, so he can in like manner do so after his death. There is another report, however, against the legality of the disposal, but the first is correct.''

Shiah doctrines.

According to the Shiah doctrines, an executor cannot entrust the management of his testator's property to his own executor, *without the power having been reserved to him.* When an executor has his testator's authority for bequeathing the management of the estate at his own death, he may lawfully do so by consensus. When the testator has left no express direction, the executor has no power according to the approved doctrine to entrust the administration of the estate to another person. Thus when there is no provision in the original testator's will, the superintendence of his estate, upon the death of the executor, devolves upon the Judge. In like manner, if a person should die without appointing an executor, the superintendence and care of his estate belongs to the Judge. ''And if there is no Judge present on the spot, any true believer in whom confidence can be placed may lawfully assume the care and management of the estate, though there is doubt and difference of opinion on this point.''

Hanafî doctrine.

When there is an executor appointed by the testator, the Kâzi cannot appoint an administrator unless the executor is absent, such absence amounting to a *ghîbat-i-munkat'aa ;* this is stated in the commentaries of Mufti Abû S'aûd.

Claims against the estate.

If a person were to prefer a claim against the estate of the deceased and the executor be absent, the Kâzi would appoint a person as defendant to represent the testator. If the executor is present and consents to the debt, the Kâzi may, at his discretion, appoint another person to represent the testator, so that the plaintiff may properly prove his claim against him. For the acknowledgment of the *wasî* is not valid against the testator, and the plaintiff cannot recover a decree against the estate of the deceased by the

mere consent of the executor. This, however, does not mean that, in every instance, the executor must insist on the claim being established in a Court of Justice. What is meant is that the mere acknowledgment of the executor is not sufficient to establish a claim against an estate; and he cannot make any payment unless satisfied upon proof that the claim is just and well founded.

Where the property of an infant child is managed by the father, who wastes it, the Kâzi can take it away from his hands and place it in the hands of a curator to act as a *wasî*.

NOTE.

"If a man appoint two executors, neither of them is entitled, according to Abû Hanîfa and Mohammed, to act without the other, except in particular cases, of which an explanation shall be hereafter given. Abû Yusuf is of opinion that in all cases either of them may act without the other, because an executor is endowed with his power of action in virtue of the will of the testator; and as power of action is a thing sanctioned by the law, and incapable of division, he enjoys his power complete and perfect in the same manner as a complete authority to contract their infant sister in marriage appertains to each of her brothers respectively. (The ground of this is that executorship is a succession, which succession cannot be established in the executor, unless the authority of the testator devolves to him in the same degree in which it had appertained to the testator, that is, completely and perfectly). The testator's choice, moreover, of the two to be his executors is an argument of the particular attachment of each to his interest, which attachment is equivalent to the consanguinity of two brothers in the point of contracting their infant sister in marriage. The argument of Abû Hanîfa in support of his opinion are twofold. First, the power of an executor being derived from the testator is of consequence to be exercised in the manner prescribed by him: and in the case in question the testator has entrusted this power to both the executors on the condition of their being united in the trust, for he does not expressly assent to their acting otherwise than jointly, and the above condition is moreover attended with advantage, as the deliberations of two persons are better than of one. It is otherwise with two brothers, in the circumstance of contracting their infant sister in marriage [as adduced by Abû Yusuf], since the cause of such authority being vested in them is relationship a cause which exists equally in each. The contracting in marriage, moreover, is a right of the infant, resting upon her guardian [insomuch that if the infant require her guardian to contract her to any person being her equal for whom she has a liking, he must comply], whereas, in the case here considered, the acting (with the estate) is the right of the executor himself, not of another resting upon him. In the case of contracting the infant in marriage, therefore, if one of the two brothers so contract her, he merely discharges a duty incumbent on the other brother and his act is therefore valid, whereas in the case of executorship if one of the two act alone, he exercises a right appertaining to the other and his so doing is therefore invalid—in the same manner as where two persons owe a sum of money to one, in which case it would be perfectly lawful for either of them to discharge the whole debt, whereas supposing one man to owe a sum of money to two others, it would not be lawful for him to pay the whole to either of them."

"The cases excepted by Abû Hanîfa and Mohammed in which they hold the acts of either executor, singly, to be valid, are such as require immediate execu-

tion. Thus, it is lawful for either executor singly to disburse the funeral charges, as a delay in this might occasion the body to become offensive, whence it is that a similar power is vested in the neighbours. In the same manner either of the executors singly may purchase victuals or clothes for the infant children of the testator, this being a matter of urgency and which admits of no delay."—*Hedâya*, Chapter on Wills.

"So, likewise, it is lawful for either of the executors to restore an usurped article, or deposit or a thing purchased by the testator under an invalid contract. In preserving the estate of the testator also, and in discharging his debts, the act of either executor is lawful independent of the other. For none of these are considered as an exercise of power but merely the performance of a duty, insomuch that the depositor has himself a right to seize and carry away his deposit, if he find it among the effects of the deceased, and the creditor has a similar right with regard to his debt, and it is moreover the duty of every one into whose hands property may fall to attend to the preservation of it, whence this comes under the description of aid and assistance not of an exercise of power—neither do any of these acts require thought or consideration. Either of the executors has also a right singly to discharge a legacy or emancipate a slave, if directed by the testator, because such deeds require no thought or consideration."

"In the same manner, either of them may institute a suit in claim of the rights of the testator, because a conjunction of both in so doing would be impracticable, since, if they were to do it at one and the same time in the assembly of the Kâzi, they must occasion noise and confusion (whence it is that only one of two agents for litigation is allowed to plead at a time). The acceptance of a gift for an infant is likewise an act which either may perform singly, for in case of delay there is a possibility of the gift being rendered null by the death of the donor previous to delivery of possession. These acts, moreover, being permitted to a mother and nurse is a proof that they are not exertions of power. It is likewise permitted to any of the executors singly to sell goods where there is an apprehension of their spoiling as in the case of fruit and the like, and also to collect together and preserve the scattered property of the testator as a delay might occasion the destruction of it, and such permission is, moreover, given to every person into whose hands property may fall whence it may be inferred that this is not an exertion of power. [It is recorded in the *Jâm'au-us-Saghîr* that none of the executors, where there are more than one, has singly the power of selling goods or receiving payment of debts because these are exercises of power which they must perform jointly in conformity with the will and intention of the testator."]

"If a person appoint two executors in a separate manner, as if he should first say to the one, 'I have appointed you my executor,' and again at a different period to the other, 'I have appointed you my executor,' some allege that in this case each of them has individually a power of exercising the functions of the appointment without consulting the other, in the same manner as two agents where they are appointed by different commissions—the reason of which is, that the testator, in appointing the two separately, indicates his assent to each acting from his own judgment without the other's assistance or advice. Others again say, that concerning this case a disagreement subsists between Abû Hanîfa and Mohammed on one side and Abû Yusuf on the other, because a will is not established until the death of the testator, and at that time both are executors together, notwithstanding they had been appointed separately. It is otherwise with two agents appointed under different commissions, for the appointment of each of these still continues distinct and separate as settled by the constituent."

"If one of two executors die, it is incumbent on the Kâzi to appoint another in his room. This is the opinion of Abû Hanîfa and Mohammed, because

according to their doctrine the remaining executor has not of himself power to act on every occasion and the interest of the deceased, therefore requires the appointment of another to operate with him, and it is also the opinion of Abû Yusuf, because, although the remaining executor be (according to him) empowered to act of himself, still it behoves the Kâzi to appoint another his companion, for the design of the testator evidently was to leave two successors for the management of his concerns, and as this may be fulfilled by the appointment of a substitute for him who dies, one must be appointed accordingly."—*Hedâya*, IV, Bk. LII, Ch. VII, pp. 543-546.

Section IV.

The Powers and Duties of the Executors, (Contd.)

The powers of an executor in the Mahommedan system are governed by rules closely analogous to those under the English Law. But there are points of difference which require careful attention.

When an executor may sell.

When the heirs of the testator are minors, the powers of the executor are, within certain limits, absolute. In case of necessity, he has the power of selling the property and investing the proceeds, after discharging any debts of the testator or those incurred in the maintenance of his infant children, in other and more profitable kinds of property. The sale, however, must be for an adequate consideration, "such as is reasonable among people of business."(1) The executor cannot sell the property to himself or to any relative of his, whose evidence, under the Mahommedan Law, would be inadmissible against him.(2) He can enter into a partition with the co-sharers of the deceased or the legatee, in respect of the minor's shares in all kinds of property, both movable and immovable, "even with a *slight* inadequacy in the terms (*ghubn-i-yasîr*)." A partition, however, where the inadequacy "is manifest or glaring, (*fâhish*)" *i.e.*, great, is ineffective.

Dealing with the powers of an executor, the *Durr-ul-Mukhtâr* says "It is lawful for the executor to sell other than immovable property against an absent adult heir, to pay the debts (of the testator); even the sale of immovable is valid if there is imminent

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(1) *Durr-ul-Mukhtâr*, p. 837.
(2) *Ibid*; *Fatâwai Alamgiri*, Vol. VI, p. 220.

danger of its being lost; so has stated 'Uzmi-Zâdêh, referring to the *Khanièh* (the *Fatâwai Kâzi Khan*). I say, as is stated by Zailye and Kahastâni, that the more correct doctrine is, that the sale of immovable property is not valid as its becoming lost is extremely improbable (*lit.* rare).'' But says Tahtâwi in his commentary on the *Durr-ul-Mukhtâr* ''If the deceased dies heavily involved in debt, then by *consensus* a sale of immovable property is valid.'' And the *Durr-ul-Mukhtâr* proceeds to add—''When the testator's heirs are minors, a sale of his immovable property by the executor is valid to some person other than himself at double its value or for the maintenance of the infants or for the discharge of the debts of the deceased, or for the payment of specific legacies which cannot be given effect to in any other way or where the income does not exceed the cost of its up-keep (*maunat*) or where this risk of its becoming waste or destroyed or where it is in the hands of a *muta-ghallab* (powerful misappropriator). This is the substance of what is stated in the *Durrar* and the *Ashbah.*'' ''I,'' proceeds the author of the *Durr-ul-Mukhtâr*, ''say that the power of sale given to the executor in these cases does not belong to the executor appointed by a mother or brother, for such an executor has no power at all (لَا يَمْلِكُ) to dispose of the immovable property of a minor. And he cannot purchase anything for the minor excepting food and clothes (*i.e.*, necessaries).'' According to Ibn-i-Kamâl,(1) the father has the power, in such cases to sell the immovable property of the minor provided he is a man who bears a good character among people or nothing is known against him.''

The powers of a *wasî* appointed by the mother.

It will be noticed from the above statement that the powers of an executor or guardian appointed by a mother or any other relation such as the brother or uncle, are very limited. He has no authority to deal with the immovable property of his ward under any circumstance, nor with any property inherited by the minor from any person other than their mother. If he is the mother's executor he can only deal with movable property inherited by them from her, or enter on their behalf into a partition in respect thereof,

(1) The author of the *Fath-ul-Kadir.*

provided the father be not alive, and there be no executor appointed by him.(1)

The same rule is enunciated in the *Fatâwai Alamgiri*, the authority quoted being the *Fatâwai Kâ-i Khan*. After stating that the executor of the father is in the position of the father, and the executor of the father's father (*jadd*) is in the position of the father's executor, it goes on to say "but the executor of the mother or of the brother [do not come within that category]; and if the mother dies leaving infant children or a brother dies leaving infant brothers or sisters, it is lawful for her or his executor to sell anything of the inheritance of the deceased except immovable property, but he has no power to sell the *'akâr;* nor *such* executor can buy anything for the infants save food and raiments and necessaries.

When an executor may partition.

When *all* the heirs are minors, the allotment by the executor of the legatee's share, and the retention by him of the residue for the heirs, is valid and effective. And in case any portion of their share is lost in the hands of the executor, the minors have no right to be recouped either by the legatee, or by the executor, unless it is occasioned by his wilful neglect or default. But when some of the heirs are adult and *absent*, the executor can lawfully enter into a partition on their behalf with the legatee in everything except *'akâr or what is immovable*, and to hold the shares of the minors for them. If all the heirs are adult or some of them are *adult* and *present*, any partition made by him is void against those heirs who are adult, both with respect to movable and immovable property. But if the heirs, though *sui juris*, are *absent*, the partition affected by the executor is inoperative so far as the immovable property is concerned, in other words, if the heirs are adult but not present, a partition of movable property alone made by the executor with the legatee is valid.

Specific bequests.

When the testator has left specific bequests to individuals, a division of the property by the executor among the heirs, in the absence of the legatees, is not effective; and in case the share or shares allotted to the legatees should perish, they would be entitled

(1) The limitations on the powers of executors appointed by any person other than the father are set out at considerable length in the *Fatâwai Alamgiri*, Vol. VI, p. 223.

to claim a share to the extent of a third of the estate from the shares given to the heirs.(1)

But when the partition is effected by the Judge, and the portion allotted by him to the legatee is held in his custody, the division is valid, and if the legatee's portion should perish in the hands of the Judge or the curator appointed by him, the legatee would have no right of recourse against the heirs, neither would the Judge be responsible.(2) "This rule applies, however, only to those things which can be *weighed or measured*—a partition of which is, in fact, a division. But with respect to things that are not so, a partition would in effect amount to a mutual exchange, like a sale, and, consequently, would be unlawful, for it is not lawful to sell another person's property."(3) "And when the Judge has appointed a guardian (*wasî*) for an orphan *in all things*,(4) and he has made a partition on his behalf, whether of movable or immovable things, the partition is lawful, but if the appointment is only for a special purpose, as for the maintenance of the orphan or the conservation of his property, the partition is not lawful."

Partition by an executor.

When an executor makes a partition *among* the heirs, who are all minors,(5) the partition is unlawful. If they are all adults, but some of them are absent,(6) and a partition is made with those who are present and their shares separated from the mass, the partition is lawful with respect to *chattels* (*matâ'a*) but not as regards immovable property.(7) If there are both minor and adult heirs, but the adults are absent, the partition is unlawful. If the adults are present and their share is given up to them and the shares of the minors separated from the shares of the adult heirs, and kept *in a mass without partition among the individual minors*, the division is lawful. When the share of each minor or adult is separated from the rest, the whole partition is invalid. But if the portion of

(1) "The legatees can claim also against the executor, according to Zailye. All this when a partition is made without leave of the Kâzi."—*Radd.*

(2) *Radd-ul-Muhtâr*, Vol. V, p. 692; *Fatâwai Alamgiri*, Vol. VI, p. 220.

(3) *Fatâwai Alamgiri*, Vol. VI, p. 220.

(4) *i.e.*, with general powers.

(5) "An executor cannot make a partition of the shares of the minors among themselves."—*Radd.* See also the *Fatâwai Alamgiri*, Vol. VI, p. 221.

(6) "If the heirs are absent at three days' journey or more; this is according to Kahastâni." The distance must in every case be such that it is difficult to communicate without delay.

(7) *Fatâwai Alamgiri*, Vol. VI, p. 222.

the adults is surrendered to them, and the portion of the minors retained, and subsequently on their attaining majority, divided among them, the partition, as between the adults and the minors is valid.

When the testator has left a direction in the will empowering the executor to sell his property and invest the proceeds in any other kind of property, the executor can lawfully do so.

Debts contracted by the executor.

When the executor contracts a debt on behalf of the minor without any necessity therefor, it will not be operative against the minor, and if any loss accrues to the orphan therefrom the executor will be liable.

Power of sale by an executor.

"When an executor appointed by the father sells anything belonging to his estate the legality of his act presents itself in two aspects :—

Ancient views.

"The *first* is, when the deceased has left neither debts nor legacies ; the *second* is, when he has died either leaving debts or legacies. With regard to the *first* it is stated in the 'Book' [the *Mukhtasar-ul-Kudûri*] that when the heirs are all minors, he can sell anything belonging to the estate out of chattels (*matâ'a*), furniture and *'akâr*, but the sale of anything other than *'akâr* is dependent upon its protection and the preservation of its price. Similarly as to the sale of *'akâr*. Shams-ul-aïmma Halwâni, however, has said that, what is stated in 'the Book,' was the opinion of the ancients ; this is according to the *Fatâwai Kâzi Khan ;* but that, according to the moderns, sale of the *'akâr* of a minor is lawful only when there are debts left by the deceased which cannot be discharged otherwise than by the price of the *'akâr* or when, *if the minor has need for the price thereof*, or a purchaser is eager to obtain it by giving double its value, and on this is the *fatwa*, according to the *Kâfi*. Or when there is a specific legacy which cannot be given effect to without the price of the *'akar*, or when its sale is to the benefit of the orphan as when its tax (*kharâj*) has to be paid, or when the expenses for its upkeep exceeds its income, or when being a shop or a house it is becoming dilapidated. When a necessity arises for the minor to pay the *kharâj*, and there is belonging to the estate other property (*'arûz*)(1) besides *'akâr*, that pro-

(1) *'Arûz* also means "property not being lands, houses or money."

perty is first to be applied towards its payment, and if that is not sufficient the *'akâr may then be sold* for its proper value, or a price not much less than its value, but it is not lawful for the executor to sell it at a greater depreciation than is common among people in such cases. And, in like manner, an executor cannot lawfully purchase for a minor anything at a price much above its value.''

Modern doctrines. Rule now prevailing.

In the *Radd-ul-Muhtâr* the principle is stated more explicitly, the substance of which is as follows :—The ancients held that an executor could sell the immovable property of the minors according to his discretion, but modern jurists have imposed restrictions on the power of sale possessed by the executor, in the case of immovable property belonging to his minor wards. These restrictions are specified in the *Fatâwai Kâzi Khan*, and Zailye states that Sadr-ush-Shâhîd has declared the *Fatwa* is according to the modern view. (1) These restrictions are as follow :—(*a*) if the testator has died leaving debts, and it is necessary to sell a portion of the property to discharge such debts, *i.e.*, the debts cannot be paid off without selling some portion of the immovable property, he may lawfully do so for adequate value ; (*b*) if the testator has directed the payment of legacies in money and he has left no cash out of which such legacies can be paid, the executor can sell a portion of the immovable property sufficient to pay off such legacy ; (*c*) if there is a reasonable apprehension of the property being lost by decay or dilapidation, like a house falling into ruin, etc.; (*d*) when the property is in the possession of an usurper, and there is no prospect of its being recovered ; (*e*) when the expenses connected with the management or preservation of the property exceed the income ; (*f*) when it is necessary to pay the royal taxes, and there are no funds wherewith to pay them ; (*g*) when the price offered for the property is double its real value, *i.e.*, considerably higher.

The executor can lawfully sell to any person other than himself any movable property belonging to his minor wards or purchase for them any property from such persons, *but it must be for the consideration usually current in transactions of that kind.* If the sale or purchase is for an inadequate consideration, it is not valid and can be set aside, and the executor would be liable.

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(1) *Radd-ul-Muhtâr*, Vol. V, p. 696.

An administrator or guardian (*wasî*) appointed by the Kâzi cannot purchase anything belonging to his minor wards, nor can he sell to them anything belonging to himself; but where an executor appointed by the father of the minors enters into such a transaction, it is valid, according to Abû Hanîfa, if it is to the *manifest* advantage of the minor. The Disciples hold the transaction to be invalid and decrees are passed according to their opinion.

"When an executor," says the *Fatâwai Alamgiri*, "sells the orphan's property to himself, or his own to the orphan, the sale is lawful according to Abû Hanîfa, and according to Abû Yusuf also by one report, when the sale is to the manifest benefit of the orphan though unlawful when it is not to his manifest benefit. According to Mohammed and Abû Yusuf by another and more probable report such a sale is unlawful under any circumstances."(1)

According to some jurists, the father may sell his infant children's property, provided he is an *amîn* or a person worthy of trust, and the sale is to their *manifest* advantage. "But where the father is an untrustworthy person, the minor, on attaining majority, can set aside the sale, unless it was for double the real value of the property, and the *Fatwa* is according to this doctrine. And Hamâwi has stated in his commentaries on the *Ashbâh*, that a father has no greater power than an executor, and his powers are subjected to the same restrictions. Hanouti has also passed *Fatwas* according to this view. All this applies to the sale of immovable property. With respect to movable property, the father [if *de facto* guardian] can sell an infant's goods for the current price, if it is to the advantage of the minor and even with a slight inadequacy, but such inadequacy must not in any case be great, otherwise the sale would be invalid."(2)

The powers of the executor.

"An executor," says the *Fatâwai Alamgiri*, "may give out the property of a minor in *muzâribat*,(3) and may enter into a

(1) *Fatâwai Alamgiri*, Vol. VI, p. 222; see also p. 230.

(2) *Radd-ul-Muhtâr*, Vol. V, p. 696 et *seq.*

(3) It means a contract of partnership in which one person supplies the capital, whilst the other is the working partner, with a share in the profits. Where land is let out for cultivation, on the condition that the person cultivating should give a share of the crops to the owner, it is also *Muzâribat*.

partnership with another in respect of it according to the *Muhît*(1).... If the executor gives a long lease (*ijârat-ut-tawîla*) of part of the estate for the payment of the deceased's debts it would not be lawful.... He has no power to lend to another the property of the orphan, according to all authorities (consensus of opinions or reports) says the *Muhît*, and if he should do so he would be responsible. *Neither has the Judge the power to do so.*" With regard to the power of the father there is a difference of opinion among the jurists. The correct doctrine is that the father is in the position of the executor and not of the Kâzi.(2) "If an executor or a father were to pledge the property of an orphan for his own debt, the pledge ought not by analogy to be lawful, but it is so on *istchsân* (a liberal construction of the law). But it is not lawful for the executor to pay his own debt with the property of the orphan. If [however] a father should do so it would be lawful..... And if an executor were to sell the orphan's property in exchange for his own debt to his creditor it would be lawful(3) according to Abû Hanîfa and Mohammed and the price becomes a set-off against his debt, but he is responsible to the minor according to the *Muhît*."

Doctrine of Abû Yusuf —the recognised law.

This opens up such a serious question regarding the powers of a father, or an executor, to give in pledge the property of a minor, that I think it advisable to give here a translation from the *Fatâwai Kâzi Khân*, on the authority of which the passage in question purports to be founded, as it will show that the rule in force is in accordance with the opinions of Abû Yusuf, who held such dealings to be unlawful. "The *wasî* (executor) is not entitled to lend out the property of the orphan; and if he does so, he will be liable. The Kâzi, however, has the authority to lend. With regard to the father, there is difference among the jurists..... *The correct doctrine is that the father is like the executor and not like the Kâzi.* If the executor borrows himself the property of the minor, it is not lawful and it will be a *dain* (debt) upon him. It is reported from Mohammed that, according to Abû Hanîfa, the *wasî* has no authority to borrow from the property of the minor; but Mohammed expresses a hope that if the *wasî* does so

(1) *Fatâwai Alamgiri*, Vol. VI, p. 227.
(2) *Ibid.* p. 228.
(3) So far as the buyer is concerned

when he is able to repay, his act may not be reprehensible. If the *wasî* or father pledge the property of the minor for his (the *wasî's* or father's) own debt, according to *kyâs* (analogy), it would not be valid; but according to *istehsân* (a liberal construction) it would be valid. *And it is stated from Abû Yusuf that he has adopted the (doctrine of) kyâs* (analogy) [in other words that he holds it to be illegal]. If the *wasî* discharges his own personal debt from the property of the minor, it will not be valid; if the father does so, it will be valid, for the *wasî* has no power to buy the property of the minor for himself according to current price, but the father can lawfully make such a purchase. And a pledge is like the payment of a debt; and [accordingly] the father may discharge his personal debt from the property of the minor, but it will not be lawful for the *wasî* to do so. And the same is the case with a pledge. And in the *Jâm'aa-us-Saghîr* it is stated, that when the father pledges the property of his minor child for his own debt, and the value of the property pledged is greater than the debt, and the property is lost or destroyed in the hands of the pledgee, the father will be liable for the amount of debt [which he has paid off] and not for the price of the article. But Shams-ul-Aïmma Sarakhsi has held, that the father and *wasî* will be equally liable for the value of the property pledged. *According to Abû Yusuf, as neither the father nor the wasî are entitled to pay their debts with the property of the minor, so they are not entitled to pledge his property for their debts. And Bashr ibn-i-Walîd has stated that the father has no power to pledge the property of his child for his own personal debt.* It is generally accepted that according to [the letter of] the law the father or *wasî* can pledge; but according to *kyâs* (analogical reasoning) they cannot, and when the property pledged is lost or destroyed, they are both liable for its value."

Abû Yusuf's rule the accepted doctrine.

"If the *wasî* (executor) sells the estate for the payment of the deceased's debts, which do not cover the entire estate, according to Abû Hanîfa, the sale is lawful, but it is not so according to the Disciples. If there is no debt due from the inheritance, and the heirs are minors, and the Kâzi sells the entire estate, according to Abû Hanîfa, the sale will take effect. Abû Hanîfa has drawn a distinction between the [powers of the] *wasî* of the deceased and of his father. The *wasî* has the power of selling the inheritance for paying the deceased's debts, and to give operation to his legacies.

But the father of the deceased, that is, the grandfather of the minors can sell the inheritance *for* his own son but he is not empowered to sell the estate for the payment of the debts due from the minor children on behalf of his son [*i.e.*, their father]."(1)

Shams-ul-Aïmma al-Halwâni states this as the doctrine laid down by Khassâf. But Mohammed has placed the grandfather in the position of the father. In "the Book" (*i.e.*, the *Mukhtasar-ul-Kudûri*), it is stated that when a person dies leaving a father and an executor, the executor is preferred to the father. If there is no executor, the father is preferred [for the administration of the deceased's estate] and so on in order, until the grandfather's executor, after whom comes the *wasî* or administrator appointed by the Kâzi. Shams-ul-Aïmma al-Halwâni has stated that "the *Fatwa* is according to the doctrine laid down by Khassâf."(2)

"If the father of a minor, who has inherited property, is a spendthrift and likely to commit waste, so as to be liable to inhibition, he is not entitled to the guardianship of his child's property."

"Shams-ul-Aïmma al-Halwâni has stated in his *Sharh* (gloss) on the *Adâb-ul-Kâzi* [of Abû Yusuf] that when a Kâzi appoints a *wasî* (guardian or administrator) for an orphan, the *wasî* so appointed will be like the *wasî* appointed by the father, if the Kâzi appointed him in a general manner in all matters. But if he has been appointed in any special matter, he will be a *wasî* for that matter alone. This is not the case with the *wasî* appointed by the father.....When the *wasî* appointed by the deceased is a just and qualified person (عدل کافی) it is not advisable for the Kâzi (لا ینبغی) to remove him, but if he is not 'just,' he should remove him and appoint another. And if he is just but is not thoroughly efficient (لو کان عدل غیر کافی), the Kâzi cannot remove him, but should join with him a competent administrator. If the Kâzi, however, were to remove him, he will be removed, and, similarly, if the Kâzi were to remove one who is both just and competent, it has the effect of removing him. So it has been stated by the Shaikh-ul-Imâm, known as Khâher-Zâdeh. But several jurists aver that the order of the Kâzi removing a just and competent *wasî* has no effect, for

Administrator appointed by the Kâzi.

(1) *Fatâwai Alamgiri* Vol, VI, p. 228. (2) *Fatâwai Kâzi Khân*, Vol. IV, p. 426.

he derives his authority from the deceased, and, therefore, he is to be preferred to the *wasî* of the Kâzi. And Kudûri has stated that the Kâzi has no power to remove the *wasî* appointed by the deceased or join another with him, unless he has committed a breach trust of or is a *fâsik* so as to be known as a bad man, (لو كان فاسقا معروفا بالشر). In such a case the Kâzi can remove him and appoint another in his stead, or if he is a virtuous man but inefficient [in his work], the Kâzi can associate another person with him. So it is stated also in the *Asl* and its *Sharh* by Tahâwi. But it is not mentioned whether, if the Kâzi does remove a just and competent *wasî*, it will take effect or not.(1) Shaikh Imâm Abû Bakr Mohammed ibn-ul-Fazl says that when the *wasî* is unable to carry out the disposition of the testator, he ought to be removed."....

"The *wasî* is empowered to do all acts from which benefit may accrue to the orphan, so is the father."

Powers of the executor.

The executor cannot trade with the goods of the infant on his own account, but, according to the *Durrar*, he can do so for the orphan, if it is to the latter's advantage. If the executor should engage in trade with the property of his minor ward, the profits derived therefrom should, according to some jurists, be given in *sadakah* or charity, and the money so employed recouped to the estate of the minor. According to Abû Yusuf, the profits made in such trade would belong to the minor, and Kâzi Khân declares the *Fatwa* is according to this view. But the Kâzi can authorise the executor to trade for the infant with his goods or enter into partnership with another.

Executor cannot mortgage without leave of the Judge.

The executor can, if it is to the advantage of the infant and there is a need for it, let out the infant's property on hire, but he cannot create a mortgage *without the leave of the Kâzi*. He is authorised, however, to pledge or sell chattels, if it is necessary for the maintenance of the infant children of the testator.

If the executor sells the goods on credit, the period for which credit is given must be the customary period. But where it is to the disadvantage of the infant or the period for which credit is given is either too long or not customary, according to Ramli the transaction will not be valid.

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(1) The *Radd-ul-Muhtâr* is explicit on this point, that it does not take effect.

Where there are two infants under the guardianship of two separate executors, the sale of the goods of one infant by his guardian to the other is stated by Kâzi Khân not to be lawful. And this view is accepted in the *Fatâwai Alamgiri*.(1) The correctness of this principle has been questioned in the *Radd-ul-Muhtâr*, where it is laid down that there is no reason to render such a sale invalid, "for," the author adds, "the dealing by the executor is not for himself, and the sale of a particular property on behalf of one infant may be as much advantageous to him as its purchase by the other."

The executor is liable for any serious inadequacy in the consideration of any property sold or purchased on behalf of the infant.

The executor must not spend at the funeral of the testator more than is customary.

When an infant has not attained discretion, and the executor has made over the property to him and it is lost, the executor is liable. Discretion (*rushd*) means the capacity to take care of one's property. Abû Hanîfa holds that an executor should not make over the property until the ward has attained his 25th year. But the Disciples are of opinion that discretion should be presumed when the infant attains majority, but the presumption may be rebutted by proof of the fact that he is weak in intellect or unqualified to take proper care of his property.

When the testator devises one-third of his estate to be disposed of according to the *joint* discretion of his executors,(2)—and if one of them dies before the exercise of that discretion, "the third will be returned to the heirs."

When the heirs are all *sui juris* and present, the executor can not sell any portion of the estate except under their authority. In case they are absent, he can only sell the chattels belonging to the estate, but not the *'akâr* or immovable property. He may, however, should there be any necessity for it, lease the immovable estate. The reason of this restriction is founded on the principle

(1) "And when an executor of two orphans sells the property of one of them to the other, the sale is unlawful. So, also, when he authorises them to enter into such a transaction with each other and one accordingly sells his property to the other, the sale is unlawful."—*Alamgiri*, Vol. VI, p. 228.

(2) *Lit.*, to do whatever they together like with it.

that an executor has the power of preservation over the property of an absent person, and as it may be necessary to dispose of the movables which may be likely to be wasted, the executor has the power to do so and realise for the absentee the price of such goods. But *'akâr* or immovable property is secure in itself, and the executor has no authority to part with it, *except in the case of its falling into decay*, and in that case it may also be sold. When all the heirs are adult and one of them is *absent*, while the others are present, the executor may, by general consensus, sell the share of the absentee in all that is not *'akâr* and hold the proceeds for the absent heir. According to Abû Hanîfa, the *wasî* may also sell the shares of those who are present; but, according to the Disciples, he has no such power and a sale by him of their shares is illegal and this is the accepted doctrine.

Powers of the executor—contd.

All this refers to cases where the testator has left no debts nor legacies. But if there are debts and they cover the whole of the estate, the executor may sell the whole by consensus; and when the debts do not cover the whole estate, he may sell as much of it as may be necessary for the payment of such debts. When, however, an executor has actually sold *'akâr* or immovable property in good faith for the payment of debts while he has other property in his hands sufficient for that purpose, the sale is lawful.(1) Similarly, if there are general legacies, the executor may sell as much of the property as may be necessary for their liquidation (not exceeding of course a third of the whole after payment of the debts).

If a person dies leaving several heirs, one of whom is a minor and the rest are adult, and his estate is not burdened either with debts or legacies, and consists entirely of chattels, the executor may sell the share of the minor and invest the proceeds in some more profitable property.(2)

The *wasî* cannot borrrow from the funds in his own hands belonging to the infant.

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(1) I take it that the heirs would be entitled to question the validity of his dealings and to show that the sale was not made in good faith.

(2) This is *bi'l-ijmâ'a* or by general agreement; Abû Hanîfa is of opinion that he may sell the shares of the others also, but in this view, Abû Yusuf and Mohammed differ.

The executor can take his fixed allowance from the estate and nothing more, but the father, if in want, can support himself "to the extent of necessity" from the property of his infant child. This, however, does not apply to the executor.

But unless any remuneration is fixed by the testator the executor cannot take anything for himself from the estate; but the Kâzi has the power to fix an allowance for an administrator or *wasî* appointed by him.(1)

In the *Fatâwai Kâzi Khân*, however, it is stated that, where no allowance is fixed for the executor, he can take a limited and reasonable sum for his remuneration "to the extent of his necessity; and, if there is any need for it, he can make use of the infant's conveyances in going to and fro on the work of the infant, though several jurists hold that this would not be valid." The recognised doctrine, however, is that where no allowance is fixed by the testator, and the executor wants a remuneration, it must be fixed by the Judge.

Among the Hanafîs, the executor of the father is entitled to the curatorship of the testator's infant children in preference to the grandfather.

The *wasî* cannot make a binding acknowledgment of a debt against the estate of the testator, and the acknowledgee (مقر له) would not be entitled to receive his demand until he establishes his claim by proof.(2)

Nor can the *wasî* acknowledge that somebody else is entitled to a share in the inheritance, unless he himself is an heir, when the acknowledgment will have operation against his own share.

When a person has died intestate without appointing an executor and no reference is made to the Kâzi,(3) one of the neighbours (*ahl-ul-mahalla*) may legally administer "according to necessity." And the *Fatwa* is on this.

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(1) *Durr-ul-Mukhtâr*, p. 838.

(2) "And if the *wasî* pays to the claimant what he demands, the *wasî* will be liable. If the claimant has no proof, but the executor knows that the demand is just, recourse must be had to the procedure mentioned by Kâzi Khân."

(3) "If injury be apprehended from reference to the Kâzi."

Father's executor.

The right of guardianship in respect of the property of infant children belongs preferentially to the father; in his absence to his executor; when the father has died without appointing an executor, the guardianship appertains to the grandfather, and in his absence to *his* executor, and to his executor's executor. If there are none of these, the guardianship belongs to the Kâzi and his appointee.(1)

In the *Fatâwai Alamgiri* the above principle is stated in the following terms:—"The executor of a father is in the place of the father. So, also, the executor of the grandfather is in the place of the father's executor, and the executor of a grandfather's executor is in the place of the grandfather's executor. And the executor of the Judge's executor is in the place of the Judge's executor *when his appointment was general.*"

If the father dies after appointing an executor and leaving him surviving several children, some of whom are adult and some minor; and, subsequent to the testator's death, some of these children were to die leaving them surviving infant children, the executor of the father would be the *wasî* of these children also, and would be entitled to manage their properties both movable and immovable, or to sell them [under the restrictions mentioned before].

An executor appointed by the mother—his powers.

But a *wasî* appointed by the mother, brother, uncle or any other relation has no such powers. They cannot sell the immovable property of the minor; and are only authorised to take care of the infant and his property; they cannot trade for him; and they can only buy things which are necessary for the infant, such as food and raiment; and they can only sell chattels inherited by the infant from the person who has appointed the executor, "for the preservation of the price of chattels is easier than of the things themselves."(2)

The *Fatâwai Alamgiri* dealing with the power of an executor appointed by the mother states as follows:—"The executor of a mother has no power to sell anything that a minor has inherited from his father whether movable or immovable, and whether the

(1) According to Mohammed, the grandfather comes after the father; the view in the text is that of Khassâf, according to whom is the *Fatwa*.

(2) *Radd al Muhtâr*, Vol. V, p. 697.

property be involved in debt or free from it. But of what the minor has inherited from the mother when it is free from debts and legacies, the executor may sell what is movable, but he cannot sell the *'akâr*. If the estate be involved in debt or legacies, and the debt is such as to absorb the whole, he may sell the whole, the sale of *'akâr* coming within his power; but if the debt does not absorb the whole he may sell as much of it as is necessary to defray the debts. Regarding his power to sell the surplus there is a difference of opinion among our Jurists (Shaikhs)."

"If all the heirs are adult and present, the estate being free from debt, the mother's executor can sell no part of her estate; and if the estate is in debt, the answer to be given as to the power of the mother's executor is like that in the case of the father's executor, both in respect of matters in which opinions agree and in which they differ."

"If there are both adult and minor heirs, and the adult are absent, the estate being free from debt, the mother's executor may sell what is movable, of her estate, whether it belongs to the share of the minor or the adult, but cannot sell the *'akâr* of her estate, the shares of the minors and the adult being in this case the same. If the adults are present and the estate free from debt, the executor may sell the minor's share of her movable estate; but whether he can sell the share of the adults opinions differ; while he certainly cannot sell the *'akâr*."

"Whatever has been said as to the executor of the mother is true of the executor of the brother, and the paternal uncle, the principle being that the power of the executor is measured by the power of the testator."

To summarise—a *wasî* appointed by the mother has no power to intermeddle with any property which her children may have inherited from their father or any other relation, whether it be involved in debt or not; nor can he sell any portion of the immovable property inherited from her, unless it is involved in debt or burdened with the payment of legacies. If the estate is involved in debt or burdened with legacies, he can sell any portion of the property, whether movable

or immovable, sufficient to pay off the debt. If all the heirs are adult and present, and the estate is free from debt, he can sell no portion of it, but if the estate is involved in debt, his powers are subject to the same rules which apply to an executor appointed by the father. If some of the heirs are adult and some minors, and the adult are absent, and the estate is free from debt, he can sell what is movable, whether it belongs to the share of the minor or the adult, but cannot sell the *'akâr* of either the minors or adults. If the estate be involved in debt, his powers are exactly similar to those of the father's *wasi*. If the adult are present and the estate free from debt, the executor may sell the minor's share of the movable estate, but as to whether he can sell the share of the adults opinions differ, but he certainly cannot sell the *'akâr*. The mother's *wasî* cannot lawfully purchase anything for her minor children, except food and clothing which are necessary for their preservation. * * * Whatever has been said as to the executor of the mother is true of the executor of the brother and the paternal uncle, the principle being that the power of the executor is measured by the power of his testator.''(1)

Executor appointed by the mother.

The executor is entitled to repay himself any expenditure incurred by him on behalf of the infants, *but he must keep proof thereof*. In the *Fatâwai Kâzi Khân*, there is a passage to the effect that he may recoup himself, though he may have no witnesses of the fact that he has incurred the particular expenditure. The recognised doctrine, however, is as stated above. Although this rule does not apply to a father or mother, when either of them happens to be the guardian, it is regarded as *preferable* that they should also keep evidence.

Executor bound to keep proof of his dealings.

The executor is also entitled to recover from the estate in his hands any expenses incurred by him out of his own pocket, for the funeral of the testator or of any of his heirs; or in the discharge of the debts of the testator or his heirs.

Where an executor pays any claim made against the estate of the deceased *without due proof* thereof, he will not be entitled

(1) *Fatâwai Alamgiri*, Vol. VI, p. 235.

to any credit for such payment in the administration of the testator's assets, when the payment is questioned by the heirs or creditors of the deceased. But no responsibility attaches to him if the payment is made upon satisfactory evidence. "Whether he can pay when two just persons testify to a debt in his presence but do not testify to it before the Judge, and the debt is denied by the heirs, is a point upon which 'our' shaikhs have differed, some saying that he may pay the debt and others that he may not."(1)

Executor's liability.

Where the executor has satisfied one creditor without an order of the Judge, he is responsible to the other creditors; but it is otherwise if he made the payment under the direction of the Judge. Similarly, when a debt has been made obligatory on the estate of the deceased by the decree of a Judge, and the executor has satisfied it, after which another person prefers a claim against the estate, the executor is not liable if the payment was made under the Judge's order. But the second creditor may have recourse against the first for a share of what he received proportionate to the debt, if what he received be still subsisting; and if it has perished in his hands, he is responsible to the second in the same proportion, but the executor is in nowise liable. If, on the other hand, the executor had paid without the order of the Judge, the second creditor may claim either from the executor, or the first creditor, a due proportion of what was received by the latter.(2)

When an executor has expended the whole of the estate upon the infant children of the testator and nothing remains, after which a claim is made against the estate and is established by proof before the Judge who decrees it, can this creditor make the executor liable? Some of the lawyers have held that if the expenditure was made by order of the Judge, the executor is not responsible, whereas if it were made without the Judge's order, he is liable. The meaning of this seems to be

(1) *Ibid.* This, however, is a matter of procedure.

(2) "When an executor wishes to pay a debt to a creditor and is apprehensive of other creditors appearing against the deceased, he may sell something belonging to the estate to the creditor in exchange for the debt, and will not then be responsible, should another creditor appear as apprehended."—*Alamgiri*, Vol. VI, p. 235. This device is hardly likely to be countenanced by the Indian Courts.

that if the estate of the deceased has been applied in the maintenance, education or advancement of the testator's children with the sanction of the Court, the executor is absolved from all liability in respect of the deceased's creditors. It would apparently be otherwise, if the executor applied the whole estate for these purposes without such sanction.

Shiah Law—Liability of the executor.

According to the Shiah Law, an executor is not responsible for any loss or destruction of the deceased's property, unless occasioned by his departure from the conditions or rules of his office, or by some personal neglect. If he be a creditor of the deceased, he can lawfully pay himself out of the property in his hands without the order of a Judge *when he has proof of the debt*, though some lawyers think he may do so in all cases without a Judge's order. According to the *Sarâir*, the executor cannot purchase for himself on his own account any portion of the deceased's property, but the author of the *Sharâya* thinks "he may lawfully do so at a just valuation." The doctrine of the *Sarâir*, however, seems to be the recognised law.

The Shiahs differ from the Hanafîs in holding, that the appointment of any other person, as *wasî*, is not valid whilst the father of the deceased is alive, for the right of guardianship over the minor children belongs to the grandfather to the exclusion of the father's executor. Ibn Junaid, however, thinks that the nomination by the father is valid "to the extent of a third of his property and for the discharge of all rights or claims upon his estate."

Competency of an executor—Hanafi Law.

According to the Hanafîs, the competency of an executor has reference to the time of the testator's death. For example, if a minor is appointed as a *wasî* and he attains his majority before the testator's decease, the appointment is effective. Some of the Shiah jurists hold the same view, pre-eminently Ibn Junaid. According to the *Sharâya*, however, the generally received doctrine is, that the qualifications required in an executor have reference to the time of his appointment, and, consequently, the appointment of a minor, or a slave, or any person otherwise incompetent, is initially invalid, though the disability may cease prior to the testator's death.

The testator can appoint a *wasî* or guardian for every person, over whom he can exercise the *patria potestas* of the Mussulman

Law, as for example, a child how low soever in descent, provided that the child is of tender age or a minor. But if a person should appoint an executor for his children who are *sui juris*, the appointment is of no effect in law. And even though the appointment should be for the superintendence of property which the testator himself has left to the parties, the executor has no right to deal with it even to the extent of a third. He can, however, lawfully separate from it enough for the discharge of the testator's debts and bequests.

Limited executorship. Hanafî Law.

When a person appoints one executor for a particular purpose, *e.g.*, for the payment of his debts, and another for the administration of his property generally, or if he uses the following expression, "I have appointed so-and-so my executor to pay my debts and do not appoint him for anything else, and I have appointed so-and-so my executor for all my property," both are executors in all matters, according to Abû Hanîfa and Abû Yusuf, as if he had appointed them both *generally*, but according to Mohammed each is restricted to the particular purpose for which he has been appointed. Where it is made an express condition that one shall not be executor in the matter to which the other is appointed, it has been said by Mohammed Ibn-ul-Fazl that their powers will be limited according to the directions of the testator, and it is only where he has not made any such condition that there is the difference of opinion mentioned above, the doctrine enunciated by Abû Yusuf being the law in force.

Derivative executors Hanafî Law.

With reference to the transmissibility of the office of executor, there is considerable difference, as pointed out already, between the Hanafîs and the Shiahs. The provisions of the Hanafî Law are, in some respects, analogous to the principles of the English Law. For example, although under the English Law, the executor cannot assign the executorship, yet the interest vested in him by the will of the deceased may, generally speaking, be continued and kept alive by the will of the executor; so that if there be a sole executor of *A*, the executor of the executor is, to all intents and purposes, the executor and representative of the first testator. Similarly, under the Hanafî Law, an executor may, on the approach of death, appoint a successor though the power may not have been expressly reserved to him by the

testator.(1) It is not necessary that the executor should expressly constitute *his* executor to be the *wasî* of his testator's estate; the mere appointment as *wasî* to the executor carries with it the power to administer both estates. And if *A* appoints *B* as his executor and *C* appoints *A* as his executor, upon the death of *A* and *C*, the executorship of both *A* and *C* devolves on *B*.

Shiah doctrines.

According to the generally approved doctrine among the Shiahs, the executor can transmit the office, or appoint a successor, only when the testator has authorised him to entrust to another the management of the estate at his own death. When a person dies without appointing an executor, or when an executor dies to whom the authority to appoint a successor was not given, the superintendence of the original testator's estate devolves upon the Judge. If there is no Judge present on the spot, any true believer in whom confidence can be placed may lawfully assume the care and management of the estate. "But, on this point," says the author of the *Sharâya*, "there is room for doubt and difference of opinion."(2)

Hanafi doctrines.

"A person dies leaving two minor children. These on attaining majority demand their inheritance from the *wasî*, who says that the entire inheritance left by their father was 1,000 dirhems which had been spent on them. One of the sons affirms the statement of the executor, but the other does not. The latter will be entitled to recover, according to Zuffar, 250 dirhems from the first but not from the executor. And this also is the view of Abû Hanîfa. Ibn Abî Malik, however, reports from Abû Yusuf that he can. So it is said in the *Muhit-i-Sarakhsi*."(3)

"If a person die leaving minor children and a father, but without appointing an executor, the father is in the position of an executor for the protection of the inheritance (فی حفظ التركة) and can administer the property in whatever way it may be necessary. And if the deceased has left heavy debts (دين كثير) the father,

(1) In the case of *Shaikh Hafiz-ur-Rahman* v. *Khadim Hossain*, 4 N. W. P. Reps., p. 106, it was held that under the Mahommedan Law, an executor is entitled to nominate a successor to carry out the purposes of the will under which he was made executor. This, of course, is under the Hanafi Law.

(2) In the *Jâm'aa ush-Shittât* the approved doctrine is stated to be that where reference to a Judge is impossible, it is incumbent (*wâjib*) upon the just "Momins" (faithful Moslems) to assume the management.

(3) *Fatâwai Alamgiri*, Vol. VI, p. 221.

that is, the grandfather of the minors, has no authority to sell the inheritance for the payment of the debts. Similarly, if a person authorises his adolescent son (صغير المراهق.) possessed of understanding to buy and sell, and he enters into any transaction and becomes indebted, after which he (the son) dies leaving his father, the father will have no power to deal with the son's property to pay his debts."(1)

"A person, who is in debt, makes certain bequests, all of which after the payment of the debt, can be discharged out of the third. He dies leaving a house ; and the *wasî* cannot pay his debts or discharge the legacies, without the price of the house ; but the heirs are not agreeable to the sale of the house, when the debts do not cover the whole house or the major portion of the house,—in such case, the *wasî* is empowered to sell the house, and he should sell it if he is aware that the debts will remain unpaid for a long time if he does not sell it."(2)

Rights of creditors.

When the estate of a deceased person is subject to debts, but the debts do not overwhelm the estate, in other words, do not exceed the assets, and it is divided among the heirs ; and subsequent to the partition, a creditor of the estate appears, he will be entitled to recover the debt due to him proportionately from the different heirs. He can do this, however, only by taking all of them before the Kâzi. But if he proceeds(3) against any one of them, he can recover his debt to the extent of the share in such person's hands whatever that be.(4)

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(1) *Fatâwai Alamgiri*, Vol. VI, p. 225.
(2) *Ibid*, p. 227.
(3) *Lit*,, "if he can get hold of any one of them."
(4) For the case-law on the subject see Appendix.